Harris Funeral Homes: A Proposed Tool for Claiming Trans Rights that is Dead on Arrival

JOE SULLIVAN*

In June 2020, the Supreme Court extended protections under Title VII of the Civil Rights Act to LGBTQ Americans in Bostock v. Clayton County, Georgia. *This historic decision presents the LGBTQ community with the opportunity to claim rights under a wide range of laws. This Note will consider implications of the Supreme Court's recent ruling in* Bostock *on future challenges to transgender health care discrimination by employers. Defining "sex" as including "sexual orientation" has the potential to make great progress towards ending trans health care discrimination. The Religious Freedom Restoration Act (RFRA), however, stands in the way as a formidable obstacle. RFRA allows corporations to engage in conduct that would otherwise be unlawful, if those laws conflict with their religious beliefs. Unless those laws further a compelling state interest in the least restrictive manner, RFRA provides a loophole. Closely held religious corporations are still able to employ a RFRA-based defense against Title VII claims, narrowing the scope of Title VII rights.*

In Part I, this Note provides a background of the current state of trans health care coverage denial in the United States and notes the inherent conflicts between RFRA and Title VII. In Part II, it provides an explanation of the three cases which were consolidated by the Court in Bostock. *Part III then analyzes* Bostock*'s majority opinion and Justice Alito's dissent to highlight the uncertainty left in the wake of* Bostock. *Next, Part IV examines scholars' optimism that* Harris Funeral Homes *is a guide for claiming future LGBTQ rights. Finally, Part V argues instead that* Harris Funeral Homes *is a weak tool to use for future litigation, concluding that a legislative solution can best secure trans health care rights.*

---

* Notes Editor, Colum. J.L. & Soc. Probs., 2021–2022. J.D. 2022, Columbia Law School; A.B. 2019, New York University. The author is grateful to the staff of the *Columbia Journal of Law & Social Problems* for many readthroughs, edits, and comments. The author would also like to thank friends and family for their moral support and encouragement throughout the writing process.

INTRODUCTION

James Washburn stared at his phone and "watch[ed] the light at the end of the tunnel flicker out."[1] At 21 years old, James was a dependent on his mother's employer's self-funded health plan, meaning that he relied on his mother's policy to provide him health care coverage.[2] James had been saving for three years to afford top surgery,[3] but when he finally requested preauthorization for the procedure, his insurance denied the request because "gender transition-related costs of any kind [were] not covered" under the plan.[4] Because his insurance was a self-funded plan, the employer could choose which services would be covered under James' health insurance policy.[5] The policy excluded James' top surgery under a provision that stipulated the insurance would not cover "sexual transformation," a "term for gender-affirming services including therapy, hormone replacement, and all related surgeries."[6] James would thus have to pay $11,000 out of pocket to undergo his surgery.[7]

Unfortunately, James' "uniquely American nightmare"[8] is not an uncommon experience.[9] Across the country, systematic

---

1. James Washburn, *Healthcare Loophole Allows Employers to Deny Coverage to Transgender People in Spite of State Laws*, GLAAD: AMP (Sept. 5, 2019), https://www.glaad.org/amp/erisa-healthcare-loophole [https://perma.cc/48T6-SCNP].

2. *Id.*

3. Top surgery is a procedure by which breast tissue is removed for transgender men. *Top Surgery for Transgender Men*, MAYO CLINIC (Sept. 27, 2019), https://www.mayoclinic.org/tests-procedures/top-surgery-for-transgender-men/about/pac-20469462# [https://perma.cc/673C-PCTF]. Top surgery is used to treat gender dysphoria, and transgender men transition to their self-affirmed gender. *Id.*

4. Washburn, *supra* note 1.

5. *Id.*; *see also* CHRISTINE EIBNER ET AL., EMPLOYER SELF-INSURANCE DECISIONS AND THE IMPLICATIONS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT AS MODIFIED BY THE HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010 (ACA) 9 (2011) ("Some self-insured employers acknowledged that they did not cover certain benefits mandated in fully insured plans but remarked that their self-funded plans were no less generous overall; rather, they chose more-generous benefits in other areas that best met the needs of their particular employee populations.").

6. Washburn, *supra* note 1.

7. *Id.*

8. *Id.*

9. *See, e.g.*, Lisa L. Gill, *Transgender People Face Huge Barriers to Healthcare*, CONSUMER REPORTS (Nov. 20, 2020), https://www.consumerreports.org/healthcare/transgender-people-face-huge-barriers-to-healthcare/ [https://perma.cc/4EJ3-EUAQ] ("When Jami Claire, 62, learned that her health insurance from her employer would not cover her medical transition, including hormone replacement therapy, she went into a deep depression and attempted suicide on three occasions."); Graham Kates, *Transgender Advocates on the "Unspeakable Cruelty" of Federal Rule Erasing Health Care Protections*,

barriers such as inadequate insurance coverage make it incredibly challenging for transgender people to obtain transition-related health care under their insurance policies.[10] The National Center for Transgender Equality (NCTE) reported in their 2015 survey of more than 27,000 trans[11] adults[12] that more than half (55%) of respondents who submitted claims for transition-related surgery had coverage denied in the past year.[13] Among those surveyed who had health insurance policies, more than half had policies provided by their employers (53%).[14] Other studies have found that around

---

CBS NEWS (June 17, 2020), https://www.cbsnews.com/news/transgender-advocates-health-care-protections-removal/ [https://perma.cc/P3M7-9XNH] ("It was the three months spent day after day after day on the phone, hours on hold each time, trying to get across to people, supervisors, to tell them, this is medically necessary . . ."); Kristin Lam, *Some Americans Are Denied 'Lifesaving' Health Care Because They Are Transgender*, USA TODAY (Dec. 11, 2018), https://www.usatoday.com/story/news/2018/12/11/transgender-health-care-patients-advocates-call-improvements/1829307002/ [https://perma.cc/H9NW-6J37] ("Grayson Russo desperately needs a surgery similar to a double mastectomy. Although someone with a breast tumor is able to promptly schedule such a surgery, Russo fought more than three years simply for approval."); Keren Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NPR (Mar. 12, 2019), https://www.npr.org/sections/health-shots/2019/03/12/701510605/fresh-challenges-to-state-exclusions-on-transgender-health-coverage [https://perma.cc/X7SJ-CVLM] ("[S]he learned late last fall that the county's employee health insurance plan wouldn't cover any of her transition-related surgery.").

10. *See* SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY103 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/NE8Z-DW7E] ("When examining the responses of all respondents, 91% reported that they had wanted counseling, hormones, and/or puberty blockers for their gender identity or gender transition at some point, but only 65% reported ever having any of them.").

11. This Note uses the terms "trans" and "transgender" interchangeably to describe "people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth." *Glossary of Terms: Transgender*, GLAAD, https://www.glaad.org/reference/trans-terms [https://perma.cc/4T5Z-XXMB] (last visited Mar. 2, 2022). "Trans" is viewed as being more inclusive of the identities that fall under the umbrella category of transgender. *Id.*; *see also* CAMPUS PRIDE: LAMBDA 10 PROJECT, *The Trans Umbrella*, CAMPUS PRIDE (2007), http://www.campuspride.org/wp-content/uploads/TransUmbrella.pdf [https://perma.cc/URK3-KEL2] (including transgender, transsexual, and gender variant/queer persons, as well as those born with intersex conditions, crossdressers, and drag performers under the umbrella term "transgender"); *Definitions*, TRANS STUDENT EDUCATIONAL RESOURCES, https://transstudent.org/about/definitions/ [https://perma.cc/G3PM-U2EU] (last visited Mar. 2, 2022) (defining transgender/trans as "[a]n umbrella term for people whose gender identity differs from the sex they were assigned at birth").

12. JAMES ET AL., *supra* note 10 at 4.

13. *Id.* at 95 tbl.7.2.

14. *Id.* at 94 (Beyond the 53% with employer-sponsored insurance plans, "[f]ourteen percent (14%) of respondents had individual insurance plans that they or someone else purchased directly from an insurance company, through healthcare.gov, or from a health insurance marketplace . . . 13% were insured through Medicaid," 5% through Medicare, 4% through TRICARE, military, or Veterans Affairs plans, less than 1% through the Indian Health Service, and 6% through another type of insurance.).

10% of self-funded employer health insurance plans categorically exclude gender-affirming health procedures, in addition to other plans in which they found "extensive variation in clarity, coverage specifications, and types of exclusions."[15] In short, many trans Americans are in insurance situations similar to James, and thus may find themselves in the same nightmare: unable to receive necessary health care because their insurance policies will not cover the procedures.

Two common misconceptions minimize the priority of transgender health care in America: first, that the community is insignificantly small;[16] and, second, that trans-specific health care is largely cosmetic.[17] While researchers have struggled to accurately estimate the size of the trans population in America,[18] the most recent estimates put the number at about 1.5 million.[19]

---

15. Anna Kirkland et al., *Transition Coverage and Clarity in Self-Insured Corporate Health Insurance Benefit Plans*, 6 TRANSGENDER HEALTH 207 (2021).

16. *See, e.g.*, Zack Ford, *The American Transgender Population Is Larger Than We Thought It Was*, THINKPROGRESS (June 30, 2016), https://archive.thinkprogress.org/the-american-transgender-population-is-larger-than-we-thought-it-was-ab83126f33a/ [https://perma.cc/4T7T-QEEJ] ("Conservatives have bemoaned accommodating the transgender community with nondiscrimination protections and access to bathrooms because it is so small."); Emma Margolin, *Why the 'Tiny, Tiny' Transgender Population Should Matter to Donald Trump*, MSNBC (May 13, 2016), https://www.msnbc.com/msnbc/why-the-tiny-tiny-transgender-population-should-matter-donald-trump-msna849046 [https://perma.cc/P8BM-FXK9] ("Trump said in his 'TODAY' interview that 'everybody has to be protected,' but then undercut that argument by suggesting the transgender population is too small to require protection.").

17. *See, e.g.*, Landman, *supra* note 9 ("As the medical community has shifted from viewing gender-affirming care as cosmetic to understanding it as medically necessary, many insurers, including Medicare and many Medicaid programs, have likewise shifted to covering both surgical and nonsurgical trans-related health care."); Arielle Rebekah, *Transgender Healthcare Is Not Cosmetic. Employers, It's Time to Offer Comprehensive Care*, TRANS & CAFFEINATED, https://transandcaffeinated.com/transgender-healthcare-not-cosmetic/ [https://perma.cc/BAB5-3DNA] (last visited Mar. 2, 2022) ("[M]any insurance companies *continue* to refuse medical coverage by asserting that 'cosmetic procedures are not medically necessary.'") (emphasis in original).

