

QUEER LIBERATION’S LONG  
MARCH TOWARDS EQUALITY:  
HOW LGBTQIA+ ADVOCATES MAY SEEK TO  
COMBAT THE RISE OF ANTI-LGBTQIA+ STATE-  
LEVEL LEGISLATION AND SUBSTANTIATE BROADER  
LASTING LEGAL PROTECTIONS IN A POST-*BOSTOCK*  
WORLD

*Davis J. Villano*\*

TABLE OF CONTENTS

INTRODUCTION .....	156
I. LGBTQIA+ AMERICA: ITS PAST, PRESENT, AND POTENTIAL FUTURE .....	163
A. <i>Key LGBTQIA+ Definitions and Terminology</i> .....	163
B. <i>The History of State and Federal Government Policing of LGBTQIA+ Americans and the Historical Shift in LGBTQIA+ Equality Towards a Trans-Inclusive Future</i> .....	164
C. <i>The Sharp and Increasingly Hostile Rise in Anti-LGBTQIA+ Legislation Across U.S. State Legislatures</i> .....	167
D. <i>The “Don’t Say Gay” Bills and Anti-LGBTQIA+ Legislation in 2022</i> .....	171

---

\* Davis J. Villano (they/he) is a J.D. Candidate at the Benjamin N. Cardozo School of Law and Executive Editor of the *Cardozo Journal of Equal Rights and Social Justice*, Volume 29, pursuing a career in public interest law. Davis has experience in New York housing defense, immigration removal and asylum defense during their work at Cardozo’s Kathryn O. Greenberg Immigration Justice Clinic, as well as labor organizing and workers’ rights. Prior to law school, Davis graduated with honors from NYU Gallatin School of Individualized Study, where their concentration was titled “Power, Politics, and Propaganda in Modern Democracies.” Between undergrad and law school, Davis worked in state and local politics here in New York City, specifically organizing for progressive LGBTQIA+ candidates and electeds. Davis is the current President of OUTLaw: Cardozo’s LGBTQIA+ Student Association and is passionate about queer political activism and community-building. Davis would like to thank all of the CJERSJ Vol. 29 editors who worked on this Note.

156	<i>EQUAL RIGHTS &amp; SOCIAL JUSTICE</i>	[Vol. 29:1
	<i>E. Proposed Legislative Solutions to Ensure Expanded, Sustained Legal Protections and Rights for LGBTQIA+ Americans</i> .....	175
II.	LEGAL STATUS QUO AND THE CURRENT LEGAL REGIME.....	179
	<i>A. The U.S. Supreme Court’s LGBTQIA+ Jurisprudence</i> .....	179
	<i>B. Anti-LGBTQIA+ Legislation and American LGBTQIA+ Legal Advocacy Today</i> .....	182
	<i>C. Hyper-partisan Political Realities and the Senate Filibuster’s Continued Stonewalling of Progress and LGBTQIA+ Equality</i> .....	183
III.	OTHER CONSIDERATIONS .....	188
	<i>A. Addressing the Trans Disconnect Too Often Prevalent Within the Contemporary LGBTQIA+ Community</i> .....	188
	<i>B. The Anti-LGBTQIA+ Politics of the American Right Reflecting the Rise of Anti-Democratic Politics in the U.S.</i> ....	189
IV.	PROPOSING A WAY TOWARDS QUEER LIBERATION.....	190
	<i>A. LGBTQIA+ Legislative Advocacy</i> .....	190
	<i>B. The Continued Pursuit of Judicial and Litigative Remedies by LGBTQIA+ Advocates and Advocacy Groups</i> .....	191
	<i>C. LGBTQIA+ Administrative and Executive Advocacy</i> .....	191
	CONCLUSION.....	192

## INTRODUCTION

On June 15<sup>th</sup>, 2020, in *Bostock v. Clayton County, Georgia*, the United States Supreme Court handed down its decision in determining whether an employer is permitted to fire an employee “simply for being homosexual or transgender” under Title VII of the Civil Rights Act of 1964.<sup>1</sup> The Court in *Bostock* wrote that the “answer is clear,”<sup>2</sup> holding that “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”<sup>3</sup> The Court stated further that *sex* itself “plays a necessary and undisguisable role in the decision, *exactly what Title VII forbids.*”<sup>4</sup> In the very next portion

<sup>1</sup> *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1737 (2020); *see* 42 U.S.C. § 2000e–2(a)(1).

<sup>2</sup> *Bostock*, 140 S. Ct. at 1737; *see* § 2000e–2(a)(1).

<sup>3</sup> *Bostock*, 140 S. Ct. at 1737; *see* § 2000e–2(a)(1).

<sup>4</sup> *Bostock*, 140 S. Ct. at 1737 (emphasis added); *see* § 2000e–2(a)(1).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 157

of the *Bostock* decision, Justice Neil Gorsuch, writing for the majority, underscored that “[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.”<sup>5</sup> However, Justice Gorsuch noted that the lawmakers who passed the Civil Rights Act of 1964 “[l]ikely . . . weren’t thinking about many of the Act’s consequences that have become apparent over the years”<sup>6</sup> such as, “its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees.”<sup>7</sup>

Justice Gorsuch here further pointed out that “the limits of the drafters’ imagination supply no reason to ignore the law’s demands”<sup>8</sup> and further that “[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest.”<sup>9</sup> While a particularly recent decision, *Bostock* ultimately stands to produce “far-reaching implications for the interpretation of other statutes that may benefit LGBT persons” and may further advance substantive protections of and expansions to lesbian, gay, bisexual, transgender, queer, intersex, asexual, plus [hereinafter “LGBTQIA+”]<sup>10</sup> rights.<sup>11</sup> Ultimately, the majority in *Bostock* found that “[o]nly the written word is the law, and *all persons* are entitled to its benefit.”<sup>12</sup>

For many LGBTQIA+ advocates, however, the Supreme Court’s ruling in *Bostock* does not go far enough, lacking the substantial and broad expansions to legal protections for historically discriminated and vulnerable communities found elsewhere in federal legislation (e.g., the Americans with Disabilities Act of 1990).<sup>13</sup> Therefore, one solution to this potential deficit is

<sup>5</sup> *Bostock*, 140 S. Ct. at 1737; see § 2000e–2(a)(1).

<sup>6</sup> *Bostock*, 140 S. Ct. at 1737; see § 2000e–2(a)(1).

<sup>7</sup> *Bostock*, 140 S. Ct. at 1737; see § 2000e–2(a)(1); see e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (writing that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII”).

<sup>8</sup> *Bostock*, 140 S. Ct. at 1737; see § 2000e–2(a)(1).

<sup>9</sup> *Bostock*, 140 S. Ct. at 1737; see § 2000e–2(a)(1).

<sup>10</sup> For the purposes of clarity and inclusion, this Note will use “LGBTQIA+” to describe the broad category of queer Americans (including—but not limited to—cisgender, transgender, and non-binary/gender non-conforming individuals). It will use the term “trans” when speaking about transgender individuals and related discriminatory legislation discussed throughout this piece. See Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>; see also Bex Montz & Matthew Solomon, *Acronyms Explained*, OUTRIGHT INT’L (Sept. 20, 2021), <https://outrightinternational.org/content/acronyms-explained>.

<sup>11</sup> Marc Spindelman, *Bostock’s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 554 (2021); see generally *Bostock*, 140 S. Ct. at 1737; § 2000e–2(a)(1).

<sup>12</sup> *Bostock*, 140 S. Ct. at 1737 (emphasis added); see § 2000e–2(a)(1).

<sup>13</sup> See § 2000e–2(a)(1); see also 42 U.S.C. § 12101;

Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is *clear*. An employer who fires an individual for

158 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:1

the pursuit of a legislative solution in Congress. Today, Congressional proponents to expand LGBTQIA+ rights seemingly already have a solution to this inquiry in H.R.5 (the “Equality Act”), most recently passed by the U.S. House of Representatives in February 2021.<sup>14</sup> Likewise, as of 2022, there are indications that LGBTQIA+ advocates have a strong ally in the White House, with President Joseph R. Biden issuing executive orders to expand the rights and protections of LGBTQIA+ Americans as held by the Supreme Court in *Bostock*,<sup>15</sup> and his support of Congress’s Equality Act.<sup>16</sup> While President Biden’s executive orders merely seek to enforce the kinds of legal protections enshrined by the Supreme Court’s decision in *Bostock*, his support for an expansion of these rights in passing the Equality Act may give LGBTQIA+ advocates hope for further advancement and security of such legal protections.<sup>17</sup>

Introduced for consideration several times prior to its initial passage by House Democrats in 2019, the Equality Act was most recently passed by the U.S. House of Representatives on February 25, 2021.<sup>18</sup> Unlike its 2019 passage, however, in its 2021 passage, House Democrats brought with them President Biden’s support for the Bill. On Biden’s campaign trail, the future president stated that passing the Equality Act “would be one of his top legislative priorities for the first 100 days of his presidency.”<sup>19</sup> Further, upon its passage in the House in February 2021, President Biden reiterated his support for the bill, stating, “I urge Congress to swiftly pass this historic legislation” and that “[e]very person should be treated with dignity and respect, and this bill represents a critical step toward ensuring that America

---

being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

*Bostock*, 140 S. Ct. at 1737 (emphasis added).

<sup>14</sup> Equality Act, H.R. 5, 117th Cong. (as passed by House of Representatives, Feb. 25, 2021).

<sup>15</sup> See *Bostock*, 140 S. Ct. at 1737 (President Biden proposing expansions to the protections under the *Bostock* holding to be more inclusive within the inner workings of the federal government and federal agencies).

<sup>16</sup> Statement, President Joseph R. Biden, *Statement by President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress*, WHITE HOUSE (Feb. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/19/statement-by-president-joseph-r-biden-jr-on-the-introduction-of-the-equality-act-in-congress/>; see President Joseph R. Biden, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>; see generally H.R. 5.

<sup>17</sup> See e.g., Biden, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, *supra* note 16; see generally H.R. 5.

<sup>18</sup> Danielle Kurtzleben, *House Passes The Equality Act: Here’s What It Would Do*, NPR (Feb. 24, 2021, 5:00 AM), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>; see generally H.R. 5.

<sup>19</sup> Kurtzleben, *supra* note 18; see generally H.R. 5.

2022] *THE MARCH TOWARDS QUEER LIBERATION* 159

lives up to our foundational values of equality and freedom for all.”<sup>20</sup> For now, LGBTQIA+ advocates seem to have an ally in the White House, with President Biden showing a willingness and desire to work with Congress to pass substantive legislation.<sup>21</sup> Additionally, advocates underscore this shift in executive leadership, noting the “four years of relentless attacks by the Trump administration on LGBTQ people in all aspects of life,” and highlight the Biden administration’s willingness to “recognize and work to combat the sobering reality that ‘transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.’”<sup>22</sup>

And yet, since the momentous decision in *Bostock* protecting the rights of LGBTQIA+ employees was handed down from the nation’s highest court, LGBTQIA+ Americans have seen an alarming rise in explicitly anti-transgender and anti-queer legislation on the state-level.<sup>23</sup> This coincides with a disturbing rise in anti-LGBTQIA+ hate crimes, with incidents of violence disproportionately targeting transgender people.<sup>24</sup> Likewise, the

<sup>20</sup> Kurtzleben, *supra* note 18 (quoting Biden, *Statement by President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress*, *supra* note 16); see generally H.R. 5.

<sup>21</sup> See Biden, *Statement by President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress*, *supra* note 16; see generally H.R. 5; see also Biden, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, *supra* note 16; see generally U.S. CONG. H.R.5 (Feb. 25, 2021).

<sup>22</sup> Chase Strangio, *What President Biden’s LGBTQ Executive Order Does and Doesn’t Do*, ACLU (Jan. 21, 2021), <https://www.aclu.org/news/lgbtq-rights/what-president-bidens-lgbtq-executive-order-does-and-doesnt-do/> (quoting Biden, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, *supra* note 16); see, Respect for Marriage Act, H.R. 8404, 117th Congress (as passed by the House of Representatives, Dec. 8, 2022), *infra* note 131; Domenico Montanaro, *Biden to sign Respect for Marriage Act, reflecting his and the country’s evolution*, NPR (Dec. 13, 2022), <https://www.npr.org/2022/12/13/1142331501/biden-to-sign-respect-for-marriage-act-reflecting-his-and-the-countrys-evolution>, *infra* note 131.

<sup>23</sup> Press Release, Wyatt Ronan, *2021 Slated to Become Worst Year for LGBTQ State Legislative Attacks as Unprecedented Number of States Poised to Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law*, HUM. RTS. CAMPAIGN (Apr. 22, 2021), <https://www.hrc.org/press-releases/2021-slated-to-become-worst-year-for-lgbtq-state-legislative-attacks>.

<sup>24</sup> See James Factora, *Hate Crimes Against Black, Asian, and LGBTQ+ People Hit Record Highs in 2020*, THEM (Aug. 31, 2021), <https://www.them.us/story/hate-crimes-against-black-asian-and-lgbtq-people-hit-record-highs-in-2020> (reporting that in 2020, “[h]ate crimes against trans people specifically rose more sharply” than other categories, and further that 2020 was “the deadliest year on record for anti-trans homicides”); see also *FBI Releases 2020 Hate Crime Statistics*, U.S. DEP’T JUST. (Aug. 30, 2021), [https://s3-us-gov-west-1.amazonaws.com/cg-d4b776d0-d898-4153-90c8-8336f86bdfec/hate\\_crime\\_2020\\_summary.pdf](https://s3-us-gov-west-1.amazonaws.com/cg-d4b776d0-d898-4153-90c8-8336f86bdfec/hate_crime_2020_summary.pdf);

This year has seen a spike in online harassment and extremism, especially surrounding anti-LGBTQ rhetoric. One in three LGBTQ+ respondents to a July 2022 survey conducted by YouGov reported encountering harassment in online spaces either very frequently or frequently, compared to one in five Americans overall. A recent HRC report also unearthed coordinated hate campaigns against hospitals and medical providers who offer gender-affirming care.

legislative solution on the federal-level in Congress under the Equality Act seems unlikely to pass due to partisan gridlock in the Senate, the continued existence of the filibuster, as well as Democratic disunity due to an unwillingness of a handful of caucus members to do away with it.<sup>25</sup>

This Note proceeds in four parts. Part I provides the necessary background and context of the contemporary goals and broader concerns of LGBTQIA+ advocates in the United States, as well as identifying key definitions and terminology used throughout the Note. Part II identifies the current legal regime and the Supreme Court's modern LGBTQIA+ jurisprudence, particularly as it relates to the Court's 2020 ruling in *Bostock*.<sup>26</sup> Likewise, Part II investigates the rise in anti-transgender and anti-queer legislation in recent years, as well as the hyper-partisan realities LGBTQIA+ advocates face in Congress, particularly with the Senate filibuster. Part III provides a discussion of other important considerations for LGBTQIA+ advocates to advance the legal rights and protections of transgender and queer Americans, including the historic disconnect within the LGBTQIA+ community when it comes to transgender folks, the opposition to the Equality Act from the American Right, and the detrimental effects anti-transgender/queer legislation has on American democracy. Part IV proposes three possible routes for LGBTQIA+ advocates: (1) legislative advocacy; (2) a continued pursuit of judicial and litigation remedies; and (3) further administrative and executive advocacy.

