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BEYOND BOSTOCK: TITLE IX PROTECTIONS FOR TRANSGENDER ATHLETES

I. INTRODUCTION: WHAT IT MEANS TO BE A TRANSGENDER ATHLETE

“Gender” and “sex” are sometimes erroneously conflated and used interchangeably, but in fact, the terms embody two distinct concepts.¹ Much of western society now distinguishes “sex,” referring to the physiological distinctions between male and female individuals based on anatomical and biological factors, from “gender,” the socially constructed amalgam of behaviors, identities, and expressions of identity.² While some individuals’ gender identities

1. See, e.g., *Sex & Gender*, NIH OFF. OF RSCH. ON WOMEN’S HEALTH, <https://orwh.od.nih.gov/sex-gender> [<https://perma.cc/V9X5-U49D>] (last visited Nov. 6, 2021) (“‘Sex’ refers to biological differences between females and males, including chromosomes, sex organs, and endogenous hormonal profiles. ‘Gender’ refers to socially constructed and enacted roles and behaviors which occur in a historical and cultural context and vary across societies and over time.”); see also Virginia Prince, *Sex vs. Gender*, 8:4 INT’L J. OF TRANSGENDERISM 29, 29 (2005) (“Sex and gender are not the same thing. We are born into a society that is highly polarized and highly stereotyped, not only into male and female, but into man and woman. Man and male, female and woman are considered synonymous pairs of words for the same thing . . . But it is not so. Sex and gender are not the same thing.”); Krista Conger, *Of Mice, Men and Women*, STAN. MED. (Spring 2017), <https://stanmed.stanford.edu/2017spring/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health.html> [<https://perma.cc/2LS4-2NE7>] (explaining how “gender” is often erroneously used by medical researchers instead of “sex”); Tim Newman, *Sex and Gender: What’s the Difference?*, MED. NEWS TODAY (May 11, 2021), www.medicalnewstoday.com/articles/232363.php [<https://perma.cc/5XEE-FT5N>] (describing shifting public perception of sex and perception of gender over time while distinguishing between those terms).

2. See generally *Gender and Health*, WORLD HEALTH ORG., www.who.int/gender-equity-rights/understanding/gender-definition/en/ [<https://perma.cc/HKC4-W37Z>] (last visited Sep. 22, 2021) (elaborating on differences between sex versus gender). See also *What is Gender? What is Sex?*, CANADIAN INST. OF HEALTH RSCH., <https://cihr-irsc.gc.ca/e/48642.html> [<https://perma.cc/A8UR-YZ6E>] (last visited Nov. 4, 2021) (“Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people Gender identity is not confined to a binary (girl/woman, boy/man) nor is it static; it exists along a continuum and can change over time. There is considerable diversity in how individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, relations with others and the complex ways that gender is institutionalized in society.”); *What is the Difference Between Sex and Gender?*, OFF. FOR NAT’L STAT. (Feb. 21, 2019), <https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21> [<https://perma.cc/S3SX-7NJT>] (providing UK government’s definition of sex as referring to biological aspects of individuals determined by anatomy and gender as social construction relating to behaviors, and attributes based on masculinity or femininity).

correspond with their biological sex, this is not always the case.³ Moreover, there is no commonly accepted definition of “sex” or method for distinguishing between sexes, and not every definition or method of sex determination consistently produces a clear, male-female binary.⁴ In response to historical practices among various international sporting organizations that adopted so-called “objective” methods for rooting out “impostors” or intersex athletes, some experts and activists have argued instead for more fluid definitions of sex determined not by any one set of physical features but by a confluence of genetic, hormonal, and physiological factors.⁵ Ultimately, these experts assert that any purportedly objective test or guideline claiming to accurately distinguish between male and female athletes is inevitably flawed due to the inherently amorphous borders between sexes.⁶

3. See, e.g., *Gender Identity, Gender-Based Violence and Human Rights*, COUNCIL OF EUR., <https://rm.coe.int/chapter-1-gender-identity-gender-based-violence-and-human-rights-gende/16809e1595> [<https://perma.cc/R3SQ-RQ3H>] (last visited Nov. 4, 2021) (“Gender is not necessarily defined by biological sex: a person’s gender may or may not correspond to their biological sex. Gender is more about identity and how we feel about ourselves. People may self-identify as male, female, transgender, other or none (indeterminate/unspecified). People that do not identify as male or female are often grouped under the umbrella terms ‘non-binary’ or ‘genderqueer’, but the range of gender identifications is in reality unlimited.”).

4. See J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass “Gender”?*, 51 J. MARSHALL L. REV. 225, 227 (2018) (finding gonadic criteria based on reproductive glands is not only factor upon which definition of biological gender rests). Other definitions of sex include genetic sex based on X and Y chromosome combinations, anatomical sex based on the appearance of the genitalia, and hormonal sex based on predominant hormones. See *id.* at 228 (providing overview of various ways of defining “sex”). These commonly accepted methods of defining sex do not lend themselves to neat categorizations of sex along a male-female binary. See *id.* at 227 (explaining chromosomal criteria make definition of sex more nuanced). See generally Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 288–291 (Feb. 19, 2015) (“[I]f biologists continue to show that sex is a spectrum, then society and state will have to grapple with the consequences, and work out where and how to draw the line . . . [I]f the law requires that a person is male or female, should that sex be assigned by anatomy, hormones, cells or chromosomes, and what should be done if they clash? . . . If you want to know whether someone is male or female, it may be best just to ask.”).

5. See Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> [<https://perma.cc/E7RE-82E4>] (explaining various factors forming basis for one’s sex, ways in which international sports organizations have attempted to define or distinguish sex over time, various experts’ finding of criteria to be inadequate, unfair, not founded in science); see also Christie Aschwanden, *The Olympics Are Still Struggling to Define Gender*, FIVETHIRTYEIGHT (June 28, 2016), <https://fivethirtyeight.com/features/the-olympics-are-still-struggling-to-define-gender/> [<https://perma.cc/VM95-GNE3>] (describing debate over testosterone limits versus chromosomal tests for determining sex or use of gender identity, and tradeoffs of various approaches).

6. See Padawer, *supra* note 5 (“Relying on science to arbitrate the male-female divide in sports is fruitless . . . because science could not draw a line that nature

The increased visibility of transgender athletes and state laws meant to curb their participation in athletics have placed issues of sex and gender at the center of the larger legal, political, and cultural debate.⁷ Transgender (or “trans”) individuals are those whose gender identity differs from the gender they were thought to be at birth.⁸ An increasing number of high school and college-aged individuals are identifying as transgender, and these students and activists are challenging educators and lawmakers to rethink gender as universally fixed at birth.⁹ While transgender individuals generally have enjoyed increased visibility and acceptance in recent years, the transgender community still faces obstacles in gaining access to competitive sports.¹⁰ On July 14, 2021, for example, Texas passed SB 2, a bill that would ban transgender women and girls from par-

itself refused to draw.”); *see also* Melonyce McAfee, *Am I Not a Woman?*, SLATE (Aug. 19, 2009), <https://slate.com/news-and-politics/2009/08/how-to-perform-a-gender-test.html> [<https://perma.cc/5WGW-2Z73>] (describing some experts’ view of futility of sex determination tests based on genetics or appearance of genitalia as well as sordid history of tests employed by International Olympic Committee).

7. *See generally* Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women’s Sports? There are Two Almost Irreconcilable Positions*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html> [<https://perma.cc/6T72-F4QJ>] (describing increased acceptance of transgender athletes amid increased resistance from some competitors, some lawmakers).

8. *See Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 19, 2016), <http://www.transequality.org/issues/resources/transgender-terminology> [<https://perma.cc/7L6A-2CU2>] (defining basic terminology, commonly used acronyms); *see also* Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, SOC. SCI. & MED. 147, 222–231 (2015) (finding transgender is umbrella term used to define individuals whose gender identity or expression differs from culturally-bound gender associated with one’s assigned birth sex, is defined by transgender individuals, is expressed in variety of ways); Megan Davidson, *Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category Transgender*, 4 SEXUALITY RSCH. & SOC. POL’Y. 60, 60 (Dec. 2007) (finding “transgender” has no singular, fixed meaning but is largely held as inclusive of identities or experiences of some or all gender-variant, gender or sex-changing, gender-blending, gender-bending people).

9. *See NCAA Inclusion of Transgender Student-Athletes*, OFF. OF INCLUSION OF THE NAT’L COLLEGIATE ATHLETIC ASS’N, Aug. 2011, at 1, 2 (providing guidance to NCAA athletic programs on how to ensure transgender student-athletes fair, respectful, legal access to collegiate sports teams based on current medical, legal knowledge); *see also Model School District Policy on Transgender and Gender Nonconforming Students*, NAT’L CENT. FOR TRANSGENDER EQUAL. (GLSEN), (Sept. 2018), at 1, 2 (providing education lobbying group’s model policy in which individuals determine gender identity for themselves, rejecting medical, legal, or other proof of gender identity).

10. *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 272 (2013) (providing background on struggles faced by transgender athletes).

ticipating in sports consistent with their gender identity.¹¹ In the 2020–21 legislative session alone, more than seventy-five bills were introduced throughout the country that would bar transgender students from playing school sports on teams that conform with their gender identity.¹² Some proposals go so far as to suggest criminal penalties if transgender athletes participate on teams consistent with their gender identity.¹³ Notably, sixteen states have passed legislation banning transgender women and girls from participating on teams that conform to their gender identity.¹⁴ Those in favor of these laws often express fears that allowing transgender women and girls to participate in high school and collegiate athletics will jeopardize the existence of women’s sports generally.¹⁵ Others believe transgender participation in athletics does not spell an end to women’s sports but will actually enhance access to it.¹⁶

Moreover, the requisite gender “policing” procedures suggested by some state bills have been described by various international human rights organizations as both discriminatory and a

11. See Wyatt Ronan, *Texas Senate Passes Anti-Transgender Sports Ban Bill*, HUM. RTS. CAMPAIGN (July 15, 2021), <https://www.hrc.org/press-releases/texas-senate-passes-anti-transgender-sports-ban-bill-2> [<https://perma.cc/4BLG-QS9E>] (detailing recent state action both within Texas, within other states, barring transgender girls, women from participating on sports teams in conformity with their gender identity).

12. See Dan Avery, *Biden Administration Sends Trans Students a Back-to-School Message*, NBC NEWS (Aug. 19, 2021), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/biden-administration-sends-trans-students-back-school-message-rca1724> [<https://perma.cc/R6Q7-EER2>] (describing largely positive response to Biden Administration’s executive order by transgender activists).

13. See Elizabeth Sharrow et al., *States Are Still Trying to Ban Trans Youths from Sports. Here’s What You Need to Know*, WASH. POST (Jul. 26, 2021), <https://www.washingtonpost.com/politics/2021/07/26/states-are-still-trying-ban-trans-youths-sports-heres-what-you-need-know/> [<https://perma.cc/BF8Q-AVB5>] (highlighting number of state legislators with proposed bills targeting trans youths).

