
# Potential Application of *Bostock v. Clayton County* to Other Civil Rights Statutes

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SUMMARY

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**Christine J. Back**
Legislative Attorney

**Jared P. Cole**
Legislative Attorney

# Potential Application of *Bostock v. Clayton County* to Other Civil Rights Statutes

Last year, the Supreme Court ruled in *Bostock v. Clayton County* that a statutory provision prohibiting discrimination in the workplace "because of … sex" also forbids employers from making employment decisions because of an employee's sexual orientation or gender identity. In reaching that conclusion, Justice Gorsuch's majority opinion focused on the statutory text at issue—Section 703(a)(1) of Title VII of the Civil Rights Act of 1964—and the statute's "but for" causation standard. Given these aspects of the statute, the majority opinion reasoned that because discrimination based on sexual orientation or gender identity necessarily involves consideration of an individual's sex, such actions are unlawful under Title VII's prohibition of discrimination "because of … sex." While *Bostock* addressed Title VII, the decision has sparked questions about the potential application of the opinion's reasoning to other statutes. Numerous federal laws prohibit sex discrimination in contexts outside of employment, such as in housing and the extension of credit. In addition, courts have sometimes looked to Title VII precedent to either inform or sometimes distinguish the operation of other federal antidiscrimination statutes.

The Biden Administration has already taken actions responsive to the *Bostock* decision relating to agencies' enforcement and interpretation of civil rights statutes. The White House issued an Executive Order (EO) on the day of President Biden's inauguration, stating that laws that prohibit sex discrimination "prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." A number of agencies have already taken actions responsive to the EO, including the Department of Education, the Department of Justice, and the Department of Health and Human Services.

Federal courts have also begun to address whether *Bostock*'s reasoning may be applied to interpret other statutory provisions that prohibit sex discrimination, apart from Title VII. Importantly, the Court's reasoning in *Bostock* focused on the specific text of Section 703(a)(1) in Title VII, operating under a "but for" causation standard. The potential application of *Bostock* may be most immediately relevant to statutes with text and phrasing similar to that Title VII provision, and which also incorporate a "but for" causation standard. It is less clear how *Bostock* might apply to statutory provisions that incorporate another causation standard, or which phrase their prohibitions differently than Section 703(a)(1). Other considerations may also shape whether a federal court applies the judicial interpretation of one statutory provision to another, including differences in the context and operation of each statute's mandates, as well as case law construing a particular statute (including whether the Supreme Court has looked to Title VII to inform its interpretation of the other statute).

While the reasoning of *Bostock* could have implications for certain statutes, Title IX of the Education Amendments of 1972 has already received some judicial analysis in light of the Court's decision, and is the subject of a recently-issued interpretation notice from the Department of Education.

Among potential legislative approaches, Congress could amend current law to either expressly include or exclude sexual orientation and gender identity as characteristics covered under particular statutes, or enact new standalone legislation addressing protections and prohibitions concerning sexual orientation or gender identity.

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# Introduction

Last year, the Supreme Court ruled in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 (Title VII) forbids employers from firing an employee because of the employee's sexual orientation or gender identity.[1] Because the Court reached this conclusion when interpreting Title VII's provision prohibiting discrimination "because of . . . sex" in the workplace, *Bostock* immediately raised questions about the scope and reach of other federal antidiscrimination statutes that also bar sex-based discrimination.[2] This report examines whether and how the Supreme Court's decision in *Bostock* might apply to other federal statutes that also bar sex discrimination in the absence of legislative amendments to those statutes.

This report begins with a discussion of *Bostock* itself, including the emphasis the Court placed on the statutory text of Title VII and the "but for" causation standard that the Court applied in the case. The report continues by examining how the Biden Administration has understood the reach of the decision's reasoning in the context of agency enforcement of civil rights statutes.

The report then turns to an analysis of what considerations courts might examine if asked to apply *Bostock* to other civil rights statutes. The two primary emphases in the *Bostock* decision—the text of Title VII operating under a "but for" causation standard—suggest that an extension of the Supreme Court's reasoning to analyze other statutes would similarly consider a statute's text and causation standard(s). A statute's causation standard—if more stringent or more lenient than the "but for" standard—may have implications for whether *Bostock*'s reasoning can be applied to interpret that statute's scope.[3] Apart from causation, other considerations may also shape how courts analyze the potential applicability of *Bostock* to other statutes.

This report then considers the potential application of *Bostock* to Title IX of the Education Amendments of 1972, which bars sex discrimination by recipients of federal financial assistance in education programs. There has been significant attention in the wake of *Bostock* over how its reasoning applies to the interpretation of Title IX, with the Department of Education issuing an interpretative guidance in June 2021 on the matter. Meanwhile, federal courts have also begun to address questions concerning *Bostock*'s applicability to Title IX. Accordingly, this report examines factors that courts might consider when determining whether to apply *Bostock* to interpret Title IX. These factors include Supreme Court precedent that has considered Title IX in relation to Title VII, as well as federal appellate court precedent addressing causation under Title IX. This report also discusses two recent federal appellate decisions that have applied *Bostock* to Title IX in cases challenging school bathroom policies alleged to have discriminatorily excluded students based on gender identity. The report closes with a discussion of potential legislative considerations for Congress, should it choose to legislate in this area.

# *Bostock v. Clayton County*

*Bostock v. Clayton County* consolidated three cases from federal appeals courts applying Title VII's prohibition on sex discrimination in the workplace; two focused on sexual orientation, and

[1] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

[2] *See, e.g.*, Julie Moreau, *Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC NEWS (June 23, 2020), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779.

[3] *See infra* "The Potential Role of Causation in Other Statutes."

one centered on gender identity.[4] The plaintiffs alleged that their employers fired them because of their sexual orientation or gender identity and, in doing so, violated Title VII by discriminating against them "because of . . . sex."[5] Leading up to the decision in *Bostock*, the question of whether Title VII prohibits employment discrimination based on sexual orientation had split lower federal courts.[6] Likewise, courts reached divergent conclusions about whether Title VII protects transgender employees from employment discrimination.[7] This judicial debate arose in part because the text of Title VII does not explicitly address discrimination based on sexual orientation or gender identity.

The *Bostock* Court held by a 6-3 vote that Title VII's prohibition of discrimination "because of…sex" bars discrimination based on sexual orientation or gender identity.[8] Justice Gorsuch's majority opinion focused on the "ordinary public meaning" of Title VII's text and the statute's causation standard.[9] The Court in *Bostock* noted disagreement between the parties as to what the term "sex" even meant under Title VII. One side asserted that sex centered on "reproductive biology," while the other claimed that "sex" includes more than anatomical features and incorporates norms regarding gender identity.[10] The Court declined to resolve this question, noting that "nothing in our approach to these cases turns on the outcome of the parties' debate," but proceeded on the assumption that sex refers to biological distinctions.[11]

The Court instead focused on the operation of Title VII's language prohibiting discrimination "because of . . . sex," which, the majority opinion observed, incorporated the "but for" standard of causation.[12] The Court explained the operation of this causation standard in the following way: if an outcome would not have occurred without, or "but for," the purported cause, causation is established.[13] As Justice Gorsuch noted, there can be multiple but for causes of the same event.

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[4] Zarda v. Altitude Express, 883 F.3d 100, 131 (2d Cir. 2018) (en banc) (ruling that sexual orientation discrimination violates Title VII); Bostock v. Clayton Cnty. Bd. of Commissioners, 894 F.3d 1335 (11th Cir. 2018) (en banc) (denying rehearing en banc in a case that dismissed a Title VII claim brought by a gay man, relying on prior circuit precedent holding that Title VII does not prohibit sexual orientation discrimination); Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018) (ruling that discrimination for being transgender violates Title VII).

[5] 42 U.S.C. § 2000e-2(a)(1).

[6] *Compare* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (ruling that "sexual orientation discrimination is a subset of sex discrimination," and that "[s]exual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted"), *and* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) ("[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination."), *with* Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1257 (11th Cir. 2017) (ruling that Title VII does not recognize discrimination claims based on sexual orientation and declining to recognize a claim under the sex-stereotyping theory of *Price Waterhouse*).

[7] *Compare* Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018) (recognizing that transgender employees may bring Title VII claims under the sex stereotyping theory of *Price Waterhouse* and holding that "discrimination on the basis of transgender and transitioning status violates Title VII"), *with* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (concluding that transgender people "are not a protected class under Title VII").

[8] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

[9] *Id*. at 1738–43 (majority opinion).

[10] *Id*. at 1739.

[11] *Id*.

[12] *See infra* "'But-For' Causation."

[13] *Bostock*, 140 S. Ct. at 1739. The Court has applied a different causation standard for Title VII cases in the past. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (plurality opinion) ("To construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them."). The *Bostock* majority opinion also noted

The majority opinion gave an example: if a car crash occurred both because a defendant ran a red light and because a plaintiff failed to signal, both mistakes qualify as but for causes.[14] The Court also emphasized that Title VII's prohibition against discrimination is focused on discrimination against *individuals*, rather than different treatment across groups.[15] This distinction means that firing a female worker because she is "insufficiently feminine," or a male worker for being "insufficiently masculine," for example, violates the statute even if male and female workers are generally treated the same overall.[16] In light of the above, the Court reasoned that it is impossible to discriminate against an employee based on sexual orientation or gender identity without considering that individual's sex.[17] As an example, Justice Gorsuch pointed to a situation where two employees, a man and a woman, are attracted to men.[18] If an employer fires the man for being attracted to men, but not the woman who is also attracted to men, in the view of the majority, the employer has discriminated against the male employee for traits the employer tolerates in a woman.[19] For the Court, the employee is singled out in part because of his sex—a "but for" cause of the discrimination.[20] Likewise, the Court observed, if an employer fires a transgender man (assigned female gender at birth who now identifies as a man) for being transgender, the employer penalizes that person for being assigned the female gender at birth for traits that it would tolerate in a person assigned the male gender at birth.[21]

Justice Gorsuch also rejected the suggestion that the majority's interpretation should be disfavored because it would have "undesirable policy consequences."[22] In particular, the opinion dismissed the argument that "under Title VII itself . . . sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today."[23] The Court observed that "we do not purport to address bathrooms, locker rooms, or anything else of the kind."[24] Instead, the Court emphasized, the only question addressed in the case was whether firing an employee based on the employee's sexual orientation or gender identity was discrimination "because of . . . sex."[25]

The majority opinion acknowledged that its decision could have implications for religious liberty,[26] but noted that Title VII has long intersected with several existing religious liberty legal

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that Congress amended Title VII (and partially superseded *Price Waterhouse*) to provide an alternative "motivating factor" standard. Civil Rights Act of 1991, P.L. 102-661 § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e–2(m). Applying that standard, liability can sometimes attach "even if sex wasn't a but-for cause of the employer's challenged decision," but the *Bostock* majority believed it unnecessary to resolve the case under this more lenient standard for establishing liability. *Bostock*, 140 S. Ct. at 1739–40.

[14] *Bostock*, 140 S. Ct. at 1739.

[15] *Id*. at 1740.

[16] *Id*. at 1741.

[17] *Id*. at 1741.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 1753.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] The majority opinion also rejected the argument that, because the legislative authors of Title VII likely did not anticipate that the statute prohibited discrimination based on sexual orientation or gender identity, Title VII should not be interpreted to apply to those contexts. *Id*. at 1749. The Court ruled that the plain meaning of Title VII controlled, irrespective of the principal goals of its congressional authors. *Id*.

protections.[27] First, the majority opinion pointed to one of Title VII's exceptions for religious organizations.[28] Second, the Court noted that the First Amendment can prohibit applying employment discrimination laws to claims that concern employment relationships between ministers and their religious institutions.[29] Finally, the majority opinion observed that the Religious Freedom Restoration Act (RFRA) bars "the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest."[30] The Court described RFRA as a "kind of super statute, displacing the normal operation of other federal laws," which could supersede Title VII's requirements in certain circumstances.[31] Though the Court did not elaborate further, it might have been referring to the possibility of a defendant in a Title VII lawsuit raising RFRA as a defense to liability.

In dissent, Justice Alito, joined by Justice Thomas, claimed that the majority was functionally legislating through the guise of a judicial decision.[32] Among other things, Justice Alito argued that virtually no one in 1964 would have understood the statute to prohibit discrimination on the basis of sexual orientation or gender identity.[33] He also highlighted arenas in which the Court's reasoning would have "far-reaching consequences."[34] He noted that numerous other statutes prohibit sex discrimination, including Title IX of the Education Amendments of 1972, the Fair Housing Act, and the Affordable Care Act.[35] Justice Alito highlighted that the majority's reasoning would have potential consequences for these laws, although he explained that he was not suggesting how the majority's reasoning would actually apply to them.[36] Nevertheless, he argued that the Court's holding will "threaten freedom of religion, freedom of speech, and personal privacy and safety."[37] For Justice Alito, given these potential policy consequences and given Title VII's silence on sexual orientation or gender identify, whether Title VII bars discrimination on these bases should be the product of legislative deliberation, rather than judicial construction.[38]

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[27] *Id*. at 1754.

[28] *Id*. *See* 42 U.S.C. § 2000e-1(a).

[29] *Bostock*, 140 S. Ct. at 1754. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 188 (2012).

[30] *Bostock*, 140 S. Ct. at 1754. *See* 42 U.S.C. § 2000bb-1.

[31] *Bostock*, 140 S. Ct. at 1754. *See* 42 U.S.C. § 2000bb-3.

[32] *See also Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) (arguing that the ordinary meaning of Title VII does not prohibit discrimination based on sexual orientation).

[33] *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

[34] *Id.* at 1778.

[35] *Id.* at 1778-81.

[36] *Id.* at 1778.

[37] *Id*.

[38] *Id*. ("If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.").

# Initial Reaction to *Bostock* by the Biden Administration

While courts will be asked to apply the *Bostock* decision when interpreting other civil rights statutes that similarly prohibit sex discrimination, the judiciary is not the only branch of government where the implications of the decision could be felt. Federal agencies also enforce a variety of civil rights statutes that prohibit sex discrimination. For instance, Title IX makes nondiscrimination based on sex a condition for receiving federal financial assistance in any education program or activity.[39] The Department of Education (ED) and other agencies that distribute funds in this context can ultimately suspend or terminate funding in cases where the respective agency determines that a recipient has violated the statute or applicable regulations.[40] Accordingly, the interpretation by a federal agency of the meaning of a civil rights statute can also be important for regulated entities.