18. *See, e.g.*, Claire Cain Miller, *The Search for the Best Estimate of the Transgender Population*, N.Y. TIMES (June 8, 2015), https://www.nytimes.com/2015/06/09/upshot/the-search-for-the-best-estimate-of-the-transgender-population.html [https://perma.cc/L54R-6UWQ] ("The main reason is that the United States Census Bureau and other keepers of official records do not ask about gender identity. Also, gender identity can be fluid and hard to define in a multiple-choice list."); Mona Chalabi, *Why We Don't Know the Size of the Transgender Population*, FIVETHIRTYEIGHT (July 29, 2014), https://fivethirtyeight.com/features/why-we-dont-know-the-size-of-the-transgender-population/ ("[Unreliable estimates are] partly because there is disagreement about what it means to be transgender, and because of some people's reluctance to identify themselves that way.").

19. Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx [https://perma.cc/NZ3C-SLPG] (finding that 0.6% of American adults identify as transgender); Stella U. Ogunwole et al., *Population Under Age 18 Declined Last Decade*,

The number of trans Americans potentially impacted by health care coverage denial for transition-related care is thus not insignificant.[20] Further, medical procedures related to gender transition[21] have been deemed medically necessary by a number of prominent organizations, including the American Psychological Association[22] and the American Medical Association.[23] Yet even with these esteemed organizations insisting on the medical necessity of such procedures, many employers continue to exclude them from their employees' health insurance policies.[24]

U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html [https://perma.cc/HP6Z-QYHV] (The 2020 U.S. Census recorded 258.3 million U.S. adults. 0.6% of 258.3 million is about 1.55 million.); ANDREW R. FLORES ET AL., THE WILLIAMS INSTITUTE, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf [https://perma.cc/E7VB-GKEG] ("We find that 0.6% of U.S. adults identify as transgender."); Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/health/transgender-population.html [https://perma.cc/ELM2-SJKB].

20. *See* Hoffman, *supra* note 19 ("'[T]hat's a lot more than they thought,' Ms. Keisling said. 'That helps us to say, Don't use us politically—you have to do something right by us. There are a lot of us living in your state.'") (cleaned up). Pew Research reported that there may be at least 4.1 million closely held corporations in existence as of 2011. Drew DeSilver, *What is a 'Closely Held Corporation,' Anyway, and How Many are There?*, PEW RSCH. (July 7, 2014), https://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/ [https://perma.cc/2ZLA-S8Q5].

21. Gender-affirming care may include medical "procedures that help align one's body with their gender identity." Jae A. Puckett et al., *Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 SEXUALITY RSCH. & SOC. POL'Y 48, 48-49 (2017). Trans-feminine (male to female) surgeries include breast augmentation, facial feminization surgery, orchiectomy, vaginoplasty, and voice feminization. *Trans-feminine (Male to Female) Surgeries*, MOUNT SINAI CTR. FOR TRANSGENDER MED. & SURGERY, https://www.mountsinai.org/locations/center-transgender-medicine-surgery/care/surgery/male-to-female [https://perma.cc/BN75-AWZM] (last visited Mar. 2, 2022). Trans-masculine (female to male) surgeries include chest masculinization, metoidioplasty, phalloplasty, and hysterectomy. *Trans-masculine (Female to Male) Surgeries*, MOUNT SINAI CTR. FOR TRANSGENDER MED. & SURGERY, https://www.mountsinai.org/locations/center-transgender-medicine-surgery/care/surgery/female-to-male [https://perma.cc/E2AP-VP2U] (last visited Mar. 2, 2022). Additionally, both trans-masculine and trans-feminine patients often seek hormone therapy. Cécile A. Unger, *Hormone Therapy for Transgender Patients*, 5 TRANSLATIONAL ANDROLOGY & UROLOGY 877, 877 (2016).

22. B.S. Anton, *Proceedings of the American Psychological Association for the Legislative Year 2008: Minutes of the Annual Meeting of the Council of Representatives*, 64 AM. PSYCHOLOGIST 372, 397–99, https://www.apa.org/about/policy/transgender.pdf [https://perma.cc/ZNZ8-XRC2].

23. AM. MED. ASS'N, *H-185.927: Clarification of Medical Necessity for Treatment of Gender Dysphoria* (2021), https://policysearch.ama-assn.org/policyfinder/detail/gender%20dysphoria?uri=%2FAMADoc%2FHOD-185.927.xml [https://perma.cc/6KVM-Y42G].

24. *See, e.g.*, Gill, *supra* note 9; Landman, *supra* note 9.

How do employers justify this apparent discrimination? Religious employers and closely held corporations[25] have claimed that providing trans health care coverage burdens their free exercise of religion, which is protected by the Religious Freedom Restoration Act (RFRA).[26] This strategy has been roundly successful.[27] But the 2018 Sixth Circuit decision *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*[28]—affirmed by the Supreme Court in a three-case consolidation as *Bostock v. Clayton County, Georgia*[29]—created a potential weak spot in RFRA defenses.

In *Harris Funeral Homes*, a transgender employee sued her employer under Title VII for unlawful termination.[30] As a defense, her employer claimed that employing the plaintiff as a transgender woman infringed upon the corporation's religious liberty in violation of RFRA.[31] The Sixth Circuit found for the plaintiff-employee, holding that the defendant-employer engaged in unlawful discrimination by terminating the plaintiff.[32] Further, it held that RFRA did not provide a defense to Title VII in this case because "[enforcement of] Title VII [was] the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against [the plaintiff]."[33]

Then, the Supreme Court granted certiorari and consolidated *Harris Funeral Homes* with two other cases.[34] The consolidated cases became known as *Bostock*, and were decided on June 15, 2020.[35] In *Bostock*, the Court ruled that Title VII of the Civil

25. The Internal Revenue Service defines a closely held corporation as a corporation that "is not a personal service corporation," and "[a]t any time during the last half of the tax year, more than 50% of the value of its outstanding stock is, directly or indirectly, owned by or for five or fewer individuals." I.R.S., PUB. 542 CORPORATIONS 3 (Jan. 2022).

26. Since *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), religious employers and closely held corporations have been considered persons under RFRA to protect their exercise of religion. *Id.* at 719; *see also* Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113 (D.N.D. 2021); *see also* Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

27. *Religious Sisters*, 513 F. Supp. 3d at 1153; *Franciscan Alliance*, 227 F. Supp. 3d at 691–93.

28. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

29. Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020).

30. *Harris Funeral Homes, Inc.*, 884 F.3d at 566–67.

31. *Id.* at 567.

32. *Id.*

33. *Id.*; *see also* discussion of *Harris Funeral Homes*, *infra* Part II.

34. *See* Bostock v. Clayton County, Georgia, 139 S. Ct. 1599 (Apr. 22, 2019) (mem.) (granting cert. and consolidating cases); *Bostock*, 140 S. Ct. at 1738 (2020).

35. *See Bostock*, 140 S. Ct. 1731 (2020).

Rights Act of 1964[36] included sexual orientation and gender identity under its definition of "because of sex."[37] The media also hailed the decision as a landmark moment for LGBTQ[38] rights,[39] even as Justice Alito warned in dissent of an incoming deluge of litigation as a result of the decision.[40]

Transgender health care was one area of future litigation Justice Alito noted in his dissent.[41] He predicted that the religious liberty of certain employers may conflict with requiring coverage of gender-affirming health care.[42] Naturally, this conflict puts RFRA and Title VII at odds with each other.[43] Advocates and scholars, however, have identified *Harris Funeral Homes* as the lodestar to guide them through this litigation.[44]

While *Harris Funeral Homes*, and its reliance on the *Price Waterhouse* framework,[45] shows one path for transgender employees to successfully defeat employers' RFRA-based defenses against their Title VII claims, the case is not a panacea, and future litigants should not rely on it as a silver bullet. Because the Supreme Court did not take up the Sixth Circuit's ruling on RFRA's interaction with Title VII, RFRA still stands in the way as a potential obstacle.[46] RFRA—a super-statute that gives a cause of action or legal defense to actors whose religious freedom is substantially burdened by the government—may still provide a viable defense to employers in future litigation.[47] Moreover, some

---

36. 42 U.S.C. §§ 2000e–2000e-17.

37. *Bostock*, 140 S. Ct. at 1743.

38. This Note uses the acronym LGBTQ to describe people who identify as lesbian, gay, bisexual, transgender, and queer. The term "LGBTQ community" is used to describe these people as a group, and "LGBTQ rights" refer to rights specific to that community. *Cf. Glossary of Terms: Lesbian / Gay / Bisexual / Queer*, GLAAD, https://www.glaad.org/reference/lgbtq [https://perma.cc/3NUN-CQLN] (last visited Mar. 2, 2022).

39. *See, e.g.*, Samantha Schmidt, *Fired after Joining Gay Softball League, Gerald Bostock Wins Landmark Supreme Court Case*, WASH. POST (June 15, 2020), https://www.washingtonpost.com/dc-md-va/2020/06/15/fired-after-joining-gay-softball-league-gerald-bostock-wins-landmark-supreme-court-case/ [https://perma.cc/X73D-GV9L].

40. *See generally Bostock*, 140 S. Ct. at 1778–84 (2020) (Alito, J., dissenting).

41. *Id.* at 1781–82.

42. *Id.*

43. *See* Part I, *infra*.

44. *See* Part IV, *infra*.

45. *See* discussion of the *Price Waterhouse* framework within discussion of *Harris Funeral Homes* in Part II, *infra*.

46. *See Bostock*, 140 S. Ct. 1731, 1754 (2020); *see also* discussion of RFRA as a viable obstacle in Part IV, *infra*.

47. 42 U.S.C. § 2000bb(b)(2); *Bostock*, 140 S. Ct. at 1754; *see also* Michael S. Paulsen, *A RFRA Runs through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995).

of the language in the Sixth Circuit's opinion seems to signal a limit to the case's utility for litigants claiming more substantive rights.[48]

The fight for transgender Americans' access to gender-affirming health care could not come at a more precarious time. Having nominated three justices to the Supreme Court,[49] President Trump effectively created a 6–3 conservative super-majority on the Court.[50] Pro-LGBTQ activists and legal experts have issued statements of concern about the threat that a conservative Court poses to LGBTQ rights.[51] Presented with the problem of how to claim and secure LGBTQ rights with a hostile judiciary, some see *Harris Funeral Homes* as an avenue for claiming future rights for transgender claimants.[52]

---

48. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 589 (6th Cir. 2018) ("[A]s a matter of law, bare compliance with Title VII—without actually assisting or facilitating Stephens' transition efforts—does not amount to an endorsement of Stephens' views.").

