IT IS TIME TO MOVE FORWARD...ON THE BASIS OF SEX: THE IMPACT OF *BOSTOCK V. CLAYTON COUNTY* ON THE INTERPRETATION OF "SEX" UNDER TITLE IX

Abbey Widick*

INTRODUCTION

The late Ruth Bader Ginsburg began her notorious career rendering unprecedented opinions and scathing dissents in the name of effectuating the prohibition on sex-based discrimination.[1] In her early career, Justice Ginsburg successfully argued that discrimination "on the basis of sex" violated the Equal Protection Clause of the Constitution.[2] Shortly after, Congress passed Title IX of the Education Amendments of 1972, explicitly prohibiting sex-based discrimination in an education program or activity.[3] A few years prior, Congress had voted to prohibit sex-based discrimination in employment through Title VII of the Civil Rights Act of 1964.[4] Ironically, in one of Justice Ginsburg's final votes before her passing, she voted to affirm that Title VII's prohibition against sex discrimination

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* J.D. (2022), Washington University School of Law. This Student Note is dedicated to my close family member, R.M.A, who is transgender. It has been an honor to walk alongside him as he has been on the leading edge of fighting for access to education free from discrimination. *See* Matti Gellman, *'Shake up the Earth: Missouri Mother Fought Transgender Son's School for Equality*, THE KANSAS CITY STAR (Jan. 23, 2022). A special thank you to S.A.W. and H.V.R.

1. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (Ginsburg, J., concurring); U.S. v. Virginia, 518 U.S. 515 (1996) (Ginsburg, J.).

2. Ruth Bader Ginsburg wrote the plaintiff's brief in *Reed v. Reed*. Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4). In *Reed*, the Supreme Court unanimously held that an Idaho law preferencing males over females in the administration of an estate violated the Equal Protection Clause of the Fourteenth Amendment. *Reed*, 404 U.S. at 77. This was the first time the Supreme Court held that a law that discriminated on the basis of sex violated the Equal Protection Clause. Emily Martin, *Reed v. Reed at 40: A Landmark Decision*, NAT. WOMEN'S LAW CENTER (Nov. 16, 2011), https://perma.cc/9AMG-C9TM. To learn more about Ruth Bader Ginsburg's fight for gender equality, see Erin Blakemore, *Ruther Bader Ginsburg's Landmark Opinions on Women's Rights*, HISTORY (May 30, 2018), https://perma.cc/E5LW-JDP7.

3. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq*.

4. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*.

includes discrimination on the basis of sexual orientation and gender identity in *Bostock v. Clayton County, Georgia*.[5] Now, the Court is left to resolve the divide over the legal interpretation of sex-based discrimination, this time under Title IX, without her.

Discrimination on the basis of sexual orientation and gender identity should be prohibited in education under Title IX's prohibition on "sex-based" discrimination. Following the Supreme Court's landmark ruling in *Bostock*,[6] other federal courts should follow *Bostock*'s but-for causation test to analyze claims for gender identity and sexual orientation discrimination under Title IX's ban on sex-based discrimination. The major courts to address this issue under Title IX since *Bostock* have relied on *Bostock* to hold that that the "plain meaning" of sex under Title IX encompasses LGBTQ[7] status, and therefore the prohibition against discrimination on the basis of sex under Title IX also prohibits discrimination based on gender identity and sexual orientation.[8] This interpretation of sex-based discrimination follows from a plain meaning interpretation of "sex" under Title IX and would best effectuate Title IX's broad purpose to ensure that no student is subjected to discrimination in a federally funded education program or activity.[9]

Part I and Part II of this Note outline the historical development of Title VII and Title IX both in the legislative branch and judicial branch, as well

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5. 140 S. Ct. 1731 (2020). The Supreme Court consolidated three circuit court cases to reach this decision: Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018); and Bostock v. Clayton Cnty., Ga., 723 Fed. Appx. 964 (11th Cir. 2018).

6. 140 S. Ct. 1731 (2020); *see infra* Part III.B.

7. LGBTQ is the common acronym for lesbian, gay, bisexual, transgender, and queer. "Sexual Orientation" refers to an individual's sexual and emotional attraction to another person, such as lesbian, gay, or bisexual. "Gender identity" is an individual's sense of self as man or women. "Transgender" refers to individuals whose gender identity is different from their biological sex assigned at birth. *Adolescent and School Health Terminology*, CENTER FOR DISEASE CONTROL & PREVENTION (Dec. 18, 2019), https://perma.cc/LJL6-W2TZ. This Note will use the same terminology that is used in each case discussed. The commentary will refer to transgender, gay, and other gender nonconforming individuals as "LGBTQ" individuals.

8. *See infra* Part III.C; Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020); Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344 (Nev. 2020); B. P. J. v. W. Va. State Bd. of Educ., 550 F.Supp.3d 347 (S.D.W.Va. 2021).

9. For a comprehensive legislative history of Title IX, see *Synopsis of Purpose of Title IX, Legislative History, and Regulations*, JUSTIA (April 2018, updated October 2021), https://perma.cc/EW7D-TH6Q [hereinafter *Purpose of Title IX*].

as the relevant Title IX guidance issued during different presidential administrations. Part III follows the incorporation—or lack thereof—of protections for LGBTQ individuals through extensive case law prior to *Bostock*, discusses the Supreme Court's landmark Title VII employment case, *Bostock*, and then discusses the recent judicial interpretations of discrimination on the basis of "sex" under Title IX following *Bostock*. Part IV of this Note analyzes the influence the *Bostock* decision has had on recent Title IX cases and examines how the legal reasoning in *Bostock* will impact future interpretations of sex discrimination under Title IX. Part V proposes explicitly encompassing discrimination based on sexual orientation or gender identity in educational institutions under Title IX's prohibition on sex-based discrimination by applying *Bostock*'s but-for causation analysis and examines arguments and counterarguments for adopting a similar definition of "sex" under Title IX and Title VII based on the plain language of the statutes, parallel judicial developments, and the similarly broad purpose of both statutes. This Note concludes by emphasizing the positive policy implications of interpreting gender identity and sexual orientation discrimination as forms of prohibited sex discrimination. As the most recent federal appellate court to address this issue concluded in *Grimm*, "[t]he proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. . . . It is time to move forward."[10] Now, in the next frontier of the Civil Rights movement, it is once again time to move forward, this time on the basis of sex.

I. HISTORY OF TITLE VII

Title VII of the Civil Rights Act of 1964 ("Title VII") and Title IX of the Education Amendments of 1972 ("Title IX") were influential discrimination statutes that prohibited discrimination on the basis of sex. Together, Title VII, which prohibitions discrimination in employment,[11] and Title IX, which prohibits discrimination in educational institutions that receive federal funding,[12] provide broad protection against sex-based

10. *Grimm*, 972 F.3d at 620.
11. 42 U.S.C. § 2000e-2(a)(1).
12. 20 U.S.C. § 1681(a).

discrimination, which has been further broadened by the extensive definition of "sex" developed through decades of comprehensive judicial decisions.

A. Legislative History of Title VII

Following a decade-long struggle for civil rights culminating in the March on Washington, Congress passed the Civil Rights Act of 1964.[13] Title VII of the Civil Rights Act prohibits employers from discriminating against any individual because of such individual's race, color, religion, sex, or national origin.[14] The legislative history of the addition of "sex" as a prohibited basis for discrimination is obscure, as it is alleged that the Representative who introduced the amendment to include "sex" was against the passage of the Civil Rights Act as a whole and intended to introduce this amendment as a "joke" to derail the entire bill.[15] Ironically, the amendment passed 168-133, supported by southern representatives that opposed the overall bill and opposed by non-southern supporters of the bill, further supporting the theory that the amendment to include sex was intended to

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13. *Legacy and Impact of the March*, NATIONAL MUSEUM OF AMERICAN HISTORY, https://perma.cc/Z9CG-DQTD (last visited Nov. 19, 2021).

14. 42 U.S.C. § 2000e-2. Title VII of the Civil Rights Act states it shall be an unlawful employment practice for an employer to

> fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000 e-2(a).

15. The "Smith Amendment" proposing to add "sex" to Title VII was introduced by Representative Howard Smith, who was notorious for opposing civil rights legislation during his time as chairman of the House Committee on Rules and who opposed the civil rights bill as a whole. Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition on Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. OF S. HIST. 37, 42 (1983). Representative Smith stated he proposed the amendment to "prevent discrimination against another minority group, the women" because women do not receive as high of compensation in employment. 110 CONG. REC. H.R. 2577 (daily ed. Feb. 8, 1964) (statement of Rep. Smith). However, Smith's remarks provoked laughter on the House floor and a fellow representative recalled that Smith explicitly told her that the amendment was a "joke." Brauer, *supra*, at 45, 48. For a more in-depth analysis of the history of the "Smith Amendment," and the alternative perspective that the Smith amendment was not introduced as a joke, see Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 432-433 (2009) (arguing that Smith was a true supporter of the women's rights movement).

sabotage the entire Civil Rights Act.[16] The Civil Rights Act overwhelmingly passed by a vote of 290-130 in the House and 73-27 in the Senate, and was subsequently signed into effect by President Lyndon B. Johnson in July of 1964.[17] The sparse legislative history of the inclusion of "sex" was first used by the Equal Employment Opportunity Commission as its rationale for lax enforcement of sex discrimination, but then later it was utilized by courts for stricter enforcement based on "purposive arguments about Title VII's ambitious goal of achieving broad nondiscrimination."[18] In response to Title VII Supreme Court decisions favorable to employers in the 1980s,[19] Congress passed the Civil Rights Act of 1991, to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[20] The 1991 Act, amending the 1964 Act, established that Title VII's protections broadly encompass discriminatory employment practices that result in disparate treatment[21] or a disparate impact[22] based on sex.

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16. Brauer, *supra* note 15, at 51.

17. *The Civil Rights Movement and The Second Reconstruction*, 1945—1968, HIST., ART & ARCHIVES: U.S. HOUSE OF REP., https://perma.cc/KT58-42ZD.

18. Osterman, *supra* note 15, at 420, 431.

19. Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1071 (codified as amended in 42 U.S.C. §§ 1981, 2000e *et seq*.); *see* Landgraf v. USI Film Products, 511 U.S. 244, 250–51 (1994) ("The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964.")

20. *Landgraf*, 511 U.S. at 250–51 (citing Section 3(4), 105 Stat. 1071, note following 42 U.S.C. § 1981).

21. *See supra* note 14. The initial burden of establishing a *prima facie* case for individual disparate treatment under Title VII is on the plaintiff. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The plaintiff must show that they were a member of a protected class, they were qualified for the position, that the employer took an adverse employment action against them, and an employee of comparable qualifications was promoted, hired, or not demoted or discharged instead. *Id.* After the Plaintiff establishes a *prima facie case*, the burden shifts to the employer to articular a "legitimate, nondiscriminatory reason" for the employee's adverse employment action. *Id.* The employee has an opportunity to show that the employer's stated reason for the adverse action was pretextual. *Id.* at 804. Plaintiffs can also recover for employment "patterns or practices" that result in systematic discrimination. *See* International Broth. of Teamsters v. U.S., 431 U.S. 324 (U.S. 1977). In addition to the original disparate treatment provision in the Civil Rights Act of 1964, Congress passed the Civil Rights Act of 1991 to address employment actions where a protected characteristic was a "motivating factor" in an adverse employment decision. 42 U.S.C. § 2000e-2(m); *see also* Desert Palace Inc. v. Costa, 593 U.S. 90 (2003) (addressing the type of evidence required to prove a "mixed-motive" case).

22. While the disparate impact theory was available under the 1964 Act, *see* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), the 1991 Act also added a provision to expressly address employment actions that cause a "disparate impact" on the basis of a protected characteristic. § 2000e-2(k).

B. History of Title VII Cases

Over the past six decades, employees have enjoyed increasingly greater protection through the courts' expansive interpretation of "sex." Four Supreme Court cases, in particular, detail the progression of the Court's evolving application of "sex" to effectuate Congress's intent to "strike at the entire spectrum of disparate treatment of men and women" in employment.[23] In 1971, the Supreme Court determined in *Martin Marietta v. Phillips*[24] that an employer's policy of refusing to hire women with preschool-aged children made out a *prima facie* case for discrimination on the basis of sex, despite the fact that the employer alleged this was a policy based on "motherhood," not womanhood.[25] Then in 1986, the Supreme Court held in *Meritor Savings Bank, FSB v. Vinson*[26] that sexual harassment of an employee that is sufficiently severe or pervasive to create a hostile environment is "without question" discrimination on the basis of sex.[27]

Shortly afterwards in 1989, the Supreme Court established the "sex-stereotyping" theory of sex-based discrimination for plaintiffs that do not conform to gender stereotypes. In *Price Waterhouse v. Hopkins*,[28] a female employee alleged that she was not promoted to partner based in part on

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23. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

24. 400 U.S. 542 (1971).

25. *Id.* at 543. While the Court did not reach the merits of the case, as the record before the Court was not adequate for resolution, the Court stated that a separate hiring policy for women and another for men, who each have pre-school aged children, is not permitted under Title VII, which requires that individuals are given employment opportunities irrespective of their sex. *Id.* at 544.

26. 477 U.S. 57 (1986).

27. *Id.* at 64. Shortly before *Meritor*, the DC Circuit in *Barnes v. Costle* held that conditioning a job on submitting to sexual relations with a supervisor violated Title VII. 561 F.2d 983, 994 (D.C. 1977). This type of harassment was first recognized by *Barnes*, but got the label "quid pro quo" harassment in *Henson v. City of Dundee*. 682 F.2d 897, 908 (11th Cir. 1982). The Court in *Meritor* stated that both *quid pro quo* claims for conditioning a grant or denial of an employment benefit on a sexual favor and non-*quid pro quo* claims for a severe or pervasive "hostile environment" are actionable kinds of sexual harassment under Title VII. *Meritor*, 477 U.S. at 65. An employer is liable for either type of sexual harassment if a "tangible employment action" resulted. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754 (1998).

