BOSTOCK AND THE "NEXUS TEST" IN CUSTODY DISPUTES*

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"The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."
– Justice Anthony Kennedy[1]

INTRODUCTION

In a custody dispute between parents where one parent is LGBTQ+,[2] courts use one of several approaches when considering that parent's sexual orientation and/or gender identity (SO/GI) in determining the appropriate custody arrangement for the child. Currently, the most common approach is

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1. Obergefell v. Hodges, 576 U.S. 644, 651–52 (2015).

2. LGBTQ+ is a common abbreviation for the multitude of persons who identify as lesbian, gay, bisexual, transgender, queer, or otherwise not heterosexual and cisgender.

the use of a "nexus test."[3] The nexus test requires the existence of a close "nexus" between the parent's SO/GI and purported harm to the child, a connection which indicates to the court that there is a need to give preference to the other parent in the custody dispute. Only if such a nexus exists will the court take into consideration the LGBTQ+ parent's SO/GI in making a custody determination. The interpretation and application of the nexus test varies across states, with some requiring a very close nexus and others requiring only a loose connection between the parent's SO/GI and harm to the child.

This difference in application prompts the question: is there a proper construction of the nexus test, and if so, what is it? In other words, what sort of nexus should states require in order to consider a parent's SO/GI in a custody dispute? This question is important to explore because it concerns the fundamental right to parent children, and a court's ability to infringe upon that right in certain circumstances. The United States Supreme Court has long held that parents' custodial and parental rights warrant protection[4]; but in many states, as explored below, courts have used a parent's LGBTQ+ identity as a reason to limit or even terminate parental rights.[5] There is currently no national consensus on how close of a connection the nexus test should require.[6]

This Recent Development argues that the 2020 U.S. Supreme Court decision in *Bostock v. Clayton County* helps to clarify the nexus test and raises the lower limit on what may qualify as a sufficient nexus between the parent's SO/GI and harm to the child. Pursuant to the logic in *Bostock*, a court may not make a custody decision based on a parent's SO/GI unless there is a "substantial relationship" between a parent's SO/GI and the harm to the child. Part I of this Recent Development will briefly describe the background of LGBTQ+ rights in the United States and the development of the nexus test in custody disputes. Part II will explore the Supreme Court's ruling in *Bostock* and argue that its holding can be applied to all Equal Protection sex discrimination cases. Part III will examine the ways *Bostock* should shape the future of the nexus test in custody disputes to comply with the demands of

3. Sonia K. Katyal and Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1600 (2019).

4. *See infra* Part IV.

5. *See, e.g.,* Pulliam v. Smith, 501 S.E.2d 898, 903–04 (N.C. 1998); Daly v. Daly, 715 P.2d 56, 59 (Nev. 1986).

6. *See* Katyal & Turner, *supra* note 3, at 1599, 1617–19.

Equal Protection. Part IV will present four cases and apply the post-*Bostock* nexus test to illustrate how it should function as a tool to ensure that custody determinations comply with Equal Protection. Part V will analyze these examples in order to crystallize the proper construction of an Equal Protection-compliant nexus test.

I. BACKGROUND ON THE NEXUS TEST IN CUSTODY DISPUTES

In recent years, LGBTQ+ Americans have made significant progress in achieving equality under the law.[7] One of the first Supreme Court rulings related to sexual orientation discrimination came in *Romer v. Evans*, where the Court held that Colorado's constitutional amendment barring ordinances from protecting persons from sexual orientation discrimination violated the federal Constitution.[8] Several years after *Romer*, the Court disavowed anti-sodomy laws in *Lawrence v. Texas*,[9] and about a decade later, it established marriage equality by affirming that same-sex couples had the "fundamental right to marry in all States" in *Obergefell v. Hodges*.[10] In the recent case *Karnoski v. Trump*, the Ninth Circuit held that for Equal Protection claims of discrimination against people based on their transgender identity, the applicable level of scrutiny is "more than rational basis but less than strict scrutiny,"[11] implying that intermediate scrutiny—which is the standard usually applied to sex discrimination cases—is the appropriate standard for cases of discrimination against transgender people. In 2020, the Supreme Court held in *Bostock v. Clayton County* that an employer's discrimination against a person because of their sexual orientation or gender identity is a form of sex discrimination, heightening the level of scrutiny which employers had to meet to justify such discrimination.[12] These cases have developed a

7. Justice Thomas's concurrence in *Dobbs* (Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300–04 (2022) (Thomas, J., concurring)) calls into question some of the caselaw which this paper relies upon, such as *Obergefell* and *Lawrence* (*see Dobbs*, at 142 S. Ct. at 2301 (Thomas, J., concurring)), because these cases rely upon substantive due process, which the Court is admittedly hesitant to expand (*see Dobbs*, 142 S. Ct. at 2247 (majority opinion)). Because Justice Thomas's concurrence was not joined by any other justices, this paper shall continue on the assumption that these cases are and will remain good law.

