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Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock

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Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-*Bostock*

In Bostock v. Clayton County*, the Supreme Court held that Title VII's sex-discrimination prohibition applies to discrimination against gay and transgender employees. This decision, surprising from a conservative Court, has engendered a huge amount of commentary on both its substantive holding and its interpretive method. This Note addresses a single question arising from this discourse: After* Bostock*, how will courts address allegations of sex discrimination by plaintiffs whose gender identities exist outside of traditional sex and gender binaries? As this Note explores, some have argued that* Bostock*'s textualist logic precludes sex-discrimination claims by nonbinary plaintiffs. While such arguments fail to recognize the import of pre-*Bostock *Title VII jurisprudence, they are worth engaging. Given the history of narrow judicial interpretations of Title VII, the conservative leanings of the federal bench, and the controversial nature of gender-discrimination law, this Note argues that while Title VII protects employees of all gender identities, amending federal law to explicitly prohibit gender-identity discrimination remains a policy priority post-*Bostock.

INTRODUCTION

Since Title VII's prohibition on sex-based discrimination was passed nearly sixty years ago, American attitudes towards sex and gender have changed drastically. The statute's language has not. Law, however, changes along with the society it structures. Until June 2020, it was generally understood that Title VII's[1] prohibition on discrimination "because of . . . sex" did not reach discrimination on the basis of sexual orientation or gender identity. It was in this context that Gerald Bostock, Donald Zarda, and Aimee Stephens were fired by their employers solely for being gay, in the cases of Mr. Bostock and Mr. Zarda, and transgender, in the case of Ms. Stephens.[2] If the employers had sought legal counsel before their decisions, they would likely have been given the all clear: though plaintiffs and scholars had long argued that Title VII could be interpreted to prohibit sexual-orientation and gender-identity discrimination, precedent favored the defendant employers. Nevertheless, all three employees sued, and all three cases eventually reached the Supreme Court, consolidated in *Bostock v. Clayton County*.[3] To the surprise of many observers, the Court held that the plain text of Title VII prohibits employment discrimination on the bases of homosexuality and transgender identity.[4]

Substantively and symbolically, *Bostock* is a triumph for LGBTQIA+ rights: thousands of American workers are legally protected from discrimination based on a core component of their identities. But the opinion also does little to clarify the law's understandings of "sex" as a statutory term or to assist courts in understanding sex discrimination claims by plaintiffs whose identities exist throughout the universe of gender. This Note examines *Bostock*'s effect on one subset of plaintiffs: those whose gender identities exist outside the male/female binary.

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1. 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer [to discriminate against an employee] because of such individual's race, color, religion, *sex*, or national origin." (emphasis added)).

2. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737–38 (2020).

3. Both Mr. Zarda and Ms. Stephens died before the Supreme Court decided the case. Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES, https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html?searchResultPosition=1 (last updated June 17, 2021) [https://perma.cc/WWV2-4RF5]. Their estates continued to pursue the cases after their deaths. *Id.*

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

Part I first provides background on the concepts of sex, gender, and gender identity in the hopes of orienting the reader and establishing clear usage of these terms. It then provides background on both *Bostock* itself and pre-*Bostock* Title VII discrimination law, focusing on sex-stereotyping discrimination and sex-plus discrimination. Part II analyzes how the *Bostock* court relied on binary conceptions of gender and illustrates, through a hypothetical, how nonbinary litigants might argue for Title VII protection post-*Bostock* and how their opponents might respond. Finally, Part III offers a legislative solution: even after *Bostock*, Title VII, along with other federal antidiscrimination laws, should be amended to explicitly protect gender identity and sexual orientation in order to provide more stable protection for people of all genders.

I. SEX, GENDER, AND THE LAW

A. Sex, Gender, and Gender Identity

Vocabulary and attendant understandings of sex and gender are continuously evolving. The following discussion defines terms for purposes of this Note, with several important caveats. First, these terms are neither universal nor comprehensive. They serve as proxies for complex issues of identity that likely can never be reduced to absolute definitions. Second, there are as many gender identities as there are people.[5] A glossary can never fully capture that diversity and should not pretend to do so. Finally, the definitions that follow are largely sociological, not legal—as this Note explores, "sex" in Title VII may signify something different than "sex" in social science and gender theory contexts.[6]

As with many social issues, the prevailing sociocultural understandings of sex, gender, and gender identity are helpfully framed by a social media trend. In so-called "gender reveal parties," expecting parents dramatically announce their unborn child's sex (as determined by an ultrasound or chromosome analysis) with balloons, cake, or explosives[7] colored pink to signify a female child or blue to signify a

5. Thanks to Kate Uyeda for this phrasing.

6. *See infra* Part II.C.3.

7. *See Gender-Reveal Device Kills Father-to-Be*, BBC NEWS (Feb. 23, 2021), https://www.bbc.com/news/world-us-canada-56159731 [https://perma.cc/846C-C8HD]; Christina Morales & Allyson Waller, *A Gender-Reveal Celebration Is Blamed for a Wildfire. It Isn't the First Time.*, N.Y. TIMES, https://www.nytimes.com/2020/09/07/us/gender-reveal-party-wildfire.html (last updated July 21, 2021) [https://perma.cc/X6Y3-RPCB].

male child.[8] Such rituals implicitly assume both that the unborn child's genitalia or chromosomal makeup indicates the child's gender and that the child's gender will fall into either the girl (pink) or the boy (blue) category. Gender reveal parties thus reflect two key beliefs: that sex is completely determinative of gender and that sex and gender are binaries. Both are incorrect.

Sex and gender are distinct concepts.[9] "Sex," which is typically assigned at birth, is a physical classification based on a person's genitalia and chromosomal makeup.[10] "Gender" refers to complex social understandings and expectations of how people of a given sex do or should behave.[11] The term "gender identity" refers to an individual's understanding of their own gender and its relationship to social categories.[12] Gender identity is internally determined, fluid, and may change over an individual's lifetime—a child classified male at birth may grow up to be a man or a different gender; likewise, a child classified female at birth might later be a woman, a man, both, or neither.[13]

Sex and gender are not equivalent, but also not wholly independent. The difference between the two is sometimes colorfully summarized as sex being what is "between [the] legs" while gender is what is "between [the] ears."[14] Many theorists consider gender to be socially constructed and individually performed, attributable more to social norms than to innate biological characteristics.[15] However, gender and gender identity are not solely psychological—both are intimately linked with the physical body.[16] The categorization of sex as

8. *See* Rebecca Desfosse, *What's the Deal with Gender Reveal Parties?*, FAM. EDUC., https://www.familyeducation.com/whats-deal-gender-reveal-parties (last visited Sept. 13, 2021) [https://perma.cc/7458-CF75] (pointing out that, since such events in fact announce the child's physical categorization, they would more aptly be called "sex-reveal parties").

9. Jennifer Tseng, *Sex, Gender, and Why the Differences Matter*, 10 AMA J. ETHICS: VIRTUAL MENTOR 427, 427 (2008).

10. Walter Liszewski, J. Klint Peebles, Howa Yeung & Sarah Arron, *Persons of Nonbinary Gender – Awareness, Visibility, and Health Disparities*, 379 NEW ENG. J. MED. 2391, 2392 (2018) (defining sex as the "reproductive phenotype, categorized as male, female, or intersex").

11. Tseng, *supra* note 9 ("Gender refers to the continuum of complex psychosocial self-perceptions, attitudes, and expectations people have about members of both sexes.").

12. Liszewski et al., *supra* note 10, at 2392.

13. *Id.*

14. Neela Ghoshal, *Transgender, Third Gender, No Gender: Part II*, HUM. RTS. WATCH (Sept. 8, 2020, 8:19 AM), https://www.hrw.org/news/2020/09/08/transgender-third-gender-no-gender-part-ii [https://perma.cc/U32V-BEYE].

15. *See, e.g.*, Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 522 (1988) ("Gender is . . . a construction that regularly conceals its genesis. The tacit collective agreement to perform, produce, and sustain discrete and polar genders as cultural fictions is obscured by the credibility of its own production.").

16. *See* Vernon A. Rosario, *The Biology of Gender and the Construction of Sex?*, 10 GLQ: J. LESBIAN & GAY STUD. 280, 283 (2004) (discussing criticisms, particularly by transgender and queer

physical and gender as social thus risks oversimplification, but it remains a helpful starting place for understanding the complexities of gender identity.

The relationship between sex and gender identity takes many forms at the individual level. Some people's gender identities align with social expectations based on their sex, such as a woman who was assigned female at birth. Such people are described as "cisgender."[17] Some people, however, have gender identities that do not match social expectations of their sex assigned at birth; people in this category frequently identify as transgender.[18] Some trans individuals' gender identities are adequately described by the man/woman gender binary—like a man assigned female at birth or a woman assigned male at birth.[19] Others—whether or not they identify as trans—have a gender identity that is not adequately described by either "man" or "woman."[20] While individuals describe their gender identities in diverse ways,[21] this Note will use the term "nonbinary" as an umbrella term to refer to gender identities that do not fit neatly in the man/woman binary framework.[22] Some people with nonbinary gender identities use gender neutral pronouns like "they" rather than gendered pronouns like "he"

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theorists, of feminist theories that discuss gender as completely separate from the physical body); C. E. Roselli, *Neurobiology of Gender Identity and Sexual Orientation*, 30 J. NEUROENDOCRINOLOGY e12562 (2018) (discussing evidence of biological components of sexual and gender identity).