Despite the Court's landmark holding in *Bostock*, transgender Americans continue to be discriminated against by the State explicitly because of their gender and/or sexual identity.<sup>27</sup> With over 100 pieces of anti-transgender legislation proposed in state legislatures across the U.S. in the past year, there is a clear and concise effort by conservative lawmakers to campaign on and enact legislation impeding on LGBTQIA+ rights, such

---

Cady Stanton, "Hate starts with spec": Club Q survivors, LGBTQ leaders testify on anti-LGBTQ rhetoric, violence, USA TODAY (Dec. 14, 2022), <https://www.usatoday.com/story/news/nation/2022/12/14/club-q-shooting-testify-house-lgbtq-violence/10886989002/>.

<sup>25</sup> See Kurtzleben, *supra* note 18; see also Olivia Beavers & Melanie Zanona, *Historic LGBTQ rights bill passes—after exposing GOP divisions*, POLITICO (Feb. 25, 2021, 5:21 PM), <https://www.politico.com/news/2021/02/25/lgbtq-equality-act-passes-471628> ("The House passed sweeping legislation on Thursday to ban discrimination against people based on sexual orientation and gender identity, delivering a major victory to the LGBTQ community—while exposing an ugly rift in the GOP."); see generally H.R. 5.

<sup>26</sup> *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731 (2020).

<sup>27</sup> See NAT'L CTR. FOR TRANSGENDER EQUAL., *Tips for Journalists: Writing About Transgender People and Issues* (Jan. 26, 2014), <https://transequality.org/issues/resources/tips-journalists> (underscoring that the "[t]erminology within the transgender community varies and has changed over time so we recognize the need to be sensitive to usage within particular communities. . . ." and noting that "[t]ransgender is correctly used as an adjective, not a noun, thus 'transgender people' is appropriate but 'transgenders' is often viewed as disrespectful").

2022] *THE MARCH TOWARDS QUEER LIBERATION* 161

as restricting bathroom access to transgender Americans, banning transgender athletes from competing in school sports, and denying transgender children access to life-saving healthcare.<sup>28</sup> The *Bostock* Court's extension of legal protections for cisgender lesbian women and gay men granted in early cases have now expanded to include transgender people, marking a significant shift in substantive legal rights and protections *which include* transgender Americans.<sup>29</sup> This is, however, in contrast to the rise in anti-transgender legislation within state legislatures, which raises an important question: how can LGBTQIA+ activists and advocates combat the continuous rise of anti-transgender/anti-queer legislation on the state level in a post-*Bostock* world?

If advocates want to achieve substantial and lasting protections for LGBTQIA+ folks, particularly for transgender and non-binary/gender non-conforming [hereinafter "GNC"] Americans, the only way forward may be to enact federal legislation and enshrine these protections in statute.<sup>30</sup> While ideally, this would take the form of the Equality Act, partisan gridlock and the reality of current legislative politics makes legislation seemingly unfeasible.<sup>31</sup>

For LGBTQIA+ advocates, it may be clear—as evidenced in *Bostock*—that the manner in which the Supreme Court analyzes issues pertaining to LGBTQIA+ individuals is necessarily limited, particular, and confined to the sexual and gender binary.<sup>32</sup> While many critics point to the Court's approach as too limited in scope, some have argued that the broad reading, self-purportedly textualist interpretation of "sex" may provide the most substantive legal protections and ultimately include a wider range of gender-

---

<sup>28</sup> Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS NEWS HOUR (April 15, 2021), <https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws>.

<sup>29</sup> Spindelmann, *supra* note 11, at 557; *see Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

<sup>30</sup> *See e.g.*, H.R. 5 (prohibiting "discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system"); *see contra Bostock*, 140 S. Ct. at 1741 (explaining that Title VII "works to protect individuals of both sexes from discrimination, and does so equally" and positing that "an employer who fires a woman . . . because she is insufficiently feminine and also fires a man . . . for being insufficiently masculine may treat men and women as groups more or less equally" thus under Title VII "in both cases the employer fires an individual in part *because* of sex" which creates a functional biological determinism—excluding GNC and transgender folks in particular, potentially harmful ways).

<sup>31</sup> *See Beavers & Zanona, supra* note 25; *see also* H.R. 5.

<sup>32</sup> *Bostock*, 140 S. Ct. at 1741-42 ("If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.").

162 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:1]

identities.<sup>33</sup> However, LGBTQIA+ advocates reasonably fear the shifted composition of the Court and its recent willingness to rule against LGBTQIA+ interests—as seen in cases such as *Fulton v. City of Philadelphia, Pennsylvania* and *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*—in favor of religious liberties.<sup>34</sup>

Thus, in ensuring safeguards to and expansions of the legal protections and rights of LGBTQIA+ Americans, should LGBTQIA+ advocates pursue legislative rather than judicial means of achieving their goals? Likewise, does federal legislation like the Equality Act do more for transgender and GNC Americans than *Bostock*'s interpretations of sex and gender?<sup>35</sup> In contrast, LGBTQIA+ advocates may seek to investigate *how* prospective state legislators trying to pass anti-transgender bills would get around the protections enshrined in *Bostock* and the Court's general LGBTQIA+ jurisprudence.<sup>36</sup> Ultimately, LGBTQIA+ advocates may conclude that *Bostock* and the Court's broader LGBTQIA+ jurisprudence fail to provide the kinds of lasting substantive legal protections for a more inclusive swath of LGBTQIA+ Americans.<sup>37</sup> Particularly, the Court's current interpretation of sex as illustrated in *Bostock*, and its understanding of sexuality and gender identity fail to demonstrate a fuller understanding of the complexity inherent to these identities.<sup>38</sup> If LGBTQIA+ Americans are to enjoy long-lasting legal and civic equality, these complexities must be wrestled with and addressed in the law. Further, without such substantive rights and legal protections for GNC and transgender folks enshrined, the full breath of queer liberation will never be achieved.

---

<sup>33</sup> Spindelman, *supra* note 11, at 570-71 (arguing that *Bostock*'s textualist approach connotes "sex" discrimination as "the grand, operative statutory category under which sexual orientation and trans discrimination 'necessarily' fall as subcategories given the operation of Title VII's 'but for' sex discrimination rules"); *see generally Bostock*, 140 S. Ct. at 1741-42.

<sup>34</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (holding that Philadelphia could not deny public funding to an adoption agency's refusal on religious grounds to service LGBTQIA+ couples); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (ruling that the State failed to act religiously neutrally in requiring a baker to service a same-sex couple).

<sup>35</sup> *See* H.R. 5 ("[T]he bill defines and includes sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation.") (emphasis added).

<sup>36</sup> *Bostock*, 140 S. Ct. at 1741-42.

<sup>37</sup> Spindelman, *supra* note 11, at 634; *see also Bostock*, 140 S. Ct. at 1741-42.

<sup>38</sup> Spindelman, *supra* note 11, at 634 ("The complex identifications of the Supreme Court's *Bostock* opinion may yet be a sign that other complex social identities and ways of living—of being in the world—may someday find more of a home in the law than they now receive."); *see also Bostock*, 140 S. Ct. at 1741-42.

2022] *THE MARCH TOWARDS QUEER LIBERATION* 163

## I. LGBTQIA+ AMERICA: ITS PAST, PRESENT, AND POTENTIAL FUTURE

A. *Key LGBTQIA+ Definitions and Terminology*

For the purposes of clarity, it is crucial to identify and define key terms used throughout this discussion. The *Journal of Adolescent Health* defines “transgender” [hereinafter interchangeable with “trans”] as describing “a person whose gender identity does not match their natal sex or does not align with traditional notions of masculinity or femininity.”<sup>39</sup> As defined by the Silvia Rivera Law Project, an individual’s “gender identity” refers to how they “see and identify themselves” which may include—but is not limited to—female, male, and GNC or non-binary identities.<sup>40</sup> Meanwhile “gender expression” refers to how individuals “express their gender identity,” manifesting in the ways one dresses, wears their hair, acts and/or speaks, and so on.<sup>41</sup> These differences in sex and gender identity/expression—and the ways in which they are discussed—are subtle, yet important in order to devise a legal framework that is inclusive and broadly protective of all identities.<sup>42</sup>

---

<sup>39</sup> Samantha J. Gridley, Julia M. Crouch, Yolanda Evans, Whitney Eng, Emily Antoon, Melissa Lyapustina, Allison Schimmel-Bristow, Jake Woodward, Kelly Dundon, RaNette Schaff, Carolyn McCarty, Kym Ahrens, & David J. Breland, *Youth and Caregiver Perspectives on Barriers to Gender-Affirming Health Care for Transgender Youth*, 59 J. ADOLESCENT HEALTH 254, 255 (2016).

<sup>40</sup> *Fact Sheet: Transgender & Gender Nonconforming Youth In School*, SILVIA RIVERA L. PROJECT, <https://srlp.org/resources/fact-sheet-transgender-gender-nonconforming-youth-school/> (last visited Dec. 22, 2021).

<sup>41</sup> *Id.*;

[F]or example, some people identify as female; some people identify as male; some people as a combination of genders; as a gender other than male or female; or as no gender. For example, transgender girls identify as girls but were classified as males when they were born. Transgender boys identify as boys but were classified female when they were born. Everyone has a gender identity.

*Id.*;

We’re in the midst of a fundamental transformation in how society thinks about gender. With transgender people on the cover of magazines, prominent celebrities challenging gender norms in fashion, and the mainstreaming of people who identify as neither men nor women, the last few decades of cultural trends have brought new ideas about gender to the forefront.

Lily Zheng, *Transgender, Gender-Fluid, Nonbinary, and Gender-Nonconforming Employees Deserve Better Policies*, HARV. BUS. REV. (Nov. 20, 2020), <https://hbr.org/2020/11/transgender-gender-fluid-nonbinary-and-gender-nonconforming-employees-deserve-better-policies>.

<sup>42</sup> See e.g., *Fact Sheet: Transgender & Gender Nonconforming Youth In School*, *supra* note 40 (noting that in New York, both City and State law “protects students right to be free from discrimination on the basis of their gender identity or because some aspect of their appearance or behavior does not match stereotypes associated with their gender identity or their sex assigned at birth”); N.Y. EXEC. LAW § 291(2); see also N.Y.C. ADMIN. CODE § 8-107(4).

The terms “gender” and “sex” are commonly—and mistakenly—used interchangeably.<sup>43</sup> It is crucial to note that “[w]hile a connection exists between the two terms, equating sex and gender perpetuates the myth that gender is based on the narrow concept of anatomical sex—male or female.”<sup>44</sup> This ultimately: (1) enforces the cisheteronormative concept of gender and sex;<sup>45</sup> and (2) erases the real-world diversity of gender identity and expression. In the last decade, a more “expansive notion of ‘gender,’ as well as recognition of its capacity to fluctuate, reveals the falsehood in this widespread binary notion. The dictionary definition requires an individual to pick a gendered or sexed category—either/or—usually male or female—which does not comport with everyone’s lived reality.”<sup>46</sup>

*B. The History of State and Federal Government Policing of  
LGBTQIA+ Americans and the Historical Shift in LGBTQIA+  
Equality Towards a Trans-Inclusive Future*

The U.S. has a long and varied history of legal restrictions on gender expression (e.g., the criminalization of “cross-dressing”)<sup>47</sup> and the criminalization of the trans body.<sup>48</sup> The history of being trans in America—

<sup>43</sup> § 27:2. Title VII and sexual orientation—Generally, 3 Employment Discrimination Law and Litigation § 27:2 (noting that the Supreme Court’s opinion in *Price Waterhouse* “used ‘gender’ interchangeably with ‘sex’ without defining the terms; Title VII has since been considered to encompass both sex and gender” further writing that “[s]ex is often interpreted to refer to physiology attributed as sex characteristics, and ‘gender’ is often interpreted to refer to cultural attributes self-determined by individuals or ascribed to them by others”); see e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 1785 (1989).

<sup>44</sup> Adam R. Chang & Stephanie M. Wildman, *Gender In/Sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 45 (2017).

<sup>45</sup> MICH. STATE UNIV. THE GENDER AND SEXUALITY CAMPUS CTR., *Glossary*, <https://gscc.msu.edu/education/glossary.html> (last visited Feb. 28, 2022) (defining cisheteronormativity as “a pervasive system of belief that centers and naturalizes heterosexuality and a binary system of assigned sex/gender when there are two rigid, distinct ways of being: assigned-male-at-birth masculine men and assigned-female-at-birth feminine women”).

<sup>46</sup> Chang & Wildman, *supra* note 44, at 44-45; see *contra* *Bostock v. Clayton Cnty, Georgia*, 140 S. Ct. 1731, 1741-42 (2020), *supra* note 30.

<sup>47</sup> News Desk, *Arresting dress: A timeline of anti-cross-dressing laws in the United States*, PBS NEWS HOUR (May 31, 2015, 12:36 PM), <https://www.pbs.org/newshour/nation/arresting-dress-timeline-anti-cross-dressing-laws-u-s> (noting that “a person perceived as male who dressed in clothing customarily designed for women could technically be arrested in New York for ‘impersonating a female’ as recently as 2011—the remnants of a 19th century statewide law prohibiting wearing ‘the dress of the opposite sex’”).