8. Romer v. Evans, 517 U.S. 620, 635–36 (1996).

9. Lawrence v. Texas, 539 U.S. 558, 562, 578 (2003).

10. Obergefell v. Hodges, 576 U.S. 644, 651–52, 681 (2015).

11. Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019).

12. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020).

baseline for SO/GI discrimination claims in the United States, recognizing that historical prejudices against LGBTQ+ persons may only play a severely limited role in modern jurisprudence.

Because family law is traditionally left to state courts,[13] it is necessary to examine the practices used by individual states in determining whether to allow family courts to consider a parent's SO/GI in a custody proceeding. In state courts, one marker of progress for LGBTQ+ parents has been the shift away from the presumption that LGBTQ+ parents are unfit, moving instead to the application of a nexus test.[14] This nexus test requires that a parent's SO/GI may be taken into account only if there is evidence that the parent's identity is likely to cause harm to the child.[15] The nexus test is also called an "orientation-blind" approach because the courts will "blind" themselves to the parent's SO/GI until a demonstrated nexus between the parent's identity and harm to the child is demonstrated.[16] The shift to a nexus test requirement occurred in most states by the 1990s, but its specific formulation and application varies among states.[17] One example of an applied nexus test is *Damron v. Damron*, where the court held that "a custodial parent's homosexual household is not grounds for modifying custody . . . in the absence of evidence that [the] environment endangers or potentially endangers the children's physical or emotional health or impairs their emotional development."[18] While the nexus test is not truly "orientation-

13. *See, e.g.*, Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1073 (1994); *see also* Ankenbrandt v. Richards, 504 U.S. 689, 693–704 (1992).

14. Kim H. Pearson, *Sexuality in Child Custody Decisions*, 50 FAM. CT. REV. 280, 280 (2012).

15. *Id.* Not all states use a nexus test in considering sexuality in custody cases; a second common test among states is that a parent's sexual orientation other than heterosexuality "evokes a rebuttable presumption of unfitness and requires that the parent prove the absence of harm," and "absent such proof, the presumption of unfitness applies." D. KELLY WEISBERG, MODERN FAMILY LAW 681 (7th ed. 2020); Katyal & Turner, *supra* note 3, at 1617 n.132. This and other approaches are beyond the scope of this Recent Development.

16. Pearson, *supra* note 14, at 280.

17. Katyal & Turner, *supra* note 3, at 1600, 1618.

18. Damron v. Damron, 670 N.W.2d 871, 876 (N.D. 2003).

blind,"[19] it is an improvement for LGBTQ+ couples from a system that presumed them to be naturally unfit custodians.[20]

Many states have codified the nexus test by statute as the standard for considering parents' SO/GI in custody decisions.[21] Even where the test has not been codified, the nexus test is often applied as binding caselaw.[22] While the nexus test represents a progressive shift from the *per se* unfitness rule, it is far from fully protective of the rights of LGBTQ+ parents. Purported harm to the child, if not carefully outlined in the state's relevant statute, is open to broad and varied interpretation. Some courts have considered evidence of harm which is based purely on prejudice and social bias, the kind of harm which is "minimal, hypothesized, or purely imaginary."[23] Because there is no uniformity in the nexus test among states, certain jurisdictions permit discrimination against LGBTQ+ parents which I argue constitutes a violation of those parents' Equal Protection rights. Such discrimination on the basis of sex must survive heightened judicial scrutiny, which many states' nexus tests currently do not require.[24]