The Biden Administration has already taken actions responsive to the *Bostock* decision relating to agencies' enforcement and interpretation of civil rights statutes. On the day of President Biden's inauguration, the White House issued an Executive Order (EO) stating that laws that prohibit sex discrimination, including Title IX, "prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary."[41] The EO directs federal agencies to review actions implementing statutes that prohibit sex discrimination that could be inconsistent with the Administration's position on *Bostock*'s application.[42] Below are a few selected examples of how federal agencies have recently responded to the EO and the *Bostock* decision.[43]

## Department of Justice

The Department of Justice (DOJ) is responsible for the coordination of enforcement and implementation by federal agencies of Title IX.[44] In March 2021, the DOJ's Civil Rights Division issued a memorandum that concludes that Title IX's prohibition against discrimination on the basis of sex reaches discrimination based on sexual orientation and gender identity.[45]

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[39] 20 U.S.C. § 1681(a).

[40] *Id.* § 1682.

[41] Exec. Order 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

[42] *Id.*

[43] Although this report does not comprehensively examine all such agency actions, other agencies have taken similar actions to the ones discussed below. *See, e.g.*, Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14363 (Mar. 16, 2021) (Consumer Financial Protection Bureau); Dep't of Hous. and Urban Devel., Memorandum from Jeanine Worden, Acting Assistant Secretary for Fair Housing and Equal Opportunity (Feb. 11, 2021) ("HUD's Office of General Counsel has concluded that the Fair Housing Act's sex discrimination provisions are comparable to those of Title VII and that they likewise prohibit discrimination because of sexual orientation and gender identity."), https://www.hud.gov/sites/dfiles/FHEO/documents/WordenMemoEO13988FHActImplementation.pdf. On March 31, 2021 the Department of Defense also published an update to its policy on transgender service that "restores the Department's original 2016 policies regarding transgender service." Dep't of Def., DOD Announces Policy Updates for Transgender Military Service (Mar. 31, 2021), https://www.defense.gov/Newsroom/Releases/Release/Article/2557220/dod-announces-policy-updates-for-transgender-military-service/.

[44] *See* Exec. Order No. 12250, 45 Fed. Reg. 72,995 (Nov. 4, 1980).

[45] Dep't of Justice, Civil Rights Division, Memorandum to Federal Agency Civil Rights Directors and General

Explaining the basis for its interpretation, the DOJ memorandum opens by observing that because Title VII's statutory prohibition against sex discrimination is similar to that of Title IX, courts "consistently look to interpretations of Title VII to inform Title IX."[46] The memorandum also emphasizes two features of Title IX that, in the agency's view, indicate *Bostock*'s reasoning applies to the statute. First, the Supreme Court's opinion in *Bostock* focused on how Title VII prohibits discrimination against individuals, and Title IX is similarly phrased to prohibit discrimination against a "person."[47] Second, the language of Title IX's prohibition, "on the basis of sex," is so similar to Title VII's phrase "because of" that the two can "be considered interchangeable."[48] The memorandum points out that the *Bostock* decision describes Title VII's prohibitions as extending to "discrimination in the workplace on the basis of . . . sex."[49] As the *Bostock* decision concluded that discrimination "because of" sex includes discrimination because of sexual orientation or gender identity, so too does Title IX's prohibition against discrimination "on the basis of sex" include discrimination based on sexual orientation and gender identity.[50] The DOJ memorandum also observes that whether any specific allegations of discrimination based on sexual orientation or gender identity constitute a Title IX violation will depend on the specific facts at issue in a particular case.[51]

## Department of Education

On March 8, 2021, the White House issued another EO explaining that it is the policy of the Biden Administration that all students deserve an educational environment free from sex discrimination, including sexual harassment and discrimination based on sexual orientation and gender identity.[52] It directs the Secretary of Education, in consultation with the Attorney General, to review all regulations, guidance, or similar agency actions that may be inconsistent with that policy.[53] The EO specifically points to Title IX regulations promulgated last year during the Trump Administration addressing sexual harassment, directing the Secretary of Education to review those regulations for consistency with Biden Administration policy and Title IX.[54]

ED has announced that it will examine its Title IX regulations for consistency with the Biden Administration's policy.[55] As part of this review process, ED's Office for Civil Rights (OCR) held public hearings where members of the public could provide their views.[56] The hearings aimed to

Counsels 1-3 (Mar. 26, 2021) [CRD Memorandum] ("The Executive Order directs agencies to review other laws that prohibit sex discrimination, including Title IX, to determine whether they prohibit discrimination on the basis of gender identity and sexual orientation. We conclude that Title IX does.").

[46] CRD Memorandum, *supra* note 45, at 1.

[47] CRD Memorandum, *supra* note 45, at 2; 20 U.S.C. § 1681(a).

[48] CRD Memorandum, *supra* note 45, at 2.

[49] CRD Memorandum, *supra* note 45, at 2; *see* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

[50] CRD Memorandum, *supra* note 45, at 2.

[51] CRD Memorandum, *supra* note 45, at 3.

[52] Exec. Order 14021, 86 Fed. Reg. 13,803 (March 11, 2021). The EO notes that sexual harassment includes sexual violence.

[53] *Id*. at 13,803.

[54] *Id*. *See generally* CRS Legal Sidebar LSB10479, *New Title IX Sexual Harassment Regulations Overhaul Responsibilities for Schools*, by Jared P. Cole.

[55] Dep't of Education, Letter from Suzanne Goldberg, Acting Assistant Secretary for Civil Rights to Students, Educators, and other Stakeholders re Executive Order 14021 (April 6, 2021) [hereinafter Goldberg Letter].

[56] Dep't of Education, Title IX Hearing (last visited June 7, 2021), https://web.cvent.com/event/06428d78-948c-456b-9d57-ac391407e1cc/summary.

address steps that ED can take to (1) prevent sexual harassment in schools; (2) "ensure that schools have grievance procedures that" can fairly and equitably resolve allegations of discrimination; and (3) "address discrimination based on sexual orientation and gender identity" at school.[57] OCR also plans to issue a question and answer document outlining how the office interprets schools' "existing obligations" under current Title IX regulations.[58] Finally, OCR anticipates issuing a new notice of proposed rulemaking to amend the agency's Title IX regulations.[59]

The agency has also released a "Notice of Interpretation" explaining that *Bostock*'s reasoning guides ED's interpretation of Title IX's prohibition against discrimination "on the basis of sex."[60] The Notice points to the textual similarity between Title VII's "because of" language and Title IX's "on the basis of" phrasing.[61] It asserts that the Supreme Court "has used these two phrases interchangeably."[62] In addition, the Notice explains that both Title VII and Title IX protect *individuals* against discrimination.[63] ED's Notice also argues that the *Bostock* decision noted the lack of an exception under Title VII that would permit discrimination based on sexual orientation or gender identity as evidence that such discrimination is prohibited.[64] Similarly, ED notes, Title IX "contains no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity."[65] The Notice also relies for support on various federal court opinions that have applied *Bostock* to Title IX, as well as the recent memorandum from DOJ, discussed above, that argues the reasoning of *Bostock* apples to that statute.[66]

## Department of Health and Human Services

The Department of Health and Human Services (HHS) has also announced that it considers *Bostock* applicable to a sex discrimination ban that the agency enforces.[67] By way of background, Section 1557 of the Patient Protection and Affordable Care Act, commonly known as the Affordable Care Act (ACA), prohibits discrimination in health programs or activities that receive federal financial assistance.[68] The statute does not list specific types of discrimination that are barred in such federally funded programs, but instead incorporates by reference discrimination "on the ground" prohibited by other statutes, including Title IX.[69] As Section 1557 thus prohibits

[57] Announcement of Public Hearing; Title IX of the Education Amendments of 1972, 86 Fed. Reg., 27429 (May 20, 2021).

[58] Goldberg Letter, *supra* note 55, at 3.

[59] *Id.* at 4.

[60] Dep't of Education, Office for Civil Rights, Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County (June 16, 2021).

[61] *Id.* at 6.

[62] *Id.* at 7 (citing Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020)).

[63] *Id.*

[64] *Id.* at 8.

[65] *Id.*

[66] *Id.* at 9-10. For more on the DOJ memorandum, *see supra* "Department of Justice."

[67] Notification of Interpretation and Enforcement, 86 Fed. Reg. 27984 (May 25, 2021).

[68] 42 U.S.C. § 18116(a).

[69] 42 U.S.C. § 18116(a). In 2016, HHS promulgated regulations implementing Section 1557 which defined discrimination on the basis of sex as including discrimination based on sex stereotyping and gender identity. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,467 (May 18, 2016). A federal district court enjoined enforcement of the portion of the rule that defined "on the basis of sex" to include gender identity, but

sex discrimination in covered health programs, HHS's current position is that it will interpret and enforce that ban to include discrimination based on sexual orientation and gender identity.[70]

# Potential Judicial Application of *Bostock* to other Statutes

Whether and to what extent federal courts apply the reasoning of *Bostock* to interpret coverage under other statutes is a complex and unresolved question. As discussed above, the Supreme Court in *Bostock* anchored its analysis in the particular text of Section 703(a)(1) in Title VII,[71] and the operation of the "but for" causation standard,[72] to conclude that Title VII reaches claims alleging discrimination based on sexual orientation and gender identity. The Court's analysis and reasoning suggests that an extension of *Bostock* to analyze other statutes would similarly involve a lower court's consideration of a statute's text and its causation standard(s). Under that rationale, the decision's potential applicability to other antidiscrimination statutes may be most immediately relevant to statutes that contain a similarly-phrased prohibition of sex discrimination and also incorporate a "but for" causation standard.

Apart from the considerations reflected in the Court's decision, however, federal courts could take a range of other approaches to determining whether to apply *Bostock* to interpret the coverage of other statutes. In general, a variety of considerations may shape whether a federal court applies the judicial interpretation of one statute to another, including the case law that has arisen under a particular statute, differences in the context and operation of a statute's mandates, and other canons of statutory interpretation.[73] In addition, the Supreme Court has often looked to

left alone the portion of the rule regarding sex stereotyping. Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 695-96 (N.D. Tex. 2016). The court later vacated that same portion of the rule and remanded that aspect of the rule back to the agency for further consideration. Franciscan Alliance, Inc. v. Azar, 414 F. Supp. 3d 928, 945 (N.D. Tex. 2019). In 2020, following a change in presidential administrations, HHS promulgated new regulations that repealed the previous regulation's definition of "on the basis of sex," which had specified that the phrase included sex stereotyping and gender identity. *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020). Those 2020 regulations were proposed before the Supreme Court's decision in *Bostock* and published four days after the decision. The 2020 regulations were also challenged in federal court. *See, e.g.*, Whitman-Walker Clinic, Inc. v. Dep't of Health & Human Servs., 485 F. Supp. 3d 1, 39 (D.D.C. 2020) (concluding that the rule's elimination of the definition of "on the basis of . . . sex" was arbitrary and capricious in light of *Bostock*). In one decision, a federal district court concluded that the new regulations' repeal of the terms "sex stereotyping" and "gender identity" from a definition of "on the basis of sex" was "contrary to law" because the preamble to the rules made clear that the reason for the change was an interpretation of the provisions of Section 1557 that was implicitly rejected by the *Bostock* decision. Walker v. Azar, 480 F.Supp. 417, 429 (E.D.N.Y. 2020). Moreover, the district court reasoned, the agency's failure to address the *Bostock* decision in its consideration of the rules was arbitrary and capricious. *Id*. at 430. For these reasons, the agency stayed these aspects of the rule and issued a preliminary injunction against their enforcement. *Id*.

[70] Notification, *supra* note 67, at 27984.

[71] *See Bostock*, 140 S.Ct. at 1738-39 (quoting the text of 42 U.S.C. § 2000e–2(a)(1) and describing its analysis as beginning with "examining the key statutory terms").

[72] *See id*. at 1739-40 (after examining the text "sex" as "a starting point," stating that "[t]he question isn't just what 'sex' meant, but what Title VII says about it"; describing as "most notabl[e]" the statute's prohibition against taking certain actions "because of" sex and the provision's causation standard).

[73] *See generally, e.g.,* Bostock v. Clayton Cty., 140 S.Ct. 1731, 1738-39 (2020) (describing its approach to interpreting the Title VII provision at issue as "determin[ing] the ordinary public meaning" of the provision, by "orient[ing] ourselves to the time of the statute's adoption, here 1964, and []by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents."); *Gross*, 557 U.S. at 175-76 (when addressing whether an ADEA violation could be established under a "motivating factor"

its Title VII precedent when analyzing other antidiscrimination statutes, to both liken[74] *and* distinguish[75] the operation or meaning of other statutes. Accordingly, a lower court might also look to whether and in what ways the Supreme Court has likened or distinguished the statute in question to Title VII, as well as look to its own precedent for that purpose. Meanwhile, as federal agencies issue guidance or regulations pursuant to the administration's understanding of the implications of the *Bostock* decision, these actions may also inform how some courts interpret other statutes addressing sex discrimination.[76] While the above-mentioned considerations may shape a court's application of *Bostock*, it is possible that other considerations may inform a court's interpretation as well.[77]

## Federal Statutes that Address Various Forms of Sex Discrimination

One relevant starting point for considering the potential application of *Bostock* is the identification of other statutes that expressly prohibit a form of sex discrimination. Apart from the prohibition of discrimination "because of . . . sex"[78] in Section 703(a)(1) of Title VII, which applies to certain employment actions taken by private sector employers,[79] various other federal statutes also prohibit forms of sex-based treatment in different settings.

In the labor context, for example, the Equal Pay Act prohibits certain covered employers[80] from "discriminat[ing] . . . between employees on the basis of sex by paying wages to employees" at a lesser rate than "the rate at which he pays wages to employees of the opposite sex . . . for equal work."[81] In the education context, Title IX of the Education Amendments of 1972 prohibits

causation standard, applying a canon of statutory interpretation that courts should examine the statutory text at issue and assume "that the ordinary meaning of that language accurately expresses the legislative purpose"). *See also, e.g.*, *infra* notes 74 and 75.

[74] *See, e.g.*, Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, 576 U.S. 519, 530-35 (2015) (to determine whether the Fair Housing Act (FHA) prohibits "housing decisions with a disparate impact," looking to its Title VII precedent addressing the availability of disparate impact liability under Title VII's private sector provision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); concluding that its analysis in *Griggs* and its precedent analyzing the Age Discrimination in Employment Act supported interpreting the FHA to similarly encompass disparate impact liability).

