

CAN *BOSTOCK* DO THE TEXAS TWO-STEP? THE NEED FOR LGBTQ LEGAL PROTECTIONS IN THE LONE STAR STATE

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I. INTRODUCTION

Imagine a newly engaged couple. They are brimming with excitement, full of hope and possibility and riding the high of new love. The planning

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begins and the venue must be picturesque and finding the perfect dress can be make or break. Boutique bridal shops hold the answer, and they eagerly schedule their appointment. But upon arrival, the owner realizes that there is not one bride, but two, and tells them that she cannot accept their business because she does not believe two women should get married. Feeling confused and embarrassed, Kate and Mary must sheepishly accept that other Texans are allowed to treat them as second-class citizens. Will they endure this belittlement at every step of planning? Will they be able to find vendors to make this day what they have been dreaming of? Is a celebration of their love even possible in their tiny Texas town? This problem is one that many same-sex couples face because Texas has no laws that prohibit discrimination against LGBTQ individuals in spaces of public accommodation.¹

Public accommodation laws ensure that every individual can enjoy businesses that are generally open to the public.² To put it another way, these laws ensure that you can shop where you want, eat where you want, and go do the things you like to do without businesses turning you away based on your status as a woman, racial minority, or LGBTQ individual.³ Under current Texas law, LGBTQ Texans receive zero statewide legal protections that prohibit discrimination in places of public accommodation.⁴ The majority of Texans—close to 70%—support the enactment of legal protections for this community.⁵ In June 2020, the Supreme Court of the United States decided *Bostock v. Clayton County*, holding that discrimination based on sexual orientation or gender identity is necessarily discrimination “because of sex.”⁶ Although *Bostock* addressed employment discrimination under Title VII, many states are using its holding to interpret and expand their state public accommodation laws and offer legal protections to LGBTQ individuals.⁷ Texas should pass legislation that prevents discrimination in

1. A place of public accommodation includes: any business, store, entertainment venue, restaurant, or other establishment which supplies goods or services to the general public, or which solicits or accepts the patronage of the general public. Civil Rights Act of 1964, 42 U.S.C. § 2000a. “LGBTQ is an acronym for lesbian, gay, bisexual, transgender and queer or questioning. These terms are used to describe a person’s sexual orientation or gender identity.” *What is LGBTQ?*, THE CTR., <https://gaycenter.org/about/lgbtq/> (last visited Sept. 21, 2021).

2. See Civil Rights Act 1964, 42 U.S.C. § 2000a.

3. *Id.*

4. *But see* AUSTIN, TEX., CODE OF ORDINANCES, tit. 5, § 5-3-1 (1992); DALLAS, TEX., CITY CODE, § 46-1 (2015); SAN ANTONIO, TEX., CODE OF ORDINANCES, § 2-592 (2013) (illustrating how certain big cities have municipal ordinances that prohibit discrimination in places of public accommodation).

5. PRRI Staff, *Spotlight on Texas: Broad Support Remains for LGBT Nondiscrimination Laws*, PRRI (Mar. 26, 2019), <https://www.prrri.org/spotlight/spotlight-on-texas-broad-support-remains-for-lgbt-nondiscrimination-laws/>.

6. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1752–54 (2020).

7. See Howard Fischer, *Arizona AG to Enforce Laws Against Workplace Discrimination Based on Sexual Orientation*, KAWC (June 22, 2020), <https://www.kawc.org/post/arizona-ag-enforce-workplace-discrimination-laws-based-sexual-orientation>; Andrew Bahl, *In Major Shift, State Human Rights Commission Broadens LGBT Protections Statewide*, TOPEKA CAP.-J. (Aug. 21, 2020, 7:23 PM), <https://www.cjonline.com/story/news/politics/state/2020/08/22/in-major-shift-state-human-rights-commi>

places of public accommodation, utilizing the language in the *Bostock* decision.

Texas is the second most diverse state in the United States, with over a million Texans identifying as LGBTQ.⁸ The Movement Advancement Project collects data and tracks equality measures across all fifty states⁹ and has given Texas a rating in the negative, reflecting a hostile environment that showcases the difficulties that LGBTQ individuals face.¹⁰ Inclusive public accommodation laws could provide these millions of individuals the safety and security to live life as they are, as well as establishing their dignity and worth as fellow Texans. While the Texas Legislature has seen numerous renditions of similarly proposed laws, the *Bostock* holding provides a fresh legal analysis that can be used to demonstrate why now is different.¹¹

This Comment will lay out the trajectory of public accommodations protections across the United States as a whole, with a specific focus on how states are using *Bostock* to expand protections for the LGBTQ community, as well as argue how and why Texas can and should do the same. Part II outlines a historical summary of the major cases that have paved the way for this necessary moment, starting with the implementation of the Civil Rights Act of 1964 and tracing the progression into the fight for LGBTQ equality where it currently stands after the *Bostock* decision.¹² This analysis includes how other states are interpreting *Bostock*, primarily focusing on states that are using it to change the interpretation or expand their own state public accommodation laws.¹³ Part III looks at where Texas stands in relation to other states, the current protections in place, and where the state falls short.¹⁴ Part IV demonstrates how and why Texas should implement *Bostock* in crafting its own legislation and why the time is ripe.¹⁵

ssion-broadens-lgbt-protections-statewide/114794158/; Abby Llorico, *What the Supreme Court Ruling on Discrimination Means in Missouri*, KSDK-TV (June 15, 2020, 7:13 PM), <https://www.ksdk.com/article/news/local/supreme-court-ruling-lgbtq-discrimination-missouriimpact/63-2f0dea34-6bea-4309-98ed-9d6195c6c35>.

8. Adam McCann, *Most & Least Diverse States in America*, WALLETHUB (Sept. 9, 2020), <https://wallethub.com/edu/most-least-diverse-states-in-america/38262>; *Texas' Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality_maps/profile_state/TX (last visited Sept. 21, 2021).

9. MOVEMENT ADVANCEMENT PROJECT, *supra* note 8.

10. *Id.*

11. *See infra* Part III.B (explaining the relevance of *Bostock* to Texas public accommodation laws).

12. *See infra* Part II.A–B (showing the progression of the civil rights movement related to LGBTQ individuals).

13. *See infra* Part II.C (showing how states currently stand in interpreting *Bostock*).

14. *See infra* Part III (showing how Texas compares to other states in implementing the *Bostock* decision).

15. *See infra* Part IV (showing why Texas should implement its own post-*Bostock* legislation).

II. PROTECTIONS FOR THE PUBLIC: A LEGAL OVERVIEW

Places of public accommodation have long been a source of contention in the United States, including extensive debate over business owners' ability to exclude individuals based on certain traits or differing beliefs.¹⁶ The origin of this debate is rooted in racial divides and has since expanded to religious exemptions for businesses that want to turn away LGBTQ individuals and same-sex couples.¹⁷ Congress attempted to regulate discrimination in public places for decades before the passage and implementation of substantive legislation.¹⁸ Congress cited a need to "promote the general welfare by eliminating discrimination" with the Civil Rights Act of 1964, but its protections were limited.¹⁹ There have since been numerous amendments and expansions to further that goal of protecting individuals' right to fully and equally enjoy privileges enjoyed by all citizens.²⁰

A. The Civil Rights Act of 1964 and Its Limitations

When Congress passed the Civil Rights Act of 1964 (the Act), it was lauded as the most comprehensive protection of civil rights to date.²¹ The Act contained provisions protecting voting rights, ensuring equal access to places of public accommodation, and establishing equal educational opportunities.²² At the time of its enactment, it primarily focused on preventing discrimination on the basis of race, color, religion, or national origin.²³ This section examines the substance of two relevant portions of the Act: how it has been amended and expanded since its enactment, and how states have built on to the protections that it seeks to provide.

Title II of the Act prohibits discrimination on the basis of race in places of public accommodation.²⁴ Title II guarantees equal access to establishments that affect interstate commerce such as lodging, restaurants, gas stations, retail establishments, entertainment venues, and any other business that is

16. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244 (1964).

17. See *supra* notes 1–3 and accompanying text (discussing The Civil Rights Act of 1964).

18. *Delivering on a Dream: The House and the Civil Rights Act of 1964*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/Civil-Rights/1964-Essay/> (last visited Sept. 21, 2021) (outlining the role the House played in passing the Civil Rights Act after previously failed bills that were less comprehensive).

19. *Heart of Atlanta Motel*, 379 U.S. at 245 (quoting H.R. Doc. No. 124, 88th Cong., 1st Sess., at 14).

20. See *14th Amendment*, HIST. (Jan. 12, 2021), <https://history.com/topics/black-history/fourteenth-amendment>; *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/legal-events-timeline.html> (last visited Sept. 21, 2021).

21. See 42 U.S.C. Ch. 21.

22. *Id.*

23. See Civil Rights Act of 1964, 42 U.S.C. § 2000a.

24. *Id.*

generally open to the public.²⁵ Following the Civil Rights movement, and the desegregation of the South, there was a demonstrable need to ensure that people of color would have equal access to businesses and other places of public accommodation.²⁶ Congress achieved this equal access through two means: passage of the Act under its constitutionally enumerated power of the Commerce Clause and enforcement through the Necessary and Proper Clause.²⁷ This Act was quickly challenged in state courts in cases such as *Heart of Atlanta Motel* and *Piggie Park*, and subsequently was upheld by the Supreme Court, holding that Congress was within its authority to prohibit discrimination in places of public accommodation.²⁸

Notably, Title II does not prohibit sex-based discrimination in public accommodation, and it has seen little expansion since its implementation.²⁹ As a result, those increased protections are left to the states to enact. State public accommodation laws greatly expanded upon Title II's protections, adding sex or gender, age, marital status, and other protected classes.³⁰ All of the forty-five states with public accommodation laws on record include sex as a protected class, but Texas remains one of the five states without any public accommodation law on record.³¹

Conversely, Title VII of the Civil Rights Act includes more protected classes of individuals and has seen notable growth since it was passed.³² Title VII prohibits discrimination in employment based on race, color, religion, sex, and national origin.³³ Courts and Congress have interpreted and amended Title VII several times since its enactment.³⁴ The *Bostock* decision marks the most significant judicial extension of its protections in a generation, though Congress has demonstrated a commitment to an even broader expansion of the Act as a whole.³⁵

25. 42 U.S.C. § 2000b-1-b-4.

26. See Alton Hornsby Jr., *Looking Back on the Fight for Equal Access to Public Accommodations*, ECON. POL'Y INST. (July 2, 2014), <https://www.epi.org/publication/fight-equal-access-public-accommodations/>.

27. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252–62 (1964).

28. *Id.* at 245–47; *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968).

29. Civil Rights Act of 1964, 42 U.S.C. § 2000a.

30. *State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#_ftn8.