14. See *K-12 Policies*, TRANSATHLETE.COM, <https://www.transathlete.com/k-12> [<https://perma.cc/5VFG-J24C>] (last visited Sep. 6, 2021) (listing states with laws banning transgender students from participating in sports consistent with their gender identity with temporary injunctions blocking enforcement in Idaho, West Virginia).

15. See Abigail Shrier, *Joe Biden’s First Day Began the End of Girls’ Sports*, WALL STREET J. (Jan. 22, 2021), <https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066> [<https://perma.cc/F6MF-HKU4>] (arguing President Biden’s January 20, 2021 Executive Order will result in stripping all Title IX benefits away from women, girls).

16. See *Statement from Women’s Rights and Gender Justice Organizations in Support of the Equality Act*, NOW (Mar. 17, 2021), <https://now.org/media-center/press-release/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act/> [<https://perma.cc/TS4J-U5N9>] (“Girls and women who are transgender should have the same opportunities as girls and women who are cisgender to enjoy the educational benefits of sports, such as higher grades, higher graduation rates, and greater psychological well-being.”).

violation of basic human rights.¹⁷ The National Collegiate Athletic Association (“NCAA”) recognizes all stakeholders involved in collegiate sports benefit from fair and inclusive participation practices enabling transgender student-athletes to participate on teams that align with their gender identity.¹⁸ Yet, despite the strides transgender athletes have made in representation throughout the past few decades, statutory protections under Title IX and the Department of Education’s policies have not always provided adequate protections.¹⁹

The Supreme Court’s recent decision in *Bostock v. Clayton County*²⁰ appears to have set the stage to change this dynamic.²¹ This Comment reviews the legislative history and application of civil rights legislation barring discrimination on the basis of sex, includ-

17. See *They’re Chasing Us Away from Sport*, HUM. RTS. WATCH (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#> [<https://perma.cc/5KRA-KZUA>] (stating nearly century-long history of sex testing of women athletes at international level represents human rights issue); see also *Intersection of Race and Gender Discrimination in Sport*, UNITED NATIONS HUM. RTS. COUNCIL (June 15, 2020), <https://undocs.org/en/A/HRC/44/26> [<https://perma.cc/374U-NAJ3>] (“The implementation of female eligibility regulations denies athletes with variations in sex characteristics an equal right to participate in sports and violates the right to non-discrimination more broadly.”).

18. See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 9, at 8 (“All stakeholders in NCAA athletics programs will benefit from adopting fair and inclusive practices enabling transgender student-athletes to participate on school sports teams. School-based sports, even at the most competitive levels, remain an integral part of the process of education and development of young people, especially emerging leaders in our society.”).

19. See, e.g., Anagha Srikanth, *Taylor Small Becomes Vermont’s First Transgender Legislator*, HILL (Nov. 4, 2020), <https://thehill.com/changing-america/respect/diversity-inclusion/524512-taylor-small-becomes-vermonts-first-transgender> [<https://perma.cc/LUR8-JR9Q>] (discussing Vermont’s first transgender legislator and implications of groundbreaking victory for future LGBTQ legislators); see also *Laurel Hubbard: First Transgender Athlete to Compete at Olympics*, BBC (June 21, 2021), <https://www.bbc.com/news/world-asia-57549653> [<https://perma.cc/AB22-VWM5>] (discussing first transgender athlete to compete at Olympics, including public’s reaction); Caitlin O’Kane, *Chris Mosier, First Openly Transgender Athlete on Team USA, Hopes Sharing His Story Inspires Others*, CBS NEWS (Jan. 4, 2021), <https://www.cbsnews.com/news/chris-mosier-transgender-olympic-athlete-team-usa-sharing-story/> [<https://perma.cc/6BAB-LH8X>] (interviewing first transgender male athlete to represent United States in international competition, prompting International Olympic Committee to change policy on transgender athletes). See generally Maya Satya Reddy, *The Weaponization of Title IX in Sports*, REGULATORY REV. (June 29, 2021), <https://www.theregview.org/2021/06/29/reddy-weaponization-of-title-ix-sports/> [<https://perma.cc/G9DW-4DRV>] (describing ways in which Title IX enforcement can reinforce prevailing views of masculinity and gender stereotypes).

20. 140 S. Ct. 1731, 1734, (2020).

21. For further discussion of *Bostock*’s future impact on Title IX legislation, see *infra* notes 70–156 and accompanying text.

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ing Title IX and its corollary in the employment realm, Title VII.²² Moreover, this Comment shows that recent legislation at the state level is destined to fail given recent Title IX challenges bolstered by the *Bostock* decision as well as potential constitutional arguments against these laws.²³ This Comment also discusses what the *Bostock* decision implies for women's sports generally going forward and shows that, despite the pessimistic predictions of some commentators, the future of women's sports is not being threatened by transgender athletes.²⁴ Section II discusses Title IX and guidance provided by the Department of Education relating to the law's application to transgender students.²⁵ The Comment then examines the approach taken by various federal courts to Title IX and competing legal theories for its application.²⁶ Finally, the Comment explores recent state legislation regarding transgender athletes that have brought this issue to the fore.²⁷ Section III shows that this state level legislation is ultimately destined to be overturned on challenge under Title IX, bolstered by equal protection challenges, and what the inevitable inclusion of transgender athletes means for women's athletics going forward.²⁸

II. BACKGROUND: CIVIL RIGHTS LEGISLATION AND TRANSGENDER ATHLETES

Title IX of the Education Amendments of 1972 was signed into law on June 23, 1972 by President Richard Nixon.²⁹ The statute itself provides that “[n]o 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 pro-

22. For further discussion of how Title IX and Title IV relate, see *infra* notes 70–156 and accompanying text.

23. For further discussion of implications for recent legislation at the state level, see *infra* notes 158–170 and accompanying text.

24. For further discussion of the impact of *Bostock* on women's sports generally, see *infra* notes 188–200 and accompanying text.

25. For further discussion of the Department of Education's guidance on Title IX application, see *infra* notes 44–69 and accompanying text.

26. For further discussion of the competing legal theories of Title IX's application, see *infra* notes 81–118 and accompanying text.

27. For further discussion of the recent state legislation either banning transgender athletes or enabling their participation, see *infra* notes 120–132 and accompanying text.

28. For further discussion of the implication of recent court developments on women's sports generally, see *infra* notes 188–200 and accompanying text.

29. See generally Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 Del. L. Rev. 83, 83 (2013) (providing overview of history and future of Title IX).

gram or activity receiving Federal financial assistance.”³⁰ Title IX was modeled after Title VI of the Civil Rights Act of 1964.³¹ Where Title VI protects against race discrimination in all programs receiving federal funds, Title IX protects against sex discrimination and applies only to educational programs.³² The U.S. Department of Education’s Office of Civil Rights (OCR) has since provided additional direction in the form of memorandums, “Dear Colleague” letters, clarifications, and other various guidance extending Title IX protections to athletics at educational institutions.³³

A. Title IX and Competing Guidance from the Department of Education

On October 26, 2010, under the Obama administration, the OCR released a “Dear Colleague” letter stating that “Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”³⁴ In an opinion letter dated January 7, 2015, the OCR elaborated further by stating that the portion of Title IX providing for separate bathroom and locker room facilities on the basis of sex should be applied to transgender students consistent with their gender identity.³⁵ In July

30. 20 U.S.C. § 1681(a) (LexisNexis 2021) (emphasis added).

31. See *Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, JUSTIA (last visited Sept. 23, 2021), <https://www.justia.com/education/docs/title-ix-legal-manual/overview-of-title-ix/> [<https://perma.cc/ZHN8-2D8V>] (describing Congress’s conscious effort to model Title IX on Title VI of Civil Rights Act of 1964).

32. See generally Ann K. Wooster, *Sex discrimination in Public Education Under Title IX — Supreme Court Cases*, 158 A.L.R. Fed. 563 (1999) (describing how Title IX was designed, and how school receiving federal funds remain in compliance).

33. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 333 (2012) (describing mechanisms through which Title IX has been enforced including its application to athletic programs).

34. See Ruslynn Ali, Asst. Secretary for Civil Rts., U.S. Dep’t of Educ., *Dear Colleague Letter* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> [<https://perma.cc/YU87-JLFQ>] [hereinafter *2010 Dear Colleague Letter*] (providing Obama administration policy toward LGBT students).

35. See 34 C.F.R. § 106.33 (2022) (providing in part “a recipient [of federal funds] 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”); see also Letter from James A. Ferg-Cadima, Acting Deputy to Asst. Secretary for Policy, Office for Civil Rights, to Emily Prince, Esq. (Jan. 7, 2015) available at: http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [<https://perma.cc/S2XG-UNUZ>] (“When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”); *G.G. ex rel. Grimm v. Gloucester Cty. Sch.*

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of that same year, the Department of Justice and OCR approved the nondiscrimination policy of Arcadia Unified School District, created in response to a Title IX complaint filed by a transgender student in that district.³⁶ Finally, on May 13, 2016, OCR released an additional “Dear Colleague” letter stating that departments should treat a student’s gender identity the same as a student’s sex for purposes of Title IX and its implementing regulations.³⁷ Regarding athletics, this letter stated that while a school may operate sex-segregated athletic teams when such selection is based on competitive skill or when the activity involved is a contact sport, schools may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”³⁸

On February 22, 2017, following the election of President Donald J. Trump, the U.S. Departments of Education and Justice issued a joint letter withdrawing the guidance of the 2016 “Dear Colleague” letter.³⁹ In an internal memo, the OCR was advised to rely

Bd., 822 F.3d 709, 715 (4th Cir. 2016) [hereinafter *Grimm I*] (finding U.S. Department of Education entitled to Auer deference in interpreting 34 C.F.R. § 106.33).

36. See KAREN J. LANGSLEY & SHELLY L. SKEEN, *TRANSGENDER ISSUES* (TX. C.L.E. ADVANCED FAM. L. 12.2, 2016) (providing background on nondiscrimination policy for transgender students adopted by Arcadia Unified School District); see also David Vannasdall, *Arcadia Unified Sch. Dist., Transgender Students — Ensuring Equity and Nondiscrimination*, ARCADIA UNIFIED SCH. DIST. (Apr. 16, 2015), <http://www.nclrights.org/wp-content/uploads/2015/07/Transgender-Policy-Bulletin-Approved-w-corrections-April-2015.pdf> [<https://perma.cc/HW8T-FU6X>] (providing Arcadia Unified School District policy regarding issues relating to transgender students).

37. See *U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students*, U.S. DEP’T OF JUST. (May 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights> [<https://perma.cc/TUR3-3F8C>] (“The guidance makes clear that both federal agencies treat a student’s gender identity as the student’s sex for purposes of enforcing Title IX.”); see also Catherine E. Lhamon, Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Asst. Attorney General for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/3N2A-VF2J>] [hereinafter *2016 Dear Colleague Letter*] (“This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”).

38. See *id.* at 3 (finding under Title IX, schools must treat students consistent with gender identity despite contrary education records, identification documents).