[75] *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173-75, 179 (2009) (analyzing whether a plaintiff can establish a violation of the Age Discrimination in Employment Act (ADEA) under a "motivating factor" causation standard, and rejecting the argument that its Title VII precedent addressing causation should control its interpretation of the ADEA; stating that "[b]ecause Title VII is materially different with respect to the relevant burden of persuasion," those decisions "do not control our construction of the ADEA"). *See also, e.g.*, United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 206, n.6 (1979) (discussing differences between Title VI and Title VII of the Civil Rights Act of 1964 and stating that "Title VII and Title VI, therefore, cannot be read *in pari materia*.").

[76] *See, e.g.*, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016) (deferring to ED's interpretation of Title IX regulations contained in a 2015 opinion letter). The Supreme Court later vacated and remanded this decision to the Fourth Circuit after a new presidential administration issued guidance rescinding the 2015 opinion letter, as well as another opinion letter from 2016. Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017). *See generally supra* section "Initial Reaction to *Bostock* by the Biden Administration."

[77] For example, depending on which claims and theories are presented before federal courts, and which considerations courts view as persuasive or dispositive, courts could arrive at different conclusions concerning the extent to which *Bostock* affects the interpretation of another statute that also addresses sex discrimination.

[78] *See* 42 U.S.C. § 2000e–2(a)(1).

[79] *Cf. id.*; *id.* § 2000e-16(a) (Title VII mandate applicable to various federal sector employers).

[80] *See* 29 U.S.C. § 203(s).

[81] *See id.* § 206(d)(1) (also describing "equal work" in terms of "jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," and setting out certain

federally funded education programs or activities from "exclud[ing] from participation," "den[ying] the benefits of," or "subject[ing] to discrimination" a person "on the basis of sex."[82] Title IX and its implementing regulations also identify sex-based distinctions permitted in certain circumstances.[83] In the housing and real estate context, the Fair Housing Act bars covered entities[84] from certain actions against any person relating to the rental and sale of property "because of . . . sex," among other protected traits.[85] In the context of credit transactions, the Equal Credit Opportunity Act prohibits creditors from "discriminat[ing] against any applicant . . . on the basis of . . . sex,"[86] while also defining conduct that does not constitute discrimination under the Act.[87]

Like the statutory prohibition addressed in *Bostock*, the mandates of the above-listed statutes also prohibit some form of sex discrimination. That similarity alone, however, does not necessarily mean that courts will interpret these mandates in the same way.[88] Rather, distinctions among these statutes could lead a court to assess the potential application of *Bostock* differently, including in light of a provision's distinctive text or phrasing, the constitutional basis upon which the statute was enacted, the context and fact patterns that arise under a statute, or its particular operation (such as burdens of proof and affirmative defenses).[89] Meanwhile, the Supreme Court itself reached its conclusion in *Bostock* concerning the scope of Section 703(a)(1) based on more than that provision's express prohibition of sex discrimination. Another key consideration for the

exceptions).

[82] *See* 20 U.S.C. § 1681(a) (providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," subject to nine exceptions).

[83] *See id*. § 1681(a)(1)–(9) (setting out exceptions). *See also, e.g.*, 34 C.F.R. § 106.32(b) (permitting a recipient to "provide separate housing on the basis of sex"); *id*. § 106.34(b) (permitting recipients that operate nonvocational coeducational elementary or secondary schools to "provide nonvocational single-sex classes or extracurricular activities," subject to certain requirements).

[84] *See* 42 U.S.C. § 3603 (enumerating entities to which § 3604 of the Fair Housing Act applies).

[85] *See id.* §§ 3604(a)-(f) (making it unlawful, for example, to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin," among other prohibited conduct, including with respect to disability).

[86] *See* 15 U.S.C. § 1691(a) ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under this chapter.").

[87] *See id*. §§ 1691(b) and (c).

[88] As discussed in a later section of this report, for example, the Court's precedent addressing Title IX of the Education Amendments of 1972 reflects that the Court has at times rejected arguments that Title IX should be interpreted in light of Title VII. *See infra* section "Supreme Court Precedent Addressing Title IX in Relation to Title VII."

[89] For example, although the Equal Pay Act (EPA), like Title VII, prohibits discriminatory compensation based on sex in certain circumstances, the EPA phrases its mandate in different terms, operates on a different burden-shifting framework than Title VII claims, and contains a multi-pronged affirmative defense. *See generally, e.g.*, Rizo v. Yovino, 950 F.3d 1217, 1222 (9th Cir. 2020) (discussing the operation of the EPA's four exceptions to its equal-pay mandate as affirmative defenses); *id*. at 1223 (stating that EPA claims, unlike Title VII claims, do not require evidence of discriminatory intent, and do not use the "familiar three-step *McDonnell Douglas* framework that applies to Title VII claims"). *Cf.* 42 U.S.C. § 2000e-2(a)(1) (Title VII provision making it unlawful to "discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex"); 29 U.S.C. § 206(d)(1) (EPA provision phrasing its mandate to prohibit discrimination "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions").

Court was the operation of that text under a "but for" causation standard.[90] Given that emphasis, the next section of this report examines the issue of causation in more detail.

## Interpreting Statutes for Causation Purposes

As courts address arguments concerning the applicability of *Bostock* to interpret another statute's prohibition of sex discrimination, courts may also consider whether that other statute—like the Title VII provision at issue in *Bostock*—incorporates "but for" causation.[91] This section briefly discusses the "but for" causation standard before turning to Supreme Court precedent interpreting provisions in antidiscrimination statutes for causation purposes. While the issue of causation can encompass a range of complex legal questions,[92] as a general matter, antidiscrimination statutes—including provisions within the *same* statute—do not phrase their mandates in a uniform manner,[93] and differences in text can produce different interpretations with respect to causation.[94] As the discussion below reflects, when the Supreme Court has interpreted the text "because of" in several antidiscrimination statutes for causation purposes, it has often looked at factors beyond the plain text to inform its decisions.

### "But For" Causation

The "but for" causation standard, as described by the Supreme Court, generally requires that a plaintiff show that the harm being alleged "'would not have occurred' in the absence of—that is,

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[90] *See Bostock*, 140 S.Ct. at 1739-40.

[91] *See, e.g.*, Adams by and through Kasper v. Sch. Bd. of St. Johns County, 968 F.3d 1286, 1305 (11th Cir. 2020) (describing the Supreme Court's analysis in *Bostock* and stating that the "but for" causation standard was "critical to its expansive interpretation of sex discrimination.") (citing *Bostock*, 140 S. Ct. at 1739).

[92] *See, e.g.*, Sandra F. Sperino, *The Emerging Statutory Proximate Cause Doctrine*, 99 NEB. L. REV. 285, 286, 293 (2020) (stating that "factual cause doctrine is a central battleground of discrimination jurisprudence"; describing factual causation in discrimination law as turning on the two central issues of "the substantive standard for establishing causation (motivating factor versus 'but for' cause) and the party required to establish causation" and observing that "[s]ince the early 1970s, the Supreme Court has been engaged in a decades-long battle about causation in discrimination law.") (footnotes omitted).

[93] *See, e.g.*, 42 U.S.C. § 2000e-2(m) (Title VII provision establishing liability for intentional discrimination under a "motivating factor" causation standard); 42 U.S.C. § 2000e-16 (Title VII provision applicable to federal sector employers which is phrased to require that "[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."). *See also, e.g.*, 29 U.S.C. § 623(a)(1) (ADEA provision applicable to private sector employers, making it unlawful for employers to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"); 29 U.S.C. § 633a(a) (ADEA provision applicable to federal sector employers, mandating that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age."). *Cf.* 38 U.S.C. § 4311(a) (provision in the Uniformed Services Employment and Reemployment Rights Act (USERRA), mandating that a "person who is a member of . . . a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.").

[94] *See, e.g.*, Babb v. Wilkie, 140 S.Ct. 1168, 1171, 1177-78 (2020) (analyzing the text and syntax of 29 U.S.C. § 633a(a), which mandates that "[a]ll personnel actions affecting employees … who are at least 40 years of age . . . shall be made free from any discrimination based on age"; interpreting this text to incorporate two causation standards with different remedies); Staub v. Proctor Hosp., 562 U.S. 411, 416-17, 422 (2011) (interpreting text in USERRA and stating that the "central difficulty in this case is construing the phrase 'motivating factor in the employer's action'"; holding that liability may be established under this statutory text "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action") (emphasis in original).

but for—the defendant's" discriminatory motive.[95] Put another way, the evidence must show that the defendant's adverse or negative treatment of a person would not have occurred but for the person's protected trait.[96] Federal courts have differed in their views on how demanding the "but for" standard is to satisfy.[97]

## Supreme Court Precedent Addressing Causation in Antidiscrimination Statutes

Critically, numerous statutes do not explicitly indicate which, if any, causation standard(s) to apply, and the Supreme Court has repeatedly had to address which causation standards should govern a particular statutory claim.[98] As the Court has addressed the question of causation in *antidiscrimination* provisions over the years, a prominent thread of these decisions has concerned how to interpret the text "because" or "because of" in certain provisions.[99]

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[95] *See generally, e.g. Nassar*, 570 U.S. 338, 346-47 (2013) (describing "but for" causation and stating that "[i]n the usual course, this standard requires the plaintiff to show "that the harm would not have occurred" in the absence of—that is, but for—the defendant's conduct") (citations omitted).

[96] *See id*. *See generally Bostock*, 140 S.Ct. at 1739 (stating that "causation is established whenever a particular outcome would not have happened 'but for' the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."). *Cf.* Burrage v. United States, 571 U.S. 204, 211 (2014) (describing the operation of "but for" causation; explaining that if a combination of multiple factors produced one result, one of the "predicate act[s]" constitutes a "but for" cause "if, so to speak, it was the straw that broke the camel's back").

[97] *Cf.* Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 323-24 (2021) (stating that satisfying "but for" causation "is no simple task" under the Age Discrimination in Employment Act; describing the standard as requiring a "showing that age was *the* determinative reason they were terminated") (emphasis in original); Kurtzhals v. Cnty. of Dunn, 969 F.3d 725, 729-30 (7th Cir. 2020) (observing that causation is "often the most difficult element" and concluding that the plaintiff had failed to make the requisite showing on his Americans with Disabilities Act claim; describing the "but for" causation standard as asking, based on the evidence, if "a reasonable juror [could] conclude that he would not have suffered the same adverse employment action if he were not disabled and everything else had remained the same") (citations omitted); United States v. Salinas, 918 F.3d 463, 466 (5th Cir. 2019) (in the context of reviewing a district court's application of a criminal sentencing enhancement, discussing the "but for" causation standard and describing it as "not a difficult burden to meet.") (citing *Nassar*, 570 U.S. at 346–47 (2013); United States v. Ramos-Delgado, 763 F.3d 398, 402 (5th Cir. 2014)). *See generally, e.g.*, Leora F. Eisenstadt, *Causation in Context*, 36 BERKELEY J. EMP. & LAB. L. 1, 3 (2015) ("The notion of 'but-for' causation in employment discrimination cases has been debated in courts and among scholars at least since the Court decided *Price Waterhouse v. Hopkins* in 1989."). *See also id.* at 16 (asserting that "the nature of human thought processes makes a 'but-for' causation standard difficult, if not impossible, to apply in the employment context").

[98] *See, e.g., Babb*, 140 S.Ct. at 1171-72 (addressing which causation standard(s) should be applied to the federal-sector provision of the Age Discrimination in Employment Act of 1967 "to resolve a Circuit split over the interpretation" of that provision); Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S.Ct. 1009, 1013, (2020) (addressing which causation standard applies to 42 U.S.C. § 1981 "[t]o resolve the disagreement among the circuits over § 1981's causation requirement"); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342-43 (2013) (addressing whether Title VII's antiretaliation provision incorporates the "lessened causation standard" of "motivating factor" or the higher standard of "but for" causation). *See also, e.g.*, Burrage v. United States, 571 U.S. 204, 206, 210 (2014) (addressing the statutory text "results from" in the Controlled Substances Act to determine whether it incorporates "contributing to" or "but for" causation, as the "Act does not define the phrase").

[99] *See, e.g., Nassar*, 570 U.S. at 348-52 (discussing its precedent addressing the text "because of" in other statutory provisions to inform its interpretation of the text "because of" in Section 704(a) of Title VII of the Civil Rights Act of 1964); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176-77 (2009) (addressing the meaning of the text "because of" in Section 4(a)(1) of the Age Discrimination in Employment Act); Price Waterhouse v. Hopkins, 490 U.S. 228, 240-42 (1989) (plurality opinion) (discussing the meaning of the text "because of" in Section 703(a)(1) of Title VII of the Civil Rights Act of 1964).

The Court has taken various approaches to interpreting antidiscrimination provisions for causation purposes, including with respect to the statutory text "because" or "because of." Rather than viewing those terms as necessarily incorporating "but for" causation,[100] the Court has considered the broader context of the statutory provision at issue,[101] including the provision's other text and phrasing,[102] the relationship to a statute's overall schema (including other statutory provisions),[103] and common law tort principles to inform its interpretation.[104] While the Court's most recent decisions appear to reflect greater reliance on common law tort doctrine to read in "but for" causation as a "default" standard,[105] the Court continues to underscore the specific choice of text and syntax in a provision[106] to determine whether "but for" causation, or another causation standard or related formulation,[107] applies.

## *Price Waterhouse v. Hopkins* (1989): Introducing "Motivating Factor" Causation

*Bostock* was not the first time the Court addressed causation in Section 703(a)(1) of Title VII, which makes it is unlawful for certain private sector employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex."[108] While the Court in *Bostock* construed this text to incorporate a "but for"

[100] *See, e.g., infra* notes 101-103.

[101] *See, e.g., Gross*, 557 U.S. at 173-75 (when interpreting "because of" in the ADEA, considering Congress's decision to amend Title VII to codify "motivating factor" causation in that statute, but to not similarly amend the ADEA).

[102] *See, e.g.*, *Price Waterhouse*, 490 U.S. at 241-42 (plurality opinion) (considering the "present, active tense of the operative verbs of § 703(a)(1)" when interpreting Section 703(a)(1) of Title VII to incorporate a "motivating factor" causation standard).

[103] *See, e.g., Nassar*, 570 U.S. at 362 (pointing to the "text, structure, and history of Title VII" as supporting the Court's interpretation that "a plaintiff making a retaliation claim under § 2000e–3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.").

[104] *See, e.g., id*. at 346-47 (discussing and citing various treatises addressing common law tort doctrine, including different sections of the RESTATEMENT OF TORTS (1934), RESTATEMENT (SECOND) OF TORTS (1963 and 1964), and RESTATEMENT (THIRD) OF TORTS (2010)).