31. *Id.*

32. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> (last visited Sept. 21, 2021); Civil Rights Act of 1964, 42 U.S.C. § 2000e.

33. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 32; Civil Rights Act of 1964, 42 U.S.C. § 2000e.

34. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989); 42 U.S.C. § 1981.

35. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020); Kate Sosin, *Equality Act Would Fill Key Gaps in Civil Rights Law for Women, People of Color, the Faithful*, 19TH* NEWS (Jan. 26, 2021, 2:37 PM), <https://19thnews.org/2021/01/equality-act-would-fill-key-gaps-in-civil-rights-law-for-women-people-of-color-the-faithful/>.

The Equality Act would amend the Civil Rights Act of 1964 to explicitly include sexual orientation and gender identity.³⁶ President Biden has vowed to pass the Equality Act as a part of his first 100 days initiative.³⁷ This federal legislation would not preempt states from passing their own laws regarding protections against discrimination. In fact, state laws typically offer more expansive protections, filling in the patchwork gaps left by foundational federal coverage.³⁸ The Equality Act would be groundbreaking in the fight for LGBTQ equality, but its fate is still uncertain.³⁹ The next subsection will examine the trajectory of LGBTQ rights leading up to *Bostock* and what questions remain unanswered for this community in the wake of this precedent.

B. The Historical Arch in the Fight for LGBTQ Equality

The legal fight for LGBTQ equality in the United States reflects a steady progression of general social acceptance of the community.⁴⁰ What began as a fight for the right to conduct relationships in the privacy of one's home has now progressed to the public stage to central issues such as the right to marry, the right to adopt, and the right to not be discriminated against in businesses generally open to the public.⁴¹ This transcendence from private rights to public rights has as much to do with a growing social acceptance as it does with courts' continued affirmation of LGBTQ rights.⁴²

1. Precedent That Paved the Road to Bostock

The first recognition of LGBTQ equal rights came in *Romer v. Evans*.⁴³ In *Romer*, the Supreme Court held that Colorado violated the Equal Protection Clause with a state constitutional amendment that would permit discrimination rooted in anti-LGBT animus.⁴⁴ *Romer* was the first messaging

36. See Sosin, *supra* note 35.

37. See *id.*

38. See Delaney Hiegert, *Patchwork Protections in Kansas: The Rise of Religious Exemption Laws Demands State-Level LGBTQ+ Antidiscrimination Protections*, 30 KAN. J.L. & PUB. POL'Y 128, 153–57 (2020).

39. See Sosin, *supra* note 35.

40. See Kyle C. Velte, *Postponement as Precedent*, 29 S. CAL. L. REV. & SOC. JUST. 1, 26 (2019); Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994) (commenting on the relationship between law and social attitudes, Haney states that “the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination.”).

41. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Fulton v. City of Philadelphia*, 141 S. Ct. 1104 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (showing the civil rights progress made by the LGBTQ community).

42. See Velte, *supra* note 40; Haney-López, *supra* note 40 (discussing the role that social acceptance plays in influencing the law).

43. See *Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

44. See *id.* at 623–24; Velte, *supra* note 40, at 26.

from the Court that “LGBT people should be viewed as full and equal citizens under the law . . . suggesting that the law must reflect [their] equal integrity and dignity.”⁴⁵ This holding did not grant any rights to the LGBTQ community, but rather protected rights that the Court held were already afforded by the Constitution.⁴⁶

The first major victory came in the early 2000s with the decision in *Lawrence v. Texas*, holding that the state’s criminalization of consensual same-sex intimate conduct infringed on the right to privacy embedded in the Constitution.⁴⁷ Where *Romer* was centered on equality, *Lawrence* was focused on dignity, rejecting the social and legal precedent that demeaned the lives of LGBTQ people.⁴⁸ By holding as unconstitutional the criminal penalties for same-sex relations, the Court effectually granted LGBTQ persons the right to engage in relationships.⁴⁹ This case was the starting point for two decades of legal precedent that propelled LGBTQ Americans ever closer to a place of equality and, by default, into a place of acceptance in society.⁵⁰

In 2015, this fight for equality culminated in the ruling of *Obergefell v. Hodges*, which held that same-sex couples share in the fundamental right to marry afforded by the Due Process Clause.⁵¹ The Court again focused on the dignity inherent in recognizing LGBTQ rights, and walked through not only the legal harms that come from denying the right to marry, but also the social harms inherent in exclusion.⁵² While *Obergefell* remains one of the greatest victories for LGBTQ rights to date, the landmark ruling did not end the struggle for LGBTQ rights.⁵³ Protections from discrimination in public places were still noticeably lacking. The Supreme Court granted certiorari to

45. Velte, *supra* note 40, at 27.

46. See *Romer*, 517 U.S. at 635.

47. See *Lawrence v. Texas*, 539 U.S. 558, 602–06 (2003) (overturning the *Bowers v. Hardwick* holding that upheld the constitutionality of anti-sodomy laws).

48. See Velte, *supra* note 40, at 27–28.

49. See generally *Lawrence*, 539 U.S. 558.

50. See Don’t Ask, Don’t Tell Repeal Act of 2010, 10 U.S.C. § 654 (repealing the ban on homosexual activity for members of the United States Military); see generally *Baker v. State*, 744 A.2d 864 (1999) (Vermont Supreme Court decision that led to the state passing the first legislation recognizing same-sex civil unions, VT. STAT. ANN. tit. 15, § 1201(2) (2019)); Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (defining marriage as a legal union between one man and one woman). *But see* *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015) (effectively superseding DOMA and rendering this provision unenforceable by recognizing same-sex marriage nationwide); see also *United States v. Windsor*, 570 U.S. 744, 816–18 (2013) (nullifying a separate provision of DOMA that denied spousal benefits to legally wed same-sex couples under state law).

51. See *Obergefell*, 576 U.S. at 680–81.

52. See *id.* at 665–70; Velte, *supra* note 40, at 30.

53. See generally Christopher R. Riano & William N. Eskridge, Jr., *The Unfinished Business of LGBTQ+ Equality: Five Years After Obergefell v. Hodges*, N.Y. ST. B. J. (June 3, 2020), <https://nysba.org/the-unfinished-business-of-lgbtq-equality-five-years-after-obergefell-v-hodges/>; Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016).

examine this exact issue in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.⁵⁴

Masterpiece Cakeshop was the Court's first consideration of LGBTQ rights vis-à-vis claims for religious exemptions from public accommodation laws.⁵⁵ In *Masterpiece Cakeshop*, the Court faced the question of the ability of places of public accommodation—in that case, a wedding vendor—to refuse service to LGBTQ individuals and same-sex couples on the basis of sincerely held religious beliefs.⁵⁶ The Court declined to address the merits of the religious exemption claim, instead deciding the case on one narrow ground—that the exemption seeker had not been afforded a neutral adjudication of his claim.⁵⁷ The Court found that the state agency that reviewed civil rights claims demonstrated bias towards religious individuals in its commentary and initial investigation, depriving the exemption seeker from due process rights.⁵⁸

While the Court did not directly address the issue of whether business owners may claim a religious exemption from public accommodation laws, the decision contains dicta that suggest how the court *might* rule in a similar future case.⁵⁹ The Court recognized that while the Constitution protects religious liberties, such protections do not allow businesses and other economic actors to deny persons equal access under neutral and generally applicable laws.⁶⁰ Further, the Court was adamant that society must recognize LGBTQ individuals and couples as deserving of dignity and worth, and not treat them as social outcasts.⁶¹

Many advocates thought that the next LGBTQ rights case on which the Court would grant certiorari would be to resolve the unfinished business of *Masterpiece*.⁶² When the Court granted certiorari on the LGBTQ Title VII cases, collectively referred to as *Bostock*, many advocates were uneasy about the impact that a negative ruling would have on the continued fight for LGBTQ equality.⁶³ However, the Court determined that sexual orientation and gender identity are derivative of sex and fall under discrimination

54. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723–26 (2018).

55. See *id.*

56. *Id.* at 1723.

57. *Id.*

58. *Id.* at 1729.

59. See *id.* at 1727; see also *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871–74 (2021) (granting certiorari to determine the constitutionality of discrimination against LGBTQ individuals in the state-sponsored adoption sector).

60. *Masterpiece Cakeshop*, 138 S. Ct. at 1727. But see *Fulton*, 141 S. Ct. at 1871–74 (threatening to overturn this standard application of general and neutrally applicable laws, which stems from *Employment Division, Department of Human Res. v. Smith*, 494 U.S. 872 (1990), should petitioners succeed in their arguments).

61. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

62. See Lydia E. Lavelle, *Saving Cake for Dessert: How Hearing the LGBTQ Title VII Cases First Can Inform LGBTQ Public Accommodation Cases*, 30 GEO. MASON U. C. R. L.J. 123, 124–27 (2020).

63. See *id.* at 130–32; see generally *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

protections because of sex.⁶⁴ This determination could act as guidance on the remaining issue of *Masterpiece*.

2. *Bostock*: A Statutory Super Precedent

The *Bostock* decision was a landmark victory in LGBTQ rights, in which the Supreme Court held that Title VII's prohibition against employment discrimination "because of [an] individual's . . . sex" includes a prohibition against discrimination based on sexual orientation and gender identity.⁶⁵ Three cases were consolidated: two involved gay men fired after their employers discovered their sexual orientation, and one involved an employer who fired a transwoman after she transitioned and disclosed this information to her employer.⁶⁶ Each brought suit against their employers and alleged sex discrimination under Title VII.⁶⁷

The main issue was whether the Title VII's clause "because of . . . sex" prohibited discrimination based on sexual orientation and gender identity (SOGI).⁶⁸ To answer this question, the Court began with the plain language of the statute, taking a textualist approach.⁶⁹ Writing for the majority, Justice Gorsuch held that "because of . . . sex" textually encompasses discrimination conducted on the basis of, or because of, an individual's sexual orientation or gender identity.⁷⁰

Justice Gorsuch reasoned that the use of "because of" in the statute's prohibition of sex discrimination implied a but-for causation analysis.⁷¹ The textualist reasoning of the majority was simple: if a man was married to a woman, his employer would not have taken adverse employment action; however, if a woman was married to a woman, the employer did take adverse employment action; thus, the woman was discriminated against "because of" her sex.⁷² Put another way, had the woman been a man, she would not have been fired; but-for her sex, she would still have her job.⁷³ Thus, while she may have been fired because she is a lesbian (sexual orientation), she was also fired because of her sex.⁷⁴ The interwoven nature of sex with these derivatives of sexual orientation and gender identity leaves them all too

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

65. *Id.* at 1737–38.

66. *Id.*

67. *Id.* at 1738.

68. *Id.* at 1738–39.

69. *Id.*

70. *Id.* at 1742.