49. Anita Kumar, *Trump's Legacy is Now the Supreme Court*, POLITICO (Sept. 26, 2020), https://www.politico.com/news/2020/09/26/trump-legacy-supreme-court-422058 [https://perma.cc/49LX-HUV4].

50. Joan Biskupic, *The Supreme Court Hasn't Been this Conservative Since the 1930s*, CNN (Sept. 26, 2020) https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html [https://perma.cc/M5TA-GMB4]; Joan Biskupic, *Supreme Court's Liberals Face a New Era of Conservative Dominance*, CNN (Dec. 3, 2020) https://www.cnn.com/2020/12/03/politics/supreme-court-breyer-sotomayor-kagan/index.html [https://perma.cc/NZP9-L7ZV]; Amelia Thomson-Deveaux & Laura Bronner, *How a Conservative 6–3 Majority Would Reshape the Supreme Court*, FIVETHIRTYEIGHT (Sept. 28, 2020) https://fivethirtyeight.com/features/how-a-conservative-6-3-majority-would-reshape-the-supreme-court/.

51. *See, e.g.*, Lucas Acosta, *Amy Coney Barrett is an Absolute Threat to LGBTQ Rights*, HUMAN RTS. CAMPAIGN (Sept. 22, 2020), https://www.hrc.org/news/amy-coney-barrett-is-an-absolute-threat-to-lgbtq-rights [https://perma.cc/X4M2-KWMQ]; Kathryn Menefee, *Amy Coney Barrett Threatens the Rights of LGBTQ+ People*, NAT'L WOMEN'S L. CTR. (Oct. 13, 2020), https://nwlc.org/blog/amy-coney-barrett-threatens-the-rights-of-lgbtq-people/ [https://perma.cc/4C85-S5MC] ("Trump and Senate leadership are threatening to permanently weaken what has historically been an important venue for achieving LGBTQ+ rights: the U.S. Supreme Court."); Kate Sosin, *A More Conservative Supreme Court Could Bring Drastic Changes for LGBTQ+ Americans*, 19TH NEWS (Sept. 25, 2020), https://19thnews.org/2020/09/conservative-supreme-court-lgbtq-americans/ [https://perma.cc/BHH7-NZM5]; *Transgender Legal Defense & Education Fund Opposes Amy Coney Barrett's Confirmation to the United States Supreme Court*, TRANSGENDER L. DEF. & EDUC. FUND (Oct. 12, 2020), https://transgenderlegal.org/stay-informed/transgender-legal-defense-education-fund-opposes-amy-coney-barretts-confirmation-to-the-united-states-supreme-court/ [https://perma.cc/QWE9-P3WZ].

52. *See, e.g.*, *Twenty-First Annual Review of Gender and the Law: Employment Discrimination Against LGBT Persons*, 21 GEO. J. GENDER & L. 299 (William Besl et al., eds.) (2020); Anthony Saccocio, Case Comment, *Civil Rights — Discrimination by Reason of Sexual Orientation of Identity: The Sixth Circuit Determines that Transgender and Transitioning Status are Protected Classes under Title VII*, 94 N.D. L. REV. 239 (2019).

Future litigation surrounding the scope of Title VII is likely to run headfirst into RFRA as an obstacle. In addition to a litigation strategy, advocates should also pursue a legislative solution to overcome RFRA-based defenses in court. The House of Representatives passed one such solution, the Equality Act, on February 25, 2021.[53] The Equality Act bans discrimination based on sexual orientation and gender identity by amending the 1964 Civil Rights Act to explicitly include those categories.[54] Moreover, the Act goes further, and effectively invalidates RFRA when applied to LGBTQ persons alleging Title VII violations.[55]

The Equality Act is ambitious, however, and because of its expansive scope, its passage seems politically unlikely.[56] While its passage would clearly limit the application and scope of RFRA, doing so in smaller, incremental pieces may be more viable. A piecemeal approach would allow the political debate surrounding smaller pieces of legislation to be more focused than a debate around an omnibus bill. It would also allow political advocates to prioritize issues that have broad appeal for passage into law, making an easier case for each successive piece of legislation.

Health care has been internationally recognized as a human right,[57] and may be the most effective area to start chipping away at RFRA's power. Some states have already begun to expand

53. Felicia Sonmez & Samantha Schmidt, *House Votes to Pass Equality Act, Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*, WASH. POST (Feb. 25, 2021), https://www.washingtonpost.com/powerpost/congress-sexual-orientation-civil-rights-gender/2021/02/25/1351bea4-7779-11eb-8115-9ad5e9c02117_story.html [https://perma.cc/C4Y8-JWCG].

54. H.R. 5, 117th Cong. (2021).

55. *Id.* at § 1107.

56. *Prospects Dim for Passage of LGBTQ Rights Bill in Senate*, NBC NEWS (May 10, 2021) https://www.nbcnews.com/nbc-out/out-news/prospects-dim-passage-lgbtq-rights-bill-senate-rcna879 [https://perma.cc/72W7-GDA5]; Mike DeBonis, *The Push for LGBTQ Rights Stalls in the Senate as Advocates Search for Republican Support*, WASH. POST (June 20, 2021) https://www.washingtonpost.com/politics/senate-lgbtq-equality-act/2021/06/19/887a4134-d038-11eb-a7f1-52b8870bef7c_story.html [https://perma.cc/MAS9-E279]. Recent debates concerning trans rights have erupted into a "culture war" that has brought about a "sharp increase in brazen anti-LGBTQ rhetoric on the right." Eric Lutz, *"Children As Collateral Damage": GOP's Latest Culture War Targets Trans Kids*, VANITY FAIR (Apr. 8, 2022) https://www.vanityfair.com/news/2022/04/alabama-anti-trans-bill [https://perma.cc/C4XN-BU3E]. GOP lawmakers use these "manufactured moral panics" to rally political support behind bills that deny rights to transgender Americans. *Id.*

57. *See, e.g.*, G.A. Res. 2200A (XXI) International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); Economic and Social Council Gen. Cmt. No. 14, E/C.12/2000/4, (Aug. 11, 2000) ("The right to health contains both freedoms and entitlements . . . [which] include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

access to health care for transgender people. In 2021, for example, Colorado became the first state to recognize gender-affirming health care as an essential health benefit,[58] that is, a health procedure or service that must be covered by health insurers. By arguing that private employers deny their employees basic human rights when they exclude essential health benefits for transgender employees, advocates may compel legislatures to pass narrow statutes that nullify RFRA defenses as applied to issues of health care discrimination.

Passing a narrower statute would still allow future litigants to rest their case on the clear intent and statement of Congress. Therefore, a legislative solution provides a much more solid foundation for future transgender litigants claiming health care rights than does reliance on *Harris Funeral Homes*, a decision with ample room for a conservative Supreme Court to continue to deny transgender individuals certain rights.

Part I provides an overview of RFRA, Title VII of the 1964 Civil Rights Act, and the inherent conflict that exists between the two pieces of legislation. Part II then surveys the three cases that would later be consolidated by the Supreme Court in *Bostock*. Following this examination of the Circuit Courts' opinions, Part III summarizes the Supreme Court's decision in *Bostock v. Clayton County, Georgia*, noting the opportunities and obstacles for access to transgender health care implicated by the Court's decision. Next, Part IV reviews the scholarship produced in response to the Sixth Circuit's decision in *Harris Funeral Homes* and explains why scholars' confidence in the case as a roadmap for LGBTQ rights is ill-placed. Finally, Part V advocates for a narrowly written statute as both a better solution for securing transgender rights to non-discriminatory health care and the first step of a comprehensive strategy to end RFRA protections for religious corporations that claim religious-based exemptions to discriminate against LGBTQ employees.

58. Dan Diamond, *Biden Signs Off on Colorado's Expansion of Transgender-Related Health Coverage*, WASH. POST (Oct. 12, 2021) https://www.washingtonpost.com/health/2021/10/12/colorado-transgender-health-coverage-biden/ [https://perma.cc/NKJ7-LNQ6].

I. RFRA VS. TITLE VII

As Justice Gorsuch stated in the majority opinion and Justice Alito argued in his dissent in *Bostock*, granting Title VII protections to LGBTQ Americans puts the statute directly at odds with RFRA,[59] which Congress enacted to give a cause of action or legal defense to actors whose religious exercise is substantially burdened by the government.[60] This Part looks at both laws and details some of the cases that have come from the conflict of the two statutes. These two statutes are particularly important because their conflict was central to *Harris Funeral Homes*.

As argued by the employer in *Harris Funeral Homes*, a closely held religious corporation may view employment of an LGBTQ individual as a substantial burden to that corporation's practice of its religion.[61] In that case, the defendant-employer fired the plaintiff-employee, Aimee Stephens, because she began presenting herself differently than the sex she was assigned at birth.[62] The employer argued that "requiring [the employer] to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon [the employer's] sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act."[63] Ultimately, the Sixth Circuit found that the employer's beliefs were not substantially burdened, precluding its defense under RFRA.[64] In other cases, however, employers have successfully raised RFRA-based defenses to avoid compliance with federal regulations.[65]

In *A RFRA Runs through It: Religious Freedom and the U.S. Code*, Michael Stokes Paulsen argues that RFRA is a super-statute,[66] a status endorsed by Justice Gorsuch in *Bostock*.[67] As a super-statute, RFRA constrains the reach of all federal laws (unless they include an explicit exemption provision)[68] to ensure

---

59. *See* Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1754 (2020); *id.* at 1780 (Alito, J., dissenting).

60. 42 U.S.C. § 2000bb(b)(2).

61. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 585 (6th Cir. 2018).

62. *Id.* at 566.

63. *Id.* at 567.

64. *Id.* at 585–86; *see also* discussion of *Harris Funeral Homes* in Part II, *infra*.

65. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

66. Paulsen, *supra* note 47 at 253.

67. Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1754 (2020).

