



Beyond *Bostock*

The Future of LGBTQ Civil Rights

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On June 15, 2020, the U.S. Supreme Court issued a landmark 6-3 decision affirming that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 extends to discrimination based on sexual orientation and gender identity. This decision resulted from three cases: *Altitude Express Inc. v. Zarda* and *Bostock v. Clayton County, Georgia*, in which gay men were fired because of their sexual orientation, and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment and Opportunity Commission*, where a transgender woman was fired because of her gender identity. The Supreme Court combined these cases and issued a single opinion—*Bostock v. Clayton County*—in which it held that “an employer who fires an individual merely for being gay or transgender violates Title VII.”¹ Despite the holding’s language and *Bostock*’s focus on firing under Title VII, the potential impact of the decision is much broader: The Supreme Court’s opinion states that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²

This framing has much larger implications and provides a critical tool to address the widespread discrimination that LGBTQ people face not just in employment but in other key areas of life as well. Although Justice Samuel Alito’s dissent in *Bostock* is dripping with transphobia and homophobia, it correctly notes that the court’s broad holding could advance LGBTQ equality under civil rights statutes that prohibit sex discrimination, such as Title IX, the Affordable Care Act (ACA), the Fair Housing Act, and the 14th Amendment to the Constitution.³

This issue brief discusses the significance of the Supreme Court’s June 15 decision for LGBTQ people in terms of employment, education, health care and coverage, and housing, as well as under the Equal Protection Clause of the 14th Amendment. It also describes how attacks could weaken civil rights protections for LGBTQ people. Finally, although the Supreme Court’s decision will affect many other laws and expand equality for LGBTQ people, this brief discusses why more still needs to be done—and specifically, why there is still an urgent need for Congress to pass the Equality Act.

The broad impacts of the Supreme Court's decision

The Supreme Court's landmark decision could have wide-ranging effects for LGBTQ people in not just employment but many other areas as well. These impacts are highlighted in the sections below.

Impacts on employment

Discrimination against LGBTQ workers is pervasive and has negative impacts on their lives. A 2014 report from the Movement Advancement Project and the Center for American Progress estimated that between 8 and 17 percent of lesbian, gay, and bisexual workers are denied employment or unfairly fired on the basis of their sexual orientation; this number rose to 13 to 47 percent for transgender workers.⁴ For LGBTQ people of color, workplace discrimination is an even more common experience, with nearly 1 in 3 reporting that they have experienced discrimination when applying for a job because of their LGBTQ identity.⁵

Title VII's protections both apply to and extend beyond hiring and firing. The statute makes it "unlawful" for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."⁶ And although the Supreme Court's *Bostock* decision responds to a concern from the employers that the decision will prohibit sex-segregated spaces—stating that "we do not purport to address bathrooms, locker rooms, or anything else of the kind"⁷—this does not mean that the court's decision does not extend to access to existing sex-segregated spaces for transgender workers. The question of whether equal access to facilities is protected under Title VII has been resolved in other contexts and should apply the same for transgender employees.⁸ In other words, while *Bostock* does not resolve whether the existence of sex-segregated bathrooms or locker rooms in an office violates Title VII's sex discrimination prohibitions, prohibiting a transgender woman from using the women's restroom violates Title VII's prohibition on discrimination with respect to the privileges of employment.

In addition to facilities access, compensation discrimination is prohibited under Title VII. This includes not only wages but also benefits such as sick and vacation leave, insurance, overtime pay, and retirement programs. While the wide range of protections afforded to workers under Title VII is clear in case law, and while Equal Employment Opportunity Commission decisions make clear that these protections apply to LGBTQ workers, the Trump administration's hostility toward protections for LGBTQ people—indeed, its open animus toward transgender people—calls into question its willingness to enforce the statute's full protections.⁹

Impacts on education

One of the Trump administration's first actions after taking office was to rescind Obama administration guidance that interpreted Title IX of the Education Amendments Act of 1972 to prohibit discrimination against transgender students. In addition to this explicit attack on protections for transgender students, a CAP study of complaints

filed by LGBTQ students found that complaints were nine times less likely to result in corrective action under the Trump administration than they were under the Obama administration.¹⁰ Instead of upholding the rights of LGBTQ students, President Donald Trump’s Department of Education is incorrectly and perversely applying Title IX to invalidate protections for transgender student athletes.¹¹