17. Liszewski et al., *supra* note 10, at 2392. The Latin prefix "cis" means "on this side of," while "trans" means "across." Avery Dame, *Tracing Terminology: Researching Early Uses of "Cisgender*,*"* PERSPS. ON HIST. (May 22, 2017), https://www.historians.org/publications-and-directories/perspectives-on-history/may-2017/tracing-terminology-researching-early-uses-of-cisgender [https://perma.cc/45VY-WRQ7]. The term "cisgender" was officially added to the Oxford English Dictionary in 2015, though it had been in popular usage for many years prior. *Id.*

18. Liszewski et al., *supra* note 10, at 2392; *PFLAG National Glossary of Terms*, PFLAG, https://pflag.org/glossary (last updated Jan. 2021) [https://pflag.org/glossary]. The term transgender is often shortened to "trans" and sometimes "trans*," with the asterisk signifying inclusion of all gender-nonconforming identities. *See Transgender Identity Terms and Labels*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/transgender/transgender-identity-terms-and-labels (last visited Sept. 13, 2021) [https://perma.cc/KT4K-KX6R]. This Note will use transgender and trans interchangeably.

19. *See Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 5, 2018), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive [https://perma.cc/PN4B-S9F5].

20. *Id.*

21. *Id.* (noting that nonbinary is only one way to describe such identities and noting other terms including genderqueer, agender, and bigender).

22. CHARLIE MCNABB, NONBINARY GENDER IDENTITIES: HISTORY, CULTURE, RESOURCES 19 (2017).

or "she."[23] Others—whether or not they identify as nonbinary—use more than one type of pronoun.[24]

When gender is understood primarily as a social rather than biological category, its fluidity is unsurprising. Sex, however, also sometimes resists binary categories. While most bodies are classified relatively easily as either male or female, a disputed number of people are born with anatomy that is neither clearly male nor clearly female;[25] such bodies are usually classified as "intersex."[26] The existence of intersex individuals undermines prevailing notions of sex as a male/female binary. Those born without definitively male or female sex characteristics have historically been subjected to surgery, often while still infants, to "normalize" their anatomy and define their sex as either male or female.[27] This practice has recently attracted significant criticism, particularly from intersex advocates, and parents of intersex children are increasingly rejecting the practice.[28] Intersexuality, like gender identity diversity, complicates the binary conceptions that have historically undergirded both social and legal treatments of sex and gender.

While social awareness of sex and gender diversity has grown in recent years, widespread understanding of sex and gender diversity is still lacking,[29] and news related to gender identity frequently sparks

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23. *Id.*

24. *See, e.g.*, Michelle Kim, *Halsey Thanks Fans for Support After Announcing Pronouns Are "She/They,"* THEM. (Mar. 15, 2021), https://www.them.us/story/halsey-thanks-fans-support-after-announcing-pronouns-she-they-kehlani [https://perma.cc/ZV4R-6VL4].

25. *See How Common Is Intersex?*, INTERSEX SOC'Y N. AM., https://isna.org/faq/frequency/ (last visited Sept. 13, 2021) [https://perma.cc/VEB3-NHQM] (noting differing opinions about what types of anatomy variations should be designated as intersex); Melanie Blackless, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne & Ellen Lee, *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 159 (2000) (estimating that 1.7% of people are born intersex); Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RSCH. 174, 177 (2002) (estimating that .018% of people are born intersex).

26. Liszewski et al., *supra* note 10, at 2392.

27. Laura Sundin, Note, *Imposing Identity: Why States Should Restrict Infant Intersex Surgery*, 73 SMU L. REV. 637, 643–46 (2020).

28. *Id.*; Julie Compton, *'You Can't Undo Surgery': More Parents of Intersex Babies Are Rejecting Operations*, NBC NEWS (Oct. 24, 2018, 3:30 AM), https://www.nbcnews.com/feature/nbc-out/you-can-t-undo-surgery-more-parents-intersex-babies-are-n923271 [https://perma.cc/JWD5-L7U3].

29. Many organizations provide glossaries, FAQ pages, and other educational resources on gender and gender identity. *See, e.g.*, *Sex and Gender Identity*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity (last visited Sept. 13, 2021) [https://perma.cc/S59H-ZSWK]; *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Sept. 13, 2021) [https://perma.cc/A97P-NKFV].

controversy.[30] The apparently nascent state of social consciousness is not evidence that diverse gender identities are novel or purely modern creations—nonbinary gender identities and gender nonconformity have deep historical roots in many cultures.[31] Still, in the contemporary United States, discrimination against transgender, nonbinary, and otherwise gender-diverse people pervades all spheres of life.[32] In recent months, state legislatures have introduced a slew of anti-trans legislation targeting access to health care, public accommodations, and sports participation.[33] Importantly, transgender and nonbinary individuals report high levels of workplace mistreatment and concern about workplace discrimination.[34]

Despite these barriers, times are changing. Younger generations report higher levels of awareness and acceptance of nonbinary gender identities and related issues, with one study finding that nearly a third of Gen Zers (those born in 1997 or later) know someone who uses gender neutral pronouns.[35] Millennials (those born between 1981 and 1996)

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30. *See, e.g.*, SE Fleenor, *If You Don't Understand Demi Lovato's Nonbinary Gender Identity, That's OK*, INDEP. (May 19, 2021, 9:30 PM), https://www.independent.co.uk/voices/demi-lovato-nonbinary-gender-b1850411.html [https://perma.cc/MU3D-FV4G] (discussing a variety of reactions to the singer's announcement regarding their nonbinary identity). Conversations around issues of transgender identity and gender transitions tend to be especially heated. *See, e.g.*, Abby Gardner, *A Complete Breakdown of the J.K. Rowling Transgender-Comments Controversy*, GLAMOUR, https://www.glamour.com/story/a-complete-breakdown-of-the-jk-rowling-transgender-comments-controversy (last updated July 20, 2021) [https://perma.cc/56S4-29MA] (discussing the *Harry Potter* author's controversial tweets and subsequent essay, viewed by many as transphobic).

31. *See A Map of Gender-Diverse Cultures*, PBS: INDEP. LENS (Aug. 11, 2015) https://www.pbs.org/independentlens/content/two-spirits_map-html/ [https://perma.cc/HPK4-RP5D] (collecting historical information about cultures across the world that have recognized more than two genders).

32. S.E. JAMES, J.L. HERMAN, S. RANKIN, M. KEISLING, L. MOTTET & M. ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, NAT'L CTR. FOR TRANSGENDER EQUAL. 4–5 (2015) https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/8GG2-RHQA] (summarizing findings of a nationwide survey of transgender individuals' life experiences and noting high rates of family violence, mistreatment in schools and workplaces, and sexual violence). While this survey's title uses the term transgender, a term which does not always indicate disruption of the man/woman gender binary, 35% of survey respondents indicated their gender identity as nonbinary. *Id.* at 45.

33. Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law [https://perma.cc/V73L-YMF9]; *Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMS., https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/ (last visited Sept. 21, 2021) [https://perma.cc/YE4N-YACH].

34. JAMES ET AL., *supra* note 32, at 148 (relaying that 30% of respondents reported workplace mistreatment within the preceding year and 77% reported taking steps to avoid such mistreatment).

35. *See* Kim Parker, Nikki Graf & Ruth Igielnik, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RSCH. CTR. (Jan. 17, 2019),

and Gen Zers are more likely than preceding generations to reject binary conceptions of gender.[36] As younger generations join the workforce, these views and identities are ever more likely to appear in employment discrimination cases. Unfortunately, Title VII jurisprudence—even after *Bostock*—is ill-suited to assist courts in understanding and analyzing cases of discrimination against people with nonbinary sex and gender identities.[37]

B. Bostock*: A Brief Summary*

Gender equality advocates generally anticipated the *Bostock* ruling with trepidation.[38] *Bostock* was the Supreme Court's first major LGBTQIA+ rights case since the retirement of Justice Kennedy, the author of several landmark gay rights decisions including *Obergefell v. Hodges*.[39] The appointments of Justices Gorsuch and Kavanaugh had recently cemented the Court's conservative majority.[40] In this context, the 6–3 ruling in the plaintiffs' favor came as a surprise.

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https://www.pewsocialtrends.org/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/ [https://perma.cc/Z364-Z47T] (noting that younger generations are progressively more likely to know someone who uses gender neutral pronouns and to say that forms and online profiles should include more than two gender designations); *see also* Shepherd Laughlin, *Gen Z Goes Beyond Gender Binaries in New Innovation Group Data*, WUNDERMAN THOMPSON (Mar. 11, 2016), https://intelligence.wundermanthompson.com/2016/03/gen-z-goes-beyond-gender-binaries-in-new-innovation-group-data/ [https://perma.cc/XM3F-YBFT] (reporting that 56% of surveyed Gen Zers know someone who uses gender neutral pronouns); *see also* Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/ [https://perma.cc/HZU9-LXHJ].

36. Curtis M. Wong, *50 Percent of Millennials Believe Gender Is a Spectrum, Fusion's Massive Millennial Poll Finds*, HUFFPOST: QUEER VOICES, https://www.huffpost.com/entry/fusion-millennial-poll-gender_n_6624200 (last updated Feb. 2, 2016) [https://perma.cc/R8AU-DLW5]; *see also* Parker et al., *supra* note 35 (finding that six in ten Gen Zers believe forms and official documents should offer gender options beyond "man" and "woman").

37. Some courts have begun to recognize the extent to which sex discrimination law fails to reflect contemporary gender theory. In a post-*Bostock* sex-plus-age discrimination case, the Tenth Circuit noted in a footnote that certain evidentiary structures in such cases fail to accommodate nonbinary gender identities. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1047 n.3 (10th Cir. 2020) ("We acknowledge that this framework requiring a comparison between male and female employees assumes that sex is binary. This case does not raise, and we do not address, sex discrimination involving intersex or gender non-binary individuals.").