39. See Sandra Battle, Acting Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & T.E. Wheeler, II, Acting Asst. Atty. Gen. for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter* (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/7CKJ-T8SP>] [hereinafter *2017 Dear Colleague Letter*] (noting withdrawal of guidance documents

solely on Title IX and its implementing regulations as interpreted by federal courts and remaining OCR guidance documents in evaluating complaints of sex discrimination against individuals.⁴⁰ Department enforcement of Title IX protections for transgender athletes once again shifted following the election of President Joseph Biden.⁴¹ The Civil Rights Division of the Department of Justice issued a memo to federal agencies reestablishing protections for gay and transgender students under Title IX.⁴² This memo returned to the Department of Education policies followed under President Obama, bolstered by legal arguments following *Bostock*.⁴³

B. Recent Federal Court Cases and Regulatory Developments:

Circuit courts currently appear on the brink of a split over the rights of transgender students, and the Supreme Court has thus far refused to take up the issue.⁴⁴ Understandably, the unresolved le-

did not leave students without protections from discrimination, bullying or harassment as OCR would continue to hear all claims of discrimination).

40. See Candice Jackson, Acting Asst. Secretary for Civil Rights, Office for Civil Rights, Dep't of Educ., *OCR Instruction to the Field re Complaints Involving Transgender Students* (June 6, 2017), <https://s3.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf> [<https://perma.cc/SJN6-H5SH>] [hereinafter *OCR Instruction*] (reiterating withdrawal from Obama Administration guidance documents does not leave students without protections, OCR should rely on Title IX, Department regulations, in evaluating complaints of sex discrimination against individuals whether or not individual is transgender).

41. See Avery, *supra* note 12 (describing new approach taken by Biden Administration in enforcing Title IX).

42. See *Marking the One-Year Anniversary of Bostock With Pride*, OFF. FOR CIV. RTS. (June 16, 2021), <https://www2.ed.gov/about/offices/list/ocr/blog/20210616.html> [<https://perma.cc/AQ94-8J3F>] (“In *Bostock*, the Supreme Court recognized that ‘it is impossible to discriminate against a person’ because of their sexual orientation or gender identity ‘without discriminating against that individual based on sex.’ That reasoning should—and does—apply regardless of whether the individual is an adult in a workplace or a student in school . . . [O]CR affirms our commitment to guaranteeing all students—including those who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+)—an educational environment free from discrimination.”).

43. See *id.* (issuing Notice of Interpretation enforcing Title IX’s prohibition on sex discrimination to include discrimination based on gender identity consistent with reasoning in *Bostock*).

44. See *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021) (mem.) (denying writ of certiorari, leaving in place Fourth Circuit ruling that Gloucester County School Board acted unlawfully by preventing transgender boy from using boy’s bathroom); see also *Parents for Priv. v. Barr*, 141 S. Ct. 894, 894 (mem.) (2020) (denying writ of certiorari, leaving in place Ninth Circuit ruling that policy allowing transgender students to use bathrooms, locker rooms, showers matching gender identity rather than biological sex assigned at birth does not violate Fourteenth Amendment right to privacy or create hostile environment or discrimination claim actionable via Title IX); *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636, (mem.) (2019) (denying writ of certiorari, leaving in place Third Circuit decision to uphold Pennsylvania school district policy allowing transgender stu-

gal questions surrounding transgender students' rights have resulted in myriad school policies and state laws throughout the country.⁴⁵ Idaho was the first state to pass a law preventing transgender women from participating in women's sports.⁴⁶ The law never went into effect as there was an injunction followed by a Ninth Circuit appeal.⁴⁷ In *Grimm v. Gloucester County School Board*,⁴⁸ the U.S. Court of Appeals for the Fourth Circuit became the first federal court to rule in favor of the right of transgender students to use bathrooms corresponding with their gender identity.⁴⁹ In this case, a transgender student claimed that the use of "alternative pri-

dents to use bathrooms that conform to gender identity); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (holding transgender students protected from discrimination under Title IX, Equal Protection Clause of Fourteenth Amendment). *But see Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369, 1372 (11th Cir. 2021) (ordering panel's previous opinion that district's policy barring transgender student from using boys' restroom violated Fourteenth Amendment guarantee of equal protection will be reheard en banc, then vacating panel's opinion); *see also* Jo Yurcaba, *Supreme Court Could Hear Transgender Student Bathroom Case, Experts Say*, NBC NEWS (Aug. 27, 2021), <https://www.nbcnews.com/nbc-out/out-news/supreme-court-hear-transgender-student-bathroom-case-experts-say-rcna1797> [<https://perma.cc/HGH5-LK9P>] (citing experts stating Eleventh Circuit likely to find in favor of school district creating split in circuit courts over transgender bathroom access); *see also* Soule by Stanescu v. Connecticut Ass'n of Sch., Inc., No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (rejecting potential challenge to Connecticut trans-inclusive laws).

45. *See, e.g.,* Sonali Kohli, *How California Protects Transgender Students*, L.A. TIMES (May 17, 2016), <https://www.latimes.com/local/education/la-me-edu-transgender-student-rights-20160516-snap-htmstory.html> [<https://perma.cc/D7WD-LGA6>] (describing various pro-transgender student policies throughout State of California); *see also, e.g.,* 2012–13 Case Studies, ALA. HIGH SCH. ATHLETIC ASS'N, http://media.wix.com/ugd/2bc3fc_87536da66cad4d6195ae056a573e67da.pdf [<https://perma.cc/U8S3-J853>] (last visited Sept. 6, 2021) ("[P]articipation in athletics should be determined by the gender indicated on the student-athlete's certified certificate of birth."). *See generally* *K-12 Policies*, supra note 14 (providing overview of disparate state, school district policies toward transgender student athletes).

46. *See* Talya Minsberg, *Boys Are Boys and Girls Are Girls: Idaho Is First State to Bar Some Transgender Athletes*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html> [<https://perma.cc/V3WZ-EJFA>] (describing Idaho as first state in United States to bar transgender girls from participating in girls' or women's sports, first to legalize practice of sex testing in order to compete).

47. *See All Women and Girls Can Now Try Out For Fall Teams*, AM. C. L. UNION (Aug. 17, 2020), <https://www.aclu.org/press-releases/judge-blocks-first-law-targeting-transgender-athletes-case-continues> [<https://perma.cc/4R3F-SKG5>] (describing ACLU's successful efforts to block Idaho's law targeting transgender student athletes).

48. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) [hereinafter *Grimm II*].

49. *See id.* (holding Board's application of its restroom policy against Grimm violated Title IX).

vate” restroom facilities rather than communal restrooms violated Title IX and equal protection guaranteed under the Fourteenth Amendment.⁵⁰ The case was initially granted certiorari by the U.S. Supreme Court but was later remanded back to the Fourth Circuit when federal guidelines were withdrawn by the Trump administration in 2017.⁵¹

The Third and Ninth Circuits have rejected invasion of privacy claims filed on behalf of non-transgender students that intended to challenge policies that explicitly permit transgender students to use bathrooms that correspond with their gender identity.⁵² In *Doe v. Boyertown Area School District*,⁵³ the Third Circuit affirmed the district court’s decision to deny a preliminary injunction against the school district’s policy allowing transgender students to use locker rooms that conform to their gender identity.⁵⁴ The court based its decision on the state’s “compelling interest in not discriminating against transgender students.”⁵⁵ Likewise, students in this case brought a Title IX claim, which the Third Circuit rejected because the school district’s policy allowed all students to use bathrooms and locker rooms that aligned with their gender identity, and thus “[did] not discriminate based on sex.”⁵⁶ Therefore the court found

50. *See id.* at 709 (holding Board’s policy does not satisfy heightened scrutiny because it is not substantially related to its important interest in protecting students’ privacy).

51. *See Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017) (mem.) (holding Fourth Circuit’s “[j]udgment [is] vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of guidance document issued by Department of Education and Department of Justice on February 22, 2017”).

52. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020) (“Plaintiffs fail to show that the contours of the privacy right protected by the Fourteenth Amendment are so broad as to protect against the District’s implementation of the Student Safety Plan. This conclusion is supported by the fact that the Student Safety Plan provides alternative options and privacy protections to those who do not want to share facilities with a transgender student, even though those alternative options admittedly appear inferior and less convenient.”); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (noting “a person has a constitutionally protected privacy interest in his or her partially clothed body,” but rejecting appellant argument privacy rights violated by school district policy allowing transgender students access to “bathrooms and locker rooms that aligned with their gender identities”).

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

54. *See id.* at 538 (denying preliminary injunction against Pennsylvania school districts policy allowing transgender athletes to play on teams in conformity with gender identity).

55. *See id.* at 526 (“The District Court correctly concluded that the appellants’ constitutional right to privacy claim was unlikely to succeed on the merits.”).

56. *See id.* at 533 (“The District Court correctly concluded that the appellants’ Title IX claim was unlikely to succeed on the merits.”).

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that school policy allowing transgender students to use facilities that conform with their gender identity did not violate Title IX.⁵⁷ In *Soule v. Connecticut Ass'n of Schools*,⁵⁸ non-transgender student athletes challenged a Connecticut state policy allowing transgender students to compete in girls' high school sports.⁵⁹ This case was ultimately dismissed for mootness since the plaintiffs had graduated and were no longer eligible to compete, but the case is currently on appeal before the Second Circuit.⁶⁰ Finally, in *Adams v. School Board of St. Johns County*⁶¹ a three-judge panel for the Eleventh Circuit held that barring a transgender student from using the restroom that conforms with their gender identity violates the Constitution's guarantee of equal protection.⁶² The Eleventh Circuit ultimately vacated this ruling and will now review the case en banc.⁶³ Some have speculated that the Eleventh Circuit will likely split with other circuits who have unanimously upheld trans-inclusive school policies against challenge and protected transgender student's access to facilities that conform with their gender identity.⁶⁴

While circuit courts have been addressing the applicability of Title IX and gender identity at school, on June 15, 2020, the U.S. Supreme Court issued its watershed *Bostock* decision holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on sexual orientation or gender identity.⁶⁵ In

57. See *id.* at 535 (holding school district's policy allowing transgender students to compete on teams conforming to gender identity does not discriminate based on sex or violate Title IX).

58. *Soule v. Conn. Ass'n of Schools, Inc.*, No. 3:20-cv-00201(RNC), 2021 WL 1617206 (D Conn., Apr. 25, 2021).

59. See *id.* at *1 ("This case involves a challenge to the transgender participation policy of the Connecticut Interscholastic Athletic Conference ("CIAC"), the governing body for interscholastic athletics in Connecticut, which permits high school students to participate in sex-segregated sports consistent with their gender identity.").

60. See *id.* at *4 ("Plaintiffs correctly argue that the issue is one of mootness rather than standing."); see also *Soule by Stanescu v. Conn. Ass'n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (providing appellants opening brief requesting reversal of district court's order, accusing district judge of bias).

61. *Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369 (11th Cir. 2021) (mem.).

62. See *Soule by Stanescu*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *15 (stating arbitrariness of school's policy does not pass heightened scrutiny as it targets transgender students for restrictions but not other students, including district failure to demonstrate substantial, accurate relationship between sex classification with policy's stated purpose).