28. 490 U.S. 228, 232 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1071. The 1991 Act superseded *Price Waterhouse*'s standard for employer liability in "mixed motive" cases. *See supra* notes 19–20 and accompanying text.

comments from the evaluation committee that she was too masculine.[29] The *Price Waterhouse* plurality opinion stated that an employer who acts on the basis of a sex stereotype has acted on the basis of sex because "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[30] In 1998, the prohibition of sex discrimination was extended to protect male employees as well. In *Oncale v. Sundowner Offshore Services, Inc.*,[31] the Supreme Court determined that male plaintiffs can have viable claims for same-sex sexual harassment, even though male-on-male sexual harassment in the workplace was likely not the "principal evil" Congress was concerned about preventing when it enacted Title VII.[32] The unanimous Court stated that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[33]

Within the last few years, LGBTQ plaintiffs have increasingly relied on the same-sex sexual harassment reasoning in *Oncale* and the theory of sex-stereotyping from *Price Waterhouse* to assert protections for gender identity and sexual orientation discrimination under Title VII.[34] In the context of LGBTQ plaintiffs, the sex-stereotyping argument asserts that discrimination solely because someone is homosexual is discrimination based on sex because the individual does not conform to the "stereotype" of being attracted to the opposite sex.[35] Similarly, discrimination because someone is transgender is impermissible sex-stereotyping because transgender individuals do not conform to the "stereotype" of identifying

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29. *Id.* at 235. Hopkins was described in her evaluations for partnership as "macho", unlady-like, and told she needed to "walk more femininely, talk more femininely, (and) dress more femininely." *Id.* There was evidence that other males expressing the same characteristics were evaluated in a positive manner. *Id.*

30. *Id.* at 251.

31. 523 U.S. 75 (1998).

32. *Id.* at 79.

33. *Id.*

34. For a discussion of the Title VII federal appellate court cases addressing protections for LGBTQ individuals before the Supreme Court's decision in *Bostock*, see Kathleen Conn, *The Supreme Court and Protections for LGBTQ Individuals: The Beat Goes On*, 368 ED. LAW REP. 1, 10–14 (2019).

35. Sexual orientation discrimination is based upon stereotyped assumptions about who members of a particular gender should be attracted to. Zarda v. Altitude Express, Inc., 883 F.3d 100, 131 (2d Cir. 2018), *aff'd*, 140 S. Ct. 1731 (2020).

with the gender that matches their biological sex.[36] The most recent Title VII Circuit Court opinions to rely on the theory of sex-stereotyping to support—or reject—a cause of action for discrimination based on LGBTQ status were *Harris Funeral Homes Inc. v. EEOC*, *Zarda v. Altitude Express*, and *Bostock v. Clayton County*—the trio of cases that gave rise to 2020's landmark Title VII "on the basis of sex" decision.[37]

II. HISTORY OF TITLE IX

Shortly after the Civil Rights Act of 1964, the women's rights movement in the late 1960s and early 1970s, also known as the "second wave" of feminism, led to greater educational, personal, and economic freedom for women.[38] The Civil Rights Act of 1964 did contain a provision that prohibited discrimination in federally funded education programs.[39] However, this provision did not include "sex" as a prohibited basis for discrimination.[40] Faced with educational institutions around the country that limited the number of women admitted to a college, required females to have higher test scores than males, or restricted the number of women who could earn financial aid, Congress began debating sex-based discrimination in education in the early 1970s.[41] In 1972, Congress finally added "sex" to

36. When an employer discriminates against an individual for being transgender, the employer is imposing "stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity." Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560, 576–77 (6th Cir. 2018), *aff'd*, 140 S. Ct. 1731 (2020).

37. Harris Funeral Homes, Inc. v. EEOC, 884. F.3d 560 (6th Cir. 2018), *aff'd*; Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *aff'd*; Bostock v. Clayton Cnty., Ga., 723 Fed. Appx. 964 (11th Circ. 2018), *rev'd*, 140 S. Ct. 1731 (2020). These three cases were consolidated and argued before the Supreme Court on October 8, 2019.

38. Kristen M. Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, ABA (July 1, 2004), https://perma.cc/2ZT3-FMGY.

39. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-4a.

40. § 2000d. *Compare* § 2000d (prohibiting discrimination on the basis of race, color, or national origin in any federally funded program or activity), *with* § 2000e-1(a), e-2(a) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin but explicitly exempting educational institutions); *see also infra* notes 241-42 and accompanying text.

41. Deondra Rose, *Regulating Opportunity: Title IX and the Birth of Gender-Conscious Higher Education Policy*, 27 J. OF POL. HIST. 157, 160–63 (2015).

the list of protected characteristics in order to close the "loophole" in education discrimination.[42]

A. Legislative History of Title IX

Like Title VII, the inclusion of sex in the amendment that eventually became Title IX of the Education Amendments of 1972 has an unusual history. In 1971, Representative Edith Green first introduced an amendment to prohibit sex discrimination in education and directed advocates to keep the lobbying under the radar in order to avoid igniting opposition.[43] After House of Representative opponents significantly weakened Green's amendment, Senator Birch Bayh introduced a stronger amendment in the Senate as a way to "give the women of America something that is rightfully theirs – an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice."[44] Despite the fact that there were only eleven female representatives in the House of Representatives and only one female Senator in 1972,[45] the House and Senate conference committee adopted the Senate's stronger language and the Education Amendments of 1972 passed with a vote of 218-210 in the House and 63-15 in the Senate.[46]

In enacting Title IX, Congress's broad purpose was "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."[47] Congress

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42. 118 CONG. REC. 5803, 5807 (1972) (statement of Sen. Bayh).

43. Rose, *supra* note 41, at 161–67.

44. 118 CONG. REC. 5803, 5808 (1972) (statement of Sen. Bayh). Senator Bayh directly addressed the link between discrimination in education and unequal employment opportunities for women, stating this amendment would "provide women with solid legal protection as they seek education and training for later careers, and as they seek employment commensurate to their education." *Id.* at 5806–07.

45. Rose, *supra* note 41, at 178 n.7.

46. *Id.* at 174. The final substantive language of Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance.

20 U.S.C. § 1681(a).

47. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (holding Title IX contains both a public remedy and an implied private remedy).

has further amended Title IX to reenforce its broad scope, first in 1974 to clarify that intercollegiate athletics are governed by Title IX,[48] and again in 1988 through the Civil Rights Restoration Act to "restore" Congress's broad interpretation of covered educational programs and activities.[49]

B. History of Title IX Cases

Ten years after its passage, the Supreme Court stated that "[t]here is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language."[50] In the past four decades, federal courts have broadly interpreted Title IX, leading to expansive applications.[51] In 1992 in *Franklin v. Gwinnett County Public Schools*,[52] the Court stated that "when a teacher sexually harasses and abuses a student" because of the student's sex, the teacher discriminates on the basis of sex.[53] The Court characterized the sexual harassment as intentional discrimination because the school knew that the student was being sexually abused by a teacher, took no action, and discouraged the student from pressing charges.[54] Shortly thereafter, in *Kinman v. Omaha Public School District* in 1996,[55] the Eighth Circuit determined that same-sex sexual harassment between a teacher and a student of the same gender was actionable under

48. Education Amendments of 1974, Pub. L. 93- 380, § 844, 88 Stat. 612 (1974) (codified at 20 U.S.C. § 1681); *see also Purpose of Title IX*, *supra* note 9

49. Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §1687); *see also Purpose of Title IX*, *supra* note 9. Today, Title IX applies to any educational program or activity receiving Federal financial assistance, covering over 17,600 school districts, 5,000 postsecondary institutions, and many more charter schools, for-profit schools, libraries, museums, and rehabilitation agencies. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (last modified Aug. 20, 2021), https://perma.cc/47C6-ZQ9W.

50. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (internal citation omitted).

51. *See* Kathleen Conn, *Title IX Protections for Transgender Students: Why Parents for Privacy v. Barr Should Reach the Supreme Court?*, 377 ED. LAW REP. 439, 443–453 (2020).

52. 503 U.S. 60 (1992).

53. *Id.* at 75.

54. *Id.* The lower courts have also adopted the disparate impact theory in the Title IX context to prohibit unintentional sex-based discrimination that disproportionately excluded females. *See* Sharif by Salahuddin v. New York State Educ. Dept., 709 F. Supp. 345, 364 (S.D.N.Y. 1989) (holding that a state department of education's practice of awarding scholarships that disproportionately excluded female students violated Title IX).

55. Kinman v. Omaha Public School Dist., 94 F.3d 463 (8th Cir. 1996), *abrogated on other grounds* by Gebser v. Lago Vista Indepen. School Dist., 524 U.S. 274, 290 (1998).

Title IX.[56] The court also confirmed that Title IX sexual harassment claims can be "quid pro quo*"* claims where an educational benefit is conditioned upon sexual advances or "hostile environment claims" when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct interferes with the educational environment.[57] In 1998 in *Gebser v. Lago Vista Independent School District*,[58] the Supreme Court stated that in order for an education institution to be liable for a teacher's harassment of a student, a school official with authority to institute corrective measures must have "actual knowledge" of the discrimination and must have responded with "deliberate indifference" to the teacher's misconduct.[59] The Court stated Title IX aims to prevent educational institutions from using federal funds in a discriminatory manner.[60] The following year, the Court in *Davis v. Monroe County Board of Education*[61] required that sexual harassment between students be "so severe, pervasive, *and* objectively offensive" since peer harassment is less likely to have a systemic effect on a student's access to education than sexual harassment by a teacher.[62]

In order to reflect Supreme Court precedent and assist educational institutions in Title IX compliance, the Department of Education and the Department of Justice issue informal policy guidance and formal

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56. *Id.* at 468. The female teacher wrote a letter to a female student stating she liked her, informed the student that she had slept with a woman, and then slept with the student. *Id.* at 465. The teacher did not direct "similar attentions" towards male students. *Id.* at 468.

57. *Id.* at 467. The five elements of a hostile environment claim under Title IX require "(1) [the plaintiff] was a student, who was (2) subjected to harassment (3) based upon sex (4) that the harassment was sufficiently severe and pervasive to create and abusive educational environment; and (5) that a cognizable basis for institutional liability exists." Frazier v. Fairhaven School Committee, 276 F.3d 52, 66 (1st Cir. 2002).

58. 524 U.S. 274 (1998).

59. *Id.* at 290. The Court reasoned that since Congress's intent was not to direct funding away from educational institutions who were unaware of discrimination, yet willing to respond promptly, then Congress did not intend the private remedy to impose liability on a district that did not know of a teacher's conduct, and therefore, did not have an opportunity to end the harassment. *Id.* at 275–76.

60. *Id.* at 287; *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 704 n.36 (1979) (quoting 117 CONG. REC. 39252 (1971) (statement of Rep. Mink) ("Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access")).

61. 526 U.S. 629 (1999).

62. *Id.* at 652–53 (emphasis added). The Court noted that a single instance of severe peer harassment could have a systemic effect. *Id.*

regulations interpreting Title IX.[63] Since Title IX guidance documents and regulations are normally drafted by presidential appointees, the interpretation of Title IX changes with each new administration.[64]

C. History of Title IX Guidance on Gender Identity and Sexual Orientation Discrimination Before Bostock

Two years after Title IX's enactment, Congress delegated authority to the Secretary of Education to propose regulations implementing Title IX.[65] In 1980, Executive Order 12250 tasked the Attorney General with developing standards to coordinate the enforcement of Title IX.[66] Together, the Department of Education and Department of Justice collaborate to "vigorously enforce" Title IX.[67] The Department of Education and the Department of Justice issue both informal and formal guidance to assist schools, universities, and other agencies in voluntarily complying with Title IX.[68] The informal guidance can be found in Memorandums, Question and Answer documents, and "Dear Colleague" letters.[69] While this guidance is not legally binding,[70] guidance documents allow administrative agencies to "explain ambiguous terms in legislative enactments."[71] Contrarily, formal

63. *Title IX Legal Manual*, THE DOJ, (Aug. 12, 2021), https://perma.cc/3D2U-F2DM; *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Aug. 20, 2021), https://perma.cc/47C6-ZQ9W.

64. Conn, *supra* note 51, at 441.

65. Education Amendments of 1974, Pub. L. 93-380, § 844, 88 Stat. 612 (1974) (codified at 20 U.S.C. § 1681)).

66. Exec. Order. No. 12,250, 47 Fed. Reg. 32,421 (July 27, 1982), (available at https://perma.cc/6QEG-XBBA).

67. Memorandum of Understanding Between the U.S. Dep't of Educ., Office for Civil Rights, and the U.S. Dep't of Just., Civil Rights Division, from Catherine Lhamon, Assist. Sect. for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., & Jocelyn Smuels, Acting Asst. Attn'y Gen., Civil Rights Division, U.S. Dep't of Just. (Apr. 28, 2014), https://perma.cc/8SKU-V9NF. For a succinct summary of each agencies' role in enforcing Title IX, see Jared P. Cole & Christine J. Beck, *Title IX: Who Determines the Legal Meaning of "Sex"?*, CONG. RSCH. SERV., https://perma.cc/E8NG-5E9K.

68. *Title IX and Sex Discrimination*, *supra* note 63; *see also Educational Opportunities Section*, U.S. DEP'T OF JUST. (last updated Feb. 3, 2021), https://perma.cc/2FMV-4SHH.

69. *Policy Guidance Portal*, U.S. DEP'T OF EDUC. (last updated Aug. 24, 2021), https://perma.cc/R5TC-3ZTS.

70. Agency interpretations contained in policy statements "lack the force of law," but courts will defer to an agency's interpretation of its own ambiguous regulation. Christensen v. Harris Cnty., 529 U.S. 576, 587–88 (2000) (citing Auer v. Robbins, 519 U.S. 452 (1997)).

71. Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987). Interpretive guidance does not have to follow notice-and-comment requirements prescribed by the Administrative Procedures

rules and regulations enacted by the Department of Education pursuant to their rulemaking authority that follow the notice-and-comment period under the Administrative Procedures Act carry the "force and effect of law."[72] When the Department of Education utilizes informal guidance rather than the formal rule making process, a previous administration's guidance is easily rescindable by the next administration, leading to particular instability in the guidance addressing LGBTQ students.[73]

i. Early Guidance on Gender Identity and Sexual Orientation Discrimination

As society has progressed in its understanding of LGBTQ individuals and the relevant administrative appointees have changed, the guidance from the Department of Education and the Department of Justice on the status of their protection under Title IX has rapidly shifted over the past two decades.[74] The Department of Education, on the last day of President Bill Clinton's administration in 2001, issued the first guidance about the protections—or lack thereof—for LGBTQ individuals under Title IX.[75] This Revised Guidance explicitly stated that Title IX does not prohibit discrimination on the basis of sexual orientation.[76] While the January 2001 Revised Guidance prevented sexual harassment based on *Price*

Act ("APA"). 5 U.S.C. § 553(b)(A). However, the Department of Education is frequently criticized for publishing informal guidance that extends beyond mere interpretations to include substantive regulations that did not properly follow the APA. *See infra* note 223.

72. Chrysler Corp. v. Brown, 441 U.S. 281, 282, 295 (1979). Substantive rules are issued by an agency pursuant to delegated authority from Congress to implement a statute, such as Title IX, and affect individual rights and obligations. *Id.* at 282, 302–03. *See also* APA, 5 USC § 551(4). For a thorough description of the distinction between informal agency guidance and formal rules, see generally Thomas Merril & Kathryn Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

73. *See* Tyler Kingkade, *Biden Wants To Scrap Betsy Devos' Rules On Sexual Assault In Schools. It Won't Be Easy.*, NBC NEWS (Nov. 12, 2020), https://perma.cc/K65B-KZSQ (discussing the impact of the Trump Administration's use of the formal rule-making process for the 2020 Title IX regulation on Biden's ability to repeal these regulations); *see infra* notes 90 and 219–20.

74. For another thorough explanation of the recent administrative guidance and handling of complaints impacting LGBTQ individuals, see generally Kathleen Conn, *Re-Interpreting Sex: Changing Judicial Views of Title VII and Title IX*, 357 ED. LAW REP. 1, 9–12 (2018).

75. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Office for Civil Rights, U.S. Dep't of Educ., (Jan. 19, 2001) (rescinded), https://perma.cc/6Z2B-845R.

76. *Id.* at 3.

Waterhouse's theory of sex-stereotyping and protected students that were sexually harassed that also happened to be "gay or lesbian," discrimination based solely on "non-sexual, gender-based harassment" was not prohibited under Title IX. The guidance provided the following example:

> If students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.[77]

This Revised Guidance was reiterated by the Bush Administration in a January 2006 Dear Colleague Letter.[78]

ii. Guidance on Gender Identity and Sexual Orientation Discrimination under the Obama Administration

Under President Barack Obama's appointees, the Department of Education first stated in 2010 that Title IX prohibited "gender-based harassment," defined as harassment based on sex-stereotyping,[79] and then in 2014 explicitly stated that schools must treat transgender students consistent with their gender identity.[80] In 2016, the Department of Education and the Department of Justice issued a joint "Dear Colleague Letter on Transgender Students," interpreting Title IX's prohibition against sexual harassment to include discrimination based on a student's gender identity and transgender status, and stated that the department treats a student's gender identity as the student's sex for purposes of Title IX.[81] The

77. *Id.*

78. Dear Colleague Letter from Stephanie Monroe, Assistance Secretary for Civil Rights, Dep't. of Educ. Office for Civil Rights (Jan. 25, 2006) (rescinded), https://perma.cc/4XZF-BT22.

79. Dear Colleague Letter, from Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Oct. 26, 2010) (archived), https://perma.cc/4ZF9-AH8R; *see* Conn, *supra* note 74, at 9.

80. Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, from Catherine E. Lhamon, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Dec. 4, 2014) (rescinded), https://perma.cc/H24E-E5WG.

81. Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (May 13, 2016) (rescinded), https://perma.cc/YSW5-QNZR. This letter was later rescinded by the Department of Education under the Trump Administration. *See infra* note 87.

letter stated that harassment that targets a student based on gender identity, transgender status, or their gender transition is considered sex-based discrimination and may amount to a hostile environment claim. For the first time in a Department of Education guidance document, this letter stated that schools must allow transgender students to use the bathroom that matches their gender identity.[82] This guidance explicitly addressed common societal counterarguments from parents of cisgender[83] students and stated,

> [E]nsuring nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[84]

Furthermore, the letter addressed additional facets of educational programs or activities where this guidance applied, including in student documents and records, overnight accommodations provided by the school, and single-sex classes.[85] The guidance also responded to a common counter-argument for restrooms access, rooted in a line in Title IX's implementing regulations that allows for sex-segregated facilities, by stating that sex-segregated restrooms are permissible, but schools must allow transgender

82. *Id.* at 3–5. Under this guidance, a school must allow transgender students to access a restroom or locker room, single-sex class, or overnight accommodation that is consistent with their gender identity and, overall, must treat students consistently with their preferred gender identity, such as when using pronouns to address a student.

83. Cisgender, or non-transgender individuals, are individuals whose gender identity is the same as the sex they were assigned at birth. *See Adolescent and School Health Terminology*, *supra* note 7.

84. Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, *supra* note 81, at 2. This "discomfort" by other students was later used by cisgender students to assert a claim under the Fourteenth Amendment for Invasion of Privacy. *See infra* Section III.A.

85. Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, *supra* note 81, at 3–5. The letter emphasized that Title IX does not apply to social fraternities and sororities, and, in the context of athletics, Title IX does not prohibit requirements based on medical knowledge about the impact of a transgender student's participation in a sport "on the competitive fairness or physical safety of the sport." *Id.*

students to access sex-segregated restrooms based on their gender identity.[86]

iii. Guidance on Gender Identity and Sexual Orientation Discrimination under the Trump Administration

In February 2017, the Department of Education and Department of Justice, under appointees from the Trump administration and subsequent new hires, withdrew the 2016 Dear Colleague Letter on Transgender Students that provided for protections for LGBTQ students.[87] A few months later, a new 2017 Dear Colleague Letter was issued, stating that schools must ensure that all students, including LGBTQ students, are protected by Title IX, but that Title IX does not prohibit discrimination solely because of LGBTQ status.[88]

While guidance documents and Dear Colleague Letters do not carry the force of law, new Title IX regulations that undergo a formal public comment period are binding.[89] In May of 2020, the Department of Education issued a new final rule under Title IX,[90] one month before the Supreme Court rendered its decision in *Bostock*, and included a new definition of sexual harassment.[91]

Like the Department of Education's prior Title IX rules, the official regulation did not define "sex" in the final regulation itself.[92] However,

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86. *Id.* Title IX's implementing regulations permit "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33.

87. Dear Colleague Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights, U.S. Dep't of Educ. (Feb. 22, 2017) (under review), https://perma.cc/MW88-AXW6.

88. Dear Colleague Letter from Candice Jackson, Acting Assistant Secretary for Civil Rights, U.S. Dep't of Educ. (Sept. 22, 2017) (rescinded), https://perma.cc/K7BB-SCKG.

89. *See supra* notes 70–72 and accompanying text.

90. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. § 106), https://perma.cc/4ZLD-NHEV.

91. Sexual harassment was defined as conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct ("quid pro quo"); (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity ("Sexual harassment"); or (3) Sexual assault, dating violence, domestic violence, or stalking. *Id*. at § 106.30.

92. *Id.* at 30,177; *see* Conn *supra* note 51, at 443.

unlike previous regulations, the rule's accompanying supplementary information explicitly states, "Title IX does not prohibit discrimination on the basis of sexual orientation."[93] According to the regulations, students heckling another student based on the student's sexual orientation, but without actions involving conduct of a sexual nature, would not be sexual harassment covered under Title IX.[94] In these regulations, the Department of Education "declin[ed] to address discrimination on the basis of gender identity or other issues raised in . . . the 2016 Dear Colleague Letter on Transgender Students."[95] Additionally, the commentary noted that nothing in the regulation "precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex that constitutes sexual harassment," and that some of the cases involving the theory of sex stereotyping were "cases under Title VII . . . on appeal before the Supreme Court of the United States."[96] Alas, the cases that the Title IX regulation's commentary cited that were on appeal before the Supreme Court were *Harris Funeral Homes Inc. v. EEOC, Zarda v. Altitude Express*, and *Bostock v. Clayton County*[97]—the trio of cases that gave rise to Title VII's landmark "on the basis of sex" decision just one month after this Title IX rule was published by the Department of Education.[98]

93. 85 Fed. Reg. 30,026, 30,179 (May 19, 2020).

94. According to this commentary, the example, "Gay students are not welcome at this table in the cafeteria," is not a Title IX violation. *Id.* This is the same example that the Department of Education gave in 2001 Guidance. *See supra* note 77 and accompanying text.

95. 85 Fed. Reg. 30,026, 30,179 (May 19, 2020).

96. *Id.* at 30,178.

97. Harris Funeral Homes, Inc. v. EEOC, 884. F.3d 560 (6th Cir. 2018), *aff'd*; and Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *aff'd*; Bostock v. Clayton Cnty., Ga., 723 Fed. Appx. 964 (11th Cir. 2018), *rev'd*, 140 S. Ct. 1731 (2020).

98. 85 Fed. Reg. 30,026, 30,178 (May 19, 2020) (to be codified at 34 C.F.R. § 106). After the Supreme Court released the *Bostock* decision, the Trump Administration and the Biden Administration released guidance directly addressing the impact of Bostock decision on Title IX. This guidance is discussed, *infra*, in part IV.D.

III. HISTORY OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY

As the trio of Title VII cases that gave rise to the *Bostock* decision were pending in their respective courts, several Title IX cases brought on behalf of LGBTQ students were simultaneously winding their way through the circuit courts. Four influential Title IX circuit court decisions concerning LGBTQ students preceded the *Bostock* ruling,[99] and four notable Title IX decisions, explicitly relying on *Bostock*'s interpretation of "sex," have been rendered after.[100]

A. Title IX Sexual Orientation and Gender Identity Discrimination Cases Before Bostock

To succeed on a Title IX disparate treatment claim, a Plaintiff must show "(1) that [she] was excluded from participation in an education program 'on the basis of sex'; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused [her] harm."[101] In order to show that the transgender or sexual orientation discrimination was "on the basis of sex," LGBTQ plaintiffs in Title IX cases before *Bostock* largely based their legal arguments, and courts primarily based their reasoning, on the theory of sex-stereotyping developed in *Price Waterhouse*, a Title VII case.[102]

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99. *See infra* Section III.A. In addition to the circuit court cases discussed below, additional district court decisions prior to *Bostock* also found claims for sexual orientation discrimination viable under Title IX. *See* Harrington by Harrington v. City of Attleboro, No. 15-CV-12769-DJC (D. Mass. 2018); D.V. by & through B.V. v. Pennsauken Sch. Dist., 247 F. Supp. 3d 464 (D.N.J. 2017); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *see also* Erin E. Buzuviz, *"On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC'Y 219, 233–36 (2013) (analyzing the use of the *Price Waterhouse* theory for LGBTQ individuals in Title IX district court cases prior to *Bostock*).

100. *See infra* Section III.C.

101. Preston v. Va. ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994).

102. *See supra* notes 28–33 and accompanying text. For an additional analysis of the theories used by transgender students, with a particular emphasis on the distinct legal issues identified and answered in each court decision, see Conn, *supra* note 51, at 449–53. Notably, some courts differentiated between sex-stereotyping and discrimination on the basis of sex when identifying the distinct legal issues to be decided on appeal. *Id.* at 456–57.

i. Dodds v. United States Department of Education

The first influential Title IX case involving a transgender student before *Bostock* was in the Sixth Circuit in 2016. The Superintendent, Dodds, filed a lawsuit challenging the Department of Education's finding that prohibiting a transgender female student from using the girls' restroom violated Title IX.[103] The transgender student, an eleven-year-old with special needs, and her parents intervened, seeking a preliminary injunction. The Sixth Circuit upheld the injunction, reasoning that "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."[104] The student had already been using the girls' restroom for weeks, which had greatly alleviated her distress, whereas her daily life and well-being was substantially adversely impacted when the school had excluded her from the girls' restroom prior to the injunction.[105] The court concluded that the public interest weighed in favor of the injunction allowing the transgender student to use the girls' restroom, as "the overriding public interest lies in the firm enforcement of Title IX."[106]

ii. Whitaker By Whitaker v. Kenosha Unified School District

A few months later, in *Whitaker By Whitaker v. Kenosha Unified School District*,[107] the Kenosha Unified School District did not permit senior Ash Whitaker, a transgender male ranked in the top five percent of his class, to use the boys' restroom, claiming that his presence would invade the privacy rights of other male students.[108] Whitaker filed a lawsuit claiming that this bathroom policy violated Title IX and sought a preliminary injunction to allow him to use the boys' restroom.[109] The Seventh Circuit affirmed the district court's order enjoining the school district from denying Whitaker access to the boys' restroom because he demonstrated a likelihood of

103. Dodds v. United States Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016).
104. *Id.* at 221 (citing Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004)).
105. *Id.*
106. *Id.* at 222 (citing Cohen v. Brown Univ., 991 F.2d 888, 906 (1st Cir. 1993) (internal citation omitted)). The court did not believe that the school demonstrated a likelihood of success on appeal. *Id.* at 221.
107. 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018).
108. *Id.* at 1040.
109. *Id.* at 1042.

success on the merits of his Title IX sex discrimination claim on a theory of sex-stereotyping.[110] The court noted that they look to Title VII when construing Title IX.[111] The court stated that "a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth" and *Price Waterhouse* established the prohibition on discrimination based on a failure to conform to stereotypical gender norms.[112] A frequent argument school districts use to defend their discriminatory bathroom policies is that the sex-stereotyping reasoning fails under Title IX because Congress did not explicitly add transgender status as a protected characteristic under Title VII or Title IX.[113] However, the court stated that Congressional inaction is not determinative, because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[114] The school district petitioned the Supreme Court for a writ of *certiorari*.[115] However, while the petition for *certiorari* was pending, the school district agreed to pay Whitaker a $800,000 settlement,[116] so the case was dismissed and the Supreme Court was never able to rule on the merits of Whitaker's case.[117]

iii. Doe by and through Doe v. Boyertown Area School District

The following year, the Third Circuit had the opportunity to address the allegedly threatened privacy rights of transgender students' classmates, this time through a lawsuit brought by cisgender students in a school district with a bathroom policy based on gender. In *Doe by and through Doe v.*

110. *Id.* at 1048.