71. *Id.* at 1739.

72. *Id.*

73. *See id.*

74. *Id.* at 1742–43.

interconnected to not be considered a single trait when it comes to discriminatory motive.⁷⁵

The majority limited its holding to the narrow scope of Title VII claims, despite the dissent adamantly insisting the impact this statutory interpretation would have.⁷⁶ The majority refused to expand on how the holding in *Bostock* could implicate other areas such as religious liberty.⁷⁷ Justice Alito recognized the widespread impact that this holding would have (citing the hundreds of other federal statutes that it would impact) and scolded the majority for refusing to acknowledge the breadth of the holding they were implementing.⁷⁸ One of the first executive orders President Biden enacted after his inauguration proved that Justice Alito was correct in his predictions.⁷⁹

The Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation was signed on January 20, 2021.⁸⁰ This Order applies the holding of *Bostock* to all federal statutes prohibiting sex discrimination.⁸¹ The Human Rights Campaign regards this as “the most substantive, wide-ranging LGBTQ executive order in U.S. history.”⁸² The order will have positive implications for 11 million LGBTQ individuals as it encompasses new protections for education, housing, healthcare, and credit.⁸³ However, executive orders are easily superseded by new administrations and without codification—there is no permanency.⁸⁴ Fortunately, this sweeping federal enactment supports states’ adoptions and expansions of the *Bostock* decision as applicable to state anti-discrimination laws.

C. How States Are Applying and Expanding *Bostock*

LGBTQ rights activists quickly took the *Bostock* holding and leveraged its analytical framework to apply it in other legal contexts.⁸⁵ As pertinent here, these advocates argue that *Bostock*’s reasoning equally applies to state

75. *See id.*

76. *Id.* at 1754–84.

77. *Id.* at 1754.

78. *Id.* at 1778.

79. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) [hereinafter Executive Order].

80. *Id.*

81. Lucas Acosta, *The Real-Life Implications of Biden’s Bostock Executive Order*, HUM. RTS. CAMPAIGN (Jan. 21, 2021), <https://www.hrc.org/press-releases/the-real-life-implications-of-bidens-bostock-executive-order>.

82. *Id.*

83. *Id.*

84. *See Sosin, supra* note 35.

85. *See generally* Christy Mallory et al., *Legal Protections for LGBT People After Bostock v. Clayton County*, UCLA SCH. OF L. WILLIAMS INST. (Aug. 2020), <https://escholarship.org/uc/item/1h88n2d8>.

public accommodation laws that prohibit discrimination because of sex.⁸⁶ Forty-four states have codified their own public accommodation laws and include sex as a protected class, but only twenty-one currently extend protections to LGBTQ individuals by including sexual orientation and gender identity.⁸⁷ State-level protections are instrumental in LGBTQ rights as they usually offer greater protections and more expansive remedies than federal statutes.⁸⁸ There is a wide spectrum of state interpretations of *Bostock* in relation to anti-discrimination laws.⁸⁹ This section will examine three case studies that demonstrate the predominant approaches.

1. Kansas

The Kansas Human Rights Commission (KRHC) was one of the first state agencies to take the *Bostock* holding and apply it to its state laws, sending out a mass email to state agencies and officials in August 2020, stating that it would interpret *Bostock* to prevent SOGI discrimination in public accommodation, housing, and state employment.⁹⁰ The guidance document released by KHRC states that the statutory analysis the Supreme Court used in *Bostock* is the same as that used by the Kansas Supreme Court.⁹¹ Based on this reasoning, the KHRC believes that *Bostock* applies equally to its entire anti-discrimination act, not only in employment law.⁹² Another basis for this broad application was the comparable language in federal and state provisions.⁹³ The KHRC reasoned that given the similarity, “it is appropriate to look to federal civil rights jurisprudence for rules of general construction.”⁹⁴ Because Kansas already had anti-discrimination laws on record that prohibited discrimination in these areas because of sex, applying the *Bostock* decision was an easy process.

The guidance document explained that no new or additional regulations were required to enforce this interpretation of *Bostock* as it applied to the Kansas Act Against Discrimination (KAAD).⁹⁵ KHRC stated that the statutory language of the KAAD was “unambiguous and itself requires this

86. *Id.* at 4–10.

87. *Id.* at 2,13.

88. *Id.* at 4–6.

89. *Id.* at 5–11.

90. Bahl, *supra* note 7; see Ruth Glover, *LGBTQ Discrimination Protections Recognized in Kansas Law!*, KAN. HUM. RTS. COMM’N (Aug. 21, 2020, 4:51 PM), <https://eqks.org/2020/08/21/lgbtq-discrimination-protections-recognized-in-kansas-law/>.

91. See generally GUIDANCE ON SEX DISCRIMINATION IN EMPLOYMENT, PUBLIC ACCOMMODATIONS, AND HOUSING, KAN. HUM. RTS. COMM’N, <http://www.khrc.net/pdf/KHRC%20Guidance%20on%20Sex%20Discrimination%20in%20Employment,%20Public%20Accommodations,%20and%20Housing%20on%20letterhead%20rev%20dwh.pdf> (last visited Sept. 21, 2021).

92. *Id.* at 1.

93. *Id.* at 2.

94. *Id.*

95. *Id.* at 1.

result.”⁹⁶ The guidance document has been submitted to the state’s joint committee on Administrative Rules and Regulations to be formally adopted by the legislature next session in 2021.⁹⁷ Kansas’s interpretation was a broad take on *Bostock*, because it expanded beyond the area of employment law and surprised advocates in the state.⁹⁸ However, this interpretation is now consistent with the Executive Order that President Biden enacted in January of 2021, which greatly expanded the implications of *Bostock*.⁹⁹ Additional protections for individuals mean a possibility of increased complaints and Kansas delegated the management of complaints to the KHRC, a common agency oversight structure utilized by states to process complaints of discrimination in housing, employment, and other areas.¹⁰⁰

The existing structure of agency oversight for these complaints provides a judicial efficiency to remedying them. KHRC handles all complaints of discrimination via an intake department.¹⁰¹ The investigative process is conducted by the KHRC, separately from any private attorney, and a mediation option also exists for those who would like an alternative option.¹⁰² This investigative process consists of interviewing the complainant, reviewing any available documents, interviewing any witnesses, and finally determining either “Probable Cause” or “No Probable Cause.”¹⁰³ The agency acts as a fact finder during this investigative process, gathering information in an objective manner and reporting on its findings, a structure that states commonly utilize, and one from which Texas would benefit.¹⁰⁴

2. Arizona

Unlike Kansas’s broad application, Arizona took a much narrower approach, addressing only state employment discrimination law.¹⁰⁵ The Attorney General issued an advisory opinion in an ongoing case in June 2020, almost immediately post-*Bostock*, stating that he considered the ruling to be “binding in all cases of sex discrimination in the workplace.”¹⁰⁶ Because Arizona already prohibits discrimination in employment based on sex, applying *Bostock* was merely a matter of interpretation, and the Attorney General stated that he would enforce the state law in conformity with the

96. *Id.*

97. *See generally id.*; *see* Glover, *supra*, note 90.

98. Bahl, *supra* note 7.

99. Executive Order, *supra* note 79.

100. *See generally* KAN. HUM. RTS. COMM’N, *supra* note 91; *see* Glover, *supra* note 90.

101. *Filing a Complaint*, KAN. HUM. RTS. COMM’N, <http://www.khrc.net/complaint.html> (last visited Sept. 21, 2021).

102. *Id.*

103. *Id.*

104. *Id.*

105. Fischer, *supra* note 7.

106. *Id.*

Supreme Court's holding.¹⁰⁷ However, he did leave the window open for the state legislature to come in and explicitly permit SOGI discrimination in employment.¹⁰⁸ Specifically, he stated that the Arizona legislature would need to amend the Arizona Civil Rights Act to define a different meaning of sex, one that specifically excludes sexual orientation and gender identity from coverage, if the state legislature disagreed with his decision to follow the *Bostock* decision.¹⁰⁹

Arizona's application of *Bostock* is confined to employment discrimination claims and thus not as broad as Kansas's expansion of *Bostock* principles to public accommodations and housing.¹¹⁰ Numerous Arizona state representatives agreed with the Attorney General's decision even if they did not necessarily agree with the *Bostock* ruling itself.¹¹¹ The representatives cited compliance with the Supreme Court as a logical step for the state, and also noted that even if they could gather the votes to amend the state laws to permit SOGI discrimination, such action would likely be met with costly litigation.¹¹²

Arizona's state law, that prohibits discrimination in places of public accommodation, includes sex as a protected class but does not extend to SOGI.¹¹³ A number of major urban areas within Arizona have gone further with their own municipal public accommodation laws, including SOGI protections.¹¹⁴ Given the Attorney General's reasoning in applying *Bostock* to state employment laws and the Executive Order that expanded *Bostock*'s application to all federal statutes, it is reasonable to expect that all Arizona laws that prohibit discrimination because of sex will soon be interpreted to include SOGI.

3. Missouri

Missouri's approach to *Bostock* is the narrowest—the state has not actually applied it yet.¹¹⁵ LGBTQ rights advocates in the state are hoping to use *Bostock* as the final push in a twenty-two-year effort to enact the Missouri Nondiscrimination Act (MONA).¹¹⁶ Advocates of MONA think that the

107. *Id.*; ARIZ. REV. STAT. ANN. § 41–1463 (2010).

108. Fischer, *supra* note 7.

109. *Id.*

110. *Id.*; see generally KAN. HUM. RTS. COMM'N, *supra* note 91.

111. Fischer, *supra* note 7; KAN. HUM. RTS. COMM'N, *supra* note 91.

112. Fischer, *supra* note 7.

113. ARIZ. REV. STAT. ANN. § 41–1442 (2010).

114. Jeremy Duda, *LGBTQ Workers are Protected, but Advocates Say More Work Remains*, AZ MIRROR (June 15, 2020, 3:45 PM), <https://www.azmirror.com/2020/06/15/lgbtq-workers-are-protected-but-advocates-say-more-work-remains/>.

115. Abby Llorico, *What the Supreme Court ruling on discrimination means in Missouri*, KSDK-TV (June 15, 2020, 7:13 PM), <https://www.ksdk.com/article/news/local/supreme-court-ruling-lgbtq-discrimination-missouri-impact/63-2f0dea34-6bea-4309-98ed-39d6195c6c35>.

