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BOSTOCK V. CLAYTON COUNTY AND THE PROBLEM OF BISEXUAL ERASURE

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ABSTRACT—The Supreme Court's *Bostock v. Clayton County* opinion, affirming that Title VII's sex discrimination protections extend to "gay and transgender" employees, is an opinion emphatically grounded in a textualism-based analysis. It is also an opinion that does not once mention bisexuals in its text.

The bisexual erasure in the opinion is not unusual; in the nearly quarter century leading up to *Bostock*, the Supreme Court has repeatedly failed to explicitly acknowledge the existence or equal rights of bisexuals. While bi erasure in Supreme Court cases is not new, in the case of *Bostock*, the problematic nature of omitting bisexuals from the text of the opinion takes on an additional and ironic dimension: Those seeking to apply *Bostock*'s holding to bisexuals must contend with a unique tension between the majority opinion's textualism emphasis and the need to read beyond the literal text of the holding's limited "gay and transgender" language to ensure that it applies to bisexuals as well.

Along with calling for greater bi inclusivity, this Essay offers an interpretive guide to ensuring *Bostock*'s precedent, textualist emphasis notwithstanding, is extended to bisexuals. While resolving such tensions, the Essay also describes how systemic bi erasure in LGBTQ rights cases beyond *Bostock* remains a significant problem. In doing so, it explains the reciprocal benefits of being bi-inclusive, including the role bisexuals can play in illustrating that sexual orientation discrimination is a form of sex discrimination.

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INTRODUCTION

The United States entered into a new era of Supreme Court LGBTQ[1] rights jurisprudence with Justice Kennedy's retirement in 2018. Until his retirement, Justice Kennedy was the author of every Supreme Court decision affirming LGBTQ rights while he was on the bench and was thus a particularly critical swing vote and voice in LGBTQ rights cases.[2] The confirmation of two new Justices, Gorsuch and Kavanaugh, compounded uncertainty about how the new Court would rule on LGBTQ rights cases that come before it. However, the Court's 6–3 decision in *Bostock v. Clayton County*[3] handed the LGBTQ rights movement a somewhat unexpected victory.[4]

Despite the clumsy and tone-deaf "homosexual and transgender" vernacular used by Justice Gorsuch[5]—as compared to the equal-dignity-embracing opinions authored by Justice Kennedy in past sexual orientation discrimination cases[6]—the *Bostock* opinion was reassuring in its affirmation of employment discrimination protections for gay and

[1] In this Essay, "LGBTQ" is intended to include not just lesbian, gay, bisexual and transgender people, but other sexual minorities as well such as intersex people, pansexual people, and those of other minority sexual orientations and gender identities.

[2] Obergefell v. Hodges, 576 U.S. 644 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996); *see also* Alicia Parlapiano & Jugal K. Patel, *With Kennedy's Retirement, The Supreme Court Loses its Center*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html [https://perma.cc/K3DJ-UT84] (providing an overview of Justice Kennedy's votes in landmark cases).

[3] Bostock v. Clayton County, (U.S. Sup. Ct. Case No. 17-1618), Altitude Express, Inc. v. Zarda (U.S. Sup. Ct. Case No. 17-1623); R.G. & G.R. Harris Funeral Homes Inc. v. Equal Emp. Opportunity Comm'n (U.S. Sup. Ct. Case No. 18-107), consolidated as Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (collectively, "*Bostock*").

[4] *See* Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html [https://perma.cc/89N5-H3Q2].

[5] *Bostock*, 140 S. Ct. at 1738, 1747, 1749, 1751.

[6] *See, e.g.*, *Obergefell*, 576 U.S. at 657–66, 677–81; *Windsor*, 570 U.S. at 764, 768–71; *Lawrence*, 539 U.S. at 567, 575.

transgender people. After framing the issue as "whether an employer can fire someone simply for being homosexual or transgender," the Court concluded, "[t]he answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."[7] Repeating the holding at the end of the opinion, the Court at least substituted "gay" for "homosexual," concluding that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[8]

Yet, bisexuals, who were omitted from the Court's "homosexual and transgender" and "gay and transgender" framing, are left struggling to reconcile conflicting emotions in the aftermath of *Bostock*'s release: relief that the Court affirmed Title VII sex discrimination protection[9] for sexual minorities, and dismay at the bisexual erasure in the framing and subsequent media coverage of the opinion. As a result, bisexual attorneys are forced to expend a frustrating amount of energy reassuring other members of the bi community that bisexuals are protected under the law along with gay and transgender people, despite *Bostock*'s failure to explicitly include us in its text.[10]

Part I of this Essay explores the problem of transcending *Bostock*'s bisexual erasure and explains why, despite the opinion's textualist emphasis and the bisexual erasure in the text of *Bostock*, the Court's affirmation of Title VII protection against employment discrimination in *Bostock* nonetheless applies to bisexual employees. Namely, this Part discusses how canons of case law interpretation counsel in favor of including bisexuals; how the opinion's analytical grounds for protecting gay and transgender individuals extend to bisexual individuals; how nothing in the opinion indicates it is meant to be read narrowly to exclude bisexuals; and how Supreme Court cases from the past quarter century have been interpreted to apply to bisexuals even without explicit acknowledgement of bi individuals. Part II then addresses the harms that flow from bisexual erasure, including the increased burden put on

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[7] *Bostock*, 140 S. Ct. at 1737.