Title IX prohibits discrimination “on the basis of sex” in federally funded education programs.¹² The statute and accompanying regulations do not define what the term “on the basis of sex” means, but since Title IX’s language is closely modeled on Title VII’s language, courts regularly look to case law around Title VII for how to define the scope of sex discrimination under Title IX.¹³ For example, the extension of sex discrimination to prohibit discrimination based on sex stereotyping and pregnancy and to prohibit sexual harassment under Title IX stems from Title VII case law.¹⁴ Even before the Supreme Court’s sweeping decision in *Bostock*, the U.S. Courts of Appeals for the 4th, 6th, and 7th Circuits extended decisions that defined Title VII as prohibiting sexual orientation and gender identity discrimination to Title IX—finding that Title IX prohibits gender identity discrimination in schools.¹⁵

Ensuring that the Supreme Court’s decision is applied to Title IX is critically important for LGBTQ students. CAP’s study of Title IX complaints from LGBTQ students found that allegations of harassment appeared more frequently in complaints based on LGBTQ identity than they did in the general population—72.5 percent versus only 19.9 percent.¹⁶ The U.S. Department of Education and other agencies that enforce Title IX should take immediate measures to ensure that it prohibits discrimination against LGBTQ students.

Impacts on health care

While Section 1557 of the ACA prohibits discrimination based on race, color, national origin, sex, age, or disability in covered health programs or activities, the statute’s text does not actually include any of these words. Instead, it refers to protected characteristics in other statutes: Title VI of the Civil Rights Act of 1964, which covers race, color, and national origin; the Age Discrimination Act of 1975; Section 794 of Title 29 of the U.S. Code, which covers disability; and Title IX of the Education Amendments Act of 1972, which covers sex. As discussed above, since Title VII’s definition of sex informs the definition of sex in Title IX, it is clear that sexual orientation and gender identity discrimination are also prohibited under the ACA. As in the Title IX context, federal courts have consistently affirmed that the prohibition of sex discrimination in Section 1557 of the ACA prohibits gender identity discrimination.¹⁷ In 2016, the Obama administration promulgated a rule clarifying that Section 1557 prohibited gender identity discrimination and sex stereotyping, which could include sexual orientation as well as discrimination based on pregnancy, false pregnancy, termination of pregnancy or recovery, childbirth, or related medical conditions.¹⁸

This interpretation was quickly enjoined by Reed O'Connor, a conservative activist judge who has since ruled that the ACA as a whole is unconstitutional.¹⁹ Rather than defend the Obama administration's interpretation of sex discrimination, the Trump administration elected to promulgate a new rule that not only erased the inclusive definition of sex discrimination but also eliminated sexual orientation and gender identity protections from a number of other regulations.²⁰ The administration also rolled back language access protections.²¹ Trump's Department of Health and Human Services (HHS) posted its final rule four days after the Supreme Court's decision in *Bostock*.²² The rule was slated to go into effect on August 18; however, a federal judge issued a preliminary injunction on August 17 finding that HHS' position that sexual orientation and gender identity were not covered under Title IX was rejected by the Supreme Court in *Bostock*. As a result, the administration was blocked from rescinding the 2016 rule's protections.²³

Impacts on housing

The Fair Housing Act makes it unlawful to refuse to sell, rent, or otherwise make unavailable or deny a dwelling to anyone because of race or color, religion, sex, national origin, familial status, or disability. Its prohibition of sex discrimination comes from a 1974 amendment to the statute. In 2012, to ensure that LGBTQ people were protected from housing discrimination, the U.S. Department of Housing and Urban Development (HUD) put forward a rule prohibiting discrimination on the bases of sexual orientation and gender identity in HUD-assisted or HUD-insured housing. This rule is titled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity."²⁴ HUD drew its authority for the rule—as well as its 2016 rule on "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs"—not from the Fair Housing Act, but rather from Congress' broad grant of authority to HUD to promulgate rules to fulfill its mission under the Housing and Urban Development Act.²⁵ In addition to these regulations, HUD has enforced the Fair Housing Act's prohibition on sex stereotyping to cover LGBTQ people.²⁶