63. See *Adams*, 9 F.4th at 1372 (ordering case be reheard en banc).

64. See Yurcaba, *supra* note 44 (describing potential student rights under Title IX on treatment of transgender student rights under Title IX).

65. See Lawrence Hurley, *In Landmark Ruling, Supreme Court Bars Discrimination Against LGBT Workers*, REUTERS (June 15, 2020), <https://www.reuters.com/article/>

Bostock, the U.S. Supreme Court heard three consolidated cases involving LGBTQ employees who had been dismissed because of their LGBTQ status: (1) *Bostock v. Clayton County II*,⁶⁶ (2) *Zarda v. Altitude Express, Inc.*,⁶⁷ and (3) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*⁶⁸ The same week this case was decided, President Biden issued an Executive Order asserting that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”⁶⁹

C. Bostock’s Impact on the LGBTQ Community Generally

The majority in *Bostock* referred to Title VII’s protections against discrimination on the basis of sex as “simple but momentous.”⁷⁰ *Bostock* settled the major legal questions regarding LGBTQ employees and Title VII protections, but questions regarding exactly how far the *Bostock* decision extends still remain to be determined.⁷¹ In addition to Title VII and Title IX, sex discrimination is prohibited by several other federal statutes including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act.⁷² Questions remain about *Bostock*’s implication for these statutes.⁷³ Regardless, the Supreme Court’s decision in *Bostock* will certainly have a wide-ranging impact on the LGBTQ community generally.⁷⁴ The

us-usa-court-lgbt/in-landmark-ruling-supreme-court-bars-discrimination-against-lgbt-workers-idUSKBN23M20N [https://perma.cc/KK55-BCGF] (summarizing *Bostock* decision including implications for transgender people).

66. No. 1:16-CV-001460-ODE-WEJ, 2016 WL 9753356 (N.D. Ga. Nov. 3, 2016).

67. 883 F.3d 100 (2d Cir. 2018).

68. Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018); see also *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1731 (2020) (discussing consolidated cases as part of *Bostock* decision).

69. Exec. Order No. 13,988, 86 C.F.R. § 7023 (Jan. 20, 2021) (“Under *Bostock*’s reasoning, laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation so long as the laws do not contain sufficient indications to the contrary.”).

70. See *Bostock*, 140 S. Ct. at 1741 (“The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

71. See *id.* at 1753 (“Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases.”).

72. See 15 U.S.C. § 1691(a) (2012) (prohibiting creditors from discriminating against applicant on the basis of sex); see also 42 U.S.C. § 3604 (2012) (prohibiting sex discrimination in “the sale or rental of housing”).

73. For further discussion of *Bostock*’s impact on other civil rights laws, see *infra* note 74 and accompanying text.

74. See generally Amanda Hainsworth, *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731 (2020), Bos. B.J. 3, 22, 23 (2020) (describing anticipated

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most immediate impact will likely be within states without preexisting employment discrimination protections for members of the LGBTQ community.⁷⁵ The decision appears to provide an immediate remedy for discrimination within the realm of employment.⁷⁶

Justice Alito in his *Bostock* dissent stated that the problem with the Court's majority decision is most acute in its implication for schools and religious institutions.⁷⁷ Moreover, Justice Alito argued that *Bostock* could infringe on free speech rights if employers refused to use transgender employees' chosen names and pronouns.⁷⁸ In his dissent, Justice Kavanaugh states that he disagrees with the majority regarding the original meaning of the statutory language of Title VII, but recognized the important victory the majority's decision represents for "gay and lesbian Americans."⁷⁹ The Majority asserted that, while those who originally adopted the Civil Rights Act might not have anticipated their work leading to this particular result, "the limits of the drafters' imagination supply no reason to ignore the law's demands."⁸⁰

litigation related to interplay between federal civil rights laws, employers religious beliefs, additional protections for LGBTQ individuals beyond state nondiscrimination laws, federal equal protection claims involving discrimination against LGBTQ individuals).

75. See generally *id.* (describing *Bostock's* effects on federal law).

76. For further discussion of *Bostock's* impact in the employment realm, see *infra* note 83 and accompanying text.

77. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1781 (2020) (Alito, J., dissenting) ("This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty 'communicate a particular way of life to its students,' and a 'violation by the faculty of those precepts' may undermine the school's 'moral teaching.' Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment." (footnote omitted)).

78. See *id.* at 1782 ("The position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety.").

79. See *id.* at 1837 ("Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans.").

80. See *id.* at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

D. Title IX's Purpose and Theories on Application to Transgender Individuals

The original intent of Title IX was to “remedy to some extent sex discrimination in education.”⁸¹ The Supreme Court has held that Title IX broadly prohibits a funding recipient from subjecting any person to disparate treatment “on the basis of sex” including sexual harassment or retaliating against one who complains about sexual discrimination.⁸² During the drafting of Title IX, some feared that the Act would mandate gender-mixed sports teams or would otherwise negatively impact men’s access to collegiate sports.⁸³ In response, Senator Bayh stated that the intent of the law was to “provide equal access for women and men students to the educational process and extracurricular activities in school” and not to “desegregate” the men’s locker room.⁸⁴ Moreover, subsequent implementing regulations allow schools to “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.”⁸⁵ While no language within the law provides a direct connection between Title IX and athletics, the legislative history and early case law demonstrate that athletics is a vital and

81. Trustees of Univ. of Del. V. Gebelein, 420 A.2d 1191, 1196 (Del. Ch. 1980).

82. See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005) (“We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.”).

83. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 Marq. Sports L. Rev. 325, 333 (2012) (describing fears of some during drafting of Title IX that it would mandate gender-mixed athletic teams); see also Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. OF GENDER L. & POL'Y 69, 72-73 (2020) (describing aftermath of bill's passage including efforts by those who feared Title IX would hinder men's revenue-producing sports such as football).

84. See 117 Cong. Rec. 30407 (Sep. 8, 1971) (statement of Sen. Birch Bayh) (“I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men’s locker room be desegregated.”); see also Lambelet Coleman, *supra* note 83, 77–78 no. 40 (describing Senator Bayh’s assurances Title IX would not require women play on football teams, elaborating on origins of “sports exception” of Title IX).

85. 34 C.F.R. § 106.41(b) (2020).

important part of the educational experience for high school and college students.⁸⁶

To establish a prima facie case of discrimination under Title IX, a student must allege that: (1) he or she was “subjected to discrimination in an educational program”; (2) “the program receives federal assistance”; and (3) the discrimination “was *on the basis of sex*.”⁸⁷ While Title IX’s implementing regulations bar discrimination on the basis of sex, they also permit schools to operate separate teams for members of each sex in certain circumstances.⁸⁸ Various federal courts have recognized that cases interpreting Title VII’s provisions are relevant to and can be useful in analysis of claims of Title IX discrimination.⁸⁹

In early employment discrimination decisions involving the “because of sex” provisions of Title VII, courts have held that Congress intended “sex” to mean biological sex as traditionally understood, denying Title VII protections for transgender individuals and individuals on the basis of their sexual orientation, and even denying Title VII protections for pregnant women.⁹⁰ Beginning in the

86. See Anderson, *supra* note 83 (explaining importance of athletics in Title IX legislative history); see also Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973) (“Discrimination in high school interscholastic athletics constitutes discrimination in education.”). See generally *History of Title IX*, WOMEN’S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/> [<https://perma.cc/G9U3-RWHZ>] (providing comprehensive overview of legislative history, including subsequent regulatory developments of Title IX).

87. See Bougher v. Univ. of Pitt., 713 F. Supp. 139, 144 (W.D. Pa. 1989) (establishing prima facie case of discrimination under Title IX).

88. 34 C.F.R. § 106.41(a) (1980) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.”); see also *id.* § 106.41(b) (implementing regulations also permit schools to “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”).

89. See, e.g., Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 283 (2013) (“Title VII, which prohibits sex discrimination in employment, has been applied regularly to claims of discrimination brought by transgender plaintiffs. Courts generally recognize that cases interpreting Title VII’s provisions are relevant to and can be imported into analysis of Title IX.”); see also Miles v. N.Y. Univ., 979 F. Supp. 248, 250 n. 4 (S.D.N.Y. 1997) (holding “it is now established that the Title IX term ‘on the basis of sex’ is interpreted in the same manner as similar language in Title VII”).

90. See, e.g., Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (holding Title VII, including its legislative history subsequent to passage, indicates Congress intended “sex” to be understood traditionally to “place women on an equal footing with men” while denying protection to “transsexual” woman alleging she was terminated on basis of sex); see also De Santis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (“Giving [Title VII] its plain meaning, this

1970s and 1980s, a series of Supreme Court cases expanded the meaning of “because of sex” to encompass protections against sexual harassment, discrimination against men, and discrimination based on women’s familial status.⁹¹ In 1984, the plaintiffs in *Ulane v. Eastern Airlines*⁹² again tried to expand Title VII’s protections against discrimination “because of sex” to transgender individuals, but the Seventh Circuit Court of Appeals rejected their argument, holding that the plaintiff’s transition did not change their biological sex and therefore, their employer did not discriminate “because of sex.”⁹³ Five years later, the Supreme Court did expand the meaning of “because of sex” in *Price Waterhouse v. Hopkins*⁹⁴ by holding that that Title VII prohibited discrimination against individuals based on “sex stereotyping” or non-conformance with perceived gender expectations.⁹⁵ Courts have since typically considered discrimination against transgender individuals under two legal theories: (1) sex or gender stereotyping via *Price Waterhouse* or (2) discrimination on the basis of gender identity constituting per se discrimination “on the basis of sex.”⁹⁶ Courts have therefore found

court concludes that Congress had only the traditional notions of ‘sex’ in mind.” (quoting *Holloway*, 566 F.2d at 662–63)); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (affirming dismissal of employee’s Title VII claim alleging he was fired because of sexual orientation); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding employer’s disability benefits plan that fails to cover pregnancy-related disabilities does not violate Title VII). See generally Erin Buzuvis, “*On the Basis of Sex*”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 Wis. J.L. GENDER & SOC’Y 219, 229 (2013) (providing early history of Title VII cases including Title VII’s influence on Title IX cases).

91. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”); see also *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp’t Opportunity Comm’n*, 462 U.S. 669, 685 (1983) (holding health benefits plan providing greater pregnancy-related coverage to female employees than spouses of male employees constitutes discrimination against male employees on basis of sex under Title VII); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (“Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school-age children.”).

92. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984).

93. See *id.* (finding *Ulane*’s transition did not change her biological sex, therefore airline did not fire her “because of sex”).

94. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

95. See *id.* at 231–32 (finding in favor of female employee who sued employer for discrimination on basis of sex under Title VII after coworkers said her chances of making partner would be greater if she acted more feminine).

96. See Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 Penn St. L. Rev. 187, 193 (2016) (“Under Title VII, most courts have found that transgender peo-

that discrimination “because of sex” potentially includes not just discrimination based on one’s “biological” sex, but also discrimination on the basis of how one presents one’s gender relative to “biological” sex and the stereotypes associated with that sex.⁹⁷ Prior to *Bostock*, the Sixth and Eleventh Circuits had held that discrimination based on sex stereotypes and *per se* discrimination based on expressed gender identity were actionable under Title VII.⁹⁸ The Equal Employment Opportunity Commission (“EEOC”) similarly found prior to *Bostock* in 2012 that sex, as used in Title VII, encompassed both sex and gender.⁹⁹

ple are protected only on the basis of sex stereotyping, not because they are a protected class *per se*.”).