[8] *Id*. at 1754.

[9] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

[10] *See* Heron Greenesmith, *Supreme Court LGBTQ Protections Cover Bisexual and Pansexual Workers, Too*, TEEN VOGUE (June 18, 2020), https://www.teenvogue.com/story/supreme-court-lgbtq-protections-bisexual-pansexual-workers [https://perma.cc/5J2Y-QGEK] (explaining that *Bostock*'s protections extend to bisexual and pansexual employees but that this erasure by the Court and media is nonetheless harmful). Indeed, one individual in the bi community expressed concern after reading the opinion stating, "I am seriously wondering if bisexual people are included in yesterday's ruling, because I haven't heard that identity mentioned once in any reporting or reading of the opinion." *Id.*

bisexual litigants, the perpetuation of bisexual stereotypes, and the tangible harms resulting from bisexuals' lack of formal recognition and support. The effects of bi erasure also extend beyond the bisexual community, for example, by undermining the integrity of LGBTQ rights arguments. Finally, Part III argues that in failing to address bisexuality the Court squandered an opportunity to describe with more clarity and cohesiveness how sexual orientation discrimination is, in fact, a form of sex discrimination.

I. TRANSCENDING TEXTUALIST TENSIONS IN APPLYING *BOSTOCK* TO BISEXUALS

There is an immediate irony-soaked problem with trying to minimize the harm of the Court's bi erasure in *Bostock* with the argument that, even if bisexuality is not mentioned in the *text* of the majority opinion, the Court surely *intended* its ruling to extend to bisexuals. The irony of such platitudes encouraging bi people to overlook the literal text of the *Bostock* holding is that *Bostock* is a textualism-embracing opinion to an extreme. To the anguish of conservative legal theorists, the opinion even divorces textualism from originalism in its adamance that where text is unambiguous, interpretation must stop at the plain meaning and not consider legislative intent.[11] For example, in rejecting the dissenters' arguments about what Title VII's drafters may have intended to cover, the majority opinion admonished that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[12]

As such, the fact that the text of *Bostock*'s holding only explicitly acknowledges protections for "gay and transgender" people seems a legitimate source of concern for bisexuals, considering the ruling was based on a textualist analysis that emphasized *not* reading beyond the text in statutory interpretation. That said, there are several reasons for bisexuals to be reassured that the rights affirmed in *Bostock* should, and in fact do, trickle down to bisexuals, even if the Court did not explicitly say so.

First, the canons of *statutory interpretation* that demand strict plain-language textualism in the face of unambiguous language do not govern *case law interpretation*. There are no comparable canons of common law

[11] *See* Tim Ryan, *Legal Theory Debate Rages After High Court LGBT Ruling*, COURTHOUSE NEWS SERV. (June 17, 2020), https://www.courthousenews.com/legal-theory-debate-rages-after-high-court-lgbt-ruling/ [https://perma.cc/8E73-6BP5].

[12] *Bostock*, 140 S. Ct. at 1737.

or case law interpretations proscribing strict textualism, or, conversely, prohibiting interpreting the holding of a case in light of its surrounding context. Thus, while the dicta and procedural history of a case may not have the precedential weight of the law that a holding does, when an appellate court affirms or reverses a ruling, it is impossible to interpret the word "affirm" or "reverse" without consideration of what it is that is being affirmed or reversed, i.e., the lower court opinion. For example, it is a pertinent and permissible consideration that *Bostock* explicitly affirmed the Second Circuit's en banc ruling in *Zarda v. Altitude Express, Inc.,* which did not single out only gay and transgender people for protection under Title VII, but rather affirmed more generally that "sexual orientation discrimination is an actionable subset of sex discrimination."[13] Thus, since *Zarda* broadly includes sexual orientation discrimination as sex discrimination, so does *Bostock* in affirming *Zarda*.

Second, other than the "gay and transgender" language, there is nothing in the opinion indicating that the Court intended it to be interpreted narrowly or limited to the facts of the case at hand. In fact, despite the Court's embrace of textualism in statutory interpretation, the Court balances textualism with a healthy dose of *label* flexibility in its discussion of how the law is applied. The *Bostock* majority explains that "[a]s enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[14] The Court's consideration of "whatever other labels might attach" acknowledges that those labels listed and discussed in the opinion are not exhaustive and therefore allows for more identities, including bisexuality, to be protected. In the same vein, *Bostock* will likely be applied beyond the context of employment discrimination as well; its analysis extends to other applications, such as anti-discrimination protections in educational and health care settings.[15]

And, third, if the Court's use of label flexibility wasn't convincing, the underlying analysis of the opinion logically extends beyond gay and transgender people, to both bisexuals and other sexual minorities. This includes the Court's explanation that sexual orientation discrimination is sex discrimination because "homosexuality and transgender status are inextricably bound up with sex" and thus "to discriminate on these

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[13] 883 F.3d 100, 132 (2d Cir. 2018).