38. *See* Adam Liptak, *Can Someone Be Fired for Being Gay? The Supreme Court Will Decide*, N.Y. TIMES (Sept. 23, 2019), https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?searchResultPosition=1 [https://perma.cc/335B-XELV].

39. 576 U.S. 644 (2015) (holding that same-sex couples have a constitutional right to marriage); *see also* Liptak, *supra* note 38.

40. *See* Adam Liptak, *As the Supreme Court Gets Back to Work, Five Big Cases to Watch*, N.Y. TIMES, https://www.nytimes.com/2019/10/06/us/as-the-supreme-court-gets-back-to-work-five-big-cases-to-watch.html?searchResultPosition=4 (last updated Nov. 11, 2019) [https://perma.cc/TUP2-44W5].

According to the Court, "few facts are needed to appreciate the legal question" presented in *Bostock*.[41] Each of the three plaintiffs before the Court was fired "allegedly for no other reason than [their] homosexuality or transgender status."[42] The plaintiffs were Gerald Bostock, a gay man fired from his job as a child welfare advocate after joining a recreational gay softball league; Donald Zarda, a gay man fired from his job as a skydiving instructor after mentioning his sexual orientation to his employer; and Aimee Stephens, a transgender woman who was fired from her job at a funeral home after informing her employer about her transgender identity and her plans to "live and work full-time as a woman."[43]

Each plaintiff sued their employer in federal court, with differing results at the circuit level. In Mr. Bostock's case, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of Mr. Bostock's case, adhering to circuit precedent holding that Title VII does not prohibit antigay discrimination.[44] In Mr. Zarda's case, the Second Circuit reached the opposite conclusion, reasoning that expecting employees to have only opposite-sex attraction is a sex-based stereotype, which is impermissible under Title VII.[45] Similarly, in Ms. Stephens's case, the Sixth Circuit concluded that Title VII prohibits discrimination based on transgender identity because expecting a person to conform to the gendered expectations of the sex to which they were assigned at birth "falls squarely into the ambit of sex-based discrimination."[46]

In contrast to the circuit courts, the Supreme Court treated *Bostock*'s issue as wholly a matter of statutory interpretation, without the explicit reliance on sex-stereotyping case law that predominated in the lower courts.[47] While taking a textualist approach, the Court also declined to resolve the parties' arguments over the meaning of the statutory term "sex": assuming, without deciding, that the term refers only to the narrowest definition—biological categorization—the Court held that discrimination based on homosexuality or transgender identity violates the plain meaning of the statute because "the

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

42. *Id.*

43. *Id.* at 1737–38 (quoting Ms. Stephens's letter to her employer).

44. Bostock v. Clayton Cnty. Bd. of Comm'rs., 723 Fed. Appx. 964 (11th Cir. 2018) (per curiam) (unpublished).

45. Zarda v. Altitude Express, Inc., 883 F.3d 100, 120–21 (2d Cir. 2018) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)); Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *4 (July 15, 2015) (citing *Price Waterhouse*, 490 U.S. at 228).

46. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

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

individual employee's [biological] sex plays an unmistakable" role in such discrimination.[48] That is, discrimination against homosexual or transgender individuals is prohibited by Title VII because homosexuality and transgender identities are defined with reference to the individual's biological sex. As such, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[49]

Three Justices dissented from the Court's holding. Justice Alito's dissent, joined by Justice Thomas, criticized the holding as legislation in disguise, noting that a 2019 House bill that stalled in the Senate would have amended Title VII to explicitly include sexual orientation and gender identity.[50] In a now infamous passage, Justice Alito accused the majority of textual piracy.[51] In his view, the majority's logic improperly disregarded the conceptual differences between "sex" on the one hand and sexual orientation and gender identity on the other.[52] Justice Alito went on to discuss parties' arguments not addressed by the majority, including reliance on sex-stereotyping precedent[53] and analogies to race-discrimination cases.[54] Finally, Justice Alito examined the dictionary definitions of "sex" in an attempt to rebut the argument that "sex" in 1964 could have had a broader meaning than biological binary.[55]

Justice Kavanaugh also dissented from the Court's holding, primarily criticizing it as judicial overreach.[56] Drawing on the famous bicycle-in-the-park hypothetical, he criticized the majority for adhering to the "literal" meaning of the statute rather than its ordinary meaning.[57] He emphasized interpretation of phrases, as opposed to words in isolation, arguing that the ordinary meaning of discrimination "because of sex" cannot encompass gender-identity and sexual-orientation discrimination because "few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex."[58] He also highlighted federal and state politicians distinguishing "sex" from "sexual orientation" in past legislation and executive

48. *Id.* at 1741.
49. *Id.*
50. *Id.* at 1755 (Alito, J., dissenting).
51. *Id.*
52. *Id.* at 1758–59.
53. *Id.* at 1763–64.
54. *Id.* at 1764.
55. *Id.* at 1765.
56. *Id.* at 1824 (Kavanaugh, J., dissenting).
57. *Id.* at 1824–25.
58. *Id.* at 1828.

orders.[59] Justice Kavanaugh thus viewed the Court's opinion as a "transgression of the Constitution's separation of powers" even as he recognized "the important victory achieved today by gay and lesbian Americans" (with no mention of the victory of trans people).[60]

C. Title VII Precedents

While the textualist approach taken by the majority was advanced by litigants,[61] it was not the only way. Two other options frequently advocated by plaintiffs and scholars, and adopted by lower courts pre-*Bostock*, were reliance on the sex-stereotyping line of cases under *Price Waterhouse v. Hopkins*[62] and reliance on the sex-plus discrimination line of cases under *Phillips v. Martin Marietta Corporation*.[63] While the Court did not explicitly take the paths laid by these precedents, they are nevertheless important for understanding the law's relationship with gender and for elucidating the limits and opportunities of the law for sex-discrimination plaintiffs of all genders.

1. Sex Stereotyping as Sex Discrimination

Long before *Bostock*, it was established that Title VII prohibits discrimination against employees for failure to adhere to sex-based stereotypes.[64] In *Price Waterhouse*, an accounting firm refused to elevate a high-performing woman associate to partner status because firm leadership found her to be too abrasive and insufficiently feminine.[65] The partners reviewing Ms. Hopkins for potential partnership criticized her in gendered terms, calling her "macho," suggesting that her demeanor was "overcompensat[ion] for being a woman," and suggesting that she take "a course at charm school."[66] While aggressiveness can itself be a nondiscriminatory reason for firing a worker,[67] the Supreme Court held that these gendered criticisms were

59. *Id.* at 1829–31.

60. *Id.* at 1837.

61. *See, e.g.*, Reply Brief for Respondents at 12, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1623), 2019 WL 4464222.

62. 490 U.S. 228 (1989).

63. 400 U.S. 542 (1971) (per curiam).

64. *Price Waterhouse*, 490 U.S. at 228 (1989).

65. *Id.* at 233–37 (describing coworkers' assessments of the plaintiff employee's manner).

66. *Id.* at 235.

67. In the United States, most employment in non-unionized workforces is at will, meaning employers can fire workers for any reason, even an arbitrary or illogical one. *At-Will Employment – Overview*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx

evidence that Hopkins's sex played a role in the firm's employment decision, establishing a Title VII violation.[68] As the Court wrote, "if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."[69]

Price Waterhouse is typically summarized as holding that Title VII prohibits sex discrimination by way of sex stereotyping. Put simply, an employer cannot require its employees to behave in ways stereotypically associated with their sex.[70] This rule, however, appears to recognize that Title VII's sex discrimination prohibition extends to *gender* discrimination. "Sex stereotypes" are expectations about how a given person should behave based on their sex—which is exactly how "gender" is defined in contemporary discourse.[71] The employer in *Price Waterhouse* was less concerned about promoting female accountants as a general matter than it was about the particular female accountant's lack of femininity.[72] Thus, *Price Waterhouse*'s prohibition on sex stereotyping seems to, without saying as much, prohibit gender discrimination.[73]

The benefits of this framing of *Price Waterhouse* were not lost on plaintiffs and scholars before *Bostock*. One of the main arguments of the *Bostock* plaintiffs and amici was that discrimination against gay and transgender individuals was impermissible sex stereotyping.[74] *Price Waterhouse* formed a basis of this argument for both gay and transgender plaintiffs. In discriminating against either identity, the

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[https://perma.cc/A6SF-PH5R]. Employment discrimination law limits at-will employers' discretion by making some characteristics off-limits for consideration in employment decisions. *Id.*

68. *Price Waterhouse*, 490 U.S. at 251.

69. *Id.* at 256.

70. This straightforward statement of *Price Waterhouse*'s holding obscures significant complexities in sex stereotyping doctrine. For a start, this summary ignores the distinction between ascriptive stereotyping, in which employers "ascribe[ ] actual characteristics to their employees based on their membership in a protected class," and prescriptive stereotyping, in which employers "analyze[ ] an employee's individual characteristics . . . in reference to an unacceptably biased norm." Zachary R. Herz, Note, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 406 (2014).

71. *See supra* Part I.C.1.

72. *See Price Waterhouse*, 490 U.S. at 279 (noting that the firm had considered other women for partnership in the past and that women's candidacy had been viewed favorably so long as they were traditionally feminine).

73. Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L.R. ONLINE 1, 13 (2020).