116. *Id.*

Bostock decision could be the final push that the bill needs to pass.¹¹⁷ However, the Attorney General filed an amicus brief in *Bostock* that was expressly opposed to what the Court held.¹¹⁸ The day the decision was released, the Attorney General and other conservative representatives of the state expressed their displeasure with both the merits of the decision itself and its impact on textualism more generally.¹¹⁹ While this high-level opposition may have previously been seen as an impossible barrier, the recent Executive Order from President Biden supports the advocates' position and could offer an alternative path to reach the same result.¹²⁰

PROMO—a Missouri-based organization advocating for LGBTQ equality—recognizes the impact that *Bostock* could have when it comes to protections in areas such as housing, banking, and hospice care.¹²¹ MONA would encompass all of those areas by adding sexual orientation and gender identity to Missouri's Human Rights Act, which already prohibits discrimination in the areas of employment, housing, and public accommodations.¹²² This application would be consistent with the Executive Order that applied the *Bostock* decision to any federal law that prohibited discrimination on the basis of sex.¹²³ MONA has been introduced twenty years in a row, yet the Missouri House Minority Leader expressed hope that the *Bostock* ruling will serve as precedent for the long-awaited passage of the bill.¹²⁴

Another avenue the State can now consider is a reimagining of its existing public accommodation law.¹²⁵ Because Missouri already has a public accommodation law on record that includes discrimination on the basis of sex, interpreting *Bostock* and the subsequent Executive Order as applying to the existing public accommodation law would effectually have the same result as passing MONA.¹²⁶ This approach would be similar to that of Arizona, which did not add SOGI terms to any state laws but rather interpreted the because of sex analysis as encompassing SOGI in the context

117. *Id.*

118. *Attorney General States Title VII Does Not Protect LGBTQ Discrimination*, PROMO (Aug. 26, 2019), <https://promoonline.org/news/title-vii-discrimination-mo/>.

119. *Id.*

120. Executive Order, *supra* note 79.

121. *U.S. Supreme Court Rules in Landmark LGBTQ Employment Discrimination Cases*, PROMO (June 15, 2020), <https://promoonline.org/news/employmentdiscrimination/>.

122. *Missouri Nondiscrimination Act (MONA)*, ACLU MO., <https://www.aclu-mo.org/en/missouri-nondiscrimination-act-mona> (last visited Sept. 21, 2021).

123. Executive Order, *supra* note 79.

124. Cameron Gerber, *US Supreme Court's Landmark LGBT Rights Decision Renews Calls for MONA in Missouri*, THE MO. TIMES (June 15, 2020), <https://themoisouritimes.com/us-supreme-courts-landmark-lgbt-rights-decision-renews-calls-for-mona-in-missouri/>.

125. See PROMO, *supra* note 118 (showing state law does not currently offer civil rights protections on the basis of sexual orientation and gender identity, so legislation is needed).

126. Executive Order, *supra* note 79; See generally *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

of state employment laws.¹²⁷ These varying approaches for a state that has a limited public accommodation law on record are helpful to consider when looking at Texas, a state that has no public accommodation law on record.¹²⁸

III. WHERE TEXAS CURRENTLY STANDS IS BEHIND MOST OF THE COUNTRY

Texas is one of only five states that has no statewide public accommodation law *at all*, let alone one that protects against sex-based or SOGI-based discrimination.¹²⁹ Legal protections exist to prohibit discrimination in employment and housing, but these do not extend to the LGBTQ community.¹³⁰ While the acceptance for LGBTQ individuals in the state is close to 70% of Texas citizens supporting the implementation of legal protections for this community, the current laws in place do not reflect those attitudes, nor do the lived experiences of LGBTQ Texans.¹³¹

The current social climate towards LGBTQ individuals in Texas is dismal, with Texas ranking 39th in the nation when it comes to support for the LGBTQ community.¹³² With the current legal climate and lack of protections, LGBTQ Texans experience stigma in discrimination that has dire social consequences such as “bullying and family rejection of LGBT[Q] youth [and] overrepresentation in the criminal justice system.”¹³³ The impact of this stigma is directly linked to higher rates of mental health diagnoses, with increased rates of depressive disorders and binge drinking reported within the community.¹³⁴ These effects have not gone unnoticed by advocates within the state, and state representatives have made multiple attempts to regulate discrimination through enactment of legal protections in bills that have all been unsuccessful.¹³⁵

127. See *supra* notes 105–107, 110–112 and accompanying text (explaining that Arizona only applied *Bostock* to employment law claims because Title VII only applies to discrimination in the workplace).

128. See generally *Ending Discrimination*, EQUAL. TEX., <https://www.equalitytexas.org/our-issues/ending-discrimination/> (last visited Sept. 21, 2021).

129. *Id.* (emphasis added). There are public accommodation laws that pertain to the differently abled community and equal access/accommodations to public places, but these are limited and do not extend to any class of individuals outside of those that are disabled by definition TEX. HUM. RES. CODE ANN. § 121.003(a). *But see* AUSTIN, TEX., CODE OF ORDINANCES, tit. 5, § 5-3-1 (1992); DALLAS, TEX., CITY CODE, § 46-1(2015); SAN ANTONIO, TEX., CODE OF ORDINANCES, § 2-592 (2013).

130. *Non-Discrimination*, EQUAL. TEX., <https://www.equalitytexas.org/legislature/2015legislation/non-discrimination/> (last visited Sept. 21, 2021); TEX. PROP. CODE ANN. § 301.021.

131. PRRI Staff, *supra* note 5.

132. Christy Mallory, et al., *The Impact of LGBT Discrimination in Texas*, WILLIAMS INST. OF UCLA COLL. OF L. 1 (Apr. 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-TX-Apr-2017.pdf>.

133. *Id.*

134. *Id.* at 4.

135. See *infra* Section III.B (discussing legislative attempts to regulate discrimination).

A. The Limited Antidiscrimination Laws in Place are Narrow in Scope and Application

The nondiscrimination provisions codified in Texas do not explicitly include SOGI but do prohibit discrimination on the basis of sex. *Bostock* supports the interpretation that these state laws encompass SOGI under the because of sex analysis; however, this issue has yet to be addressed by any state official or challenged in the courts.¹³⁶ The Texas Equal Rights Amendment (TERA) has almost identical language when compared to Title VII, as do the anti-discrimination provisions in the labor and property codes.¹³⁷

The TERA provides that no individual shall be denied “[e]quality under the law . . . because of sex, race, color, creed, or national origin.”¹³⁸ This state constitutional provision can only be violated by state action, which limits its scope of protections.¹³⁹ Other nondiscrimination statutes in Texas codes are more akin to Title VII.¹⁴⁰

Texas’s employment laws state that employers commit an unlawful practice if they fail or refuse to refer for employment “or discriminates in any other manner against an individual . . . because of race, color, disability, religion, sex, national origin, or age.”¹⁴¹ This statute was constructed with Title VII in mind, as expressly stated by its purpose.¹⁴² The *Bostock* decision provides employment protections to LGBTQ workers in Texas under Title VII, but Title VII does not apply to *every* employer in the state.¹⁴³ Title VII applies only to employers and businesses that employ more than fifteen employees, meaning that the *Bostock* decision does not apply to small businesses in Texas who employ fewer than fifteen individuals.¹⁴⁴ Employment discrimination is just one area where Texas mirrors similar federal provisions; the Texas Property Code also outlines prohibited discrimination when it comes to housing.¹⁴⁵

The Texas Property Code also contains antidiscrimination language that provides, “[a] person may not refuse to sell or rent, after the making of a bona fide offer, refuse to negotiate for the sale or rental of, or in any other manner make unavailable or deny a dwelling to another because of race, color,

136. *Contra* Emma Platoff & Cassandra Pollock, *Texas Lawmakers Want to Add More LGBTQ Safeguards after U.S. Supreme Court Guarantees Workplace Protections*, TEX. TRIB. (June 17, 2020, 6:00 AM), <https://www.texastribune.org/2020/06/17/lgbtq-texas-nondiscrimination-comprehensive/>.

137. TEX. CONST. art. I, § 3(a); *see generally* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

138. TEX. CONST. art. I, § 3 (a).

139. *Id.*; *see* *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 258 (2002).

140. TEX. LAB. CODE ANN. § 21.001(1); TEX. PROP. CODE ANN. § 301.021(a).

141. TEX. LAB. CODE ANN. § 21.051.

142. *Id.* § 21.001(1).

143. Platoff & Pollock, *supra* note 136.

144. *Title VII of the Civil Rights Act*, JUSTIA (Apr. 2018), <https://www.justia.com/employment/employment-discrimination/title-vii/>.

145. TEX. PROP. CODE ANN. § 301.021(a); TEX. LAB. CODE ANN. § 21.001(1).

religion, sex, familial status, or national origin.”¹⁴⁶ Similar to employment protections from discrimination, Texas’s state laws are somewhat supplemented by federal law, namely the Federal Fair Housing Act (FFHA).¹⁴⁷ The FFHA is contained within the Civil Rights Act of 1964, meaning that *Bostock* and the subsequent Executive Order apply to its because of sex analysis and include SOGI.¹⁴⁸ Similar to the federal agency oversight that manages FFHA complaints, Texas utilizes a similar agency structure to investigate claims of discrimination.¹⁴⁹

In 1983, the Texas Commission on Human Rights Act (TCHR) was formed to work with federal agencies to investigate instances of perceived discrimination.¹⁵⁰ TCHR acted as an investigatory fact finder, and its primary purpose was to provide for the execution and policies of the Civil Rights Act of 1964.¹⁵¹ In 2015, all duties and authority of TCHR were transferred to the Civil Rights Division of the Texas Workforce Commission (TWC).¹⁵² The current structure in place to handle complaints of discrimination in either of these sectors, employment or housing, involves varying levels of agency oversight by TWC.¹⁵³ In instances of housing discrimination, certain municipalities have localized offices that handle claims for the areas within their jurisdiction.¹⁵⁴ In allegations of employment discrimination, TWC shares authority with the federal Equal Employment Opportunity Commission.¹⁵⁵ In each investigation, TWC acts as a neutral third party to determine if the perceived discrimination has a factual basis before allowing the individual a private cause of action.¹⁵⁶

146. *Id.*

147. *Fair Housing 101*, TEX. DEP’T HOUS. & CMTY. AFFS., <https://www.tdhca.state.tx.us/fair-housing/> (last visited Sept. 21, 2021).

148. 42 U.S.C. § 3604; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020); Executive Order, *supra* note 79.

149. 42 U.S.C. § 3604; *see generally Employee Rights & Laws*, TEX. WORKFORCE COMM’N [Hereinafter *Employee Rights & Laws*], <https://www.twc.texas.gov/jobseekers/employee-rights-laws> (last verified June 11, 2019); *Housing Discrimination*, TEX. WORKFORCE COMM’N [hereinafter *Housing Discrimination*], <https://www.twc.texas.gov/partners/housing-discrimination> (last verified Feb. 18, 2020).

150. Richard Allen Burns, *Texas Commission on Human Rights*, TEX. STATE HIST. ASS’N, <https://www.tshaonline.org/handbook/entries/texas-commission-on-human-rights> (last updated Aug. 13, 2020).