[105] *See, e.g., Comcast*, 140 S.Ct. at 1013-14 (characterizing "but for" causation as the "traditional arrangement," and describing it as a "'default' or 'background' rule") (citing *Nassar*, 570 U.S. at 347); *Burrage*, 571 U.S. at 211 (stating that the "but-for requirement is part of the common understanding of cause"). *See also Comcast*, 140 S.Ct. at 1014-15 (addressing the statutory text at issue, which did "not expressly discuss causation," and holding that it required a showing that "race was a but-for cause" of the harm); *Burrage*, 571 U.S. at 218 (concluding that the statute at issue required a showing of "but for" causation).

[106] *See, e.g.*, Babb v. Wilkie, 140 S.Ct. 1168, 1173-76 (2020) (when interpreting the ADEA's federal sector provision for causation purposes, examining the text "free from," "shall be made," "discrimination," and "based on age"; in its analysis, also emphasizing two "critical" matters of syntax concerning the "adjectival phrase" "based on age" and its modification of the noun "discrimination," and the "adverbial phrase" "free from any discrimination" and its modification of the verb "made") (discussing and citing 29 U.S.C. § 633a(a)).

[107] *See, e.g., supra* note 106. Addressing the question of whether a plaintiff must show "but for" causation to establish liability under 29 U.S.C. § 633a(a), the Court in *Babb* interpreted the text to require that "a personnel action must be made 'untainted' by discrimination based on age." *See* 140 S.Ct at 1173-74 ("If age discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by such discrimination."). Pursuant to that rationale, the Court concluded that a plaintiff could prevail on a claim by showing that age tainted the decision, even if age was not a "but for" cause of the decision itself. *See id*. In terms of the requisite showing of causation, the Court held that if a plaintiff shows that "age was a but-for cause of differential treatment in an employment decision but not a but-for cause of the decision itself," then a plaintiff can establish liability under the provision but would be limited to "injunctive or other forward-looking relief." *See id*. at 1178. The Court also interpreted Section 633a(a) to allow a plaintiff to establish liability by showing that "age discrimination was a but-for cause of the employment outcome" itself, in which case such plaintiffs could seek relief in the form of "reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision." *See id*. at 1177-78.

[108] 42 U.S.C. § 2000e-2(a)(1).

causation standard,[109] the Court some three decades earlier in its *Price Waterhouse v. Hopkins* decision interpreted the same text to employ a different standard[110]—"motivating factor" or "substantial factor" causation.[111] The "motivating factor" standard requires a showing that an individual's protected trait "played a motivating part in an employment decision," even if other factors also played a role.[112]

Though no single opinion in *Price Waterhouse* commanded a majority,[113] a four-Justice plurality expressly rejected the view that "because of" in this provision was "colloquial shorthand for 'but-for causation,'" stating that to "construe the words" in that way was to "misunderstand them."[114] In reaching that conclusion, the plurality opinion emphasized the "present, active tense of the operative verbs" in the provision, such as "to fail or refuse," as indicating that a Title VII analysis should focus on "the actual moment of the event in question."[115] Given that focus, the plurality concluded that the "critical inquiry, the one commanded by the words of Section 703(a)(1), is whether gender was a factor in the employment decision."[116] The plurality contrasted this inquiry with the "hypothetical construct" of "but-for" causation, which "begin[s] by assuming that [a] factor was present at the time of the event, and then ask[s] whether, even if that factor had been absent, the event nevertheless would have transpired in the same way."[117] The plurality expressed skepticism that Congress would have used the phrase "because of" "to obligate a plaintiff to identify the precise causal role" in a challenged employment action.[118] Citing these and other reasons,[119] the plurality concluded that Section 703(a)(1) requires a plaintiff to show that "gender

[109] *Bostock*, 140 S.Ct. at 1739-40.

[110] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-42 (1989) (plurality opinion). Although Section 703(a)(2) was not at issue before the Court in *Price Waterhouse*, the plurality also referred to the text "because of" in (a)(2) when rejecting an interpretation of "but for" causation based on the text "because of." *See id.* at 240 (referring to both 42 U.S.C. §§ 2000e–2(a)(1) and (a)(2) when rejecting the view that "the words 'because of'" incorporated "but-for" causation).

[111] *Price Waterhouse*, 490 U.S. at 244-45, 258. *See also id*. at 259-60 (White, J., concurring in judgment) (agreeing that the plaintiff's burden is "to show that the unlawful motive was a *substantial* factor in the adverse employment action" and that after such a showing, "[t]he burden of persuasion then should have shifted to Price Waterhouse to prove 'by a preponderance of the evidence that it would have reached the same decision ... in the absence of' the unlawful motive") (citation omitted); *id.* at 276 (O'Connor, J., concurring in judgment) (stating that "a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision" and that upon such a showing, "the burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor").

[112] *See id*. at 244. *See also Nassar*, 570 U.S. at 343 (describing the "motivating factor" causation standard as requiring a showing that "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.").

[113] *See Nassar*, 570 U.S. 338, 348 (2013) (discussing the *Price Waterhouse* decision, in which the Court "addressed in particular what it means for an action to be taken 'because of' an individual's" protected trait; stating that "[a]lthough no opinion in that case commanded a majority, six Justices did agree that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a 'motivating' or 'substantial' factor in the employer's decision.") (citing *Price Waterhouse*, 490 U.S., at 258 (plurality opinion); *id.* at 259 (White, J., concurring in judgment); *id.*, at 276 (O'Connor, J., concurring in judgment)).

[114] *See Price Waterhouse*, 490 U.S. at 240-41.

[115] *See Price Waterhouse*, 490 U.S. at 240-41.

[116] *Id*. at 241.

[117] *Id*. at 240.

[118] *Id*. at 241 ("It is difficult for us to imagine that, in the simple words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges.").

[119] *Id*. at 242 (discussing another Title VII provision—the statute's "bona fide occupational qualification" exception—as further support for its interpretation) (citing 42 U.S.C. § 2000e–2(e)).

played a motivating part in an employment decision," with two Justices concurring in the judgment.[120] The four-Justice plurality and two Justices also agreed that an employer could avoid liability altogether "by proving that it would have made the same decision even if it had not allowed gender to play such a role."[121]

Two years after the *Price Waterhouse* decision, in 1991, Congress codified in part and rejected in part the holding of that case.[122] Congress codified the "motivating factor" causation standard in Title VII,[123] thereby appearing to endorse that aspect of *Price Waterhouse*.[124] Congress, however, rejected the aspect of *Price Waterhouse* holding that an employer could avoid liability altogether where it could establish that it would have made the same decision absent consideration of the individual's sex.[125] In amending the statute, Congress left the text of Section 703(a)(1) unchanged,[126] but added provisions expressly providing that liability under Section 703(a)(1) could be established with a showing of "motivating factor" causation,[127] and addressing the burden-shifting framework and available relief for such claims.[128]

## *Gross v. FBL Financial Services, Inc.* (2009): Rejecting "Motivating Factor" Causation

In its 2009 decision *Gross v. FBL Financial Services, Inc.*,[129] the Court again reached the issue of causation, this time in a provision of the Age Discrimination in Employment Act (ADEA).[130] In contrast to *Price Waterhouse*, the Court held that the statutory text at issue—"because of such

[120] *See supra* notes 111, 113.

[121] *See supra* note 111.

[122] *See Nassar*, 570 U.S. at 343 (discussing *Price Waterhouse* and stating that Congress's "ensuing statutory amendment" "codified in part and abrogated in part the holding in *Price Waterhouse*") (citing 42 U.S.C. §§ 2000e–2(m), 2000e–5(g)(2)(B)). *See also Nassar*, 570 U.S. at 348 (stating that "[t]wo years later, Congress passed the Civil Rights Act of 1991," which among other things, "codified the burden-shifting and lessened-causation framework of *Price Waterhouse* in part but also rejected it to a substantial degree").

[123] *See supra* note 122 and *infra* note 127.

[124] *See Nassar*, 570 U.S. at 370 (Ginsburg, J., dissenting, joined by three other Justices) ("Congress endorsed the plurality's conclusion that, to be actionable under Title VII, discrimination must be a motivating factor in, but need not be the but-for cause of, an adverse employment action" but "disagreed with the Court, however, insofar as the *Price Waterhouse* decision allowed an employer to escape liability by showing that the same action would have been taken regardless of improper motive.") (citing H.R. REP. NO. 102–40, pt. II, at 18 (1991)).

[125] *See Nassar*, 570 U.S. at 349 ("The 1991 Act also abrogated a portion of *Price Waterhouse*'s framework by removing the employer's ability to defeat liability once a plaintiff proved the existence of an impermissible motivating factor.").

[126] *See* Civil Rights Act of 1991, P.L. 102-166, § 107, 105 Stat. 1071, 1075-76.

[127] *See* Civil Rights Act of 1991, P.L. 102-166, § 107(a), 105 Stat. 1071, 1075-76, codified at 42 U.S.C. § 2000e-2(m).

[128] *See supra* notes 125 and 126; 42 U.S.C. § 2000e–5(g)(2)(B)). *See generally Comcast*, 140 S.Ct. at 1017 ("In the Civil Rights Act of 1991, Congress provided that a Title VII plaintiff who shows that discrimination was even a motivating factor in the defendant's challenged employment decision is entitled to declaratory and injunctive relief.") (citing § 107, 105 Stat. 1075); *Nassar*, 570 U.S. at 349 (explaining that under the 1991 Act, "a plaintiff could obtain declaratory relief, attorney's fees and costs, and some forms of injunctive relief based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action; but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order.").

[129] 557 U.S. 167 (2009).

[130] *See id*. at 176 (examining the text of 29 U.S.C. § 623(a)(1) of the Age Discrimination in Employment Act).

individual's age"—incorporated "but for" causation.[131] In so holding, the Court rejected arguments that the text should be read to incorporate "motivating factor" causation.[132]

In distinguishing the ADEA provision from the Title VII provision at issue in *Price Waterhouse*, the Court in *Gross* cautioned that "[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'"[133] Highlighting differences between the statutory text of the ADEA and Title VII, the Court pointed to Congress's amendment of Title VII to add "motivating factor" causation without similarly amending the ADEA to expressly incorporate this standard, even though Congress had contemporaneously amended the ADEA in other ways.[134] The Court emphasized that it could not "ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA," and observed that "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[135] On that basis, the Court concluded that its "interpretation of the ADEA is not governed by Title VII decisions such as . . . *Price Waterhouse*."[136]

Differentiating the ADEA provision from Title VII in that regard,[137] the Court turned to the specific text of the ADEA provision at issue. Citing dictionary definitions of the word "because," the Court concluded that the "ordinary meaning" of the text "because of" in the ADEA provision meant that "age was the 'reason' that the employer decided to act,"[138] which in turn corresponded as a legal matter to "but for" causation.[139] To support that conclusion, the Court cited two other decisions without additional discussion:[140] one decision in which the Court addressed the import of the statutory phrase "'[a]ny person injured in his business or property by reason of a violation'" in an anti-racketeering statute;[141] and another in which the Court examined the

[131] *Id*. at 176 ("To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision.").

[132] *See id*. at 174-75.

[133] *Id.* at 174 (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

[134] *Id*.

[135] *Id*. at 174.

[136] *Id*. at 175.

[137] *See also id*. at 178 (rejecting the argument that the Court should adopt the burden-shifting framework in *Price Waterhouse* to the ADEA, observing that "it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply"). *See also id*., n. 5 ("Congress' careful tailoring of the 'motivating factor' claim in Title VII, as well as the absence of a provision parallel to § 2000e–2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA.").

[138] *Id*. at 175-77.

[139] *Id*. at 176 ("To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.").

[140] *See id*. (citing Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 652-55 (2008); Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 63–64, and n. 14 (2007)). *See also id*. (parenthetically describing its citation to *Bridge* as "recognizing that the phrase, 'by reason of,' requires at least a showing of 'but for' causation"); *id*. (parenthetically describing its citation to *Safeco* as "observing that '[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition' and that the statutory phrase, 'based on,' has the same meaning as the phrase, 'because of'").

[141] *See Bridge*, 533 U.S. at 641-42 (quoting 18 U.S.C. § 1964(c)) of the Racketeer Influenced and Corrupt Organizations Act (RICO)), and explaining that the "question presented in this case is whether a plaintiff asserting a RICO claim predicated on mail fraud must plead and prove that it relied on the defendant's alleged misrepresentations."). *See also id*. at 653-54 (discussing an earlier decision in which the Court "recognized that § 1964(c)'s 'language c[ould], of course, be read to mean that a plaintiff is injured 'by reason of' a RICO violation" upon a showing that "the defendant's violation was a 'but for' cause of plaintiff's injury" but ultimately concluded that this text additionally "require[d] the plaintiff to establish proximate cause in order to show injury 'by reason of' a RICO

statutory phrase "adverse action ... based in whole or in part on any information contained in a consumer [credit] report" in a provision of the Fair Credit Reporting Act.[142]

## *University of Texas Southwestern Medical Center v. Nassar* (2013): "Textbook Tort Law" to Address Causation

A few years later, in its 2013 decision *University of Texas Southwestern Medical Center v. Nassar,*[143] the Supreme Court addressed which causation standard—"but for" or "motivating factor"—should apply to yet another antidiscrimination provision, this time Title VII's antiretaliation provision.[144] That provision generally bars retaliatory actions against an employee "because" the employee has opposed an employment practice prohibited under Title VII or was involved in a Title VII-related investigation or proceeding.[145]

In its analysis, the Court placed particular emphasis on common law tort doctrine as an interpretive tool to analyze questions of causation. Describing "but for" causation as "textbook tort law," and observing that such tort law concepts are "the background against which Congress legislated in enacting Title VII," the Court stated that it would presume that Congress incorporated these "default" rules, in the absence of legislative intent in the statute indicating otherwise.[146] In addition to emphasizing this "background" understanding, the *Nassar* Court also looked to its analysis in *Gross*,[147] and concluded that the earlier decision contained "insights" for interpreting Title VII's antiretaliation provision,[148] and supported the conclusion that "because" as it appears in Title VII's antiretaliation provision similarly requires "but for" causation.[149]

The *Nassar* Court also discussed other aspects of Title VII to support its interpretation,[150] including a comparison of specific textual references to "unlawful employment practice" in Title

violation") (citing and discussing Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 265–266, 268 (1992).