<sup>48</sup> See generally GENNY BEEMYN, *Transgender History in the United States: A Special Unabridged Version of a Book Chapter from TRANS BODIES, TRANS SELVES* (Laura Erickson-Schroth, ed.) (ebook) (examining the history of transgender Americans: the developments of respective terminology, community building, and related concepts in the transgender experience contextualized within the United States through primary sources and secondary accounts); GLSEN, *LGBTQ History Timeline Reference*, <https://www.glsen.org/sites/default/files/LGBTQ-History-Timeline-References.pdf> (last visited Mar. 25, 2022).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 165

as well as GNC and non-binary—is a sordid one filled with accounts of legally-sanctioned violence, extreme social stigma, and tragic personal accounts of trans and GNC folks whose lives were too often cut short by such social and legal pressures.<sup>49</sup> Despite—or perhaps in spite of—this torrid history, the contemporary discourse underscores the growing social and political visibility of LGBTQIA+ Americans, with legal scholars Adam R. Chang and Stephanie M. Wildman noting:

While documentation exists of lesbians, gay men, bisexual, transgender, and queer (LGBTQ) people in all corners of the world, modern formal research and understanding of LGBTQ people remained largely invisible until the early Twentieth Century. Greater exposure ultimately led to the political and social persecution of LGBTQ individuals by the 1950s, which then triggered advocacy movements across the United States.<sup>50</sup>

These early advocacy movements within the LGBTQIA+ community, however, are historically rooted in a forced assimilation of trans folks into the cisgender gay and lesbian social movement(s) of the mid-to-late 20<sup>th</sup> century, more often than not advocating for an assimilationist or “transnormative” strategy—of which vestiges certainly remain today.<sup>51</sup>

Today, many LGBTQIA+ folks have gained “visibility, acceptance, and approval,” securing huge legal victories (e.g., same-sex marriage in 2015).<sup>52</sup> Further:

The “T” in “LGBT”(transgender) has also gained notable visibility in the past few years as cultural and legal recognition for transgender people has reached new heights of awareness. . . . Contrasting the transgender rights movement with the same-sex marriage movement and speaking on trans issues, Jennifer Finney Boylan stated: “It’s not about who you want to go to bed with, it’s *who you want to go to bed as*.”<sup>53</sup>

---

<sup>49</sup> *See id.* at 32;

Alas, the train of trans murders was not. Brandon’s death was a wake-up call. Once we started paying attention to and tracking transgender murders, it was shocking how many there were. Deborah Forte, Channelle Pickett, Christian Paige, James Percy Rivers, Tarayon Corbitt, Quincy Taylor, Tyra Hunter—and that was just 1995.

*Id.*

<sup>50</sup> Chang & Wildman, *supra* note 44, at 48-49.

<sup>51</sup> Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 585 (2018).

<sup>52</sup> *Id.* at 504; *see, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment requires states to provide marriage licenses to gay and lesbian couples).

<sup>53</sup> Chang & Wildman, *supra* note 44, at 50-51 (emphasis added) (“The visibility of Laverne Cox on the cover of *Time Magazine* . . . [and] shows like *Transparent*, have brought a broader awareness of transgender issues into mainstream media and cultural consciousness. Groundwork laid by organizations like the Transgender Law Center has sowed seeds for this change.”).

166 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:1]

However, despite the visibility and social acceptance gained by trans Americans in recent years, “religious conservatives discovered they could convince legislators and voters to repeal sexual orientation anti-discrimination laws by highlighting that the statutes’ gender identity provisions created ambiguity about who could access sex-segregated facilities.”<sup>54</sup>

In recent years, much of the LGBTQIA+ advocacy has particularized efforts in securing the rights of trans Americans and other queer folks falling outside the lesbian and gay cisgender categories.<sup>55</sup> In advocating for executive action from the Biden administration, the Director of Public Policy for Family Equality Council Emily Hecht-McGowan writes that:

President Biden should reinstate Obama-Biden era executive actions that were undone by the Trump-Pence administration. As commander-in-chief, Biden has already directed the Department of Defense to lift the ban on open service by transgender individuals. The Department of Education should withdraw its anti-transgender position statements, and, along with the Department of Justice, should reissue guidance clarifying that all students are entitled to attend school free from discrimination and harassment and to participate in school activities consistent with their gender identity. Any harmful regulatory proposals that were not finalized prior to January 20 should be immediately withdrawn and those that were finalized should be reversed. Sexual orientation and gender identity should be included in the Census and all other federal data-gathering activity, and *LGBTQ+-inclusive language* that was erased from federal agency websites must be restored.<sup>56</sup>

This trans-inclusivity is evidenced not only by the ways in which LGBTQIA+ advocates discuss their legislative and political strategy, but also in the substantive results such advocacy has had in jurisdictions where transgender-inclusive non-discrimination laws have been enacted.<sup>57</sup> In a joint report authored by the Movement Advancement Project (“MAP”) and GLAAD [hereinafter “MAP/GLAAD report”], LGBTQIA+ advocates investigated the variety of transgender laws, including non-discrimination laws enacted throughout the country, underscoring that “[t]hese laws provide

---

<sup>54</sup> George, *supra* note 51, at 504-05 (“From municipal ordinances with limited reach to state laws that became national controversies, these campaigns have exploited the anxieties of a public unfamiliar with transgender individuals to attack sexual orientation protections.”).

<sup>55</sup> Chang & Wildman, *supra* note 44, at 49-50 (“[M]arriage equality for same-sex couples has *not* ended gender culture wars, as exemplified by the recent targeting of transgender people and the misrepresentation of transgender women as male sexual predators invading women’s restrooms in schools and other public spaces.”).

<sup>56</sup> Emily Hecht-McGowan, *Reversing the Damage Done to LGBTQ+ Rights and Equality*, 46 HUM. RTS. 8, 9 (2021) (emphasis added).

<sup>57</sup> LGBT MAP & GLAAD, *An Ally’s Guide to Talking About Transgender-Inclusive Non-Discrimination Laws*, <https://www.lgbtmap.org/file/allys-guide-talking-about-trans-inclusive-ndos.pdf> (last visited Feb. 28, 2022).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 167

essential protections to transgender people, who often face widespread discrimination across many aspects of public life.”<sup>58</sup> Interestingly, the MAP/GLAAD report’s stated objectives are first to “remind people of the common, shared values that lead them to support non-discrimination laws in the first place—values like fairness and the idea that everyone should be treated equally” and second, “to correct opponents’ falsehoods quickly and factually, without getting stuck debating specious claims that are designed to distract people away from their core values.”<sup>59</sup> The authors of the MAP/GLAAD report further call attention to the fact that:

[M]ore than 100 cities have implemented transgender-inclusive non-discrimination laws is important for another reason as well: it reminds people that there is strong precedent for these laws. As of 2011, 16 states and the District of Columbia have passed laws protecting transgender people from discrimination. Additionally, more than 125 cities and counties protect transgender people under their non-discrimination laws. These include large cities (like Los Angeles, Seattle, San Francisco, Atlanta, Dallas, Boston, Philadelphia, Baltimore, Denver, and New York City); smaller communities (like Shaker Heights, OH; Charleston, WV; Evanston, IL; University City, MO; and Covington, KY); and counties (like Johnson County, IA; and Erie County, PA).

The grounding of this trans-inclusive messaging in simple terms centered on issues of employment, housing, and public accommodations—reflects a historical shift across the LGBTQIA+ advocacy world to be more inclusive of not only trans individuals within the community, but the substantive rights, day-to-day necessities, and resources which trans Americans have been too often denied.<sup>60</sup>

*C. The Sharp and Increasingly Hostile Rise in Anti-LGBTQIA+ Legislation Across U.S. State Legislatures*

Today, the United States is witnessing an intense rise in anti-LGBTQIA+ legislation and hate crimes.<sup>61</sup> The general forms of this discriminatory legislation include denying access to public facilities (i.e., “bathroom bans”), prohibiting trans women from competing in gendered sports activities in school, and—possibly most dire and harmful of all—limiting the access of trans minors to medical care, thereby failing to let

---

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Factora, *supra* note 24; see also Ronan, *supra* note 23.

minors fully realize their gender identity.<sup>62</sup> The Williams Institute at UCLA Law writes that the latter of this category of legislation largely “penalize[s] medical providers for delivering gender-affirming care to minors” and further underscores that “[a]ccess to gender-affirming care is in jeopardy” for an estimated 58,200 transgender youth across the country, with “more than a third of the 150,000 transgender youth ages 13-17 in the U.S. live in the 15 states that have restricted access to gender-affirming care or are currently considering laws that would do so.”<sup>63</sup> While these bills collectively deny access to gender-affirming and broader transgender medical care, the Williams Institute notes that the states legislatures that have passed such bills implement a variety of mechanisms to achieve their anti-transgender and anti-LGBTQIA+ ends, writing:

Most of these bills propose to make it a crime or a cause for professional discipline for medical providers to deliver gender-affirming care to minors. Bills in Louisiana, Missouri, North Carolina, South Carolina, Tennessee, and Texas also include penalties for parents who encourage or facilitate minors’ access to gender-affirming medical care. In three other states—Alabama, Louisiana, and South Carolina—school employees would be prohibited from withholding information about a child being transgender from that child’s parents, while a similar requirement proposed in North Carolina would apply to all state employees. The bill passed in Arkansas, and bills under consideration in Louisiana, Montana, North Carolina, and Tennessee, would allow individuals to file civil suits for damages against medical providers who violate these laws. Bills in Arkansas and Montana provide mechanisms for the state Attorneys General to file suit against medical providers to enforce compliance.<sup>64</sup>

Ultimately, the Williams Institute underscores the stakes of passing such legislation, noting that the research “indicates that efforts to support transgender youth in living according to their internal sense of gender is associated with better mental health and feelings of safety at school, while

---

<sup>62</sup> See *Legislation Affecting LGBT Rights Across the Country*, ACLU, <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country> (last updated Dec. 17, 2021) (documenting the various anti-LGBTQIA+ and particularly anti-trans laws being introduced, debated, and passed in State legislatures).

<sup>63</sup> Kerith J. Conron, Kathryn K. O’Neill, & Luis A. Vasquez, *Prohibiting Gender-Affirming Medical Care for Youth*, UCLA WILLIAMS INST. (Mar. 11, 2021), <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/> (writing that “an estimated 53,800 transgender youth ages 13-17 who live in the 15 states that are currently considering or have enacted bans on access to gender-affirming medical care” and further “an estimated 4,400 transgender young adults ages 18-20 who live in the three states that have proposed or enacted bans on access to gender-affirming medical care for people of those ages”).

<sup>64</sup> Kerith J. Conron, Kathryn K. O’Neill, & Luis A. Vasquez, *Prohibiting Gender-Affirming Medical Care for Youth: Brief*, UCLA WILLIAMS INST. at 1 (April 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Apr-2021.pdf>.

2022] *THE MARCH TOWARDS QUEER LIBERATION* 169

efforts to change the gender identity of transgender people (i.e., conversion therapy) are associated with suicidality.”<sup>65</sup> Further, the ACLU underscores how detrimental such legislation is to both transgender Americans and LGBTQIA+ Americans, overall writing:

These measures target transgender and nonbinary people for discrimination, such as by barring or criminalizing healthcare for transgender youth, barring access to the use of appropriate facilities like restrooms, restricting transgender students’ ability to fully participate in school and sports, allowing religiously-motivated discrimination against trans people, or making it more difficult for trans people to get identification documents with their name and gender.<sup>66</sup>

For example, the Arkansas State Legislature signed into law House Bill 1570 (“H.B. 1570”) on April 13, 2021, after overriding Republican Governor Asa Hutchinson’s veto of the bill, enacting the so-called “Save Adolescents from Experimentation”<sup>67</sup> (“SAFE Act”). The SAFE Act “prohibit[s] healthcare professionals from providing or even referring transgender young people for medically necessary health care”<sup>68</sup> and “bar[s] any state funds for gender-affirming health care for transgender people under 18 . . . allow[ing] private insurers to refuse to cover gender-affirming care for people of any age,”<sup>69</sup> further causing doctors who do provide such medical care to “risk losing their licenses and be subject to lawsuits by individuals and the state.”<sup>70</sup> The ACLU described H.B. 1570 as “one of the most extreme and harmful anti-trans bills in the country”<sup>71</sup> and, prior to its passage in April 2021, the ACLU emphasized that if passed, H.B. 1570 “will be the most extreme piece of anti-trans legislation ever signed into law.”<sup>72</sup> In denying access to healthcare

---

<sup>65</sup> *Id.*

<sup>66</sup> *Legislation Affecting LGBT Rights Across the Country*, *supra* note 62.

<sup>67</sup> Arkansas Save Adolescents from Experimentation (SAFE) Act, H.R. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); see Alyssa Lukpat & Isabella Grullón Paz, *Judge Temporarily Blocks Arkansas Ban on Health Treatments for Transgender Youth*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/us/politics/arkansas-transgender-law-block-bill.html>.

<sup>68</sup> *What You Need to Know About the Transgender Health Care Ban (HB 1570)*, ACLU ARK. (Mar. 23, 2021, 6:45 PM), <https://www.acluarkansas.org/en/news/what-you-need-know-about-transgender-health-care-ban-hb-1570> (underscoring that “[d]enying best practice medical care and support to transgender youth can be life-threatening” and further “has been shown to contribute to depression, social isolation, self-hatred, risk of self-harm and suicidal behavior, and more”).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (“The American Academy of Pediatrics, the American Psychological Association, the American Psychiatric Association, the Pediatric Endocrinology Society, and the American Medical Association, among others, have all voiced opposition to laws and policies like this.”); see Lukpat & Grullón Paz, *supra* note 67 (“More broadly, in a 2018 statement, the American Psychiatric Association said there was ‘significant and longstanding medical and psychiatric literature’ demonstrating the ‘clear benefits of medical and surgical interventions’ for transgender people.”).

<sup>71</sup> *What You Need to Know About the Transgender Health Care Ban (HB 1570)*, *supra* note 68.