151. *See id.*; TEX. LAB. CODE ANN. § 21.001.

152. Burns, *supra* note 150.

153. *Housing Discrimination*, *supra* note 149; *Employee Rights & Laws*, *supra* note 149.

154. *Housing Discrimination*, *supra* note 149.

155. *Employee Rights & Laws*, *supra* note 149; *How to Submit an Employment Discrimination Complaint*, TEX. WORKFORCE COMM’N, <https://twc.texas.gov/jobseekers/how-submit-employment-discrimination-complaint> (last verified Mar. 03, 2020).

156. TEX. WORKFORCE COMM’N, *supra* note 155.

B. Past Legislative Attempts and Why They Failed

Though it has never enacted any, the Texas Legislature is no stranger to public accommodation laws. Nearly every session, the house and senate see some reiteration of the same general concept: spaces of public accommodation should be open to all classes of individuals free from discrimination.¹⁵⁷ Within the 86th Legislative Session alone, five different bills were proposed in the house or senate that included protections to prevent discrimination in places of public accommodation on the basis of sexual orientation and gender identity.¹⁵⁸ All of these bills were referred to the Committee on State Affairs, yet only one was given a hearing before ultimately being left pending in the committee.¹⁵⁹

House Bill 244 is one of the previously proposed bills that attempted to remedy the gap in Texas law. This public accommodations bill explicitly included protections based on gender identity, expression, and sexual orientation.¹⁶⁰ It made it to the House Committee on State Affairs for a hearing but was left pending in its final hour.¹⁶¹ The legislation that this Comment proposes incorporates much of the language of H.B. 244 and seeks to remedy the problems noted in the committee hearing: scope, criminal punishments, and religious freedom concerns.¹⁶² Many of the concerns regarding infringement on religious expression are moot due to protections codified in Texas law, as explained in the next section.¹⁶³

The Texas House LGBTQ Caucus is proposing new legislation in 2021 that seeks to prohibit discrimination against LGBTQ individuals.¹⁶⁴ The legislation includes protections based on sexual orientation and gender identity in spaces of public accommodation, housing, and employment.¹⁶⁵ The proposed legislation will address the issue of not having an anti-discrimination statute on record for places of public accommodation; however, whether it will use *Bostock* as a justification to do so is yet to be

157. Tex. S.B. 165, 85th Leg., R.S. (2017); Tex. S.B. 856, 84th Leg., R.S. (2015); Tex. H.B. 2215, 81st Leg., R.S., (2009); Tex. H.B. 900, 80th Leg., R.S. (2007); Tex. H.B. 2522, 79th Leg., R.S. (2005); Tex. H.B. 1136, 78th Leg., R.S. (2003); Tex. H.B. 1642, 77th Leg., R.S. (2001).

158. Tex. H.B. 2692, 86th Leg., R.S. (2019); Tex. S.B. 151, 86th Leg., R.S. (2019); Tex. H.B. 254, 86th Leg., R.S. (2019); Tex. H.B. 244, 86th Leg., R.S. (2019); Tex. S.B. 888, 86th Leg., R.S. (2019).

159. Tex. H.B. 2692, 86th Leg., R.S. (2019); Tex. S.B. 151, 86th Leg., R.S. (2019); Tex. H.B. 254, 86th Leg., R.S. (2019); Tex. H.B. 244, 86th Leg., R.S. (2019); Tex. S.B. 888, 86th Leg., R.S. (2019).

160. *Hearings on Tex. H.B. 244 Before the Comm. on State Affs.*, 2019 LEG. 86TH SESS. (Apr. 18, 2019) [hereinafter *Hearings on Tex. H.B. 244*] (recording available in online archives at https://tlchouse.granicus.com/MediaPlayer.php?view_id=44&clip_id=17187 [bill discussion begins at 12:21:34, ends at 13:05:52]).

161. *Id.*

162. *Id.*

163. See discussion *infra* Part III.C, IV.C (discussing protections of religious freedom in codified Texas law).

164. Telephone Interview with Zanir Ali, Dir. of Commc'ns for Representative Jessica González (Sept. 9, 2020); Platoff & Pollock, *supra* note 136.

165. Telephone Interview with Zanir Ali, *supra* note 164; Platoff & Pollock, *supra* note 136.

determined.¹⁶⁶ Further, the LGBTQ Caucus will face an uphill battle in passing substantive legislation in this area because Texas democrats needed to flip nine seats to take the majority and failed to do so in the November 2020 election.¹⁶⁷

C. Texas's Statutory Commitments to Religious Freedoms Allow Room for Compromise

Texas has two pertinent statutes that seek to protect religious freedoms, and either could potentially conflict with a public accommodation law.¹⁶⁸ Most notable is Texas's iteration of a Religious Freedom and Restoration Act (RFRA), comparable to the federal act of the same title that was ultimately deemed unconstitutional as it applied to states.¹⁶⁹ The second is a recent enactment and protects individuals from government retaliation based on their membership in a religious organization.¹⁷⁰ The Texas RFRA prohibits the government from substantially burdening religious practice but also aims to strike a balance so it is not misused to disregard civil rights protections.¹⁷¹

Most supporters view Texas's RFRA as effectively shielding the government from discriminating against them for acting on sincerely held religious beliefs.¹⁷² RFRA has been used to provide additional excused absences to students for religious holidays, to prevent home owners' associations from prohibiting religious holiday displays, and to create an exemption to the meningitis vaccination.¹⁷³ With the exception of the vaccine exemption, most actions brought under Texas's RFRA were largely uncontroversial up until recent developments.¹⁷⁴

After the decision in *Obergefell v. Hodges*, numerous amendments to Texas's RFRA were proposed that would provide religious exceptions to businesses providing services to LGBTQ individuals.¹⁷⁵ The Texas Legislature has seen numerous bills that purport to protect religious freedoms by explicitly allowing discrimination against the LGBTQ community, though

166. See generally Platoff & Pollock, *supra* note 136.

167. *Id.*; Emma Platoff, *Democrats' Hopes of Flipping Texas Again Fall Short as Republicans Dominate the State's 2020 Elections*, TEX. TRIB. (Nov. 4, 2020, 2:00 AM), <https://www.texastribune.org/2020/11/04/texas-republicans-election-results/>.

168. Texas Religious Freedom and Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN., §§ 110.001–.012; TEX. GOV'T CODE ANN. §§ 2400.001–.006.

169. Texas Religious Freedom and Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN., §§ 110.001–.012; see generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

170. TEX. GOV'T CODE ANN. §§ 2400.001–.005.

171. Robbie Owens, *Texas Has Its Own Religious Freedom Law*, CBS LOC. DFW (Mar. 31, 2015, 10:00 PM), <https://dfw.cbslocal.com/2015/03/31/fifteen-year-old-texas-law-similar-to-new-indiana-law/>.

172. *Id.*

173. Kimberly Saindon, Note, *Religious Freedom Legislation in Texas Takes Aim at Same-Sex Marriage*, 23 TEX. J. ON C.L. & C.R. 165, 168 (2017).

174. *Id.*

175. *Id.*

only two have been passed and codified.¹⁷⁶ While Texas's RFRA previously struck a respected balance, the recent legislative attacks on LGBTQ rights demonstrate the need for inclusive, state-wide public accommodation law that protects this community while preserving the integrity of Texas's religious freedom protections.¹⁷⁷

One such legislative attack is the now codified S.B. 1978.¹⁷⁸ This statute prohibits the government from taking adverse action against any individual based on their membership in, support of, or affiliation with a religious organization.¹⁷⁹ The novelty of this legislation means that its effects have not yet been analyzed fully.¹⁸⁰ However, the Texas House LGBTQ Caucus was adamant that S.B. 1978 would have dire consequences for the LGBTQ community as it would effectually license discrimination.¹⁸¹ The definitions of this act indicate that the adverse action prohibited is primarily the refusal of business to an individual based on their religion, meaning that by including the religious affiliation within a public accommodation act Texas could achieve substantially the same goal.¹⁸² Nothing in the act indicates it cannot work cohesively with inclusive anti-discrimination provisions.¹⁸³

IV. A TEXAS SIZED SOLUTION WILL BRING US UP TO SPEED

The lack of state-level protections for LGBTQ individuals is a problem that Texas must remedy.¹⁸⁴ There is no valid reason for continuing to allow LGBTQ individuals, or same-sex couples, to be discriminated against in places generally open to the public.¹⁸⁵ Broad, class-based discrimination is not permissible based on any other trait, and to continue to allow discrimination against LGBTQ individuals only reinforces the notion that

176. Pastor Protection Act, Tex. S.B. 2065, 84th Leg., R.S. (2015) (permitting clergy members to refuse to conduct same-sex marriages); Adoption Act, Tex. H.B. 3859, 85th Leg., R.S. (2017) (permitting religious adoption agencies to reject same-sex parents seeking to adopt); Bathroom Bill, Tex. S.B. 6, 85th Leg., R.S. (2017) (regulating bathroom usage by transgender individuals); Free to Believe Act, Tex. H.B. 1035, 86th Leg., R.S. (2019) (prohibiting state agencies or local governments from punishing individuals who decline service to same-sex couples); Save Chick-fil-a Bill, Tex. H.B. 3172, 86th Leg., R.S. (2019) (prohibiting government entities from taking adverse action against businesses for their religious affiliation or related beliefs).

177. Autumn Rendall, *Slew of Anti-LGBTQ Bills Scheduled to Hit Texas Capitol This Week*, SPECTRUM S. (Apr. 15, 2019), <https://www.spectrumsouth.com/anti-lgbtq-bills-texas-lege-2019/>.

178. TEX. GOV'T CODE ANN. §§ 2400.001–.005.

179. *Id.*

180. *Id.*

181. Emma Platoff, *Texas House Passes Religious Liberty Bill Amid LGBTQ Caucus' Objections*, TEX. TRIB. (May 20, 2019, 2:00 PM), <https://www.texastribune.org/2019/05/20/texas-religious-liberty-bill-passes-lgbtq-caucus-fear-hateful-rhetoric/>.

182. TEX. GOV'T CODE ANN. § 2400.001.

183. *Id.* §§ 2400.001–.005.

184. Kate Sosin, *New Research Reveals 'Shocking' Rates of Anti-LGBTQ+ Discrimination*, 19TH* NEWS (Oct. 6, 2020), <https://19thnews.org/2020/10/new-research-reveals-shocking-rates-of-anti-lgbtq-discrimination/>; Mallory et al., *supra* note 132.