[14] *Bostock*, 140 S. Ct. at 1747.

[15] *See* Julie Moreau, *Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC NEWS (June 23, 2020, 3:40 AM), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 [https://perma.cc/5BZL-BZK9].

grounds requires an employer to intentionally treat individual employees differently because of their sex."[16] As the Court illustrates, in the context of a job application requiring an applicant to check a "homosexual" or "transgender" box,

> [t]here is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex.[17]

The same, by logical extension, is true of other sexual minorities, including bi*sex*uals. And when a bisexual person is discriminated against for having a picture of her same-sex partner on her desk, it is unlikely that a person will stop to clarify whether she is bisexual or gay before discriminating against her. It is her sex in relation to her female romantic partner that triggers the discrimination, not necessarily where precisely she lies on the sexual orientation "Kinsey scale."[18]

A fourth and more cynical reason that bisexual people should not be concerned is that bisexuals have frequently been rendered invisible in LGBTQ rights cases,[19] but they have nonetheless been understood to be

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[16] *Bostock*, 140 S. Ct. at 1742; *see also id*. at 1742–43 (rejecting pretextual "it was really sexual orientation" defenses against sex discrimination claims, because discrimination against gay and transgender employees necessarily takes their sex into account, and Title VII only requires that discrimination be "in part because of sex" to establish liability).

[17] *Id*. at 1746.

[18] That said, allegations of pure sexual orientation discrimination also do not preclude a Title VII claim from being actionable, due to the Title VII causation standard allowing for multiple factors, as discussed herein. For more on the history and meaning of the Kinsey scale and other ways of defining bisexuality and sexual orientation, see Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 380–81 (2000) (including a description of the "Kinsey scale" which depicts a continuum of sexual orientation).

[19] *See* Nancy C. Marcus*, Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. GENDER & L. 291, 306–15, 343–44 (2015) (documenting how bisexuals have been excluded from the majority of briefs and opinions of LGBTQ rights cases since *Romer*). Bisexuals were referenced over a dozen times between the briefs and decision for the 1995 Supreme Court case *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Brief for Respondent, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (No. 94-749), 1995 WL 143532. But from *Romer* onward bisexuals have almost never been mentioned. 517 U.S. 620 (1996); *see, e.g.*, Boy Scouts v. Dale, 530 U.S. 640 (2000); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013); Hollingsworth v. Perry, 570 U.S. 693 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015); *see also infra* notes 28–31 and accompanying text discussing *Romer*. Similarly, bisexuals and bisexuality have almost never been mentioned in federal appellate decisions and briefs in LBGTQ rights cases. *See* Marcus, *supra*, at 311–15.

equally protected by such "gay rights" opinions.[20] When bisexual existence is deemed unworthy of mention, bi erasure is itself also deemed insignificant, particularly by those who do not comprehend bisexuality as an equally valid and independent sexual orientation in the first place, as opposed to just a variant of or phase on the way to becoming a "real" gay.[21] As such, because neither bisexual existence nor erasure is accorded significant weight in the grander doctrinal scheme, bisexuals are told not to worry, that they can always scurry under the broader "gay rights" and "gay and transgender rights" umbrellas even if they were not explicitly invited to seek shelter through legal doctrine acknowledging them along with the rest of the LGBTQ community.

Each of these arguments provide solid grounds for interpreting *Bostock* as extending beyond the specific classes of sexual minorities named in the opinion. And each can and should be made in response to those who try to limit the reach of *Bostock* to only gay and transgender employees in the future.

Indeed, such issues may arise in a pending case involving a bisexual seeking Title VII protection, *Breiner v. Board of Education*,[22] in which a bisexual teacher was allegedly fired because of his bisexual orientation. The case is currently pending at the federal appellate level after the U.S. District Court for the Eastern District of Kentucky denied Breiner's claim prior to the *Bostock* decision.[23] In doing so, the court explained that the Sixth Circuit in *Vickers v. Fairfield* had previously declined to recognize sexual orientation as a prohibited basis for discrimination under Title

[20] This phenomenon is evidenced by the media reports following the Court's opinion in *Bostock*. Several outlets referred to the opinion as a victory for "lesbian, gay, bisexual, and transgender" people without realizing that the opinion did not explicitly mention bisexuals. *See* Ryan Thoreson, *US Supreme Court Ruling a Victory for LGBT Workers*, HUM. RTS. WATCH (June 15, 2020, 4:03 PM), https://www.hrw.org/news/2020/06/15/us-supreme-court-ruling-victory-lgbt-workers [https://perma.cc/K37V-RMC7]; *see also* Rebecca L. Baker & Caroline Melo, *Supreme Court Rules Title VII Bars Discrimination on the Basis of Sexual Orientation and Gender Identity*, NAT'L L. REV. (June 15, 2020), https://www.natlawreview.com/article/supreme-court-rules-title-vii-bars-discrimination-basis-sexual-orientation-and [https://perma.cc/2C6N-FUAN] (explaining that the Court's holding "protects lesbian, gay, bisexual, and transgender workers" from employment discrimination under Title VII); Spencer Bokat-Lindell, Opinion, *Why the Supreme Court Ruling on L.G.T.B.Q. Rights Is Such a Big Deal*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/lgbt-trans-supreme-court.html [https://perma.cc/QG26-XNT9] (mentioning that the opinion meant employers could not "fire someone for being gay, bisexual or transgender").

