

TITLE VII'S HIDDEN AGENDA:  
SEX DISCRIMINATION, TRANSGENDER RIGHTS,  
AND WHY GENDER AUTONOMY MATTERS

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INTRODUCTION

The last few decades have witnessed the rise of transgender visibility on both a national and global scale. Transgender<sup>1</sup> individuals continue to subvert the “traditional” notion of binary gender, exposing its antiquated values and questioning its widely accepted fallacies. Whether through organization and activism or through personal commitment to authenticity, transgender and nonbinary individuals have challenged an understanding of sex that attempts to erase their existence. Transgender visibility has been a double-edged sword, resulting in significant support and acceptance in many cases, but resulting in increased violence<sup>2</sup> against trans people in others.<sup>3</sup> Beyond the threat of violence, transgender individuals regularly confront rampant discrimination that detrimentally hinders their ability to participate in essential life activities, such as obtaining health insurance or medical services;<sup>4</sup> applying for new

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1. “Transgender” often refers to an individual who was assigned one sex at birth but then identifies with a different sex. Transgender is an all-encompassing term that can also denote people who identify as male, female, neither male nor female, or a combination of male and female. Individuals who do not identify entirely as male or female might alternatively describe themselves as “nonbinary” or “genderqueer.” Additionally, some trans individuals also identify as gender nonconforming, meaning they do not adhere to traditional gender stereotypes of presentation, expression, or conduct. *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

2. See, e.g., *A National Epidemic: Fatal Anti-Transgender Violence in the United States in 2019*, HUM. RTS. CAMPAIGN (last visited Apr. 20, 2020), <https://www.hrc.org/resources/a-national-epidemic-fatal-anti-trans-violence-in-the-united-states-in-2019> (estimating that an average of twenty-two transgender and gender nonconforming individuals per year are victimized by “fatal violence” and that, in 2019, twenty-six transgender and gender nonconforming individuals were violently killed, 91% of whom were black transgender women and 68% of whom lived in the South); Nico Lang, *Breaking: Hate Crime Murders Are Highest Ever Recorded by FBI*, OUT: CRIME (Nov. 12, 2019), <https://www.out.com/crime/2019/11/12/breaking-hate-crime-murders-are-highest-ever-recorded-fbi> (concluding that from 2017 to 2018, hate crimes against transgender individuals increased by 34%); Rick Rojas & Vanessa Swales, *18 Transgender Killings This Year Raise Fears of an ‘Epidemic.’* N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/27/us/transgender-women-deaths.html> (“In the United States this year, at least 18 transgender people—most of them transgender women of color—have been killed in a wave of violence that the American Medical Association has declared an ‘epidemic.’”).

3. In accordance with generally accepted terminology among the transgender community, this Note will sometimes use “trans” as an abbreviated version of “transgender.” See *Frequently Asked Questions About Transgender People*, *supra* note 1.

4. See Katelyn Burns, *How the Trans Community is Surviving The Coronavirus Pandemic*, VOX (Apr. 3, 2020), <https://www.vox.com/identities/2020/4/3/21204305/coronavirus-transgender-economy-health-care> (noting that the 2015 U.S. Transgender Survey revealed 13% of trans people lack access to health insurance

identification documents, or more often, being forced to use documents that identify them according to their sex assigned at birth;<sup>5</sup> obtaining, or attempting to obtain, housing;<sup>6</sup> and seeking or maintaining employment.<sup>7</sup>

Since the late 1980s, cases involving transgender rights have increasingly appeared before American courts, particularly in the realm of employment discrimination. On April 22, 2019, the Supreme Court of the United States granted certiorari review in the case of *R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC (Harris Funeral Homes)* to resolve whether Title VII coverage extends to transgender discrimination in the workplace.<sup>8</sup> The case involved Aimee Stephens, a transgender woman, and whether her employer violated Title VII's prohibition on sex discrimination by terminating Stephens's employment on

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and commenting that “[p]rescription delays, postponed surgeries, and lost insurance are all part and parcel for the trans community, who’s used to being one of the health care system’s last priorities”); Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States*, 73 *INDUS. & LAB. REL. REV.* 573, 594 (2020) (explaining evidence from their study that “compared with cisgender men, transgender individuals report . . . lower rates of having excellent or very good self-rated health”); Ryan Sutherland, *What Isn't Seen Isn't Heard: Trans and Non-Binary Health Amid COVID-19*, *CONN. MIRROR: CT VIEWPOINTS* (Apr. 6, 2020), <https://ctmirror.org/category/ct-viewpoints/what-isnt-seen-isnt-heard-trans-and-non-binary-health-amid-covid-19-ryan-sutherland> (“The International Foundation for Employee Benefit Plans reported that transgender inclusive healthcare benefits are offered to less than one-third of U.S. employees.”).

5. See Ayden I. Scheim et al., *Gender-concordant Identity Documents and Mental Health Among Transgender Adults in The USA: A Cross-Sectional Study*, 5 *LANCET PUB. HEALTH J.* e196 (2020), [https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667\(20\)30032-3.pdf](https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667(20)30032-3.pdf) (explaining the difficult and expensive process transgender people face when amending identification documents that varies from state to state and can include surgical requirements or court orders; also, finding that of the 22,286 respondents in a study on American transgender individuals, 10.7% had their “preferred name and gender marker” on all of their identification documents, 44.2% had these items on some of their identification documents, and 45.1% had these items on none of their identification documents); *Issues: Identity Documents and Privacy*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/identity-documents-privacy> (last visited Apr. 23, 2020) (“[G]ender incongruent identification exposes people to a range of negative outcomes, from denial of employment, housing, and public benefits to harassment and physical violence.”).

6. See *Issues: Housing and Homelessness*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/housing-homelessness> (last visited Apr. 23, 2020) (observing that “[o]ne in five transgender people in the United States has been discriminated [against] when seeking a home, and more than one in ten have been evicted from their homes, because of their gender identity” and that “one in five transgender individuals have experienced homelessness at some point in their lives”); Shannon Minter, *SPLC Report Is a Wake-Up Call for LGBTQ People*, *S. POVERTY L. CTR: FEATURES & STORIES* (Apr. 1, 2020), <https://www.splcenter.org/news/2020/04/01/splc-report-wake-call-lgbtq-people> (noting the Trump administration's policies that could “destroy protections” for LGBTQ people, such as Housing Secretary Ben Carson's decision to “eliminate anti-discrimination protections for transgender people in homeless shelters”).

7. See Carpenter et al., *supra* note 4, at 594 (describing their data as providing “evidence that, compared with cisgender men, transgender individuals report significantly lower employment rates, lower household incomes, [and] higher rates of poverty”); *Issues: Employment*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/employment> (last visited Apr. 23, 2020) (estimating that over 25% of transgender people have lost their employment because of transgender bias, over 75% of transgender people have experienced workplace discrimination, and employment discrimination is experienced even more frequently by transgender people of color).

8. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18-107).

the basis of (1) her transgender status or (2) her failure to conform her appearance to her employer's stereotypes based on her sex assigned at birth.<sup>9</sup>

This Note analyzes Aimee Stephens's case and the Supreme Court's decision in *Bostock v. Clayton County*<sup>10</sup> to demonstrate that employment discrimination against transgender individuals constitutes unlawful sex discrimination under Title VII. Through its effort to eradicate employment discrimination on the basis of both immutable traits and core beliefs, Title VII functions as an autonomy-promoting statute by allowing people to live authentically without having to compromise their dignity or identity to maintain and sustain employment. As will be demonstrated, Title VII's scope of protection extends to gender autonomy, thereby ensuring trans people will not be penalized for merely existing. Part I will provide the factual and procedural background of *Harris Funeral Homes* and the Supreme Court's reasoning in *Bostock* to contextualize transgender discrimination in the workplace. Part II will discuss the history of Title VII, including case law developments within sex discrimination that exemplify its broad, remedial purpose. It will further demonstrate that at its core, Title VII promotes individual autonomy by protecting employees from being discriminated against for living authentically according to their self-identities. Part III will discuss the concept of autonomy in American legal and cultural history, defining gender autonomy and analyzing its relevance to transgender individuals. Part IV will demonstrate that Title VII's prohibition of transgender discrimination in employment fulfills and furthers the statute's implicit purpose of protecting autonomy, and specifically, gender autonomy. The Note will then conclude by discussing the impact of the Court's decision in *Harris Funeral Homes* on the future of transgender rights in America.