111. *Id.* at 1047 (quoting Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997) ("It is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.")).

112. *Id.* at 1049.

113. *Id.*

114. *Id.* (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

115. Petition for Writ of Certiorari, Whitaker v. Kenosha Unified School Dist., 138 S. Ct. 1260 (2018) (No. 17-301).

116. Terry Flores, *Unified Settles Transgender Lawsuit*, KENOSHA NEWS (Jan. 9, 2018), https://perma.cc/D5FU-RLAZ.

117. Petition for Writ of Certiorari Dismissed, *Whitaker*, 138 S. Ct. 1260 (2018) (No. 17-301).

Boyertown Area School District,[118] the Third Circuit rejected the cisgender students' claims that a school district's policy allowing transgender students to use the bathrooms and locker rooms that aligned with their gender identity violated Title IX or the plaintiff's constitutional privacy rights.[119] The students' parents sought to enjoin the school district from allowing transgender students to use the bathroom or locker room that aligned with their gender, rather than their biological sex at birth.[120] The Third Circuit affirmed the district court's denial of an injunction, stating that the plaintiffs were unlikely to succeed on the merits of both their privacy claim and their Title IX claim.[121] The court rejected the cisgender students' privacy arguments, stating "the mere presence of transgender students in a locker room should not be objectively offensive to a reasonable person given the safeguards of the school's policy."[122] Likewise, the court rejected the cisgendered plaintiff's Title IX "hostile environment claim" by referencing a Title VII case that held that a transgender individual's "mere presence" in a restroom was not enough to create a sexually hostile environment.[123] Ironically, the court stated that the cisgender student's requested injunction to require transgender students to use the restroom only of their biological sex is akin to the district's policy in *Whitaker*; the court stated that the school district here "can hardly be faulted for being proactive in adopting a policy that avoids the issues that may otherwise have occurred under Title IX."[124] The Supreme Court denied the plaintiffs' petition for a writ of *certiorari*, and let the Third Circuit's decision stand.[125]

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118. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).

119. *Id.* at 520.

120. *Id.*

121. *Id.* at 538.

122. *Id.* at 525. The "safeguards" of the school district's policy included individual toilet stalls and four to eight additional single-user restrooms. *Id.* at 524. They also had a team meeting room separate from the common area of the locker room. *Id.*

123. *Id.* at 527 (quoting Cruzan v. Special Sch. Dist., No. 1, 294 F.3d 981, 984 (8th Cir. 2002)) (holding that a transgender employee's presence in the restroom did not create a hostile environment needed to sustain a Title VII claim). The Third Circuit stated that Title VII cases are instructive in Title IX cases. "Title IX's 'hostile environment harassment' cause of action originated in a series of cases decided under Title VII. The Supreme Court has extended an analogous cause of action to students under Title IX." *Id.* at 534.

124. *Id.* at 536

125. Petition for Writ of Certiorari, Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (No. 18-658).

iv. Parents for Privacy v. Barr

In the fourth circuit court decision concerning transgender students, rendered just months before the Supreme Court's decision in *Bostock*, the Ninth Circuit, like the Third Circuit, affirmed the district court's dismissal of the Title IX and constitutional claims of cisgender students concerning the presence of transgender students in the school's restrooms and locker rooms. [126] In *Parents for Privacy v. Barr*, the school district, in response to being notified that "Student A" was a transgender male, had created a "Student Safety Plan" to ensure that transgender persons could safely participate in school activities.[127] The plan gave transgender students the ability to use the restroom and locker room matching their gender identity and detailed Title IX and anti-bullying training for school's staff. The plaintiffs, which consisted of parents of non-transgender students, filed suit against Attorney General William Barr and the Dallas School District, seeking to enjoin the school district from enforcing the Student Safety Plan and sought an order requiring students to only use restrooms and locker rooms of their "biological sex assigned at birth."[128] The plaintiffs alleged that the Student Safety Plan violated Title IX because it "produced unwelcome sexual harassment and created a hostile environment on the basis of sex" for non-transgender students by potentially exposing them to "opposite sex nudity."[129] The Ninth Circuit affirmed the district court's dismissal of all claims and invalidated the plaintiff's privacy assertion, since Title IX does not create distinct "bodily privacy rights" that may be

126. Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020). The Constitutional rights that the parents alleged, and the court dismissed, were the right to privacy, the parental right to direct the education and upbringing of one's children under the Fourteenth Amendment, and the right to freely exercise one's religion under the First Amendment. *Id.* at 1222.

127. *Id.* at 1218.

128. *Id.* at 1219.

129. *Id.* at 1228. Plaintiffs rely on Title IX's implementing regulations that state the statute should not be construed to "prohibit any educational institution . . . from maintaining separate living facilities for the different sexes. . . . 20 U.S.C. § 1686." However, the Ninth Circuit rebutted, "[j]ust because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity." *Id.* at 1227.

vindicated through a Title IX suit, but instead provides recourse for discriminatory treatment "on the basis of sex." [130]

In invalidating the parents' claim that the Student Safety Plan treated cisgender students differently, and therefore discriminated against cisgender students, the court noted that the plan did not treat students differently on the basis of sex; it actually treated students of both sexes equally.[131] Since Title IX is aimed at addressing discrimination based on sex or gender stereotypes, the court noted that treating both male and female students the same actually suggests an *absence* of sex animus or discrimination based on gender stereotypes.[132] Finally, the court added that the presence of a transgender student in a locker room or restroom, without more, does not create a sexually harassing environment.[133] In December 2020, after the *Bostock* decision, the Supreme Court denied the plaintiffs' petition for a writ of *certiorari*.[134]

The Supreme Court has never addressed the issue of discrimination on the basis of sexual orientation or gender identity in the context of Title IX. Despite three recent Title IX cases with transgender plaintiffs petitioning the Supreme Court for *certiorari*,[135] it was a Title VII case that reached the Supreme Court first. *Bostock v. Clayton County*, which also interprets "sex," provides insight into the High Court's recent evolution away from the sex-

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130. Fourteenth Amendment claims were dismissed because the right to privacy does not extend to avoid all risk of intimate exposure and the Due Process Clause does not provide a fundamental parental right to determine public school bathroom policies. *Id.* at 1230. The First Amendment claim, where plaintiffs asserted the plan forced students to be exposed in front of the opposite sex in violation of their religious beliefs, was dismissed because the school district's plan was neutral and generally applicable with respect to religion and the plan was "rationally related" to the legitimate government purpose of protecting student safety. *Id.* at 1234.

131. *Id.* at 1228.

132. *Id.* The court did not reach the question of whether requiring transgender students to use the bathroom of their biological sex would constitute sex-stereotyping. *Id.* at n.22 (citing Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed., 858 F.3d 1034, 1048–50 (7th Cir. 2017)).

133. *Id.* at 1229.

134. Parents for Privacy v. Barr, 141 S. Ct. 894 (2020).

135. The Supreme Court actually granted *Grimm*'s petition for certiorari in 2016, but after the Department of Education withdrew the Obama Administration's 2016 Dear Colleague Letter on Transgender Students that the Fourth Circuit's decision had relied upon, the Court remanded the case for further consideration. Grimm v. Gloucester Cnty. Sch. Bd., 137 S. Ct. 1239 (2017) (No. 16-273); *see supra* notes 81, 87 and *infra* note 172. In 2018, *Whitaker* was settled while the petition for *certiorari* was pending. *See supra* notes 116–17. The Supreme Court denied *certiorari* to Boyertown in 2019. *See supra* note 125. When compared to other petitions for *certiorari* in the 2018-2019 term, petitions from LGBTQ plaintiffs were handled in an "atypical" manner. *See generally* Conn, *supra* note 34..

stereotyping argument in cases with LGBTQ individuals and signals a preference for interpreting "sex" in federal statutes based upon the plain meaning of the term.

B. Landmark Title VII Decision: Bostock v. Clayton County, Georgia

In a landmark decision in June 2020, the Supreme Court clarified in *Bostock v. Georgia County* that employers cannot discriminate on the basis of sexual orientation or gender identity.[136] Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual because of sex.[137] For years, the lower courts had been divided on whether an employer can fire an employee simply for being homosexual or transgender.[138] This Supreme Court decision arose out of a trio of cases. The Second Circuit in *Zarda v. Altitude Express, Inc.* held, *en banc*, that sexual orientation discrimination was a "subset" of sex discrimination under Title VII.[139] The Sixth Circuit in *Harris Funeral Homes, Inc. v. EEOC* held that discrimination on the basis of transgender or transitioning status was sex discrimination under Title VII.[140] However, the Eleventh Circuit in *Bostock v. Clayton County, Georgia* stated that sexual orientation discrimination was not a form of prohibited sex discrimination under Title VII.[141] To resolve the circuit split, the Supreme Court granted *certiorari*.[142] Convinced by the plain meaning of the express terms in Title VII, the Court concluded in a 5-4 decision that discrimination on the basis of gender

136. 140 S. Ct. 1731, 1737 (2020). "The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." *Id.*

137. Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a)(1).

138. *Bostock*, 140 S. Ct. at 1738.

139. Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018), *aff'd*, 140 S. Ct. 1731 (2020).

140. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560, 575 (6th Cir. 2018), *aff'd*, 140 S. Ct. 1731 (2020).

141. Bostock v. Clayton Cnty., Ga., 723 Fed. Appx. 964 (11th Cir. 2018), *rev'd*, 140 S. Ct. 1731 (2020).

142. *Bostock*, 140 S. Ct. at 1738. This also resolved a discrepancy between the EEOC and the Department of Justice. The EEOC took the position that Title VII protected workers from gender identity and sexuality discrimination, while the DOJ took the position that Title VII did not. Lisa Nagle-Piazza, *DOJ Asks Supreme Court to Find Workplace Bias Law Doesn't Cover Sexual Orientation*, SHRM (Aug. 26, 2019), https://perma.cc/PR44-YPWP.

identity and sexual orientation is prohibited discrimination on the basis of sex.[143]

Contrary to the Second and Sixth Circuits in the decisions below, the Supreme Court did not rest its reasoning on the *Price Waterhouse* theory of sex-stereotyping stating that discrimination against a gay or transgender individual was discrimination because they failed to conform to gender stereotypes. Rather, the opinion, written by Justice Gorsuch, was rooted mainly in the "Ordinary Meaning" canon of interpretation.[144] The Court began by emphasizing their intention to interpret a statute in accordance with the "ordinary public meaning" of its terms at the time of its enactment, since people have a right to rely on the original meaning of the law, without fear that courts will disregard the plain meaning.[145] Under Title VII, it is unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against someone "because of . . . sex."[146] The Court began by examining the statutory terms, and determined that discrimination "because of" sex followed the standard of but-for causation, satisfied whenever a particular outcome would not have happened "but for" the alleged cause.[147] The Court stated that this lead to a straightforward rule: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex."[148]

The Court proceeded to apply this quote to the cases at hand, and explained "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[149] If an employer fires a male employee because he is attracted to men, but wouldn't fire a female employee for being attracted to men, then the man's sex plays an "unmistakable and impermissible" role in the discharge decision.[150] Just because there are two factors at play in the

143. *Bostock*, 140 S. Ct. at 1734. Justice Gorsuch delivered the opinion of the Court, which was joined by Chief Justice Roberts, Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan. Justice Alito, joined by Justice Thomas, filed a dissenting opinion and Justice Kavanaugh filed a separate dissenting opinion. *Id.*

144. *Id.* at 1739.

145. *Id.* at 1749.

146. *Id.* (quoting 42 U.S.C. § 2000e-2).

147. *Id.* at 1739. In Title VII cases, the but-for causation standard means a defendant "cannot avoid liability just by citing some other factor that contributed to its challenged employment action." *Id.*

148. *Id.* at 1735.

149. *Id.* at 1741.