It is worth asking why it is necessary to take a judicial approach to the nexus test and custody decisions. After all, should not state legislatures, with political accountability, be in charge of policy changes? While legislatures can write their nexus tests and other guidelines for custody determinations to become more facially neutral, the focus of LGBTQ+ rights advocacy must be on family courts.[25] Political divisions and the nature of the legislative branch make lasting change through statutory adoption unlikely. Because of the "elastic and responsive nature" of family courts, judicial venues have been more receptive and responsive, making them "valuable for making progress" in the rights of LGBTQ+ parents.[26] Furthermore, federal courts are a key stage when dealing with any fundamental right because state regulations must comply with the rights guaranteed in the Constitution. Many significant

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19. *See* Pearson, *supra* note 14, at 281 (arguing that the nexus test is not as progressive and "blind" as some claim it to be, stating that "the nexus test itself is not neutral because it necessarily seeks evidence of a connection between homosexual orientation and harm").

20. *Id.* at 281.

21. Katyal & Turner, *supra* note 3, at 1618.

22. *Id.* at 1617–19.

23. *Id.* at 1620 (citing Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 641–46 (1996)).

24. *See infra* Part III.

25. *See* Pearson, *supra* note 14, at 282–83.

26. *Id.*

national policies related to family law and child custody have been handed down by the Supreme Court, ensuring that state family law complies with constitutional requirements.[27] The judicial branch shall likely continue to be the best venue for mandating change; therefore, courts must take an active role rather than a passive one in preserving that function.

II. *BOSTOCK* AND SEX DISCRIMINATION

The Supreme Court's 2020 decision in *Bostock v. Clayton County* established that discrimination based on sexual orientation and gender identity is a form of sex discrimination.[28] The case addressed whether employers could fire an employee for being homosexual or transgender, and the Court held that Title VII forbids such a firing.[29] According to the Court, the employee's sex "play[ed] a necessary and undisguisable role in the decision [to fire the employee], exactly what Title VII forbids."[30]

While *Bostock* was a Title VII case dealing with discrimination in the employment context, the logic that instances of SO/GI discrimination are forms of sex discrimination extends to other constitutional situations, such as Equal Protection cases. Justice Alito, who dissented in *Bostock*, acknowledged that implementing the interpretation of SO/GI discrimination as sex discrimination in the employment context will extend such an interpretation to other areas.[31] Additionally, multiple federal circuit courts have now extended *Bostock's* logic beyond Title VII cases. In *Grimm v. Gloucester County School Board*, the Fourth Circuit held that the logic in *Bostock* should be extended to Title IX cases,[32] and the Ninth Circuit held the same in *Doe v. Snyder*.[33] In accordance with this trend, it follows that the holding in *Bostock* can and should be extended to custody dispute cases.

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27. *See infra* Part IV; Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Skinner v. Oklahoma, 316 U.S. 535, 536, 541–43 (1942).

28. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

29. *Id.*

30. *Id.*

31. *Id.* at 1778–84 (Alito, J., dissenting) (noting that the reasoning set out by the majority "may have effects that extend" to bathrooms, locker rooms, women's sports, housing, employment by religious organizations, healthcare, freedom of speech, and constitutional claims).

32. 972 F.3d 586, 593, 616–17 (4th Cir. 2020).

33. 28 F.4th 103, 113–15 (9th Cir. 2022).

In order for a piece of gender-discriminating legislation to survive judicial review, it must meet intermediate scrutiny.[34] Intermediate scrutiny demands that 1) the value or interest being advanced by the government must be "important," and 2) the statute in question must be "substantially related" to advancing that goal.[35] As such, laws based on stereotyping are unlikely to satisfy such scrutiny because the statute will not be "substantially related" to advancing the goal in question.[36]

For example, in *United States v. Virginia*, the Court addressed whether Virginia's exclusion of women from the educational opportunities provided by the Virginia Military Institute ("VMI") denied women the equal protection of the laws guaranteed by the Fourteenth Amendment's Equal Protection Clause.[37] The Court found that this exclusion violated the Equal Protection Clause because Virginia had shown no "exceedingly persuasive justification" for excluding women from VMI and failing to provide an adequate alternative.[38] The Court specifically rejected stereotypes or "generalizations" about differences between sexes because Virginia never asserted that VMI's method of education would suit "most men," so "generalizations about 'the way women are' . . . no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[39] In his concurrence, Chief Justice Rehnquist stated that "the State should avoid assuming demand [for opportunities by members of one gender] based on stereotypes; it must not assume *a priori*, without evidence, that there would be no interest in a women's school of civil engineering, or in a men's school of nursing."[40] Following the precedent set for evaluating sex discrimination in *U.S. v. Virginia*, it is unlikely that a