## I. R.G. & G.R. HARRIS FUNERAL HOMES, INC. v. EEOC

### A. Factual Background

Aimee Stephens, a transgender woman, began working for R.G. & G.R. Harris Funeral Homes (the Harris Funeral Home) in 2007.<sup>11</sup> Within six months, she was promoted to Funeral Director and Embalmer, serving in this position until her termination in August 2013.<sup>12</sup> The Harris Funeral Home was a for-profit corporation with three locations, all operated by Thomas Rost, who owned 95.4% of the company.<sup>13</sup> Rost self-identified as a Christian and believed

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9. *Id.*

10. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* was consolidated on appeal and decided together with *Bostock v. Clayton County* and *Altitude Express, Inc. v. Zarda*. *See id.* at 1754.

11. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018).

12. *See id.*

13. *Id.* at 567–68.

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he was called by God to “minister to the grieving.”<sup>14</sup> The Harris Funeral Home itself, however, was neither affiliated with a church nor declared in its articles of incorporation to be religious in purpose.<sup>15</sup> Importantly, Rost asserted that “he [did] not endorse or consider himself to endorse his employees’ beliefs or non-employment-related activities,”<sup>16</sup> regardless of his own Christian beliefs.

While employed at the Harris Funeral Home, Stephens presented as male, according to the sex she was assigned at birth.<sup>17</sup> Despite Stephens’s life-long attempt to preserve this male façade, she “felt imprisoned in a body that d[id] not match [her] mind,”<sup>18</sup> sparking a deep internal conflict that had induced severe emotional trauma since the age of five. However, Stephens did not allow her personal struggles to compromise her duties at the Harris Funeral Home; her work performance remained consistently excellent.<sup>19</sup>

Two years after being hired by the Harris Funeral Home, Stephens entered therapy seeking relief from the burden of her ongoing emotional strife.<sup>20</sup> She was diagnosed with gender dysphoria, a clinical form of distress experienced by many transgender individuals that occurs when a person’s sex assigned at birth differs from their gender identity.<sup>21</sup> Following widely recognized standards of medicine, her clinicians prescribed that she begin her gender transition by living and presenting as a woman for one year before undergoing gender affirmation surgery.<sup>22</sup> On July 31, 2013, following four years of professional treatment,<sup>23</sup> Stephens gave Rost a letter explaining her lifelong struggle with her gender identity and her plans to commence her clinicians’ prescribed treatment upon returning from her work-approved vacation.<sup>24</sup> In the letter, she further explained that the treatment would require her to live and present as female—as her “true self, [Aimee] Australia Stephens”<sup>25</sup>—including while she was at

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14. *Id.* at 568.

15. *Id.* (noting also that the Harris Funeral Home did not close for Christian holidays and that it both served clients and hired employees without regard to their choice of faith or lack thereof).

16. *Id.* (citing paragraphs 37–38 of the Defendant’s counter Statement of Facts).

17. *Id.* at 567 (indicating that Stephens used her former legal name, “William Anthony Beasley Stephens”); Brief for Respondent Aimee Stephens at 5–6, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 884 F.3d 560, 567 (6th Cir. 2018) (No. 18-107) (indicating that she wore men’s apparel and was perceived by others in the workplace as male).

18. Brief for Respondent Aimee Stephens, *supra* note 17, at 6 (alterations in original).

19. *Id.* (noting that Thomas Rost, Stephens’s employer at the Harris Funeral Home, testified that she competently performed her work duties; that she was an “incredible embalmer”; and that she “showed sensitivity and compassion to the clients who came in,” exhibiting “courte[asy] and compassion[]” in her interactions with patrons).

20. *Id.*

21. *Id.*

22. *Id.* at 6–7.

23. *Id.* at 7.

24. *Id.* at 7–8.

25. *Id.* at 8.

work, and that she would wear “appropriate business attire”<sup>26</sup> in accordance with the Harris Funeral Home’s dress code policies.<sup>27</sup>

On August 15, 2013, just before Stephens’s vacation, Rost informed her that her “services would no longer be needed.”<sup>28</sup> Rost offered Stephens a severance package conditioned on her agreement not to speak of the termination, but Stephens declined.<sup>29</sup> The only reason management offered Stephens for her termination was that “the public would [not] be accepting of [her] transition.”<sup>30</sup> However, Rost testified that he fired Stephens because “[Stephens] was no longer going to represent himself as a man. He wanted to dress as a woman.”<sup>31</sup> Rost invoked his personal Christian beliefs to justify terminating Stephens, arguing that it was “wrong for a biological male to deny his sex by dressing as a woman or for a biological female to deny her sex by dressing as a man,”<sup>32</sup> and that allowing Stephens to remain his employee “would render him complicit ‘in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.’”<sup>33</sup> He then offered practical reasons for Stephens’s termination, opining that a transgender woman had little chance of plausibly passing as female and speculating that clients would be distracted by a transgender employee’s appearance, thereby negatively impacting the Harris Funeral Home’s business.<sup>34</sup>

### B. Procedural History

Shortly after her termination, Aimee Stephens filed a discrimination claim against the Harris Funeral Home with the EEOC.<sup>35</sup> The EEOC initially asserted two theories of sex discrimination under Title VII in its district court complaint, arguing that the Harris Funeral Home unlawfully discriminated against Stephens because of (1) her transgender status; (2) her failure to conform to her employer’s “sex- or gender-based preferences, expectations, or stereotypes”; or both.<sup>36</sup> Following the Harris Funeral Home’s motion to

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26. *Id.*

27. *Id.* at 10–11 (describing the Harris Funeral Home’s employee dress code as “sex-specific;” women were required to “wear skirts instead of pants, even though its owner [was] aware that female funeral directors [wore] pants suits at other funeral homes,” but Rost maintained a skirt policy for women because “he believe[d] that ‘a male should look like a . . . man, and a woman should look like a woman’”).

28. *Id.* at 9.

29. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018).

30. *Id.*

31. *Id.*

32. Brief for Respondent Aimee Stephens, *supra* note 17, at 9.

33. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 569.

34. Brief for Respondent Aimee Stephens, *supra* note 17, at 9–10.

35. *Id.* at 11.

36. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 596 (E.D. Mich. 2015) (italics omitted). The EEOC brought an additional Title VII violation claim against the Harris Funeral Home for providing a “clothing allowance/work clothes” for their male employees but not for their female

dismiss,<sup>37</sup> in which the court rejected the EEOC's claim of Title VII sex discrimination based on Stephens's transgender status,<sup>38</sup> the EEOC proceeded solely on its sex-stereotype claim of sex discrimination under the *Price Waterhouse v. Hopkins* standard.<sup>39</sup>

Both parties filed for summary judgment at the conclusion of discovery.<sup>40</sup> The district court granted summary judgment to the defendant Harris Funeral Home, holding that the Religious Freedom Restoration Act (RFRA) shielded the Harris Funeral Home from Title VII sex discrimination liability.<sup>41</sup> Although the EEOC appealed the district court's judgment,<sup>42</sup> the Sixth Circuit granted Stephens's motion to intervene on appeal, permitting her to both file a brief and seek representation independently.<sup>43</sup>

A Sixth Circuit panel heard the case on appeal and unanimously reversed the district court, ruling in favor of Aimee Stephens and the EEOC.<sup>44</sup> In granting summary judgment to the EEOC and Aimee Stephens, the court held that the Harris Funeral Home had violated Title VII's sex discrimination prohibition by firing Stephens for her desire "to appear or behave in a manner that contradict[ed] the Funeral Home's perception of how she should appear or behave based on her sex."<sup>45</sup> The Sixth Circuit agreed with the district court that the *Price Waterhouse* standard applies to any employee that experiences discrimination for failure to comply with "stereotypical gender norms,"<sup>46</sup>

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employees. EEOC v. R.G. & G.R. Funeral Homes, Inc., 201 F. Supp. 3d 837, 864 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560. However, this claim was dismissed without prejudice in the subsequent district court hearing for failure to follow proper procedure in filing the complaint. *Id.* at 870. This Note will not discuss this claim as it is not relevant for the purposes of this analysis.

37. R.G. & G.R. *Harris Funeral Homes, Inc.*, 100 F. Supp. 3d at 595 (explaining the Harris Funeral Home moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6), which allows the court to dismiss a case provided the plaintiff's complaint "fail[s] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6)).

38. R.G. & G.R. *Harris Funeral Homes, Inc.*, 100 F. Supp. 3d at 598–99. The Court explained that because transgender status is not a protected class under Title VII, the EEOC had not stated a valid claim and thereby had no grounds for relief.

39. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255–58 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075, *as recognized in* *Comcast Corp. v. Nat'l Ass'n of Afr. American-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

40. EEOC v. R.G. & G.R. *Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560 (6th Cir. 2018), *aff'd*, 140 S. Ct. 1731 (2020).

41. *Id.* at 870; *see also id.* at 856 (reasoning that the RFRA exemption applied because Rost's Christian belief that being transgender was sinful was so sincere that he would feel compelled to sell his business and "give up [his] life's calling of ministering to grieving people as a funeral home director and owner" were he forced to financially support an employee who was transgender) (alteration in original).