<sup>72</sup> *Id.*

170 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:1]

options for trans minors, state legislatures such as Arkansas “take away options for trans youth, irreversibly force youth through endogenous puberty and undermine the prevailing recommendations of every major medical association.”<sup>73</sup> Further, in a 2019 statement, the American Academy of Child and Adolescent Psychiatry (“AACAP”) strongly opposed “efforts—legal, legislative, and otherwise—to block access to these recognized intervention”<sup>74</sup> further stating:

State-based legislation regarding the treatment of transgender youth that directly oppose the evidence-based care recognized by professional societies across multiple disciplines is a serious concern. Many reputable professional organizations, including the American Psychological Association, the American Psychiatric Association, the American Academy of Pediatrics, and the Endocrine Society, which represent tens of thousands of professionals across the United States, recognize natural variations in gender identity and expression and have published clinical guidance that promotes nondiscriminatory, supportive interventions for gender diverse youth based on the current evidence base. These interventions may include, and are not limited to, social gender transition, hormone blocking agents, hormone treatment, and affirmative psychotherapeutic modalities.<sup>75</sup>

The AACAP underscored the real-world stakes—particularly to trans youth—if such anti-transgender legislation passed, writing that “[b]locking access to timely care has been shown to increase youths’ risk for suicidal ideation and other negative mental health outcomes.”<sup>76</sup>

Though passed into law in April 2021, Arkansas H.B. 1570 was temporarily blocked by a U.S. District Court in July following a legal challenge brought by the ACLU.<sup>77</sup> Following the District Court’s decision in July 2021, the executive director of the ACLU of Arkansas, Holly Dickson, stated that “[t]his ruling sends a clear message to states across the country that gender-affirming care is *lifesaving care*, and we won’t let politicians in Arkansas—or anywhere else—take it away.”<sup>78</sup> While LGBTQIA+ advocates found a victory in the Supreme Court’s 2020 *Bostock* decision expanding protections for LGBTQIA+ employees under Title VII, the Court’s holding in *Bostock* and its broader LGBTQIA+ jurisprudence

---

<sup>73</sup> *Id.* (“Research shows, after gender-affirming care and treatment, trans youth experience significant decreases in suicidal thoughts and improvements in overall emotional and behavioral health.”).

<sup>74</sup> AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, *AACAP Statement Responding to Efforts to Ban Evidence-Based Care for Transgender and Gender Diverse Youth* (Nov. 8, 2019), [https://www.aacap.org/AACAP/Latest\\_News/AACAP\\_Statement\\_Responding\\_to\\_Efforts-to\\_ban\\_Evidence-Based\\_Care\\_for\\_Transgender\\_and\\_Gender\\_Diverse.aspx](https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Lukpat & Grullón Paz, *supra* note 67.

<sup>78</sup> *Id.* (emphasis added).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 171

does seemingly little—if anything—to help advocates combat this alarming rise in anti-trans and anti-queer legislation on the state level.<sup>79</sup>

*D. The “Don’t Say Gay” Bills and Anti-LGBTQIA+ Legislation in 2022*

As of December 2022, there has been a particularly concerning intensification of anti-LGBTQIA+ rhetoric and explicitly anti-transgender legislation being debated, passed, and enacted on the State-level. It has taken the form of “Don’t Say Gay” bills across many states, such as Florida’s House Bill 1557 passed by the state’s legislature with the support of the state’s executive, Governor Ron DeSantis who signed the bill into law on March 28, 2022.<sup>80</sup> While supporters of the Florida legislation call it the “Parental Rights in Education” law, its opponents refer to this legislation as the “Don’t Say Gay” bill.<sup>81</sup> President Biden has called the legislation “hateful” and stated on Twitter: “I want every member of the LGBTQI+ community—especially the kids who will be impacted by this hateful bill—to know that you are loved and accepted just as you are. I have your back, and my Administration will continue to fight for the protections and safety you deserve.”<sup>82</sup> Unlike prior anti-LGBTQIA+ legislation such as Arkansas’s H.B. 1570,<sup>83</sup> Florida’s “Don’t Say Gay” law seeks to diminish LGBTQIA+ civic advances as well as public visibility, explicitly targeting the classroom by prohibiting “not only ‘instruction’ around gender identity and sexual orientation, but also ‘classroom discussion’ of these topics.”<sup>84</sup> Further, the

<sup>79</sup> *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731, 1737 (2020); see 42 U.S.C. § 2000e-2(a)(1).

<sup>80</sup> Dana Goldstein, *Opponents Call It the ‘Don’t Say Gay’ Bill. Here’s What It Says*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html>; Christina Cauterucci, *Republicans Are Furious That People Are Calling Florida’s “Don’t Say Gay” Bill a “Don’t Say Gay” Bill*, SLATE (Mar. 26, 2022, 9:30 AM), <https://slate.com/news-and-politics/2022/03/republicans-mad-dont-say-gay-bill.html> (“Critics have dubbed it a ‘Don’t Say Gay’ bill, part of a class of anti-LGBTQ censorship legislation gaining steam across the country.”); Patricia Mazzei, *DeSantis Signs Florida Bill That Opponents Call ‘Don’t Say Gay’*, N.Y. TIMES (Mar. 28, 2022), <https://www.nytimes.com/2022/03/28/us/desantis-florida-dont-say-gay-bill.html>; see generally, H.B. 1557, 2022 Leg., 124th Sess. (Fla. 2022).

<sup>81</sup> Zac Anderson, *DeSantis Says He Will Soon Sign So-Called ‘Don’t Say Gay’ Bill, Again Criticizes Disney*, USA TODAY (Mar. 22, 2022, 2:29 PM), <https://www.usatoday.com/story/news/nation/2022/03/22/florida-gov-ron-desantis-criticizes-disney-dont-say-gay-bill/7130035001/>.

<sup>82</sup> President Biden (@POTUS), TWITTER (Feb. 8, 2022, 6:07 PM), [https://twitter.com/POTUS/status/1491186973511458818?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1491186973511458818%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fiframe.nbcnews.com%2FczDagLN%3F\\_showcaption%3Dtrueapp%3D1](https://twitter.com/POTUS/status/1491186973511458818?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1491186973511458818%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fiframe.nbcnews.com%2FczDagLN%3F_showcaption%3Dtrueapp%3D1); see Goldstein, *supra* note 80; see generally, H.B. 1557.

<sup>83</sup> *What You Need to Know About the Transgender Health Care Ban (HB 1570)*, *supra* note 68.

<sup>84</sup> Goldstein, *supra* note 80; see also, Ana Ceballos, *What’s Ahead for Parents, Students After Passage of ‘Don’t Say Gay’ Bill in Florida?*, MIAMI HERALD (Mar. 10, 2022, 3:25 PM), <https://www.miamiherald.com/news/local/education/article259182023.html>.

Florida law “would allow parents to sue a school district if they believe a teacher has taught children in third grade or younger about ‘sexual orientation or gender identity,’ or taught older students about such topics ‘in a manner that is not age-appropriate or developmentally appropriate.’”<sup>85</sup> More troubling, it would force schools to “notify parents if they begin providing support to queer or trans students who come out”—outing LGBTQIA+ youth to possibly unsupportive parents or communities and worse, potentially putting these minors in physical danger.<sup>86</sup> The language of the Florida law is notably vague, with advocates and the media alike underscoring that “‘classroom instruction’ could mean eliminating books in the classroom with [LGBTQIA+] characters or historical figures” and is “a broad phrase, and could mean that teachers with a student with gay parents should not talk about those families with the entire class.”<sup>87</sup> Further, Florida’s “Don’t Say Gay” law has a particularly troubling enforcement mechanism which “supporters say would give parents a way to hold schools accountable” by permitting parents to bring legal action against the school seeking damages, while opponents argue the mechanism would “create a chilling effect” among educators—significantly constraining the ability of teachers and counselors to provide adequate support to LGBTQIA+ students in and out of the classroom.<sup>88</sup>

In a March 2022 article in *New York Magazine*, Jay Michaelson interviewed an LGBTQIA+ Florida middle and high school history teacher, Jean Eckhoff, who feared for her employment under the “Don’t Say Gay” law. Under the law as proposed by Florida Republicans, merely stating her sexuality could cost Eckhoff her job. Eckhoff stated: “I feel targeted. [] It would be very easy for a parent to say, ‘There’s my dyke teacher teaching my kid to be gay,’ and sue the school.”<sup>89</sup> While the law’s provisions are

---

<sup>85</sup> Cauterucci, *supra* note 80.

<sup>86</sup> Cauterucci, *supra* note 80 (“Leaders of LGBTQ advocacy groups maintain that the bill is vague and broad enough to create a chilling effect among teachers and school administrators, such that none will want to risk potentially ruinous lawsuits by even mentioning the existence of gay or trans people in classrooms.”).

<sup>87</sup> Goldstein, *supra* note 80.

<sup>88</sup> *Id.*;

As a result, the bill endangers the lives of children who already suffer disproportionately high rates of houselessness and self-harm. Really, it’s the “Don’t Discuss Anything About Queer or Trans Existence and Don’t Counsel Trans or Gay Kids (Instead, You Must Out Them to Their Parents) or Else Parents Can Force a State Investigation of the School, Get Money Damages, and Probably Get You Fired” bill.

Jay Michaelson, *The ‘Don’t Say Gay’ Bill Is Worse Than It Sounds*, N.Y. MAG.: INTELLIGENCER (Mar. 24, 2022), <https://nymag.com/intelligencer/2022/03/florida-dont-say-gay-bill-is-even-worse-than-it-sounds.html>.

<sup>89</sup> Michaelson, *supra* note 88.

2022] *THE MARCH TOWARDS QUEER LIBERATION* 173

extremely troubling, the dangers posed to LGBTQIA+ youth must be emphasized Michaelson wrote:

[Florida's "Don't Say Gay" law is] also dangerous: According to UCLA's Williams Institute, 22 percent of houseless youth are LGBTQ+ even though they account for just 7 percent of the overall population, and around half say they were thrown out of their homes by disapproving parents. LGBTQ+ kids are four times more likely to consider, plan, or attempt suicide than straight ones, according to studies conducted by the Trevor Project. "This puts kids at risk," says Eckhoff. "As teachers, we aren't going to be able to help them."<sup>90</sup>

Florida's "Don't Say Gay" law is one of many such bills being introduced across Republican-held state legislatures. Another example of this recent wave of anti-LGBTQIA+ legislation can be found in Tennessee, where the state legislature proposed House Bill 0821 ("H.B. 0821") "to prohibit discussion of any sexual orientation in Tennessee schools other than heterosexuality, sometimes called 'No Promo Homo' laws."<sup>91</sup> LGBTQIA+ advocates and advocacy groups emphasize that these laws "can make LGBT students feel invisible and could cut them off from resources they need, such as supportive teachers."<sup>92</sup>

In Tennessee, unlike in Florida, LGBTQIA+ advocacy groups like GLSEN and the Tennessee Transgender Political Coalition<sup>93</sup> successfully forced the relevant subcommittee in the Tennessee legislature to drop the bill, stalling its debate and potential passage for a least another year.<sup>94</sup> LGBTQIA+ advocates and advocacy groups, meanwhile, continue to underscore concerns over this new approach to anti-LGBTQIA+ legislation.<sup>95</sup> LGBTQIA+ advocates and advocacy groups note that the Florida bill is "vague and broad *enough* to create a chilling effect among teachers and school administrators, such that none will want to risk potentially ruinous lawsuits by even mentioning the existence of gay or trans people in classrooms."<sup>96</sup> Dana Goldstein wrote for the *New York Times* in March 2022:

Shani M. King, a University of Florida law professor, noted that the idea of deputizing parents to enforce a law—at schools' expense—had previously

<sup>90</sup> *Id.*

<sup>91</sup> *Derailed "Don't Say Gay" Bill in TN Shows How Your Voice*, GLSEN, <https://www.glsen.org/blog/derailed-dont-say-gay-bill-tn> (last visited Mar. 26, 2022).

<sup>92</sup> *Id.*

<sup>93</sup> Dani Heffernan, *Tennessee Transgender Political Coalition*, GLAAD (Feb. 26, 2016), <https://www.glaad.org/tags/tennessee-transgender-political-coalition>.

<sup>94</sup> *Derailed "Don't Say Gay" Bill in TN Shows How Your Voice*, *supra* note 91.

<sup>95</sup> See Cauterucci, *supra* note 79; Michaelson, *supra* note 88.

<sup>96</sup> Cauterucci, *supra* note 80 (emphasis added).

been used in legislation limiting discussion of critical race theory, resulting in schools pre-emptively canceling events and removing reading materials from shelves, in order to avoid expensive litigation. The combination of the bill's broad, vague language and punitive enforcement mechanism could lead to a similar dynamic.<sup>97</sup>

Moreover, right-wing advocates and commentators “deny that the bill is anti-gay and insist that it will neither discriminate against queer and trans students nor prohibit normal, age-appropriate discussion of LGBTQ culture and history,”<sup>98</sup> however, this appears diametrical in contrast to the bill's purpose: “prohibiting classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner.”<sup>99</sup> For proponents, the intended effects of Florida's “Don't Say Gay” legislation seem quite clear.<sup>100</sup> Madeline Kearns, a writer for the *National Review*, stated:

We mustn't allow transgender activists to hijack the language in this debate. Conservatives don't oppose transgender athletes' participation in sports, they oppose male athletes dominating female sports. In Florida, Republicans aren't trying to outlaw schools' acknowledgment of gay people, they are trying to protect young children from ideological indoctrination and require school districts to be transparent with parents.<sup>101</sup>

While the language in this explicitly anti-LGBTQIA+ legislation is undoubtedly familiar, the particular posturing from advocates to focus on not only youth, but on the ways in which schools and educators are permitted to discuss LGBTQIA+ topics and individuals, is alarming. In a March 2022 article in *Slate*, Christina Cauterucci writes: “‘Ideological indoctrination.’ ‘Weighty and sometimes explicit topics.’ ‘Cultural agenda.’ These are the euphemisms conservatives have apparently settled on to describe any acknowledgement in schools that LGBTQ people exist and are as deserving of respect and rights as anyone else.”<sup>102</sup> Further, the “debates around the bill have been a shocking throwback to the anti-gay crusades of the 1970s with conservatives casting gay people as child molesters and opponents of the bill as groomers of children to be gay or trans.”<sup>103</sup> For example, in responding to criticism of the anti-LGBTQIA+ legislation in Florida, Christina Pushaw, a spokesperson for Gov. DeSantis, tweeted, “If you're against the Anti-

---

<sup>97</sup> Goldstein, *supra* note 80.