34. Clark v. Jeter, 486 U.S. 456, 461 (1988).

35. *Id.*

36. For further material supporting the assertion that sex-based stereotyping does not survive intermediate scrutiny, *see, e.g.,* M.E. v. T.J., 854 S.E.2d 74, 97–100 (N.C. Ct. App. 2020) (applying intermediate scrutiny in invalidating a statute which allowed the denial of a Domestic Violence Protective Order to a person leaving a homosexual relationship specifically because of the genders of the people in the relationship); *see also* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1478–79 (2000) (noting that in Miller v. Albright, 523 U.S. 420 (1998), seven justices "explicitly agreed that if the sex-respecting rules at issue were based on stereotypes, they would be unconstitutional").

37. United States v. Virginia, 518 U.S. 515, 519 (1996).

38. *Id.* at 534.

39. *Id.* at 550.

40. *Id.* at 565–66 (Rehnquist, J., concurring).

standard for SO/GI discrimination based on stereotypes would satisfy the courts.

II. REFINING THE NEXUS TEST

While custody disputes are historically a matter handled by the states, state law must nonetheless comply with the Constitution.[41] The doctrine of Equal Protection has already placed restrictions on how state law may and may not take certain identities into account when making custody determinations. In *Ex parte Devine*, the Supreme Court of Alabama held that the "tender years presumption," which preferred mothers to fathers in custody cases involving young children, violated the Equal Protection Clause.[42] The "tender years presumption" represented "an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex."[43] The presumption has since been struck down by all states either via the judiciary or through legislative codification.[44] Thus, every state has acknowledged that parents in custody disputes are protected from gender-based discrimination.

In *Palmore v. Sidoti*, the US Supreme Court found that a Florida court ruling, which gave custodial preference to the White parent of a mixed-race child because of concerns about social bias against Black persons in Florida, did not satisfy Equal Protection requirements.[45] While Florida had a substantial governmental interest in protecting children, such an interest could not support the State's toleration of prejudices based on race.[46] The Court concluded that "the reality of private biases and the possible injury they might inflict" are not "permissible considerations for removal of an infant child from the custody of its natural mother."[47] Thus, Equal Protection prevents courts from taking the race of a parent into account for prejudicial reasons, whether that prejudice comes from the State or from society.

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41. *See* U.S. CONST. art. VI, cl. 2.

42. *Ex parte* Devine, 398 So. 2d 686, 695–96 (Ala. 1981).

43. *Id.* at 695.

44. Linda J. Lacey, *Mimicking the Words, but Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. Rev. 1, 22 (1993).

45. Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984).

46. *Id.*

47. *Id.* at 433.

Because of the circuit cases extending the logic in *Bostock* to Title IX cases[48] and Justice Alito's dissent acknowledging that *Bostock*'s holding will extend beyond Title VII cases,[49] we can posit that the equivalence of SO/GI discrimination with sex discrimination will extend to all Equal Protection cases, including custody decisions considering a parent's SO/GI. Thus, post-*Bostock*, the government may only consider SO/GI in custody disputes if the law setting the standard for such a consideration survives intermediate scrutiny. Intermediate scrutiny requires that there be a "substantial relationship" between the government's regulation and the "important" interest it is trying to achieve. [50] In the custody context, one of the government's primary interests is the welfare of the child, commonly called the "best interest of the child" standard.[51] Therefore, to comply with *Bostock*, any state that uses a nexus test must require demonstration of a "substantial relationship" between the court's consideration of SO/GI and the prevention of harm to the child. In states that have implemented very loose nexus tests, where the connection between a parent's SO/GI and the harm to the child does not have to be "substantial," their nexus tests cannot pass constitutional muster.

In determining what counts as a "substantial" relationship between a parent's LGBTQ+ identity and the harm to the child, it is useful to consider other Equal Protection custody cases. While *Palmore* specifically applies to considering race, it suggests that purported harm to a child which is based on social stigma is likely insufficient.[52] Similarly, as discussed above, the VMI case established that harm based on stereotypes is also inadequate to count as

48. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616–17 (4th Cir. 2020) (holding that the logic in *Bostock* should be extended to Title IX cases); Doe v. Snyder, 28 F.4th 103, 113–15 (9th Cir. 2022) (same); *see also* Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (finding that intermediate scrutiny is the appropriate standard "applicable to the equal protection or substantive due process rights of transgender persons").

49. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1778–82 (2020) (Alito, J., dissenting).

50. Clark v. Jeter, 486 U.S. 456, 461. (1988).

51. *See* UNIF. MARRIAGE & DIVORCE ACT § 402 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1970); Victoria L. Pepe, Note, *Conceiving Consistency: Giving Birth to a Uniform "Best Interests of the Child"*, 50 HOFSTRA L. REV. 467, 475 (2022) (citing Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUDS. 337, 370 (2008); *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY 1 (2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

52. Palmore v. Sidoti, 466 U.S. 429 (1984).

a "substantial" nexus.[53] Thus, to constitute a substantial relationship, the harm to a child posed by a parent's SO/GI must be based upon something more than stereotypes or social stigma. A demonstration of real and significant differences, comparable to a mother's ability to breastfeed an infant, which can harm the child in question must be present before a court may consider the parent's SO/GI.

III. OPERATIONALIZING THE NEXUS TEST POST-*BOSTOCK*

We now turn to what a constitutionally permissible nexus test will look like in the post-*Bostock* world. In order to survive intermediate scrutiny, the State's nexus test must provide that the court's consideration of a parent's SO/GI is substantially related to preventing harm to the child. In order to understand how a proper nexus test should be constructed, I will explore four hypothetical applications of this heightened standard: the first, based on North Carolina Supreme Court case *Pulliam v. Smith*; the second, based on Nevada Supreme Court case *Daly v. Daly*; the third, based on Washington Supreme Court case *In re Marriage of Black*; and the fourth, based on a hypothetical family where one parent wishes to retain custody of their child, including when traveling to a country where the parent's sexual orientation is criminalized.

A. Pulliam v. Smith

In *Pulliam*, the North Carolina Supreme Court considered a custody arrangement which had initially given the father physical custody over his two children but was modified by the district court in favor of the mother.[54] The Court held that the intermediate appellate court erred in reversing the district court's grant of the modification, a modification based in part on the homosexuality of the father.[55] The Court concluded that the District Court "could and did order a change in custody based in part on proper findings of fact to the effect that defendant-father was regularly engaging in sexual acts with [his male partner] in the home while the children were present."[56] One

53. United States v. Virginia, 518 U.S. 515, 565–566 (1996) (Rehnquist, J., concurring).

54. Pulliam v. Smith, 501 S.E.2d 898, 899 (N.C. 1998).

55. *Id.* at 899–901.

56. *Id.* at 904.

of the major factors which the District Court relied upon was the "emotional difficulties" which the father's "activity" would create for his children.[57] To demonstrate these difficulties, the mother gave evidence that one of the children, when told by the father that he was homosexual, cried and asked the mother to take him out of the home.[58] The other significant evidence relied upon by the court was the presence of "admittedly improper sexual material" (pictures of drag queens) in the home.[59]

The "emotional difficulties" that defendant-father's children would face due to his homosexual activity are parallel to the social bias argument which the Supreme Court rejected in *Palmore*.[60] While the child's initial upset is certainly not ideal, long-term and substantial distress in a child would most likely stem from the child's inability to accept their parent's sexuality, in the absence of the showing of some other form of harm. Because the father had clearly stated that he would not counsel his children that homosexual conduct was improper,[61] the child's failure to accept his father's sexuality would almost certainly stem from the prejudices of society or, equally invalidly, the prejudices of the child's mother foisted upon the child. Because the State's standard for considering a parent's SO/GI must be set at a level substantially connected to the prevention of harm to the child, the standard implemented must be tailored to prevent harm which is more than a superficial, temporary distress. In a case like *Pulliam*, an intellectually and intentionally crafted bias imposed upon the child is not sufficient to warrant a court's acceptance of sex-based discrimination.

When considering the other evidence presented against the father, it is clear that its importance boiled down to one thing: the father's homosexuality. The father having sex with his partner while his children were in the house could only be seen by the Court as a problem because that partner was a male; had the father been having sex with a woman (such as his wife)

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57. *Id.* at 902.