[142] *See Safeco*, 551 U.S. at 52 (discussing and quoting 15 U.S.C. §§ 1681m(a) and 1681n(a) of the Fair Credit Reporting Act); *id*. at 63-64 (in the context of addressing a party's contention "that in order to have adverse action 'based on' a credit report, consideration of the report must be a necessary condition for the increased rate," concluding that "[t]o the extent there is any disagreement on the issue, we accept [that] reading; further stating that because in "common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition," concluding that "an increased rate is not 'based in whole or in part on' the credit report unless the report was a necessary condition of the increase."). *Cf*. *Babb*, 140 S.Ct. at 1175 (discussing its analysis in *Safeco* and highlighting differences in the text of the provision at issue in that case with the text of the ADEA's federal sector provision, 29 U.S.C. § 633a(a)).

[143] 570 U.S. 338 (2013).

[144] *Id*. at 342-43 (discussing the "but for" and "motivating factor" causation standards and stating that the "question the Court must answer here is whether that lessened causation ["motivating factor"] standard is applicable to claims of unlawful employer retaliation under § 2000e–3(a).").

[145] *See* 42 U.S.C. § 2000(e)-3(a). For further discussion of Title VII's antiretaliation provision, see CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back, at 77-78 (Sept. 21, 2020).

[146] *Nassar*, 570 U.S. at 346-47.

[147] *Id*. at 343 (stating that though "the Court has not addressed the question of the causation showing required to establish liability for a Title VII retaliation claim," stating that its holding and analysis in *Gross* "are instructive here").

[148] *Id*. 350-52 (discussing its analysis in *Gross* and stating that "that opinion holds two insights for the present case," the first being "textual and concern[ing] the proper interpretation of the term 'because' as it relates to the principles of causation," and the second being "the significance of Congress' structural choices in both Title VII itself and the law's 1991 amendments"; adding that "[t]hese principles do not decide the present case but do inform its analysis, for the issues possess significant parallels.").

[149] *Id.* at 352.

[150] *See id*. at 352-57.

VII's antiretaliation and "motivating factor" provisions,[151] and "the design and structure of the statute as a whole."[152] The Court concluded, "based on these textual and structural indications," that Title VII retaliation claims "must be proved according to traditional principles of but-for causation."[153]

## *Bostock v. Clayton County* (2020): Another View of Section 703(a)(1)

In its 2020 *Bostock* decision, the Court revisited Title VII's antidiscrimination provision, Section 703(a)(1), this time reading the provision as incorporating "but for" causation.[154] In the Court's 1989 *Price Waterhouse* decision, however, six Justices had previously construed "because" in Section 703(a)(1) to require that a plaintiff show that a protected trait was a "motivating" or "substantial" factor in the challenged employment action.[155] Making no reference to this aspect of *Price Waterhouse*, the Court in *Bostock* pointed to its decisions in *Gross* and *Nassar*, stating that "as this Court has previously explained, 'the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'"[156] "In the language of law," the Court continued, "this means that Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation."[157] With little further discussion,[158] the Court read Title VII's antidiscrimination provision to incorporate "but for" causation, emphasizing the text "because of" interpreted in light of common law tort principles.[159]

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[151] *See id*. at 352-53 (comparing the manner in which these two provisions refer or relate to "unlawful employment practice[s]" under Title VII).

[152] *See id*. at 353-56.

[153] *Id*. at 360. *See also id*. at 362 ("The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e–3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.").

[154] *See Bostock*, 140 S.Ct. at 1739 (pointing to "because of" in Title VII's antidiscrimination provision, 42 U.S.C. § 2000e-2(a)(1), and concluding that incorporated "but for" causation). *See* 42 U.S.C. § 2000e-2(a)(1) (making it an "unlawful employment practice" for an employer to take certain employment-related actions against an individual "because of such individual's race, color, religion, sex, or national origin").

[155] *See Price Waterhouse*, 490 U.S. at 244-45, 258. *See also id*. at 259-60 (White, J., concurring in judgment) (agreeing that the plaintiff's burden is "to show that the unlawful motive was a *substantial* factor in the adverse employment action"; *id.* at 276 (O'Connor, J., concurring in judgment) (stating that "a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision"). *See generally supra* section "Price Waterhouse v. Hopkins (1989): Introducing "Motivating Factor" Causation."

[156] *Bostock*, 140 S.Ct. at 1739 (citing *Nassar*, 570 U.S. at 346, 350, 360; *Gross*, 557 U.S. at 176).

[157] *Id*. (citing *Nassar*, 570 U.S. at 346, 360).

[158] While the Court did not discuss the *Price Waterhous*e decision, it referred to Congress's 1991 amendment codifying the "motivating factor" causation standard, in the context of suggesting that "Congress has moved in the opposite direction" of causation requirements that would demand a showing that a prohibited factor be the sole or primary cause of the challenged action. *See Bostock*, 140 U.S. at 1739-40. *See also infra* note 162.

[159] *See supra* note 156. *Cf*. Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, 576 U.S. 519, 535 (2015) (addressing and rejecting the argument that the phrase "because of race" in a Fair Housing Act provision "foreclose[d] disparate impact liability" because that text required a showing that race was a reason for the action; pointing to the Court's precedent interpreting Title VII and the Age Discrimination in Employment Act (ADEA) and stating that "[b]oth Title VII and the ADEA contain identical 'because of' language, *see* 42 U.S.C. § 2000e–2(a)(2); 29 U.S.C. § 623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.") (citations omitted).

## The Potential Role of Causation in Other Statutes

As the above cases illustrate, the Supreme Court has taken different approaches for determining how to construe statutory text in antidiscrimination provisions for causation purposes.[160] Given the differing rationales reflected in these cases, it is possible that lower courts may also approach the analysis of causation standards in a range of ways.[161]

In addition, how courts resolve questions of causation may also affect their analyses concerning whether and how *Bostock* might apply when interpreting other antidiscrimination statutes. As discussed earlier, when interpreting Section 703(a)(1) of Title VII,[162] the Court in *Bostock* repeatedly emphasized that when an employer discriminates against an individual "because of" an individual's sexual orientation or gender identity, at least one "but for" cause of that discrimination is consideration of the individual's "sex."[163] While the termination of a gay employee may be based on a *combination* of both the individual's "sex and attraction,"[164] that combination, the Court explained, is sufficient to trigger Title VII liability because the individual's sex was one "but for" cause of the termination.[165] Rooting its analysis in the "but for" standard, the Court in *Bostock* concluded that Title VII's prohibition of discrimination "because of…sex" covers claims alleging discrimination based on sexual orientation and gender identity.[166]

The Court's exclusive emphasis on "but for" causation, however, leaves it an open question as to whether a statute that incorporates a different causation standard might alter the legal analysis. As discussed in more detail below, to the extent a lower court considers causation to determine whether to apply *Bostock* to another statute, it appears that a statute incorporating a *less stringent* causation standard than "but for" causation may be amenable to an interpretation that it too, like Title VII in *Bostock*, encompasses sexual orientation and gender identity-based claims. A provision incorporating a *more demanding* causation standard than "but for," however, would

[160] *See supra* note 159.

[161] *Compare* Clerveaux v. E. Ramapo Cent. Sch. Dist., 984 F.3d 213, 230-232 (2d Cir. 2021) (rejecting argument made in reliance on *Bostock* that Section 2 of the Voting Rights Act, which prohibits "denial or abridgement of the right to vote 'on account of race or color,'" requires a showing of "but for" causation) *with* Thomas v. CalPortland Co., 993 F.3d 1204, 1209-10 (9th Cir. 2021) (holding that text "because" in the antidiscrimination provision of the Federal Mine Safety and Health Act incorporates "but for" causation; citing and discussing the *Bostock* decision to support its conclusion, among other cases). *See also, e.g.*, Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) (rejecting argument that *Bostock* altered the meaning of "but for" causation under the Age Discrimination in Employment Act from requiring that age be the "determinative" reason for the alleged discrimination to age being only one "but for" cause).

[162] *See Bostock*, 140 S.Ct. at 1740 (stating that "because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. § 2000e–2(a)(1)").

[163] *See id*. at 1741-43. *See also* 42 U.S.C. § 2000e-2(a)(1) (making it an unlawful employment practice to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

[164] *See Bostock*, 140 S.Ct. at 1748 ("So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can *combine* to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.") (emphasis added).

[165] *See supra* note 164. *See also, e.g.*, *Bostock*, 140 S.Ct. at 1739 ("So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.").

[166] *See id*. at 1753.

appear to raise legal questions concerning *Bostock*'s applicability to such statutes. These scenarios are explored in two illustrations discussed below.

One illustration of a less stringent causation standard than "but for" causation is the "motivating factor" causation standard, which the Court in *Bostock* described as "more forgiving" than "but for."[167] This standard requires a plaintiff to show that an individual's protected trait "played a motivating part" in an alleged discriminatory action, even if other factors also played a role.[168] Given the Court's characterization of "motivating factor" as an easier standard to meet than "but for" causation, a party could argue under *Bostock* that if an individual's sex is a "but for" cause of discrimination based on sexual orientation or gender identity, then consideration of sex must necessarily play a motivating part in discrimination based on sexual orientation or gender identity as well. If a court adopted such a rationale, then it might thus conclude that a statutory provision that incorporates "motivating factor" causation and which expressly prohibits sex discrimination, also prohibits entities from taking certain actions based on an individual's sexual orientation or gender identity. While the Court in *Bostock* expressly stated that "nothing in [its] analysis depends on the motivating factor" standard,[169] it appears that conduct that satisfies the "but for" causation standard set out in *Bostock* also likely satisfies the more lenient "motivating factor" standard.

A statute that clearly incorporates a *stricter* causation standard than "but for," however, could raise some uncertainty concerning whether such statutes are amenable to an interpretation similar to the Court's construction of Title VII in *Bostock*. One example of a more difficult standard to satisfy than "but for" is "primary" causation—a standard repeatedly mentioned in the *Bostock* decision as a point of contrast to "but for" causation.[170] The "primary" causation standard, as applied to a statute that expressly prohibits *sex* discrimination, might require a plaintiff to show that an individual's sex was the *primary* or main cause of the discriminatory action, though not necessarily the sole cause.[171]

Referring to this standard in the *Bostock* decision, Justice Gorsuch responded to the defendants' contention that Title VII liability only addressed conduct where an individual's sex was dispositive in the employment decision.[172] Gorsuch observed that the "employers might be onto

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[167] *See id*. at 1739-40 (referring to the "motivating factor" standard and stating that "[u]nder this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision.").

[168] *See Price Waterhouse*, 490 U.S. at 244. *See also Nassar*, 570 U.S. at 343 (describing the "motivating factor" causation standard as requiring a showing that "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.").

[169] *See id*. at 1740 (stating that "nothing in our analysis depends on the motivating factor test").

[170] Justice Gorsuch, writing for the Court in *Bostock*, repeatedly stated that Section 703(a)(1) does not require plaintiffs to show that sex was the primary cause of the alleged discriminatory action. *See Bostock*, 140 S.Ct. at 1739 (noting the absence in Title VII of the terms "'primarily because of' to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision"); *id*. at 1744 (stating that under Title VII, "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action" and accordingly, that it is of "no significance [under Title VII] if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision"). *See also id*. at 1745 (discussing "the kind of cause the law is looking for in a Title VII case" and contrasting an employee's likely focus on "the primary or most direct cause" of a termination decision with "Title VII's legal analysis, which asks simply whether sex was a but-for cause").

[171] *See generally, e.g.*, Brown v. Plata, 563 U.S. 493, 517, 525 (2011) (in the context of establishing a violation of a provision in the Prison Litigation Reform Act of 1995, stating that "primary" causation requires a showing that a condition or event was the "foremost, chief, or principal cause of the violation" but not "the only cause"). *See also Bostock*, 140 S.Ct. at 1739 (describing the statutory phrase "'primarily because of'" as indicating "that the prohibited factor had to be the main cause" of the challenged action).

[172] *See id*. at 1747-48 (describing a hypothetical test offered by the employer "to isolate whether a plaintiff's sex caused

something . . . if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action."[173] The Court, however, concluded that "everything we know about the statute" demonstrates that Title VII clearly does not incorporate primary or sole causation.[174]

These observations in the decision, and the underlying rationale of the Court's analysis in *Bostock*, could be read to suggest that a statute that prohibits sex discrimination—but which employs a primary causation standard—may not be interpreted to encompass claims alleging sexual orientation or gender identity-based discrimination. Rather, under a primary causation standard, it might be argued that if an individual is discriminated against because of sexual orientation, the individual's sexual orientation was the primary cause of the conduct, not the individual's sex. Put another way, because a statute incorporating primary causation would require that the individual's *sex* was the principal cause for the action, a showing that an individual's sex was one "but for" cause of sexual orientation-based discrimination would arguably not be sufficient to trigger that statute's prohibition.

Similarly, with respect to gender identity-based discrimination, a party might argue that such a statute may not be interpreted to encompass such claims on the rationale that the principal cause of gender identity-based discrimination is not the individual's sex *per se*. Rather, it might be argued that the primary cause of such discrimination is the fact of the individual's sex assigned at birth differing from his or her gender identity,[175] or actions undertaken by an individual in relation to gender transition.[176]

In light of the above, if a court were to read a statute to incorporate primary causation, it might conclude that the standard forecloses interpreting a prohibition of *sex* discrimination to encompass sexual orientation or gender identity-based discrimination claims. While the Court in *Bostock* did not expressly address how its analysis might differ under a primary causation standard, the underlying reasoning of the decision could lead a court to interpret a statute with a heightened causation standard differently.

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the dismissal"). *See also id*. at 1748 ("At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow.").

[173] *See id.* at 1748.

[174] *See id.* (stating that the statute does not "care if other factors besides sex contribute to an employer's discharge decision" and that the defendants' arguments suggesting that Title VII liability requires sole or primary causation "is at odds with everything we know about the statute"). Elsewhere in the decision, Justice Gorsuch construed the defendants' arguments to suggest creating a stricter Title VII causation standard only for claims alleging discrimination based on sexual orientation or gender identity—an argument the Court rejected on the basis that this would constitute a departure from the clearly applicable "but for" causation standard that would ordinarily apply. *See id*. at 1749 (describing the "simple test" that typically applies in Title VII analyses and stating that "the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly").

[175] *See generally, e.g.*, Doe by and through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522 (3d Cir. 2018) ("The term 'transgender' refers to a person whose gender identity does not align with the sex that person was determined to have at birth.").