97. See Buzuvis, *supra* note 90 (describing evolution of interpretations of Title VII’s “because of sex” provision throughout lower courts, including Title VII’s influence on Title IX).

98. See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity”). *But see* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007))); *see also* Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007) (explaining *Smith v. City of Salem, Ohio* is first time federal court extended Price Waterhouse sex-stereotyping theory to transgender individuals, explaining Eleventh Circuit in *Brumby* found discrimination based on expressed gender identity to be *per se* discrimination under Title VII).

99. See *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) (“[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”). The court explained that a transgender person who experiences discrimination based on their gender identity may establish a *prima facie* case of sex discrimination through a number of different formulas. *See id.* at *15 (explaining different formulas by which transgender person may prove *prima facie* case of sex discrimination). A complainant may, for example establish a case of sex discrimination under a theory of gender stereotyping wherein, for example, an employer believing that biological men must present as men and wear male clothing fires an employee for being insufficiently masculine. *See id.* (providing *prima facie* case of sex discrimination established by sex stereotyping). Alternatively, a complainant could prove they were discriminated against if an employer was willing to hire them when they thought they were one gender but is unwilling to hire them when they find out they are another gender. *See id.* at *32. (providing *prima facie* case of sex discrimination established by *per se* discrimination). The commissioner compares gender to religion in this respect; for purposes of establishing a *prima facie* case that Title VII has been violated, employees must demonstrate only that an employer impermissibly used religion (or gender) in making employment decisions. *See id.* at *31–33 (comparing gender-based and religion-based discrimination in hiring).

1. *Sex Stereotyping and Title IX*

The *Price Waterhouse* gender stereotyping interpretation has proven influential in Title IX cases.¹⁰⁰ Cases involving plaintiffs targeted for their perceived gender presentation and sexual orientation have applied Title VII sex-stereotype precedents in analyzing Title IX claims.¹⁰¹ A “Dear Colleague” letter released in 2010 stated that Title IX does not expressly cover discrimination on the basis of sexual orientation or gender identity, but it does protect students who experience sex- or gender-based harassment.¹⁰² Before and after *Bostock*, Circuit Courts have applied Title VII reasoning to Title IX cases involving gender identity discrimination in schools.¹⁰³ Some courts have held that protections against discrimination based on gender stereotypes may provide the most straight-forward route to protecting transgender students facing similar harassment in the future.¹⁰⁴ The Eleventh Circuit suggested in *Glenn v. Brumby*¹⁰⁵ that considerations of gender stereotypes will inevitably

100. For further discussion of sex stereotyping as applied in the context of Title IX, see *supra* note 103 and accompanying text.

101. See *e.g.*, *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (“Although no court has addressed this issue in the context of a Title IX claim, several courts have considered whether same-sex harassment targeting the claimant’s failure to meet expected gender stereotypes is actionable under Title VII. The Court looks to these precedents in analyzing plaintiff’s Title IX claim, noting that Title VII similarly requires that the discrimination resulting in the plaintiff’s claims be based on his or her sex . . . The Court for these reasons concludes that by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX.” (citation omitted)); see also *Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997) (holding harassment because Plaintiff did not conform to stereotypical expectations of masculinity was actionable discrimination “because of sex”).

102. See *2010 Dear Colleague Letter*, *supra* note 34 (“Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”).

103. See *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Under settled law in this Circuit, gender nonconformity, as defined in *Smith v. City of Salem*, is an individual’s ‘fail[ure] to act and/or identify with his or her gender. . . . Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.’” (quoting 378 F.3d 566, 575 (6th Cir. 2004))); see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (finding policy requiring individual to use bathroom that does not conform with his or her gender identity punishes that individual for their gender non-conformance, so it violates Title IX); *Grimm II*, 972 F. Supp. 3d 586, 616 (4th Cir. 2020) (finding after *Bostock* its Title VII interpretation guides court’s Title IX evaluation, so sex stereotyping constitutes sex-based discrimination under Equal Protection clause).

104. For further discussion of sex-stereotyping and its application to Title IX, see *supra* note 103 and accompanying text.

105. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)

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be part of what drives discrimination against a transgender individual.¹⁰⁶ Moreover, some commentators have argued that sex stereotyping may allow plaintiffs to take advantage of widely recognized legal doctrine throughout various circuit courts, but it is potentially problematic in that it forces transgender individuals to focus on their gender nonconformity.¹⁰⁷ “To recover for discrimination claims based on supposed gender-nonconforming conduct, as set forth in *Price Waterhouse*, transsexual plaintiffs must identify themselves as their their biological sex . . .” rather than the gender to which they currently identify.¹⁰⁸ Moreover, this approach counterproductively seeks to reject discrimination on the basis of harmful gender stereotypes by highlighting those same gender stereotypes.¹⁰⁹ Inherent problems in the sex stereotyping approach for protecting transgender students from discrimination and harassment have led some to favor an approach which equates discrimination on the basis of gender identity with per se discrimination on the basis of sex.¹¹⁰

2. *Gender Identity Equates to Basis of Sex*

In *Macy v. Holder*,¹¹¹ the EEOC ruled that in the employment context, “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex’ . . .” under Title VII.¹¹² The EEOC went on

106. See *id.* at 1317 (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. . . . We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”).

107. See Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 Harv. J. L. & Gender 423, 437 (2012) (arguing sex stereotyping reinforces negative stereotypes forcing transgender plaintiffs to identify with biological sex).

108. See Jackie Barber, *Glenn v. Brumby: Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit*, 21 Tul. J.L. & Sexuality 169, 176 (2012) (highlighting paradoxical nature of applying gender-stereotyping approach to proving discrimination on basis of sex).

109. See Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 Wis. J.L. Gender & Soc’y 245, 257 (2013) (discussing how sex-stereotyping approach may reinforce harmful stereotypes).

110. See *id.* (highlighting counterproductive nature of sex-stereotyping approach).

111. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

112. *Id.* at *6, *11 (holding discrimination against employee for transgender status is per se discrimination on basis of sex).

to state that the term “sex” as contemplated in Title VII “encompasses both sex – that is, the biological differences between men and women – and gender.”¹¹³ Title VII’s treatment of gender and sex as synonymous is logical because if the only proscribed discrimination actionable via Title VII was discrimination on the basis of biological sex, then the only recognized, prohibited treatment would involve an employer’s preference for one sex over the other.¹¹⁴ The statute’s protections against sexual harassment, for example, clearly extend beyond what is encompassed merely by a person’s biological sex and into the realm of cultural and social conceptions of masculinity and femininity.¹¹⁵ Finally, prior to *Bostock*, the Eleventh Circuit in *Glenn v. Brumby* set out a case for why discriminating against a person because of their status as a transgender person is per se discrimination on the basis of sex.¹¹⁶ In that case, the court held that “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”¹¹⁷ Therefore, any discrimination against a transgender person because of their gender-nonconformity is tautologically sex discrimination whether it is on the basis of sex or gender.¹¹⁸

E. Recent State Legislation Barring Transgender Athletes

As discussed above, Idaho became the first state to ban trans women and girls from women’s sports leagues in schools and col-

113. *See id.* at *5 (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (holding under Title VII sex discrimination includes discrimination on basis of gender as well); *see also* *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”).

114. For further discussion of how Title VII has been extended beyond a narrow reading of the text limited to overt sex discrimination in hiring, *see supra* note 91 and accompanying text.

115. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding discrimination for failing to conform to gender-based expectations such as wearing make-up, jewelry violates Title VII).

116. *See* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007))).

117. *See id.* (finding discrimination against employee due to transgender status is per se discrimination on basis of sex because transgender status implies disconnect between one’s biological sex, gender presentation, including stereotypes of how one presents their gender given their biological sex).

118. *See* *Lee*, *supra* note 107, at 437 (providing additional information on per se approach taken by minority of courts, most notably by Eleventh Circuit in *Glenn v. Brumby*).

leges in March of 2020.¹¹⁹ H.B. 500, or the “Fairness in Women’s Sports Act,” cites “inherent differences” between men and women and promoting sex equality as part of its reasoning for barring students of the male sex from athletic teams or sports designated for females, women, or girls.¹²⁰ The legislation further states that, if disputed, a student may establish sex by presenting a signed physician’s statement that shall indicate a student’s sex based solely on their internal and external reproductive anatomy, the student’s normal endogenously produced levels of testosterone, and an analysis of the student’s genetic makeup.¹²¹ Mississippi followed suit by passing Senate Bill 2536.¹²² The Mississippi Fairness Act shares identical language to the law passed in Idaho.¹²³ Tennessee and Arkansas legislatures passed laws that require student athletes to participate in sports teams corresponding with the sex listed on a student’s birth certificate.¹²⁴ The laws in Mississippi and Arkansas apply specifically to “transgender girls, while Tennessee’s bill applies to all transgender youth.”¹²⁵ In 2021, seventeen states passed similar legislation, joined by South Dakota in early 2022.¹²⁶ At the

119. See Minsburg, *supra* note 46 (describing legislative history surrounding passage of Idaho law banning trans-women, girls from playing on teams which conform with gender identity).

120. See *Hecox v. Little*, AM. C. L. UNION (Jan. 14, 2022), <https://www.aclu.org/cases/hecox-v-little> [<https://perma.cc/M85N-NXUW>] (describing transgender athletes challenge to Idaho law).

121. See IDAHO CODE ANN. § 33-6203(3) (West 2021) (describing methods for determining student athlete’s gender).

122. See *Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/2CGF-MBW4>] (providing official text of bill).

123. See *id.* § 3(2) (“Athletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’ shall not be open to students of the male sex.”).

124. See Joe Yurcaba, *Arkansas Passes Bill to Ban Gender-Affirming Care for Trans Youth*, NBC NEWS (Mar. 29, 2021), <https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412> [<https://perma.cc/AN3D-WE4V>] (“The bill is one of two types of legislation being considered in more than two dozen states: measures that ban or restrict access to gender-affirming care for trans minors, and those that ban trans young people from competing in school sports teams of their gender identity.”).

125. See Autumn Rivera, *A Look at Shifting Trends in Transgender Athlete Policies*, NAT’L CONF. OF ST. LEGISLATURES (May 11, 2021), <https://www.ncsl.org/research/education/a-look-at-shifting-trends-in-transgender-athlete-policies-magazine2021.aspx> [<https://perma.cc/6ZU2-EGK5>] (explaining wave of states implementing bans on transgender athletes after Idaho became first state to pass such legislation preventing transgender women, girls from participating in high school or college women’s sports).