58. *Id.*

59. *Id.* at 901, 903–04. One other piece of evidence was presented: that on at least one occasion, the father's male partner had taken the children from the home without the father's knowledge of their whereabouts. The level of relevance of that factor to the Court's reinstatement of the custody modification is unclear, and it is ultimately irrelevant to the thrust of this paper. Perhaps that factor alone would have led the Court to the same conclusion about the modification, but it does not permit the Court to consider the sexuality of the father when, at its core, the father's sexuality is irrelevant to that factor.

60. Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984).

61. *Pulliam*, 501 S.E.2d at 903.

while the children were safely sequestered in another room of the house, it is inconceivable that the Court would have held such behavior against him. Similarly, the "improper sexual material," while not thoroughly detailed in the case, was described as being "drag queens," or non-women wearing clothing and makeup to imitate, exaggerate, and/or parody a traditionally feminine appearance.[62] Unless there was unnamed sexual material in the photos in question, their improper content could only be the gender-nonconforming appearance of the pictured men and the implicit assumption that those men were also homosexual. The exact content of the photos and thus the harm posed by them is never stated by the Court, and it is implausible (short of missing information which could entirely change a court's analysis) that these photos posed a harm to the children beyond the presentation of a worldview that made the Court uncomfortable, rooted in fundamentally gendered expectations of who can wear what clothing and which sexual relationships are condoned by the State.

The standard set by the NC Supreme Court in *Pulliam* does not pass the elevated requirements for a nexus test necessitated by *Bostock*. Without a substantial relationship between the State's interference and the prevention of purported harm to the children in question, the State's standard is an unconstitutional form of sex-based discrimination. Because the only harms posed to the children were social biases and the exhibition of nontraditional gender presentations which the Court found discomfiting, the Court improperly considered the sexual orientation of the father in granting a modification to the custody order in favor of the mother.

B. Daly v. Daly

After the divorce of Suzanne and Nan Daly, Suzanne (who had been assigned the gender "man" at birth) recognized that she was transgender and, with the help of several medical and psychological professionals, began to undergo her gender transition.[63] When Nan found out that Suzanne was transitioning, she sought to terminate Suzanne's parental rights, and was

62. *See* Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1977 (1995); *see also* JUDITH BUTLER, GENDER TROUBLE 186–188 (1990) (discussing the implicit philosophies in drag performance, especially the relationship between the drag performer's anatomy, gender, and the performance itself).

63. Daly v. Daly, 715 P.2d 56, 56, 57, 61 (Nev. 1986).

ultimately successful.[64] The Nevada district court used jurisdictional and categorical factors to support this termination, each of which was directly related to Suzanne's transition: her failure to visit her daughter during that time (due to her ex-wife's interference with visitations), the child's negative emotional and behavioral reaction to her transition, her "selfishness" and lifestyle as an indicator of poor care toward the child, and the child's stated desire that she not spend time with Suzanne.[65] Each of these indicators, however, diminishes significantly in value when one realizes what the dissent correctly pointed out: Suzanne was not seeking visitation with the child.[66] The possible continuing harm to her child would not change significantly if her parental rights were or were not terminated, as she was no longer attempting to see the child. As the dissent stated: "[t]his separation [of Suzanne from her child] protects [the child] from all of the concerns, imagined or real, which underlay the district court's termination of parental rights."[67] Without contact between Suzanne and her child, it is implausible that a severance of her parental rights was substantially related to the protection of that child.

The majority also discussed the child's ongoing emotional and behavior problems, such as her reversion in late adolescence to wetting the bed and her behavioral withdrawal.[68] However, as the dissent pointed out, Nan evidently had "no special concerns" about the child's behavior until after the child told Nan of Suzanne's transition.[69] This indicates that there could have been one or both of two overlapping possibilities at play: first, that Nan was exaggerating her child's distress; and second, that the child's distress stemmed from the conflict between her parents, which was known to be extreme.[70] Thus, the district court's finding of harm to the child is likely improperly inflated due to their concerns about Suzanne's transgender identity.

When these factors are given their proper weight, it is clear that while the purported harm to the Daly child may have stemmed from her parent's

64. *Id.* at 67–68.

65. *Id.* at 75–77 (Gunderson, J., dissenting).

66. *Id.* at 72 (Gunderson, J., dissenting).

67. *Id.* at 77 (Gunderson, J., dissenting).