42. EEOC v. R.G. & G.R. *Harris Funeral Homes, Inc.*, 884 F.3d 560, 570 (6th Cir. 2018).

43. EEOC v. R.G. & G.R. *Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL 10350992, at \*1 (6th Cir. Mar. 27, 2017). The court explained that "[t]he EEOC's recent actions imply that the new administration will less aggressively pursue transgender rights," and thus Stephens's concerns that the EEOC would not be able to continue "adequately represent[ing] her interests" were valid. *Id.*

44. R.G. & G.R. *Harris Funeral Homes*, 884 F.3d at 567.

45. *Id.* at 574, 600.

46. *Id.* at 572 (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

including transgender individuals.<sup>47</sup> However, the Sixth Circuit reversed the district court's holding that discrimination based on an individual's transgender status is not sex discrimination. The court explained that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."<sup>48</sup> The court further rejected that the status-based and sex-stereotype theories of sex discrimination against transgender individuals could be disaggregated at all because "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align."<sup>49</sup>

The Harris Funeral Home petitioned the Supreme Court of the United States to review the Sixth Circuit's holding,<sup>50</sup> and the Court subsequently granted certiorari on two questions: whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.<sup>51</sup> On October 8, 2019, the Supreme Court heard the oral arguments<sup>52</sup> of the Harris Funeral Home, the EEOC as a respondent supporting reversal of the Sixth Circuit's holding,<sup>53</sup> and Aimee Stephens.<sup>54</sup>

### C. *The Supreme Court's Decision*

On June 15, 2020, the Supreme Court of the United States issued an opinion in *Bostock v. Clayton County*<sup>55</sup> and two companion cases, holding that

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47. *Id.*

48. *Id.* at 575; *see also id.* at 576 ("Gender (or sex) is not being treated as 'irrelevant to employment decisions' if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.").

49. *Id.* at 576.

50. Brief for Respondent Aimee Stephens, *supra* note 17, at 14.

51. *Id.* at i; Brief for Petitioner at i, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. 2019); Brief for Federal Respondent Supporting Reversal at i, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. 2019).

52. Transcript of the Oral Arguments, R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Oct. 8, 2019).

53. Aimee Stephens's concerns that the 2016 election of President Trump would cause a shift in federal agencies' administrative policies turned out to be valid. The EEOC abandoned its initial position, in which it had proffered a transgender-inclusive understanding of Title VII sex discrimination in support of Stephens's claim, and proceeded in support of the Harris Funeral Home, urging the Supreme Court to reverse the Sixth Circuit's decision and rule in favor of the Harris Funeral Home. *See* Brief for Federal Respondent Supporting Reversal, *supra* note 51, at 12–14.

54. *See* Transcript of the Oral Arguments, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, et al., No. 18-107 (U.S. Oct. 8, 2019).

55. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), *consolq.* *Altitude Express, Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599, No. 17–1623 (Apr. 22, 2019), *and* R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599, No. 18–107 (Apr. 22,

Title VII's prohibition on sex discrimination bars adverse employment decisions rendered on the basis of sexual orientation and transgender status.<sup>56</sup> In a 6–3 decision, the Court held that Title VII's protections extend to homosexual and transgender individuals.<sup>57</sup> Justice Gorsuch authored the majority opinion, and Justices Alito and Kavanaugh wrote separate dissenting opinions.

The majority began its analysis to determine the applicable rule by identifying and defining key terms of Title VII's statutory language in accordance with their ordinary public meaning at the time of the statute's enactment in 1964 to establish the applicable rule. The Court defined “sex”; “because of,” including an analysis of the but-for causation standard; and “discriminate,” specifically within the context of disparate-treatment cases.<sup>58</sup> Significantly, it decided that sex meant “status as either male or female [as] determined by reproductive biology,” consistent with the traditional understanding asserted by the employers.<sup>59</sup> The majority reasoned that the more expansive definition of sex the employees proffered was not required for the purposes of this analysis—a point that the employees conceded.<sup>60</sup>

The majority then concluded the term “because of” invoked but-for causation, a standard with a broad scope requiring the employee's sex to be merely one of the but-for causes of an employer's adverse employment decision.<sup>61</sup> Finally, the Court determined that to discriminate against an employee or potential employee in the context of disparate-treatment cases required unfavorable treatment that was intentional.<sup>62</sup>

The Court's analysis produced an overarching rule: “An employer violates Title VII when it intentionally fires an individual . . . based in part on sex.”<sup>63</sup> The majority further found that sexual orientation and gender identity are “inextricably bound up with sex,”<sup>64</sup> meaning that an employer necessarily relies on sex when discriminating against an employee on the basis of the employee's

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2019), and *rev'g* *Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 Fed. App'x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599, No. 17–1618 (Apr. 22, 2019).

56. *Bostock* and *Zarda* both involved employers who terminated employees for being homosexual. However, for the purposes of this Note, the discussion of the Court's decision will focus primarily on the issue presented in *Harris Funeral Homes*—Title VII sex discrimination as applied to transgender persons.

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

58. *Id.* at 1738–41.

59. *Id.* at 1739.

60. *Id.* The employees asserted that “even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation.” *Id.* This definition, further discussed in Parts III and IV, challenges the binary understanding of sex based on reproductive anatomical characteristics.

61. *Id.*

62. *Id.* at 1740.

63. *Id.* at 1741.

64. *Id.* at 1742.

homosexual or transgender status.<sup>65</sup> It inevitably follows that an employer who intentionally discriminates against an employee because the employee is homosexual or transgender necessarily and intentionally relies on the employee's sex in the process.<sup>66</sup> The Court clarified that Title VII prohibits discrimination against individuals; an employer cannot defend itself against allegations of individual discrimination by arguing its policies apply equally to men and women at a group level.

The Court then recounted three landmark Title VII sex discrimination cases to explain the basis of its opinion: *Phillips v. Martin Marietta Corp.*,<sup>67</sup> *Los Angeles Department of Water and Power v. Manhart*,<sup>68</sup> and *Oncale v. Sundowner Offshore Services, Inc.*<sup>69</sup> After examining the defenses each employer in those cases offered, the Court used their common themes to synthesize three overarching rules of unsuccessful defenses to Title VII allegations. First, an employer cannot avoid Title VII liability by (1) recharacterizing or rebranding sex-based discriminatory practices or (2) offering additional motivations or intentions for its conduct.<sup>70</sup> For example, the employer in *Manhart* claimed that its policy requiring larger pension funds from female employees was a "life expectancy" adjustment, based on the statistically longer lifespans of women—not on any animus toward or perceived incompetence of women.<sup>71</sup> Similarly, the Harris Funeral Home claimed it fired Aimee Stephens for being openly transgender, not on the basis of her "biological" sex. Regardless of how the employers described their conduct, the employers in both cases unlawfully relied on the individual employees' sex to take adverse employment actions against them. Nothing in Title VII hinges on how the employer self-labels its discriminatory practices.

Second, Title VII does not require that sex be "the sole or primary cause" of the adverse employment decision; it must simply be one but-for cause.<sup>72</sup> Thus, the Harris Funeral Home cannot evade Title VII by asserting that its primary reason for firing Stephens was her transgender status, a trait that is not protected by the statute. Ultimately, if the Harris Funeral Home would not have terminated Stephens if her sex had been different—i.e., had she been assigned

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65. *Id.*

66. *Id.*

67. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (finding an employer violated Title VII when it hired male applicants but refused to hire female applicants who were parents of young children).

68. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (holding an employer engaged in unlawful sex discrimination under Title VII by requiring a larger pension fund contribution from its female employees than its male employees based on women's statistically longer lifespans).

69. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (concluding that Title VII sex discrimination protected a male employee against sexual harassment from his male coworkers for effeminate attributes or conduct).

70. *Bostock*, 140 S. Ct. at 1744.

71. *Id.*; see also *Manhart*, 435 U.S. at 712–13.

72. *Bostock*, 140 S. Ct. at 1744.

female at birth—then the Harris Funeral Home has violated Title VII, regardless of whether other more important factors were present.