[21] *See generally* Yoshino, *supra* note 18 (discussing roots of bisexual erasure by both heterosexual and homosexual communities).

[22] *See* No. 5:18-351, 2019 WL 454117, at *1 (E.D. Ky. Jan. 25, 2019), *appeal filed*, No. 19-5123 (6th Cir. Feb. 28, 2019) (Mr. Breiner's name was misspelled in the district court as Briener, but has been corrected to throughout).

[23] *Id.*

VII.[24] The district court, however, flagged language in a subsequent Sixth Circuit case acknowledging "practical problems" with such a limiting approach to Title VII, but nonetheless explained that the *Vickers* ruling "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision."[25] *Bostock* had not yet been decided when those words were written, so the stage is clearly set for the Sixth Circuit to revisit Title VII's sexual orientation discrimination coverage, and in a case involving a bisexual plaintiff, no less.

II. THE HARMS OF BI ERASURE IN *BOSTOCK* AND BEYOND

In my experience writing about the problem of bisexual erasure over the years, I have frequently been asked why it even matters that bisexuals are erased from LGBTQ rights cases. Indeed, I can well imagine one reading this Essay asking: So what? Why does it matter that bisexuals were not deemed worthy of mention in *Bostock*? What's the real harm in bisexuals not being mentioned a single time in the majority opinion, including in the Court's ultimate holding? How does it seriously hurt anyone that it was only Justice Alito's and Justice Kavanaugh's dissents, not even the majority opinion, that acknowledged that sexual orientation includes bisexuality?[26]

The most immediate harms are plentiful. As set forth in Part I, unlike gay and transgender litigants, bisexuals seeking Title VII sex discrimination protections cannot make their case by simply quoting *Bostock*'s holding that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[27] *Bostock*'s omission of bisexuals forces advocates into a complicated and messy posture, having to explain how it is that in an opinion based on *textualism*, it does not matter that bisexuals are not included in the opinion's *text*. The fact that bisexuals and their advocates must overcome additional hurdles that gay and transgender litigants do not face is inequitable. Such additional burdens relegate bisexuals to second class status, requiring them to explain away their own erasure in *Bostock*. These additional, inequitable burdens would not have emanated from a decision that explicitly included

[24] *Id*.

[25] *Id*. (citing Tumminello v. Father Ryan High Sch., Inc., 678 F. App'x 281, 285 (6th Cir.), *cert. denied*, 13 S. Ct. 121 (2017)).

[26] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1758 n.8 (2020) (Alito, J., dissenting); *id.* at 1830 n.6 (Kavanaugh, J., dissenting) (both citing to definitions of sexual orientation that explicitly include bisexuality).

[27] *Id.* at 1754 (majority opinion).

bisexuals in its coverage, or one that at least framed its holding in broader terms of sexual orientation and gender identity or LGBTQ people.

These concerns—that future defendants in bisexual discrimination cases must rely on the "gay and transgender"-specific language of *Bostock* to prove their case—has turned celebration to trepidation for bisexual Court-watchers. While the rest of the LGBTQ community celebrates *Bostock*, some bisexuals have responded to the decision with uncertainty about the repercussions of the Court's failure to acknowledge their existence and rights.[28]

This is not a new problem. In failing to mention bisexuals, *Bostock* continues a harmful tradition of bisexual erasure in Supreme Court opinions, a problem beginning with the Court's 1996 decision in *Romer v. Evans*. Prior to *Romer*—in which the Supreme Court struck down an amendment to the Colorado Constitution, Amendment 2, that barred local governments from treating "homosexual, lesbian or bisexual" citizens as a protected class[29]—Supreme Court opinions were comparatively bi-inclusive.[30] That changed with *Romer*, when the Court chose to redefine the class of persons affected by Amendment 2 as "only gay people," even though the text of Amendment 2 explicitly prohibited civil rights discrimination based on "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."[31] Subsequent LGBTQ rights Supreme Court decisions have similarly failed to mention bisexuals by name.[32]

In *Bostock*, reminiscent of *Romer*, the Supreme Court ignored bisexuality in its analysis, in part following the lead of some of the attorneys in that case. The attorneys for Mr. Bostock, for example, failed to acknowledge the existence of bisexuals even once in their petition for writ of certiorari, framing the case instead as one that affects "all the gay and lesbian workers across [the] country,"[33] urging the Court to end workplace discrimination against "[g]ay and [l]esbian [e]mployees."[34] Such bi-erasing language made it all the easier for the Court to

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[28] *See* Greenesmith, *supra* note 10.

[29] 517 U.S. 620, 624, 626 (1996).

[30] *See supra* note 19.

[31] *See* Marcus, *supra* note 19, at 307.