68. Paulsen, *supra* note 47 at 253; 42 U.S.C. § 2000bb-3(b).

they do not "substantially burden a person's exercise of religion."[69] By codifying strict scrutiny for religious liberty claimants and defendants,[70] Paulsen writes that RFRA is an "explicit textual command" to courts to apply that standard of review when resolving such disputes.[71] Title VII is one such federal law subject to modification by RFRA.[72]

Title VII makes it unlawful for an employer to discriminate against an employee on the basis of that employee's sex, among other protected traits.[73] As subject to RFRA, however, there are some cases in which Title VII–prohibited discrimination is allowed because, were it not, the religious corporation would be substantially burdened in exercising its religion.[74] Still, a corporation may be subject to the statute or regulation at issue if compliance with it is the government's least restrictive means of achieving its compelling state interest.[75]

RFRA and Title VII frequently conflict in the employment context. For example, in *Hankins v. New York Annual Conference of the United Methodist Church*,[76] the United Methodist Church forced a clergy member to retire at the age of seventy pursuant to an internal policy of the church.[77] The clergy member sued, alleging age discrimination, and the court examined whether RFRA protected the clergy member's employer from this Title VII claim.[78] Finding that interference by courts would burden the

69. 42 U.S.C. § 2000bb-1(a).

70. *Id.* at § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

71. Paulsen, *supra* note 47 at 251; *see, e.g.*, Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health and Human Services, 818 F.3d 1122, 1147 (11th Cir. 2016) ("RFRA requires strict scrutiny only when the government 'substantially burden[s] a person's exercise of religion.'") (quoting 42 U.S.C. § 2000bb-1(a)).

72. 42 U.S.C. §§ 2000e–2000e-17; *see* Paulsen, *supra* note 47 at 253 ("If Congress had power to pass a statute to begin with, Congress has power to modify it by enacting RFRA."); *see also, e.g.*, Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113 (D.N.D. 2021); Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 585 (6th Cir. 2018); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

73. 42 U.S.C. § 2000e-2(a)(1); *see, e.g.*, Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1737 (2020).

74. *See* discussion of *Burwell*, *infra* Part I.

75. *See* discussion of *Harris Funeral Homes*, *infra* Part II.

76. 516 F. Supp. 2d 225 (E.D.N.Y. 2007).

77. *Id.* at 226.

78. *Id.* at 235.

Church's right to select their own clergy, the court held that RFRA barred the plaintiff's age discrimination claim.[79]

Because RFRA applies "to all Federal law, and the implementation of that law, whether statutory or otherwise,"[80] it also can be raised as a defense to any alleged discrimination under Title VII. No matter the type of discrimination claimed, RFRA "mandates strict scrutiny of any federal law that substantially burdens the exercise of religion, even if the burden is incidental to the application of a religion-neutral rule."[81]

Commentators have long documented the conflicts between RFRA and Title VII,[82] noting that disputes between employers and employees over religion in the workplace have become increasingly commonplace.[83] Marilyn Gabriela Robb argues that RFRA offers religious business owners a convenient route to evade Title VII compliance and discriminate against employees in the name of religion.[84] This tactic sets up a tension between the employees' imminent Title VII claims and the employers' RFRA justification.[85] The tension between the two statutes is inherent: bringing people together in the workplace seems to invariably run the risk of either burdening someone's religious exercise or permitting discrimination against another.

In the Supreme Court, this conflict was brought to national attention in the 2014 decision of *Burwell v. Hobby Lobby Stores, Inc.*[86] In that case, Hobby Lobby, a closely held religious corporation, sued the Secretary of Health and Human Services, claiming that an HHS regulation promulgated under the Affordable Care Act, which mandated the corporation provide contraceptive coverage to its employees (or else pay a fine),

79. *Id.* at 236–38.

80. 42 U.S.C. § 2000bb-3.

81. Guidance Regarding Dep't of Labor Grants, 86 Fed. Reg. 4,126, 4,128 (Jan. 15, 2021).

82. *See, e.g.*, Sidney A. Rosenzweig, *Restoring Religious Freedom to the Workplace: Title VII, RFRA, and Religious Accommodation*, 144 U. PA. L. REV. 2513 (1996); Amanda Brennan, Comment, *Playing Outside the Joints: Where the Religious Freedom Restoration Act Meets Title VII*, 68 AM. U. L. REV. 569 (Dec. 2018); Hanna Martin, *Race, Religion, and RFRA: The Implications of Burwell v. Hobby Lobby Stores, Inc. in Employment Discrimination*, 2016 CARDOZO L. REV. DE NOVO 1 (2016); Marilyn Gabriela Robb, *Pluralism at Work: Rethinking the Relationship between Religious Liberty and LGBTQ Rights in the Workplace*, 54 HARV. C.R.-C.L. L. REV. 917 (2019).

83. Rosenzweig, *supra* note 82 at 2513.

84. Robb, *supra* note 82 at 918–19.

85. *Id.*

86. 573 U.S. 682 (2014).

substantially burdened its religious exercise.[87] The Court first held that, although the text of RFRA states that it applies to "persons,"[88] closely held, for-profit corporations are "persons" within the meaning of the RFRA statutory text.[89]

Next, the Court applied RFRA's religion-friendly standard of review, looking for a compelling government interest furthered by the contraceptive mandate, and whether that mandate was the least restrictive means to accomplish the government's interest.[90] The Court found that mandating coverage of contraceptives substantially burdened the corporation's exercise of religion because funding contraceptive methods for their employees violated their religious beliefs.[91] Next, the Court found that the government stated a compelling government interest in "guaranteeing cost-free access to . . . contraceptive methods."[92]

Because the government had a compelling interest that burdened the corporation's exercise of religion, RFRA required that the government show that its method of furthering that interest was the least-restrictive method of doing so.[93] In this case, the Court found that the contraceptive coverage mandate was not the least-restrictive means of furthering that interest.[94]

Following *Hobby Lobby* and the Court's support of RFRA's applicability to closely held, for-profit religious corporations, a case like *Harris Funeral Homes* seemed inevitable. Nearly four-in-ten people who self-identify as religious believe that homosexuality should be discouraged,[95] and more than six-in-ten Christians believe that sex is determined at birth.[96] With an estimated 1.5

87. *Id.* at 688, 696–97.
88. 42 U.S.C. § 2000bb-1(a).
89. *Burwell*, 573 U.S. at 708–09.
90. *Id.* at 719; 42 U.S.C. § 2000bb-1.
91. *Burwell*, 573 U.S. at 726.
92. *Id.* at 727.
93. 42 U.S.C. 2000bb-1(b); *id.* at 728.
94. *Burwell*, 573 U.S. at 730.
95. Benjamin Wormald, *U.S. Public Becoming Less Religious*, PEW RSCH. CTR. (Nov. 3, 2015) https://www.pewresearch.org/religion/2015/11/03/u-s-public-becoming-less-religious/ [https://perma.cc/N9Q3-PXL8].
96. Gregory A. Smith, *Views of Transgender Issues Divide Along Religious Lines*, PEW RSCH. CTR. (Nov. 27, 2017) https://www.pewresearch.org/fact-tank/2017/11/27/views-of-transgender-issues-divide-along-religious-lines/ [https://perma.cc/65ER-XCVB]; *see also* Marianne Campbell et al., *A Systematic Review of the Relationship Between Religion and Attitudes Toward Transgender and Gender-Variant People*, 20 INT'L J. OF TRANSGENDERISM 21 (2019) (finding "consistent evidence that self-identifying as with either being 'religious' or as Christian . . . was associated with increased transprejudice relative to being nonreligious.").

million transgender people living in the United States,[97] it is not unimaginable that one may be discriminated against by a closely held religious corporation.

Harris Funeral Homes provided an example of the inherent tensions between Title VII and RFRA as applied to the trans community: a trans employee claiming her transgender identity was the basis of employment discrimination under Title VII,[98] to which the employer claimed a defense under RFRA.[99] In two other cases at the Circuit Court level, LGBTQ employees also fought against employment discrimination under Title VII.[100]

II. *BOSTOCK*'S THREE-CASE CONSOLIDATION

When the Supreme Court decided *Bostock v. Clayton County, Georgia*[101] in June 2020, it ruled on three cases consolidated on appeal to determine whether sexual orientation and gender identity are protected under Title VII of the Civil Rights Act of 1964 (Title VII).[102] Those cases were *Bostock*,[103] *Zarda*,[104] and *Harris Funeral Homes.*[105] *Bostock*[106] and *Zarda*[107] involved employees claiming wrongful termination because of their sexual orientation, while *Harris Funeral Homes* involved a transgender employee claiming wrongful termination.[108]

The first of the three cases consolidated by the Supreme Court was *Bostock*. In *Bostock*, the Eleventh Circuit affirmed the decision of the Northern District of Georgia, dismissing the suit for failure to state a claim.[109] Bostock had brought a sexual orientation discrimination cause of action under Title VII, arguing that he had been discriminated against for his sexual orientation

97. FLORES ET AL., *supra* note 19.
98. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566–67 (6th Cir. 2018).
99. *Id.* at 567.
100. Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018); Zarda v. Altitude Express, Inc., 883 F.3d 100, 107 (2d Cir. 2018).
101. 140 S. Ct. 1731 (2020).
102. *Id.* at 1737.
103. *Bostock*, 723 F. App'x at 964.
104. *Zarda*, 883 F.3d at 100.
105. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).
106. 723 F. App'x 964.
107. Zarda v. Altitude Express, Inc., 883 F.3d 100, 107 (2d Cir. 2018).
108. *Harris Funeral Homes, Inc.*, 884 F.3d at 566.
109. Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964, 964 (11th Cir. 2018).

in violation of Title VII.[110] Rejecting this claim, the Eleventh Circuit cited countervailing binding precedent that "'[d]ischarge for homosexuality is *not* prohibited by Title VII.'"[111] Bostock then appealed to the Supreme Court.[112]

The second of the three cases consolidated was *Zarda*. In *Zarda*, the Second Circuit found that the appellant stated a cognizable claim under Title VII after his employer terminated him on the basis of his homosexuality.[113] The court held that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination" under Title VII.[114] Citing the same precedents rejected by the Eleventh Circuit in *Bostock*,[115] the Second Circuit found that the language "because of . . . sex" in Title VII's included sexual orientation, appealing to legal theories of gender role stereotyping.[116]

The third of the three cases was *Harris Funeral Homes*. In *Harris Funeral Homes*, the Sixth Circuit reversed and remanded an Eastern District of Michigan's grant of summary judgment to the appellee-employer of Aimee Stephens.[117] The appellee, R.G. & G.R. Harris Funeral Homes, Inc. terminated Stephens, born a biological male, after she informed her employer that she was transitioning from male to female, and would present herself as such while working.[118] The Equal Employment Opportunity Commission (EEOC), on behalf of Stephens, brought suit under Title VII, claiming discrimination on the basis of Stephens not

110. *Id.* at 964–65 (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79, 118 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989)).

111. *Id.* at 964 (emphasis in original) (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam)); *see also* Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (holding that all decisions of the "old Fifth" Circuit handed down prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit).

112. Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020).