185. Riano & Eskridge, Jr., *supra* note 53; Velte, *supra* note 53.

these individuals are less deserving of dignity and worth.¹⁸⁶ As a majority of other states already have done, Texas should pass legislation that closes the gaps in federal law and balances state interests to afford protections to LGBTQ individuals in places of public accommodation. Just as advocates in Missouri are attempting to use *Bostock* as the final push of momentum to pass stalled legislation, Texas should likewise view *Bostock* as the impetus to act now, falling in line with the precedent set by the decision and its continued expansion under the Biden Administration.

A. Texas Should Pass Legislation that Balances State Interests

Texas should pass legislation that prohibits discrimination in places of public accommodation based on an individual's race, ethnicity, religion, sex (including sexual orientation and gender identity or expression as held by the Court in *Bostock*), or national origin. The potential legislation outlined in this Comment strikes a balance between religious freedoms and civil rights, affording all Texans the opportunity to live without fear of discrimination while upholding the state's broad RFRA law.¹⁸⁷ The language of this legislation is a combination of proposals that have stalled within the Texas Legislature, boundaries and scope derived from the *Bostock* decision, and neighboring states' public accommodation laws.¹⁸⁸

The proposed legislation expressly states the substantive protections it is seeking to provide. Explicit language leaves no room for doubt about what actions are prohibited and what groups are protected. Further, unambiguous language makes it clear that this legislation applies only to public accommodations and no other provisions of the Texas code, a noted concern in the hearing on H.B. 244.¹⁸⁹

Sec. XX. XX. DISCRIMINATION PROHIBITED TO ENSURE EQUAL ACCESS

It is a discriminatory practice for any individual to be denied access or enjoyment to a place of public accommodation on the basis of race, ethnicity, sex (including the derivatives of sexual orientation and gender identity), national origin, age, religious affiliation or belief, or disability.¹⁹⁰ All persons shall enjoy full and equal access and enjoyment to places of public accommodation free from discrimination or segregation.

186. *Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

187. See discussion *infra* Part IV.C (discussing how the proposed legislation is balanced with religious freedom concerns).

188. Tex. H.B. 244, 86th Leg., R.S. (2019); OKLA. STAT. tit. 25, § 1402 (2011); LA. REV. STAT. § 51:2247 (2001); ARK. CODE § 16-123-107 (2017).

189. *Hearings on Tex. H.B. 244*, *supra* note 160.

190. OKLA. STAT. tit. 25, § 1402 (2011) (using similar language).

The proposed legislation leads with the definitions. While expansive definitions will need to be determined for this act—specifically in regard to sexual orientation, gender identity, and other terms that may give readers pause as to the meaning—the most important definitions will be “sex” as it is based on the Court’s holding in *Bostock* and public accommodation.¹⁹¹ These two definitions are most important because they are the crux and scope of the act itself; by defining these two terms, the entirety of the act is framed, and all other terms serve clarification purposes.¹⁹²

Sec. XX. DEFINITIONS

In this chapter:

(1) “Sex” in the context of “on the basis of sex” or “because of sex” includes any condition such as pregnancy, childbirth, menstruation, or other medical diagnoses; as well as the derivatives of sexual orientation and gender identity.

a. “Sexual orientation” means the actual or perceived sexuality of any individual.

b. “Gender identity” means the expression of any particular gender, whether perceived or real, as it pertains to dress, mannerisms, expressions, or behaviors that one may associate with sex or gender.

(2) “Public accommodation” means any business, store, entertainment venue, restaurant, or other establishment which supplies goods or services to the general public, or which solicits or accepts the patronage of the general public, except that religious organizations are exempt from this act.

(3) “Religious organization” means the organization’s primary purpose and function are religious, it is a religious school organized primarily for religious and educational purposes, or it is a religious charity organized primarily for religious and charitable purposes.¹⁹³

Another distinctive feature of this legislation is the administration of agency oversight.¹⁹⁴ The operation of an administrative agency managing complaints not only contributes to the efficiency of such claims but allows for a factual investigation that establishes the merit of any complaint.¹⁹⁵ As previously mentioned, the Civil Rights Division of the Texas Workforce Commission

191. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020).

192. *See infra* Appendix (containing the entirety of the legislation complete with full definitions).

193. This definition is consistent with the same term as it exists in the Texas Civil Practice and Remedies Code § 110.011(b). TEX. CIV. PRAC. & REM. CODE ANN. § 110.011(b).

194. *See supra* Part II.C.1 (explaining that this is the structure currently utilized by Kansas); *see also infra* Part III.A (describing a similar structure that the Texas Workforce Commission uses).

195. *See infra* Part IV.B (discussing the benefits of agency oversight and general use as a common structure for discrimination claims); *see also infra* Appendix (containing the entirety of the legislation with the extent of relief available).

currently handles allegations of discrimination after replacing the Texas Commission on Human Rights.¹⁹⁶

Sec. XX. XXX. ADMINISTRATIVE REMEDIES

(1) Any individual who asserts an actual or perceived violation of Sec. XX.XX. may file a complaint with the Civil Rights Division of the Texas Workforce Division (the Agency). The Agency will conduct a preliminary investigation to determine the factual sufficiency of any instance of actual or perceived discrimination.

(2) The Agency is permitted to facilitate conciliatory measures between the aggrieved individual and the business found to be in violation of Sec. XX.XX.

(3) If the business that is in violation of Sec. XX.XX. refuses to engage in conciliatory measures or should conciliatory measures fail, the aggrieved individual may pursue a civil suit against the business pursuant to Sec. XX. XXXX.

The final portion of the proposed legislation is the applicable relief. These provisions are instrumental in any legislation as they inform the court on appropriate findings of damages as intended by the legislature. The full text of this proposed section can be found in the Appendix, which contains the entirety of the proposed legislation.¹⁹⁷

A majority of the language in the proposed legislation is familiar to the Texas Legislature as it closely tracks H.B. 244.¹⁹⁸ H.B. 244 made it to the hearing phase of the State Action Committee of the house, further than any bill of its kind has made it to date.¹⁹⁹ Citizen testimony from religious advocacy groups raised concerns that the bill was too wide in scope when it came to alterations of other codes, such as the Government Code that regulated employment practices by state contractors, yet not wide enough when it came to preserving religious liberties as a state interest.²⁰⁰ The proposed legislation remedies both of these issues. It does not address other provisions of the Texas Code or attempt to change any statutes beyond the one being proposed. Further, the proposed legislation incorporates the Texas RFRA by specific bill and statute, preemptively remedying any discrepancies that could arise between the two.²⁰¹

In addition to drawing on the already proposed Texas bill that posed the most promise in terms of passage success, the proposed legislation also draws

196. *See supra* Part III.A (describing the authority and operation of the Texas Workforce Commission).

197. *See infra* Appendix (containing the entirety of the legislation).

198. Tex. H.B. 244, 86th Leg., R.S. (2019).

199. *Hearings on Tex. H.B. 244, supra* note 160.

200. *Id.*

201. Texas Religious Freedom and Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN., §§ 110.001–.012.

from other states who already have public accommodation laws in place.²⁰² Multiple states have similar religious freedom protections that coexist with their public accommodation laws.²⁰³ Texas's religious freedom law has historically been seen as striking the delicate balance between protecting free exercise of religion while protecting civil rights.²⁰⁴ There is no reason that Texas cannot continue that balance with the proposed legislation as it expressly accommodates Texas's RFRA.²⁰⁵

The proposed legislation also draws directly from *Bostock*, explicitly including sexual orientation and gender identity as derivatives of sex.²⁰⁶ The purpose of this *Bostock* basis is twofold: it allows Texas to fall in line with the precedent set by the Supreme Court on a state law level, and it provides for easy application to other provisions of Texas law should the legislature choose to expand protections in areas of housing, employment, or education.²⁰⁷ By incorporating SOGI as derivatives of sex, the foundation is laid for that rationale to be easily applied to other nondiscrimination provisions that are already codified in Texas.²⁰⁸ With the language of Texas's current anti-discrimination laws closely tracking that of their federal counterparts, the interpretation and application of each of the provisions should remain consistent.²⁰⁹

A final distinctive feature of this proposed legislation is its incorporation of agency oversight.²¹⁰ Texas should put an agency in charge of investigatory fact finding and have that agency submit a report to the judicial body. This structure allows the regulatory agency to create clear, consistent guidelines for reporting instances of discrimination in public accommodations and streamlines the investigation structure in order to resolve the matter efficiently. Further, this agency structure is widely utilized in other states that

202. OKLA. STAT. tit. 25, § 1402 (2011); ARK. CODE § 16-123-107 (2010); LA. REV. STAT. § 51:2247 (2001); KAN. STAT. § 44-1001 (2019).

203. KAN. STAT. § 60-5301 (2013); ARIZ. REV. STAT. § 41-1493.01 (2018); MO. REV. STAT. § 1.302 (2012); OKLA. STAT. tit. 51, §§ 251–58 (2016); N.M. STAT. § 28-22-1–5 (2011).

204. See *infra* Appendix (containing the entirety of the legislation).

205. See Owens, *supra* note 171.

206. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020).

207. See *id.*; see also discussion *supra* Part II.C.1 (explaining Kansas's broad adoption and ease of application).

208. See TEX. LAB. CODE ANN. §§ 21.001–.556.; TEX. PROP. CODE ANN. § 301.021(a); see also discussion *supra* Part II.C.1 (explaining Kansas's broad adoption of the *Bostock* holding and ease of application).

209. Compare TEX. LAB. CODE ANN. § 21.051 (prohibiting employers from discriminating on the basis of sex), and TEX. PROP. CODE ANN. § 301.012(a) (prohibiting discrimination on basis of sex when selling or renting out a dwelling), with 42 U.S.C. § 2000e-2 (prohibiting employers from discriminating on basis of sex), and 42 U.S.C. § 3604 (prohibiting discrimination on basis of sex when selling or renting out a dwelling).

210. See *supra* Part IV.A (describing the Agency's duties to investigate alleged discrimination). But see H.R. 244, Leg. 86th Sess., R.S. (Tex. 2019).

have existing protections against discrimination in public accommodations.²¹¹

It is critical for Texas to craft its own broad protective language to guarantee permanent protections for LGBTQ Texans. While the Biden administration has already shown its commitment to expanding LGBTQ rights with the Executive Order that accompanies *Bostock*,²¹² the order lacks permanency and could easily be replaced by a future administration.²¹³ This risk is somewhat tempered by the Equality Act, which would provide similar, more permanent, protections.²¹⁴ However, because political realities make the passage of the Equality Act tenuous, it is clear that Texas needs to act, and quickly.²¹⁵ Texas is already playing catch-up due to its lack of public accommodation protections; codifying the proposed legislation would provide an expedited path for future progress.²¹⁶ Texas must proactively craft its own law, following other states in adopting the *Bostock* analysis as applicable to comparable state anti-discrimination laws.