<sup>98</sup> Cauterucci, *supra* note 80 (emphasis added).

<sup>99</sup> H.B. 1557, 2022 Leg., 124th Sess. (Fla. 2022).

<sup>100</sup> Cauterucci, *supra* note 80 (emphasis added).

<sup>101</sup> Madeline Kearns, *DeSantis Hits Back at 'Don't Say Gay'*, NAT'L REV. (Mar. 9, 2022, 11:10 AM), <https://www.nationalreview.com/corner/desantis-hits-back-at-dont-say-gay/>.

<sup>102</sup> Cauterucci, *supra* note 80 (emphasis added).

<sup>103</sup> Michaelson, *supra* note 88.

2022] *THE MARCH TOWARDS QUEER LIBERATION* 175

Grooming Bill, you are probably a groomer or at least you don't denounce the grooming of 4-8 year old children."<sup>104</sup>

These bills attempt to fundamentally deny the existence and experiences of LGBTQIA+ folks, erasing them from meaningful conversations of identity and history in the formative education years of young Americans. Emphasizing the damage such legislation does, Elizabeth Morton writes in a personal essay published in *Salon*:

Denying that LGBTQ+ folks exist, and have always existed in the human family, is *harmful* to us all. As a child, I desperately needed language, stories and role models that could help me to understand and celebrate who I was. My straight parents needed that too. We needed for society at large (our shared culture and communities) to show us that the gay part of me was as normal and natural and beautiful as my brown eyes.<sup>105</sup>

This attempted erasure of the LGBTQIA+ identity and experience within the classroom is, therefore, particularly damaging to the development of American children collectively. Concluding her interview with *New York Magazine*, Eckhoff reiterates that “[t]his bill empowers bigotry in the same spirit as we’ve seen [antisemitic], anti-Black, anti-immigrant bigotry. . . . It’s *normalizing degradation*.”<sup>106</sup> Similarly, in his conclusion, Michaelson writes that “[t]his bill isn’t ‘Don’t Say Gay’” but rather “[i]t’s don’t *be* gay or trans.”<sup>107</sup>

*E. Proposed Legislative Solutions to Ensure Expanded,  
Sustained Legal Protections and Rights for LGBTQIA+  
Americans*

The most tangible legislative solution on the federal level today exists in the Equality Act, as passed by the U.S. House of Representatives in February 2021.<sup>108</sup> In its opening text, Section 2 of the Equality Act identifies Congress’s findings that “[d]iscrimination can occur on the basis of the sex, sexual orientation, gender identity, pregnancy, childbirth, or a related medical condition of an individual, as well as because of sex-based stereotypes.”<sup>109</sup> It further explains that “[e]ach of these factors alone can

---

<sup>104</sup> Christina Pushaw (@ChristinaPusha), TWITTER (Mar. 4, 2022, 6:33 PM), <https://twitter.com/christinapushaw/status/1499890719691051008>; Michaelson, *supra* note 88.

<sup>105</sup> Elizabeth Morton, *What my gay childhood in a “Don’t Say Gay” landscape was really like*, SALON (Mar. 26, 2022), <https://www.salon.com/2022/03/26/what-my-gay-childhood-in-a-dont-say-gay-landscape-was-really-like/> (emphasis added).

<sup>106</sup> Michaelson, *supra* note 88 (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> Kurtzleben, *supra* note 18; *see generally* Equality Act, H.R. 5, 117th Cong. (as passed by House of Representatives, Feb. 25, 2021).

<sup>109</sup> H.R. 5 § 2(a)(1).

serve as the basis for discrimination, and each is a form of sex discrimination.”<sup>110</sup> Congress identifies within the text of the Equality Act the kinds of historic discrimination faced by LGBTQIA+ Americans, writing that:

Individuals who are LGBTQ, or are perceived to be LGBTQ, have been subjected to a history and pattern of persistent, widespread, and pervasive discrimination on the bases of sexual orientation and gender identity by both private sector and Federal, State, and local government actors, including in employment, housing, and public accommodations, and in programs and activities receiving Federal financial assistance. This discrimination inflicts a range of tangible and intangible harms, sometimes even including serious physical injury or death. An explicit and comprehensive national solution is needed to address this discrimination, *including the full range of remedies available under the Civil Rights Act of 1964*.<sup>111</sup>

The Equality Act describes not only these forms of historic discrimination as the denial of access to services, employment, and harassment on the basis of LGBTQIA+ identity, but specifies that these forms of discrimination contribute to the “negative social and economic outcomes” for LGBTQIA+ Americans.<sup>112</sup> Further, the Act goes so far as to identify “[t]he discredited practice known as ‘conversion therapy’ [as] a form of discrimination that harms LGBTQ people by undermining individuals’ sense of self worth, increasing suicide ideation and substance abuse, exacerbating family conflict, and contributing to second-class status.”<sup>113</sup> In an effort to combat these historic modes of anti-LGBTQIA+ discrimination—as well as to remedy the lasting effects of such detrimental discrimination—the Equality Act explicitly identifies that “[n]umerous provisions of Federal law expressly prohibit discrimination on the basis of sex, and Federal courts and agencies have correctly interpreted these prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity, and sex stereotypes.”<sup>114</sup> The Equality Act’s text specifically cites the Supreme

---

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (emphasis added);

Lesbian, gay, bisexual, transgender, and queer . . . . people commonly experience discrimination in securing access to public accommodations—including restaurants, senior centers, stores, places of or establishments that provide entertainment, health care facilities, shelters, government offices, youth service providers including adoption and foster care providers, and transportation. Forms of discrimination include the exclusion and denial of entry, unequal or unfair treatment, harassment, and violence. This discrimination prevents the full participation of LGBTQ people in society and disrupts the free flow of commerce.

*Id.* § 2(a)(3).

<sup>112</sup> *Id.* § 2(a)(6); *see id.* § 2(a)(11).

<sup>113</sup> *Id.* § 2(a)(7).

<sup>114</sup> *Id.* § 2(a)(13).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 177

Court's 2020 decision in *Bostock*, writing that the Court correctly held that “the prohibition on employment discrimination because of sex under [T]itle VII of the Civil Rights Act of 1964 inherently includes discrimination because of sexual orientation or transgender status.”<sup>115</sup> In Section 2(a)(14), the Act additionally “makes explicit that existing Federal statutes prohibiting sex discrimination in employment (including in access to benefits), healthcare, housing, education, credit, and jury service also prohibit sexual orientation and gender identity discrimination”<sup>116</sup> and details a number of studies that indicate the lasting economic and psychological harm inflicted by such discrimination on LGBTQIA+ Americans—particularly on transgender Americans.<sup>117</sup>

Ultimately, the purported purpose of the Equality Act, as stated by Congress, is to “expand as well as clarify, confirm and create greater consistency in the protections and remedies against discrimination on the basis of all covered characteristics and to provide guidance and notice to

---

<sup>115</sup> *Id.*; *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

<sup>116</sup> H.R. 5 § 2(a)(14).

<sup>117</sup> *See id.* § 2(a)(18) (“Numerous studies demonstrate that LGBTQ people, especially transgender people and women, are economically disadvantaged and at a higher risk for poverty compared with other groups of people. For example, the poverty rate for older women in same-sex couples is twice that of older different-sex couples.”);

Numerous studies document the shortage of qualified and available homes for the approximately 424,000 youth in the child welfare system and the negative outcomes for the many youth who live in group care as opposed to a loving home or who age out of care without a permanent family placement. Although same-sex couples are 7 times more likely to foster or adopt than their different-sex counterparts, many child-placing agencies refuse to serve same-sex couples and LGBTQ individuals. This has resulted in a reduction of the pool of qualified and available homes for youth in the child welfare system who need placement on a temporary or permanent basis. It also sends a negative message about LGBTQ people to children and youth in the child welfare system about who is, and who is not, considered fit to be a parent. While the priority should be on providing the supports necessary to keep children with their families, when removal is required, barring discrimination in foster care and adoption will increase the number of homes available to foster children waiting for foster and adoptive families.

*Id.* § 2(a)(20)

LGBTQ youth are overrepresented in the foster care system by at least a factor of two and report twice the rate of poor treatment while in care compared to their non-LGBTQ counterparts. LGBTQ youth in foster care have a higher average number of placements, higher likelihood of living in a group home, and higher rates of hospitalization for emotional reasons and of juvenile justice involvement than their non-LGBTQ peers because of the high level of bias and discrimination that they face and the difficulty of finding affirming foster placements. Further, due to their physical distance from friends and family, traumatic experiences, and potentially unstable living situations, all youth involved with child welfare services are at risk for being targeted by traffickers seeking to exploit children. Barring discrimination in child welfare services will ensure improved treatment and outcomes for LGBTQ foster children.

*Id.* § 2(a)(21).

178 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:1]

individuals, organizations, corporations, and agencies regarding their obligations under the law.”<sup>118</sup> The Equality Act achieves this specifically in amending relevant sections of the Civil Rights Act of 1964 to expand the protections enshrined by earlier legislation by inserting, for example, “sex (including sexual orientation and gender identity)” before “or national origin.”<sup>119</sup> The Equality Act thus provides formal legislative amendments to the Civil Rights Act of 1964, particularly by including the phrase “sex (including sexual orientation and gender identity)” throughout the text.<sup>120</sup> While the Court’s holding in *Bostock* is limited to Title VII of the Civil Rights Act of 1964, the Equality Act not only expands LGBTQIA+ protections as prescribed within the Civil Rights Act of 1964, but it seeks to expand these rights in other legislation, such as the Civil Rights Act of 1968 and the subsequent Fair Housing Act;<sup>121</sup> the Congressional Accountability Act of 1995;<sup>122</sup> the Civil Service Reform Act of 1978;<sup>123</sup> the Religious Freedom Restoration Act of 1993;<sup>124</sup> and the Equal Credit Opportunity Act.<sup>125</sup>

In 2020, President Biden’s presidential campaign platform heralded the Equality Act as “the best vehicle for ensuring equal rights under the law for LGBTQ Americans,”<sup>126</sup> while LGBTQIA+ advocates underscored the lack of federal leadership on this issue.<sup>127</sup> LGBTQIA+ advocates noted that:

There is currently *no federal legislation* protecting LGBTQ Americans against discrimination, and 27 states lack a state anti-discrimination law. While recent rulings prohibit housing and employment discrimination, they do not prohibit discrimination in education, health care, or public accommodations and services.

More troubling than the absence of federal and, in the majority of cases, state anti-discrimination laws, anti-transgender legislation has been introduced in nearly half of the states, including bills in more than 15 states that would prohibit or even criminalize certain medical care for transgender youth. On March 26, the governor of Arkansas signed into law a bill that allows doctors and other health professionals, including EMTs, to refuse to treat LGBTQ

---

<sup>118</sup> *Id.* § 2(b).

<sup>119</sup> *Id.* § 3(a)(1) (emphasis added) (“Section 201 of the Civil Rights Act of 1964 (42 U.S.C. 2000a) is amended.”).

<sup>120</sup> *Id.* §§ 3(a)–(c).

<sup>121</sup> *Id.* § 10(a).

<sup>122</sup> *Id.* § 7(g).

<sup>123</sup> *Id.* § 7(h).

<sup>124</sup> *Id.* § 9(c).

<sup>125</sup> *Id.* § 11(a).

<sup>126</sup> Julie Allen, *The Equality Act Is 46 Years In The Making. The US Senate Should Pass It Now*, WBUR (Apr. 2, 2021), <https://www.wbur.org/cognoscenti/2021/04/02/equality-act-stella-keating-julie-marie-allen>.

<sup>127</sup> *Id.*

2022] *THE MARCH TOWARDS QUEER LIBERATION* 179

people on moral grounds. The Equality Act is an important step to end the uncertain patchwork of state laws on discrimination on the basis of gender identity.<sup>128</sup>

As a legislative solution to the pitfalls identified in LGBTQIA+ advocates' critique of current federal protections for LGBTQIA+ Americans—particularly for transgender and GNC Americans—the Equality Act goes *much further* than the Court's 2020 decision in *Bostock*.<sup>129</sup> The Equality Act would serve to obfuscate the advances made by anti-LGBTQIA+ state legislators in recent years.<sup>130</sup>

## II. LEGAL STATUS QUO AND THE CURRENT LEGAL REGIME

### A. *The U.S. Supreme Court's LGBTQIA+ Jurisprudence*

The *Bostock* decision is one of a host of cases encompassing the U.S. Supreme Court's broader LGBTQIA+ jurisprudence.<sup>131</sup> Additional cases range in fact, context, and substantive rights afforded to LGBTQIA+ Americans and have more or less followed—albeit slowly—progress towards more widely accepted social norms and views on LGBTQIA+ Americans today. While LGBTQIA+ advocates celebrate landmark cases such as the Court's 2015 decision in *Obergefell v. Hodges*—in which the Court held that states are required to provide marriage licenses to same-sex couples under both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment—the ways in which the Court engages in sex, sexual orientation, and gender identity arguably still fails to provide sufficient legal protections to trans and GNC Americans.<sup>132</sup>

---

<sup>128</sup> *Id.*

<sup>129</sup> See H.R. 5 § 2(a)(22); *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1734 (2020).

<sup>130</sup> See H.R. 5; *Bostock*, 140 S. Ct. at 1734.

