Beyond Bostock: Title IX Protections for Transgender Athletes

Joseph Brucker

Follow this and additional works at: https://digitalcommons.law.villanova.edu/mslj

Part of the Education Law Commons, Entertainment, Arts, and Sports Law Commons, Human Rights Law Commons, Labor and Employment Law Commons, and the Law and Gender Commons

Recommended Citation

Available at: https://digitalcommons.law.villanova.edu/mslj/vol29/iss2/4
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. 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. 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/4WK4-W97Z] (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/S38X-7NJF] (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. 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. 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. 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.

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/168Q9Q1595 [https://perma.cc/RSSQ-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 . . . . 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-E82E] (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.\footnote{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).} Transgender (or “trans”) individuals are those whose gender identity differs from the gender they were thought to be at birth.\footnote{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. Poly. 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).} 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.\footnote{See NCAA Inclusion of Transgender Student-Athletes, Off. of Inclusion of the Nat’l Colleigate 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).} 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.\footnote{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).} On July 14, 2021, for example, Texas passed SB 2, a bill that would ban transgender women and girls from participating in girls’ sports.\footnote{See 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).}
participating in sports consistent with their gender identity. 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. Some proposals go so far as to suggest criminal penalties if transgender athletes participate on teams consistent with their gender identity. Notably, sixteen states have passed legislation banning transgender women and girls from participating on teams that conform to their gender identity. 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. Others believe transgender participation in athletics does not spell an end to women’s sports but will actually enhance access to it.

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


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. 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. 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.

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


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.").


21. For further discussion of Bostock’s future impact on Title IX legislation, see infra notes 70–156 and accompanying text.
Title IX and its corollary in the employment realm, Title VII. 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. 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. Section II discusses Title IX and guidance provided by the Department of Education relating to the law’s application to transgender students. The Comment then examines the approach taken by various federal courts to Title IX and competing legal theories for its application. Finally, the Comment explores recent state legislation regarding transgender athletes that have brought this issue to the fore. 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.

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. 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.
gram or activity receiving Federal financial assistance.” Title IX was modeled after Title VI of the Civil Rights Act of 1964. 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. 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.

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.” 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. In July

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).
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.,
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

---


\(^{38}\) See id. at 3 (finding under Title IX, schools must treat students consistent with gender identity despite contrary education records, identification 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. Department enforcement of Title IX protections for transgender athletes once again shifted following the election of President Joseph Biden. 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. This memo returned to the Department of Education policies followed under President Obama, bolstered by legal arguments following Bostock.

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. Understandably, the unresolved led 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 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.\textsuperscript{45} Idaho was the first state to pass a law preventing transgender women from participating in women’s sports.\textsuperscript{46} The law never went into effect as there was an injunction followed by a Ninth Circuit appeal.\textsuperscript{47} In \textit{Grimm v. Gloucester County School Board},\textsuperscript{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.\textsuperscript{49} In this case, a transgender student claimed that the use of “alternative private 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). \textit{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); \textit{see also} Jo Yurcaba, \textit{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); \textit{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).


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

\textsuperscript{49} \textit{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. 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.

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. In Doe v. Boyertown Area School District, 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. The court based its decision on the state’s “compelling interest in not discriminating against transgender students.” 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.” 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).


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”).


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.”).
that school policy allowing transgender students to use facilities that conform with their gender identity did not violate Title IX. In *Soule v. Connecticut Ass’n of Schools*, non-transgender student athletes challenged a Connecticut state policy allowing transgender students to compete in girls’ high school sports. 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. Finally, in *Adams v. School Board of St. Johns County* 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. The Eleventh Circuit ultimately vacated this ruling and will now review the case en banc. 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.

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. 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).
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).
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 split among circuit courts on treatment of transgender student rights under Title IX).
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

67. 883 F.3d 100 (2d Cir. 2018).
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.”).
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...
most immediate impact will likely be within states without preexisting employment discrimination protections for members of the LGBTQ community.\footnote{75} The decision appears to provide an immediate remedy for discrimination within the realm of employment.\footnote{76}

Justice Alito in his \textit{Bostock} dissent stated that the problem with the Court’s majority decision is most acute in its implication for schools and religious institutions.\footnote{77} Moreover, Justice Alito argued that \textit{Bostock} could infringe on free speech rights if employers refused to use transgender employees’ chosen names and pronouns.\footnote{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.”\footnote{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.”\footnote{80}

\begin{footnotesize}
\begin{itemize}
\item\footnote{75} See generally id. (describing \textit{Bostock}’s effects on federal law).
\item\footnote{76} For further discussion of \textit{Bostock}’s impact in the employment realm, see infra note 83 and accompanying text.
\item\footnote{77} See \textit{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)).
\item\footnote{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.”).
\item\footnote{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.”).
\item\footnote{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.”).
\end{itemize}
\end{footnotesize}
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.” 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. 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. 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. 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.” 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).