150. *Id.* at 1741–42.

employer's decision, the employee's sex and the sex of the person whom they are attracted to or which they identify with, the employer still would not have discharged them "but for" that employee's sex.[151] The Court analogized this "additional motivation" reasoning with the one in *Phillips v. Martin Marietta Corp*, a landmark Title VII case from 1971.[152] In *Martin Marietta*, an employer refused to hire women with young children but would hire men with children the same age.[153] The Court in *Martin Marietta* determined that because the discrimination was in part because of sex, the policy violated Title VII.[154] Likewise, with transgender or gay individuals, the presence of an additional factor such as the sex the plaintiff is attracted to does not change the fact that the employer "necessarily and intentionally applies sex-based rules."[155]

Additionally, the Court held that when Congress chooses not to include any exceptions to the broad Title VII rule, courts must apply the broad rule. The Court was not persuaded by the employers' argument that Congress did not intend to prohibit discrimination against gay or transgender individuals in 1964.[156] In the context of an unambiguous statutory text, the Court stated that whether Congress anticipated specific applications of the law at the time of passing "is irrelevant;" rather, the Court's role is to apply protective laws as the plain terms require.[157] The Court noted that in *Oncale v. Sundowner Offshore Service, Inc*., they had found that sexual harassment of a male by other men presented a triable claim under Title VII.[158] While male-on-male sexual harassment was not "the principal evil Congress was concerned with when it enacted Title VII,"[159] the unanimous *Oncale* Court explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[160] The Court noted that Title VII's broad language guaranteed that unanticipated results would emerge

151. *Id.* at 1742.
152. *Id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curium)). *See supra* note 25 and accompanying text, discussing "motherhood" as the additional criteria.
153. *Bostock*, 140 S. Ct. at 1743.
154. *Id.*
155. *Id.* at 1745.
156. *Id.* at 1749.
157. *Id.* at 1751.
158. *Id.* at 1735 (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)).
159. *Id.* at 1744 (quoting *Oncale*, 523 U.S. 79).
160. *Id.*

over time, having a broader impact than those in Congress may have expected.[161] The Court concluded that Congress's broad prohibition on sex-based discrimination led to the necessary consequence that firing an individual for being gay or transgender defies the law.

Rather than relying on the anticipated theory of sex-stereotyping to extend Title VII's purview to prohibit LGBTQ discrimination, the Supreme Court in *Bostock* adopted a textualist approach to interpreting discrimination because of sex. Following the ordinary meaning of the statute, the Court applied the "but-for" causation standard. Since this landmark decision, broad application of *Bostock*'s but-for causation standard has already been adopted in the context of Title IX to extend protections to LGBTQ students. While the judicial system has been crucial to the development of sex-based protections under Title VII, it is proving to be similarly critical to the expansive prohibition of sex-based discrimination under Title IX.

C. Title IX Sexual Orientation and Gender Identity Discrimination Cases After Bostock

Just two months after the Supreme Court rendered the *Bostock* decision, the Fourth Circuit in *Grimm v. Gloucester County School Board* and the Eleventh Circuit in *Adams v. School Board of St. Johns County*, later vacated and awaiting a decision *en banc*, determined that gender identity discrimination is sex discrimination under Title IX. As evidenced further by several state supreme court and district court decisions, courts have expressly relied on *Bostock*'s Title VII reasoning to interpret Title IX's similar prohibition against sex discrimination.

161. *Id.* "But the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command." *Bostock*, 140 S. Ct. at 1749 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (citation omitted)).

i. *Grimm v. Gloucester County School Board*

In *Grimm v. Gloucester County School Board*,[162] the Fourth Circuit held that a school district that prohibited a transgender male from using the bathroom that matched his gender-identity and refused to change his sex to his gender identity on his education records violated Title IX.[163] The court explicitly stated, "After the Supreme Court's recent decision in *Bostock v. Clayton County*, we have little difficulty holding that a bathroom policy precluding Grimm from using the boys' restrooms discriminated against him 'on the basis of sex.'"[164] Although *Bostock* interpreted Title VII of the Civil Rights Act of 1964, it guided the court's evaluation of claims under Title IX.[165] The Fourth Circuit followed the Supreme Court's emphasis on an individual's sex as the but-for cause of the employer's discrimination of transgender individuals.[166] The Fourth Circuit was unconvinced by the school district's claim that their motivation in implementing the bathroom policy to exclude Grimm solely because of his status as transgender was a reason distinct from his sex.[167] The court determined that his sex was nonetheless a but-for cause of the district's actions.[168] Likewise, the court found that the district violated Title IX when they refused to update Grimm's records to reflect his gender identity because it treated him worse than other similarly-situated students.[169]

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162. 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F. 3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163 (June 28, 2021). Ironically, this is the third separate Fourth Circuit decision concerning the *Grimm* case over the past five years. *Grimm* was almost the first transgender discrimination case under Title IX *or* Title VII to be heard by the Supreme Court, but the Department of Education's recension of the 2016 Dear Colleague Letter on Transgender Students in February 2017 forced the Supreme Court to remand the case because the District Court and Fourth Circuit opinions deferred to this letter. *See supra* notes 81, 87, 135. For a detailed discussion of *Grimm*'s complex procedural history, see Conn, *supra* note 74, at 13.

163. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020).

164. *Id.* at 616.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* The court reasoned, "That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions." *Id.*

169. *Id.* at 619. Discrimination "mean[s] treating that individual worse than others who are similarly situated." *Id.* at 618 (quoting Bostock v. Clayton Cnty, Ga., 140 S. Ct. 1731, 1740 (2020).). Requiring Grimm to use a single-stall option or a women's restroom that did not align with his gender identity was treating him worse than similarly situated students. The "harm" that resulted from the school

Notably missing from the Fourth Circuit's reasoning for the Title IX claim is a reliance on *Price Waterhouse*'s sex-stereotyping theory, present in pre-*Bostock* Title IX decisions. While the court agreed that the school district's bathroom policy punished Grimm for not conforming to gender stereotypes, the court found it unnecessary to address whether Grimm's treatment was discrimination independently under the theory of sex-stereotyping, since they now had "the benefit of *Bostock*'s guidance" to determine that gender identity discrimination is discrimination because of sex.[170] The Fourth Circuit denied the School Board's petition for a rehearing *en banc*,[171] and the Supreme Court denied the school district's petition for writ of *certiorari* a few months later, allowing the Fourth Circuit's decision in favor of the transgender student to stand.[172]

ii. *Adams v. School Board of St. Johns County*

Likewise, following *Bostock*, the Eleventh Circuit held in August 2020 in *Adams v. School Board of St. Johns Count*y (*Adams I*) that a school district's bathroom policy, requiring transgender students to only use gender-neutral restrooms located far from their classes, was discrimination based on sex and therefore violated Title IX.[173] However, it is still notable that while the Eleventh Circuit found the school district's bathroom policy violated the Equal Protection Clause based on a theory of sex-stereotyping, the Eleventh Circuit analyzed the Title IX claim under the but-for standard of causation.[174] Relying on *Bostock*, the court stated both Title VII and Title

district's refusal to change his records was that when Grimm applied to four-year universities, he would have to submit a high school transcript that does not match his other documentation.

170. *Id.* at 617 n.15.

171. Order Denying Motion for Rehearing en Banc, Grimm, 972 F.3d 586, 593 (4th Cir. 2020) (No. 19-1952).

172. Petition for Writ of Certiorari, *Grimm*, 141 S. Ct. 2878 (No. 20-1163), *cert. denied*, 141 S. Ct. 2878 (Mem) (2021). The school district did not oppose Grimm's petition to pay him $1.3 million for his legal fees. Press Release, ACLU, Gloucester County School Board to Pay $1.3 Million to Resolve Gavin Grimm's Case (Aug. 26, 2021), [https://perma.cc/42TG-7WN5].

173. 968 F.3d 1286, 1292 (11th Cir. 2020), *vacated and superseded*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021). Adams, a transgender student who had undergone hormonal treatment and a bilateral mastectomy to masculinize his body was allowed to use boys' restroom at school until the school district received complaints. After receiving complaints from other students, school administrators required Adams to use only gender-neutral restrooms. *Id.* After unsuccessful discussions with the school board, Adams, through his mother, sued the school. *Id.* at 1295.

174. *Id.* at 1305.

IX employ a "but-for" causation standard, and discrimination against a transgender student solely because that person is transgender is illegal when it occurs "but for" their sex.[175] The school district asserted that Title IX only intended to address discrimination against biological women, but the court responded that even if Congress never contemplated Title VII to prevent discrimination against gender identity, the terms of the statute "require nothing less" and that the reasoning of *Bostock* applies with the same force to Title IX's equally broad prohibition on sex discrimination.[176] Since Adams suffered harm through "debilitating distress and anxiety" exacerbated by the school district's policy, this differential treatment violated Title IX.[177]

However, one year later, the Eleventh Circuit granted the school district's petition for a rehearing and vacated the original decision in *Adams I*.[178] The second decision in July 2021, *Adams II*, was also decided in favor of Adams, but on Equal Protection grounds only.[179] The court stated that the School Board's bathroom policy based on biological sex fails to satisfy intermediate scrutiny because it is arbitrary that the school did not treat transgender students who transitioned before enrolling the same as students who transitioned after enrolling, nor did they update the students' gender on their enrollment documents to match a student's governmental records that reflected their transition.[180] Because Adam's equal protection claim entitled

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175. *Id.* The court stated that but-for causation is the default rule for federal antidiscrimination laws. *Id.* (citing Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020)). Additionally, the court noted that the Supreme Court frequently looks to Title VII interpretations of discrimination in its Title IX decisions. *See Adams*, 968 F.3d at 1305.

176. *Id.* The school board argued that Title IX's ban on sex discrimination was different than Title VII's because "schools are wildly different environment than the workplace." *Id.* (quoting Supplemental Brief of Defendant-Appellant at 43–44, Adams v. Sch. Bd. of St. John's Cnty., No. 18-13592-EE (11th Cir. July 2, 2020)). The court rejected this argument and said, "[c]ongress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces." *Adams*, 968 F.3d at 1305. The court also noted that Title IX, nor its implementing regulations, declared how "sex" should be defined. Even following *Bostock*, the school district continued to claim that *Bostock* endorsed the interpretation of "sex" to mean biological sex. However, the Eleventh Circuit noted that the *Bostock* Court expressly declined to decide whether "sex" meant biological sex or gender identity, and likewise avoided answering this question. Rather, it was important for the court to focus on the fact that the school district's bathroom policy singled out Adams for differential treatment because of his transgender status.

177. *Id.* at 1310.

178. *Id.* at 1299.

179. 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

180. Adam's Florida birth certificate and driver's license state that he is male. Because the Fourteenth Amendment "requires a substantial, accurate relationship between a gender-based policy and

him to relief, the court declined to reach his Title IX claim.[181] Noticeably absent from this opinion was an analysis of sex-stereotyping *or* a reference to the *Bostock* decision.

Just one month later, this decision was again vacated, awaiting an *en banc* decision.[182] The majority of the Eleventh Circuit judges voted to grant an *en banc* hearing,[183] available when "en banc consideration is necessary to secure or maintain uniformity of the court's decisions or the proceeding involves a question of exceptional importance."[184] The Eleventh Circuit, *en banc*, held oral arguments on February 22, 2022.[185] If the Eleventh Circuit reaches an alternative outcome in the *en banc* decision and decides that differential treatment based on gender identity does not violate Title IX, *Adams* will create a circuit split between the Eleventh Circuit and the Fourth Circuit, in *Grimm*, ripe for the Supreme Court to finally resolve. In the interim, *Bostock* influenced the parties' *en banc* briefs in *Adams* and has continued to guide lower court Title IX decisions.[186]

iii. State Supreme Court and District Court Decisions Since *Bostock*

State supreme courts that have considered the scope of Title IX protections for LGBTQ students have also relied upon *Bostock* to rule in favor of transgender students. In *Clark County School District v. Bryan*, the Supreme Court of Nevada held that harassment by a student bully based on the student victims' perceived sexual orientation was harassment on the

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it's state purpose," the school district's policy that did not treat transgender students the same was not a legitimate, accurate proxy for protecting student privacy. *Id.* at 1304.

181. *Id.* at 1320.

182. 9 F.4th 1369 (11th Cir. 2021).

183. *Id.* at 1372; 28 U.S.C. § 46(c); Fed. R. App. P. 35(a); Loc. R. 35(b).

184. Fed. R. App. P. 35(a).

185. Oral Argument, Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369 (2022) (No. 18-13592) (available at https://perma.cc/KB5B-9UXG).

186. En Banc Brief of Appellant The School Board of St. Johns County, Florida, Adams v. Sch. Bd. of St. Johns Cnty., Fla., 9 F.3d 1369 (11th Cir.) (Oct. 26, 2021) (No. 18-13592). The school district attempted to distinguish the present case from *Bostock* by emphasizing Title IX's implementing regulations expressly permit separate bathrooms based on biological sex. *Id.* at 25–26. But as the Eleventh Circuit's second panel decision in *Adams* stated, "To be clear, Mr. Adams does not challenge the existence of sex-segregated bathrooms and does not question the ubiquitous societal practice of separate bathrooms for men and women." Adams v. Sch. Bd. of St. Johns Cnty, Fla., 3 F.3d 1299, 1308 (11th Cir. 2021). He only challenged his use based on biological sex rather than the sex that matched his governmental records. *Id.*

basis of sex under Title IX.[187] Sixth grader Ethan Bryan and his friend Nolan were repeatedly called homophobic names, mocked for their long hair, and teased about being boyfriends. Bryan was taunted with specific sexual acts and stabbed in the groin while being questioned if he was a boy or a girl.[188] After multiple complaints to school administrators, the harassment persisted, and both boys, who testified that they were not gay, became stressed and withdrew from school.[189] Explicitly applying *Bostock*'s "sweeping standard," the court held that if the plaintiff's sex was even *one* of the but-for causes of the discrimination, the harassment was based on actual or perceived sexual orientation and was prohibited under Title IX.[190]

Likewise, in *B.P. J. v. West Virginia State Board of Education*, the United States District Court for the Southern District of West Virginia granted Plaintiff's preliminary injunction preventing the state from enforcing the "Save Women's Sports Bill" against B.P.J.[191] The West Virginia bill prohibited transgender individuals from participating in sports based on gender identity. B.P.J. was a transgender female who had undergone puberty-preventing treatment that she claimed prevented her from developing a physiological advantage over other female athletes.[192] Similarly relying on *Bostock*, the court determined that since the law could not exclude the student from the girls' athletic team without referencing her "biological sex," her sex "remains a but-for cause" of her exclusion under the law.[193] After determining that it was in the public's interest that the student not be treated differently than her peers, the court granted plaintiff's

187. Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344, 357 (Nev. 2020).

188. *Id.* at 355.

189. *Id.* at 352.