[32] *See id.* at 306–15, 343–44 (documenting the bi erasure in court opinions over the decades).

[33] Petition for Writ of Certiorari at 5, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618).

[34] *Id.* at 26.

subsequently further abbreviate the class of persons affected by its ruling as homosexual/gay and transgender people.[35]

This is not just a problem of semantics; the more courts do not explicitly acknowledge the existence of bisexuals the less willing attorneys may be to bring discrimination cases on their behalf. Reciprocally, the fewer cases are brought on behalf of bisexuals, the less likely court opinions are to be bi-inclusive. This perpetual cycle of bi erasure makes it difficult to find any case law addressing discrimination against bisexuals, even though they are explicitly included in many state discrimination statutes.[36]

The harms stemming from *Bostock*'s bi erasure extend farther than the opinion itself, as it compounds the serious harms that emanate from bi erasure in general. The failure of courts to recognize bisexuality as a valid sexual orientation can have tragic, even life-or-death, repercussions. Too often, for example, bisexual parents are subjected to negative custody or adoption determinations when their bisexual orientation is unjustly conflated with instability.[37] Additionally, in the context of immigration and asylum, bisexual asylees seeking refuge from countries that persecute people for their sexual orientation have been disbelieved and treated with suspicion by asylum adjudicators who do not consider bisexuality as a valid sexual orientation.[38] Such adjudicators have penalized bisexual asylees for not being "gay enough," at times denying them asylum and sending them back to the countries where they faced persecution for their sexual orientation.[39] Finally, in criminal cases, misapprehension of

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[35] *See Bostock*, 140 S. Ct. at 1737, 1741–49, 1751, 1753.

[36] *See generally* Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. AM. PROGRESS ACTION FUND (2012) (cataloging the twenty-two states that explicitly include bisexuals in their antidiscrimination statutes); *see also* Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. RACE, GENDER, & SOC. JUST., 699, 709–10 (2015) (documenting the lack of published cases addressing claims by bisexuals, and explaining that even in employment discrimination cases involving claims by bisexual plaintiffs, "it seems to be virtually unheard of for a bisexual plaintiff to succeed in such a claim on the merits").

[37] *See* Marcus, *supra* note 19, at 318–20; RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 39(1996); Patricia M. Logue, The *Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIM. L. 95, 95 (2002) (discussing non-heterosexual custody cases almost exclusively in terms of gay and lesbian individuals, not bisexuals).

[38] *See* Marcus, *supra* note 19, at 316–18; Thom Senzee, *Bisexual Seeking Asylum Resorts to Photos When Asked to Prove It*, ADVOCATE (May 11, 2015, 11:00 AM), http://www.advocate.com/world/2015/05/10/bisexual-asylum-seeker-humiliated-trying-prove-sexuality-uk-officials-0 [https://perma.cc/VED2-WYNS]; Joe Morgan, *Mother of Bisexual Asylum Seeker Will Sue Britain if They Send Her Son Home to Die*, GAY STAR NEWS (Apr. 24, 2015), https://www.gaystarnews.com/article/mother-bisexual-asylum-seeker-will-sue-britain-if-they-send-her-son-home-die240415/ [https://perma.cc/8CBH-BFH9].

[39] *See* Marcus, *supra* note 19, at 316–18.

bisexuality can have dire consequences, as bisexual defendants risk losing their freedom when judges, prosecutors, or jurors view bisexuality as an indicator of deceptiveness and, by extension, criminal behavior.[40]

The stigma of bisexual erasure can have other grave consequences as well. Bisexuals already suffer from a comparative lack of community and resources and disproportionately high rates of employment discrimination and pay disparity, mental and physical health problems, suicide and suicidal ideation rates, and violence—including intimate partner violence, domestic violence, rape and sexual assault.[41] Bi erasure compounds such disparities as bisexuals internalize the stigma of bi erasure and may be subjected to increased violence and hostilities from those who do not recognize bisexuality as valid.[42] The more bisexuals are ignored, and are consequently misunderstood by courts, lawmakers, and broader society, the more these dangerous disparities grow.

Bisexual erasure also hurts the integrity of LGBTQ rights discourse by perpetuating false dichotomies, reinforcing inaccurate paradigms that require persons to fall under either a gay or straight category to be entitled to formal recognition.[43] A legal system that serves and reflects the

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[40] *See* Nancy Marcus, *Legally Bi: "The Staircase" Tells the Case of an Anti-Bi Bias in Our Courts*, BI.ORG (Aug. 25, 2018), https://bi.org/en/articles/legally-bi-the-staircase-tells-the-case-of-an-anti-bi-bias-in-our-courts [https://perma.cc/S6SY-W6JK] (reviewing the Netflix documentary film, *The Staircase*, which documented, among other things, the role that anti-bisexual biases played in the murder conviction of American novelist Michael Peterson.)