[176] *See generally, e.g.*, Nat'l Center for Transgender Equality, *Understanding Transgender People: The Basics* (July 9, 2016), https://transequality.org/issues/resources/understanding-transgender-people-the-basics (discussing gender transition and stating that "steps in a gender transition may or may not include changing your clothing, appearance, name, or the pronoun people use to refer to you (like 'she,' 'he,' or 'they'). If they can, some people change their identification documents, like their driver's license or passport, to better reflect their gender. And some people undergo hormone therapy or other medical procedures to change their physical characteristics and make their body match the gender they know themselves to be.").

Importantly, both scenarios explored above—concerning "motivating factor" and "primary" causation— contemplate questions of statutory interpretation absent legislative amendment or newly enacted legislation expressly addressing sexual orientation or gender identity as protected characteristics. If Congress enacted express amendments or legislation in either direction—to either include or exclude sexual orientation or gender identity as characteristics protected under a statute—such legislative direction would appear to eliminate the need for a court to consider a statute's causation standard to resolve a statute's scope of coverage.

# Potential Implications of *Bostock* for Title IX

Having surveyed two considerations that may inform whether a federal court applies or declines to apply *Bostock*'s reasoning to other statutes—a similarly-phrased mandate prohibiting sex discrimination and "but for" causation—this section considers these and other factors with a focus on one statute in particular—Title IX of the Education Amendments of 1972. While the *Bostock* decision has prompted questions about its implications for various civil rights statutes,[177] Title IX has been the subject of significant attention.[178] In addition, whether Title IX's prohibition of sex discrimination in federally-funded education programs extends to gender identity has been the subject of controversy from well before the *Bostock* decision. During the Obama Administration in 2016, for instance, OCR and the Civil Rights Division of the Department of Justice jointly issued a "Dear Colleague" Letter which instructed schools that a student's gender identity is their sex for Title IX purposes.[179] That policy sparked debate and litigation over the meaning of Title IX before the Court issued its decision in *Bostock*.[180] This section thus considers possible factors that courts might weigh to determine whether to apply *Bostock*'s reasoning to interpret the scope of another statute, using Title IX as a potential illustration.

This section first examines Supreme Court precedent addressing Title IX in relation to Title VII. Because federal courts sometimes look to jurisprudence interpreting Title VII to inform their interpretation of other antidiscrimination statutes, this consideration may also shape how courts determine whether to apply *Bostock* to interpret another statute. As discussed in more detail below, the Court's precedent interpreting Title VII and Title IX reflects the Court at times drawing strong similarities between the two while at other times emphasizing strong distinctions. Following that discussion, the report briefly examines federal appellate court precedent addressing another important consideration—causation applicable to Title IX claims. That precedent reflects that the issue of causation under Title IX remains unresolved among federal courts. This section then discusses two decisions in which federal appellate courts have applied

[177] *See, e.g.*, Julie Moreau, *Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC NEWS (June 23, 2020), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779.

[178] *See, e.g.*, Wesley Whistle, *What Does Today's LGBT Supreme Court Ruling Mean for Schools*?, FORBES (June 15, 2020), https://www.forbes.com/sites/wesleywhistle/2020/06/15/what-does-todays-lgbt-supreme-court-ruling-mean-for-schools/?sh=66d2ad974558.

[179] Dear Colleague Letter on Transgender Students, Dep't of Justice Civil Rights Division, Dep't of Educ. Office for Civil Rights (May 13, 2016).

[180] *Compare* Texas v. United States, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (ruling that ED failed to comply with the Administrative Procedure Act when issuing the 2016 Letter and that the Letter contradicted Title IX regulations), *with* G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016) (extending deference under Auer v. Robbins, 519 U.S. 452 (1997) to ED's similar interpretation of Title IX regulations contained in a 2015 opinion letter). The *Gloucester County School Board* decision was vacated and remanded to the Fourth Circuit by the Supreme Court after a new presidential administration issued a guidance document rescinding the 2015 opinion letter, as well as another Dear Colleague letter from 2016. Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017).

*Bostock* to interpret Title IX to encompass claims alleging discrimination based on sexual orientation and gender identity.

## Supreme Court Precedent Addressing Title IX in Relation to Title VII

The Supreme Court has repeatedly considered aspects of Title IX in relation to Title VII. When doing so, the Court has at different turns highlighted "vast" differences between the two statutes[181] while elsewhere importing certain aspects of its Title VII precedent to analyze Title IX claims.[182]

The Court in its 1992 decision *Franklin v. Gwinnett County Public Schools*,[183] for example, drew upon its Title VII precedent recognizing sexual harassment as a cognizable form of sex discrimination to similarly recognize sexual harassment as actionable under Title IX.[184] The Court in *Franklin*, citing an earlier Title VII decision, *Meritor Savings Bank, FSB v. Vinson*,[185] expressed the view that Title IX's mandate prohibiting discrimination on the basis of sex should be interpreted to prohibit sexual harassment by a teacher against a student, just as the Court had interpreted Title VII to prohibit sexual harassment by a supervisor against a subordinate.[186]

A few years later, however, in its 1998 decision *Gebser v. Lago Vista Independent School District*,[187] the Court rejected arguments that such Title IX harassment claims should be analyzed in the same way as harassment claims under Title VII,[188] citing distinctions between the two statutes[189] and Title IX's administrative enforcement schema.[190] The *Gebser* Court created a different legal standard for establishing liability under Title IX for harassment—that of deliberate

[181] *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) (stating that Title VII "is a vastly different statute from Title IX," and discussing various distinctions between the two).

[182] *See, e.g.*, *infra* note 186.

[183] 503 U.S. 60 (1992).

[184] *See generally* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998) (explaining that its reference in *Franklin* to its Title VII *Meritor* decision "was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX").

[185] 477 U.S. 57 (1986). The Court in *Meritor* held that sexual harassment constituted actionable sex discrimination prohibited by Title VII. *Id.* at 64.

[186] *Franklin*, 503 U.S. at 75 (stating that "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student.") (quoting *Meritor*, 477 U.S. at 64).

[187] 524 U.S. 274 (1998).

[188] *See id*. at 282-85 (discussing petitioner's arguments that the legal standards used in Title VII harassment cases based on agency principles should likewise apply to Title IX and rejecting those arguments; concluding that "it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on" agency principles). *See also* Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) ("As an initial matter, in *Gebser* we expressly rejected the use of agency principles in the Title IX context, noting the textual differences between Title IX and Title VII.") (citing *Gebser*, 524 U.S., at 283).

[189] *See Gebser*, 524 U.S. at 283-84 (distinguishing Title IX from Title VII on the basis that the text of Title IX makes no reference to "agent," as the text of Title VII does, and contrasting the judicially implied private right under Title IX with Title VII's provisions expressly providing for a private right of action and "the particular situations in which damages are available as well as the maximum amounts recoverable").

[190] *See id*. at 287-90 (citing various features of Title IX's administrative enforcement schema to conclude that, "in the absence of further direction from Congress," the framework for analyzing a Title IX harassment claim for damages "should be fashioned along the same lines" as the administrative enforcement schema, which is "predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation").

indifference—in light of its precedent addressing municipal liability under another statute, 42 U.S.C. § 1983.[191] And in rejecting the application of a Title VII analysis to Title IX liability, the Court instead highlighted similarities between Title IX and another title of the 1964 Civil Rights Act—Title VI.[192] The Court underscored the shared "contractual framework" of Title VI and Title IX as legislation enacted based on Congress's Spending Clause authority, which "condition[s] an offer of federal funding on a promise by the recipient not to discriminate,"[193] and contrasted those statutes with Title VII, "which is framed in terms not of a condition but of an outright prohibition."[194]

While the Court in *Gebser* distinguished Title IX from Title VII, the Court in its 1999 decision *Davis Next Friend LaShonda D. v. Monroe County Bd. of Education*[195] returned in part to draw upon its Title VII precedent when addressing the standard for Title IX liability for a certain subset of harassment claims—those involving harassment committed by one student against another.[196] For this category of Title IX harassment claims, the Court discussed unique considerations concerning the scope of liability for harassment among students in a school setting,[197] and held that—in addition to showing actual notice and deliberate indifference required by *Gebser*—plaintiffs would have to make an additional showing.[198] The Court concluded that plaintiffs would also have to establish harassment that "is so severe, pervasive, and objectively offensive, and that

[191] *Id*. at 290-91 (concluding that to establish liability under Title IX for a teacher's sexual harassment of a student, the recipient's "response must amount to deliberate indifference to discrimination" and likening its adoption of that standard to Title IX to its "adoption of a deliberate indifference standard for claims under [42 U.S.C.] § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation."). The Court in *Gebser* also identified "actual notice" to an "appropriate person" as requisite components of a Title IX harassment claim. *See id*. at 290-91 (describing "an appropriate person" and "actual notice," and holding that "in cases like this one that do not involve official policy of the recipient entity," "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond"). *See also id*. at 292-93 (stating that "we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference"). For further discussion of the standards governing Title IX liability in private rights of action for harassment, see CRS Report R45685, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, by Jared P. Cole and Christine J. Back.

[192] *Gebser*, 524 U.S. at 286-87 (explaining that Title IX "was modeled after Title VI of the Civil Rights Act of 1964").

[193] *Id*. at 286 (stating that the "two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds."). *See also id*. at 287 (stating that "Title IX's contractual nature has implications for our construction of the scope of available remedies" under that statute).

[194] *Id*. at 286 ("That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition."). *See also id*. at 286-87 (contrasting the operation of Title IX with the scope of Title VII, which "applies to all employers without regard to federal funding and aims broadly to 'eradicat[e] discrimination throughout the economy'"; also stating that while Title VII "seeks to 'make persons whole for injuries suffered through past discrimination,'" "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds") (internal citations omitted).

[195] 526 U.S. 629 (1999).

[196] *See id.* at 639 (addressing the issue of "whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment.").

[197] *See id*. at 644-46 (explaining that in student-on-student harassment cases, certain factors "combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs").

[198] *Id*. at 650 (in addition to establishing a recipient's deliberate indifference and actual knowledge, requiring plaintiffs to make an additional showing as to the harassment itself and victims' "access to the educational opportunities or benefits provided by the school").

so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[199]

In formulating this standard, the Court looked both to the text of Title IX's antidiscrimination provision,[200] and to its decision in *Meritor Savings Bank*,[201] which established the "severe or pervasive" legal standard applicable to Title VII harassment claims.[202] Beyond citing to *Meritor*, however, the Court offered no additional discussion on its reliance upon or modification of the Title VII "severe or pervasive" standard to Title IX.[203] Nonetheless, the Court's analysis reflects its attention to the text of Title IX, the educational context and actors at issue in student-on-student harassment claims,[204] as well as the adaptation of a key concept from Title VII harassment jurisprudence.[205]

More recently, the Court emphasized what it viewed as critical differences between Title VII and Title IX. In its 2005 decision *Jackson v. Birmingham Board of Education*,[206] the Court addressed the question of whether Title IX's mandate encompasses claims alleging retaliation for reporting sex discrimination brought in a private suit.[207] Focusing its analysis on the text of Title IX,[208] the Court reasoned that because retaliation for reporting sex discrimination is a form of intentional discrimination based on sex, the text of Title IX prohibits such retaliation.[209] The Court rejected

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[199] *Id*. at 651.

[200] *Id*. at 650 (quoting the text of 20 U.S.C. § 1681(a) and stating that the "statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender"; concluding that in light of the statutory text, "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."). *See also id*. (discussing the text of Title IX as reflecting that "students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance'") (quoting 20 U.S.C. § 1681(a)).

[201] *See id*. at 651 (using the signal *cf*. to cite to *Meritor*, 477 U.S. at 67).

[202] *See Meritor*, 477 U.S. at 67 (in the context of Title VII, stating that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'") (citations omitted).

[203] *See Davis*, 526 U.S. at 650-51 (reflecting no further mention or discussion of *Meritor*). Following its citation to *Meritor*, the Court quoted from one other Title VII decision, among other references, to illustrate relevant considerations under its modified Title IX "severe or pervasive" standard. *See id*. at 651 (explaining that whether conduct "rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships') (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)). *See also Davis*, 526 U.S. at 651 (discussing considerations "including, but not limited to, the ages of the harasser and the victim and the number of individuals involved," citing DEP'T OF ED, OCR TITLE IX GUIDELINES 12041–42, and cautioning that courts "must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults.")

[204] *See supra* notes 197-98. *See also Davis*, 526 U.S. at 651-52.

[205] For further discussion of case law interpreting the "severe or pervasive" standard under Title VII, *see* CRS Report R45155, *Sexual Harassment and Title VII: Selected Legal Issues*, by Christine J. Back.

[206] 544 U.S. 167 (2005).

[207] *Id*. ("We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.").

[208] *Id*. at 178 (when describing the basis of its holding in *Jackson*, stating that "the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional 'discrimination' 'on the basis of sex.' We reach this result based on the statute's text.").

[209] *Id*. at 173-74 (discussing the text of Title IX and its earlier precedent addressing the statute and concluding that "when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX") (emphasis in original). *See also id*. at 175

arguments that it should read Title IX in light of Title VII, stating that the fact that Title VII contains a separate antiretaliation provision while Title IX does not was not dispositive on the question of whether Title IX also reached retaliation claims.[210] Rather, the Court described Title VII as "a vastly different statute from Title IX,"[211] contrasting Title IX's judicially implied private right with Title VII's express private right.[212] The Court also emphasized the different content and structure of their respective prohibitions, stating that while Title IX is a "broadly written general prohibition" followed by a series of narrow exceptions to that prohibition, Title VII's provisions "spell[] out in greater detail the conduct that constitutes discrimination in violation of that statute."[213] Accordingly, the Court concluded, "[b]ecause Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered."[214] Instead, the Court emphasized the timing of Title IX's passage several years after a decision interpreting another statute, 42 U.S.C. § 1982, to encompass retaliation claims absent an express textual reference to retaliation.[215] The Court reasoned that the drafters of Title IX would have been aware of this earlier decision, and intended Title IX to similarly be understood to encompass retaliation claims.[216]

As the above precedent reflects, the Court has at times drawn from its Title VII jurisprudence to inform its analysis of Title IX, while at other junctures distinguishing between the two statutes given the Spending Clause basis of Title IX, the structure of Title IX's prohibition and exceptions, its judicially implied private right, and its administrative enforcement scheme. This precedent reflects that the Court itself has neither reflexively adopted nor rejected the potential applicability of Title VII jurisprudence to Title IX. Rather, when interpreting Title IX, the Court has drawn from or developed modifications from its Title VII precedent, while also looking to *other* statutes to inform its Title IX analyses, most notably Title VI of the Civil Rights Act of 1964.[217]

("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.").