Just as courts look to Title VII to interpret sex under Title IX, courts treat sex under the Fair Housing Act as analogous to sex under Title VII and are likely to determine that the Supreme Court's *Bostock* decision extends to the interpretation of sex under the Fair Housing Act.²⁷ Yet similarly to how HHS disregarded the interplay between Title VII and other statutes and is continuing to erode the rights of LGBTQ people with its efforts to undermine Section 1557, HUD published a proposal in July that would limit sex under the 2016 Equal Access Rule to biological sex and permit discrimination against transgender people seeking shelter. This is clearly illegal under the Fair Housing Act and the Equal Access rule. During the House Financial Services Committee's review of the proposed rule, Reps. Jennifer Wexton (D-VA) and Maxine Waters (D-CA) submitted a letter to HUD Secretary Ben Carson calling on the agency to review the proposal in light of the Supreme Court's holding in *Bostock*.²⁸ Secretary Carson responded, incorrectly claiming that the decision had "no impact" on the proposed rule, which indicates the agency's unwillingness to respect the court's decision.²⁹

Impacts on the Equal Protection Clause

The Equal Protection Clause of the 14th Amendment to the Constitution prevents states from denying people equal protection under the law. Generally, when courts review a challenge to a law under this clause, they apply a rational-basis test: As long as the government has a rational reason for the law, it will be upheld. Courts apply heightened scrutiny whenever a law targets what are called suspect or quasi-suspect classes—in other words, a group that has suffered historic discrimination and political disempowerment as a result of an immutable or distinguishing characteristic that defines them as a discrete group.³⁰

In *Romer v. Evans*, the Supreme Court invoked the 14th Amendment’s Equal Protection Clause to invalidate a state constitutional amendment that barred protections for gays, lesbians, and bisexuals but did not specify a level of scrutiny.³¹ And while the Supreme Court’s decision in *Obergefell v. Hodges* mostly focused on marriage as a fundamental right under the 14th Amendment’s due process clause, its decision in part recognized the right of same-sex couples to marry under the equal protection clause.

Again, this heightened scrutiny was based on marriage as a fundamental right, not on whether same-sex couples were a suspect or quasi-suspect class. Instances of sex discrimination, however, have been subject to “intermediate scrutiny,” by which a statutory classification must be substantially related to an important government objective in order to be found constitutional.³² An extension of the Supreme Court’s finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny.

Recently, a federal judge issued a preliminary injunction on an Idaho law, H.B. 500, that banned transgender women and girls from sports teams. In his reasoning for applying heightened scrutiny to the Idaho law, he cited the Supreme Court’s statement in *Bostock* affirming that one cannot discriminate against an individual for being transgender without also discriminating against that individual based on sex.³³

The fight ahead

The Supreme Court’s decision in *Bostock v. Clayton County* has enormous implications for expanding protections for LGBTQ people beyond employment. Yet due to the Trump administration’s anti-LGBTQ animus, it is unlikely that these protections will be enforced until courts explicitly expand protections to other statutes. Each application of sex in the law to protect LGBTQ people will require litigation. And the *Bostock* decision itself includes a worrying deference to religious organizations.

Expanded religious exemptions

The Supreme Court’s opinion in *Bostock* points to protections for religious viewpoints in Title VII’s exemption for religious organizations, stating that the First Amendment “can bar the application of employment discrimination laws ‘to claims concerning the

employment relationship between a religious institution and its ministers.”³⁴ While Title VII permits religious organizations to hire co-religionists, religious employers are not permitted to require the conduct of employees to be consistent with the employer’s religion in a way that violates characteristics beyond religion that are protected under Title VII. In other words, religious employers are not permitted to fire someone for conduct that is inconsistent with their faith if this conduct is otherwise protected under Title VII.³⁵

In *Our Lady of Guadalupe School v. Morrissey-Berru*, however, the Supreme Court expanded the First Amendment’s “ministerial exception” to widen the category of individuals exempt from nondiscrimination protections in employment.³⁶ The continued expansion of this exemption is worrying, as it could provide religious employers with broad exemptions from nondiscrimination protections—and not just for LGBTQ employees. While the Supreme Court’s mention of Title VII and the First Amendment’s exemptions in *Bostock* are directly tied to the established application of these exemptions to Title VII’s protections, the court goes even further: It includes a vague mention of Congress’ passage of the Religious Freedom Restoration Act (RFRA), which it notes “might supersede Title VII’s commands in appropriate cases.” This is a ridiculous claim that is contrary to decades of precedent.