126. See Katie Barnes, *Young Transgender Athletes Caught in Middle of States’ Debates*, ESPN (Sept. 1, 2021), https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates [<https://perma.cc/PA6R-YPRG>] (providing review of state level legislation restricting transgender athletes’ participation and high school association policies); see also Kiara Alfonseca, *South*

federal level, The Protect Women’s Sports Act, H.R. 8932 (116), was introduced by former Rep. Tulsi Gabbard (D-Hawaii) and Rep. Markwayne Mullin (R-Okla.) and would prevent students who are assigned male at birth from participating on girls’ sports teams.¹²⁷ Schools that don’t comply would be ineligible for federal funding.¹²⁸

Athletic eligibility for transgender youth is typically determined not by the state legislature but by states’ high school associations.¹²⁹ In Louisiana, a student-athlete must compete on teams consistent with the gender on their birth certificate unless they have undergone sex reassignment surgery.¹³⁰ A “hardship committee” then considers cases of those who have undergone sex reassignment surgery, taking into account, among other considerations, whether the surgical anatomical changes have been completed.¹³¹ While some state laws restrict transgender athletes’ participation,

Dakota Signs 1st Anti-Transgender Sports Law of 2022, ABC NEWS (Feb. 4, 2022) (providing background on state laws restricting transgender women, girls from playing on sports teams conforming with gender identity).

127. See Madeleine Carlisle, *Tulsi Gabbard Introduces Bill That Would Ban Trans Women and Girls from Female Sports*, TIME (Dec. 11, 2021), <https://time.com/5920758/tulsi-gabbard-bill-transgender-women-sports/> [<https://perma.cc/9HAV-X87B>] (providing background on Protect Women’s Sports Act including its legislative history).

128. See H.R. 8932, 116th Cong. (2020) (explaining purpose of bill is “to provide that for purposes of determining compliance with title IX of the Education Amendments of 1972 in athletics, sex shall be determined on the basis of biological sex as determined at birth by a physician”).

129. For further discussion of individual states’ athletic eligibility criteria, see *supra* note 112 and accompanying text.

130. See LA. HIGH SCH. ATHLETIC ASS’N, POSITION STATEMENT, 164 (n.d.), available at: https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_c4403a24e71d4732b89d7162b6e017c7.pdf [<https://perma.cc/U6VD-GCMS>] (providing LHSAA adopts position on Gender Identity Participation as guideline to help direct member schools, including stating student-athletes should compete in gender on birth certificate unless they have undergone sex reassignment).

131. See *id.* (“A student-athlete who has undergone sex reassignment must go through the hardship appeal process to become eligible for interscholastic competition. The Hardship Committee shall consider all of the facts of the situation and shall rule the student-athlete eligible to compete in the reassigned gender when:

1. The student-athlete has undergone sex reassignment before puberty, OR
2. The student-athlete has undergone sex reassignment after puberty under all of the following conditions: a. Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy. b. All legal recognition of the sex reassignment has been conferred with all the proper governmental agencies (Driver’s license, voter registration, etc.) c. Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for sufficient length of time to minimize gender-related advantages in sports competition. d. Athletic eligibility in the reassigned gender can begin no sooner than two years after all surgical and anatomical changes have been completed.”).

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others, as in Connecticut, specifically allow transgender students to compete in accordance with their gender identity without requiring gender affirming surgical interventions prior to participating.¹³²

III. ASSESSING THE LIKELIHOOD THAT BANS WILL SUCCEED POST-BOSTOCK

The Supreme Court's *Bostock* decision was widely celebrated by civil rights activists as an expansion of workplace and hiring protections for vulnerable members of the LGBTQ community.¹³³ The president of the Human Rights Campaign, Alphonso David, referred to it as a "landmark moment in the on-going fight for LGBTQ equality."¹³⁴ Other commentators openly worried that the decision would undermine religious freedom, freedom of speech, parents' right to educate their children in line with their values, women's athletics generally, and privacy in bathrooms and locker rooms.¹³⁵ Justice Alito in his *Bostock* dissent raised pointed questions about the decision's applicability to the world of student ath-

132. See Kathleen Megan, *A Federal Agency Says Connecticut Must Keep Trans Students from Girls' Sports. The State Disagrees.*, CT MIRROR (June 15, 2020), <https://ctmirror.org/2020/06/15/a-federal-agency-says-connecticut-must-keep-trans-students-from-girls-sports-the-state-disagrees/> [<https://perma.cc/6HTE-FFCG>] (describing actions taken by Connecticut's Attorney General to halt efforts to deny or cut funding to state for enforcing policy allowing transgender girls, women to participate on athletic teams that conform to gender identity).

133. See, e.g., Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), <http://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html> [<https://perma.cc/FW4L-C4JE>] ("Supporters of L.G.B.T. rights were elated by the ruling, which they said was long overdue. 'This is a simple and profound victory for L.G.B.T. civil rights,' said Suzanne B. Goldberg, a law professor at Columbia.").

134. See Aryn Fields, *Human Rights Campaign President Celebrates One-Year Anniversary of Supreme Court Bostock Decision*, HUM. RTS. CAMPAIGN (June 15, 2021), <https://www.hrc.org/press-releases/human-rights-campaign-president-celebrates-one-year-anniversary-of-supreme-court-bostock-decision> [<https://perma.cc/3MSG-8JTH>] (citing *Bostock* ruling as victory for LGBTQ equality, calling for passage of further protections).

135. See, e.g., Melissa Moschella, *The Supreme Court Has Imperiled Parents' Right to Pass Their Values on to Children*, HERITAGE FOUND. (July 29, 2020), <https://www.heritage.org/gender/commentary/the-supreme-court-has-imperiled-parents-right-pass-their-values-children> [<https://perma.cc/NP76-C9WM>] ("Justice Neil Gorsuch's majority opinion explicitly declines to address questions about bathrooms, locker rooms, women's sports, and so on. But the logic of *Bostock* [sic] implies that it would violate Title IX, for example, to prevent a student with male anatomy who identifies as female from changing and showering in the girls' locker room or competing on the girls' track team. . . . [A] growing number of parents will have no choice but to send their children to an educational environment that may sow profound confusion about the basic truths of human identity.").

letics and whether the *Bostock* definition of “sex” extends to youth and college athletics.¹³⁶

A. Extending Title VII to Title IX

The Court’s decision in *Bostock* resolved the issue of whether Title VII protections against sex-based employment discrimination extend to LGBTQ+ employees.¹³⁷ The Supreme Court in *Bostock* announced that the plain language of the 1964 civil rights legislation prohibiting discrimination based on “race, color, religion, sex, or national origin” also prohibited discrimination based on homosexual or transgender status.¹³⁸ Perhaps most illuminating, the majority in *Bostock* concluded that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹³⁹

The statutory prohibitions against sex discrimination in Title VII and Title IX are similar, and the Supreme Court and other federal courts have often looked to interpretations of Title VII to inform Title IX analysis.¹⁴⁰ Following President Biden’s January 25, 2021 Executive Order, the Civil Rights Division of the U.S. Department of Justice issued an additional application of *Bostock* on March 26, 2021.¹⁴¹ In this application, the Department of Justice asserts

136. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1779 (2020) (“Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.”).

137. See *id.* at 1731, 1737 (holding Title VII protections extend to LGBTQ employees).

138. See *id.* (holding legislative intent may differ from express terms of statute but written word of statute is controlling); see also 42 U.S.C. § 2000e-2(a)(1)–(2) (2012) (“The Civil Rights Act of 1964, Title VII, reads in relevant part:

It shall be an unlawful employment practice for an employer—(1) 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

139. *Bostock*, 140 S. Ct. at 1741 (adopting per se discrimination approach).

140. See, e.g., *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (discussing application of Title VII precedent). But see *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643–45 (1999) (distinguishing between Title IX versus Title VII with respect to agency).

141. See Memorandum from Principal Deputy Assistant Atty. Gen. Pamela S. Karlan, Civil Rights Division to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), available at: <https://www.justice.gov/crt/page/file/1383026/download> [<https://perma.cc/7DCB-369C>] (asserting *Bostock* applies to Title IX).

that Title IX's "on the basis of sex" language has historically been seen as sufficiently similar to the "because of" sex language in Title VII such that the two are "interchangeable."¹⁴² Therefore, because Title VII's prohibition of discrimination "because of" sex includes discrimination because of sexual orientation and transgender status, the same reasoning supports the notion that Title IX's prohibition of discrimination "on the basis of" sex also prohibits discrimination against individuals based on sexual orientation or transgender status.¹⁴³ This is consistent with the Supreme Court's directive to "give Title IX . . . a sweep as broad as its language."¹⁴⁴ Similarly, the Department of Education released a Federal Register Notice of Interpretation on the enforcement of Title IX with respect to discrimination based on sexual orientation and gender identity in light of *Bostock* on June 16, 2021.¹⁴⁵ The Notice of Interpretation laid out several reasons why Title IX prohibits discrimination based on sexual orientation and gender identity.¹⁴⁶ First, it points to the textual similarity between Title VII and Title IX.¹⁴⁷ The Department of Education asserts that, as in *Bostock*, no ambiguity exists about how to apply the title's terms to the facts before it.¹⁴⁸ The Department also asserts that subsequent case law supports ap-

142. *See id.* (citing holdings from *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992), *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) as evidence of interchangeable nature of "because of sex" versus "on the basis of sex").

143. *See id.* (describing how Title IX protections apply to those whose status is of transgender student analogous to Title VII's application to transgender employee).

144. *See N. Haven Bd. Of Ed. V. Bell*, 456 U.S. 512, 521 (1982) (holding broad language of Title IX encompasses employment discrimination in federally financed education programs).

145. *See Making the Roster: Conflicting Title IX Interpretations Present Challenges for Transgendered Athlete Participation*, NAT'L L. REV. (Jun. 25, 2021), <https://www.natlawreview.com/article/making-roster-conflicting-title-ix-interpretations-present-challenges-transgendered> [<https://perma.cc/3DQP-LW2Z>] (explaining executive actions taken by President Biden on first day in office).

146. *See Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32640 (Jun. 22, 2021) (citing textual similarity between Title VII versus Title IX, including additional case law).

147. *See id.* at 32638 ("Both statutes prohibit sex discrimination, with Title IX using the phrase 'on the basis of sex' and Title VII using the phrase 'because of' sex. The Supreme Court has used these two phrases interchangeably.").

148. *See id.* at 32639 ("Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity.").

plying the reasoning of *Bostock* to Title IX.¹⁴⁹ Finally, the Department concludes that this interpretation is most consistent with Title IX's purpose of ensuring equal opportunity and protecting individuals from the harms of sex discrimination.¹⁵⁰

It seems clear – given the arguments put forward by the majority in *Bostock* and the Biden Administration's apparent willingness to extend this decision beyond merely the employment realm – that Title VII protections are likely to extend beyond employment law and impact interpretations of Title IX.¹⁵¹ In fact, the Eleventh Circuit already adopted *Bostock*'s reasoning in *Adams v. School Board of St. Johns County*,¹⁵² decided only a few weeks after the *Bostock* decision.¹⁵³ In that case, the court held that Title IX protects students from discrimination based on their transgender status and not simply against harassment or discrimination for gender nonconformity.¹⁵⁴ Moreover, the court held that the public school board's policy prohibiting a transgender boy from accessing the bathroom consistent with their gender identity "singled him out for different treatment because of his transgender status" and caused him harm in violation of Title IX.¹⁵⁵ *Bostock* represented more than a major legal victory for transgender employees; it sent a symbolic message of equal treatment and respect moving courts away from the out-

149. For further discussion of the subsequent case law applying *Bostock* in the Title IX setting, see *supra* note 148 and accompanying text.