B. Agency Oversight Provides Judicial Efficiency and Other Assurances

The proposed legislation lays the foundation for private causes of action by individuals after an initial agency investigation by the Civil Rights Division of the TWC. TWC currently manages complaints of discrimination in employment and housing, acting as an investigatory fact finder.²¹⁷ Under the proposed legislation, TWC would determine if the complaint has merit before proceeding with any conciliatory measures, a structure that is comparable to other states' public accommodation laws.²¹⁸

Vesting the authority to investigate instances of perceived discrimination with the TWC would provide statewide uniformity.²¹⁹ This agency structure would efficiently streamline complaints and provide Texas courts with an assurance that the claims before them are not frivolous in

211. See KAN. HUM. RTS. COMM'N, *supra* note 101; *Regulatory Information*, COLO. CIV. RTS. DIV., <https://ccrd.colorado.gov/regulatory-information> (last visited Sept. 21, 2021); *Civil Rights Enforcement Unit*, OFF. OKLA. ATT'Y GEN., <https://www.oag.ok.gov/civil-rights-enforcement> (last visited Sept. 21, 2021); *Civil Rights*, KY. CABINET FOR HEALTH AND FAM. SERVS., <https://chfs.ky.gov/Pages/civil-rights.aspx> (last visited Sept. 21, 2021).

212. See Executive Order, *supra* note 79.

213. See Acosta, *supra* note 81.

214. See *id.*; Sosin, *supra* note 35.

215. See Sosin, *supra* note 35; Acosta, *supra* note 81; see also discussion *supra* Part III.B (describing efforts to regulate discrimination).

216. See discussion *supra* Part II.C.1 (explaining Kansas's adoption of the *Bostock* holding and ease of application).

217. See discussion *supra* Part III.A (discussing Texas Workforce Commission's current oversight of discrimination claims in housing and employment).

218. See discussion *supra* Part II.C.1 (outlining KRHC agency structure and oversight of claims); sources cited *supra* note 211 (providing multiple examples of states with agency oversight).

219. Cf. *FAQs*, KAN. HUM. RTS. COMM'N, <http://www.khrc.net/faq.html> (last visited Sept. 21, 2021) (explaining similar rationales behind the agency oversight utilized by Kansas).

nature.²²⁰ This agency investigation would not replace the trial process but would simply determine if a reasonable fact finder could find in favor of the injured party on the merits of the claim.²²¹ This structure is similar to what TWC already uses when investigating claims of discrimination in housing or employment.²²²

Should TWC not find any plausible claim of discrimination, the cause of action would be eradicated before ever seeing a courtroom, saving time and resources.²²³ Once TWC has completed its initial investigation and deemed the claim plausible, conciliatory measures would be the next step in the remediation process.²²⁴ Only after all administrative remedies have been exhausted would the claimant have a cause of action.²²⁵ The preliminary factual report that TWC creates would be filed with the court, who could choose to reference it in decision making, or look at the case in a new light.²²⁶

C. Past Concerns are Now Moot and Future Concerns are Preemptively Remedied

There were three main concerns with H.B. 244 that are likely substantially similar to the counterarguments that could be raised against the proposed legislation: the impact on religious freedoms of individuals, the weaponized language, and the possibility of frivolous claims.²²⁷ This subsection considers each of these counterarguments individually to acknowledge and address concerns in that area.

The protection of religious freedoms is one of the most important tenets to Texans and legislators alike.²²⁸ The most repeatedly voiced concern was that H.B. 244 would interfere with the practice of religion.²²⁹ Texas's RFRA provides that a government agency, including departments and offices within, may not substantially burden an individual's free exercise of religion absent a compelling interest.²³⁰ The proposed legislation remedies this issue

220. *See id.*

221. *See id.*

222. *See supra* pp. 25-26 (explaining the agency oversight system in place for TWC).

223. *See infra* Appendix (containing the entirety of the legislation).

224. *See infra* Appendix (describing the agency's ability to facilitate conciliatory measures).

225. *See infra* Appendix (explaining that civil suits can be pursued if conciliatory measures fail).

226. *See infra* Appendix (explaining the process when the TWC files a report about discrimination).

227. *Hearings on Tex. H.B. 244, supra* note 160.

228. *Id.*

229. *Id.* (referencing specific commentary from religious advocacy and lobbying groups such as Texas Values and Family Policy Alliance); *see generally* TEX. VALUES, <https://txvalues.org/> (last visited Sept. 21, 2021); *The Left Isn't Letting Up*, FAM. POL'Y ALL., <https://familypolicyalliance.com/> (last visited Sept. 21, 2021).

230. TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a).

by expressly incorporating Texas’s RFRA into the legislation, providing recognized exemptions for religious organizations.²³¹

Additionally, S.B. 1978 has not yet been litigated enough to analyze its application when it comes to discriminatory business practices.²³² The language of the act explicitly prevents *government* retaliation, and the proposed legislation does not permit Texas to do anything aside from investigate allegations.²³³ Given the lack of state retribution in the proposed legislation, and its express incorporation of religious beliefs in the protective language, S.B. 1978 should not conflict with the proposed anti-discrimination provision.²³⁴

Further invalidating this concern is the fact that it is not a substantial burden to require businesses that are generally open to the public to serve all members of the community, regardless of conflicting beliefs.²³⁵ Numerous courts have held that anti-discrimination laws do not violate an individual’s First Amendment rights because the laws are aimed at eradicating discrimination—a compelling state interest.²³⁶ Even if legislators deem allowing individuals to engage in commerce is somehow a substantial burden on the ability of others in exercising their religion, the need to eradicate discrimination in public spaces outweighs the right to exercise religion in public.²³⁷ “[S]ecular for-profit corporations do not ‘exist to foster the interests of persons subscribing to the same religious faith’ nor do they ‘exist to serve a community of believers.’”²³⁸

Another noted concern of H.B. 244 was the “weaponized language” that provided for criminal actions.²³⁹ The major concern was that H.B. 244 was acting as a sword and not a shield by affording such harsh punitive remedies against those who violated it.²⁴⁰ This concern is clearly moot with the

231. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871–74 (2021) (threatening to remove standing for faith-based agencies that contract with the state to qualify for an exemption).

232. TEX. GOV’T CODE ANN. §§ 2400.001–.005.

233. *Id.* § 2400.001; see *infra* Appendix (containing the entirety of the proposed legislation).

234. TEX. GOV’T CODE ANN. § 2400.002; see also *infra* Appendix (containing the entirety of the proposed legislation).

235. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245–47 (1964); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 400–03 (1968).

236. See, e.g., *Hurley v. Irish Am. Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 563 (1995); *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1237–38 (Wash. 2019); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657 (2000); *Elane Photography, LLC v. Wilcock*, 309 P.3d 53, 75 (N.M. 2013).

237. See Joseph W. Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 930 (2015) (comparing the religious arguments made by segregationists in defense of excluding black patrons to those being made by the religious right in defense of refusing service to LGBTQ individuals in spaces of public accommodation).

238. Lucien J. Dhooze, *Public Accommodation Statutes and Sexual Orientation: Should There Be A Religious Exemption For Secular Businesses?*, 21 WM. & MARY J. OF WOMEN & L. 319, 350 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 756 (2014) (Ginsburg, J., dissenting)).

239. *Hearings on Tex. H.B. 244*, *supra* note 160 (containing statements from Mary Elizabeth Castle, a representative of Texas Values, Autumn-Leva Stroup, representative from Family Policy Alliance, Gary Moore, small business owner, and Johnathan Saenz, also from Texas Values).

240. *Id.*

proposed legislation, as it only provides for civil actions against businesses or individuals found to be in violation.²⁴¹ The proposed legislation does not permit the state to seek punitive remedies against businesses or individuals, nor does it permit the agency to pursue criminal charges of any kind.²⁴²

The final noted concern is a possible onslaught of frivolous actions. H.B. 244's language provided for complaints based on perceived discrimination, something that witnesses were vocal about when testifying due to the fact that the complaints would "not be based on facts."²⁴³ This concern is remedied by the incorporation of agency oversight as investigatory fact finders.²⁴⁴ Individuals must exhaust all administrative remedies before pursuing any judicial action, allowing TWC to act as a gatekeeper.

D. The Impact of Equality Is Dignity for All and Billions of Dollars for the Economy

Implementing this legislation would provide legal protections to millions of Texans that are a part of historically marginalized communities, including LGBTQ Texans.²⁴⁵ With close to a million individuals in the state identifying within the spectrum that comprises this community, this legislation would ensure that these individuals can enjoy the privileges and immunities under the color of state law, effectively closing the gap between Title II of the Civil Rights Amendment and Texas's lack of public accommodation laws.²⁴⁶ Passing this legislation will carry clear social policy implications and will also positively impact the Texas economy.²⁴⁷

The effect of this legislation on the social climate in Texas cannot be overstated. As mentioned above, Texas ranks 39th in the nation when it comes to support for the LGBTQ community.²⁴⁸ Texas is considered in the negative on an LGBTQ inclusivity rating based on a national scale that looks at factors such as legal protections and social support.²⁴⁹ Any implementation of legislative protection for the LGBTQ community would have a positive impact considering there are currently zero laws aimed at protecting the rights of this community.

241. See *infra* Appendix (containing the entirety of the proposed legislation).

242. See *infra* Appendix (containing the entirety of the proposed legislation).

243. *Hearings on Tex. H.B. 244*, *supra* note 160.

244. See discussion *supra* Part IV.B (discussing the agency structures used by Texas and Kansas).

245. See Sosin, *supra* note 35; MOVEMENT ADVANCEMENT PROJECT, *supra* note 8.

246. MOVEMENT ADVANCEMENT PROJECT, *supra* note 8; PRRI Staff, *supra* note 5.

247. Angela Hale, *Study by Leading Texas Economist Shows LGBTQ Nondiscrimination Would Create Hundreds of Thousands of Jobs, Billions in Tax Revenues, Significant Economic Growth*, EQUAL. TEX. (May 27, 2020), <https://www.equalitytexas.org/for-immediate-release-new-economic-study-shows-major-financial-benefit-to-lgbtq-nondiscrimination-laws/>.

248. See Mallory et al., *supra* note 132 (discussing the stigma and discrimination that LGBTQ individuals experience in Texas).

249. MOVEMENT ADVANCEMENT PROJECT, *supra* note 8.

Passing this legislation would create a more hospitable environment for LGBTQ individuals within the state as a whole.²⁵⁰ Multiple major cities in Texas have already implemented broad local ordinances that protect LGBTQ individuals.²⁵¹ Almost half of the LGBTQ population in Texas resides in those areas, likely because of the increased acceptance and legal protections in place.²⁵² That leaves over 50% of the community living in rural areas and small to midsize cities that would gain newfound protections under the proposed legislation.²⁵³ That means approximately 500,000 LGBTQ Texans would gain legal protections under the proposed legislation.²⁵⁴ While the social policy impacts of eradicating discrimination are clear, the economic impacts are likely more persuasive for a fiscally conservative state such as Texas.