74. *Id.* at 8–10; Ilona M. Turner, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007*). But see* Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 836 (2020) (arguing that casting discrimination against transgender people as sex stereotyping is harmful, in part because it "reif[ies] transgender persons' birth-designated sex as their legal sex").

employer would rely on sex stereotypes: assuming that a person will be sexually attracted solely to people of the "opposite" sex is a stereotype based on that individual's sex. Similarly, expecting a person assigned female at birth to be a woman, or a person assigned male to be a man, is a stereotype based solely upon that person's sex as assigned at birth. Thus, discrimination against employees for being gay or transgender impermissibly punishes them for failure to conform to sex-based stereotypes.[75]

Ms. Stephens, represented by the Equal Employment Opportunity Commission ("EEOC"), relied on this argument,[76] and the lower courts in her case accepted it as the basis of their holdings.[77] The EEOC had previously adopted similar logic for protection of sexual orientation in an agency adjudication, stating that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms" and thus that sexual orientation discrimination was impermissible sex stereotyping under Title VII.[78]

Despite the ubiquity of the sex-stereotyping logic in lower court cases, the *Bostock* majority opinion did not directly address it.[79] The Court did reaffirm in *Bostock* that sex stereotyping—as traditionally applied to a cis, binary plaintiff—is prohibited under Title VII, stating that "an employer who fires both [a male employee and a female employee] for failing to fulfill traditional sex stereotypes doubles rather

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75. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 346 (7th Cir. 2017) ("Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype . . . she is not heterosexual."); Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018) ("Viewing the relationship between sexual orientation and sex through the lens of gender stereotyping provides yet another basis for concluding that sexual orientation discrimination is a subset of sex discrimination. Specifically, this framework demonstrates that sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.").

76. Brief for Respondent Aimee Stephens at 4, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 2745392.

77. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 577 (6th Cir. 2018) ("Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.").

78. Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015). Because Congress did not grant the EEOC full authority to promulgate substantive statutory interpretations with the force of law, courts generally do not give the agency's interpretations controlling deference under *Chevron, U.S.A v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). *See* Eric Drieband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?*, 32 ABA J. LAB. & EMP. L. 93 (2016) (noting various approaches regarding deference to EEOC interpretations of statutes).

79. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) (quoting *Price Waterhouse* for the proposition that an employee's sex is irrelevant to employment decisions but not mentioning sex stereotyping); *see* McGinley et al., *supra* note 73, at 8–10.

than eliminates Title VII liability."[80] Justice Alito's dissent paid more attention to the plaintiffs' sex-stereotyping arguments, rejecting them because, in his view, expectations of heterosexuality are not sex stereotypes, as heterosexuality is a trait expected equally of men and women.[81] The Court's choice not to address the *Price Waterhouse* argument as a basis of the main holding has been criticized as "jarring" because of the argument's prevalence in lower court cases.[82]

2. Sex-Plus Discrimination

Another line of Title VII cases provides a different route to the *Bostock* result: sex-plus discrimination, a subset of sex-discrimination claims in which plaintiffs claim they were mistreated based on their sex in combination with another feature. In such cases, an employee typically alleges that the employer treated a certain characteristic, like parenthood or marital status, differently in employees of different sexes.[83] Courts have generally limited the "plus" characteristic to either an immutable characteristic, such as race, or to the exercise of a fundamental right, such as child rearing.[84]

Though the term might imply otherwise, sex-plus discrimination is not discrimination on "more" than sex—instead, it is a judicial "heuristic"[85] used to recognize sex discrimination that applies only to certain members of the disfavored class (those with the given characteristic).[86] In such cases:

> [W]hen one proceeds to cancel out the common characteristics of the two classes being compared (e.g., married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and sex remains

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80. *Bostock*, 140 S. Ct. at 1742–43.

81. *See id.* at 1763–64 (Alito, J., dissenting) (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 370 (7th Cir. 2017) (Sykes, J., dissenting)).

82. McGinley et al., *supra* note 73, at 9:

> It is the argument's ubiquity and persuasiveness that renders its absence in the majority's opinion in *Bostock* jarring. To be clear, the majority reaffirms the sex stereotyping doctrine in *dicta*, and Justice Alito's dissent discusses and rebukes the argument in earnest, but neither the six-justice majority nor Justice Kavanaugh's dissent analyzes whether sexual orientation discrimination reflects sex stereotypes.

For an argument that not relying heavily on the sex-stereotyping argument was a positive development in that the court thereby avoided classifying transgender people as "gender nonconformers," which would imply that a trans woman, for example, was not really a woman, see Schoenbaum, *supra* note 74.

83. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam).

84. *See* Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980); *see also* Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C. L. REV. 469, 477 (2019).

85. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2d Cir. 2004).

86. *Id.*; Chadwick v. WellPoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009).

> the only operative factor in the equation. Thus, although the protected class need not include all women, the plaintiff must still prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men.[87]

In this example, the employer discriminates not against women generally (which would be a plain violation of Title VII), nor against married people generally (which would not), but against married women specifically.[88] Thus, sex-plus claims target not animus against an entire protected class, but more specific biases against certain members of a protected class who also have another characteristic.[89] The employer's targeted discrimination—against a specific trait within a protected class—violates Title VII because the employee's sex is the "operative factor" in the discrimination.[90]

The Supreme Court first approved a sex-plus theory, though not by that name, in the 1971 case *Phillips v. Martin Marietta Corporation*.[91] In *Phillips*, the Court confronted an employer's policy of hiring men, but not women, who were parents of young children.[92] The appellate court had held that the policy did not violate Title VII because while the employer clearly treated parenthood differently in men than in women, it also had a general preference for hiring women—so long as they were childless.[93] The employer thus had no general bias against women but treated a characteristic—parenthood—differently in men than it did in women.[94] In reversing the Fifth Circuit, the Supreme Court established that treating a subset of women differently than a similarly situated subset of men violated Title VII's prohibition on sex discrimination, regardless of the employer's treatment of women as a whole.[95]

Over time, the sex-plus doctrine came to include other types of "plus" characteristics. These are typically characteristics protected by

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87. Coleman v. B–G Maint. Mgmt., 108 F.3d 1199, 1203 (10th Cir. 1997). The Tenth Circuit has since ruled that a sex-plus plaintiff is not required to show that the employer mistreated an entire subclass, but only that the employer mistreated the individual plaintiff based on their sex. *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1047 (10th Cir. 2020).

88. *Coleman*, 108 F.3d at 1203.

89. Marc Chase McAllister, *Sexual Orientation Discrimination as a Form of Sex-Plus Discrimination*, 67 BUFF. L. REV. 1007, 1010–11 (2019).

90. *Coleman*, 108 F.3d at 1203.

91. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam).

92. *Id.* at 544.

93. *Id.* at 543.

94. *Id.*

95. *Id.* at 543–44 ("[Title VII] 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.").

Title VII itself, like race,[96] or unprotected by any antidiscrimination statute, like parenthood[97] or marital status.[98] Prior to *Bostock*, some commentators had suggested that sexual-orientation discrimination could be recognized as a form of sex-plus discrimination.[99] A sex-plus framing of a sexual-orientation discrimination claim would entail arguing that the employer treated attraction to a given gender differently based on the employee's sex—that is, the employer tolerated attraction to men in female employees but not in male employees.[100] In 2018, the First Circuit held that a plaintiff could pursue a sexual-orientation discrimination claim under a sex-plus theory as long as that plaintiff "demonstrates that he or she was discriminated *at least in part* because of his or her gender."[101] Other circuit-level cases, including those that eventually made their way to the Supreme Court with *Bostock*, did not explicitly adopt the sex-plus framework in holding Title VII protected sexual orientation.[102] Case law and scholarship regarding the application of a sex-plus theory to antitrans discrimination is less common, but the logic is much the same: if the employer tolerates a feminine-coded gender presentation in employees assigned female at birth, it cannot treat that same presentation differently in an employee solely because the employee was assigned male at birth.

As with the sex-stereotyping argument, the *Bostock* opinion did not directly address a sex-plus basis for its holding.[103] Some of *Bostock*'s reasoning, however, implicitly recognizes a sex-plus component of the discriminatory treatment at issue. According to the Court, an employer that, for example, discriminates against a gay man but not against a straight woman impermissibly treats the characteristic of sexual attraction towards men differently based on the employee's sex:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.[104]

96. *See, e.g.*, Lam v. Univ. of Haw., 40 F.3d 1551 (9th Cir. 1994); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980).

97. *See, e.g.*, *Phillips*, 400 U.S. 542.

98. *See, e.g.*, Coleman v. B–G Maint. Mgmt., 108 F.3d 1199 (10th Cir. 1997).

99. *See, e.g.*, McAllister, *supra* note 84.

100. *Id.* at 1011–13.

101. Franchina v. City of Providence, 881 F.3d 32, 54 (1st Cir. 2018).

102. *See* McAllister, *supra* note 84, at 1036–56 (discussing cases in the Seventh and Second Circuits).

103. *See* discussion *supra* Part I.C.2.

104. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

Similarly, an employer that discriminates against a person assigned male at birth who identifies and presents as a woman but tolerates similar feminine-coded presentation in employees assigned female at birth impermissibly differentiates its employees based on sex:

> Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.[105]

Some commentators have suggested that the Court's treatment of the case thus amounted to a sex-plus analysis, with the employees' sexual attraction or gender presentation serving as the "plus" characteristic that the employers impermissibly treated differently based on the employee's sex.[106] The Court's opinion did not frame the issue as a sex-plus case, though it did rely in some parts on *Phillips*[107] for the proposition that the employer's description of its discriminatory policy was irrelevant to Title VII liability.[108] The sex-plus line of cases was thus used to reject the employers' contention that their intent to discriminate on the basis of sexual orientation or gender identity shielded them from liability for sex discrimination, but it was not employed as a main vehicle for reaching the result of the case.[109]

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Scholars and pundits have proposed a host of theories on why the *Bostock* decision came out the way it did, both in substance and in which Justices joined the majority.[110] Whatever the Court's reasons for

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105. *Id.* at 1741–42.