190. *Id.* at 354. To succeed on the Title IX claim, the plaintiff must show that the school acted with "deliberate indifference," so the court remanded the case to determine if the school was deliberately indifferent to the student-on-student harassment. *Id.* (citing Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 643 (1991)).

191. B. P. J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347 (S.D.W.Va. 2021).

192. *Id.* The court noted that the NCAA and International Olympic Committee permit transgender women to compete as women if they "suppress their testosterone for a certain period of time or that it is suppressed below a particular threshold." *Id.* at n.5.

193. *Id.* at 356 (citing Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020),). This action on the basis of sex was discriminatory because the student was treated worse than other girls who were able to join the team of their gender identity. *Id.* "In the Title IX context, discrimination 'mean[s] treating that individual worse than others who are similarly situated.'" *Id.* (quoting *Grimm*, 972 F.3d at 618).

preliminary injunction because she demonstrated a likelihood of success on the merits of her Title IX claim.[194]

Since *Bostock*, the courts that have addressed *Bostock*'s impact on Title IX have followed the Supreme Court's emphasis on the but-for causation stemming from the plain language of Title IX, rather than following the sex-stereotyping theory under *Price Waterhouse* that was previously the most common approach for asserting a claim of harassment based on gender identity or sexual orientation under Title IX. This broader standard can allow other forms of discrimination against transgender students, including refusing to address students by their proper pronouns, declining to update a student's gender transition in their educational records, and verbal harassment based purely on gender identity, to be encompassed under prohibited discrimination that would not happen but for an LGBTQ student's sex.

IV. ANALYSIS: THE IMPACT OF *BOSTOCK* ON TITLE IX

The four main Title IX decisions involving transgender students prior to *Bostock* relied upon the theory of sex-stereotyping. However, the Title IX decisions after *Bostock* now rely on sex as the "but-for" cause of discrimination to encompass gender identity discrimination within Title IX's prohibition. Mapping the progression of the legal theories utilized by the courts to grant protection for gay and transgender individuals provides an understanding of how Title IX is being broadly interpreted to best effectuate the purpose of Title IX.

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194. *Id.* The court stated,

> It is clearly in the public interest to uphold B.P.J.'s constitutional right to not be treated any differently than her similarly situated peers because any harm to B.P.J.'s personal rights is a harm to the share of American rights that we all hold collectively.

Id.

A. Early Reliance on the Sex-Stereotyping Theory for LGBTQ Students

The circuit courts in *Dodds*, *Whitaker*, *Boyertown*, and *Parents for Privacy* prior to *Bostock*, as discussed above, relied in part on the theory of sex-stereotyping to attempt to bring gender identity and sexual orientation discrimination within Title IX's prohibition against discrimination on the basis of sex.[195] In 2016 in *Dodds*, the Sixth Circuit stated that sex-stereotyping based on gender non-conformity was impermissible sex discrimination.[196] In the 2017 *Whitaker* decision, the Seventh Circuit held that transgender students may bring discrimination claims under Title IX based on a theory of sex-stereotyping because, "by definition, a transgender individual does not conform to the *sex-based stereotypes* of the sex that he or she was assigned at birth."[197] Then in 2018, when denying requests for an injunction to *prohibit* transgender students from using the restroom of their gender identity, the Third Circuit in *Boyertown* refused to decide whether a policy prohibiting transgender students from using the restroom of their gender identity "would, itself, constitute discrimination under a *sex-stereotyping theory* in violation of Title IX," but that the school district could "hardly be faulted for being proactive in adopting a policy that avoids the issues that may otherwise have occurred under Title IX."[198] In denying a similar claim in 2020 in *Parents for Privacy*, the Ninth Circuit stated that "Title IX is aimed at addressing discrimination based on *sex or gender stereotypes*."[199] The Supreme Court dismissed the petition for certiorari in *Whitaker* after the case settled, and denied certiorari to *Boyertown* and *Parents for Privacy*.[200] While the theory of sex-stereotyping was successful at protecting transgender students in these circuits, the Supreme Court has

195. *See supra* Part III.A; *see also* Conn, *supra* note 51, at 444–53.

196. Dodds v. United States Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016).

197. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed., 858 F.3d 1034, 1048 (7th Cir. 2017) (emphasis added). The court acknowledged that several district courts have allowed a transgender plaintiff to state a claim on the basis of this theory under Title VII, referencing the *Harris* district court decision, which was one of the cases later affirmed by the Supreme Court in *Bostock*. The frequency of references between the circuit courts in Title IX and Title VII cases further support just how often the courts look to one statute when interpreting the other. *See infra* Part V.B.

198. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 536 (3d Cir. 2018) (emphasis added).

199. Parents for Privacy v. Barr, 949 F.3d 1210, 1228 (9th Cir. 2020) (emphasis added).

200. *See supra* note 135.

indicated that there is an even more viable theory to protect LGBTQ individuals.[201]

B. Absence of the Sex-Stereotyping Theory in Bostock

Like the four early Title IX circuit court decisions, the three Title VII circuit court decisions consolidated in *Bostock* referenced the theory of sex-stereotyping. However, in *Bostock*, Justice Gorsuch, writing for the 5-4 majority, referenced this theory just three times in the 37-paged majority opinion: once to state the EEOC's position in *Harris*, once in reference to a hypothetical about a feminine woman, and once to state that the legal test for "sexual stereotypes" is "simple." The third reference is the most unusual, as the Court's iteration of the sex-stereotype theory as a "test" seems to imply that the legal test for sex-stereotyping is distinct from the "test" to be used to determine if LGBTQ discrimination has occurred.[202] As discussed in Part II.B, the legal "test" the Supreme Court employs for LGBTQ discrimination under Title VII is the but-for standard of causation. Noticeably absent from the Supreme Court's majority opinion is an explanation for the shift away from the circuit courts' reliance on the sex-stereotyping theory to encompass LGBTQ discrimination under sex-based discrimination. Perhaps it could be explained by the scathing dissent by Justice Alito, joined by Justice Thomas, which states that the premise that Title VII forbids discrimination based on sex stereotypes is "faulty," which may have motivated the development of a new theory.[203] The majority's

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201. For a meticulous analysis of the "evolution" of the arguments transgender plaintiffs used in the circuit courts prior to *Bostock*, see Conn, *supra* note 51 , at 454–60 (discussing the theories utilized by the circuit courts and the district courts in the decisions below).

202. The context of this reference to sex-stereotyping states,

> Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are these reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

Bostock v. Clayton Cnty, Ga., 140 S. Ct. 1731, 1749 (2020).

203. Justice Alito quoted the dissent in a 2017 Seventh Circuit Title VII case, stating, "[H]eterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex specific* stereotype

subtle shift away from the lower courts' reliance on the sex-stereotyping theory has implications for pending Title IX cases.

C. Absence of the Sex-Stereotyping Argument in Title IX Cases Since Bostock

The Supreme Court released the *Bostock* decision on June 15, 2020. At the time, many Title IX cases alleging gender identity discrimination were pending in the lower courts. In the Fourth Circuit case, *Grimm*, and Eleventh Circuit case, *Adams*, the parties had already given oral arguments and were awaiting a decision. Both of the plaintiffs' original briefs in both cases, filed before *Bostock*, relied on the theory of sex-stereotyping. In the days following *Bostock*, the Eleventh Circuit and the Fourth Circuit allowed the parties to file supplemental briefs advising the court of the impact of *Bostock* on the parties' arguments.[204] Likely picking up on the *Bostock* opinion's absence of a sex-stereotyping theory, neither plaintiff-appellee in either case asserted a sex-stereotyping argument in their supplemental briefs.[205]

On August 9, 2020, just two months after the *Bostock* decision, having had "the benefit of *Bostock*'s guidance," the Fourth Circuit in *Grimm* explicitly stated they did not need to address Grimm's claim under the sex-stereotyping theory, and analyzed the Title IX claim under the but-for standard of causation. Clearly spelling out the but-for causation test in Grimm's circumstance, the court reasoned that the school board's decision

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at all." *Bostock*, 140 S. Ct. at 1764 (quoting Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 370 (en banc) (Sykes, J., dissenting)).

204. The Eleventh Circuit ordered the parties to file supplemental briefs. Order Directing the Parties to File Supplemental Briefs, Adams v. Sch. Bd. of St. Johns Cnty., No.187, 968 F.3d 1286 (11th Cir. 2020) (No. 18-13592). In the Fourth Circuit, Grimm requested to file supplemental briefs, and the next day, the Fourth Circuit granted his request. Motion by Grimm to File Supplemental Briefs, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952); Order Granting Motion to File Supplemental Briefs, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952). Ordering and permitting the parties to file supplemental briefs advising the court about the impact of *Bostock* upon their arguments previously made in this case signaled the importance of *Bostock*'s decision to the Title IX issue. Rina Grassotti & Sheila Willis, *What the Supreme Court's LGBTQ Decision May Mean For Bathroom and Locker Room Access in Title IX Schools: A 4-Step Best Practices Guide*, JDSUPRA (July 15, 2020), [https://perma.cc/AMS9-NA93].

205. The school district in *Adams* even emphasized, "The School Board's classifications were not based on stereotypes about the sexes." Supplemental Brief for Defendant-Appellant, Adams v. Sch. Bd Board of St. Johns Cnty., No.187, 968 F.3d 1286 (11th Cir. 2020) (18-13592).

to exclude Grimm because he is transgender could not be done without referencing his gender identity in relation to "the sex marker on his birth certificate," meaning sex remained a but-for cause of the school district's actions.[206] This clear prohibition against excluding transgender students solely because they are transgender is a significantly stronger objective rule than the four courts reached prior to *Bostock* under the norm-based and fact-specific sex-stereotyping analysis. [207]

Whether the *en banc* decision in *Adams* follows the but-for causation standard from *Bostock* as closely as the now-vacated 2020 *Adams I* opinion did will determine the breadth of the protections that transgender students will receive in future cases. This first decision of the Eleventh Circuit stated that the "but-for causation standard" was critical to *Bostock*'s expansive interpretation of sex discrimination.[208] The decision clearly stated that Title VII's "starkly broad terms" apply with the same force to Title IX's "equally broad prohibition on sex discrimination."[209] This now-vacated opinion concluded by reaffirming their reliance on *Bostock* and emphasized how it "confirmed that workplace discrimination against transgender people is contrary to law. Neither should this discrimination be tolerated in schools."[210] In the 2021 *Adams II* opinion, now also vacated awaiting a decision *en banc*, the court found in favor of the transgender student only on the Equal Protection claim because of the arbitrary distinctions in the policy.[211] This time, the court declined to reach the Title IX issues, and even when analyzing the bathroom policy under the Equal Protection Clause, stated, "We set aside for now that the policy treats transgender students differently than non-transgender students."[212] This completely veered away from the first *Adams I* decision's emphasis on the resulting "harm" of the differential treatment under the transgender student bathroom policy, such as a transgender student's debilitating stress and anxiety due to the school district's policy.[213]

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206. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593, 608 (4th Cir. 2020).
207. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed., 858 F.3d 1034, 1049–52 (7th Cir. 2017).
208. *Adams*, 968 F.3d at 1305 (citing *Bostock*, 140 S. Ct. at 1739).
209. *Id.*
210. *Id.* at 1310.
211. Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299, 1309 (11th Cir. 2021).
212. *Id.*
213. *See supra* note 177.

While both *Adams* opinions are now vacated, the broader scope of the first *Adams I* decision, applying the but-for standard from *Bostock*, and the narrower second *Adams II* decision, which does not even mention but-for causation or *Bostock* until the dissent, indicates how critical *Bostock*'s broad but-for standard is to encompassing gender identity discrimination under Title IX. Both the Nevada Supreme Court in *Bryan* and the Southern District of West Virginia in *B.P.J.* applied the but-for standard from *Bostock* to encompass additional forms of discrimination beyond bathroom use.[214] In *Bryan*, the court stated that before *Bostock*, there was "substantial conflicting law" regarding Title IX's protections for harassment based on sex-stereotypes.[215] After *Bostock*, as long as sex was a but-for cause of harassment, it was enough to trigger the protections of the law and encompass bullying based on perceived sexual orientation.[216] While the *Adams* case awaits an *en banc* decision from the Eleventh Circuit, the same circuit court that was overturned by *Bostock*, the administrative guidance since *Bostock* will be crucial in the interim.

D. Shift in Administrative Guidance Since Bostock

During the second-to-last week of the Trump administration, the Department of Education issued a letter stating *Bostock* did not affect the meaning of "sex" under Title IX, quoting Justice Alito's dissent that "the ordinary public meaning of the term 'sex' in Title VII means biological distinctions."[217] Just twelve days later, on President Biden's first day in office, Biden signed the "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." The order stated, "[u]nder *Bostock*'s reasoning, laws that prohibit sex

214. *See infra* Section III.C.iii.

215. Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344, 354 (Nev. 2020).