Third, an employer offers no cognizable defense to Title VII sex discrimination claims by showing its practices ensure equality among male and female employees at a group level.<sup>73</sup> Although the employer in *Manhart* formulated its sex-based pension fund policy to ensure the funds would be paid equally among its male and female employees overall, the policy was discriminatory when applied on an individual basis.<sup>74</sup> In *Phillips*, the employer claimed that it generally favored female applicants over male applicants; nonetheless, its practice of refusing employment to mothers of young children was discriminatory to individual applicants.<sup>75</sup> Likewise, even though the Harris Funeral Home argued it would discriminate equally against both transgender women and transgender men, such a practice is unlawfully discriminatory when applied to individual employees.<sup>76</sup> In fact, the Court later observed that this practice would only double, not eliminate, the Harris Funeral Home's violation.<sup>77</sup>

The majority then examined and rejected each of the current employers' defenses, categorizing them by textual and extratextual arguments. Justice Gorsuch provided numerous hypothetical examples and comparisons to Title VII caselaw to reveal the flaws in each of these arguments.<sup>78</sup> Both Justices Alito's and Kavanaugh's dissenting opinions deconstructed the majority's reasoning and analogies in an unsuccessful attempt to prove that Title VII sex discrimination does not encompass homosexual and transgender discrimination.<sup>79</sup> Although their analyses do not lack for thoroughness, they ultimately remain unpersuasive because they bury the straightforward application of Title VII's general language under a mountain of technicalities and speculation. Put plainly, the dissenting justices overanalyzed Title VII in their effort to find ways to circumvent the reasonable, unambiguous result that the statutory language "sex discrimination" applies to gay, lesbian, and transgender individuals. Further scrutiny of their dissenting opinions, however, is not necessary to the analysis of this Note, because this Note focuses on the overall function and impact of *Bostock* on Title VII and its interaction with the right to autonomy.

The impact of the majority's ruling cannot be underestimated. *Bostock*'s holding is a landmark victory for the LGBTQ+ community, and particularly for transgender individuals, against whom most forms of discrimination remain

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73. *Id.*

74. *Manhart*, 435 U.S. at 709.

75. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971).

76. *Bostock*, 140 U.S. at 1744.

77. *Id.* at 1748.

78. *Id.* at 1747–49.

79. *Id.* at 1754–85 (Alito, J., dissenting); *id.* at 1822–37 (Kavanaugh, J., dissenting).

legally permissible. Justice Gorsuch's thorough reasoning, bolstered by several citations, examples, and analogies, successfully establishes solid protection for transgender individuals in the workplace that cannot be cleverly manipulated by judges in lower courts. Thus, *Bostock* has created a precedent underpinned by logic and reliance on pivotal caselaw that will likely curb further litigation focused on transgender discrimination in the workplace. However, the Court left some questions unresolved that will likely generate future litigation.

For example, Justice Gorsuch does not discuss in detail whether LGBTQ+ individuals can prove Title VII sex discrimination under a sex-stereotype theory, as in *Price Waterhouse v. Hopkins*.<sup>80</sup> Because the Court uses the binary definition of sex as male or female to demonstrate that discrimination against homosexual or transgender individuals inevitably involves sex discrimination, it remains unclear whether Title VII applies to nonbinary or gender nonconforming individuals, who do not identify as strictly male or female. Particularly regarding gender identity, the Court's analysis focuses heavily on transgender individuals who are assigned one sex at birth but identify as the opposite sex. Justice Gorsuch indirectly offers some indication that gender nonconforming individuals are protected under Title VII through the example of "Hannah and Bob," each of whom failed to fulfill sex stereotypes by being insufficiently feminine or masculine.<sup>81</sup> However, the majority's reasoning fails to provide explicit protection for nonbinary individuals, which creates a potential loophole for employers to permissibly discriminate against individuals without technically implicating sex discrimination, since the Court avoided deciding if Title VII's definition of sex could be interpreted to expand beyond the male–female dichotomy.

Additionally, the majority expressly confined its holding to protection of transgender and homosexual individuals under Title VII. The majority avoided determining whether this opinion would affect homosexual and transgender discrimination under other similarly phrased statutes or whether this would affect Title VII's other permissible sex-based rules, such as those regarding bathrooms, locker rooms, and dress codes.<sup>82</sup> The Court limited its holding to invidious discrimination on the basis of transgender and homosexual status under Title VII, reasoning that the other laws or permissible sex-based rules concerning the employers were not presented to the Court in this case.<sup>83</sup>

Then, the Court declined to determine whether employers' religious beliefs, specifically the Religious Freedom Restoration Act of 1990 (RFRA), could

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80. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255–58 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075, *as recognized in* *Comcast Corp. v. Nat'l Ass'n of Afr. American-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

81. *Bostock*, 140 S. Ct. at 1742–43.

82. *Id.* at 1753.

83. *Id.*

exempt them from compliance with Title VII.<sup>84</sup> The Court left this issue for “future cases,” explaining again that none of the employers raised this issue in the present case.<sup>85</sup> The Court’s response, however, implies that it not only expects—and perhaps even invites—this issue to resurface, but that it will likely permit the RFRA to supersede Title VII’s protection of transgender and homosexual individuals. The recent addition of Justice Amy Coney Barrett, another conservative justice, increases the likelihood that, if presented with the issue, the Supreme Court would permit the religious justifications for Title VII sex discrimination against transgender and homosexual individuals.

The Court thus created possibilities for future litigation when it failed to explicitly address sex discrimination applied to nonbinary gender identities and when it was unable to address some of the difficult issues implicated by the facts of the *Bostock* companion cases. Despite these limitations, the holding is nonetheless a major victory for the LGBTQ+ community. *Bostock* both expedited the path to LGBTQ+ rights in employment discrimination and insulated the decision against reversal by relying on Title VII as its statutory foundation—a cornerstone of employment law for over half a century that has withstood numerous challenges. Furthermore, the significance of this opinion cannot be overstated in terms of how it enables transgender people to live authentically and autonomously. Employment is crucial to every person’s ability to live autonomously, and for transgender people, employment is often the very means by which autonomy can be actualized. *Bostock* has given the LGBTQ+ community, and particularly trans individuals, a solid starting point for catalyzing equality in all aspects of society.

## II. THE EVOLUTION OF SEX IN TITLE VII

Title VII was enacted in 1964 as a remedial measure to prohibit employment discrimination on the basis of one’s “race, color, religion, sex, or national origin.”<sup>86</sup> Title VII’s overarching purpose is “to purge the workplace of criteria that Congress found unrelated to an employee’s ‘ability or inability to work.’”<sup>87</sup> When Title VII was originally created, Congress was primarily focused on eradicating racial discrimination in the workplace as one part of the larger plan for the Civil Rights Act of 1964 to rectify America’s long-standing history of African-American oppression.<sup>88</sup> Although Congress’s ultimate goal was to achieve racial equality, it recognized that at the root of racial equality was

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84. *Id.* at 1753–54.

85. *Id.*

86. 42 U.S.C. § 2000e-2(a) (2019).

87. Brief of William N. Eskridge Jr. & Andrew Koppelman as Amici Curiae in Support of Employees at 14, *R.G. & G.R. Harris Funeral Homes v. EEOC*, 884 F.3d 560 (6th Cir. 2018) (No. 16-2424).

88. Taylor Alyse Pack Ellis, *Comment: Why the EEOC Got It Right in Macy v. Holder: The Argument for Transgender Inclusion in Title VII Interpretation*, 16 SCHOLAR 375, 384 (2014).

providing “equal treatment for all” people.<sup>89</sup> Thus, Congress included within Title VII’s coverage other categories of discrimination that were inhibiting the accomplishment of equal opportunity for all in the workplace. The category of sex was not originally included in Title VII’s prohibited classifications but was added by Representative Howard Smith just before the vote was taken, without any previous debate or discussion.<sup>90</sup> Due to the lack of Congressional commentary on the definition of sex discrimination or the extent of its coverage under Title VII,<sup>91</sup> the category of sex has been a controversial subject of statutory interpretation since its inception.

Many courts, including the majority in *Bostock*, have chosen to cabin the definition of sex to its “traditional meaning”—i.e., as applying strictly to “biological” men or women.<sup>92</sup> Before *Bostock*, courts seeking to exclude LGBTQ+ individuals from Title VII’s prohibition on sex discrimination often relied on the fact that the ordinary public meaning of sex in 1964 did not explicitly include sexual orientation or gender identity.<sup>93</sup> Some courts alternatively limited the scope of sex discrimination by pointing to early Title VII caselaw, in which the statute was applied solely to women.<sup>94</sup> Despite their various explanations, these limiting techniques all emphasized the common cultural expectations of American society during the time period Title VII was enacted to prevent what conservative judges considered to be undesirable results. On the other hand, some courts have determined that discrimination on the basis of sex should be understood expansively, rather than narrowly. These courts have used legislative history on Title VII as a whole or prior courts’ interpretations on other classifications to justify liberal interpretations of sex discrimination, citing Congress’s remedial intent to wipe out discrimination across a vast array of public life, using broad, sweeping measures to do so.<sup>95</sup> Some courts have drawn inferences directly from the statutory language—or rather, the lack thereof—noting that the absence of narrowly

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89. Senator Clark, in a reply prepared by the Department of Justice regarding Title VII, asserted, “What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all.” 110 CONG. REC. 7207 (1964).