The RFRA’s application to Title VII means that the statute is subject to RFRA’s three-pronged test: 1) whether the federal government substantially burdens a person’s exercise of religion; 2) whether the government furthers a compelling government interest by substantially burdening a person’s exercise of religion; and 3) whether the government used the least restrictive means of furthering that interest. Courts have consistently held that nondiscrimination protections are found valid under the second and third prongs of an RFRA test.^{37*} Prohibiting discrimination is a compelling government interest, and enforcing nondiscrimination protections are the least restrictive means of furthering that interest.³⁸ So while the Supreme Court is correct that RFRA applies to all federal laws, including Title VII, that is a far cry from the RFRA providing an exemption to Title VII. The court’s claim about the RFRA superseding Title VII indicates a concerning willingness to reject decades of precedent under civil rights laws in order to find that prohibiting discrimination is not a compelling government interest, at least when it comes to LGBTQ people.

Similar to the bakery owner in the 2018 case *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, opponents of protections for LGBTQ people will continue to argue that laws prohibiting anti-LGBTQ discrimination violate their First Amendment rights. As the NAACP Legal Defense and Educational Fund noted in its amicus brief, however, “the First Amendment does not create a constitutional right to discriminate.”³⁹

Conclusion: The necessity of the Equality Act

While the case law strongly affirms extending the Supreme Court’s interpretation of sex to other statutes, without federal action, LGBTQ people will have to wait for courts to affirm this interpretation in future rulings.

The president could take immediate action by issuing an executive order directing each federal agency to review and align its nondiscrimination protections and enforcement of sex discrimination protections with the Supreme Court’s interpretation of sex in *Bostock*. In July, CAP joined other organizations in calling for the attorney general to enforce the *Bostock* decision and coordinate its implementation across the federal government.⁴⁰ In an oversight hearing before the U.S. House Judiciary Committee, Rep. Veronica Escobar (D-TX) asked Attorney General William Barr about the U.S. Department of Justice’s compliance with the Supreme Court’s decisions on DACA and LGBTQ employment protections—in particular, whether the department was planning to rescind its guidance that transgender workers are not protected under Title VII.⁴¹ Barr responded that he believed the administration was implementing these decisions, citing the U.S. Department of Homeland Security’s July 28, 2020, memorandum on DACA as an example. However, that memo clearly signaled the administration’s intention to keep creating excuses for eliminating DACA until it finds one that is not arbitrary and capricious.⁴² This is hardly a reassuring example of how the administration will enforce protections for LGBTQ workers. Furthermore, the continued efforts of HHS and HUD to erode the civil rights of LGBTQ Americans have made clear that this administration has no intention of complying with the Supreme Court’s order in *Bostock*.

Congress must take action by supporting the Equality Act. The legislation, which passed the U.S. House of Representatives last year with bipartisan support, would not only update sex discrimination prohibitions in the nation’s civil rights laws to explicitly prohibit discrimination based on sexual orientation and gender identity; it would also expand these laws to prohibit discrimination based on sex, sexual orientation, and gender identity in public accommodations and federally funded services. Moreover, this bill is supported by a majority of the American people, civil rights and women’s rights organizations, hundreds of major businesses and the majority of small-business owners, and faith leaders. Senate Majority Leader Mitch McConnell (R-KY) should bring the legislation forward for a vote.

The Supreme Court’s decision in *Bostock* was a massive step forward in protecting millions of LGBTQ workers from discrimination and advancing equal rights for LGBTQ people, but the fight for equality under the law is not over.⁴³ Although opponents of equality will continue to try and block progress, public opinion and the nation’s laws are on the side of LGBTQ people.

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**Correction, September 2, 2020: This sentence has been updated to accurately state that nondiscrimination protections have consistently been found valid under the second and third prongs of an RFRA test.*

Endnotes

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- 3 *Ibid.*, pp. 45–54 and Appendix C.
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