216. B. P. J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 356 (S.D.W.Va. 2021) (quoting Bostock v. Clayton Cnty, Ga., 140 S. Ct. 1731, 1740 (2020)). Since the state statute in B.P.J. couldn't be applied without referencing B.P.J.'s biological sex, the but-for standard applied to prohibit her from being treated worse than other similarly situated female athletes. *Id.*

217. Memorandum from Reed Rubinstein, Principal Deputy Gen. Couns., U.S. Dep't of Educ., to Kimberly M. Richey, Acting Assistant Sec'y, U.S. Dep't of Educ. Off. for Civ. Rts. (Jan. 8, 2021), [https://perma.cc/74XM-F3DT]. However, the Human Rights Campaign said the released memorandum "misconstrues" *Bostock* and is "legally flawed." Press Release, Hum. Rts. Campaign, Department of Education Publishes Memorandum Misconstruing Supreme Court's Bostock Decision (Jan. 8, 2021), [https://perma.cc/JGN9-VL8W].

discrimination—including Title IX . . . prohibit discrimination on the basis of gender identity or sexual orientation" because "children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."[218]

President Biden reiterated this commitment in March 2021 with the "Executive Order on Guaranteeing an Education Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity" which stated that, after *Bostock*, laws that prohibit sex discrimination, including Title IX, "prohibit discrimination on the basis of gender identity or sexual orientation." Additionally, the Order stated that the Secretary of Education must review the Trump Administration's May 2020 Title IX Rule and consider publishing for notice and comment proposed rules "suspending, revising, or rescinding" existing agency guidance inconsistent with this policy.[219] Biden's Department of Education indicated that they will undergo the formal notice and comment period to amend the May 2020 Title IX regulation to be consistent with this Order.[220]

Since this formal rule-making process took a full three and a half years under the Trump administration, President Biden's Executive Orders signal how the Department of Education and the Department of Justice will interpret and implement Title IX before the new formal rule is released. Within a few days of the March Executive Order, the Department of Justice issued a memorandum affirming that Title IX prohibits discrimination on the basis of sexual orientation and gender identity after *Bostock*, acknowledging that the Supreme Court looks to interpretations of Title VII to inform their interpretations of Title IX.[221] Notably, the memorandum emphasized that nothing in the statutory text, legislative history, or case law justified a departure from the broad interpretation of "sex" in *Bostock*.[222]

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218. Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021) (available at https://perma.cc/JCP4-SQ3S).

219. Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (March 8, 2021), https://perma.cc/V43Y-BZ8W. On March 2, 2021, Dr. Miguel Cardona was sworn in as the new Secretary of Education. *Dr. Miguel Cardona, Sec. of Educ.—Biography*, U.S. DEP'T OF EDUC., https://perma.cc/G939-7SHD.

220. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, OFFICE OF INFO. AND REG. AFF., (Spring 2021), https://perma.cc/9EKF-X84A.

221. Memorandum from Pamela S. Karlan, Principal Deputy Asst. Attn'y Gen., Civil Rights Division, to Federal Agency Civil Rights Directors and General Counsels (March 26, 2021), https://perma.cc/UV5N-CJNM.

222. *Id.* at 3.

The Department of Education then published a Notice of Interpretation in the Federal Register confirming that it will exercise the Department's enforcement authority to process complaints and conduct investigations based on sexual orientation and gender identity discrimination in light of *Bostock*.[223] The Department of Education also released a Fact Sheet giving specific examples of potential discrimination that the Department of Justice or Department of Education could investigate, including a principal who bars a transgender female student from using the girls' restroom or trying out for the girls' cheerleading team, a female student who is not allowed to attend the school dance because her date is also a female, or a professor that witnesses a student getting harassed using homophobic slurs over the course of a month and does nothing.[224]

The new guidance by the Department of Education is beneficial for protecting the rights of transgender students because courts can grant deference to this agency guidance as they analyze future cases.[225] But following the pattern of the past two decades, it is only a matter of time before a different presidential administration rescinds and rewrites this guidance again. The most feasible way to ensure a prohibition on sex-based discrimination is through a permanent, consistent interpretation through the courts.[226]

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223. Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity, 86 Fed. Reg. 32,637 (June 16, 2021) (to be codified at 34 C.F.R. 1), https://perma.cc/WG99-PDQU. A joint letter signed by twenty State Attorney Generals ("State Attorney General Letter") pushed back against this Notice, alleging that it constituted an unlawful rewrite of Title IX that deprives the public of the federal rule-making process. Letter from Herbert H. Slatery III, Tennessee Attorney General & Reporter, and twenty other State Attorneys General, to President Joseph R. Biden, Jr., President of the United States (July 6, 2021), [https://perma.cc/Z5RY-9SG5] [hereinafter State Attorney General Letter]. The letter also disagreed with the merits of applying *Bostock* in the Title IX context. *See infra* note 244–45.

224. *Supporting Intersex Students: A Resource for Students, Families, and Educators*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (October 2021), https://perma.cc/6R3Y-4QQD.

225. *See supra* note 70.

226. Passing federal legislation, such as the proposed Equality Act, could be another way to ensure a prohibition on sexual orientation and gender identity discrimination in education. *See* H.R. 5, 117th Congress (2021-2022). There are practical challenges with this option, including the perspective the Title IX's broad language already encompasses subsets of sex discrimination. *See supra* note 114 and accompanying text. However, a full discussion of the Equality Act's pros and cons is outside the scope of this Note.

V. PROPOSAL: COURTS SHOULD FOLLOW *BOSTOCK* WHEN ANLYZING TITLE IX CLAIMS FOR SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

Discrimination because of sexual orientation and gender identity should continue to be interpreted as prohibited in educational institutions under Title IX's prohibition on sex-based discrimination. Until there is a Supreme Court decision explicitly addressing sexual orientation and gender identity discrimination under Title IX, circuit courts interpreting Title IX cases should look towards the reasoning and outcome in *Bostock*, which also interprets "sex," to guide their decision. Encompassing gender identity and sexual orientation discrimination as a form of "sex" discrimination under Title IX logically follows from the *Bostock* decision for three main reasons. First, both Title IX and Title VII contain the same plain language, and therefore, the same default test for causation. Second, the similar history of judicial development between Title VII and Title IX support a congruent interpretation. Third, following Title VII's interpretation will best effectuate the similarly broad purpose of Title IX.

A. Similarities Between Title VII and Title IX's Plain Language

"Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination," Title VII is "the most appropriate analogue when defining Title IX's substantive standards."[227] As the parties conceded in *Bostock*, the term "sex" in 1964 "referred to the biological distinctions between male and female."[228] However, the *Bostock* Court did not find that dispositive, as "it was just the starting point."[229] Just as neither the dictionary definition or legislative history cutting in favor of a biological interpretation of "sex" in Title VII were detrimental to the Court's expansive interpretation in *Bostock*, neither should the dictionary definition or legislative history in Title IX, given the broadly enacted language. The plain

227. Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n. 6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987).

228. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1739 (2020).

229. *Id.*

meaning of sex discrimination at the time of the enactment of Title VII in 1964 was virtually the same as the plain meaning of sex discrimination just eight years later when Title IX was enacted in 1972.[230] Additionally, both statutes contain a vague and obscure legislative history. When Representative Smith introduced the "sex" amendment to Title VII, he clearly stated that the purpose was to "prevent discrimination against another minority group, the *women*."[231] Similarly, when Senator Bayh introduced the Title IX amendment, he stated that the purpose of Title IX was to "provide *women* with solid legal protection"—not all "sexes" or "genders."[232] However, as *Bostock* clearly stated, "it is ultimately the provisions of those legislative commands rather than the principal concerns of our legislators by which we are governed."[233] Even if Senator Bayh had intended for Title IX to only protect women, just as Representative Smith likely intended Title VII would, these comments cannot overcome Title IX's clear expansive purpose and broad language, that delineated no exceptions, that Congress ultimately enacted. As the Supreme Court has explicated stated in Title IX cases, "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."[234]

The Supreme Court's reliance on the plain meaning of sex discrimination, implicating the but-for causation test, rather than the sex-stereotyping theory, is beneficial to LGBTQ students. The "because of" sex phrase ordinarily means "on account of" sex, which incorporates the simple test established when a particular outcome would not have happened but for one's sex, a much broader test than the sex-stereotyping analysis. The largest debate currently surrounding Title IX in both society and the courts is the issue of transgender student bathroom access. As opponents of gender-identity bathroom policies assert, the bathroom aspect of the discrimination debate is slightly different than pure hostility towards

230. *Id.*

231. 110 CONG. REC. H.R. 2577 (daily ed. Feb. 8, 1964) (statement of Rep. Smith) (emphasis added).

232. 118 CONG. REC. 5803, 5806-07 (1972) (emphasis added) (statement of Sen. Bayh).

233. Bostock v. Clayton Cnty, Ga., 140 S. Ct. 1731, 1744 (2020) (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998)).

234. North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801, (1966)).

transgender or gay students based on their perceived failure to conform to gender stereotypes, such as acting or dressing too femininely.[235] Gaining bathroom access for transgender students through the theory of "stereotypes" might be a slippery slope that raises difficult questions for courts. What degree of gender non-conformity is necessary to amount to discrimination because of failing to conform to a stereotype? Can a school district frame their bathroom policy in a way that only applies to students that have medically transitioned?[236] Relying on the degree of non-conformity is an inconsistent way to analyze a claim of discrimination and will lead to varying levels of protection between circuits. Other federal courts should adopt this same but-for causation test, which places a greater emphasis on the harm resulting from differential treatment under a school district's restroom policy, rather than the sex-stereotyping theory that places a greater emphasis on the constantly evolving notion of gender stereotypes.

Rather than relying on the sex-stereotyping theory, the court in *Grimm* focused on the resulting "harm" of the transgender student bathroom policies, such as a transgender students' lost classroom time or health impacts because of inconvenient bathroom options.[237] The but-for analysis followed in *Grimm* is a simple two-step process to determine if "sex discrimination" occurred. First, the school district's treatment of the student occurred because of the student's status as transgender or gay; therefore, following *Bostock*, that discrimination could not have occurred but for their "sex." Second, this differential treatment of transgender students compared to non-transgender students was "discrimination" because a harm resulted. In *Grimm*, the harm that resulted from the differential treatment was urinary tract infections from bathroom avoidance, how frequently he was late to class because of the location of the only single-sex restroom, and his

235. As the school district emphasized in their Supplemental Brief in *Grimm*, the School Board's classifications were not based on stereotypes about the sexes. The classifications were based on the enduring biological differences between boy and girls that the Supreme Court has repeatedly recognized support a classification challenged under the intermediate scrutiny standard. Supplemental Brief of Defendant-Appellant, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 587 (4th Cir. 2020) (No. 19-1952).

236. In fact, during the *en banc* hearing in *Adams*, the Eleventh Circuit judges questioned whether the same privacy justifications for the school district's policy would exist for fully medically transitioned students. Oral Argument at 12:18, Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369 (11th Cir. 2021) (No. 18-13592), https://perma.cc/KB5B-9UXG.

237. *Grimm*, 972 F.3d at 598, 600.

suicidal thoughts that led to hospitalization.[238] This differential treatment, that wouldn't have occurred but for sex, is sex discrimination under Title IX. This standard's focus on the resulting harm, rather than the nature of the discrimination rooted in biological sex versus gender and the degree of the student's "non-conformity" to stereotypes, is a more advantageous legal theory to effectuate the purpose of Title IX: to prevent intentional, systemic sex-based harm.

Additionally, Title IX was intentionally structured to contain the same but-for standard of causation as other federal anti-discrimination laws.[239] Title VII interpretations guide courts' evaluation of claims under Title IX because Congress modeled Title IX after Title VI of the Civil Rights Act of 1964.[240] Congress "passed Title IX with the explicit understanding that it would be interpreted as Title VI was."[241] Title VI of the Civil Rights Act of 1964 prohibited discrimination in federally assisted programs based on race, and the language and structure is almost identical to that of Title IX.[242] Court opinions frequently compare all three of these federal anti-discrimination laws, except where the statutes or regulations "carve out" explicit exceptions.[243]

However, the main counter-argument to interpreting these statutes in a similar manner relies upon the "carve outs" in Title IX's implementing regulations for sports teams, bathrooms, and living facilities. In response to the Biden Administration's notices of interpretation, twenty-two State Attorney Generals criticized that the guidance applying *Bostock* to Title IX was legally flawed because the *Bostock* Court explicitly stated that the decision did not apply to other federal statutes that were not before the court, nor did it address other issues such as "sex-segregated bathrooms, locker

238. *Grimm*, 972 F.3d at 600.

239. But-for causation is the default for federal anti-discrimination laws. Bostock v. Clayton Cnty, Ga., 140 S. Ct. 1731, 1739 (2020) (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350, (2013)); *see also* Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 589 U.S. ___, 140 S. Ct. 1009, 1014 (2020).

240. *Grimm*, 972 F.3d at 616 (quoting Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009)); *see supra* notes 39–-40.

241. *Id.* at 616 (citing Fitzgerald, 555 U.S. at 258).

242. Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d-4a.

243. *Title IX Legal Manual*, *supra* note 63, at Part I. Just as Title IX cases look to Title VII cases for guidance, Title VI cases also incorporate Title VII modes of analysis. *Id.*

rooms, and dress codes."[244] It further emphasized the significant textual differences between Title VII and Title IX.[245] Particularly, it quoted the Title IX implementing regulations, which state that:

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.[246]

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.[247]

A recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.[248]

However, as the *Grimm* court emphasized, the *existence* of sex-segregated options is not discriminatory in and of itself, but the school board's reliance on their own "invented classification" of "biological gender" was a discriminatory way to define sex in order to exclude Grimm from a particular sex-segregated restroom.[249] These implementing regulations cannot "override the statutory prohibition against *discrimination*"[250] and "discrimination" means "treating that individual worse than others who are similarly situated."[251] A transgender boy with a

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244. State Attorney General Letter, *supra* note 223, at 2 (quoting *Bostock*, 140 S. Ct. at 1753). Eighteen of these twenty-one states also filed an amici curiae brief for the *en banc* rehearing in *Adams*. En Banc Amici Curiae Brief, Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369 (11th Cir.) (Oct. 26, 2021) (No. 18-13592). The alleged flaws in the Department of Education's Notice of Interpretation were also the basis of the state attorney generals' claim in their *en banc* brief that Title IX does not prohibit educational institutions from assigning students to restrooms based on biological sex. *Id.*

245. State Attorney General Letter, *supra* note 223, at 2.

246. *Id.* (quoting 34 C.F.R. § 106.33).

247. *Id.* (quoting 20 U.S.C. § 1686).

248. *Id.* (quoting 34 C.F.R. § 106.41(b)).

249. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619 (4th Cir. 2020).. "Again, this [regulation] is a broad statement that sex-separated living facilities are not unlawful—not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities." *Id.* at 618 n.16.