90. Ellis, *supra* note 88, at 384. Some sources have speculated that sex was added by Representative Howard in an effort to derail the entire Civil Rights Act. *Id.* at 384 n.55.

91. *Id.* at 384.

92. See *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984) (concluding that Congress only intended for sex discrimination to cover the “traditional concept of sex”).

93. See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (“[F]or the purposes of Title VII the plain meaning must be ascribed to the term ‘sex’ in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII.”).

94. See *Sommers*, 667 F.2d at 750 (recognizing that Title VII was understood to create “equal opportunities for women” in employment); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (noting Title VII sought to “ensure that men and women are treated equally”).

95. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (“Title VII . . . should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.”).

defined classifications<sup>96</sup> and the thorough lists of prohibited employment practices<sup>97</sup> indicate Congress's intent to cover multiple forms of discrimination and adverse employer actions.

Though the debate on the meaning of sex has remained lively since Title VII's enactment, the questions of whether and how sex discrimination applies to members of the LGBTQ+ community have grown increasingly urgent over the last few decades. In the context of transgender individuals, courts have been divided over whether employment discrimination against a transgender person constitutes discrimination on the basis of sex under Title VII.<sup>98</sup> Many courts have rejected the idea that discrimination against a person based on their transgender status is sex discrimination, using what Professor Andrew Koppelman has called “subtractive moves” to exclude members of the LGBTQ+ community from Title VII's coverage.<sup>99</sup> Koppelman explains that rather than “relying on any language in the statute,” so-called textualist judges will “plac[e] the language in some larger cultural context in order to defeat the law's literal command.”<sup>100</sup> Justice Alito used some of these methods in his dissent in *Bostock*, such as when he asserted,

While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would

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96. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1d071, 1075, *as recognized in* *Comcast Corp. v. Nat'l Ass'n of Afr. American-Owned Media*, 140 S. Ct. 1009, 1017 (2020). (“We take these [statutory] words to mean that gender must be irrelevant to employment decisions.”).

97. 42 U.S.C. § 2000e-2(a) (2019). See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–67 (1986) (“The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”).

98. Cases that have found Title VII sex discrimination does not include transgender individuals: *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977); *Grossman v. Bernards Twp. Bd. Educ.*, No. 74-1904, 1975 WL 302 (D. N.J. Sept. 10, 1975), *aff'd without opinion*, 538 F.2d 319 (3d Cir. 1976). Cases that have found Title VII sex discrimination includes transgender discrimination: *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (indicating that employer's discrimination against transgender employee would be actionable under Title VII sex discrimination); *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638*, 867 F. Supp. 2d 1023 (D. Minn. 2012) (discussing the applicability of Title VII definition of “sex” to an ERISA case); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

99. Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. LAW REV. 1, 3 (analyzing the extratextual methods that textualist judges use to limit “the law's literal command” to avoid unwanted applications of broad remedial statutes like Title VII). Professor Koppelman explained that these methods include focusing on:

(1) the law's prototypical referent, or (2) the categories of objects that it happens to bring to mind, or (3) distinctions that feel familiar but which do not appear in the statute, or (4) formalist exceptions that are unrelated to the law's language, or (5) the general expectations that were part of the law's cultural background.

*Id.*

100. *Id.* at 2–3.

have been bewildered to hear that this law also forbids discrimination on the basis of ‘transgender status’ or ‘gender identity,’ terms that would have left people at the time scratching their heads.”<sup>101</sup>

However, as Justice Gorsuch aptly observed, “Over time, though, the breadth of the statutory language proved too difficult to deny.”<sup>102</sup> Major caselaw developments on sex discrimination provide context for understanding the malleable, sustainable nature of Title VII’s statutory language and exemplify that a broad, trans-inclusive interpretation of sex discrimination is required to satisfy Congress’s remedial purpose.

In *Los Angeles Department of Water v. Manhart*, one of the three primary cases the majority discussed in *Bostock*, the Court considered whether an employer’s practice of requiring its female employees to contribute more to a pension fund than its male employees constituted sex discrimination under Title VII.<sup>103</sup> The employer justified its decision by contending that because women typically have longer lifespans than men, women should contribute more to the pension fund.<sup>104</sup> The Court rejected the employer’s defense, emphasizing that Title VII protects individuals, not classes of people; thus, discriminating against an individual based on stereotypes associated with their sex—even if supported by statistical evidence—is unlawful.<sup>105</sup> As the Court noted in *Bostock*, *Manhart* clarifies that Title VII measures discrimination on an individual level; thus, schemes aimed at equality on a group level violate Title VII if they are discriminatory when applied on an individual basis.

*Price Waterhouse v. Hopkins*, another landmark sex discrimination case, provided the framework for sex stereotype claims.<sup>106</sup> Ann Hopkins, a senior manager at Price Waterhouse, an accounting partnership, filed a sex discrimination claim under Title VII after being refused reconsideration for a promotion to partner based on her failure to conform her appearance and behavior to the partners’ preconceived notions of feminine presentation.<sup>107</sup> The partners acknowledged evidence that she produced excellent work—such as the \$25 million deal she secured<sup>108</sup>—and that she was more accomplished than the other candidates for partnership.<sup>109</sup> However, their decision ultimately hinged on her inability to behave in a stereotypically feminine manner; they indicated that she was too aggressive for a woman, that she was “macho” and needed “a

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101. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1772 (2019).

102. *Id.* at 1752.

103. *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 704 (1978).

104. *Id.* at 705.

105. *Id.* at 708.

106. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255–58 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075, *as recognized in Comcast Corp. v. Nat’l Ass’n of Afr. American-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

107. *Id.* at 231–232.

108. *Id.* at 233.

109. *Id.* at 234.

course at charm school,” and that her propensity for using “foul language” was unseemly for a woman.<sup>110</sup> The Court found that Price Waterhouse had unlawfully discriminated against Ann Hopkins when the partners based their decision not to consider her as a candidate for partner on sex stereotypes about women.<sup>111</sup> The Court observed that Hopkins’s qualities would not have precluded her from partnership eligibility were she male, and thus, Price Waterhouse had unlawfully taken her gender into consideration.<sup>112</sup>

Surprisingly, the *Bostock* Court declined to provide an in-depth discussion of *Price Waterhouse* in its analysis. *Price Waterhouse* profoundly impacted Title VII litigation by permitting evidence of sex stereotyping to demonstrate sex discrimination, which in turn expanded the scope of actionable sex discrimination in employment. Furthermore, it set the tone for understanding sex in an expansive way, as it constitutes the first time the Court explicitly treated “gender” as synonymous with sex.<sup>113</sup> By expanding the definition of sex to encompass not just anatomical features, but also sociological constructs of sex, the Court established a basis upon which the meaning of sex could evolve and maintain relevance in the future.<sup>114</sup> *Price Waterhouse*, at its core, protects autonomy in gender expression, and potentially in gender identity, making this case ideal for demonstrating sex discrimination against transgender individuals by way of sex stereotyping. The *Price Waterhouse* Court’s use of gender also makes the inclusion of “gender identity” within the definition of sex more readily acceptable.

*Oncale v. Sundowner Offshore Services* serves as yet another example of how sex discrimination under Title VII has expanded since its inception.<sup>115</sup> Although *Oncale* is primarily noted for recognizing same-sex harassment as sex discrimination under Title VII,<sup>116</sup> its influence on statutory interpretation is what makes it especially salient in transgender discrimination. In its analysis, the Court reasoned that although same-sex harassment was not considered when the statute was originally created, Title VII nonetheless extended “beyond the principal evil to cover reasonably comparable evils.”<sup>117</sup> *Oncale* established Title VII as a dynamic, ever-evolving statute,<sup>118</sup> expertly and thoughtfully crafted to maintain relevance in a society in which the meaning of sex is rapidly transforming. It further supports Title VII’s malleable nature; even as originally

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110. *Id.* at 235.

111. *Id.* at 258.

112. *Id.*

113. *See id.* at 251.

114. Ellis, *supra* note 88, at 388.

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

116. *Id.* at 82.

117. *Id.* at 79.

118. Ellis, *supra* note 88, at 387–88.

unexpected applications emerge, Title VII continues to protect against new and “comparable evils,” such as transgender discrimination.

These cases demonstrate that Title VII can and should be interpreted liberally if it is to fulfill its purpose of eliminating discrimination that would prevent individuals from being able to participate equally in society. Furthermore, as Justice Gorsuch recognized in *Bostock*, a textualist interpretation of the statutory language reveals an unequivocal protection of transgender individuals under discrimination on the basis of sex, even when using the narrow, “traditional” definition of sex.