106. Shirley Lin, *SCOTUS' Landmark Reading of Title VII "Sex" as Encompassing Sexual Orientation and Gender Identity*, LAW PROFESSOR BLOGS NETWORK: HUM. RTS. HOME BLOG (June 15, 2020), https://lawprofessors.typepad.com/human_rights/2020/06/scotus-landmark-reading-of-title-vii-sex-as-encompassing-sexual-orientation-and-gender-identity.html [https://perma.cc/QL55-FBJV] ("[I]mplicitly, the Court for now viewed both [sexual orientation and transgender] statuses as a 'plus' in the vein of its sex-plus precedent, rather than as subsets of 'sex.' ").

107. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam).

108. *Bostock*, 140 S. Ct. at 1744.

109. *See id.* at 1743–44.

110. *See, e.g.*, Charlton C. Copeland, *Another Explanation of Justice Gorsuch's* Bostock *Vote*, REGUL. REV. (July 22, 2020), https://www.theregreview.org/2020/07/22/copeland-another-explanation-gorsuch-bostock-vote/ [https://perma.cc/P2DJ-DZ4N] (suggesting the *Bostock* decision furthers Justice Gorsuch's "battle against the *Chevron* doctrine" by bolstering the Court's credibility among liberals); Ed Whelan, *Did the Chief Assign* Bostock *to Gorsuch? Probably Not*, NAT'L REV. (July 13, 2020, 11:41 AM), https://www.nationalreview.com/bench-memos/did-the-chief-assign-bostock-to-gorsuch-probably-not/ [https://perma.cc/73TA-SUC6] (suggesting Chief Justice Roberts joined the opinion "to avoid a 5-4 ruling on a highly controversial issue," or "in

its approach, however, the *Bostock* opinion leaves many questions unanswered.[111] This Note focuses on just one of these: how Title VII will apply to plaintiffs who are discriminated against because of their nonbinary gender identities. The *Bostock* majority's repeated use of the phrase "homosexual or transgender" has raised questions about the holding's applicability to bisexual individuals and has led to criticism over the opinion's "bisexual erasure."[112] In a similar vein, the Court's narrowly framed textualist approach—hinging entirely on the statutory term "sex" without defining it—raises questions about how nonbinary Title VII plaintiffs will be viewed by courts post-*Bostock*.[113]

II. NONBINARY PLAINTIFFS POST-*BOSTOCK*

The debate over Title VII's coverage of nonbinary gender identity persists post-*Bostock* in part because of the majority's nonengagement with contemporary gender theory. While the Court's approach arguably does a disservice to nonbinary Americans by inviting continued debate over their antidiscrimination protections, *Bostock* is

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exchange for votes from liberal justices"); Mark Joseph Stern, *Neil Gorsuch Just Handed Down a Historic Victory for LGBTQ Rights*, SLATE (June 15, 2020, 12:19 PM), https://slate.com/news-and-politics/2020/06/supreme-court-lgbtq-discrimination-employment.html [https://perma.cc/T2ZA-W9N5] (attributing Justice Gorsuch's position to "genuine integrity" and commitment to textualist principles).

111. Lower courts have grappled with the opinion's diverse implications, many of which are not relevant to this Note. These include the opinion's discussion of but-for causation, Black v. Grant Cnty. Pub. Util. Dist., 820 Fed. App'x 547, 551–52 (9th Cir. 2020); emphasis on individual rather than collective analysis regarding discrimination, Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038 (10th Cir. 2020); the viability of sex-plus-age claims, *id.*; and implications for other federal antidiscrimination statutes, Adams *ex rel.* Kasper v. Sch. Bd. of St. John's Cnty., 968 F.3d 1286 (11th Cir. 2020) (relying on *Bostock* in holding that disallowing a transgender student from using the bathroom aligned with his gender identity constituted sex discrimination under Title IX), *vacated sub nom* Adams v. Sch. Bd, 3 F.4th 1299 (11th Cir. 2021) (affirming the judgment against the school board on Fourteenth Amendment grounds but not reaching the Title IX question).

112. *See, e.g.*, Heron Greenesmith, *Supreme Court LGBTQ Protections Cover Bisexual and Pansexual Workers, Too*, TEEN VOGUE (June 18, 2020), https://www.teenvogue.com/story/supreme-court-lgbtq-protections-bisexual-pansexual-workers [https://perma.cc/4WEB-A44J]; Nancy Marcus, Bostock*'s Bisexual Erasure*, L.A. BLADE (June 25, 2020), https://www.losangelesblade.com/2020/06/25/bostocks-bisexual-erasure/ [https://perma.cc/RW3Z-T9XJ].

113. *See* Vin Gurrieri, *Questions About 'Nonbinary' Bias Linger After LGBT Ruling*, LAW360 (June 19, 2020, 9:06 PM), https://www.law360.com/articles/1284955/questions-about-nonbinary-bias-linger-after-lgbt-ruling [https://perma.cc/E8R8-A2F5] (collecting practitioners' views on the issue); Ryan Anderson, *Symposium: The Simplistic Logic of Justice Neil Gorsuch's Account of Sex Discrimination*, SCOTUSBLOG, (June 16, 2020, 1:28 PM), https://www.scotusblog.com/2020/06/symposium-the-simplistic-logic-of-justice-neil-gorsuchs-account-of-sex-discrimination/ [https://perma.cc/M8MC-P7BT] (arguing that nonbinary plaintiffs are excluded under *Bostock*'s logic).

only the latest—not the only—high-profile Title VII case relevant to the argument.

This Part first turns to the opinion itself and examines how it reinforced binary conceptions of gender. It then details the ongoing debate over how Title VII applies to nonbinary individuals. Finally, it explores possible paths forward for nonbinary Title VII plaintiffs and the arguments likely to be raised against them.

A. Bostock *and the Binary*

Though all three plaintiffs before the Court in *Bostock* subverted heterosexual and cisgender norms, all three also had binary gender identities. Gerald Bostock and Donald Zarda were men attracted to men, and Aimee Stephens was a trans woman assigned male at birth.[114] These identities challenge hetero- and cis-normative beliefs but do not necessarily undermine binary views of sex and gender. The particular identities of the plaintiffs before the Court perhaps account for the opinion's repeated use of the phrase "homosexual or transgender,"[115] but the usage of the phrase raised questions about whether the case's holding applied to other sexual and gender identities.[116] Nonbinary gender identities are just one such identity. This Part explores how the *Bostock* opinions engaged—or failed to engage—with gender diversity beyond the binary.

The Court appears to have taken great care in its usage of the terms "sex" and "gender," with the majority using the latter only five times.[117] This may reflect an effort toward linguistic precision in response to long-standing criticism of courts' inexact uses of gender terminology.[118] In contrast, the opinions reveal less sensitivity to contemporary criticisms of binary conceptions of gender. The majority opinion and Justice Alito's dissent repeatedly used language like "the other sex" and "opposite sex," revealing a conception of two discrete and opposing sex categories.[119] The majority's hypotheticals presupposed a

114. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737–38 (2020).

115. *Id.* at 1737, 1741, 1742–46, 1753.

116. *See* McGinley et al., *supra* note 73, at 14–15; Greenesmith *supra* note 112; Marcus *supra* note 112.

117. *Bostock*, 140 S. Ct. at 1738, 1739, 1748–49.

118. *See* Meredith Gould, *Sex, Gender, and the Need for Legal Clarity: The Case for Transsexualism*, 13 VAL. U. L. REV. 423 (1979); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & C.R.L. REV. 573 (2009).

119. *Bostock*, 140 S. Ct. at 1740 (discussing comparison of "one sex as a whole versus *the other* as a whole" (emphasis added)); *id.* at 1748 ("How could sex be necessary to the result if a member of the *opposite sex* might face the same outcome from the same policy?" (emphasis added)); *id.* at 1758 (Alito, J., dissenting) ("Both men and women may be attracted to members of *the opposite*

gender binary: the hypothetical employees, "Hannah" (a woman) and "Bob" (a man), appear to fall neatly into the categories of man and woman.[120] On the other hand, the majority sometimes referred to employees "of a different sex," rather than of the "opposite sex," suggesting room for more than two binary options.[121] Thus, while the *Bostock* holding has clear, groundbreaking legal results for gay and transgender victims of employment discrimination, it at the same time left the law on uncertain footing with regard to binary conceptions of gender and sexuality.

Of all the opinions, Justice Alito's dissent displayed the most awareness of gender diversity. Though he ignored distinctions between sex and gender by linking the physical condition of pregnancy exclusively to women,[122] he also paid more attention to gender diversity than did the majority opinion. At one point, his dissent references "a different gender," hinting at a possibility of more than two binary genders.[123] In Justice Alito's framing, however, gender diversity is a hazard. He went on to write that, under *Bostock*, a "gender fluid . . . person who has not undertaken any physical transitioning . . . [can] claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time."[124] In drawing on the "bathroom predator" myth,[125]

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sex, members of the same sex, or members of *both sexes*." (emphases added)); *id.* at 1748 ("[T]he employers' policies in the cases before us have the same adverse consequences for men and women.").

120. *Id.* at 1741 (majority opinion):

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.

121. *Id.* at 1737 ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of *a different sex*." (emphasis added)); *id.* at 1740 ("[A]n employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual *of another sex*—discriminates against that person in violation of Title VII." (emphasis added)).