<sup>131</sup> *Bostock*, 140 S. Ct. at 1734; see *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment requires states to provide marriage licenses to gay and lesbian couples); see *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018); see *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

<sup>132</sup> See e.g., *Obergefell*, 576 U.S. at 647 (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)) (“The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians.”); see also Respect for Marriage Act, H.R. 8404, 117th Congress (as passed by the House of Representatives, Dec. 8, 2022); Domenico Montanaro, *Biden to sign Respect for Marriage Act, reflecting his and the country's evolution*, NPR (Dec. 13, 2022), <https://www.npr.org/2022/12/13/1142331501/biden-to-sign-respect-for-marriage-act-reflecting-his-and-the-countrys-evolution> (writing that “[f]or advocates of the Respect for Marriage Act and the White House, Tuesday is a big day. But the bill’s potential impact is limited” underscoring that the Respect for Marriage Act “does not guarantee the right to marry” rather requiring states where same-sex marriage is not protected by state law “to recognize same-sex marriages across state lines and that same-sex couples are entitled to the same federal benefits of any other married couple, like Social Security survivor

180 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 29:1

The Court's LGBTQIA+ jurisprudence, taken together, and particularly with its favorable decisions on LGBTQIA+ constitutional rights, "now look to be 'clear,' 'straightforward,' 'plain,' and 'settled' on the basic question of lesbian and gay formal equality, with *Bostock* itself putting to rest whatever questions may have been lingering on the status of trans equality within that body of law."<sup>133</sup> However, it may be argued that *Bostock* and the Court's broader LGBTQIA+ jurisprudence fails to fully provide substantive and lasting legal protections for *all* LGBTQIA+ Americans, with the Court's current interpretation of sex, sexuality, and gender identity lacking the nuance and complexity inherent to these markers. This concerns LGBTQIA+ advocates.<sup>134</sup> In particular, the term "sex" in the *Bostock* Court's interpretation of Title VII may fail to protect a GNC individual from discrimination, whereas amending the Civil Rights Act of 1964 (i.e., passing the Equality Act) to include an inclusive definition of gender identity may provide more lasting legal safeguards and protections for such individuals.<sup>135</sup>

---

benefits"); Devin Dwyer, *What the Respect for Marriage Act does and doesn't do*, ABC NEWS (Dec. 13, 2022), <https://abcnews.go.com/Politics/respect-marriage-act-same-sex-interracial-couples/story?id=95181737> ("If the Supreme Court were to overrule either [*Obergefell* or *Loving v. Virginia*]*—*a fear among Democrats and advocates in light of a concurring opinion in the conservative majority's June ruling to scrap national abortion rights*—*then the [Respect for Marriage Act] acts as a limited remedy.");

The Respect for Marriage Act does not codify same-sex marriage protections. It would recognize marriage between two individuals regardless of their "sex, race, ethnicity, or national origin." While the legislation does not require any state to permit same-sex couples to marry, it does require that all states recognize any marriage that was legal in the state where it took place, under the U.S. Constitution's full faith and credit clause. The [A]ct, too, would repeal the Defense of Marriage Act of 1996, which defined "marriage" as between a man and a woman and "spouse" as "only a person of the opposite sex who is a husband or wife."

Ryan Thomas, *What is the Respect for Marriage Act?*, PBS NEWS HOUR (last updated Dec. 8, 2022), <https://www.pbs.org/newshour/politics/same-sex-marriage-bill-clears-key-hurdle-in-senate-heres-what-it-does-and-doesnt-do>.

<sup>133</sup> Spindelman, *supra* note 11, at 613; *quoting Bostock*, 140 S. Ct. at 1737, 1743, and 1751.

<sup>134</sup> *See* Spindelman, *supra* note 11, at 634 ("The complex identifications of the Supreme Court's *Bostock* opinion may yet be a sign that other complex social identities and ways of living—of being in the world—may someday find more of a home in the law than they now receive."); *see also Bostock*, 140 S. Ct. at 1741-42.

<sup>135</sup> *See Bostock*, 140 S. Ct. at 1741 (existing exclusively within the male-female binary, the Court in *Bostock* writes "[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred") (emphasis added); *see generally*, H.R. 5 ("An explicit and comprehensive national solution is needed to address [LGBTQIA+] discrimination, including the full range of remedies available under the Civil Rights Act of 1964.");

Not without complications or future conditions, and not beyond critique from across the political spectrum, *Bostock* will undoubtedly make the lives of lesbian, gay, and trans workers in the U.S. both just a little more equal, and, frankly, easier, less dominated by the vicissitudes of homophobia and transphobia, and the complex ways they can lead a self to

2022] *THE MARCH TOWARDS QUEER LIBERATION* 181

Many legal scholars argue that *Bostock* is an explicit textualist statutory interpretation of Title VII—particularly the Court’s interpretation of the word “sex”<sup>136</sup>—which narrows the protections and rights afforded to LGBTQIA+ folks and specifically excludes any gender diversity (i.e., GNC folks existing outside the cisgender male-female binary).<sup>137</sup> Yet, others argue that *Bostock* may provide LGBTQIA+ advocates with more substantial legal protections.<sup>138</sup> One scholar notes that “*Bostock* announces that all these individuals now ‘are entitled to the benefit[s] of the law’s terms’—benefits that begin in this case with Title VII’s sex discrimination protections, but that, by virtue of *Bostock*’s configurations, also include equal legal protections in a much wider sense.”<sup>139</sup> It is important to note that “the federal courts have been responsible for some of the LGBTQ+ community’s most triumphant victories,” including the Court’s holding in *Bostock* which—regardless of its potentially narrow definition of sex—provides LGBTQIA+ Americans with substantial protections today.<sup>140</sup> However, LGBTQIA+ advocates may ultimately find that *Bostock* and the Court’s broader LGBTQIA+ jurisprudence substantially fails to ensure substantive, lasting, and inclusive legal protections for LGBTQIA+ Americans—particularly trans and GNC Americans—due to the Court’s narrow and limiting interpretation of sex, sexuality, and gender identity; raising concerns for LGBTQIA+ advocates.<sup>141</sup>

---

live and be at work, as in the remainder of life. This is why some people, again, wept tears of joy on first reading *Bostock*’s text.

*Contra* Spindelman, *supra* note 11, at 632.

<sup>136</sup> *Bostock*, 140 S. Ct. at 1741-42; *see* 42 U.S.C. § 2000e-2(a)(1).

<sup>137</sup> *Bostock*, 140 S. Ct. at 1739 (“The only statutorily protected characteristic at issue in today’s cases is ‘sex’—and that is also the primary term in Title VII whose meaning the parties dispute.”) (emphasis added); *see* § 2000e-2(a)(1); *see e.g.*, Julie Tamerler, *Transgender Athletes and Title IX: An Uncertain Future*, 27 JEFFREY S. MOORAD SPORTS L.J. 139, 141 (2020) (examining the challenges faced by transgender athletes as to the “established legal categories used to determine Title IX compliance[.]” and noting the “[c]onfusion regarding the topic of transgender individuals begins with the definition of the word itself” and that “[t]he term transgender encompasses a variety of ways in which an individual’s gender identity differs from that which was assigned to them at birth”).

<sup>138</sup> Spindelman, *supra* note 11, at 630-31;

Like the larger political struggles to which *Bostock* is related, the play in the Court’s opinion in the case, adjudicating disputes that are bound up with processes of legal, social, and cultural transformation, is complex, paradoxical, messy, and inconsistent, not a pure specimen of the legal arts, including the judicial craft.

*Id.*; *see Bostock*, 140 S. Ct. at 1741-42; *see generally* § 2000e-2(a)(1).

<sup>139</sup> Spindelman, *supra* note 11, at 557; *see Bostock*, 140 S. Ct. at 1737.

<sup>140</sup> Hecht-McGowan, *supra* note 56; *see generally Bostock*, 140 S. Ct. at 1737.

<sup>141</sup> *See* Spindelman, *supra* note 11, at 634 (“The complex identifications of the Supreme Court’s *Bostock* opinion may yet be a sign that other complex social identities and ways of living—of being in the world—may someday find more of a home in the law than they now receive.”); *see also Bostock*, 140 S. Ct. at 1741-42.

*B. Anti-LGBTQIA+ Legislation and American LGBTQIA+ Legal Advocacy Today*

Much has changed in the political and legal landscape of the U.S. since the Court's decision in *Bostock*.<sup>142</sup> The make-up of the Court itself shifted soon after *Bostock*, with Justice Ruth Bader Ginsburg's passing and the subsequent confirmation of Justice Amy Coney Barrett, leaving the Court with a markedly conservative majority. Furthermore, the questions left unanswered in *Bostock* continue to raise concerns among LGBTQIA+ advocates in protecting these newly gained legal protections for LGBTQIA+ employees.<sup>143</sup>

Of specific concern to LGBTQIA+ advocates is the dramatic rise in anti-LGBTQIA+ legislation across the states, particularly anti-trans legislation.<sup>144</sup> In the spring of 2021, Alphonso David, the former President of the prominent LGBTQIA+ advocacy organization the Human Rights Campaign ("HRC"), noted that "[h]undreds of bills have been introduced in state legislatures around the country that attempt to erase transgender people [and] make LGBTQ people second class citizens."<sup>145</sup> Specifically, State legislatures have introduced over 250 anti-LGBTQIA+ bills as of April 2021, with the majority of these laws targeting trans Americans, especially trans youth.<sup>146</sup> Further, as of March 2022, advocates have also raised alarm over the sharp rise and intensification of anti-LGBTQIA+ rhetoric and legislative action following years of the aforementioned anti-transgender legislation on the State-level; particularly in the form of the so-called "Don't Say Gay" bills, (e.g., Florida's House Bill 1557, signed into law by Governor Ron DeSantis).<sup>147</sup> While this form of legislation can be distinguished from the

---

<sup>142</sup> See *Bostock*, 140 S. Ct. at 1737; see also Katrina C. Rose, *Reflections at the Silver Anniversary of the First Trans-Inclusive Gay Rights Statute: Ruminations on the Law and Its History—and Why Both Should Be Defended in an Era of Anti-Trans "Bathroom Bills"*, 14 U. MASS. L. REV. 70, 140 (2019) (noting that the current constitution of the Court makes for "an ominous immediate future" for trans Americans).

<sup>143</sup> See Samantha Schmidt & Sarah Pulliam Bailey, *A New Conservative Supreme Court Justice Could Boost Religious Rights at the Cost of LGBTQ Protections*, WASH. POST (Sept. 20, 2020); see e.g., *Bostock*, 140 S. Ct. at 1754 (holding that the Court will not seek to answer "how these doctrines protecting religious liberty interact with Title VII" leaving them for future cases).

<sup>144</sup> See *Legislation Affecting LGBT Rights Across the Country*, *supra* note 62 (documenting the various anti-LGBTQIA+ and particularly anti-trans laws being introduced, debated, and passed in State legislatures).

<sup>145</sup> Ronan, *supra* note 23.

<sup>146</sup> *Id.* ("This wave of anti-LGBTQ legislation . . . is part of a broader strategy to score political points with the conservative base by curtailing the rights of trans youth—under the guise of responding to nonexistent and baseless threats.")

<sup>147</sup> Goldstein, *supra* note 80; Cauterucci, *supra* note 80 ("Critics have dubbed it a "Don't Say Gay" bill, part of a class of anti-LGBTQ censorship legislation gaining steam across the country."); see generally, H.B. 1557, 2022 Leg., 124th Sess. (Fla. 2022).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 183

earlier iterations of anti-trans bathroom, sports, or medical access bills, the throughline remains consistent with the language utilized by anti-LGBTQIA+ legislators and proponents, much of which is shockingly reminiscent of “the anti-gay crusades of the 1970s with conservatives casting gay people as child molesters and opponents of the bill as groomers of children to be gay or trans.”<sup>148</sup> These bills not only seek to explicitly discriminate against LGBTQIA+ Americans on the basis of their identities in specific ways—such as denying access to trans healthcare as is the case in Arkansas’s H.B. 1570—but promote another, more insidious goal: the erasure of the LGBTQIA+ American identity, experience, and history in the broader public consciousness.<sup>149</sup>

*C. Hyper-partisan Political Realities and the Senate Filibuster’s Continued Stonewalling of Progress and LGBTQIA+ Equality*

As of March 2022, the legislative solution proposed by advocates in Congress to finally enact the Equality Act seems unlikely, due in particular to the continued existence of the Senate filibuster and the current Democratic majority’s disunity on the issue; specifically, the unwillingness of certain caucus members to do away with this procedural hurdle.<sup>150</sup> The Senate filibuster—a procedural rule which “essentially requires 60 votes to pass most legislation”<sup>151</sup>—presents a particular procedural roadblock to LGBTQIA+ advocates who hope for substantive legal protections for LGBTQIA+ Americans and denies possible expansion to the rights already protected by the Civil Rights Act of 1964 or expounded in the Supreme

<sup>148</sup> Michaelson, *supra* note 88.

<sup>149</sup> *What You Need to Know About the Transgender Health Care Ban (HB 1570)*, *supra* note 68 (“Research shows, after gender-affirming care and treatment, trans youth experience significant decreases in suicidal thoughts and improvements in overall emotional and behavioral health.”); see Michaelson, *supra* note 88.

<sup>150</sup> See Kurtzleben, *supra* note 18; see also Beavers & Zanona, *supra* note 25 (“The House passed sweeping legislation on Thursday to ban discrimination against people based on sexual orientation and gender identity, delivering a major victory to the LGBTQ community—while exposing an ugly rift in the GOP”); see generally Equality Act, H.R. 5, 117th Cong. (as passed by House of Representatives, Feb. 25, 2021).

<sup>151</sup> Peter W. Stevenson & Amber Phillips, *The filibuster, explained*, WASH. POST. (Oct. 22, 2021), <https://www.washingtonpost.com/politics/2021/04/09/what-is-filibuster/>;

The Senate is required to follow certain procedural steps in passing legislation. When a bill is brought to the Senate floor, any senator can bring things to a halt by speaking for as long as they wish, effectively delaying a vote to end debate on a bill. The Senate can vote to end debate with a three-fifths majority, or 60 of 100 senators. So any bill that has the support of at least 60 senators is, in effect, filibuster-proof, and the Senate can quickly move on to the next steps leading up to a final vote.

*Id.*

Court's 2020 decision in *Bostock*.<sup>152</sup> Without eliminating the Senate's filibuster when Democrats maintain a majority in Congress, the passage of the Equality Act as it stands seems all but impossible.