### III. AUTONOMY IN AMERICA

Title VII not only seeks to prevent prejudice; it also aims to promote and protect one of America’s most cherished core values: individual autonomy. Though Title VII prohibits employment discrimination based on various immutable characteristics, it also addresses subjective aspects of a person’s identity, such as one’s personal choice in religious belief and practice. Thus, Title VII considers deeply personal beliefs to be just as central to a person’s identity as their objective, immutable qualities, such as their genetic configuration. By protecting a person’s ability to live authentically according to core components of their identity free from unreasonable, burdensome employment consequences, Title VII effectively protects the right to personal autonomy.

Autonomy has deep roots in American cultural and legal history. Black’s Law Dictionary defines “autonomy” as “[a]n individual’s capacity for self-determination.”<sup>119</sup> Though it goes by many different names, such as self-determination, personal liberty, and dignity, the concept of autonomy embodies the American ideal of the right to individualism. Psychology has verified these cultural ideals through scientific research, which has long recognized the necessity of autonomy to a person’s psychological growth and well-being.<sup>120</sup> An individual’s need for autonomy is fulfilled “[w]hen one’s behavior is experienced as self-determined rather than being regulated by sources external to the self.”<sup>121</sup> Thus, central to actualizing the American right to “Life, Liberty and the pursuit of Happiness”<sup>122</sup> is the freedom to author one’s own story.

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119. *Autonomy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

120. Darcy R. Dupuis & Ian Newby-Clark, *Economic Threat Undermines the Satisfaction of Psychological Needs for Competence and Autonomy*, 46 J. APPLIED SOC. PSYCH. 94, 95 (2016).

121. *Id.*

122. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

*A. Autonomy's Philosophical Birth*

The rugged individualism of American culture can be best understood by looking at the evolution of self-determination theory in American culture. John Locke, whose writings inspired revolutionary figures like Thomas Jefferson, analogized the human body as property.<sup>123</sup> His theory proposed that each person, as a steward of their body, held the natural right to control their body.<sup>124</sup> He proffered that the law should function solely to protect the individual's autonomy from any outside forces, including the government or third parties, that would attempt to compromise or erode that right.<sup>125</sup> This idea of individual liberty catalyzed the American Revolutionary War; we can see Locke's influence in The Declaration of Independence, in which Thomas Jefferson justified the colonists' right to break away from England's tyrannical rule on the natural, God-given right to individual autonomy.<sup>126</sup>

The prominence of individual autonomy in American idealism continued to develop well past the Revolutionary War, facilitated by the theories of Western philosophers John Stuart Mill, Jeremy Bentham, and Immanuel Kant.<sup>127</sup> Jeremy Bentham applied a utilitarian perspective<sup>128</sup> of human nature to develop his political philosophy of autonomy, proposing that society's greatest good would be manifested by laws that gave individuals freedom of choice, rather than laws that restricted individual autonomy.<sup>129</sup> John Stuart Mill built upon Bentham's utilitarian perspective on maximizing society's potential through individual autonomy.<sup>130</sup> However, Mill's version of autonomy was more intellectual, proffering that personal development and self-fulfillment relied on freedom of thought and choice, and that society's progress relied upon the contributions of well-developed individuals.<sup>131</sup> Mill also proposed the "harm principle," premised on the idea that maintaining individual autonomy is society's "basic moral obligation," and the only limitations the government had the authority to exercise on individual autonomy were in circumstances that would result in harm to another person.<sup>132</sup>

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123. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 367 (2000).

124. *Id.* at 367–68. Locke proposed that each individual was a steward of their own body because God, as the Divine Creator, was the true owner of the human body. *Id.*

125. See Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1708 (1992).

126. *Id.*

127. *Id.* at 1712.

128. *Id.* at 1713.z

129. William Sweet, *Jeremy Bentham*, INTERNET ENCYCLOPEDIA PHIL., <https://www.iep.utm.edu/bentham> (last visited Apr. 25, 2020).

130. Winick, *supra* note 125, at 1713.

131. *Id.* at 1714.

132. *Id.* at 1713–14.

Similarly to Bentham and Mill, German philosopher Immanuel Kant described individual autonomy as a moral obligation society owed to each person.<sup>133</sup> However, he proffered that this duty was not justified by the benefits society might reap from productive, emotionally-developed citizens; rather, it was each person's natural right to self-reflection and freedom of choice that demanded society's respect and protection.<sup>134</sup> Thus, Kant premised it would be immoral for the State or any other individual to impede upon another's autonomy.<sup>135</sup>

### B. *The Dichotomy of Autonomy*

American law adopted these philosophies, creating a dichotomy of physical and spiritual autonomy.<sup>136</sup> The terms "physical autonomy" and "spiritual autonomy" are not seen in statutory or constitutional language; however, many scholars have used these terms, or similar terms, to define more concretely a set of implicit ideas expressed by the texts. "Physical autonomy" denotes a sense of self-determination manifest in a tangible, external manner.<sup>137</sup> Physical autonomy involves the realm of both real and personal property, in which the idea of property extends not only to one's home and personal belongings, but also to ownership of one's body. "Spiritual autonomy" refers to the intangible, internal sphere of personal freedom. It encompasses liberty of personal beliefs, self-reflection, self-identity, and other related concepts of internal existence. Though this dichotomy theoretically clearly distinguishes the components of autonomy, in reality, the physical and spiritual aspects of autonomy are interwoven and work together symbiotically. A careful analysis of the Constitution and other legal and historical documents underpinning our constitutional doctrine provides context for understanding how the autonomy dichotomy has evolved since its conception.

The First Amendment creates a hybrid protection of both aspects of self-determination, but places primary emphasis on spiritual freedoms.<sup>138</sup> It asserts the individual's right to religious, political, social, and personal belief—elements of internal sense of self and choice—as well as verbal and bodily expression of those beliefs (i.e., freedom of speech and the press, freedom of peaceful assembly and association with others of one's choosing, and freedom

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133. *Id.* at 1714.

134. *Id.* at 1715.

135. *Id.*

136. This section is largely inspired by Meghan Boone's article *The Autonomy Hierarchy*, 22 TEX. J. C.L. & C.R. 1 (2016), which discusses how some courts have distinguished spiritual autonomy as more worthy of protection than bodily autonomy in an attempt to deprive people of reproductive rights such as abortion.

137. *See id.* at 16–17 (distinguishing between "bodily" and "spiritual" autonomy).

138. U.S. CONST. amend. I.

of government petition).<sup>139</sup> The First Amendment's religious protections are particularly expansive, including both an affirmative right to personal choice of religion and a negative right to freedom from government compulsion of religion. In 1993, the Religious Freedom Restoration Act enhanced the protection of the First Amendment right to religious belief and practice and effectively prioritized spiritual autonomy at the expense of other individuals' physical autonomy.<sup>140</sup>

The Constitution also provides several protections for physical autonomy. For example, the Fourth Amendment preserves the individual's right to security of physical person and property from unwarranted governmental search and seizure.<sup>141</sup> The Fifth Amendment also preserves physical autonomy by guaranteeing due process of law before the government may deprive one of bodily freedom, property, and in a criminal context, preserves freedom from compulsory self-incrimination.<sup>142</sup> The Sixth and Eighth Amendments provide further physical autonomy for criminal defendants, protecting defendants' rights to be the primary decision-makers in the presentation of their defense, as well as protecting them from being subjected to unreasonable denigrations of autonomy while incarcerated, such as "excessive bail" and "cruel and unusual punishments."<sup>143</sup> The Thirteenth Amendment applied autonomy to racial equality by prohibiting slavery, an indication that the law would, at the very least, safeguard the bodily autonomy of African-American individuals against being treated as property.<sup>144</sup> Substantive due process, which originated from the Fourteenth Amendment's Due Process Clause, has evolved into a vast body of judicially interpreted autonomous rights, most of which can be considered subcategories of physical autonomy.<sup>145</sup> These include rights involving freedom of self-determination in one's financial affairs,<sup>146</sup> freedom of movement and settlement,<sup>147</sup> and freedom in marriage and family planning.<sup>148</sup>

The problem with this dichotomy, however, is that physical and spiritual autonomy cannot be so easily disaggregated in reality. This becomes particularly apparent when viewing autonomy in the context of gender.

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139. *Id.*

140. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2018).

141. U.S. CONST. amend. IV.

142. U.S. CONST. amend. V.

143. U.S. CONST. amend. VI, VIII.

144. U.S. CONST. amend. XIII; *see also* Boone, *supra* note 136, at 18.

145. *See* Winick, *supra* note 125, at 1715–21.