[210] *Id.* at 175.

[211] *Id.* ("Title VII . . . is a vastly different statute from Title IX, and the comparison the Board urges us to draw is therefore of limited use.") (citing *Gebser*, 524 U.S., at 283–284, 286–287).

[212] *Id.*

[213] *Id.* (listing various examples of conduct that constitute discriminatory employment practices under Title VII in 42 U.S.C. §§ 2000e–2 and 2000e–3).

[214] *Id.*

[215] *Id.* at 176-77 (pointing to Title IX's enactment three years after *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 (1969), and describing *Sullivan* as a case in which the Court "interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition," in the context of a case brought under 42 U.S.C. § 1982 by a white plaintiff "who spoke out against discrimination toward one of his [black] tenants and who suffered retaliation as a result").

[216] *Jackson*, 544 U.S. at 176-77 (stating that its *Sullivan* decision "provides a valuable context for understanding [Title IX]," and quoting earlier Title IX precedent in which the Court had previously stated that "'it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it].'") (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 699 (1979)).

[217] The Supreme Court has repeatedly emphasized similarities between Title VI and Title IX in its precedent. *See, e.g.*, *Gebser*, 524 U.S. at 286 (describing Title VI and Title IX as "parallel," except that Title VI "prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs"); Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979) (stating that "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives" to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices"; explaining that "[b]oth of these purposes were repeatedly identified in the debates on the two statutes"). *See*

## Title IX and Unsettled Questions of Causation

Title IX provides that "[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[218] As discussed earlier, given the Court's emphasis in *Bostock* on the "but for" causation standard,[219] a lower court might look to whether this mandate also employs the "but for" causation standard, or uses a different standard, to determine whether to apply *Bostock* to its interpretation of Title IX.[220] When it comes to Title IX, however, the Supreme Court has not expressly addressed causation,[221] and few federal appellate courts have reached or resolved the question of which causation standards correspond to the statute's mandates, or whether different causation standards apply to different types of claims under Title IX.[222]

Addressing retaliation claims under Title IX, for example, the Seventh Circuit appears to apply the "but for" causation standard,[223] while the First Circuit has recently observed that the applicable causation standard for Title IX retaliation claims remains unclear.[224] The Fifth Circuit,

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*also* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was") (citations omitted). *See generally, e.g.*, Yusuf v. Vassar Coll., 35 F.3d 709, 714 (2d Cir. 1994) (observing that "courts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the caselaw interpreting Title VII"). *Cf.* Emeldi v. Univ. of Oregon, 698 F.3d 715, 724 (9th Cir. 2012) (noting that "the legislative history of Title IX 'strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII'") (quoting Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir.1988)).

[218] 20 U.S.C. § 1681(a). This prohibition is subject to exceptions enumerated in 20 U.S.C. § 1681(a)(1)–(9). *See also id.* §§ 1686, 1688.

[219] *See Bostock*, 140 S.Ct. at 1739-40 (after examining the text "sex" as "a starting point," stating that "[t]he question isn't just what 'sex' meant, but what Title VII says about it"; describing as "most notabl[e]" the statute's prohibition against taking certain actions "because of" sex and the provision's causation standard).

[220] *See supra* section "The Potential Role of Causation in Other Statutes."

[221] *See generally, e.g.*, Theidon v. Harvard Univ., 948 F.3d 477, 506 (1st Cir. 2020) ("Neither the Supreme Court nor our court has resolved the question of whether [*University of Texas Southwestern Medical Center v.*] *Nassar*'s holding on [but for] causation extends to Title IX retaliation claims"); Doe v. Valencia Coll., 903 F.3d 1220, 1236 (11th Cir. 2018) ("Neither the Supreme Court nor this Court has established a framework for analyzing Title IX challenges to university disciplinary proceedings.").

[222] *See supra* note 221. *See also infra* notes 223-31. The Supreme Court has addressed two liability standards under Title IX—both relating to a recipient's "deliberate indifference" to sexual harassment. *See supra* "Supreme Court Precedent Addressing Title IX in Relation to Title VII." Federal courts apply these standards to Title IX *harassment* claims. *See, e.g.*, I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360, 368 (5th Cir. 2019) (setting out the standard for establishing a Title IX claim alleging student-on-student harassment; stating that a "school district that receives federal funds may be liable for student-on-student harassment if the district (1) had actual knowledge of the harassment, (2) the harasser was under the district's control, (3) the harassment was based on the victim's sex, (4) the harassment was so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit, and (5) the district was deliberately indifferent to the harassment.") (citation and internal quotation marks omitted); Doe v. St. Francis Sch. Dist., 694 F.3d 869, 871 (7th Cir. 2012) (with respect to a Title IX claim alleging a teacher's sexual harassment of a student, stating that the "plaintiff must prove that 'an official of the school district who at a minimum has authority to institute corrective measures . . . has actual notice of, and is deliberately indifferent to, the teacher's misconduct.'") (citing *Gebser*, 524 U.S. at 277).

[223] *See* Doe v. Columbia Coll. Chicago, 933 F.3d 849, 857 (7th Cir. 2019) (listing as one of the elements of a Title IX retaliation claim a showing that "there was a but-for causal connection" between a plaintiff's protected activity and alleged adverse action) (citing Burton v. Bd. of Regents of the Univ. of Wis. Sys., 851 F.3d 690, 695 (7th Cir. 2017)); Milligan v. Bd. of Trs. of S. Ill. Univ., 686 F.3d 378, 388 (7th Cir. 2012) ("The Title VII retaliation framework applies with equal force to retaliation claims brought under Title IX.")

[224] *See Theidon*, 948 F.3d at 506-508 (observing that the First Circuit has not "resolved the question of whether [the Supreme Court's holding in *Nassar*] on causation extends to Title IX retaliation claims given the import of Title VII to

in a decision from earlier this year, clarified that its precedent addressing Title IX retaliation claims does not require a showing that a plaintiff's report of sex discrimination was the "sole" cause of an alleged retaliatory action,[225] and instead generally described the requisite showing as a "'causal connection' between the Title IX complaint" and the challenged action.[226] The Ninth Circuit, while expressly drawing upon Title VII's antiretaliation framework to inform its analysis of Title IX retaliation claims,[227] has nevertheless described the requisite showing for Title IX retaliation claims as the demonstration of a "causal link."[228]

Federal appellate courts have also expressed different views on the causation standard for Title IX claims alleging that a university's disciplinary proceeding or decision was biased by sex discrimination. In a decision from earlier this year, for example, the Fourth Circuit concluded that "'on the basis of sex' requires 'but-for' causation in Title IX claims alleging discriminatory school disciplinary proceedings."[229] The Fourth Circuit cited the Supreme Court's decisions in *Bostock*, *Gross,* and *Nassar*, and its own circuit precedent, to construe Title IX's prohibition to incorporate "but for" causation.[230] While the court's reasoning suggests that it might interpret all Title IX claims under this causation standard, the court repeatedly noted that its analysis specifically addressed causation in those Title IX claims alleging discriminatory disciplinary proceedings.[231]

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the adjudication of such claims"; concluding that it "need not resolve that issue today" because the plaintiff had failed to establish causation under the "but for," "motivating factor," or proximate causation standards).

[225] *See* Taylor-Travis v. Jackson State Univ., 984 F.3d 1107, 1117-19 (5th Cir. 2021) (addressing a challenge to a jury instruction on the causation standard for Title IX retaliation claims and stating that the circuit precedent cited by both parties "did not announce a sole causation standard for Title IX retaliation claims"; instead, construing its precedent as "suggest[ing] that the causation standard for Title IX claims should be the same as the causation standard for Title VII claims while clarifying that complaints about conduct barred by Title VII could not form the basis of a Title IX claim").

[226] *See Taylor-Travis*, 984 F.3d at 1119 and n. 43 (concluding that a new trial on the plaintiff's Title IX retaliation claim was not warranted "because the district court's instruction 'substantially covered' the correct standard: that there must be a 'causal connection' between the Title IX complaint and the adverse employment action") (citations omitted). *Cf. id*. at n. 43 (citing several Fifth Circuit cases either requiring "a causal link," or suggesting that because the "anti-retaliation provision of title IX is similar to those of title VII and the ADEA," it should be similarly interpreted).

[227] *See* Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 867 (9th Cir. 2014) (stating that the Ninth Circuit "appl[ies] to Title IX retaliation claims 'the familiar framework used to decide retaliation claims under Title VII'").

[228] *See id*. 867, 869 (requiring a showing of a "causal link" to establish a prima facie case of retaliation under Title IX; stating that "[w]e construe the causal link element of the retaliation framework 'broadly' such that "a plaintiff 'merely has to prove that the protected activity and the [adverse] action are not completely unrelated.'").

[229] Sheppard v. Visitors of Virginia State Univ., No. 19-2452, 2021, WL 1227809, at *4 (4th Cir. Apr. 2, 2021).

[230] *See id.* (stating that "the Supreme Court and our Circuit have held that the same or similar language requires 'but-for' causation.") (citing *Bostock*, 140 S. Ct. 1731; *Nassar*, 570 U.S. at 351–52; *Gross*, 557 U.S. at 176; *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert denied*, -- S.Ct. -- (2021); *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235–36 (4th Cir. 2016)). *See also Sheppard*, 2021 WL 1227809, at *4, n. 7 (noting that in the absence of "congressional intervention" in the form of amendments to Title IX, it was "constrained to the text of Title IX and our binding precedent interpreting the same or similar language" to interpret this category of Title IX claims to incorporate "but for" causation).

[231] *See, e.g. id*. at *3 (observing that because the court had "no precedential decisions regarding Title IX claims in the context" of "higher-education disciplinary proceedings," "our first task is to determine what a party asserting such a Title IX claim must plausibly allege."); *id*. at *4 ("While admittedly not yet addressed in the context of a Title IX school disciplinary proceeding, the Supreme Court and our Circuit have held that the same or similar language requires 'but-for' causation."); *id*. (concluding that the "but for" causation standard applies to "Title IX claims alleging discriminatory school disciplinary proceedings.").

In contrast, other federal courts of appeals, including for the First,[232] Second,[233] and Third[234] Circuits, have analyzed Title IX claims challenging allegedly discriminatory discipline under the "motivating factor" causation standard. These and other courts have drawn upon the analysis of a Second Circuit decision, *Yusuf v. Vassar College*.[235] In *Yusuf*, the court of appeals looked to the "motivating factor" causation standard codified in Title VII and applied that standard to Title IX claims alleging discriminatory discipline.[236] Under Title VII's "motivating factor" provision, a plaintiff need not establish that a protected trait was a "but for" cause of the challenged action, but instead must show that a protected trait was "a motivating factor" for an employer's action against an individual, "even though other factors also motivated the practice."[237]

Meanwhile, still other courts, often in the context of evaluating dismissals of a plaintiff's Title IX complaint, have addressed Title IX claims with similar fact patterns alleging discriminatory discipline but without expressly identifying which causation standard—"but for," "motivating factor," or other standard—applies.[238]

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[232] *See, e.g.*, Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56, 74 (1st Cir. 2019) ("To make out a claim under Title IX, Haidak must show that 'gender bias was a motivating factor' in the disciplinary process.") (quoting Trs. of Boston Coll., 892 F.3d 67, 90 (1st Cir. 2018). *Cf. Trs. of Boston Coll.*, 892 F.3d at 90-92 (stating that although "[n]either the Supreme Court nor this Circuit have adopted a framework for analyzing claims by students challenging a university's disciplinary procedures as discriminatory under Title IX," it "need not establish one at this moment" given the parties' agreement on the "motivating factor" causation standard; analyzing the plaintiff's Title IX claims under that standard) (citing Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)).

[233] *See* Yusuf v. Vassar Coll., 35 F.3d 709, 714-15 (2d Cir. 1994) (looking to Title VII to inform its analysis of the plaintiff's Title IX claim alleging a discriminatory disciplinary proceeding, and analyzing the Title IX claim under the "motivating factor" causation standard, in light of Title VII's provision providing for liability on that basis) (citing 42 U.S.C. § 2000e–2(m)). *See generally* 42 U.S.C. § 2000e–2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). *See, e.g.*, Menaker v. Hofstra Univ., 935 F.3d 20, 31 and n. 34 (2d Cir. 2019) (stating that the circuit has "long interpreted Title IX 'by looking to the ... the caselaw interpreting Title VII,' and we have therefore held that 'Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline'") (citing and quoting *Yusuf*, 35 F.3d 714-15).

[234] *See, e.g.*, Doe v. Univ. of Sciences, 961 F.3d 203, 209 (3d Cir. 2020) ("'Because Title IX prohibits ... subjecting a person to discrimination on account of sex, it is understood to bar the imposition of university discipline [when sex] is a motivating factor in the decision to discipline.'") (quoting Doe v. Columbia Univ., 831 F.3d 46, 53 (2d Cir. 2016)). *See also id.* at 208, 210 (addressing a district court's dismissal of the plaintiff's Title IX complaint and concluding that "[d]rawing all reasonable inferences in the light most favorable to Doe, as we must at this stage, it is plausible that, as he alleges, sex was a motivating factor in USciences's investigation and decision to expel him.").

[235] *See supra* notes 232-33. *See also, e.g.*, Klocke v. Univ. of Texas at Arlington, 938 F.3d 204, 210-213 (5th Cir. 2019) (discussing the Second Circuit's *Yusuf* decision; as the parties agreed on "this framework" as the applicable standard, analyzing the plaintiff's Title IX claims relating to discriminatory discipline under *Yusuf*). *Cf.* Rowles v. Curators of Univ. of Missouri, 983 F.3d 345, 359 (8th Cir. 2020) (stating that "Title IX is 'understood to "bar[ ] the imposition of university discipline where [sex] is a motivating factor in the decision to discipline."'") (citing Doe v. Columbia Univ., 831 F.3d 46, 53 (2d Cir. 2016)) (quoting *Yusuf*, 35 F.3d at 715). *See also Rowles*, 983 F.3d at 360 (concluding that the plaintiff's allegations of discriminatory discipline based on sex failed to satisfy either "Title IX's 'motivating factor' standard" or the state law's "'contributing factor'" standard).

[236] *See supra* note 233. The court of appeals in *Yusuf* further delineated two categories of Title IX claims alleging discrimination in a disciplinary proceeding—claims alleging an "erroneous outcome" and claims alleging "selective enforcement." *See Yusuf*, 35 F.3d at 715.