At the close of his first year in office, President Biden and his administration claimed to have “delivered results for the American people”<sup>153</sup> and “made history growing our economy, addressing the climate crisis, and building a judiciary and government that represents America.”<sup>154</sup> While the President's record indicates a major shift in political priorities from the previous administration, critics continue to demand that President Biden take more assertive action to execute the purported legislative goals of his administration,<sup>155</sup> particularly the Build Back Better Act<sup>156</sup> and the John Lewis Voting Rights Act.<sup>157</sup> Amid widespread misinformation stoking fears of voter fraud and Republican-led state legislatures passing restrictive voting rights laws, President Biden's inaugural address, in which he pledged to “defend our democracy”<sup>158</sup> in the wake of a violent insurrection on the U.S. Capitol, feels particularly empty one year into his presidency.<sup>159</sup> Facing hyper-partisan opposition to his legislative agenda—as well as prominent Senate defectors within the Democratic Caucus—President Biden and

---

<sup>152</sup> 42 U.S.C. § 2000e–2(a)(1); *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1737 (2020); see H.R. 5 (“An explicit and comprehensive national solution is needed to address [LGBTQIA+] discrimination, including the full range of remedies available under the Civil Rights Act of 1964.”).

<sup>153</sup> *Fast Facts: Record Firsts in President Biden's First Year*, WHITE HOUSE (Jan. 19, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/19/fast-facts-record-firsts-in-president-bidens-first-year/>.

<sup>154</sup> *Id.*

<sup>155</sup> *Top progressive urges Biden to focus on Build Back Better despite Manchin blow*, GUARDIAN (Dec. 26, 2021), <https://www.theguardian.com/us-news/2021/dec/26/joe-biden-build-back-better-pramila-jayapal-manchin-rejection> (“Pramila Jayapal, a leading House progressive, has urged Joe Biden to continue focusing on his Build Back Better social spending legislation and to use executive actions as a way to work around public rejection by Senator Joe Manchin.”).

<sup>156</sup> Inflation Reduction Act, H.R. 5376, 117th Cong. (2022) (the “Build Back Better Act”); see *The Build Back Better Framework: President Biden's Plan to Rebuild the Middle Class*, WHITE HOUSE, <https://www.whitehouse.gov/build-back-better/> (last visited Jan. 20, 2022) (stating that this legislation “will set the United States on course to meet its climate goals, create millions of good-paying jobs, enable more Americans to join and remain in the labor force, and grow our economy from the bottom up and the middle out”).

<sup>157</sup> John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2022).

<sup>158</sup> *Inaugural Address by President Joseph R. Biden, Jr.*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/>.

<sup>159</sup> Jonathan Lemire, *Biden's first year: A tale of 2 presidencies*, POLITICO (Jan. 19, 2022), <https://www.politico.com/news/2022/01/19/joe-biden-first-year-two-presidencies-527352> (noting that “on the big ticket items, including voting rights, there has not been success. It has left Biden appearing, at times, as president of the Senate rather than the nation as a whole, as his administration became bogged down in the legislative morass”).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 185

Congressional Democrats are confronted with a specific hurdle that time and time again has blocked any significant progress: the Senate filibuster.<sup>160</sup>

Following months of calls to end the filibuster by progressive activists and legislators alike, President Biden called for the Senate filibuster rule(s) to be changed.<sup>161</sup> During a speech made on January 11, 2022, the President warned of “a grave threat to American democracy if lawmakers did not act to ‘protect the heart and soul’ of the country,”<sup>162</sup> further stating, “we have no option but to change the Senate rules, including getting rid of the filibuster for this.”<sup>163</sup> Despite this call for reform, the U.S. Senate voted 48-52 against altering the filibuster on January 19, 2022, which would have changed the chamber rules for voting rights legislation *alone*; with Democrats—Sen. Krysten Sinema (D-AZ) and Sen. Joe Manchin (D-WV)—voted to oppose the change, thereby potentially “dooming much of Democrats’ agenda for the near term.”<sup>164</sup> Many political commentators consider it an “embarrassing

---

<sup>160</sup> See *Rules of the Senate, Rule XIX (Debate) and XXII (Motions)*, U.S. SENATE, <https://www.rules.senate.gov/rules-of-the-senate> (last visited Jan 22, 2022); see also *About Filibusters and Cloture*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> (last visited Jan. 22, 2022) (explaining the Senate’s adoption of a rule to “allow a two-thirds majority to end a filibuster, a procedure known as ‘cloture’” requiring “two-thirds of senators voting to three-fifths of all senators duly chosen and sworn, or 60 of the 100-member Senate”).

<sup>161</sup> Morning Edition, *Biden calls for changes to Senate filibuster to pass voting rights bills*, NPR (Jan. 12, 2022), <https://www.npr.org/2022/01/12/1072372531/biden-calls-for-changes-to-senate-filibuster-to-pass-voting-rights-bills>;

We need a path forward that gets us to the legislation that is required in order to stop these attacks on our elections infrastructure. I don’t think that there is anything more important to how we self-govern. . . . There’s nothing more important than our ability to participate in our elections to make sure that the will of the people is reflected in the results of our elections.

*Id.* (quoting Nse Ufot, the CEO of the Georgia voting rights group the New Georgia Project).

<sup>162</sup> Katie Rogers, *‘We have no option’: Biden calls for changing Senate rules to pass voting rights laws*, N.Y. TIMES (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/us/politics/biden-filibuster-voting-rights.html>;

I ask every elected official in America: How do you want to be remembered? . . . Do you want to be on the side of Dr. King or George Wallace? Do you want to be on the side of John Lewis or Bull Connor? Do you want to be on the side of Abraham Lincoln or Jefferson Davis?

Pres. Joseph R. Biden, *Remarks by President Biden on Protecting the Right to Vote*, WHITE HOUSE (Jan. 11, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/11/remarks-by-president-biden-on-protecting-the-right-to-vote/>.

<sup>163</sup> Biden, *Remarks by President Biden on Protecting the Right to Vote*, *supra* note 162; see also Maegan Vazquez, *Biden calls on Senate to change filibuster rules to pass voting rights bills in forceful speech: ‘I’m tired of being quiet’*, CNN (Jan. 12, 2022), <https://www.cnn.com/2022/01/11/politics/biden-atlanta-voting-rights-speech/index.html> (“Without changing the rules, it’s unclear how either bill Biden wants passed—the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act—will get done.”).

<sup>164</sup> Li Zhou, *Democrats’ failure on filibuster reform will haunt them*, VOX (Jan. 19, 2022), <https://www.vox.com/2022/1/19/22881837/senate-filibuster-vote-voting-rights-joe-manchin-krysten>

setback”<sup>165</sup> for President Biden, who conceded after a “closed-door meeting [with Senators Sinema and Manchin] that his efforts likely were not enough.”<sup>166</sup>

Fundamentally what is at stake for both President Biden and Congressional Democrats is not only the future of voting rights in America, but the substantive legislative goals on which the President ran his 2020 presidential campaign. Without an end to the Senate filibuster, the “reality the party faces . . . [is] one that severely reduces the policy impact it could otherwise have.”<sup>167</sup> As of December 2022, Democrats control the White House and both chambers of Congress. Yet, despite this, both continue to endure unfavorable polling—many believe there has been little progress on either the President’s campaign promises or his party’s legislative agenda. Likewise, as political commentators speculated about Democratic losses in the 2022 midterm elections and ceding control of Congress to Republicans, 2023 will see a slim Republican majority in the House—further stalling meaningful advances to the President’s policy agenda.<sup>168</sup> Further, while the

---

sinema; Kelsey Snell, *Biden says he doesn’t know if voting rights legislation can pass*, NPR (Jan. 13, 2022), <https://www.npr.org/2022/01/13/1072778094/sen-sinema-dashes-democrats-hope-to-change-the-filibuster> (“Sinema said she supports voting reforms and the specific voting rights bills under consideration but added she is unwilling to change her position on the filibuster for them to pass.”).

<sup>165</sup> Carl Hulse, *Sinema Rejects Changing Filibuster, Dealing Biden a Setback*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/us/politics/sinema-voting-rights-bill.html> (“Senator Krysten Sinema . . . stunned her colleagues just hours before the president was slated to make his case to them in person at the Capitol by taking the Senate floor to declare that she would not support undermining the filibuster to pass legislation under any circumstances.”).

<sup>166</sup> Snell, *supra* note 164 (quoting President Biden as saying “[b]ut I know one thing: As long as I have a breath in me, as long as I’m in the White House, as long as I’m engaged at all, I’m going to be fighting to change the way these legislatures have moved”).

<sup>167</sup> Zhou, *supra* note 164;

Because the filibuster is still intact, a lot of Democratic bills have no path forward” and further, that: [b]y voting to keep the filibuster as is, moderate Democrats have guaranteed that much of the party’s agenda will be stymied for now. Already, Republicans have blocked multiple bills including legislation to establish a committee to investigate the January 6 insurrection and a measure aimed at guaranteeing equal pay in the workplace.

*Id.*; see, e.g., Rep. David N. Cicilline, *To ensure equality for all, Senate must end filibuster*, THE HILL (Oct. 25, 2021), <https://thehill.com/blogs/congress-blog/politics/578240-to-ensure-equality-for-all-senate-must-end-filibuster>;

The filibuster . . . has prevented this Congress from making progress on nearly every major issue. More than 70 years after the Jim Crow era ended, it is still being used to block civil rights legislation like the John Lewis Voting Rights Advancement Act, the For the People Act, the George Floyd Justice in Policing Act, the DREAM Act, and the Equality Act—even though each of these bills have overwhelming public support.

*Id.*

<sup>168</sup> Jeffrey M. Jones, *U.S. Political Party Preferences Shifted Greatly During 2021*, GALLUP (Jan. 17, 2022), <https://news.gallup.com/poll/388781/political-party-preferences-shifted-greatly-during-2021.aspx> (“With control of the House of Representatives and Senate at stake in this year’s midterm elections, party

2022] *THE MARCH TOWARDS QUEER LIBERATION* 187

filibuster’s defenders argue the Senate rule “enriches our democracy by forcing senators to debate more,” a new study published by the University of Chicago found that “historical data shows that the filibuster largely has no effect on debate—and to the extent that it does, it appears to *dampen* it rather than invigorate it.”<sup>169</sup>

In a 2021 opinion piece critical of the Senate filibuster, Rep. David N. Cicilline (D-RI) writes that “[i]nstead of passing legislation into law with the support of the majority in both chambers, the will of the American people is being blatantly and undemocratically subverted by the filibuster.”<sup>170</sup> He continued that Democrats must “eliminate the filibuster completely, or at the very least, make sure that it cannot be used as a weapon to defeat legislation that promotes, protects, and defends civil rights, voting rights, and our democracy”<sup>171</sup> and that “[a] procedural tactic should not be used to deny BIPOC individuals their right to vote or allow an LGBTQ+ American to be discriminated against just because one person wants to stand in the way of

---

preferences will be a key indicator of which party will be better positioned to gain majorities in the next session of Congress.”); Ally Mutnick & Jessica Piper, *Republicans flip the House*, POLITICO (Nov. 16, 2022, 6:38 PM), <https://www.politico.com/news/2022/11/16/house-control-midterm-elections-results-2022-00066546> (“Republicans are on track for the smallest of majorities despite pre-election predictions that a red wave was coming. . . . And that majority could be difficult to manage for a Republican speaker next year.”); see Alex Samuels & Nathaniel Rakich, *Some Early Clues About How The Midterms Will Go*, FIVETHIRTYEIGHT (Jan. 5, 2022), <https://fivethirtyeight.com/features/some-early-clues-about-how-the-midterms-will-go/> (“While Biden entered the White House earlier this year on a high note (his initial net approval rating was +17 points), his approval has ticked down almost ever since. Currently, Biden’s net approval rating is -8.4 points.”); see also Juliegrace Brufke, *Political handicapper predicts 2022 red wave that hands House back to GOP*, CNN (Dec. 31, 2021), <https://nypost.com/2021/12/31/political-handicapper-predicts-2022-red-wave-that-hands-house-back-to-gop/>.

<sup>169</sup> Zeeshan Aleem, *A study shows the filibuster doesn’t actually increase debate*, MSNBC (Jan. 31, 2022) (citing Shu Fu and William G. Howell, *The Filibuster and Legislative Discussion*, UNIV. OF CHI. (Jan. 18, 2022), <https://uchicago.app.box.com/s/35gq9vc8c6erwui2iny1vt79nv9i65rp> (investigating “whether the filibuster stimulates public debate and discussion within Congress, as its advocates argue; or whether, instead, it discourages legislators from devoting time and attention to bills they know will not pass, as its critics attest”)), <https://www.msnbc.com/opinion/study-shows-filibuster-doesn-t-actually-increase-debate-n1288202>;

Many defenders of the filibuster—from both parties—have taken pride in the filibuster as an indispensable feature of a legislative body whose purported purpose is to slow the law-making process and ensure that policies are improved by consensus-building and input from the opposition. But the absence of any evidence to support that point strengthens what many critics have pointed out for years—that at least in our current era, the filibuster is really just a cudgel used to thwart the majority party.

*Id.*; see also Cicilline, *supra* note 167.

<sup>170</sup> Cicilline, *supra* note 167;

It used to be that if a senator wanted to filibuster legislation, they had to hold the Senate floor and block the vote by speaking for hours on end without food, water, or even a break to sit down. Today, just the mere mention of a filibuster is enough to stop legislation dead in its tracks.

*Id.*

<sup>171</sup> *Id.*

progress.”<sup>172</sup> If President Biden and Democrats seriously hope to deliver on their promises to the American public and in turn “protect the heart and soul’ of the country,”<sup>173</sup> the solution is clear: eliminate the filibuster, lest the Senate devolve further into “a graveyard for democracy.”<sup>174</sup>

### III. OTHER CONSIDERATIONS

#### *A. Addressing the Trans Disconnect Too Often Prevalent Within the Contemporary LGBTQIA+ Community*

To develop strategies that advance more trans-inclusive, lasting LGBTQIA+ legal protections, LGBTQIA+ advocates need to address the underlying misalignment within the broader queer community regarding trans and GNC individuals. While the movement for LGBTQIA+ equality “presents itself as a coalition of gays, lesbians, and transgender individuals, many Americans accept and approve of the former (LG), but not the latter (T).”<sup>175</sup> Further, anti-LGBTQIA+ opponents have:

[C]apitalized on this social and political disconnect in local ballot measure campaigns, convincing voters to repeal sexual orientation anti-discrimination laws by highlighting that the statutes also contain gender identity protections. Thus, there is a sufficiently large gap between the identity categories that lesbian and gay legal victories have not built support for transgender rights, and yet they are integrated enough that one can be deployed against the other.”<sup>176</sup>

Some LGBTQIA+ advocates argue for a transnormative strategy (i.e., the assimilation of trans folks into normative, binary categories), which “has clear costs, but is often a viable strategy to entrench a legal movement.”<sup>177</sup>

<sup>172</sup> *Id.*

<sup>173</sup> Rogers, *supra* note 162; Biden, *Remarks by President Biden on Protecting the Right to Vote*, *supra* note 162.