122. *Id.* at 1775 (Alito, J., dissenting) ("[M]otherhood, by definition, is a condition that can be experienced only by women . . . ."). Some people who are not women have wombs and are capable of bearing children. *See* Samantha Schmidt, *A Mother, But Not A Woman*, WASH. POST (Aug. 16, 2019), https://www.washingtonpost.com/dc-md-va/2019/08/16/non-binary-pregnant-navigating-most-gendered-role-all-motherhood/?arc404=true [https://perma.cc/A45Q-5WBS].

123. *Bostock*, 140 S. Ct. at 1758 (Alito, J. dissenting) ("[I]ndividuals who are born with the genes and organs of either biological sex may identify with a different gender.").

124. *Id.* at 1779 (Alito, J., dissenting).

125. Debates over trans equality have been peppered with unsupported assertions that allowing people to use facilities aligned with their gender identity will threaten the safety of others, particularly cis women. *See* German Lopez, *Anti-Transgender Bathroom Hysteria, Explained*, VOX, https://www.vox.com/2016/5/5/11592908/transgender-bathroom-laws-rights (last updated Feb. 22, 2017, 7:27 PM) [https://perma.cc/A756-6DZB]. There is no evidence to support these

Justice Alito signaled awareness of contemporary gender theory but also disapproval of it. As he wrote, an argument can be made that "neither 'sexual orientation' nor 'gender identity' is tied to either of the two biological sexes."[126] As discussed in the next Part, some commentators have taken Justice Alito's invitation, attempting to limit *Bostock*—and Title VII's protection—to plaintiffs whose sexual and gender identities leave binaries undisturbed.[127]

B. The Nonbinary Debate

After *Bostock*, it is clear that Title VII prohibits employment discrimination on the basis of homosexuality and binary transgender identity. But commentators still debate whether Title VII prohibits discrimination on the basis of nonbinary gender identity.[128] To make direct use of the *Bostock* opinion's textualist logic, plaintiffs will have to find ways to link their discriminated-against trait to the narrowest definition of "sex," which the *Bostock* Court understood as a purely physical categorization.[129] This logic presents challenges to arguments in favor of Title VII protection for certain sexualities and gender identities not represented in the *Bostock* cases. For example, it is unclear whether discrimination against a bisexual employee constitutes sex discrimination, because bisexuality can be defined without reference to the sex of the employee—and an employer that discriminates against an employee for attraction to both males and females would presumably not tolerate that attraction in an employee of any sex.[130] Whether other sexual orientations not defined in reference

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concerns. Amira Hasenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL'Y 70 (2019).

126. *Bostock*, 140 S. Ct. at 1758 (Alito, J., dissenting).

127. Anderson, *supra* note 113 ("This understanding of gender identity is utterly detached from sex, not inextricably connected to it. How will Gorsuch handle a plaintiff like this? . . . The logic of Gorsuch's opinion, such as it is, makes no sense once you get beyond "trans" gender and consider contemporary gender theory.").

128. *See, e.g.*, MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 27.13 (2020) (arguing Bostock clearly applies to nonbinary individuals); Anderson, *supra* note 113 (arguing it clearly does not); McGinley et al., *supra* note 73 (arguing that Bostock leaves a gap to be filled by future cases).

129. *See Bostock*, 140 S. Ct. at 1739 ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

130. *See, e.g.*, Greenesmith, *supra* note 112 ("For non-legal readers, Gorsuch's 'gay or transgender' language might sound as if it deliberately excludes bisexual and pansexual people (who can be transgender, cisgender, or nonbinary) from protection."); Marcus, *supra* note 112 (noting that if a bisexual woman dates a man she may be less likely to face workplace discrimination than when she dates a woman and that "[t]he only thing that has changed in the two scenarios is the sex of the person [she is] dating, not [her] sexual orientation").

to a person's sex (like pansexuality or asexuality) are protected is even murkier.[131]

In this vein, some have suggested that *Bostock*'s logic cannot extend to nonbinary plaintiffs because nonbinary gender identity, unlike binary transgender identity or homosexuality, "is utterly detached from sex, not inextricably connected to it."[132] In this understanding, because nonbinary gender identity does not define itself with reference to a biological sex, the *Bostock* opinion's logic cannot accommodate it: a nonbinary plaintiff cannot link their discriminated-against trait to the narrowest definition of the statutory term "sex," and thus sex cannot have been a but-for cause in the action taken against them.[133]

Other commentators have argued that *Bostock*'s logic clearly extends to nonbinary gender identities, because nonbinary identities are understood against the backdrop of an individual person's biological sex:

> *Bostock* . . . applies with equal force to non-binary people as it does to transgender men and women. . . . A person is understood as non-binary by virtue of sex-based characteristics. Thus, an employer who fires an employee for being non-binary penalizes the non-binary person for "traits or actions" tolerated in binary male or female colleagues, and inevitably sex is a but-for cause.[134]

In this view, discrimination against nonbinary people is clearly sex discrimination because an employer that discriminates against a nonbinary person almost certainly objects to sex-associated characteristics or gender presentations in the nonbinary employee that

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131. Nancy C. Marcus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223, 230 (2020); *see also* McGinley et al., *supra* note 73, at 10:

> [I]t is possible that *Bostock* bans discrimination based on bisexuality because bisexuality can be defined by the employee's sex (i.e., firing a male employee because he is attracted to, *inter alia*, men, a trait or action the employer tolerates in his female colleagues). However, it is also possible that *Bostock* does not prohibit discrimination based on bisexuality because bisexuality can just as easily be defined without regard to the employee's sex (i.e., firing an employee for being attracted to individuals of either binary sex). Even less clear is whether *Bostock* bans discrimination based on pansexuality (i.e., attraction to individuals regardless of sex), asexuality (i.e., no sexual attraction), or demisexuality or graysexuality (i.e., limited sexual attraction), all of which manifest the sex-based stereotype of heterosexism but none of which definitionally rely on the sex of the employee.

132. Anderson, *supra* note 113; *see also Bostock*, 140 S. Ct. at 1758 (Alito, J., dissenting) ("[N]either 'sexual orientation' nor 'gender identity' is tied to either of the two biological sexes.").

133. *Cf.* Daniel Hemel, *The Problem with That Big Gay Rights Decision? It's Not Really About Gay Rights*, WASH. POST (June 17, 2020.), https://www.washingtonpost.com/outlook/2020/06/17/problem-with-that-big-gay-rights-decision-its-not-really-about-gay-rights/ [https://perma.cc/V92L-DE5Y] (noting that if an employer discriminates against all bisexual employees regardless of gender, "[t]he same trait—being attracted to both men and women—is treated the same for both men and women").

134. ROSSEIN, *supra* note 128, § 27.13.

it tolerates in binary male or female employees. This interpretation is attractive in both its simplicity and its result but may risk oversimplifying *Bostock*'s reasoning and leaving nonbinary plaintiffs vulnerable to arguments against Title VII protection.

Neither of these positions—that *Bostock* clearly excludes or clearly includes nonbinary gender identity—is eminently apparent. On the one hand, as discussed above, the Justices showed little interest in disrupting binary conceptions of gender. This fact may well have consequences for future plaintiffs, since parties and courts will be able to point to nonbinary gender identity as a distinguishing fact in future cases, with little guidance on how to approach such a plaintiff.[135] On the other hand, it seems almost certain that an employer who discriminates against a nonbinary employee will consider sex- and gender-related characteristics in taking adverse employment actions, and plaintiffs will be able to point to impermissible distinctions made by the employer between the nonbinary individual and the binary individuals who were not discriminated against. If the plaintiff can point out where sex played a role in the employer's decision, *Bostock*, with its strong statement against the consideration of sex in employment decisions, may be a helpful precedent.[136] Pre-*Bostock* jurisprudence, however, may be even more important.

C. Nonbinary Title VII Plaintiffs: Bostock *and Beyond*

Constructing a hypothetical claim by a nonbinary plaintiff elucidates routes toward a more inclusive Title VII jurisprudence. Before proceeding, it is important to note that, as discussed above, gender identities and presentations are highly variable and deeply personal. While a plaintiff whose presentation directly challenges binary assumptions by combining traditionally masculine and feminine traits is beneficial for hypothetical purposes, it should not be assumed that all nonbinary individuals look like the plaintiff imagined below. Nonbinary people are not necessarily androgynous and do not necessarily use gender neutral pronouns. Conversely, a person who combines masculine and feminine traits or dress and uses gender-neutral pronouns is not necessarily nonbinary. The following is meant only to reveal gaps and opportunities in Title VII jurisprudence in response to ongoing debates about *Bostock*'s implications for gender-diverse plaintiffs in antidiscrimination law.

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135. *Cf.* Hemel, *supra* note 133 ("Worryingly, Gorsuch's opinion avoids using the word 'bisexual' or any acronym that contains it, suggesting that this group still may lack robust protection.").

136. *Bostock*, 140 S. Ct. at 1741 (majority opinion).

For this discussion, assume the following: Robin identifies as nonbinary, uses they/them pronouns, and wears clothing without regard to gender categories—Robin sometimes wears skirts, sometimes wears ties, sometimes wears makeup, and sometimes has untrimmed facial hair. Robin sometimes wears feminine-coded apparel or makeup while simultaneously wearing masculine-coded apparel or a beard. Robin is the only nonbinary employee at the Employer. Other employees wear beards, makeup, and clothing in ways that align with binary expectations of gender—men wear beards and ties, and women wear skirts and makeup. The Employer is uncomfortable with Robin's appearance and fires them for no reason other than their nonbinary gender presentation. Robin decides to sue the Employer under federal law.