113. Zarda v. Altitude Express, Inc., 883 F.3d 100, 109, 112 (2d Cir. 2018). The appellant passed away while the lower court decided his case, so the executors of his estate became the plaintiffs, then appellants. *Id.* at 107 n.1.

114. *Id.* at 112.

115. *Id.* at 123 ("*Price Waterhouse*, read in conjunction with *Oncale*, stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms."); *see Oncale*, 523 U.S. at 78 (holding that Title VII protects both men and women); *Price Waterhouse*, 490 U.S. at 251 ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

116. *Zarda*, 883 F.3d at 112–13.

117. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566–67 (6th Cir. 2018).

118. *Id.* at 566.

conforming to sex stereotypes because of her transgender identity.[119]

In *Harris Funeral Homes*, the Sixth Circuit found a prima facie case of sex discrimination under the *Price Waterhouse* framework.[120] In *Price Waterhouse*, Hopkins, a female employee, brought suit against her former employer under Title VII, alleging that her lack of promotion was wrongful and discriminatory on the basis of sex.[121] The Supreme Court found that Hopkins had an actionable claim based on a theory of sex stereotyping: Price Waterhouse violated Title VII when it did not promote Hopkins because she did not present herself as a stereotypical female.[122] The Court held that "an employer [cannot] evaluate employees by assuming or insisting that they match[ ] the stereotype associated with their group."[123]

Applying *Price Waterhouse* to Aimee Stephens, the Sixth Circuit found that Stephens' employer engaged in sex stereotyping by terminating her for her choice to represent herself as a woman, and thus violated Title VII.[124] Additionally, the court found that Stephens' termination based on her transgender status violated Title VII.[125] Analogizing to firing an employee for changing their religion, the court found that the funeral home's decision was at least partially motivated by Stephens' desire to change sex.[126] Thus, because her termination was on the basis of sex, the Sixth Circuit found that Stephens' termination on the basis of her transgender status was a violation of Title VII.[127]

In so doing, the Sixth Circuit rejected the RFRA-based defense raised by Harris Funeral Homes.[128] As a closely held

---

119. *Id.* The Sixth Circuit, like the Second and Eleventh Circuits, cites *Price Waterhouse* and *Oncale*. *Id.* at 577–78.

120. *Id.* at 572. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

121. *Price Waterhouse*, 490 U.S. at 231–32.

122. *Id.* at 250–51.

123. *Id.* at 251.

124. *Harris Funeral Homes*, 884 F.3d at 574.

125. *Id.* at 574–75.

126. *Id.* at 575–76. *See also* Schroer v. Billington, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) ("Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.'").

127. *Harris Funeral Homes*, 884 F.3d at 580–81.

128. *Id.* at 583–84. Harris Funeral Homes also claimed a ministerial exception to Title VII, but the court disposed of the issue as "Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case." *Id.* at 583.

corporation,[129] owner Thomas Rost claimed that operating the funeral home was an exercise of his religion.[130] Further, he argued that "continuing to employ Stephens would substantially burden [his] ability to serve mourners."[131] First, Rost claimed that Stephens' presentation as a trans woman would burden his business as employing a trans woman would distract grieving loved ones, "hinder[ing] their healing process (and [the Funeral Home's] ministry)."[132] The court found this argument unpersuasive, as it relied on presuming customers' biases, and held as a matter of law "that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."[133] Alternatively, Rost argued that employing Stephens left him with a burdensome choice: purchase a female uniform for Stephens, allow her to dress in feminine clothes, or face pressure to close his business.[134] The court rejected this argument, finding a "difference between employment and endorsement," and thus finding no substantial burden of Rost's religious exercise by employing Stephens.[135]

Under RFRA, the government may not substantially burden a corporation's free exercise of religion "unless the government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[136] For Stephens' Title VII claim to meet that standard and overcome Harris Funeral Homes' RFRA defense, the court had to find a "compelling government interest."[137] They also had to find that requiring Harris Funeral Homes to comply with Title VII was "the least restrictive means of furthering that compelling

129. Rost, a practicing Christian, owned 95.4% of the corporation, claimed the work of the corporation was his calling from God, and included honoring God in the corporation's mission statement. *Id.* at 567–68. The corporation, however, had no official affiliation with a church, nor did it explicitly state a religious purpose in its articles of incorporation. *Id.* at 568.

130. *Id.* at 585.

131. *Id.* at 586.

132. *Id.*

133. *Harris Funeral Homes*, 884 F.3d at 586.

134. *Id.* at 587.

135. *Id.* at 589.

136. *Id.* at 583 (quoting 42 U.S.C. § 2000bb-1). *See also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 708–09 (2014) (holding that the meaning of person under RFRA includes closely held, for-profit corporations).

137. 42 U.S.C. § 2000bb-1(b)(1).

governmental interest."[138] Applying strict scrutiny,[139] the court found "a compelling interest in the 'elimination of workplace discrimination, including sex discrimination.'"[140] When analyzing whether Title VII compliance was the least restrictive means, the court considered that Title VII is a "comprehensive scheme to effectuate its goal of eradicating discrimination based on sex,"[141] and found that "the only way to achieve the scheme's objectives is through its enforcement."[142] Ultimately, Stephens prevailed on appeal,[143] and Harris Funeral Homes petitioned for a writ of certiorari.[144]

III. *BOSTOCK V. CLAYTON COUNTY, GEORGIA*

On June 15, 2020, the Supreme Court ruled in the landmark case of *Bostock v. Clayton County, Georgia* that the term "sex" under Title VII includes sexual orientation and gender identity.[145] In his 6–3 majority opinion, Justice Gorsuch wrote that discriminating against an individual based on sexuality or gender identity necessarily implicates discrimination based on sex—both are "inextricably bound."[146] To know whether an employee's behavior conforms with cis-heterosexuality, it is necessary to consider the sex of the employee.[147] Thus, the Court held that sexual orientation and gender identity are incorporated under Title VII's definition of "sex."[148]

Though Justice Gorsuch granted the LGBTQ community broad employment rights under Title VII in *Bostock*, he also forewarned

138. 42 U.S.C. § 2000bb-1(b)(2).
139. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 590 (6th Cir. 2018).
140. *Id.* (quoting Appellee Br. at 41 (quoting Appellant Br. at 51)).
141. *Id.* at 596.
142. *Id.*
143. *Id.* at 600.
144. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S. Ct. 1599 (Apr. 22, 2019) (mem.). Aimee Stephens died of kidney failure while her case was pending before the Supreme Court. *See* Masha Gessen, *Remembering Aimee Stephens, Who Lost and Found Her Purpose*, New Yorker (May 20, 2020), https://www.newyorker.com/news/postscript/remembering-aimee-stephens-who-lost-and-found-her-purpose [https://perma.cc/3UXB-CXFV]. One of the contributing factors to the deterioration of her health was the loss of her health insurance, precipitated by R.G. & G.R. terminating her employment. *Id.*
145. 140 S. Ct. 1731, 1754 (2020).
146. *Id.* at 1741–42.
147. *Id.*
148. *Id.* at 1754.

a potential limitation of these rights: RFRA.[149] Noting that RFRA has the effect of a "super-statute,"[150] Justice Gorsuch warned that RFRA may, in some cases, constrain the reach of Title VII protections.[151] Because Harris Funeral Homes did not appeal the Sixth Circuit's rejection of its RFRA-based defense, however, the Court left the tension between RFRA and Title VII to be resolved in a future case.[152]

Justice Alito, in his dissent, characterized the majority's opinion as a threat to religious liberty.[153] He wrote that compelling religious organizations to employ individuals who do not uphold its faith forces such organizations to present a contradictory message.[154] Further, he predicted that "[h]ealthcare benefits may emerge as an intense battleground under the Court's holding."[155] In his view, plaintiffs who require employers to pay for sex reassignment procedures burden religious employers' ability to uphold their deeply held beliefs.[156] Looking ahead, Justice Alito posited that "[t]he entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning [in *Bostock*]."[157]

Bostock was immediately hailed as a landmark ruling and triumphant victory for LGBTQ rights.[158] Many in the media, however, were surprised by the justices who joined in the 6–3

149. *Id.*

150. *Bostock*, 140 S. Ct. at 1754. *See also* Paulsen, *supra* note 47, at 253 ("RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach.").

151. *Bostock*, 140 S. Ct. at 1754.

152. *Id.*

153. *Id.* at 1778 (Alito, J., dissenting).

154. *Id.* at 1780. While Justice Alito's dissent does not explicitly mention closely held religious corporations, one can see the logical step by which such an organization could make an identical claim. This argument parallels Harris Funeral Homes' argument before the Sixth Circuit. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 587 (6th Cir. 2018).

155. *Bostock*, 140 S. Ct. at 1781 (Alito, J., dissenting).

156. *Id.* at 1782. *See also* Toomey v. Arizona, No. CV 20-0335-TUC-SHR, 2020 WL 6149843 (D. Ariz. Oct. 20, 2020) (order denying plaintiff's motion to transfer) (interim order in a case in which plaintiff-employee is challenging gender reassignment coverage exclusion under his employer's self-funded health plan as sex discrimination under Title VII of the Civil Rights Act of 1964); Fletcher v. Alaska, 443 F. Supp. 3d 1024 (D. Alaska 2020) (granting summary judgment that employer's coverage exclusion of medically necessary surgery for employees born biologically male while covering the same surgery for employees born biologically female is a violation of Title VII rights).

157. *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting).

158. *See, e.g.*, Schmidt, *supra* note 39.

majority.[159] Justice Neil Gorsuch and Chief Justice John Roberts, both conservatives appointed by Republican presidents, joined the four Democrat-appointed justices of the Court.[160] Few thought that Justice Gorsuch would side with the four more liberal justices of the Court, much less author an opinion granting a broad, new right to LGBTQ Americans.[161]

One person who was not surprised at the result was Pamela Karlan, the lawyer arguing for the estate of one of the plaintiff-respondents, Donald Zarda.[162] In crafting the brief and argument for the Court, Karlan specifically sought to appeal to Justice Gorsuch's textualist jurisprudence.[163] After arguing her case, Karlan said that she felt confident she had won Justice Gorsuch's vote because all of her arguments flowed from the explicit text of Title VII.[164]

While *Bostock* can be viewed as an example of textualism securing progressive rights, some conservative scholars and commentators distinguish Justice Gorsuch's textualism from the jurisprudence of the other eight members of the Court.[165] Professor Josh Blackman of the South Texas College of Law

---

159. *See* Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html [https://perma.cc/NAB2-TLM9]; Harper Nedig & John Kruzel, *Gorsuch Draws Surprise, Anger with LGBTQ Decision*, HILL (June 15, 2020, 5:43 PM), https://thehill.com/regulation/court-battles/502834-gorsuch-draws-surprise-anger-with-lgbt-decision [https://perma.cc/Z7DZ-5VNQ].

160. Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020).

161. *See, e.g.*, Barnes, *supra* note 159 ("If the first shock Monday morning was that the conservative Supreme Court had delivered a landmark victory to gay and transgender workers, the second was the opinion's author: President Trump's first nominee for the high court, Neil M. Gorsuch.").

162. Mr. Zarda died midway through the appellate process of his case, but the appeals were allowed to be heard. *See* Pamela S. Karlan & Joseph Bankman, *Arguing at the Court: Pam Karlan Discusses Zarda and the LGBTQ+ Win for Employment Rights*, STAN. L. SCH. (June 18, 2020), https://law.stanford.edu/2020/06/18/arguing-at-the-court-pam-karlan-discusses-zarda-and-the-lgbtq-win-for-employment-rights/ [https://perma.cc/HX8F-AL25].

163. *See* Hunter Poindexter, *A Textualist's Dream: Reviewing Justice Gorsuch's Opinion in* Bostock v. Clayton County, U. CINN. L. REV. (June 23, 2020), https://uclawreview.org/2020/06/23/a-textualists-dream-reviewing-justice-gorsuchs-opinion-in-bostock-v-clayton-county/ [https://perma.cc/HMS3-7QRN].

164. *Id. See also* Karlan & Bankman, *supra* note 162.

165. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *was Bogus: Textualism, Pluralism, and Title VII*, (Univ. of Penn. L. Sch. Pub. L. Working Paper, Research Paper No. 21-31, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777519; Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, THE ATLANTIC (July 24, 2020), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/ [https://perma.cc/3R8Q-8623].

Houston, for example, calls Justice Gorsuch's jurisprudence fragmented and ignorant of past precedent that cuts against the "level of textual precision" that he demands from Congress when reading statutes.[166] Because he does not view "Gorsuch-Textualism" as true textualism, Blackman believes that "Gorsuch's opinions leave enough wiggle room to avoid a strict textualist holding in the future."[167] In other words, the Court's opinion in *Bostock* may have more wiggle room than has been recognized to date.

If Professor Blackman is correct, the protections for trans health care rights that some view as vested in the *Bostock* decision may be more fragile than some thought.

IV. RFRA VS. TITLE VII AND *HARRIS FUNERAL HOMES*' OVERSTATED SOLUTION

This Part details the inherent conflict between RFRA and Title VII and then argues why Harris Funeral Homes is a weak guide for plaintiffs navigating this conflict. It shows how RFRA's "super-statute" status qualifies the rights granted under Title VII. It also recounts previous cases in which the two statutes have conflicted and looks at how courts have resolved those disputes. Next, it revisits *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, a case some have described as a blueprint for LGBTQ plaintiffs navigating the RFRA-Title VII conflict to secure Title VII protections.[168] This Note takes a different position—that *Harris Funeral Homes* is a weak guide for this conflict and the optimism with which it is read is ill-placed.

The subsequent history of Aimee Stephens' case in *Harris Funeral Homes*, once consolidated with the case of Gerald Bostock,[169] has been discussed thoroughly in this Note[170] as well as in the news media.[171]

---

166. *See* Blackman, *supra* note 165.

167. *Id.*

168. *See, e.g.*, Sachin S. Pandya & Marcia McCormick, *Sex and Religion After* Bostock, ACS SUP. CT. REV. 4 (forthcoming).

169. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019).

170. *See* discussion *supra* Part III regarding *Bostock v. Clayton County, Georgia*.

171. *See, e.g.*, *All Things Considered: Sex Discrimination Case Plaintiff Comments on the Supreme Court's Decision*, NPR: ALL THINGS CONSIDERED (June 15, 2020), https://www.npr.org/2020/06/15/877585253/sex-discrimination-case-plaintiff-comments-on-the-supreme-courts-decision [https://perma.cc/DJ3B-FZWZ]; Julie Moreau, *Supreme*

One commentator to write on *Harris Funeral Homes* is William Besl. In his Note, *Employment Discrimination against LGBT Persons*, for the *Georgetown Journal of Gender and the Law*,[172] he posits that "the *Price Waterhouse* framework[173] can evolve to include sex discrimination based on gender identity and transgender status."[174] He claims that sex stereotyping—that is, the legal theory of discrimination relied on in *Price Waterhouse*—"provide[s] insight on how other courts may interpret [transgender status discrimination] claims in the future."[175] He then acknowledges *Harris Funeral Homes*' role as a guide for future litigation.[176] The Sixth Circuit found for Stephens on a theory of sex stereotyping, and Besl believes that sex stereotyping theories will become more common in Title VII cases in the future.[177] Without noting any limitations to his litigation recommendation,[178] Besl seems to hold *Harris Funeral Homes* as a panacea for future transgender claimants to secure a wide array of rights.

In a case comment for the *North Dakota Law Review*, Anthony Saccocio advocates for attorneys in the Eighth Circuit to bring forth claims of transgender persons alleging discrimination under Title VII by their employers.[179] Like Besl, he sees *Harris Funeral Homes* as a guide for future litigation because future litigants "will have a persuasive argument and reasoning from the Sixth Circuit for including transgender or transitioning status as a protected

---

Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say, NBC NEWS (June 23, 2020, 4:40 AM), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 [https://perma.cc/XY6M-TR3P]; Samantha Schmidt, *Fired After Joining Gay Softball League, Gerald Bostock Wins Landmark Supreme Court Case*, WASH. POST (June 15, 2020, 5:49 PM), https://www.washingtonpost.com/dc-md-va/2020/06/15/fired-after-joining-gay-softball-league-gerald-bostock-wins-landmark-supreme-court-case/ [https://perma.cc/28PJ-VUUA].

172. Besl, *supra* note 52.

173. 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" (cleaned up)).

174. Besl, *supra* note 52, at 311.

175. *Id.*; *see* discussion *supra* Part II regarding the *Price Waterhouse* framework.

176. Besl, *supra* note 52, at 311.

177. *See* E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571–75 (6th Cir. 2018) (Sixth Circuit's discussion of discrimination on the basis of sex stereotypes in relation to Stephens' unlawful termination claim).

178. *See generally* Besl, *supra* note 52.

179. Saccocio, *supra* note 52, at 253–54.

class."[180] Saccocio discusses the Sixth Circuit's reliance on the *Price Waterhouse* framework in *Harris Funeral Homes*.[181] He sees *Harris Funeral* Homes as a case that extends the *Price Waterhouse* framework to transgender individuals.[182] Saccocio, however, is unable to point to any other case law that will give transgender plaintiffs the "persuasive argument and reasoning" necessary to claim future rights.[183]

Finally, and most forcefully, C. Benjamin Cooper, an Ohio-based litigator, calls *Harris Funeral Homes* "a powerful tool to defeat the RFRA defense."[184] In his article, *Equal Protections for All*, he notes that the Sixth Circuit found Title VII protections did not substantially burden the employer's exercise of religion, and that enforcement of Title VII is "*always*" the least restrictive means to further a compelling state interest.[185] "RFRA does not provide a defense to Title VII claims," he concludes, neatly wrapping up the conflict between two major pieces of federal legislation into ten words.

Besl, Saccocio, and Cooper all place too much trust in the Sixth Circuit's opinion in *Harris Funeral Homes* because they do not appreciate the context and limited impact of the case. While Besl and Saccocio correctly note that *Harris Funeral Homes*' expansion of the *Price Waterhouse* framework to include gender identity and transgender status would allow trans plaintiffs a pathway to secure more rights than are currently legally recognized,[186] their arguments have limitations.

First, the sex stereotype argument made successfully by Stephens in *Harris Funeral Homes* was entirely contextual.[187] Stephens' argument against her employer was in relation to a specific context of a workplace dress code that implicated sex

180. *Id.* at 254.
181. *Id.*
182. *Id.*
183. *See generally id.*
184. C. Benjamin Cooper, *Equal Protections for All*, 55 AM. ASS'N JUST.: TRIAL MAG. 34 (Sept. 2019).
185. *Id.*
186. Besl, *supra* note 52, at 311. This litigation strategy would, for example, allow a transmasculine employee to sue his employer for refusing to promote him on the basis of him not conforming with stereotypically male characteristics.
187. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 573 (6th Cir. 2018) ("When the Funeral Home's actions are viewed *in the proper context*, no reasonable jury could believe that Stephens was not 'target[ed] . . . for disparate treatment' and that 'no sex stereotype factored into [the Funeral Home's] employment decision.'" (emphasis added) (quoting Appellee Br. at 19–20)).

stereotypes.[188] Consider instead a trans employee who claims her religious employer will not cover her gender-affirming care in her insurance policy because of religious objections. In this context, a sex stereotype argument does not fit as neatly. The case does not provide a one-size-fits-all solution.

On the other hand, a claimant could argue that an employer unwilling to pay for trans-specific health care is just as discriminatory as one who is unwilling to employ a transgender person. The hypothetical claimant might allege that the employer is engaging in employment discrimination on the basis of sex stereotypes by refusing to cover trans-specific health care. Caveats within the Sixth Circuit's opinion in *Harris Funeral Homes*, however, make the outcome of this argument uncertain, as evidenced when comparing the text of the opinion to C. Benjamin Cooper's argument in his article, *Equal Protections for All*.[189]

Cooper far overstates the impact of *Harris Funeral Homes* in his assessment. He sees the Sixth Circuit's holding in *Harris Funeral Homes*, that "applying Title VII protections would not substantially burden the owner's religious exercise,"[190] as a tool for future cases. The weakness of the court's conclusion, however, is evident in the very same passage cited by Cooper. The court hedged its conclusion with the caveat that, "compliance with Title VII—*without actually assisting or facilitating Stephens' transition efforts*—does not amount to an endorsement of Stephens' views."[191] Again, the specific circumstances of Aimee Stephens' case allowed her to succeed against her employer. Consistent with this text from *Harris Funeral Homes*, it is not hard to imagine that a conservative Supreme Court finding that trans employees claiming further rights under Title VII are asking their employer to endorse their views. For instance, seeking coverage of gender-affirming health care procedures under their religious employer's self-funded health plan would be "assisting or facilitating . . . transition efforts"[192] by facilitating coverage that would, in turn, lower the cost of the procedures.