<sup>174</sup> Nancy Beck Young, *History reveals that getting rid of the filibuster is the only option*, WASH. POST (Mar. 12, 2021), <https://www.washingtonpost.com/outlook/2021/03/12/history-reveals-that-getting-rid-filibuster-is-only-option/>;

The filibuster was an unintended consequence that warped the Founders’ vision for the Senate. It has evolved into a commonplace tool used for obstructing the will of democratic majorities, ultimately heightening polarization, distrust and frustration with government. Eliminating it would not be a partisan maneuver. At some future point a Republican president and a Congress narrowly controlled by the GOP will also benefit from the elimination of the filibuster. That’s how democracy should work.

*Id.*

<sup>175</sup> George, *supra* note 51, at 503 (underscoring the challenges faced historically by transgender folks to gain acceptance in the mainstream consciousness of Americans versus the general acceptance secured by their cisgender counterparts—and the division within the LGBTQIA+ community as well).

<sup>176</sup> *Id.*; see e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>177</sup> George, *supra* note 51, at 584-585.

2022] *THE MARCH TOWARDS QUEER LIBERATION* 189

Further, this strategy is arguably “similarly situated to the gay and lesbian rights movement of the 1980s, which debated whether to pursue a politics of sameness or difference, and ultimately adopted assimilationist tactics.”<sup>178</sup> The argument—reminiscent of the proponents of the holding in *Bostock*—is that “[b]y securing rights for binary transgender people, LGBT rights groups could then build towards protections for non-binary individuals.”<sup>179</sup> Yet, “[a]t the same time, assimilationist and other strategies are not mutually exclusive,” which is underscored historically by “[t]he Civil Rights movement’s push for equality and Black Power’s call for liberty *coexist[ing]*” and is likewise seen with “Second Wave feminists simultaneously [seeking] solutions for women’s rights through formal equality, substantive equity, and radical feminist anti-subordination approaches.”<sup>180</sup> These historical examples ultimately show how “transnormativity *may be* a beneficial strategy in certain circumstances, but that LGBT rights advocates could combine it with other approaches.”<sup>181</sup> Ultimately, it is crucial that LGBTQIA+ advocates work to resolve the “disconnect between LG and T that movement opponents exploited to inflict losses at the ballot box. The success these opponents have had in repealing anti-discrimination laws demonstrates that national LGBT rights groups need to reconsider their approach with respect to transgender rights.”<sup>182</sup> In crafting more trans- and GNC-inclusive approaches to their political and legal strategies, LGBTQIA+ advocates may successfully build a united and progressive queer front—marching further toward a future of true queer liberation.

*B. The Anti-LGBTQIA+ Politics of the American Right  
Reflecting the Rise of Anti-Democratic Politics in the U.S.*

In recent decades—particularly within the past five years—there has been a clear and steady rise in anti-democratic politics. Notably, the “civil unrest we witnessed during the final days of the Donald Trump presidency, has tested the *very foundations* of our democracy in ways we never

---

<sup>178</sup> *Id.*; see also Spindelman, *supra* note 11, at 633.

For the time being, then, we continue with cisheterosexuals legally governing a basically cisheteronormative way of American life . . . [which] has thankfully yielded an opinion allowing lesbian women, gay men, and trans people access to this way of life on terms we did not set and may not fully endorse, but anyway find ourselves practically having to live.

*Id.*

<sup>179</sup> George, *supra* note 51, at 585; see also Spindelman, *supra* note 11, at 613; see generally *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

<sup>180</sup> George, *supra* note 51, at 585 (emphasis added); see also Chang & Wildman, *supra* note 44, at 45.

<sup>181</sup> George, *supra* note 51, at 585 (emphasis added); see also Chang & Wildman, *supra* note 44, at 45.

<sup>182</sup> George, *supra* note 51, at 591.

previously could have imagined . . . .”<sup>183</sup> and following President Trump’s four years of “systematically dismantling our government institutions, the executive branch Joe Biden is now tasked with leading is nearly unrecognizable from the one he left in January 2017.”<sup>184</sup>

The strategy of Republican-controlled state legislatures in proposing and enacting anti-trans legislation reflects both a disregard for serious governing and participation in a modern liberal democracy, as well as a clear shift to the basest level of “us vs. them” politics.<sup>185</sup> This explicit legislative targeting of trans Americans, and particularly the highly vulnerable population of trans youth—who face disproportionately higher rates of suicide and self-harm, and face physical and sexual abuse and violence<sup>186</sup>—is an illuminating example of this concerning shift towards anti-democratic politics.<sup>187</sup>

#### IV. PROPOSING A WAY TOWARDS QUEER LIBERATION

##### A. LGBTQIA+ Legislative Advocacy

The most effective, and therefore, potentially most substantial, avenue for LGBTQIA+ advocates to pursue in ensuring lasting legal protections for

---

<sup>183</sup> Hecht-McGowan, *supra* note 56; see STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 176-177 (2018);

President Trump exhibited clear authoritarian instincts during his first year in office . . . .” and further highlighting strategies adopted by the Trump White House exhibited in other authoritarian-minded leaders, including “capturing the referees, sidelining the key players, and rewriting the rules to tilt the playing field against opponents” concluding that “Trump attempted all three of these strategies.

*Id.*

<sup>184</sup> Hecht-McGowan, *supra* note 56; see LEVITSKY & ZIBLATT, *supra* note 183, at 7-8;

Institutions become political weapons, wielded forcefully by those who control them against those who do not. This is how elected autocrats subvert democracy—packing and ‘weaponizing’ the courts and other neutral agencies, buying off the median and the private sector (or bullying them into silence), and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy’s assassins use these very institutions of democracy—gradually, subtly, and even legally—to kill it.

*Id.*

<sup>185</sup> See JASON STANLEY, *HOW FASCISM WORKS: THE POLITICS OF US AND THEM* (2018).

<sup>186</sup> Gridley, Crouch, Evans, Eng, Antoon, Lyapustina, Schimmel-Bristow, Woodward, Dundon, Schaff, McCarty, Ahrens, & Breland, *supra* note 39 (“Delaying gender-affirming treatment, including pubertal blockers and subsequent cross-sex hormones, is correlated with further increased psychiatric comorbidity within this population.”); see generally STANLEY, *supra* note 185.

<sup>187</sup> See Loffman, *supra* note 28 (“[T]wo-thirds of Americans are against laws that would limit transgender rights. . . . That opposition includes majorities of every political ideology from liberal to conservative and every age group.”); see generally LEVITSKY & ZIBLATT, *supra* note 183, at 219 (identifying business and economic boycotts as part of a potentially “effective coalition in defense of American democracy” including in protest of anti-LGBTQIA+ laws and policies).

2022] *THE MARCH TOWARDS QUEER LIBERATION* 191

LGBTQIA+ Americans is a federal legislative solution. This avenue may be produced in legislation like the Equality Act, for example.<sup>188</sup> The argument for a legislative (i.e. passing the Equality Act) instead of a judicial remedy is that “[e]ven after *Bostock*, LGBTQ+ people need legislative action to ensure comprehensive coverage and protection under federal law.”<sup>189</sup> Although President Biden has shown to be a friendlier LGBTQIA+ ally than previous presidential administrations, the LGBTQIA+ community in the U.S. is in need of guaranteed federal legislative protections—like those that would be enshrined in the Equality Act.<sup>190</sup> Similar to the ADA’s protection of disabled Americans, if successful, the Equality Act would provide specific and lasting legal protections for a broad and inclusive swath of LGBTQIA+ Americans.<sup>191</sup> Proponents of the Equality Act argue the legislation will:

[A]ccomplish a number of important objectives, including securing *Bostock* through legislative codification; adding sex discrimination protections to the federal public accommodations law; expanding the definition of ‘public accommodations’ to provide broader coverage against all forms of discrimination (including race)” as well as ensuring that “all legislative proposals—from COVID-19 relief to criminal justice reform—must take into account the experience of the LGBTQ+ community, including the disproportionate effects on LGBTQ+ people of color.”<sup>192</sup>

*B. The Continued Pursuit of Judicial and Litigative Remedies by LGBTQIA+ Advocates and Advocacy Groups*

A judicial and litigative route seems to be a more uphill battle than a legislative solution for LGBTQIA+ advocates, requiring a systemic change to either: (1) the way in which the Judiciary branch functions; and/or (2) the appointment of judges by the Biden administration “who reflect the diversity of America and who believe in the Constitution’s promise of equal justice for all.”<sup>193</sup> While it may be possible for President Biden to accomplish—at least in part—a diversification of the federal judiciary, LGBTQIA+ advocates are unlikely to see an overhaul of the functioning of the Judicial branch.

*C. LGBTQIA+ Administrative and Executive Advocacy*

On January 20, 2021, President Biden signed the *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity*

<sup>188</sup> Equality Act, H.R. 5, 117th Cong. (as passed by House of Representatives, Feb. 25, 2021).

<sup>189</sup> Hecht-McGowan, *supra* note 56; *see e.g.*, H.R. 5; *see generally* *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731, 1737 (2020).

<sup>190</sup> Hecht-McGowan, *supra* note 56; *see e.g.*, H.R. 5; *see generally* *Bostock*, 140 S. Ct. at 1737.

<sup>191</sup> H.R. 5.

<sup>192</sup> Hecht-McGowan, *supra* note 56 (citing H.R.5); *see generally* *Bostock*, 140 S. Ct. at 1737.

<sup>193</sup> Hecht-McGowan, *supra* note 56.

or *Sexual Orientation* (“Executive Order 13988”), in which President Biden “directed agencies to implement the Supreme Court’s *Bostock* ruling, and fully enforce Title VII of the Civil Rights Act of 1964 and other laws that prohibit discrimination on the basis of gender identity or sexual orientation.”<sup>194</sup> This is a particularly drastic shift from the previous administration, with ACLU attorney Chase Strangio noting that the Biden administration seems “prepared to vigorously defend and enforce the legal protections that LGBTQ people enjoy under federal law.”<sup>195</sup> Strangio further underscores that “[e]very state considering anti-trans bills barring trans people from sports must now consider that they will face a U.S. government that is not facilitating anti-trans discrimination but actually enforcing Title IX’s protections to stop it.”<sup>196</sup>

Upon the U.S. House’s passage of the Equality Act in February 2021, President Biden urged Congress “to secure these protections once and for all” by enacting the bill into law, underscoring his support for the legislation “because no one should ever face discrimination or live in fear because of who they are or whom they love.”<sup>197</sup> LGBTQIA+ advocates may, therefore, seek to further lobby President Biden to expand *Bostock*’s applicability in federal agencies and regulations as “both reasonable and necessary to ensure consistent application and enforcement across federal agencies to apply *Bostock*’s definition of ‘sex’ to all federal statutes prohibiting sex discrimination, including Title IX (education), the Affordable Care Act, and the Fair Housing Act.”<sup>198</sup>

## CONCLUSION

The Supreme Court’s holding in *Bostock* indicates a particularized definition and interpretation of “sex” as it pertains to Title VII—specifically existing along the male-female binary—and falls short of substantial protections for GNC and a broader spectrum of queer Americans.<sup>199</sup> For LGBTQIA+ advocates seeking to ensure the *most* substantive, inclusive, and lasting legal protections, the Court in its current form may be unable or unwilling to secure such goals.<sup>200</sup> Ultimately, to ensure the kinds of adequate and lasting safeguards for the LGBTQIA+ population and to expand their

---

<sup>194</sup> Biden, *Statement by President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress*, *supra* note 16; see Biden, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, *supra* note 16.

<sup>195</sup> Strangio, *supra* note 22.

<sup>196</sup> *Id.*

<sup>197</sup> Biden, *Statement by President Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress*, *supra* note 16.

<sup>198</sup> Hecht-McGowan, *supra* note 56; see *Bostock*, 140 S. Ct. at 1741-42.

<sup>199</sup> *Bostock*, 140 S. Ct. at 1741-42.

<sup>200</sup> *Id.*; see *contra* Spindelman, *supra* note 11, at 570-71.

2022] *THE MARCH TOWARDS QUEER LIBERATION* 193

legal protections, legislative and/or executive avenues may be more effective than judicial solutions.<sup>201</sup> LGBTQIA+ advocates may rightfully identify that *Bostock* and the Court's contemporary LGBTQIA+ jurisprudence *fails* to provide the kinds of substantive and lasting legal protections for LGBTQIA+ Americans that have been afforded to other historically marginalized groups through the Civil Rights Act of 1968. Furthermore, advocates may identify the Court's narrow interpretation of sex, sexuality, and gender identity as inherently limiting.<sup>202</sup> If the goal is to build a more inclusive, substantive, and lasting legal regime that aims to protect *all* LGBTQIA+ Americans from all forms of discrimination—be it by the State or their fellow citizens—LGBTQIA+ advocates must fervently pursue these multi-faceted legal strategies and enshrine these rights into law, whether through the Court, Congress, or the White House. Until advocates achieve substantive and formal legal equality for LGBTQIA+ Americans writ large, the long march towards queer liberation continues.

---

<sup>201</sup> See *Bostock*, 140 S. Ct. at 1737; see e.g., Equality Act, H.R. 5, 117th Cong. (as passed by House of Representatives, Feb. 25, 2021).

<sup>202</sup> See Spindelman, *supra* note 11, at 634 (“The complex identifications of the Supreme Court’s *Bostock* opinion may yet be a sign that other complex social identities and ways of living—of being in the world—may someday find more of a home in the law than they now receive.”); see also *Bostock*, 140 S. Ct. at 1741-42.