146. *Id.* at 1719–20 (describing the decision of *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897), in which the Court acknowledged the right to occupational choice); *see also id.* at 1717 n.49 (discussing generally *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the Court listed the individual's right to freedom of contract among other liberties in substantive due process doctrine).

147. *Id.* at 1717 n.49.

148. *Id.* at 1721–25.

*C. Gender Autonomy*

Gender autonomy is a term that Jillian Weiss has defined as “the right of self-determination of one’s gender, free from state control, and the right to self-identify as that gender, free from state contradiction.”<sup>149</sup> But is gender—and gender autonomy, for that matter—not “conceptually distinct” from sex? To facilitate a more integrated, holistic understanding of how these concepts function in tandem, it is necessary to begin by defining some key terms.<sup>150</sup>

(1) *Gender Identity*. At the center of gender autonomy lies gender identity, commonly defined as a person’s sense of being male, female, a combination or variation of the two, or neither male nor female, that forms a “deeply felt, core component of a person’s identity.”<sup>151</sup> For most of the late twentieth century, gender identity was understood as merely the emotional and psychological component of “anatomical” sex; however, recent scientific developments have concluded that gender identity is predominantly “biological and genetic,” serving as the primary determinant of a person’s sex.<sup>152</sup> As M. Dru Levasseur, a transgender attorney, aptly explained, “[B]iological sex’ is determined by ‘brain sex,’ i.e., gender identity.”<sup>153</sup> Gender identity, then, is not chosen; rather, it constitutes an integral, immutable part of a person’s identity.<sup>154</sup> For cisgender people, their gender identity is generally compatible with their sex assigned at birth. However, for transgender people, their gender identity does not conform to their sex assigned at birth.<sup>155</sup> Transgender individuals’ experiences navigating the process of self-identification within the narrow confines of Western binary sex constructs illustrate that gender identity—not one’s sex assigned at birth—ultimately defines sex.<sup>156</sup>

(2) *Gender Expression*. Gender expression refers to one form of external manifestation of a person’s gender identity. Gender expression is manifested

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149. Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, 5 J. RACE, GENDER & ETHNICITY 2, 6–7 (2010).

150. Although this Part isolates the components of gender to contextualize gender autonomy, the experience of gender is not so clearly defined or partitioned. Gender is a fluid, unique element of each person’s identity that is both influenced by and affects other facets of identity like race, class, nationality, and sexual orientation.

151. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 951 (2015).

152. *Id.*

153. Levasseur, *supra* note 151, at 987.

154. *Id.* at 984 (noting that research has “confirmed the importance and immutability of gender identity in sex determinations”); David B. Cruz, *Transgender Rights After Obergefell*, 84 UMKC L. REV. 693, 697 (2016) (observing that gender identity is fixed at a young age).

155. *Understanding Transgender People: The Basics*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), [https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Short-July-2016\\_0.pdf](https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Short-July-2016_0.pdf).

156. *Id.* (“To treat a transgender person with respect, you treat them according to their gender identity, not their sex at birth.”); Levasseur, *supra* note 151, at 988 (clarifying the misconception that “the transgender experience is . . . about choice” and quoting Jillian Weiss’s assertion that “gender chooses us, and not the other way around” (Weiss, *supra* note 149, at 8)).

through outward presentation of one's qualities such as clothing, hairstyles, vocal quality, verbal and nonverbal behavior, and body characteristics.<sup>157</sup> Gender expression is a more fluid way of exercising and actualizing one's gender identity.

(3) *Gender Transition*. Gender transition is another external manifestation of gender identity that is particularly essential to trans people's gender autonomy. Gender transition is defined by The National Center for Transgender Equality (NCTE) as the time period "[w]hen a person begins to live according to their gender identity, rather than the gender they were thought to be when they were born."<sup>158</sup> The NCTE then lists steps that transgender people might take during this time period, including "changing [their] clothing, appearance, name, or the pronoun people use to refer to [them];" modifying their "identification documents, like their driver's license or passport, to better reflect their gender;" and "undergo[ing] hormone therapy or other medical procedures to change their physical characteristics and make their body match the gender they know themselves to be."<sup>159</sup>

Although at first glance gender expression and gender transition appear synonymous, they represent different levels of gender identity manifestation. While gender expression manifests gender identity through physical presentation, gender transition manifests gender identity both internally and externally. Also, gender expression is experienced by individuals of all gender identities—including heterosexual, cisgender people. However, gender transition is a manifestation of gender identity that is only experienced by transgender, and sometimes nonbinary, individuals. For many trans people, transitioning is arguably the ultimate exercise of gender autonomy.<sup>160</sup> But as Janet Mock reminds us, "'transitioning' is not the end of the journey. Yes, it's an integral part of revealing who we are to ourselves and the world, but there's much life afterward."<sup>161</sup>

Thus, this Note offers a more comprehensive definition of gender autonomy than that offered by Professor Weiss. Gender autonomy is the right to self-actualize one's gender identity through gender expression, gender transition, or both, without discrimination or interference from the state or federal government or private entities. Gender autonomy reveals the inherently flawed nature of the autonomy dichotomy because gender autonomy

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157. Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 488 (2017); NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 155.

158. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 155.

159. *Id.*

160. Levasseur, *supra* note 151, at 988 ("Transition is not altering one's sex, but affirming one's underlying gender identity. It is not done to evade or to be someone you are not; rather, it is to realize who you deeply are.") (citation omitted).

161. JANET MOCK, REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE 255 (2014).

necessarily entails both spiritual and physical autonomy.<sup>162</sup> The components of gender autonomy, and individual autonomy more broadly, cannot be partitioned into neatly labeled segments and exercised independently of each other. Rather, gender autonomy must be considered holistically as containing spiritual and physical elements that function symbiotically to enable not merely self-determination, but self-actualization of one's gender identity.

#### IV. WHY TITLE VII PROTECTS GENDER AUTONOMY

Title VII, interpreted textually, logically includes gender identity discrimination within its prohibition of employment discrimination on the basis of sex. As scientific research has discovered, sex is not so easily categorized on a binary spectrum of male or female; determining a person's sex requires a multi-faceted analysis that, in the presence of any uncertainty, relies predominantly upon a person's gender identity.<sup>163</sup> If Title VII is to continue protecting individuals from sex discrimination, it should be interpreted to reflect the accurate, scientific definition of sex. Because the majority in *Bostock* still found that a person's transgender status, and thus gender identity, is protected under Title VII using the binary, anatomical understanding of sex, it failed to fully account for individuals who exist outside of the male-female dichotomy of sex. Furthermore, Justice Gorsuch implied that trans people's protection under Title VII might be subject to an employer's religious beliefs under the RFRA, reflecting once again that the American legal system values religious beliefs—namely, Christianity—over other people's right to exist autonomously. Justice Gorsuch's implication also indicates that certain members of the Court are not fully convinced that gender identity is immutable, or at least not significant enough to a person's core identity to warrant protection from religiously-motivated discrimination. Although the Court still found in favor of trans-inclusive sex discrimination without applying the employee's "updated" definition of sex, the Court would have better insulated transgender protection had it engaged in a more thorough discussion of the implications of what this new interpretation of sex under Title VII would mean for employers and employees.

In past LGBTQ+ discrimination cases involving private employers, many courts have drawn arbitrary boundaries between what can be summarized as "status" and "conduct" discrimination.<sup>164</sup> Under this analysis, discrimination against a person based on their status, an immutable or deeply personal facet of self-identity, is unlawful; however, discrimination based on a person's

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162. *Id.* at 982 n.225 ("Separating gender identity from the physical attributes of the body is not only inaccurate, but frames it as a matter of preference or self-expression, rather than a core aspect of identity.").

163. *See id.* at 984.

164. Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U.L. REV. 2083, 2085 (2017).

conduct—viewed dismissively as “choices,” rather than the actualization of one’s identity—does not constitute an actionable claim.<sup>165</sup> The inherent flaw in attempting to distinguish between a person’s status and conduct is that such an approach mischaracterizes these components of self-identity and the connection between them.<sup>166</sup> Excluding protection of an individual’s exercise of autonomy renders the freedom to self-identify meaningless. Although autonomy theoretically can be divided into distinct thought and action components—i.e., spiritual and physical components—these components function symbiotically, manifesting the spiritual self through physical actions.