Cooper next takes the Sixth Circuit's conclusion that "enforcing Title VII is *always* the least restrictive means to further the

188. *Id.* at 567, 571.
189. *See* Cooper, *supra* note 184.
190. *Id.*
191. Harris Funeral Homes, 884 F.3d at 589 (emphasis added).
192. *Id.*

government's compelling interest in eradicating discrimination"[193] to mean that RFRA defenses are inapplicable to Title VII claims.[194] This conclusion proved shortsighted; the employer in *Harris Funeral Homes* chose not to appeal the Sixth Circuit's RFRA ruling to the Supreme Court.[195] Thus, Justice Gorsuch, writing for the majority, remarked that "how these doctrines protecting religious liberty interact with Title VII are questions for future cases."[196]

These "future cases" are imminent as trans plaintiffs begin to file actions against their employers for discriminatory health care policies.[197] Inevitably, parties will appeal at least one of these cases up to the Supreme Court. There, a super-majority conservative Court awaits.[198] It could very likely distinguish the Sixth Circuit's declaration in *Harris Funeral Homes* that Title VII enforcement is *always* the least restrictive means when scrutinizing under RFRA.[199] This hypothesis is made more concrete when considering that the Court has already begun upholding religious liberty in high-profile cases,[200] and that one of its newer justices, Amy Coney Barrett, has been characterized as a "defender of religious freedom."[201]

The transgender employee plaintiff in *Harris Funeral Homes*, claiming rights under Title VII, prevailed over her employer's

193. Cooper, *supra* note 184; *see also Harris Funeral Homes*, 884 F.3d at 596.

194. Cooper, *supra* note 184.

195. Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1754 (2020).

196. *Id.*

197. *See, e.g.*, Toomey v. Arizona, No. CV 20-0335-TUC-SHR, 2020 WL 6149843 (D. Ariz. Oct. 20, 2020) (order denying plaintiff's motion to transfer) (interim order in a case in which plaintiff-employee is challenging gender reassignment coverage exclusion under his employer's self-funded health plan as sex discrimination under Title VII of the Civil Rights Act of 1964); Fletcher v. Alaska, 443 F. Supp. 3d 1024 (D. Alaska 2020) (granting summary judgment that employer's coverage exclusion of medically necessary surgery for employees born biologically male while covering the same surgery for employees born biologically female is a violation of Title VII rights).

198. *See* Thomson-Deveaux & Bronner, *supra* note 50.

199. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 596 (6th Cir. 2018).

200. *See, e.g.*, Andrew C. McCarthy, *For Thanksgiving, the Supreme Court Upholds Religious Liberty*, HILL (Nov. 28, 2020), https://thehill.com/opinion/judiciary/527773-for-thanksgiving-the-supreme-court-upholds-religious-liberty [https://perma.cc/73LE-S6J8]; Ian Millhiser, *Religious Conservatives Have Won a Revolutionary Victory in the Supreme Court*, VOX (Dec. 2, 2020), https://www.vox.com/2020/12/2/21726876/supreme-court-religious-liberty-revolutionary-roman-catholic-diocese-cuomo-amy-coney-barrett [https://perma.cc/T77Z-YFCW].

201. Jorge Gomez, *SCOTUS Nominee Amy Coney Barrett Will be a Defender of Religious Freedom and the Constitution*, FIRST LIBERTY (Oct. 2, 2020), https://firstliberty.org/news/if-confirmed-barrett-will-defend-religious-freedom/ [https://perma.cc/MJ6L-E9WZ].

RFRA-based defense.[202] Because the Supreme Court declined to grant certiorari on the RFRA-based defense issues[203] and the Sixth Circuit's opinion has language that could potentially limit its application and scope (especially if applied by a conservative court),[204] scholars and commentators such as Besl, Saccocio, and Cooper are arguably overly-confident in the results *Harris Funeral Homes* can deliver in combination with an expanded conception of the *Price Waterhouse* framework. The more secure path forward to secure rights and protections for the transgender community, including health care equity, is through legislation.

V. THE LEGISLATIVE PATH FORWARD

Because of the obstacle that RFRA poses for future litigation strategies concerning Title VII, a legislative solution is the only durable path to overcome RFRA-based defenses. The Equality Act is one widely touted potential solution.[205] Passed by the House of Representatives on February 25, 2021, the Equality Act bans discrimination based on sexual orientation and gender identity.[206] As passed by the House, the Act amends the 1964 Civil Rights Act to explicitly include sexual orientation and gender identity as protected categories, and explicitly invalidate RFRA as applied to LGBTQ persons.[207]

Given the conservative super-majority on the Supreme Court and the evident weakness in relying on *Harris Funeral Homes* as a lodestar for claiming future rights for transgender employees under Title VII, the most durable solution is legislative. The Biden Administration, through executive action, has made some progress on the issue, but the tenuous nature of executive orders underscores the need for a more permanent solution.[208]

Still, the Biden Administration's executive orders have already improved the on-the-ground reality for trans Americans. On his

---

202. *See generally Harris Funeral Homes*, 884 F.3d 560.

203. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S. Ct. 1599 (2019) (mem.).

204. *Harris Funeral Homes*, 884 F.3d at 589.

205. *See, e.g.*, Dan Avery, *House Passes Sweeping LGBTQ Rights Bill*, NBC NEWS (Feb. 25, 2021, 5:00 PM), https://www.nbcnews.com/feature/nbc-out/house-representatives-passes-sweeping-lgbtq-rights-bill-n1258900 [https://perma.cc/AHY5-PX64].

206. *Id. See also* H.R. 5, 117th Cong. § 1107 (2021).

207. H.R. 5, 117th Cong. § 1107 (2021).

208. *See, e.g.*, Glenn Thrush, *The Lure of Executive Orders: Easy to Implement, but Just as Easy to Cancel*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/01/22/us/politics/biden-executive-orders-trump.html [https://perma.cc/84LP-73G4].

first day in office, President Biden signed an executive order implementing the Supreme Court's decision in *Bostock*.[209] Executive Order 13988 directs all federal agencies to bring their rules and regulations in line with a reading of Title VII that includes sexual orientation and gender identity under the term "sex."[210] For example, the order mandates that the Department of Health and Human Services issue a rule or regulation specifying that insurance companies cannot refuse to cover gender transition care.[211]

While this Executive Order 13988 is a massive, sweeping accomplishment in the battle to secure rights for transgender Americans, it cannot be considered a permanent solution for two main reasons. First, because executive orders are not codified, a future Congress may simply pass legislation nullifying this executive order, or a future president may issue another executive order revoking this one.[212] President Biden's executive solution thus might only last until 2022 or 2024. Second, executive orders are subject to judicial review,[213] so any changes to rules or regulations made by an agency could be challenged in federal courts, on which 226 Trump-appointed judges sit.[214] It may be harder for a lower court to uphold a challenge to one of these future regulations, however, since the executive order simply implements the Supreme Court's *Bostock* decision.[215]

Moreover, executive orders are not immune from RFRA, as the statute applies to all federal law, "statutory or otherwise."[216] Thus, any rule or regulation implementing *Bostock* could face RFRA scrutiny by a court. In order for a solution to be more permanent,

---

209. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021); *see also* Mark Joseph Stern, *Biden Just Began the Biggest Expansion of LGBTQ Equality in American History*, SLATE (Jan. 21, 2021, 2:48 PM), https://slate.com/news-and-politics/2021/01/joe-biden-lgbtq-bostock-executive-order.html [https://perma.cc/DZW4-C35M].

210. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

211. Stern, *supra* note 209.

212. *See, e.g.*, Thrush, *supra* note 208208.

213. *Judicial Review of Executive Orders*, FED. JUD. CTR. (last accessed Feb. 21, 2021), https://www.fjc.gov/history/administration/judicial-review-executive-orders [https://perma.cc/C72N-PLCU].

214. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR.: FACT TANK (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/45UM-T2QU].

215. Stern, *supra* note 209.

216. 42 U.S.C. § 2000bb-3.

it must be legislative. Many see the Equality Act as the legislative solution to this problem.

The Equality Act effectively invalidates RFRA when applied to LGBTQ persons: "The Religious Freedom Restoration Act of 1993 shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."[217] Thus, the Act directly thwarts the RFRA-based defense employed by Harris Funeral Homes against Aimee Stephens.[218]

This legislation creates firm textual support for the kinds of conclusions drawn by C. Benjamin Cooper—that "RFRA does not provide a defense to Title VII claims."[219] The Equality Act is even stronger than the expanded conception of the *Price Waterhouse* framework, advocated for by William Besl,[220] because it strikes down an entire defense still currently available to religious employers: RFRA. This legislation gives future litigants the "persuasive argument and reasoning" that Saccocio falsely sees in *Harris Funeral Homes* standing alone.[221]

Commentators are doubtless aware that a federal statute would provide a stronger legal argument than crafting novel legal arguments that hinge on a new precedent. The legislative approach complements, rather than supersedes, their litigation strategy to put forth a full-scale, multi-prong attack to claim and solidify future trans rights. But while the Equality Act is an excellent legal solution, it faces political obstacles.[222]

Conservative opposition that threatens to tank the statute is rooted in fears about religious freedom. Specifically, many Senate Republicans have opposed passage of the Equality Act unless it includes a provision enumerating "strong religious liberty protections."[223] Religious lobbying groups, such as the United States Conference of Catholic Bishops, have strongly spoken out against the legislation, claiming that it "would discriminate

---

217. *Id.*

218. E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 596 (6th Cir. 2018).

219. Cooper, *supra* note 184.

220. Besl, *supra* note 52.

221. *See generally* Saccocio, *supra* note 52.

222. *See, e.g.*, NBC NEWS, *supra* note 56.

223. Matthew Lavietes, *Biden Scrambles Plan B on LGBT+ Rights as Equality Act Meets Resistance*, REUTERS (Apr. 13, 2021, 12:16 PM), https://www.reuters.com/article/us-usa-biden-lgbt-analysis-trfn/biden-scrambles-plan-b-on-lgbt-rights-as-equality-act-meets-resistance-idUSKBN2C02AZ [https://perma.cc/9Q75-MTMX].

against people of faith."[224] With strong opposition, pundits have remarked that the prospects for passage of the Equality Act seem dim.[225]

Supporters have described the Equality Act as "the best way to provide protections to LGBT workers" because of its expansive scope, strong protections, and direct subordination of RFRA.[226] These same ambitious qualities, however, make the Act's passage politically unlikely; ideal, but unrealistic.[227] Passage of the Equality Act is an ideal yet unrealistic solution. Still, there is incremental progress to be made that could be the first steps toward the same goal as the Equality Act. A legislative strategy that saps the power of RFRA defenses used against LGBTQ people may be more politically viable. Legislation that broadens access to health care, such as the Affordable Care Act, has grown increasingly popular in recent years.[228] Additionally, public opinion polls consistently find that Americans see access to health care as one of their top concerns about the healthcare system in the United States.[229] Thus, the intersection of RFRA and LGBTQ health care seems like a good entry point to begin passing narrower legislation.