[41] *See generally* MOVEMENT ADVANCEMENT PROJECT, INVISIBLE MAJORITY: THE DISPARITIES FACING BISEXUAL PEOPLE AND HOW TO REMEDY THEM (2016) [hereinafter INVISIBLE MAJORITY], https://www.lgbtmap.org/invisible-majority [https://perma.cc/ZJ8Y-5FM5] (extensively documenting statistical evidence of each of these types of disparities, and proposing policy-based methods of addressing the disparities); HUM. RTS. CAMPAIGN FOUND., BINET USA, BISEXUAL RES. CTR. & BISEXUAL ORG. PROJECT, HEALTH DISPARITIES AMONG BISEXUAL PEOPLE, https://assets2.hrc.org/files/assets/resources/HRC-BiHealthBrief.pdf?_ga=2.241924161.251517611.1592273885-1684528672.1590802494 [https://perma.cc/S97M-6QFA] (addressing health disparities faced by bisexuals).

[42] *See* INVISIBLE MAJORITY, *supra* note 41, at 1 (describing the report's findings in a variety of areas as collectively "show[ing] how bias, stigma, discrimination, and invisibility combine to create serious negative outcomes for bisexual people," including "pervasive discrimination and key disparities"); *id.* at 6 (describing how the lack of studies and analyses addressing bisexuals render it hard to understand and address the disparities faced by bi people, as undeniable as those disparities are); *id.* at 12 (explaining that "a lack of understanding about bisexuality may mean that an immigration official may unfairly discount a bisexual person's application for asylum by assuming that the applicant is actually heterosexual"); *id.* at 18 (addressing how studies examining health outcomes have ignored the needs and experiences of bisexual men, impacting data analysis of HIV prevention, treatment, and care).

[43] For a comprehensive discussion of the "bipolar injustice" of false dichotomies, and how a "bi jurisprudence" that sheds light on the flaws of either/or, black-and-white paradigms could also provide a model for transcending false dichotomies in other contexts such as race, gender, and

existence of all persons, not just those who fall within black-and-white polarized binaries, should acknowledge the existence and realities of bisexuals and others (including those of nonbinary gender identities, for example) who do not fit within rigid binary definitional boxes.

Moreover, bisexual erasure undermines the bedrock principles upon which LGBTQ rights advocacy often rests. For example, the historic *Lawrence*, *Windsor*, and *Obergefell* decisions were grounded in principles of equal dignity, principles advocated for by LGBTQ rights attorneys and embraced by the Court. In the context of sexual orientation, these cases eschewed second-class treatment of gay people and same-sex couples (even while, as described, erasing bi people) in favor of equal respect, autonomy, and dignity.[44] Emphasizing those principles broadly in LGBTQ rights advocacy, while simultaneously not protecting with equal force the equal dignity and respect to bisexuals, ultimately hurts not just bisexuals, but also the consistency and coherence of LGBTQ rights arguments.[45]

Finally, the bisexual erasure in *Bostock*'s text costs the Court its own credibility, as it is a dishonest reframing of the issue at its core. An analysis of the Court's reasoning in *Lawrence v. Texas*, which overruled the infamous *Bowers v. Hardwick* decision—a 1986 decision that upheld sodomy bans as constitutional after reframing the issue to be inappropriately homosexuality-specific by asking whether individuals had a "fundamental right to engage in homosexual sodomy"[46]—provides an apt illustration of how *Bostock*, like *Bowers*, harms the Court's credibility. In *Lawrence,* the Court condemned the underlying *Bowers* analysis, beginning with the *Bowers* Court's initial improper reframing of the question presented. As the *Lawrence* Court described *Bowers*:

> The Court began its substantive discussion in *Bowers* as follows: 'The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a

disability, see generally COLKER, *supra* note 37, at 15–232. Professor Colker's model for using a "bi jurisprudence" as a tool for deconstructing harmful and false dichotomies could be applied in myriad other contexts as well.

[44] *See* Obergefell v. Hodges, 576 U.S. 644, 657–66, 677–81 (2015); United States v. Windsor, 570 U.S. 744, 764, 768–75 (2013); Lawrence v. Texas, 539 U.S. 558, 567, 575 (2003).

[45] *See* Marcus*, supra* note 19, at 324–36 (describing how bi erasure in legal argument harms the broader LGBTQ community, resulting in statistical inaccuracies in legal argument, the perpetuation of false dichotomies and isolationist paradigms, the undermining of equal liberty arguments, and missed opportunities in refining legal analyses).

[46] 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). Notably, the text of the statute at issue in that case, Ga. Code Ann. § 16–6–2 (1984), did not restrict its sodomy ban to only gay, or homosexual, people. *See id*. at 188 n.1.

> very long time.' That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake.[47]

Such a narrow framing had allowed the *Bowers* Court to mock the claim to the liberty interests at issue in that case as "at best, facetious."[48]

In the opening paragraph of *Bostock*, the Court similarly misrepresents the question at issue in the sexual orientation cases as "whether an employer can fire someone simply for being homosexual or transgender."[49] However, the actual question presented in *Bostock* and *Zarda* was "[w]hether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination 'because of . . . sex' within the meaning of Title VII of the Civil Rights Act of 1964."[50] In reframing the issue in overly specific "homosexual and transgender" terms, the Court invites ridicule of the issue in the case as facetious in its overly narrow (and antiquated) "homosexual and transgender" framing. And, perhaps even more important, in reframing the issue that was asked of it in such narrow terms, the Court peddles in inaccuracy, because that, quite simply, was *not* the question asked of the Court.