1. Post-*Bostock*, Title VII Prohibits Gender- Identity Discrimination

The simplest argument in Robin's favor, and the one generally endorsed by the political left, is that *Bostock* itself establishes that Title VII prohibits gender-identity discrimination, including against those with nonbinary gender identities. The Employer will no doubt contest this interpretation, arguing that nonbinary gender identity, unlike binary transgender identity or homosexuality, cannot be linked to the statutory term "sex." The Employer will argue that it fired Robin not for failure to conform to their sex assigned at birth, but for their failure to present as one binary gender or the other. It is not Robin's sex that is causing the Employer's discomfort, but their combination of gendered traits. That is, the Employer does not care what Robin's gender is—so long as it is clearly defined as either man or woman. Some courts may be willing to accept this reasoning: unlike the *Bostock* employers, the Employer here is not requiring that Robin adhere to a gender presentation *aligned* with their sex as assigned at birth. Rather, the Employer is requiring that Robin present as either a man or a woman, *regardless* of their sex as assigned at birth. If we assume, as the *Bostock* Court did, that "sex" in Title VII refers only to a physical categorization, the Employer's action is arguably outside the statute's prohibition because Robin's medically assigned sex is irrelevant to the employer's decision.

Bostock alone provides little help in rebutting this argument. As explored above, the *Bostock* decision hinged on the still-undefined term "sex."[137] In holding that discrimination against homosexual and

137. *See supra* Part I.B (noting that *Bostock* defers the definitional question of "sex").

transgender employees constitutes sex discrimination, the Court reasoned that because "homosexuality and transgender status are inextricably bound up with sex . . . to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[138] Assuming that the narrowest definition of sex applies, this logic extends imperfectly to nonbinary plaintiffs, because, unlike a transgender person whose gender identity is "opposite" their sex assigned at birth, a man who is sexually attracted exclusively to men, or a woman who is sexually attracted exclusively to women, nonbinary identity does not align or oppose itself with one biological sex or another. Thus, discrimination against people with nonbinary gender identities is less clearly linked to the narrowest definition of "sex," and given the textualist basis of the *Bostock* opinion, this raises potential problems for nonbinary plaintiffs seeking protection under Title VII.

2. Sex-Stereotyping and Sex-Plus Precedents Establish Title VII Protection

If direct reliance on *Bostock* fails, Robin could draw on pre-*Bostock* Title VII precedents to argue in favor of protection of nonbinary gender identity.

The *Price Waterhouse* line of sex-stereotyping cases provides a promising path forward, though by no means a sure one.[139] In that case, the accounting firm's objection to Ms. Hopkins was that she failed to adhere to gendered expectations of how a person of her sex should walk, dress, and speak.[140] In this hypothetical, the Employer's objection to Robin is similar—by not identifying or presenting as one of the binary genders, Robin is disrupting gendered stereotypes, regardless of what sex they were assigned at birth. Requiring Robin to present as either a man or a woman is to require them to conform to sex stereotypes: ideas linking ties and facial hair to masculinity and skirts and makeup to femininity are themselves sex stereotypes, as is the idea that a person can or should be exclusively masculine or feminine. Under *Price Waterhouse*, the Employer's insistence that Robin conform to such gendered expectations is thus impermissible sex stereotyping.[141]

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138. *Bostock*, 140 S. Ct. at 1742.

139. Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (gender stereotyping is sex discrimination prohibited by Title VII); *see supra* Section I.C.1 (discussing the *Price Waterhouse* line of sex-stereotyping cases).

140. *Price Waterhouse*, 490 U.S. at 256.

141. *See id.* at 258 (holding that when an employer discriminates against an employee based on gendered expectations, the employer has violated Title VII).

Sex-plus discrimination precedents may also provide a basis for Robin's argument. Robin engages in a variety of behaviors that the Employer tolerates in other employees: Robin's coworkers wear skirts, ties, makeup, and beards, just as Robin does. Thus, regardless of Robin's sex as assigned at birth, the Employer objects to characteristics in Robin that it allows in employees of another sex. It allows skirts and makeup for women and ties and beards for men; Robin wears all these things. The Employer thus treats the same characteristics differently in employees of different sexes—impermissible under sex-plus discrimination precedent.[142]

In response to these arguments, the Employer is again likely to defend its actions by hewing closely to the narrowest definition of "sex." The Employer will attempt to distinguish its action from those in sex-stereotyping and sex-plus cases by arguing that what is at issue here is not sex at all—it is gender. That is, it is unimportant to the Employer whether Robin was assigned male, female, intersex, or anything else at birth. The Employer does not care whether Robin presents as a woman or a man or whether that presentation aligns with what may have been assumed about Robin at their birth. Instead, the Employer wants Robin to pick one binary gender presentation and stick to it. If the Employer ultimately does not care whether Robin presents as a man or a woman, its action is arguably distinguishable from that in *Price Waterhouse*, where the employer wished for Ms. Hopkins to adhere to the stereotypes associated with her sex as assigned at birth. As to sex-plus logic, though the Employer objects to characteristics in Robin that it tolerates in its binary employees, its bias does not clearly attach to a particular sex. Rather, the bias is directed at people—of any assigned sex—that exist somewhere outside the gender binary. Here again, the *Bostock* opinion's textualist logic poses a potential barrier to a nonbinary plaintiff's Title VII claim.

3. Despite *Bostock*, "Sex" Includes Gender

Even if reliance on pre-*Bostock* Title VII precedents fails, *Bostock* left open a crucial question that may provide another opportunity: the definition of the statutory term "sex." Though the Court studiously avoided defining the term, it did not foreclose future arguments for an expansive understanding of "sex" in Title VII.[143] Thus, nonbinary plaintiffs still could prevail on Title VII claims on the theory

142. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (sex-plus discrimination); *see supra* Section I.C.2 (explaining the concept of sex-plus discrimination and the precedents behind sex-plus discrimination).

143. *Bostock*, 140 S. Ct. at 1739.

that the term encompasses gender identity—even if that gender identity is not associated with a biological sex.

Reading Title VII's sex discrimination prohibition to include gender identity makes sense. At the time of the bill's passage, "sex" referred to a host of social markers that contemporary gender theory would refer to as gender.[144] In the 1960s, "gender" and "sexual orientation" had not yet entered the common lexicon,[145] and the term "sex" was used to denote concepts that today would likely be described as "gender."[146] To hold, therefore, that "sex" in Title VII includes gender is likely in line with the drafters' intent.[147]

Further, Title VII precedents support a reading of "sex" as broader than mere biological categorization. As we have seen, gender discrimination is implicated in the sex-stereotyping line of cases.[148] Indeed, the *Bostock* majority itself relied on understandings of "sex" as "gender" in its discussion of Title VII precedents, though without explicit acknowledgement.[149] "Sex" in Title VII has thus been operating as "gender" since at least *Price Waterhouse*, and likely since enactment, at least with regard to people with cis, binary gender identities. Applying that logic to nonbinary plaintiffs would be in accord not only with social progress but also with precedent.

Bostock's deferral of the definitional question of "sex" provides opportunities for future nonbinary sex discrimination plaintiffs, but also provides fuel for their opponents. The Supreme Court's decision not to read the term broadly when given a high-profile chance to do so might signal to lower courts that the term is to be construed narrowly. Courts' historical predilections for "cramped" readings of Title VII also may present a challenge.[150] Conceptions of the provision's history may also

144. Weiss, *supra* note 118, at 618 ("[W]hen the Civil Rights Act of 1964 was passed, sex had a meaning functionally different from its meaning today. It was generally accepted that, as Freud had explained, 'anatomy is destiny.' Sex referred to a whole constellation of biological characteristics inextricably intertwined with correlative social, behavioral, and psychological conventions.").

145. William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1551–54 (2021).

146. *Id.* at 1555.

147. Weiss, *supra* note 118, at 618.

148. *See supra* Part I.C.1 (discussing how sex-stereotyping case law seems to implicitly address gender discrimination).

149. Eskridge et al., *supra* note 145, at 1559.

150. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) ("This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose."); Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 63–67 (2016) (discussing how the scope of antidiscrimination law has shrunk because Title VII jurisprudence lacks a "compelling theory of antidiscrimination"); Vicki Schultz, *Taking Sex*

play a role: Title VII's sex-discrimination provision is popularly understood as an amendment introduced with the purpose of scuttling the entire bill, since the idea of sex equality was considered outlandish at the time.[151] Such an understanding of Title VII's history allows courts to dismiss arguments that rely on the statute's remedial purpose as a basis for expanding recognition of its scope.[152] Scholars have recently questioned this narrative, drawing attention to the feminist advocates and lawmakers who contributed to the provision's passage.[153] Even so, attempts to explicitly interpret "sex" as including gender identity will run into objections raised by the *Bostock* dissents over original and ordinary meaning.[154] Further, prior to *Bostock*, some activists and legal scholars suggested that expanded legal recognition of gender diversity would threaten cis women's legal rights, suggesting that further protection will be similarly controversial.[155]

Thus, even with the wealth of arguments in favor of Title VII's protection of nonbinary individuals, courts may continue to regard apparent expansions of Title VII with suspicion, especially given the politically polarizing debates that have accompanied *Bostock*.[156] This is not to say that nonbinary Title VII plaintiffs have no recourse under the statute. Rather, it signals that people interested in achieving comprehensive gender equality should be wary of arguments that take the *Bostock* holding as an unqualified victory.

Discrimination Seriously, 91 DENV. U. L. REV. 995, 1050–1101 (2015) (surveying federal jurisprudence that curtailed the progress initially made by Title VII).

151. Barzilay, *supra* note 150, at 67–68.

152. *See* Schultz, *supra* note 150, at 1020 ("This mythical reading reinforces the idea of women as secondary workers, depicting women's interests as so far outside the realm of employment that it is inconceivable that Congress would redress workplace sex discrimination as a serious social problem.").