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. In 1984, the plaintiffs in *Ulane v. Eastern Airlines* 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.” Five years later, the Supreme Court did expand the meaning of “because of sex” in *Price Waterhouse v. Hopkins* by holding that that Title VII prohibited discrimination against individuals based on “sex stereotyping” or non-conformance with perceived gender expectations. 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.”

---

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 *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); *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.”).


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


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, 195 (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. 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. 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.

---

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 Calif. L. Rev. 561, 563 (2007)); see also Ilona M. Turner, Sex Stereotyping Per Se: Transgender Employees and Title VII, 95 Calif. 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)
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.”).


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


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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{115} Finally, prior to \textit{Bostock}, the Eleventh Circuit in \textit{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 coll-

\textsuperscript{113} See \textit{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.”).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{116} See \textit{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, \textit{Sex Stereotyping Per Se: Transgender Employees and Title VII}, 95 CAL. L. REV. 561, 563 (2007))).

\textsuperscript{117} See \textit{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).

\textsuperscript{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 \textit{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).
121. See IDAHO CODE ANN. § 33-6203(3) (West 2021) (describing methods for determining student athlete’s gender).
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-W64V] (“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.”).
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. Schools that don’t comply would be ineligible for federal funding.

Athletic eligibility for transgender youth is typically determined not by the state legislature but by states’ high school associations. In Louisiana, a student-athlete must compete on teams consistent with the gender on their birth certificate unless they have undergone sex reassignment surgery. 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. While some state laws restrict transgender athletes’ participation,


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. H IGH S CH. A THLETIC A SS’N, P OSITION S TATEMENT, 164  (n.d.), available at: https://13248aea-16f8-fc0a-cf26-a9339d2a340.filesusr.com/ugd/2bc3fc_c4403a24e71d753b89d7126b6e017c7.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.”).
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.\footnote{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).}

III. Assessing the Likelihood that Bans Will Succeed Post-Bostock

The Supreme Court’s \textit{Bostock} decision was widely celebrated by civil rights activists as an expansion of workplace and hiring protections for vulnerable members of the LGBTQ community.\footnote{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.”).} The president of the Human Rights Campaign, Alphonso David, referred to it as a “landmark moment in the on-going fight for LGBTQ equality.”\footnote{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).} 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.\footnote{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.”).} Justice Alito in his \textit{Bostock} dissent raised pointed questions about the decision’s applicability to the world of student ath-
letics and whether the Bostock definition of “sex” extends to youth and college athletics.  

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. 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. 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.”

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. 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. 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 (adopter per se discrimination approach).


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.”

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. This is consistent with the Supreme Court’s directive to “give Title IX . . . a sweep as broad as its language.”

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. The Notice of Interpretation laid out several reasons why Title IX prohibits discrimination based on sexual orientation and gender identity. First, it points to the textual similarity between Title VII and Title IX. 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.

The Department also asserts that subsequent case law supports ap-

---


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).


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.”).
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 XI 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

---


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.

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 over-ride 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.”).


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”).
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 may ultimately be challenged.


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/DL84-2NCD] (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, JD Supra (Mar. 10, 2021), https://www.jdsupra.com/legalnews/biden-executive-order-expands-title-ix-334512/ [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-
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. Already, various circuit courts have appeared eager to apply equal protection arguments in addition to sex-stereotyping and per se discrimination arguments post-\textit{Bostock} to strike down bans on transgender athletes. In \textit{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. Moreover, the court rejected the school board’s argument that privacy interests constitute an “exceedingly persuasive” justification of the policy. Given the trend among circuit courts, including recent decisions of the Eleventh Circuit – seen by many as least likely to apply \textit{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.

\footnote{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))).}

\footnote{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).}

\footnote{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.”).}

\footnote{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.”).}

\footnote{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.”).}

\footnote{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 orientation.
tion and gender identity per Bostock, the hashtag #BidenErasedWomen trended on Twitter. 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.

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. While Linda Blade’s concerns are by no means unusual, they are likely unfounded. Twenty-four states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade. 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. 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. All else being equal, it does appear that transgender women may have a competitive advantage over cisgender female ath-


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.


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).

letes, and conceivably could lead many women’s sports competitions if a small percentage of elite athletes transition after puberty. 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. 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.

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. Moreover, as federal courts continue to expand the Bostock decision into other realms, it will continue to afford transgender individuals additional protections. One such protection will likely include transgender athletes’ ability to play on


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-914a982545e943ecc1e2b65e8c41042e7 [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 under-representation 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.
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. Ultimately, it will fall upon either the courts, federal agencies, and Congress to further clarify the meaning of sex in Title IX. 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.

---

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


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.

* J.D. Candidate, May 2023, Villanova University Charles Widger School of Law; I would like to thank my family and friends for all their encouragement and support throughout my academic and professional endeavors.