68. *Id.* at 67–68.

69. *Id.* at 74 (Gunderson, J., dissenting).

70. Nan's mother had prevented Suzanne from entering the house by guarding it with a gun. *Id.* at 74 (Gunderson, J., dissenting).

transgender identity, the connection is not sufficiently strong to terminate all custodial rights. The continuation of harm to the child could only reasonably be perpetuated through further contact between the parent and child, and such contact was not sought by Suzanne in this case.[71] Thus, there was no substantial connection between the government's desire to protect the Daly child and its decision to sever Suzanne's parental rights. As such, this case's analysis of Suzanne's transgender identity fails the post-*Bostock* elevated nexus test standard by improperly discriminating against Suzanne based on her gender identity.

C. In re Marriage of Black

In *Black*, the mother and father of three children divorced after the mother informed the father that she was a lesbian.[72] During the dissolution, the trial court designated the father as the primary residential parent and the parent with "sole decision-making authority regarding the children's education and religious upbringing."[73] The trial court ultimately adopted the recommendations of the children's guardian ad litem (GAL), who made observations in her report including that the mother's "lifestyle choice . . . can result in significant controversy," that "people can be very mean," and that the children might experience "bullying" due to their mother's sexuality.[74] The GAL recommended that the mother "be ordered to refrain from having further conversations with the children regarding religion, homosexuality, or other alternative lifestyle concepts" and not be permitted to show or give them materials regarding those concepts.[75] These recommendations were given after the mother had shown her eldest son a documentary about different Christian attitudes toward same-sex relationships and after the second son had asked if he could wear a rainbow bracelet that said "love and pride."[76] The trial court noted that the children's father would be better suited to "maintain[] their religious upbringing," asserting that "it will be very challenging for them to reconcile their religious

71. *Id.* at 72 (Gunderson, J., dissenting).
72. In re Marriage of Black, 392 P.3d 1041, 1043 (Wash. 2017).
73. *Id.* at 1043.
74. *Id.* at 1046.
75. *Id.* at 1047.
76. *Id.*

upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality."[77]

The Washington Supreme Court reversed the custody designation, stating that the trial court relied heavily on the GAL's report which demonstrated "impermissible bias" against the mother due to her sexual orientation.[78] The Court held that "[e]ven if a parent's sexual orientation is contrary to the children's religious values, a trial court may not consider it in a custody determination unless the evidence shows direct harm to the children."[79]

The approach employed by the Court in *Black* would survive the heightened scrutiny of a post-*Bostock* nexus test. The Court rejected social bias as too weak of a nexus, demanding that there be "direct" and concrete harm to the children in question. The GAL's concerns about "mean" people and possible bullying were not sufficient to overrun the rights of a mother to her children, much like the social prejudice argument which was insufficient in *Palmore*. The Washington Court established a test which requires a "substantial" relationship between the government's standard regarding consideration of a parent's SO/GI and the prevention of harm to the child, a relationship more concrete than the prevention of possible harm due to social prejudice. Thus, the test set forth in *Black* meets the intermediate scrutiny standard set forth in *Bostock* for considering a parent's SO/GI in a custody dispute.

D. *Hypothetical*

After examining three cases where a parent's SO/GI could not constitutionally be considered in a custody determination, we shall consider a hypothetical situation where the sexual orientation and related behavior of a parent may cause harm to a child to a degree that warrants government interference. For this hypothetical, we will suppose that an appeal has been filed in a case based on the following facts.

There is a family, consisting of Mother, Father, and Child. Mother and Father divorce while Child is still a minor, in part because Mother discovers that she is a lesbian and their marriage cannot survive this. Mother

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77. *Id.*

78. *Id.* at 1048.

79. *Id.* at 1050 (internal quotations omitted) (citing Fox v. Fox, 904 P.2d 66, 68–69 (Okla. 1995).

is an immigrant from a conservative nation where being gay is a crime, punishable by prison sentence or other severe penalty.[80] In the past, Mother has periodically traveled to her native country and often has taken Child with her.