250. *Id.* at 618 (emphasis in original).

251. Bostock v. Clayton Cnty, Ga., 140 S. Ct. 1731, 1740 (2020) (citing Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 59 (2006)). *Grimm* applied this same standard to the Title IX context. *Grimm*, 972 F.3d at 618.

"medically confirmed, persistent and consistent gender identity" is similarly situated to other boys.[252] Therefore, even though Title IX's implementing regulations allow schools to have separate bathrooms for each "sex," the regulations do not preclude allowing transgender students to use the bathroom of the sex that matches their gender identity.

There are other ways to protect the privacy of non-transgender students without discriminating against transgender students. As the courts upholding gender identity bathroom policies have acknowledged, "[n]o one questions that students have a privacy interest in their body when they go to the bathroom."[253] But in *Grimm*, the school district installed privacy strips and screens between the urinals.[254] The school district in *Boyertown* added single-user bathroom stalls and shower stalls.[255] These measures simply protect bathroom privacy and do not go beyond by infringing on the rights of transgender students. But when LGBTQ student are denied the right to have their education records match their state-issued identification, miss class time using a nurse's restroom far away from their classes, are harassed for being perceived to like the same gender—unlike other students of their gender—they are undoubtedly harmed and deprived of an education environment free from discrimination. "The right not to be discriminated against by the government belongs to all of us in equal measure. It is that communal and shared ownership of freedom that makes up the American ideal."[256] The actual harm that is occurring when transgender students are denied a bathroom consistent with their gender identity is too severe to ignore.

252. To compare otherwise would in itself reflect a "stereotypic notion": believing that gender identity is a choice privileging sex-assigned-at birth over Grimm's medically confirmed gender identity. *Grimm*, 972 F.3d at 610.

253. *Grimm*, 972 F.3d at 615. "The Board ignores the reality of how a transgender child uses the bathroom: 'by entering a stall and closing the door.'" *Id.* (quoting Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed., 858 F.3d 1034, 1052 (7th Cir. 2017)).

254. *Id.* at 600.

255. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 524 (3d Cir. 2018),

256. B. P. J. v. W. Va. State Bd. of Educ., 550 F.Supp.3d 347, 357 (S.D.W.Va. 2021).

B. Similarities Between Title VII and Title IX's Judicial Development

The similar judicial developments of Title VII and Title IX over the last few decades support congruent interpretations of "sex" in each statute. Until the Supreme Court explicitly clarifies the scope of "sex" under Title IX in relation to LGBTQ students, we are left to look to the trends in the federal appellate courts. Circuit courts expressly have stated, "We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."[257] The fact that they share the same terms, the same default rules, and the same statutory purpose to broadly prevent discrimination all support a congruent interpretation between the two. Because of these similarities, the courts have consistently applied similar legal standards and theories of discrimination established under Title VII when deciding Title IX cases.[258]

As the interpretation of "sex" under Title VII has evolved to allow a cause of action for many theories of sex-based discrimination in employment, the courts in Title IX cases have followed. Lacking Supreme Court guidance, early Title IX federal appellate cases looked to Title VII appellate cases to find that the conditioning of a benefit on a sexual demand is actionable sexual harassment under the *quid pro quo* theory.[259] "[A]cademic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors" constitutes "sex discrimination in employment."[260] Title VII's influence on Title IX was then followed by the Supreme Court. After the Supreme Court confirmed in 1986 that sexual harassment is impermissible sex discrimination under Title VII in *Meritor*, six years later the Court in *Franklin* relied on *Meritor* to conclude that sexual harassment of a student is also impermissible

257. Jennings v. Univ. of N. C., 482 F.3d 686, 695 (4th Cir. 2007).

258. *See generally Title IX Legal Manual*, *supra* note 63. This legal manual addresses the similarities between discriminatory conduct under each statute in Part IV.A, and explicitly compares the relationship between Title IX and Title VII in employment discrimination in Part IV.B and sexual harassment in Part IV.D.

259. Alexander v. Yale University, 459 F. Supp. 1, 4 (D. Con. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980). However, due to the lack of evidence of harassment and the graduation of multiple of the alleged victims, the court found no Title IX violation.

260. *Id.* (citing Barnes v. Costle, 561 F.2d 983, 988–92 (D.C. 1977)).

discrimination on the basis of sex under Title IX.[261] Explicitly quoting *Meritor*, the Court noted "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' . . . We believe the same rule should apply when a teacher sexually harasses and abuses a student."[262] Likewise, in *Davis* in 1999, the Court adopted the "hostile environment" theory of sexual harassment under Title IX, again referencing *Meritor*.[263]

The "same-sex" theory of harassment developed in a similar manner in the federal appellate courts before Supreme Court precedent was set. In *Kinman v. Omaha Public School District* in 1996, the court stated that a male employee's harassment of another male employee is actionable under Title VII, so "[w]e see no reason to apply a different standard under Title IX."[264] After the Supreme Court confirmed that same-sex discrimination was prohibited under Title VII in *Oncale*, courts found that "the reasoning of *Oncale* is fully transferable to Title IX cases."[265] The observation that it is unwise to presume that one group "will not discrimination against members of their group . . . has equal force in the scholastic setting."[266] Finally, the sex-stereotyping theory from *Price Waterhouse* has been adopted by courts in Title IX cases.[267] Not only are the theories of sex discrimination developed comparably, courts analyze Title IX claims in a similar fashion to Title VII claims.[268] Title IX cases have followed Title

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261. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (U.S. 1992). *Franklin* reserved the question of whether Title IX claims should always be governed by principles identical to Title VII. *Id.* at 1032 n.4.

262. *Id.* at 75 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (internal citation omitted)).

263. Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 638 (1999). The Davis court noted that peer harassment is different than teacher-student intentional discrimination, so employer liability for damages under Title IX will only attach if the harassment was "severe, pervasive, *and* objectively offensive." *Id.* at 650 (emphasis added).

264. Kinman v. Omaha Public School Dist., 94 F.3d 463, 468 (8th Cir. 1996), *abrogated on other grounds* by Gebser v. Lago Vista Indepen. Sch. Dist., 524 U.S. 274, 290 (1998) (referencing Quick v. Donaldson Company, Inc., 90 F.3d 1372 (8th Cir. 1996)). The same-sex theory of harassment under Title VII was affirmed in *Oncale*, while slightly changing the analysis found in *Quick*. *See supra* notes 31–33 and accompanying text.

265. Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

266. *Id.* (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)).

267. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed., 858 F.3d 1034, 1049 (7th Cir. 2017); *see supra* notes 28–30, 107–12.

268. *Title IX Legal Manual*, *supra* note 63, at Part IV.

VII's burden-shifting framework for disparate treatment cases[269] and recognized causes of action for disparate impact[270] and retaliation claims.[271]

As critics of parallel interpretations have asserted, "Title VII differs from Title IX in important respects. . . . It therefore 'does not follow that principles announced in the Title VII context automatically apply in the Title IX context.'"[272] Despite similar definitions of what constitutes sexual harassment, Title VII and Title IX differ in their standards to impose liability against an employer because Title IX's private right of action is judicially implied.[273] The Supreme Court has stated that employer liability under Title IX requires "actual knowledge" of the harassment by an official who has "authority to address the alleged discrimination," but who responds with deliberate indifference.[274] Contrarily, Supreme Court has established that the standard for imposing employer liability under Title VII relies on agency principles[275] and requires a "tangible employment action" by a supervisor.[276]

However, the contexts where the Title IX and Title VII precedents significantly depart are in the specific procedural requirements unique to the employment or education setting, not in their definitions or interpretations of what constitutes "sex" discrimination. These unique requirements lead

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269. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)); *see supra* notes 21, 101.

270. *Id.* (citing Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 361–62 (S.D.N.Y. 1989)); *see supra* notes 22, 54 and accompanying text.

271. *Id.* (citing Preston v. Com. of Va. ex rel. New River Community College, 31 F.3d 203, 208 (4th Cir. 1994)). "We agree that Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX." *Preston*, 31 F.3d at 207. *See also* Murray v. New York University College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) (applying Title VII retaliation standard to Title IX retaliation claim).

272. En Banc Amici Curiae Brief, Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369 (11th Cir. Oct. 26, 2021) (No. 18-13592) (quoting Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021)).

273. Gebser v. Lago Vista Indepen. School Dist., 524 U.S. 274, 275 (1998) ("Unlike Title IX, Title VII contains an express cause of action for a damages remedy. Title IX's private action is judicially implied, however, and so contains no legislative expression of the scope of available remedies.").

274. *Id.* at 290; *see supra* note 59 and accompanying text. The Court expressly declined to impose liability on an employer based on the principles of *respondeat superior* or constructive notice to a school district official because Title IX's express remedial scheme requires actual notice, so the implied remedy should too. *Id.* at 285.

275. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (U.S. 1986) (citing 42 U.S.C. § 2000e(b)); *see supra* notes 26–27 and accompanying text.

276. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754 (1998); *see supra* note 27.

to variations when imposing employer liability for actions of an agent[277] or requiring that complaints of alleged discrimination are first filled with the EEOC, [278] not when interpreting the symmetrical plain language or developing theories of discrimination. The strong history of parallel judicial developments of applying Title VII's theories and standards, rather than its procedural requirements, to the Title IX context provide strong support for applying *Bostock* to adopt a parallel interpretation of "sex" in the context of Title IX.

C. A Similarly Broad Prohibition on Discrimination Will Effectuate the Purpose of Title IX

Explicitly ruling that Title IX protects LGBTQ students, either in additional circuit court opinions or in a decision by the Supreme Court, will best effectuate the purpose of Title IX: to prohibit discrimination in education for all students in all schools. In a 2019 survey, over two-thirds of LGBTQ students were verbally harassed at school because of their sexual orientation and over half were verbally harassed because of their gender identity.[279] One third of LGBTQ students were *physically* harassed at school based on their sexual orientation or gender identity.[280] Incidents of harassment by educators are even more contrary to the goals of Title IX,[281] yet nearly one-tenth of LGBTQ students that faced harassment said that school staff were part of the harassment or assault.[282] Of the LGBTQ students that reported incidents of harassment, 60.5% of students said the

277. *See supra* notes 272–76.

278. *See generally Title IX Legal Manual*, *supra* note 63. Title VII claims, even those alleging sex-based employment discrimination by an educational institution, must first file a complaint with the EEOC. *Id.* (citing 29 C.F.R. § 1691.1-1691.13). Title IX funding recipients must develop procedures to respond to allegations of discrimination that are in compliance with the most updated Title IX regulations. *Id.* (citing 65 Fed. Reg. 52872).

279. *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GAY LESBIAN STRAIGHT EDUCATION NETWORK 28 (2020), https://perma.cc/7RVF-L6KS. For an analysis of the impact of previous presidential administrations' policies, and the resulting trends in discrimination, on the quantifiable discrimination identified in the Gay Lesbian Straight Education Network reports, see generally, Conn, *supra* note 74, at 2–4.

280. *The 2019 National School Climate Survey*, *supra* note 279, at 28.

281. *See supra* notes 62, 263.

282. *The 2019 National School Climate Survey*, *supra* note 279, at 33.

staff member did nothing or told the student to ignore the harassment and 20.8% told the student themselves to act or dress differently instead.[283] When gender identity and sexual orientation discrimination are encompassed within the prohibitions and procedures of Title IX, education officials with actual knowledge of this harassment would have to implement prompt remedial measures, just as they have had to with other forms of sex discrimination for decades.[284]

Explicitly ruling that Title IX prohibits discrimination on the basis of sexual orientation and gender identity would not only allow students to use restrooms that corresponds with their gender identity, but it would allow LGBTQ students to access education free from verbal and physical harassment from both peers and teachers. At the very least, it would require education officials with actual knowledge of sexual discrimination to utilize the Title IX reporting and investigative process if this harassment did occur.[285] Ultimately, encompassing this harassment would best effectuate the purpose of Title IX to prohibit educational institutions from utilizing federal funds to perpetuate systemic sex-based discrimination.[286] As Senator Bayh stated, Title IX was intended to provide students with "an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice."[287] Together, Title VII and *Bostock* have ensured that employees can secure jobs free from discrimination once they graduate. Now, courts must close the new "loophole" in education discrimination by applying *Bostock* to effectuate Title IX's goal of providing students with an equal chance to attend the schools of their choice free from all forms of verbal and physical harassment.

CONCLUSION

Sexual orientation and gender identity discrimination should be explicitly prohibited under Title IX's prohibition on sex discrimination. Federal courts should follow the reasoning of *Bostock* and *Grimm* by

283. *Id.* at 34.
284. *See generally* 85 Fed. Reg. 30,026 (May 19, 2020).
285. *See supra* note 59.
286. *See supra* notes 60–62.
287. *See supra* note 44.

applying the broad but-for standard of causation, rather than the narrower theory of sex-stereotyping, to determine whether a Title IX violation has occurred when a student is treated differently solely because of their sexuality or gender orientation. Including sexual orientation and gender identity discrimination under Title IX's prohibition on sex discrimination logically follows from the statute's plain language, history of parallel interpretations to Title VII, and broad statutory purpose to prevent sex discrimination in education. While the Supreme Court may one day decide a Title IX case involving sexual orientation or gender identity discrimination, they must now do so without Justice Ruth Bader Ginsburg, notorious for her support of LGBTQ rights.[288] Until then, federal courts should rely on the reasoning in *Bostock* to effectuate the broad purpose that Title IX's history requires. To echo *Grimm* once more, "[i]t is time to move forward,"[289] this time on the basis of sexual orientation and gender identity, and protect LGBTQ students' right to access education free from discrimination.

288. Matt Baume, *RBG Fought Like Hell for LGBTQ+ Equality. It's Our Turn to Fight For Her Legacy*, THEM (Sept. 19, 2020), https://perma.cc/TA3M-8BQA.

289. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020).