The lack of guaranteed health care for Americans, however, is an obstacle.[230] The Constitution does not inure a positive right to health care,[231] so the path for federal legislation expanding access to health care cannot be framed as a deprivation of rights

224. PUB. AFFS. OFFICE, U.S. Bishop Chairmen Say Equality Act Would Discriminate Against People of Faith and Threaten Unborn Life, U.S. CONF. OF CATHOLIC BISHOPS (Feb. 23, 2021), https://www.usccb.org/news/2021/us-bishop-chairmen-say-equality-act-would-discriminate-against-people-faith-and-threaten [https://perma.cc/89YN-S5HD].

225. *See* NBC NEWS, *supra* note 56.

226. *See* Shalyn L. Caulley, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, U. ILL. L. REV. 909, 953–58 (2017).

227. *See, e.g.*, NBC NEWS, *supra* note 56.

228. *KFF Health Tracking Poll: The Public's Views on the ACA*, KAISER FAM. FOUND. (Oct. 15, 2021), https://www.kff.org/interactive/kff-health-tracking-poll-the-publics-views-on-the-aca/#?response=Favorable--Unfavorable&aRange=all [https://perma.cc/PC6D-DCXW].

229. Frank Newport, Americans' Mixed Views of Healthcare and Healthcare Reform, GALLUP (May 21, 2019) https://news.gallup.com/opinion/polling-matters/257711/americans-mixed-views-healthcare-healthcare-reform.aspx [https://perma.cc/H26U-W9WZ].

230. *Introduction*, 134 HARV. L. REV. 2158 (2021). *See also* Amanda Mull, *What It Means for Health Care to be a Human Right*, ATLANTIC (June 26, 2019, 12:11 PM), https://www.theatlantic.com/health/archive/2019/06/health-care-human-right/592357 [https://perma.cc/4WKZ-3GAN].

231. *See* HARV. L. REV., *supra* note 230; *see generally* U.S. CONST.

argument.[232] The path to claiming trans health care rights in the workplace would be much easier if, say, trans plaintiffs could simply argue that their employer denied them a positive right, but no such right exists in the United States.[233]

The American position is unique in the international arena.[234] In two United Nations resolutions—the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights—that the United States voted for and signed, respectively, health care is recognized as a human right.[235] By the words of the resolutions, the United States recognized the importance of access to adequate medical care to achieve the highest attainable standard of health.[236]

Moreover, Colorado recently became the first state to categorize gender-affirming health care as an essential health benefit for its individual and small-group health plans.[237] Colorado's categorization of gender-affirming health care as essential falls in line with the growing consensus among medical and psychological associations that the mental and physical health benefits associated with gender-affirming health care are so great that the services are essential and medically necessary for trans Americans.[238]

---

232. *See* HARV. L. REV., *supra* note 230, at 2158 ("Americans have no positive, universal, constitutional right to healthcare.").

233. *Id.*

234. *See, e.g.*, G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

235. *See* G.A. Res. 2200A (XXI), Art. 12, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."); G.A. Res. 217 (III) A, Art. 25, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.").

236. G.A. Res. 2200A (XXI), Art. 12, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); G.A. Res. 217 (III) A, Art. 25, Universal Declaration of Human Rights (Dec. 10, 1948).

237. *See* Diamond, *supra* note 58. Only 9% of Colorado's insured population is covered under its individual and small-group health plans. John Frank, *A Reality Check on Colorado's Mandate to Cover Transgender Services*, AXIOS DENVER (Oct. 13, 2021), https://www.axios.com/local/denver/2021/10/13/colorado-transgender-health-care-insurance-mandate-biden [https://perma.cc/DQN5-59TS]. This further underscores the need for legislation that will eliminate obstacles to gender-affirming health care.

238. *See* B. S. Anton, *Proceedings of the American Psychological Association for the Legislative Year 2008: Minutes of the Annual Meeting of the Council of Representatives*, AM. PSYCHOLOGIST, 64, 372–453 (2009), https://www.apa.org/about/policy/transgender.pdf [https://perma.cc/5PW5-GZEW]; *see also H-185.927: Clarification of Medical Necessity for*

Given the broad support for access to health care, advocates should push for a narrower statute that invalidates RFRA-based defenses raised by employers in the context of LGBTQ health care. Withholding the essential health benefit of gender-affirming care from transgender employees could be considered a denial of human rights, as affirmatively recognized by the United States in the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights. RFRA-based defenses should not apply to cases concerning LGBTQ health care, and a statute outlining that nullification may be able to be passed into law.

Passage of a narrower statute would still allow future litigants to rest their case on a clear intent and statement of Congress. Therefore, a legislative solution gives a much more solid foundation for future transgender litigants claiming health care rights than reliance on *Harris Funeral Homes*, a decision with ample room for a conservative Supreme Court to continue to deny trans Americans certain rights.

Because of its current composition,[239] many believe that the Supreme Court's ideological makeup forecloses the possibility of any advancement of LGBTQ rights.[240] *Bostock*, however, serves as the perfect counterargument to this claim, and is an instructive guide for future progress. Pamela Karlan was able to craft a textualist argument persuasive enough to appeal to Justice Gorsuch and bring him to side with the more liberal justices of the

---

Treatment of Gender Dysphoria (2016), AM. MED. ASS'N (2021), https://policysearch.ama-assn.org/policyfinder/detail/gender%20dysphoria?uri=%2FAMADoc%2FHOD-185.927.xml; Kareen M. Matouk & Melina Wald, *Gender-Affirming Care Saves Lives*, COLUM. U. DEP'T PSYCHIATRY (June 23, 2021), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/6LBM-MNPG].

239. *See* sources cited *supra* note 50.

240. *See, e.g.*, Lucas Acosta, *Amy Coney Barrett is an Absolute Threat to LGBTQ Rights*, HUM. RIGHTS CAMPAIGN (Sept. 22, 2020), https://www.hrc.org/news/amy-coney-barrett-is-an-absolute-threat-to-lgbtq-rights [https://perma.cc/MW5N-D7V7]; Kathryn Menefee, *Amy Coney Barrett Threatens the Rights of LGBTQ+ People*, NAT'L WOMEN'S L. CTR. (Oct. 13, 2020), https://nwlc.org/blog/amy-coney-barrett-threatens-the-rights-of-lgbtq-people/ [https://perma.cc/5BPD-BE73] ("Trump and Senate leadership are threatening to permanently weaken what has historically been an important venue for achieving LGBTQ+ rights: the U.S. Supreme Court."); Kate Sosin, *A More Conservative Supreme Court Could Bring Drastic Changes for LGBTQ+ Americans*, 19TH NEWS (Sept. 25, 2020), https://19thnews.org/2020/09/conservative-supreme-court-lgbtq-americans/ [https://perma.cc/W8WR-SPX7]; Press Release, *Transgender Legal Defense & Education Fund Opposes Amy Coney Barrett's Confirmation to the United States Supreme Court*, Transgender Legal Def. & Educ. Fund (Oct. 12, 2020), https://transgenderlegal.org/stay-informed/transgender-legal-defense-education-fund-opposes-amy-coney-barretts-confirmation-to-the-united-states-supreme-court/ [https://perma.cc/D2EU-9NLU].

Court.[241] Passage of a narrow statute invalidating RFRA-based defenses as applied to cases of LGBTQ health care would be a clear statement from Congress limiting the application and scope of RFRA. Resting a case on the clear intent and statement of Congress through such a statute would be a more solid foundation for future transgender litigants claiming health care rights, especially if following a textualist-appealing legal strategy like Karlan's successful brief in *Bostock*.

Meanwhile, the omnibus solution to the RFRA obstacle—the Equality Act—sits in limbo. Having passed the House, the Equality Act is currently before the Senate Judiciary Committee, and there has been no action taken on the bill since March 2021.[242] This inaction points more strongly to the claim that the Equality Act, in its current form, is politically unviable. Should the legislation pass, it would provide a much-needed solution; one more permanent than executive orders and stronger than reliance on current case law. However, trans Americans are suffering every day that they are denied access to necessary health care. At a certain point, expediency matters, and in order to deliver a solution expeditiously, the Equality Act must be broken up into smaller pieces.

Beginning with a narrow statute nullifying RFRA's application to LGBTQ health care makes sense because of the increasing support for expanding health care access among the general public, and the urgency of the situation. It would remove the uncertainty of how a conservative Court may resolve issues of religious freedom raised in *Harris Funeral Homes*[243] and then punted in *Bostock*.[244] Granting trans Americans the security that their rights will not be subject to judicial construction, but clearly enumerated in federal law, is good public policy. Congress should act swiftly to codify the rights of trans Americans. Important fights, like that of access to trans health care, are at stake.

---

241. *See* discussion *supra* Part III regarding the *Bostock* argument strategy.

242. *All Actions H.R. 5—117th Congress (2021-2022)*, U.S. CONG. (last accessed Nov. 14, 2021), https://www.congress.gov/bill/117th-congress/house-bill/5/all-actions [https://perma.cc/H9QN-GBR8].

243. *See* discussion *supra* Part II regarding *Harris Funeral Homes*.

244. Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1754 (2020).

CONCLUSION

In his *Bostock* dissent, Justice Alito predicted that transgender health care would become a new litigation battleground in the wake of the Court's grant of Title VII protections to transgender Americans.[245] This prediction is already coming to fruition, with transgender litigants taking to courts to claim their health care rights.[246] Some scholars and commentators point to *Harris Funeral Homes* as a silver bullet for these litigants,[247] but *Harris Funeral Homes* requires more bolstering in order for trans litigants to successfully claim future rights. The Equality Act, while commendable, seems to be politically unfeasible. Thus, a narrower statute—one that nullifies RFRA's application to LGBTQ health care—is a necessary first step.

245. *Id.* at 1781–82 (Alito, J., dissenting).

246. *See, e.g.*, Toomey v. Arizona, No. CV 20-0335-TUC-SHR, 2020 WL 6149843 (D. Ariz. Oct. 20, 2020); Fletcher v. Alaska, 443 F. Supp. 3d 1024 (D. Alaska 2020).

247. *See, e.g.*, Besl, *supra* note 56; Cooper, *supra* note 184; Saccocio, *supra* note 56.