In the end, bisexual erasure has created hurdle after hurdle, in legal contexts and otherwise, for bisexuals seeking fair and just treatment under the law. The *Bostock* holding, while certainly a victory for LGBTQ equality overall, is at the same time yet another inequitable hurdle in the path of bisexual advocacy.

III. HOW BI INCLUSION COULD HAVE BUTTRESSED THE *BOSTOCK* ANALYSIS

Omitting bisexuality from the analysis of Title VII's protections for LGBTQ people also results in a flawed analysis and, reciprocally, a missed opportunity to illustrate how sexual orientation discrimination is a form of sex discrimination, i.e., the central issue in *Bostock*.

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[47] *Lawrence*, 539 U.S. at 566–67 (quoting *Bowers*, 478 U.S. at 190).

[48] *Bowers*, 478 U.S. at 194; *see also* Nancy C. Marcus, *Beyond* Romer *and* Lawrence: *The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 395–98 (2006) (explaining that the application of strict "fundamental rights" semantics in due process jurisprudence both endangers individual rights and is inconsistent with Supreme Court substantive due process precedent).

[49] Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

[50] Question Presented, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618), https://www.supremecourt.gov/qp/17-01618qp.pdf [https://perma.cc/C7WD-N4Y2]; *see also* Question Presented, Altitude Express, Inc. v. Zarda, No. 17-1623, https://www.supremecourt.gov/qp/17-01623qp.pdf [https://perma.cc/QTM4-5WZW] (presenting the same issue as, and consolidated with, *Bostock*).

Keeping in mind that the Court in *Bostock* rejected the employers' formulation of the Title VII "but-for" analysis that sex is the *only* causative factor in an adverse employment action,[51] bisexuals could nonetheless be quite instrumental in debunking even those poorly framed "but-for" arguments. The *Bostock* majority describes the employer argument as follows:

> The employers illustrate their concern with an example. When we apply the simple ["but-for"] test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So, for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.[52]

As the majority in *Bostock* points out, this argument is fundamentally flawed because it improperly assumes a single factor causation standard, which is not the requirement under Title VII.[53] However, including bisexuals at this point in the analysis would have revealed another glaring hole in the employers' argument: even under their wishfully thought-up single-cause framework, in the case of the bisexual employee discriminated against because of her or her partner's sex, every factor really *is* constant other than sex. To elaborate, when a female bisexual employee is discriminated against because her partner is female, but a male bisexual employee with a female partner is not similarly discriminated against, sex is the only variance between the two scenarios, while sexual orientation is held constant. Similarly, if a bisexual employee is discriminated against when her partner is female, but not when she has a male partner, once again, sex is the only thing that changed from one scenario to the next. Everything else is constant, *including the bi employee's sexual orientation*. Thus, bisexuals can provide a clear depiction of how sexual orientation discrimination

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[51] *See Bostock*, 140 S. Ct. at 1739–40 (explaining that under Title VII, a plaintiff can prevail by showing that sex was just one "motivating factor" in an adverse employment decision, but even under a "but-for" causation analysis, discrimination is actionable where more than one factor contributed to a negative employment decision).

[52] *Id*. at 1747–48.

[53] *Id.* at 1739–40, 1748–49.

really is a form of prohibited sex discrimination, rebutting arguments to the contrary.

This is just one example of how bi inclusion can strengthen LGBTQ rights discourse, advocacy, and jurisprudence. More generally, bi inclusion resolves the problems of bi erasure, while further strengthening LGBTQ rights discourse through a more honest and inclusive approach that rejects the rigid and confining identity-erasing categorizations from which LGBTQ people as a whole have long sought their liberty.

CONCLUSION

Why did the *Bostock* decision fail to even acknowledge the existence of bisexuals along with gay and transgender employees? It was not solely because of the parties' particular identities in that case, as the question presented in *Bostock* and *Zarda* was about sexual orientation generally, not solely about the particular plaintiffs' sexual orientations.[54] Indeed, Mr. Bostock's written and oral arguments were explicitly inclusive of lesbians,[55] although he is not a lesbian, which begs the question of why his petition to the Court did not similarly acknowledge the existence of bisexuals.