In the context of religion, for example, one manifests deep spiritual convictions through physical acts, such as prayer, worship, recognition of holy days, and through presentation, such as clothing, language, and demeanor. Title VII would be rather ineffective, then, if it protected people’s right to religious belief from discriminatory employer practices but excluded from its scope their ability to physically practice their religion. Just as religious practices enable the exercise of autonomy of one’s religious beliefs, external manifestations of gender identity, such as gender expression and gender transition, enable the exercise of autonomy over one’s gender identity. Viewed from a different perspective, if Title VII permitted employers to discriminate against employees for actualizing their beliefs through religious practice, it would effectively permit employers to discriminate against individuals for having religious beliefs. In the same way, if Title VII is construed to permit employers to discriminate against employees for externally actualizing their gender identity, then Title VII would effectively permit employers to discriminate on the basis of sex, since gender identity is an indispensable aspect of sex. Simply put, protection against sex discrimination is undermined by disaggregating gender identity from the exercise of gender autonomy. If courts are willing to recognize that exercising autonomy of one’s deeply held personal beliefs, such as religion, is worthy of statutory protection, then it follows that courts should recognize even more so the need to protect the exercise of autonomy over one’s immutable characteristics, such as gender identity. The *Bostock* majority clearly agreed that transgender status and the physical manifestations, or “conduct,” of gender identity are equally worthy of protection, as it unequivocally rejected the status-conduct argument in LGBTQ+ discrimination by holding that a person’s transgender status is protected by Title VII.

For transgender individuals, gender autonomy is critical to existing freely and authentically. It is not uncommon for trans people to express feeling “trapped” inside bodies they do not belong in. This is why exercising gender autonomy through gender expression and transition is so crucial: because it allows transgender people to align their physical and spiritual selves. Before

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165. *Id.* at 2111–12.

166. *Id.* at 2085, 2112.

*Bostock*, employers were not always prohibited from infringing upon transgender employees' autonomy, which effectively demonstrated the law's view that transgender individuals were less worthy of the right to autonomy than cisgender people. It not only undermined equality for transgender individuals; it condemned them to a corporeal prison. Without the ability to obtain financial resources through employment, transgender individuals were consequently unable to access hormone therapy, surgeries, and other health care necessary to transition. The Court's decision in *Bostock* did not articulate autonomy or employment as a facilitator of autonomy as part of its reasoning for prohibiting Title VII discrimination against trans people; nonetheless, its holding functions to protect gender and economic autonomy for transgender people and thereby strengthens the foundation for transgender equality in all aspects of society.

#### CONCLUSION

On May 12, 2020, approximately one month before the Supreme Court issued the *Bostock* opinion, Aimee Stephens passed away.<sup>167</sup> Aimee Stephens was "a hero and a trailblazer,"<sup>168</sup> whose case was the first transgender civil rights case heard by the Supreme Court.<sup>169</sup> Even though she tragically did not live to witness her historic victory, she fought zealously for the rights of all transgender individuals through her final days, with her wife Donna and her daughter Elizabeth by her side.

Aimee Stephens's termination exemplifies the truly detrimental nature of employment discrimination. When the Harris Funeral Home fired Stephens, it did not merely subject her to unemployment; it jeopardized her health and potentially her life. Aimee Stephens lost her healthcare coverage and her income, rendering her unable to pay for her kidney disease treatment and hospice.<sup>170</sup> Her wife Donna was forced to take on multiple jobs so that Aimee could receive the proper care she needed.<sup>171</sup> The Harris Funeral Home risked Aimee Stephens's health and her family's financial wellbeing because she was transgender. No one should be forced to choose between living autonomously and making a living.

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167. Vanessa Romo, *Aimee Stephens, Transgender Woman at Center of Major Civil Rights Case, Dies at 59*, NPR (May 12, 2020, 7:26 PM), <https://www.npr.org/2020/05/12/854946825/aimee-stephens-transgender-woman-at-center-of-major-civil-rights-case-dies-at-59>.

168. ACLU (@ACLU), TWITTER (May 12, 2020, 1:36 PM), <https://twitter.com/ACLU/status/1260277784250851328>.

169. ACLU (@ACLU), TWITTER (May 12, 2020, 1:36 PM), <https://twitter.com/ACLU/status/1260277787660881922>.

170. Romo, *supra* note 167.

171. *Id.*

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Transgender lives depend on legal recognition that all individuals, not just cisgender people, are entitled to exercise autonomy and embody their gender identity. For transgender people, actualizing one's gender is not a mere matter of "preference;" it is a matter of justice and equity. It is a matter of having the same right as every other American to "Life, Liberty and the pursuit of Happiness."<sup>172</sup> On its face, Title VII appears solely to protect the right to employment. However, at its core, this statute guards a significantly more fundamental right, one that is constitutionally guaranteed to every American resident and that extends across various and myriad facets of human identity: the right to individual autonomy.

The Supreme Court's decision in *Bostock* marks a crucial milestone in the path to transgender equity. Now, transgender people have significantly greater protection against employment discrimination, one of the most daunting barriers to exercising gender autonomy. Although employment protection for trans individuals will likely face resistance, such as employers' rights under the RFRA, the strength and depth of the Court's reasoning erect a powerful obstacle for future challengers to overcome.

We have already begun to see the rippling effect of *Bostock*'s legacy less than a year later. President Biden recently issued two executive orders expanding protection for transgender individuals. President Biden's Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation applies *Bostock* to all federal laws and regulations that prohibit sex discrimination, explicitly including Title IX, the Fair Housing Act, and the Immigration and Nationality Act.<sup>173</sup> The order mandates that all federal agencies review and, if necessary, "revise, suspend, or rescind" all existing agency actions promulgated under these laws that "are or may be inconsistent with" sex discrimination based on gender identity or sexual orientation.<sup>174</sup> The order further requires federal agencies to establish proactive measures that address and "combat[] overlapping forms of discrimination, such as discrimination on the basis of race or disability."<sup>175</sup> Importantly, President Biden's executive order takes an intersectional approach that is necessary to ensuring equal rights for transgender individuals.

President Biden's other executive order, *Enabling All Qualified Americans to Serve Their Country in Uniform*,<sup>176</sup> reversed the Trump administration's

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172. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

173. Proclamation No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

174. *Id.* at 7023–24.

175. *Id.* at 7024. "Discrimination on the basis of gender identity or sexual orientation . . . often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence." *Id.* at 7023.

176. Proclamation No. 14,004, 86 Fed. Reg. 7471 (Jan. 28, 2021).

order excluding transgender Americans from military service.<sup>177</sup> In a direct sense, this order removes unnecessary barriers for transgender individuals serving our country. But more broadly, this order marks a critical step toward destigmatizing transgender healthcare and de-pathologizing transgender existence.

Though President Biden's executive orders demonstrate a new and necessary government commitment to ensuring transgender individuals "receive equal treatment under the law,"<sup>178</sup> a more solid, permanent solution must be implemented. The Equality Act provides a potential remedy. The Equality Act would amend current federal civil rights law, including the Civil Rights Act of 1964, to explicitly add sexual orientation and gender identity as protected categories.<sup>179</sup> The Equality Act's turbulent legislative history, however, makes it seem like a less promising solution. It was approved by the United States House of Representatives in 2019 and subsequently referred to the Senate, where the bill was not addressed or voted on for over a year. Recently, the House of Representatives once again passed the bill.<sup>180</sup> However, there remains concern about whether the bill will pass the Senate.<sup>181</sup> The bill's explicit provision eliminating religious exemptions has many Republican senators opposed, including relatively moderate Republicans, and the bill must garner sixty Senate votes to avoid filibuster.<sup>182</sup> Some sources have speculated that substantial changes must be made in order for the bill to pass the Senate, primarily regarding the religious exemption provision.<sup>183</sup> Despite these obstacles, the Equality Act still offers hope for complete and unqualified transgender equity in America.

*Bostock* has advanced transgender rights and protected transgender individuals' autonomy in a crucial facet of life. Title VII is just the beginning of the revolutionary change already in motion for both civil rights law and society. Whether the Equality Act passes through the Senate, or whether it is struck

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177. Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals, 83 Fed. Reg. 13367 (Mar. 28, 2018), revoking Memorandum on Military Service by Transgender Individuals, 83 Fed. Reg. 41319 (Aug. 30, 2017).

178. Proclamation No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 25, 2021).

179. *The Equality Act*, HUM. RTS. CAMPAIGN: RES., <https://www.hrc.org/resources/the-equality-act> (Jan. 26, 2021).

180. Danielle Kurtzleben, *House Passes the Equality Act: Here's What It Would Do*, NPR (Feb. 24, 2021), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>.

181. *Id.*

182. *Id.*

183. Gabby Birenbaum, *House Passes the Equality Act in a Victory for LGBTQ Americans*, VOX (Feb. 26, 2021), <https://www.vox.com/2021/2/26/22303053/house-passes-equality-act-lgbtq-senate> ("Sen[ator] Susan Collins (R-ME) cosponsored the bill in 2019, though she said she will not do the same this time because certain provisions 'need revision.'").

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down and different strategies must be pursued, one thing is clear: justice and equity for transgender individuals is inevitable.

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