150. For further discussion of the Department of Education's arguments for applying *Bostock* to Title IX, see *supra* note 146 and accompanying text.

151. See John Dayton & Micah Barry, *LGBTQ+ Employment Protections: The U.S. Supreme Court's Decision in Bostock v. Clayton County, Georgia and the Implications for Public Schools*, 35 WIS. J.L. GENDER & SOC'Y 115, 137 (2020) (noting "public educational institutions are commonly a key battleground in legal/culture wars battles, and the Court's decisions on these issues generally have significant implications for public educational institutions" (citations omitted)).

152. *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020). For further discussion of the pending Eleventh Circuit appeal, see *supra* note 90 and accompanying text.

153. See *Adams*, 968 F.3d at 1286 (holding school board's policy violates Title IX while applying lessons from *Bostock*). For further discussion of recent circuit court developments, see also *supra* note 98 and accompanying text.

154. See *Adams*, 968 F.3d at 1304 ("We conclude that this policy of exclusion constitutes discrimination. First, Title IX protects students from discrimination based on their transgender status. And second, the School District treated Mr. Adams differently because he was transgender, and this different treatment caused him harm. Finally, nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy.").

155. See *id.* at 1307 ("The record leaves no doubt that Mr. Adams suffered harm from this differential treatment. Mr. Adams introduced expert testimony that many transgender people experience the 'debilitating distress and anxiety' of gender dysphoria, which is alleviated by using restrooms consistent with their gender identity, among other measures.").

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dated model which bars discrimination on the basis of sex stereotypes and toward one which recognizes and protects transgender individuals by labeling discrimination against transgender individuals as per se discrimination on the basis of sex.¹⁵⁶ While a victory for transgender activists and allies, the decision has caused a great deal of anxiety among those who feel that allowing transgender women and girls to compete with cisgendered women undermines the initial purpose of Title IX.¹⁵⁷

B. How Courts and Legislatures Will Likely Respond to *Bostock*

With the possible exception of the Eleventh Circuit, circuit courts throughout the country have thus far consistently held that Title IX requires schools to treat transgender students consistent with their gender identity.¹⁵⁸ Already we are seeing the effects of *Bostock*, with its Title VII reasoning applied in a Title IX context, and likewise, claims that educational settings are somehow different than employment settings making Title VII arguments inapplicable in a Title IX context have also been widely rejected.¹⁵⁹

Drafters of legislation barring transgender athletes from participating on teams that conform to their gender identity often point to the Department of Education's implementing regulations, which emphasize the importance of sex-segregated teams and express fears that transgender athletes jeopardize the very existence of separate teams for men and women.¹⁶⁰ This focus misconstrues transgender students' argument.¹⁶¹ Transgender plaintiffs have not

156. See generally Devon Sherrell, "A Fresh Look": Title VII's New Promise for LGBT Discrimination Protection Post-Hively, 68 Emory L.J. 1101, 1129 (2019) (discussing strong social signal transmitted by national antidiscrimination legislation).

157. See Abigail Shrier, *supra* note 15 (arguing transgender athletes may undermine women and girls sports generally).

158. See *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 552 (M.D. Pa. 2019) (discussing recent circuit court decisions finding Title IX protections extend to transgender students). For further discussion of the current holdings of circuit courts on treatment of transgender students under Title IX, see *supra* note 44 and accompanying text.

159. See *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *opinion vacated and superseded*, *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021) ("*Bostock* has great import for Mr. Adams's Title IX claim. Although Title VII and Title IX are separate substantive provisions of the Civil Rights Act of 1964, both titles prohibit discrimination against individuals on the basis of sex.").

160. For further discussion of the potential negative consequences of actions allowing transgender women and girls to participate on teams that conform to their gender identity, see *supra* note 15 and accompanying text.

161. See Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls->

challenged sex-segregated teams, but rather have challenged laws that bar them from accessing teams that conform with their gender identity.¹⁶² Moreover, the implementing regulations do not override the statutory prohibition against discrimination on the basis of sex.¹⁶³ The regulation is a broad statement that sex-segregated sports teams are not unlawful, and not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-segregated teams.¹⁶⁴

Courts have variously held that a transgender student's "psychological and dignitary harm" caused by a school bathroom policy is legally cognizable under Title IX.¹⁶⁵ This harm provides transgender students who have been barred from participating on teams that conform to their gender identity with sufficient standing to bring a Title IX case for discrimination under the act.¹⁶⁶ In the Title IX context, discrimination "mean[s] treating that individual

sports-teams/ [https://perma.cc/592D-ZEHU] (finding there is no scientific or moral basis for treating transgender girls differently from cisgender girls—therefore policies excluding transgender girls from sports are harmful to girls generally).

162. See *Gloucester County School Board v. G.G - School Administrators from 31 States and the District of Columbia Brief for Amici Curiae*, AM. C.L. UNION <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-school-administrators-31-states-and-district> [https://perma.cc/ZT4S-R984] (last visited Sept. 23, 2021) ("Amici have also addressed the lurking hypothetical concern that permitting individuals to use facilities consistent with their gender identity will lead to the abolition of gender-specific facilities. Contrary to that 'slippery slope' argument, however, all amici continue to maintain gender-segregated facilities in their schools. In fact, respecting the gender identity of transgender students reinforces the concept of separate facilities for girls and boys; requiring a transgender girl to use the boys' restroom or a transgender boy to use the girls' restroom undermines the notion of gender-specific spaces.").

163. See e.g., *Grimm II*, 972 F.3d 586, 618 (4th Cir. 2020) *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (June 28, 2021) ("[T]he implementing regulation cannot override the statutory prohibition against discrimination on the basis of sex.").

164. See, e.g., *Grimm II*, 972 F.3d at 619 n.16 (stating 20 U.S.C. § 1686 is "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").

165. See *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1306–07, 1310–11 (11th Cir. 2020) (holding transgender student's "psychological and dignitary harm" caused by school bathroom policy was legally cognizable under Title IX).

166. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045–47 (7th Cir. 2017) (affirming finding of irreparable harm because excluding transgender student from boys' restroom "stigmatized" student, caused him "significant psychological distress"); see also *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (affirming finding of irreparable harm because excluding young transgender student "from the girls' restrooms has already had substantial and immediate adverse effects on [her] daily life[,] . . . health[,] and well-being").

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worse than others who are similarly situated.”¹⁶⁷ Laws which prevent transgender individuals from playing on teams that conform to their gender identity treat these athletes worse than students with whom they are similarly situated because they do not allow transgender athletes to play on teams that correspond with their gender identity, unlike their non-transgender peers.¹⁶⁸ Recent state level legislation that bars transgender athletes from playing on the teams consistent with their gender identity is therefore susceptible to challenge and will likely be held to violate Title IX.¹⁶⁹ While the Biden Administration has so far been vocal about its support of transgender students’ access to facilities that conform to their gender identity, it has been silent on enforcement actions it would take against noncompliant institutions.¹⁷⁰ As in all issues involving federal statutory interpretation, Congress may also resolve the ambiguity of the meaning of “sex” in Title IX by amending the statute or providing additional legal protections.¹⁷¹

C. Other Avenues to Challenge Anti-Trans State Legislation (Equal Protection)

While Title IX challenges are the most likely grounds upon which state legislation banning transgender women and girls from participating in high school and collegiate sports in accordance with their gender identity will be overturned, the Fourteenth Amendment offers a second avenue by which such laws mayulti-

167. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1740 (2020) (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)) (finding disparate treatment based on sex must also be intentional).

168. For further discussion of the benefits of “trans-inclusive” school policies, see *supra* note 162 and accompanying text.

169. See Katie Rogers, *Title IX Protections Extend to Transgender Students, Education Dept. Says*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/16/us/politics/title-ix-transgender-students.html> [<https://perma.cc/DLB4-2NCD>] (citing Education Department officials who claim Title IX protections extend to transgender students, so will likely impact recent state legislation to ban transgender students from playing sports that correspond with their gender identity).

170. See *id.* (providing opinions of some commentators explaining Biden Administration may be reluctant to enforce Executive Order); see also Nikki Hatza et al., *Biden Executive Order Expands Title IX Protections*, JDSUPRA (Mar. 10, 2021), <https://www.jdsupra.com/legalnews/biden-executive-order-expands-title-ix-3384512/> [<https://perma.cc/ASQ9-BVGX>] (providing summary of Biden Administration’s Executive Order on “[g]uaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity” including its implications for Title IX enforcement).

171. See, e.g., S. 2584, 115th Congress (2018) (providing text of proposed bill barring identity-based discriminations against students in program or activities receiving federal financial assistance).

mately be challenged.¹⁷² The Fourteenth Amendment guarantees “equal protection of the laws.”¹⁷³ Sex or gender “generally provide . . . no sensible ground for differential treatment.”¹⁷⁴ Therefore, the Equal Protection Clause allows only “exceedingly persuasive” classifications based on sex or gender.¹⁷⁵

The Supreme Court has applied heightened scrutiny to sex-based classifications in order to eliminate discrimination on the basis of gender stereotypes.¹⁷⁶ Policies that bar transgender girls and women from participating in sports broadly discriminate on the basis of sex and thus could be subjected to heightened scrutiny.¹⁷⁷ Ostensibly, laws that ban transgender athletes from participating in high school and collegiate sports are done to promote an important government interest.¹⁷⁸ However, there is not a substantial relationship between banning transgender athletes from teams that conform to their gender identity and promoting sex equality.¹⁷⁹ Governmental gender classifications must be “reasonable, not arbi-

172. See generally Krista D. Brown, *The Transgender Student-Athlete: Is There A Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?*, 25 MARQ. SPORTS L. REV. 311, 314–16 (2014) (discussing due process arguments, equal protection arguments against state laws banning transgender athletes from participating on teams in conformity to gender identity).

173. U.S. CONST. amend. XIV, § 1.

174. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating general rule classifications based on gender or sex bear no relation to ability, gender or sex classifications fail equal protection scrutiny unless substantially related to sufficiently important government interest).

175. See *United States v. Virginia*, 518 U.S. 515, 534 (1996) (finding State must at least show challenged classification serves important governmental objectives, must show discriminatory means employed are substantially related to achievement of those objectives).

176. See *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (“The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.”).

177. See, e.g., *Adams ex. Rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (applying heightened scrutiny because school board’s bathroom policy singles out transgender students for differential treatment because they are transgender).

178. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

179. See Krista D. Brown, *supra* note 172, at 325 (“Under Equal Protection jurisprudence regarding gender equity in high school athletics, courts have found that categorically denying underrepresented sexes the opportunity to play on an athletic team because of health and safety concerns is not substantially related to that objective.”).

trary.”¹⁸⁰ For example, policies often are administered arbitrarily by relying on student’s enrollment documents to determine sex assigned at birth and thus do not treat all transgender students alike.¹⁸¹ Already, various circuit courts have appeared eager to apply equal protection arguments in addition to sex-stereotyping and *per se* discrimination arguments post-*Bostock* to strike down bans on transgender athletes.¹⁸² In *Grimm v. Gloucester County School Board*, for example, the Fourth Circuit agreed with the Seventh and Eleventh Circuits that when a school district decides which bathroom a student may use based upon sex listed on a birth certificate, this is sex-based discrimination and is subject to intermediate scrutiny.¹⁸³ Moreover, the court rejected the school board’s argument that privacy interests constitute an “exceedingly persuasive” justification of the policy.¹⁸⁴ Given the trend among circuit courts, including recent decisions of the Eleventh Circuit – seen by many as least likely to apply *Bostock* to a Title IX setting – it appears highly unlikely that state laws restricting the rights of transgender individuals will survive challenges on both Equal Protection and Title IX grounds.¹⁸⁵

180. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting *Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920))).

181. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding students’ sex on school enrollment documents not “legitimate, accurate proxy” for sex assigned at birth).

182. See, e.g., *Grimm II*, 972 F.3d 586, 620 (4th Cir. 2020) (“The 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. . . . How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.”).

183. See *id.* at 608 (“We agree with the Seventh and now Eleventh Circuits that when a ‘School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate, ‘the policy necessarily rests on a sex classification.’” (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017))); see also *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (“Mr. Adams and the School Board are in agreement that our Court is required to review the School District’s bathroom policy with heightened scrutiny. Although this standard of review is not in dispute, we first review why heightened scrutiny is warranted in order to chart a course for our analysis.”).

184. See *Grimm II*, 972 F.3d at 623 (Wynn, J. concurring) (“Put simply, Grimm’s entire outward physical appearance was male. As such, there can be no dispute that had he used the girls’ restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students. The Board’s stated privacy interests thus cannot be said to be an ‘exceedingly persuasive’ justification of the policy.”).

185. See generally *id.* (holding school board policy banning transgender students from using bathroom conforming to gender identity violates Title IX, Equal Protection Clause protections). See also *Glenn v. Brumby*, 663 F.3d 1312, 1321

D. What this Signifies for Women's Sports Going Forward

Recently, a federal judge issued a preliminary injunction on the Idaho law banning transgender women and girls from sports teams citing *Bostock's* reasoning that discrimination against an individual for being transgender necessarily discriminates on the basis of sex.¹⁸⁶ This ruling and others could imply that laws which discriminate on the basis of sexual orientation or gender identity may be increasingly subjected to heightened scrutiny analysis going forward.¹⁸⁷ Following the *Bostock* decision, Olympic track-and-field coach Linda Blade stated that she feared that “all the benefits society gets from letting girls have their protected category so that competition can be fair, all the advances in women's rights . . . [will] be diminished.”¹⁸⁸ Similar concerns have been echoed in state legislation banning transgender girls and women from school athletics.¹⁸⁹ Several bills specifically point out that sex-specific teams promote sex equality by providing opportunities to female athletes to “demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain . . . the numerous other long-term benefits that flow from success in athletic endeavors.”¹⁹⁰ Following President Biden's executive order calling on agencies across the federal government to review regulations and policies that prohibit sex discrimination to include sexual orienta-

(11th Cir. 2011) (“Brumby has advanced no other reason that could qualify as a governmental purpose, much less an ‘important’ governmental purpose, and even less than that, a ‘sufficiently important governmental purpose’ that was achieved by firing Glenn because of her gender non-conformity.”). In applying equal protection logic to striking down a claim of sex-based discrimination in the employment setting, the Eleventh Circuit has indicated its willingness to apply heightened scrutiny in future cases within the school setting as well. *See id.* (implying termination of employment due to gender non-conformity would likely not serve sufficiently important governmental purpose).

186. *See Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020) (ordering preliminary injunction on Idaho law).

187. *See Sharita Gruberg, Beyond Bostock: The Future of LGBTQ Civil Rights*, CAP ACTION (Aug. 26, 2020), <https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/> [<https://perma.cc/366U-6BAS>] (describing *Bostock's* impact on Equal Protection Clause as well as impacts on access to housing under Fair Housing Act, and access to healthcare under Affordable Care Act).

188. For further discussion of critics of Biden Administration's Executive Action directing all federal agencies to reevaluate treatment of transgender individuals in light of the *Bostock* decision, see *supra* note 15 and accompanying text.

189. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

190. *See, e.g., Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/5JDZ-SG8X>] (citing benefits to male, female students of sex-segregated teams barring transgender individuals from participating on teams conforming with gender identity).

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tion and gender identity per *Bostock*, the hashtag #BidenErasedWomen trended on Twitter.¹⁹¹ Inherent in this argument, however, is the idea that what is good for transgender girls and women is not also good for girls and women generally and that transgender girls and women are somehow not part of this larger group.¹⁹²

On the other hand, in a joint statement, twenty-three women's rights and gender justice organizations voiced their support of the full inclusion of transgender people in athletics.¹⁹³ While Linda Blade's concerns are by no means unusual, they are likely unfounded.¹⁹⁴ Twenty-four states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade.¹⁹⁵ It has also been found that many of these states actually saw higher participation rates in athletics among cisgender women after such policies were implemented.¹⁹⁶ University of Pennsylvania swimmer Lia Thomas became a central figure in the debate over transgender inclusion in competitive women's sports after setting the fastest women's time in the nation for the 200 meter free swim.¹⁹⁷ All else being equal, it does appear that transgender women may have a competitive advantage over cisgender female ath-

191. See Samantha Schmidt et al., *Biden Calls for LGBTQ Protection in Day 1 Executive Order, Angering Conservatives*, WASH. POST (Jan. 21, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/> [<https://perma.cc/EP5G-JYFC>] (describing backlash to Biden Administrations Executive Order).

192. For further discussion of how arguments in favor of excluding transgender women or girls from school sports are unscientific and unjust, see *supra* note 161 and accompanying text.

193. See *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People*, AM. C.L. UNION, <https://www.aclu.org/letter/statement-womens-rights-and-gender-justice-organizations-support-full-and-equal-access> [<https://perma.cc/U2CU-6FC6>] (last visited Sept. 23, 2021) ("We speak from experience and expertise when we say that nondiscrimination protections for transgender people — including women and girls who are transgender — are not at odds with women's equality or well-being, but advance them.").

194. See *id.* (stating equal participation in athletics for transgender people does not mean end to women's sports generally).

195. See *K-12 Policies*, *supra* note 16 (downplaying recent fears about transgender athletes, citing prior "trans-inclusive" laws).

196. See *Statement of Women's Rights and Gender Justice Organizations*, *supra* note 193 (indicating participation in women's sports generally increased when trans-inclusionary laws or policies were adopted).

197. See David Rieder, *Controversy of the Year: Transgender Swimmer Lia Thomas Swims Fastest Times in the Nation*, SWIMMING WORLD (Dec. 31, 2021), <https://www.swimmingworldmagazine.com/news/controversy-of-the-year-transgender-swimmer-lia-thomas-swims-fastest-times-in-the-nation/> [<https://perma.cc/VJ5L-NJMB>] (providing background on Lia Thomas, including her college swimming records).

letes, and conceivably could lead many women's sports competitions if a small percentage of elite athletes transition after puberty.¹⁹⁸ However, competitors like Lia Thomas are extremely rare and a world in which transgender athletes dominate the upper echelons of female athletics has not yet materialized—and transgender athletes in general remain quite rare.¹⁹⁹ The likeliest result of the *Bostock* case is that transgender girls and women who are currently barred or discouraged from high school and collegiate athletics will be able to participate, thus avoiding the potential psychological harms that come about from denying such participation.²⁰⁰

IV. CONCLUSION: BEYOND BOSTOCK AND INTO THE FUTURE

The *Bostock* decision will inevitably be an incredibly important development in protections for LGBTQ individuals in the employment sphere.²⁰¹ Moreover, as federal courts continue to expand the *Bostock* decision into other realms, it will continue to afford transgender individuals additional protections.²⁰² One such protection will likely include transgender athletes' ability to play on

198. See Megan McArdle, *We Need To Be Able To Talk About Trans Athletes and Women's Sports*, WASH. POST (Jan. 13, 2022), <https://www.washingtonpost.com/opinions/2022/01/13/trans-women-sports-uncomfortable-questions/> [https://perma.cc/Z483-S4QP] (discussing Lia Thomas, other transgender athletes', potential competitive edge over cisgender athletes).

199. See David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP NEWS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [https://perma.cc/Y6H3-KRYL] (highlighting inability of legislators advocating bans on transgender girls competing on girls' sports teams to cite examples of transgender athletes compromising ability of cisgender girls to participate); see also Jo Yurcaba, *Amid Trans Athlete Debate, Penn's Lia Thomas Loses to Trans Yale Swimmer*, ABC NEWS (Jan. 10, 2022), <https://www.nbcnews.com/nbc-out/out-news/trans-athlete-debate-penns-lia-thomas-loses-trans-yale-swimmer-rcna11622> [https://perma.cc/UE7R-WNAC] (citing underrepresentation of transgender athletes in NCAA compared to general population while reporting Lia Thomas recently lost to male transgender athlete who competes on women's team because he has not begun gender-affirming hormone treatment).

200. See, e.g., Grimm I, 822 F.3d 709, 727–28 (4th Cir. 2016) (Davis, J., concurring) (citing expert declaration by psychologist specializing in working with children, adolescents, with gender dysphoria, who stated treating transgender boy as male in some situations but not in others is “inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child”).

201. For further discussion of the impact of the *Bostock* decision in the employment field, see *supra* note 128 and accompanying text.

202. For further discussion of the impact of *Bostock* beyond employment, see *supra* notes 128–140 and accompanying text.

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sports teams that conform to their gender identity in high school and collegiate athletics.²⁰³

At the same time, as transgender athletes increasingly compete on teams that conform to their gender identity, there will be those who oppose the change and claim that this represents a violation of Title IX protections of cisgendered women.²⁰⁴ Ultimately, it will fall upon either the courts, federal agencies, and Congress to further clarify the meaning of sex in Title IX.²⁰⁵ While there are some who fear that these new rights will come at the expense of rights enjoyed by cisgender female athletes, these fears are likely unfounded.²⁰⁶

*Joe Brucker**

203. For further discussion of why *Bostock* may eventually extend to school athletics, see *supra* notes 150–164 and accompanying text.

204. See, e.g., *Soule v. Conn. Assn. of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn., Apr. 17, 2020) (challenging Connecticut’s law allowing transgender athletes to compete on teams corresponding with gender identity as violating Title IX protections for cisgender female athletes).

205. See *Title IX: Who Determines the Legal Meaning of “Sex”?*, CONG. RSCH. SERV. (Dec. 12, 2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10229> [<https://perma.cc/7LV7-4SKC>] (delineating roles played by courts, Congress, federal agencies in interpreting Title IX).

206. For further discussion of the impact of *Bostock*’s protection expanding to Title IX on women’s sports, see *supra* notes 188–200 and accompanying text.

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