Regardless of the reasons why Mr. Bostock's attorneys made the strategic decision to reference "gays and lesbians" but not bisexuals, by doing so they signaled the acceptability of bi erasure and led the Court to

[54] As a bit of tangential irony, Mr. Bostock was fired after his employer discovered he was on a gay softball league. *Bostock*, 140 S. Ct. at 1737–38. A decade prior, the 2008 Gay Softball World Series was the subject of a one-of-a-kind lawsuit filed by the National Center for Lesbian Rights against the North American Gay Amateur Athletic Alliance (NAGAAA), which settled the case after subjecting three bisexual softball players to hours of intrusive interrogation and discrimination for being deemed too "non-gay" to play in the Gay Softball World Series, despite NAGAAA's mission statement explicitly "celebrat[ing] inclusivity and stat[ing] that its mission is to promote amateur competition 'for all persons regardless of age, sexual orientation or preference, with special emphasis on the participation of members of the gay, lesbian, *bisexual* and transgender (GLBT) community.'" Apilado v. N. Am. Gay Amateur Athletic All., 792 F. Supp. 2d 1151, 1156, 1159 (W.D. Wash. 2011) (emphasis added); *see also Parties Settle Case Challenging Disqualification of Bisexual Players' Team at 2008 Gay Softball World Series*, NAT'L CTR. FOR LESBIAN RTS. (Nov. 28, 2011), http://www.nclrights.org/about-us/press-release/parties-settle-case-challenging-disqualification-of-bisexual-players-team-at-2008-gay-softball-world-series/ [https://perma.cc/C7N9-GNC4]. The court held that it was impermissible for the "gay" softball organization to exclude bisexual or heterosexual players who were presumed to not "share" the "values" of gay people. *See Apilado*, 792 F. Supp. 2d at 1156. From discussions with lead LGBTQ rights impact litigators and a review of published case law, that case appears to have been the only such publicized case brought by an LGBTQ rights organization against another LGBTQ organization to assert the rights of bisexuals against discrimination by gay people, and it raises the question of whether an employer who discriminates against an employee (such as Mr. Bostock) for being on a gay softball league is necessarily discriminating against the employee for being gay, as opposed to being bisexual.

[55] *See supra* notes 32–35 and accompanying text.

engage in similar erasure. Such has been the case in LGBTQ rights litigation for decades. The Court's bi erasure in *Bostock* is just the latest example of the bi erasure that has occurred in every LGBTQ rights Supreme Court decision since *Romer v. Evans*.[56]

Unfortunately, the Court's bi erasure in *Bostock* is not unique. For decades, bisexuals have been expected to acquiesce to their erasure and quietly accept that the rights explicitly affirmed for their gay and transgender friends will trickle down to them as well. And trickle down they should: a careful reading of *Bostock* supports extending its holding to bisexuals.

A better *Bostock* opinion, however, would have been a bi-inclusive opinion that recognizes the role bisexuals can play in illustrating that when an employee is treated worse when dating someone of the same sex than when dating someone of a different sex, despite being bisexual all along, that discrimination is clearly "because" of sex for Title VII purposes.

Without such an explicit recognition of how Title VII's sex discrimination protections also apply to bisexuals—even though Title VII should apply to bisexuals as well as to straight and gay people, as do other laws that protect against sexual orientation discrimination[57]—citing *Bostock* for that proposition will not be a straightforward path. The holding's "gay and transgender"-specific language will not be as easy for bisexuals to cite as precedential authority for the assertion of rights as it will be for gay and transgender people. In future cases, bisexuals may be required to add additional layers of argument explaining why the *Bostock* holding should be interpreted as applying equally to them even though it only explicitly names gay and transgender people.

With the Sixth Circuit's pending reconsideration of *Breiner v. Board of Education*,[58] the first federal appellate decision regarding the applicability of Title VII and *Bostock* to bisexual employees may come sooner rather than later. While there is no chance of bisexuality being erased in *Breiner*, a case explicitly about a bisexual employee, there is still the danger that the defendant may try to use the erasure of bisexuals in the text of *Bostock* as an argument against bisexual employees' Title

[56] *See supra* notes 18 and 20 and accompanying text.

[57] *See, e.g.*, CAL. GOV'T CODE § 11139.8(a)(5) (West 2017); COLO. REV. STAT. ANN. § 24-34-301(5)(b), (7) (West 2018); MASS. GEN. LAWS ANN. ch. 19A, § 43 (West 2018); ME. REV. STAT. ANN. tit. 5, § 4553 (9-C) (2019); NEV. REV. STAT. ANN. § 645.321(3)(d) (West 2019); UTAH CODE ANN. § 57-21-2 (23) (West 2015).

[58] No. 19-5123 (6th Cir.), *on appeal from* Breiner v. Brd. of Educ., No. 18-351-KKC, 2019 WL 454117 (E.D. Ky. Jan. 25, 2019).

VII protections. For all the reasons detailed herein, that argument should not succeed, but Mr. Breiner's attorneys must be prepared to confront it nonetheless.

Throughout decades of bisexual erasure leading up to *Breiner*, including and long before *Bostock*, bi people have been consistently reminded that our equal dignity may be denied at any turn, our identity trivialized or erased entirely, by the bench, the bar, and beyond. Hopefully, while *Bostock* marks the end of unchecked employment discrimination against LGBTQ people, *Breiner* will mark the beginning of the end of bisexual erasure.

It is time. The cumulative stigma of persistent bisexual erasure over the decades is crushing with its wearying weight, especially when even the lawyers representing LGBTQ clients fail to acknowledge bisexuals' existence and rights. This is a particularly poignant truth when the latest blatant erasure by the Supreme Court occurred in an opinion centered on the importance of taking text literally and seriously. Words matter, and they should be weighed more carefully in the future. The bench and bar can do better by bisexuals.