153. Barzilay, *supra* note 150, at 68; Schultz, *supra* note 150, at 1020 (challenging the understanding of Title VII's sex provision as a mere ploy or "joke" and emphasizing the role women activists played in its passage).

154. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) ("If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."); *id.* at 1828 (Kavanaugh, J., dissenting) ("As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination.").

155. *See* Christen Price, *Women's Spaces, Women's Rights: Feminism and the Transgender Rights Movement*, 103 MARQ. L. REV. 1509, 1511 (2020) ("[C]ertain of the transgender rights movement's legal and policy goals, especially as manifested in gender identity nondiscrimination laws, represent a new kind of 'forced closeness,' which elevates male identities, priorities, and desires, and undermines women's rights.").

156. *See, e.g.*, Hemel, *supra* note 133 ("[T]he turn to textualism reflects a strategic choice to turn down the temperature of the culture wars. . . . Liberals would not take well to Gorsuch . . . lecturing them on equality and acceptance. . . . Those who cling to anti-LGBT views, meanwhile, would not respond well to the court telling them they are bigots.").

III. THE CONTINUED NEED FOR LEGISLATIVE CHANGE

Bostock represents significant progress toward gender and sexual-orientation equality. While Title VII is limited to the employment context,[157] other federal antidiscrimination statutes contain sex-discrimination language similar or identical to Title VII's.[158] There is not yet a Supreme Court case that applies the *Bostock* logic to those statutes, but lower courts have begun to do so.[159] No court has yet addressed the issue of whether Title VII prohibits discrimination on the basis of nonbinary gender identity. As this Note has shown, an eventual holding to that effect is not a foregone conclusion.

In January 2021, President Biden released an executive order directing federal agencies to apply *Bostock*'s logic to other federal laws with prohibitions on sex discrimination, extending protection to areas such as education, housing, and immigration law.[160] The executive order left behind *Bostock*'s "homosexual or transgender" language, characterizing *Bostock* as interpreting Title VII to cover sexual orientation and gender identity generally.[161] While the order makes no explicit mention of nonbinary gender identities, it appears to contemplate protection for people who do not neatly fit into the *Bostock* Court's "homosexual or transgender" categories.[162] Whether courts will accept this interpretation of *Bostock* in future litigation remains unclear. Because of this uncertainty, those interested in furthering gender equality, and especially equality for nonbinary people, must be aware of the arguments against *Bostock*'s applicability to sexual and gender minorities beyond the binaries. Further, advocates should continue to consider both legislative and litigation efforts to ensure more stable protections for people of all genders.

As noted in *Bostock*, particularly emphasized by the dissents, Congress has previously considered amendments to antidiscrimination

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157. 42 U.S.C. § 2000e-2 ("Unlawful Employment Practices").

158. *See, e.g.*, 20 U.S.C. § 1681(a) (prohibiting discrimination "on the basis of sex" in education); 42 U.S.C. § 3604 (prohibiting discrimination "because of . . . sex" in the rental or sale of housing); 15 U.S.C. § 1691 (prohibiting discrimination in credit transactions" on the basis of . . . sex").

159. After *Bostock*, some circuits have interpreted other antidiscrimination statutes as prohibiting discrimination on the basis of gender identity and sexual orientation. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613 (4th Cir. 2020) (concluding that a school district impermissibly discriminated on the basis of sex in violation of Title IX by preventing a transgender student from using the restroom that corresponded with his gender identity).

160. Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021).

161. *Id.*

162. *Id.* ("Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals . . . .").

law that would explicitly protect against gender-identity discrimination.[163] The victory of *Bostock*, while significant, should not mark the end of these legislative efforts. A 2019 House bill proposed amending all federal antidiscrimination laws (not just Title VII) to include an explicit prohibition on discrimination on the basis of gender identity.[164] The proposed amendment would insert a parenthetical after the term "sex" specifying that the term includes sexual orientation and gender identity. Title VII would thus read:

> It shall be an unlawful employment practice for an employer [to discriminate against an employee] because of such individual's race, color, religion, *sex (including sexual orientation and gender identity)*, or national origin.[165]

Proponents have described this amendment as "codify[ing] the *Bostock* decision,"[166] agreeing with the Biden administration that *Bostock*'s logic extends beyond homosexuality and transgender identity to cover gender identity more broadly. While this reading of the case is justifiable, it is not inevitable, especially with a generally conservative judiciary. Explicit statutory protection against gender identity discrimination would once and for all remove these questions from judicial debate, providing more stable protections for all people by minimizing the chances of unduly narrow judicial interpretation.

In addition to federal efforts, state legislatures should also adopt language explicitly prohibiting gender-identity discrimination. Several

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163. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1747 (2020) ("Since 1964, . . . Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation."); *id.* at 1755 (Alito, J., dissenting):

> Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H.R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty. This bill remains before a House Subcommittee.;

id. at 1822–23 (Kavanaugh, J., dissenting):

> In 2007, the U.S. House of Representatives voted 235 to 184 to prohibit employment discrimination on the basis of sexual orientation. In 2013, the U.S. Senate voted 64 to 32 in favor of a similar ban. In 2019, the House again voted 236 to 173 to outlaw employment discrimination on the basis of sexual orientation. Although both the House and Senate have voted at different times to prohibit sexual orientation discrimination, the two Houses have not yet come together with the President to enact a bill into law.

164. H.R. 5, 116th Cong. (2019).

165. *Id.* § 7 (emphasis added).

166. HRC Staff, *The Real-Life Implications of Biden's Bostock Executive Order*, HUM. RTS. CAMPAIGN (Jan. 21, 2021), https://www.hrc.org/press-releases/the-real-life-implications-of-bidens-bostock-executive-order [https://perma.cc/TR7C-7KJA].

states already have such statutes,[167] which play an important gap-filling role as national legislation stalls. Some states that have provided explicit protection for gender identity have done so via definition: for example, Washington state law prohibits discrimination on the basis of sexual orientation and defines sexual orientation to include "gender expression or identity."[168] Minnesota law is similar.[169] California law explicitly states that discrimination on the basis of "sex, gender, gender identity, gender expression" and "sexual orientation" is unlawful.[170] The terms "gender identity" and "gender expression" are expansive enough to afford statutory protection even as social and cultural ideas about gender change over time.

Amending Title VII to explicitly protect gender identity would more clearly reflect social understandings of the differences between sex and gender and reduce confusion in the legal world about the distinctions, if any, between the two terms. An amendment recognizing the social and cultural changes to the terms "sex" and "gender" since 1964 would help courts better understand claims by plaintiffs of all genders and minimize opportunities for narrow readings that could leave some plaintiffs unprotected.

Of course, federal legislation is famously slow moving. While legislation is desirable, it is unlikely to pass before courts are presented with complex sex-discrimination cases under *Bostock* and other Title VII precedents.[171] Because *Bostock* did not define the statutory term, Title VII plaintiffs can and should still argue that "sex" includes concepts that this Note has referred to as gender. This approach, too, has models at the state level: six states have interpreted statutory

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167. *See Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Sept. 13, 2021) [https://perma.cc/HL3S-HJ8T] (detailing which states have explicit protections for gender identity and/or sexual orientation, which states have interpreted laws to include such protections, and which states have no such protection at all).

168. WASH. REV. CODE ANN. §§ 49.60.030, 49.60.040(27) (West 2020) (prohibiting discrimination on the basis of sexual orientation and defining sexual orientation to include gender identity, respectively).

169. MINN. STAT. ANN. §§ 363A.02, 363A.03(44) (West 2021) (defining "sexual orientation" to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"); *see* Jess Braverman & Christy Hall, *The Groundbreaking Minnesota Human Rights Act in Need of Renovation*, MINN. STATE BAR ASS'N: HENNEPIN CNTY. BAR ASS'N, https://www.mnbar.org/hennepin-county-bar-association/resources/hennepin-lawyer/articles/2020/03/04/the-groundbreaking-minnesota-human-rights-act-in-need-of-renovation (last visited Sept. 13, 2021) [https://perma.cc/LL2F-4PLK] (arguing the Minnesota law should be amended to deal more clearly with gender identity).

170. CAL. GOV'T. CODE § 12920 (West 2020).

171. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1824 (2020) (Kavanaugh, J., dissenting) ("For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line.").

prohibitions on sex discrimination to reach discrimination on the basis of gender identity.[172] While a judicial interpretation approach to protection is less desirable because it is vulnerable to overruling and criticism as judicial overreach, it is also likely to be the most immediately available source of protection until Title VII is amended.

CONCLUSION

Bostock is a significant step towards meaningful equality for people of all genders and sexual identities. Still, it may not be enough. As social visibility of sexual and gender diversity increases, courts will inevitably be dragged into disputes over limits of antidiscrimination law. The *Bostock* decision provided few useful tools for navigating those cases, especially where nonbinary identities are concerned. An amendment to federal antidiscrimination law therefore remains a pressing policy priority: *Bostock* marks an important step on the way towards gender equality, but it should not be viewed as the end of the road.

*Meredith Rolfs Severtson**

172. *See, e.g.*, *Interpretive Statement 2018-1 Regarding the Meaning of "Sex" in the Elliot-Larsen Civil Rights Act (Act 453 of 1976)*, MICH. CIV. RTS. COMM'N (May 21, 2018), https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf [https://perma.cc/R4LF-E5EX] (resolving that sex discrimination "includes discrimination because of gender identity and discrimination because of sexual orientation"); *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, PA. HUM. RELS. COMM'N 2–3, https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf (last visited Sept. 13, 2021) [https://perma.cc/R968-N73B] (defining terms related to sex and gender).

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