During the custody proceedings, Father seeks physical custody of Child due to Mother's travels. Specifically, Father objects to Mother taking Child to Mother's native country because the country's hostility toward LGBTQ+ people. He fears that if Mother were to be discovered as a lesbian and taken into custody, Child could be caught in the crossfire of such a proceeding and face the possibility of physical and emotional injuries, trauma at the loss of Mother, and the substantial and catastrophic risk of being consigned to the orphan system of a foreign nation where Father may have limited or even no rights to get Child back. Upon hearing this evidence, the district court rules that Mother's sexual orientation must be taken into account insofar as it harms Child, and that Mother's traveling with Child to Mother's native country poses a significant threat of harm to Child. On appeal, Mother argues that the district court improperly permitted consideration of her sexual orientation because *Bostock* forbids such consideration as unconstitutional sex discrimination.

Mother should lose in this appeal with regard to her right to take Child to her native country. The standard set by *Bostock* in custody disputes is not simply that a parent's SO/GI may not be considered; it is that the State may only consider the parent's SO/GI if such consideration is substantially related to the prevention of harm to the child. Mother traveling with Child to her native country would not ordinarily be a source of harm for Child; it is specifically Mother's travel with Child to her native country *while Mother is known to be a lesbian* that generates possible harm to Child. While within the confines of the United States, Mother's custody rights should not be affected by her SO/GI, but when Child is placed into a situation where Mother's SO/GI poses a distinct threat of bodily harm to one or both of them, the court

80. It is illegal in numerous countries to have same-sex relations. Two examples are Cameroon, where consensual same-sex conduct is prosecuted more aggressively than almost any country in the world (Siri Gloppen & Lise Rakner, *LGBT Rights in Africa*, *in* RESEARCH HANDBOOK ON GENDER, SEXUALITY AND THE LAW, 196 (Chris Ashford & Alexander Maine eds., 2020)), and Afghanistan, where members of the LGBT community are forced to keep their SO/GI a secret for fear of harassment, intimidation, persecution, and death (Hafizullah Emadi, *The Politics of Homosexuality: Perseverance of Lesbian, Gay, Bisexual and Transgender (LGBT) Community in a Repressive Social Milieu in Afghanistan*, 26 INT'L J. ON MINORITY & GRP. RTS., 242–260 (2019)).

cannot place Mother's Equal Protection rights above the safety of the child. Such harm goes beyond the social prejudices and hypothesized discomfort found in the previous examples. Thus, such a ruling would meet the increased scrutiny standard set forth in *Bostock*.

IV. DISCUSSION

In the post-*Bostock* era, states' nexus tests for consideration of a parent's SO/GI must be subject to intermediate scrutiny. To survive that scrutiny, the test must provide that the court's consideration of a parent's SO/GI is substantially related to preventing harm to the child. As demonstrated in the *Pulliam* and *Black* illustrations above, the kind of harm which can spur state intervention must be something greater than "emotional difficulty" based in social biases, learned prejudices against LGBTQ+ people, or even incompatibility with the child's religion. As demonstrated in the *Daly* and hypothetical illustrations, there must be a "substantial" connection between the limitation of a parent's custodial rights and the protection of the child; any limitation which goes beyond what is necessary to protect the child from a specific harm is unconstitutional discrimination. Thus, the proper construction of a nexus test post-*Bostock* demands that states may not consider a parent's SO/GI in the absence of a substantial, non-hypothetical harm to the child; and even when such a harm exists, the parent's custodial rights may only be limited insofar as the limitation directly mitigates the specific harm stemming from the parent's SO/GI.

CONCLUSION

States' implementation of nexus tests in custody disputes vary widely. There is currently no consensus on how closely related the "nexus" between a parent's SO/GI and purported harm to the child must be in order for a court to consider a parent's identity without discriminating impermissibly against the parent. The Supreme Court's ruling in *Bostock*, establishing that SO/GI discrimination is sex discrimination, can be used to calibrate the nexus test, setting a minimum standard for all states. Such a calibration will establish that the "substantial relationship" mandated by intermediate scrutiny is necessary for consideration of a parent's SO/GI, providing equal protection to parents of any and all sexual orientations and gender identities while still protecting a child from undue harm. Without such a unified standard, states can inflict unconstitutional sex-based discrimination on parents during

custody determinations, depriving them of fundamental parental rights for improper reasons. Requiring a substantial relationship between the government's consideration of a parent's SO/GI and the harm to the child protects the rights of parents without notably impeding the best interests of the child. LGBTQ+ parents across the United States deserve this protection, and it is the responsibility of the courts to guarantee it to them.