The longer Texas delays in applying the *Bostock* holding to state laws, the more potential for wasted time and expense via needless litigation. As conservative representatives in Arizona noted, any delay in applying *Bostock* would likely be met with litigation.²⁵⁵ Texas can preserve state resources by passing inclusive legislation modeled after *Bostock*.

Additionally, a Texas economist has highlighted major potential losses that the state economy could incur from a failure to pass substantive legal protections.²⁵⁶ Dr. Ray Perryman, an economic analyst in Texas, released a study in May of 2020 that demonstrated the billions in revenue Texas could gain over the next twenty-five years by passing comprehensive nondiscrimination laws in the areas of housing, employment, and public accommodations.²⁵⁷ Texas is one of the best states to do business and was recently cited as the number one destination for businesses, as well as individuals, relocating from California.²⁵⁸ Dr. Perryman's report demonstrates the vast economic potential for Texas to tap into, simply by passing laws that protect the LGBTQ community.²⁵⁹

250. *Id.*

251. See AUSTIN, TEX., CODE OF ORDINANCES, tit. 5, § 5-3-1 (1992); DALLAS, TEX., CITY CODE, § 46-1 (2015); SAN ANTONIO, TEX., CODE OF ORDINANCES, § 2-592 (2013).

252. THE UNIV. OF TEX. AT DALL., IMPACT TEXAS LGBTQ NEEDS ASSESSMENT, TEX. PRIDE IMPACT FUNDS 3 (Oct. 2017), <https://www.txpif.org/wp-content/uploads/2018/06/Impact-Texas-LGBTQ-Needs-Assessment-Part-1.pdf>.

253. *Id.*

254. *Id.*; MOVEMENT ADVANCEMENT PROJECT, *supra* note 8.

255. Fischer, *supra* note 7.

256. Hale, *supra* note 247.

257. *Id.*

258. *Companies Moving to Texas in 2019*, THE HT GRP. (Jan. 22, 2019), <https://www.thehtgroup.com/companies-moving-to-texas-2019/> (detailing the mass exodus of companies from other geographical areas that are moving into South Texas); Bethany Blankley, *Texas No.1 Destination for Companies Leaving California for Last 12 Years*, THE CTR. SQUARE (Dec. 4, 2019), https://www.thecentersquare.com/texas/texas-no-1-destination-for-companies-leaving-california-for-last-12-years/article_8e2f83cc-161d-11ea-8869-576046d73239.html.

259. Hale, *supra* note 247.

Employers within the state see inclusive legislation that protects LGBTQ individuals as an investment in their competitive edge.²⁶⁰ The Texas business community has appealed to the legislature before when it comes to anti-LGBTQ legislation, warning that it could come with extreme consequences for the state economy.²⁶¹ Most recently, in 2017, the Bathroom Bill was adamantly opposed by the Texas Association of Businesses, warning state officials that it posed dire consequences for the Texas tourism industry.²⁶²

Texas has the ability to remedy every single one of the aforementioned issues and mitigate future risk. The proposed legislation lays the foundation for progress by addressing a single area where the LGBTQ community faces discrimination, but it is the first step of many that are necessary for LGBTQ Texans to enjoy the full privileges and immunities of state law.²⁶³

V. CONCLUSION

Places of public accommodation are at the heart of the equality movement. The freedom to engage in commerce as one so chooses is essentially the right to exist in the public square or society at large. While certain limitations can be, and have been, placed on this right, the ability to turn away a paying customer because of an immutable personal trait should not be one of them. This was recognized in 1964 with the passage of the Civil Rights Act, heralded as groundbreaking for the strides it made towards racial equality. While the Act has seen numerous amendments and expansions to ensure its protective umbrella extends to those in need, LGBTQ individuals have not been a beneficiary of these developments. The fight for LGBTQ equality traces a historical arc that has recently come to intersect with various titles encompassed in the Civil Rights Act through a statutory super precedent known as *Bostock*.

In *Bostock*, the Supreme Court held that sexual orientation and gender identity textually fall under a because of sex analysis as stated in Title VII of the Civil Rights Act. The Court strayed from former LGBTQ rights precedents that are rooted in equal protection or due process, instead providing a statutory basis for its holding. Despite the majority insisting that

260. Emma Platoff, *U.S. Supreme Court Says Civil Rights Law Applies to LGBTQ Workers, Granting Protections Long Denied in Texas*, TEX. TRIB. (June 15, 2020, 10:00 AM), <https://www.texastribune.org/2020/06/15/bostock-supreme-court-texas-lgbtq/>.

261. Alexa Ura, *Businesses Say Anti-LGBT Bills Could Cost Texas Billions*, TEX. TRIB. (Dec. 6, 2016, 3:00 PM), <https://www.texastribune.org/2016/12/06/texas-businesses-say-bathroom-bill-could-cost-texas/>.

262. *Id.*

263. Continued attacks on transgender youth are of particular concern; bills are already being introduced this legislative session that are aimed at restricting access to healthcare for this community and criminalizing those who seek to provide it. See Tex. H.B. 68, 87th Leg., R.S. (2021) (proposing that providing healthcare to trans youth is child abuse).

Bostock applied only to Title VII, the dissenters and legal field alike understand that its effects will reach far beyond employment. The current administration has already issued an Executive Order that directs the *Bostock* holding to be applied by every federal agency that prohibits discrimination on the basis of sex. As numerous states continue to interpret and expand this holding as it applies to their state laws, Texas will only fall further behind when it comes to statewide anti-discrimination provisions.

Texas is one of only five states that have yet to pass public accommodation laws that prohibit discrimination. LGBTQ Texans have zero statewide legal protections that prohibit discrimination against them based on sexual orientation or gender identity, despite a majority of Texans' support of legal protections for this community. Codifying protections for the LGBTQ community is the next logical step in the fight for equality. Broad, class-based discrimination is impermissible when based on race, disability status, or biological sex. The state has no rational interest in continuing to allow it against the LGBTQ community. Individuals who own a business are entitled to practice their religion, but that should not manifest as the right to deem an entire class of people as inferior, less deserving of respect, or unworthy of engaging in commerce.

It is high time that Texas passes inclusive legislation, prohibiting discrimination in places of public accommodation on the basis of sexual orientation and gender identity. Further delay only leaves the State further behind in an area where we are already playing catch up. Passing inclusive legislation that prohibits discrimination in places of public accommodation, and utilizes the *Bostock* holding, paves the road for a more equal Texas.

APPENDIX: FULL TEXT OF PROPOSED LEGISLATION

SUBTITLE A. PROHIBITED DISCRIMINATION IN PUBLIC ACCOMMODATIONS

CHAPTER XX. EQUAL ACCESS AND ENJOYMENT

Sec. XX. DEFINITIONS

In this chapter:

(1) “Sex” in the context of “on the basis of sex” or “because of sex” includes any condition such as pregnancy, childbirth, menstruation, or other medical diagnoses; as well as the derivatives of sexual orientation and gender identity.

a. “Sexual orientation” means the actual or perceived sexuality of any individual.

b. “Gender identity” means the expression of any particular gender, whether perceived or real, as it pertains to dress, mannerisms, expressions, or behaviors that one may associate with sex or gender.

(2) “Public accommodation” means any business, store, entertainment venue, restaurant, or other establishment which supplies goods or services to the general public, or which solicits or accepts the patronage of the general public, except that religious organizations are exempt from this act.

(3) “Religious organization” means the organization’s primary purpose and function are religious, it is a religious school organized primarily for religious and educational purposes, or it is a religious charity organized primarily for religious and charitable purposes.²⁶⁴

Sec. XX.X. APPLICABILITY

Pursuant to Tex. Civ. Prac. and Rem. Code Tit. 5, Ch. 110, it is not violative of Sec. XX.XX. for religious organizations to act in accordance with sincerely held religious beliefs. This act does not provide any cause of action against any religious institution or organization.

Sec. XX. XX. DISCRIMINATION PROHIBITED TO ENSURE EQUAL ACCESS

It is a discriminatory practice for any individual to be denied access or enjoyment to places of public accommodation on the basis of race, ethnicity, sex (including the derivatives of sexual orientation and gender identity), national origin, age, religious affiliation or belief, or disability.²⁶⁵ All persons shall enjoy full and equal access and enjoyment to places of public accommodation free from discrimination or segregation.

264. This definition is consistent with the same term as it exists in the Texas Civil Practice and Remedies Code § 110.011(b). TEX. CIV. PRAC. & REM. CODE ANN. § 110.011(b).

265. Language comparable to Oklahoma Statutes. OKLA. STAT. Tit. 25, § 1402.

Sec. XX. XXX. ADMINISTRATIVE REMEDIES

(1) Any individual who asserts an actual or perceived violation of Sec. XX.XX. may file a complaint with the Civil Rights Division of the Texas Workforce Division (the Agency). The Agency will conduct a preliminary investigation to determine the factual sufficiency of any instance of actual or perceived discrimination.

a. Any business, or other public accommodation as defined by Sec. XX., that is found to violate Sec. XX.XX. will be given reasonable notice within ninety days of such finding.

b. The Agency will prepare a factual report of its findings including: all witnesses interviewed, relevant documents, and any other pertinent information that assisted the Agency during the investigatory process in coming to its conclusion. (The Agency Report)

(2) The Agency is permitted to facilitate conciliatory measures between the aggrieved individual and the business found to be in violation of Sec. XX.XX.

(3) If the business that is in violation of Sec. XX.XX. refuses to engage in conciliatory measures or should conciliatory measures fail, the aggrieved individual may pursue a civil suit pursuant to Sec. XX. XXXX.

a. A copy of The Agency Report shall be provided to the aggrieved individual as well as filed in the court of law in which the action will be commenced.

Sec. XX.XXXX. CIVIL ACTION

(1) An individual who has exhausted all administrative remedies pursuant to Sec. XX. XXX. may file a civil action in any district court in the county which the injury occurred, or any district court in the county where the defendant business resides.

(2) The statute of limitations for an action under Sec. XX. XXXX. is no more than two years from the date of the alleged violation.

a. The statute begins to run on the date of the alleged violation and must be reported to the regulatory agency before the expiration of the two years.

Sec. XX. XXX RELIEF AVAILABLE²⁶⁶

(1) All administrative remedies must be exhausted before the plaintiff is entitled to any judicial relief under this act.

(2) Any action brought and settled pursuant to this act entitles the injured party to seek and obtain:

a. injunctive relief;

b. declaratory relief; and

c. court costs and reasonable attorney's fees

266. The applicable relief in this section was pulled directly from a comparable Texas code. TEX. GOV'T CODE ANN. § 2400.003.