[237] *See* 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[238] For example, in *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019), the Seventh Circuit evaluated a challenge to a district court's dismissal of the plaintiff's Title IX claim alleging discriminatory disciplinary proceedings. In so doing, the court declined to adopt the approach of other circuits differentiating between four categories of Title IX

In two recent decisions discussed below,[239] the Fourth and Eleventh Circuits stated that Title IX claims generally require a showing of "but for" causation, but without separately analyzing or examining case law addressing the applicable causation standard for Title IX claims.[240]

To the extent a lower court considers the issue of causation when determining whether to apply the reasoning of *Bostock* to interpret Title IX's prohibition, the absence of unanimity among courts on the requisite causation for Title IX claims could raise novel questions of its own.

## Appellate Decisions Applying *Bostock* to Title IX for Coverage Purposes

Since the Supreme Court's decision in *Bostock*, two federal appellate courts have applied the reasoning of that case to Title IX,[241] which prohibits discrimination "on the basis of sex" in education programs that receive federal financial assistance.[242] The Fourth and Eleventh Circuits relied on *Bostock* to hold that Title IX prohibits gender identity-based discrimination in two cases involving transgender students' ability to access school bathrooms consistent with their gender identity. As discussed in more detail below, the courts also addressed and rejected arguments that this interpretation of the statute would necessarily conflict with Title IX regulations that authorize single-sex bathrooms.[243]

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claims alleging discriminatory discipline. *See id*. at 667-68 (discussing four categories of Title IX claims identified by either the Second or Sixth Circuits which concern a discriminatory disciplinary proceeding: "erroneous outcome," "selective enforcement," "deliberate indifference," and "archaic assumptions"). The Seventh Circuit observed that these various "categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student." *Id*. at 667. The court explained that it "prefer[red] to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against John 'on the basis of sex'?" *Id*. at 668. It is unclear, however, whether the court, in rejecting various categorization of Title IX claims alleging discriminatory discipline, was otherwise adopting "motivating factor" causation for all such Title IX claims, or whether it intended "discrimination on the basis of sex" to incorporate a different causation standard altogether. *See id*. The court analyzed the sufficiency of the plaintiff's complaint without reference to "but for," "motivating factor," or another causation standard in its analysis. *See id*. at 667-70. *Cf.* Schwake v. Arizona Bd. of Regents, 967 F.3d 940, 946-47 (9th Cir. 2020) (approvingly citing Seventh Circuit's decisions adopting the "far simpler standard" for analyzing Title IX claims in the disciplinary context, but also quoting the Second Circuit's *Yusuf* decision for the proposition that "Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline.") (citing *Doe v. Columbia Coll. Chi*., 933 F.3d 849, 854–55 (7th Cir. 2019); *Yusuf*, 35 F.3d at 715) (internal quotations omitted).

[239] Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *cert denied*, -- S.Ct. -- (2021); Adams by and through Kasper v. Sch. Bd. of St. Johns Cty., 968 F.3d 1286 (11th Cir. 2020).

[240] *See Grimm*, 972 F.3d at 616-17 (applying the reasoning of the Supreme Court's *Bostock* decision to a Title IX claim brought by a transgender plaintiff challenging a restroom policy that did not permit restroom use in accordance with gender identity; stating that even if the school board's "primary motivation in implementing…the policy was to exclude [the plaintiff] because he is transgender, his sex remains a but-for cause for the Board's actions" with no additional discussion or analysis of causation under Title IX); *Adams*, 968 F.3d at 1305 (in the context of discussing similarities between Title VII and Title IX, stating that both statutes "employ a 'but-for causation standard,'" without discussing or citing Title IX decisions addressing causation; citing and parenthetically describing Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020) as "explaining that but-for causation is the 'default' rule for federal antidiscrimination laws").

[241] 20 U.S.C. § 1681(a).

[242] Some federal district courts have also applied *Bostock* to Title IX. *See* Doe v. Univ. of Scranton, No. 3:19-CV-01486, 2020 WL 5993766, at *5 (M.D. Pa. Oct. 9, 2020) ("Although Title VII involves a separate provision of the Civil Rights Act of 1964, several courts from sister circuits have extended the Supreme Court's reasoning in *Bostock* to discrimination claims based on sexual orientation brought under Title IX. . . . Thus, in the absence of express Third Circuit precedent to the contrary, the Court finds Plaintiff's argument to be persuasive.").

[243] *See* 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of

Before examining the Fourth and Eleventh Circuit decisions applying *Bostock* to Title IX, it is worth noting that several appellate courts had, prior to *Bostock*, recognized Title IX's coverage of claims brought by transgender students challenging school policies that barred them from restroom use consistent with their gender identity.[244] For instance, in 2017, the Seventh Circuit affirmed a district court's preliminary injunction ordering a school district to allow a transgender boy access to the boys' bathroom.[245] In so holding, the panel relied on the Supreme Court's 1989 plurality opinion in *Price Waterhouse v. Hopkins*,[246] addressing Title VII. In *Price Waterhouse*, a plurality of the Court, joined by two Justices concurring in the judgement, found that employees can bring a Title VII claim alleging that an employer discriminated against them based on sex, for their failure to conform to sex stereotypes.[247] Applying the reasoning of that case to the context of school bathrooms, the Seventh Circuit concluded that transgender individuals do not conform to the sex stereotypes of the sex they were assigned at birth, and a "policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[248] Accordingly, notwithstanding the potential judicial application of *Bostock*'s reasoning to Title IX, some courts had already held that transgender students may bring Title IX claims, under a sex stereotyping theory, to challenge policies prohibiting restroom access consistent with their gender identity.[249]

Concerning the application of *Bostock* to Title IX, the Eleventh Circuit in its *Adams* decision cited several grounds for looking to *Bostock* to interpret the scope of Title IX.[250] The court noted that both Title VII and Title IX prohibit discrimination based on sex, reasoned that both statutes employ the "but for" standard of causation, and observed that the Supreme Court itself has sometimes looked to Title VII interpretations of sex discrimination in order to apply Title IX's mandates.[251] The Eleventh Circuit thus concluded that *Bostock*'s rationale applies to Title IX,

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sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

[244] In the Fourth Circuit litigation discussed *infra*, the court in 2016 had initially ruled for the plaintiff in a decision deferring to an OCR opinion letter that asserted Title IX requires schools to treat transgender students consistent with their gender identity. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016) (extending deference under Auer v. Robbins, 519 U.S. 452 (1997) to the Department of Education's interpretation of Title IX regulations contained in a 2015 opinion letter). That decision was vacated and remanded to the Fourth Circuit by the Supreme Court after a new presidential administration issued a guidance document rescinding the 2015 opinion letter, as well as another Dear Colleague letter from 2016. Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017).

[245] Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017).

[246] *Id.* at 1047 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion)).

[247] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion).

[248] *Whitaker*, 858 F.3d at 1049. *See also* Dodds v. United States Dep't of Educ., 845 F.3d 217, 222 (6th Cir. 2016) (affirming a grant of a preliminary injunction against a school district ordering it to allow a transgender girl to use the girls' restroom because the student demonstrated a likelihood of success under a sex stereotyping theory).

[249] *Whitaker*, 858 F.3d at 1049; *Dodds*, 845 F.3d at 222. Some courts have also reviewed challenges to school policies that *permit* transgender students to use restrooms and locker rooms consistent with their gender identity. *See* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 531 (3d Cir. 2018) (concluding that plaintiffs were unlikely to succeed on merits of Title IX and constitutional claims against allowing transgender students access to bathroom and locker room facilities consistent with their gender identity), *cert. denied*, 139 S. Ct. 2636 (2019) and Parents for Privacy v. Barr, 949 F.3d 1210, 1217 (9th Cir. 2020) ("We agree with the district court and hold that there is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth. We also hold that a policy that treats all students equally does not discriminate based on sex in violation of Title IX, and that the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX just because a person is transgender."), *cert. denied*, 141 S.Ct. 894 (2020).

[250] Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., 968 F.3d 1286, 1305 (11th Cir. 2020).

[251] *Id.* (citing Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting)); Franklin v.

meaning that Title IX also prohibits discrimination based on gender identity.[252] In applying *Bostoc*k, the panel reasoned that the school district's policy of prohibiting the transgender male student from accessing a bathroom consistent with his gender identity "singled him out for different treatment" than non-transgender students.[253] Accordingly, the court concluded that this different treatment was discrimination in violation of Title IX.

In addition, the panel rejected the school board's argument that Title IX regulations that currently authorize single-sex bathrooms "foreclosed" a discrimination claim.[254] The court noted that the plaintiff was not challenging the regulations but seeking access to the boys' bathroom, and neither Title IX nor its regulations specify how schools are to determine a transgender student's sex.[255] The panel observed, "the plain language of the regulation sheds no light on whether Mr. Adams's 'sex' is female as assigned at his birth or whether his 'sex' is male as it reads on his driver's license and his birth certificate."[256] For the court, because "Title IX and its regulations do not declare which sex should determine a transgender student's restroom use . . . the language of [the regulation] does not insulate the School Board from Mr. Adams's discrimination claim based on his transgender status."[257]

However, the panel's decision was split. One judge issued a dissenting opinion arguing that the school board's policy did not violate Title IX,[258] emphasizing several points of disagreement. The dissent underscored that the *Bostock* decision expressly disclaimed addressing matters of bathroom access and did not resolve the question of how "sex" is defined.[259] In addition, the dissent pointed to Title IX's statutory provision authorizing separate living facilities based on sex and its implementing regulations, which allow schools to offer sex-specific restrooms.[260] Further, the dissent argued, because Title IX regulations allow for different bathrooms based on sex, the school board's policy is allowed.[261] The term "sex" is "a classification on the basis of reproductive function," not gender identity.[262] Pursuant to the "unambiguous" meaning of "sex"

Gwinnett Cty. Pub. Schs., 503 U.S. 60, 75 (1992)). *See also supra* note 240.

[252] *Adams*, 968 F.3d at 1305.

[253] *Id*. at 1306.

[254] *See* 34 C.F.R. § 106.33.

[255] *Adams*, 968 F.3d at 1308.

[256] *Id*.

[257] *Id*.

[258] *Id*. at 1319 (Pryor, J., dissenting).

[259] *Id*. at 1320 ("Contrary to the majority's and Adams's arguments otherwise, the Supreme Court did not resolve this question in *Bostock*. Far from it. Not only did the Court "proceed on the assumption that 'sex' ... refer[s] only to biological distinctions between male and female," it disclaimed deciding whether Title VII allows for sex-separated bathrooms. And any guidance *Bostock* might otherwise provide about whether Title VII allows for sex-separated bathrooms does not extend to Title IX, which permits schools to act on the basis of sex through sex-separated bathrooms.") (citations omitted).

[260] *Id*. *See* 20 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes"); 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

[261] *Adams*, 968 F.3d at 1320 (Pryor, J., dissenting) ("Whether the Board violated Title IX turns on the answer to one question: what does 'sex' mean in Title IX? Regardless of whether separating bathrooms by sex would otherwise constitute discrimination 'on the basis of sex,' 20 U.S.C. § 1681(a), the bathroom policy does not violate Title IX if it falls within the safe harbor for 'separate toilet ... facilities on the basis of sex.' 34 C.F.R § 106.33.").

[262] *Id*. at 1320.

in the regulations that authorize sex-separated bathrooms, the dissent argued, the board did not violate Title IX by prohibiting the plaintiff from using the boys' bathroom.[263]

The dissent also argued that the majority opinion was not consistent with the principles that guide courts' construction of legislation like Title IX that is enacted under Congress's Spending Clause authority.[264] Under Supreme Court precedent, when Congress aims to "impose a condition on the grant of federal moneys, it must do so unambiguously" in a manner that provides regulated parties with adequate notice of the requirement.[265] According to the dissent, the only way the board can be liable under Title IX is if its policy conflicted with an unambiguous requirement of the statute. Even if the majority opinion is correct that sex is an ambiguous term, the dissent contended, the board is subject to suit "only if the meaning of 'sex' unambiguously did not turn on reproductive function."[266]

Addressing similar issues, the Fourth Circuit considered a Title IX claim brought by a transgender male student challenging a school bathroom policy prohibiting him from using the bathroom consistent with his gender identity.[267] The Fourth Circuit panel opinion reached the same conclusion as the Eleventh Circuit and similarly elicited a dissent.[268] The panel majority observed that while *Bostock* interpreted Title VII, the decision nonetheless "guides our evaluation of claims under Title IX."[269] The panel majority noted that in *Bostock*, the Supreme Court concluded that because discrimination based on gender identity or sexual orientation necessarily considers the sex of the individual, such discrimination was thus prohibited conduct under Title VII's bar against sex discrimination.[270] In light of *Bostock*, the court reasoned that the school board's policy of excluding the plaintiff from the boys' bathroom also necessarily relied on his sex, making sex a "but for" cause of the board's actions.[271] The court thus concluded that the boys' restroom policy excluding the plaintiff constituted discrimination in violation of Title IX.[272]

The Fourth Circuit panel rejected the argument that Title IX regulations, which authorize single-sex bathrooms,[273] permit the school board to exclude the plaintiff from the boys' bathroom.[274] In similar fashion as the *Adams* decision, the court noted that the plaintiff was not challenging those regulations, but "the Board's discriminatory exclusion of him from the sex-separated restroom matching his gender identity."[275] In addition, according to the court, the regulations do not

[263] *Id*. at 1321.

[264] *Id*. at 1321-22. *See supra* notes 151-52.

[265] *Adams*, 968 F.3d at 1320 (Pryor, J., dissenting) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[266] *Id*. at 1322.

[267] In 2016, the Fourth Circuit had ruled for the plaintiff in a decision that deferred to an OCR guidance document asserting that Title IX requires schools to treat transgender students consistent with their gender identity. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016). That decision was vacated by the Supreme Court after the guidance was rescinded following a change in presidential administrations. Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017).

[268] Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), cert denied, -- S.Ct. -- (2021).

[269] *Id*. at 616.

[270] *Id*.

[271] *Id*.

[272] *Id*. at 616-617. The panel also ruled that the school board's policy of refusing to update his school records to reflect his gender identity violated Title IX as well. *Id*. at 619.

[273] 34 C.F.R. § 106.33.

[274] *Grimm*, 972 F.3d at 618.

[275] *Id*. at 618.

preempt the "statutory prohibition against discriminating on the basis of sex."[276] While the court acknowledged that Title IX regulations permit sex-specific bathrooms,[277] it construed Title IX to prohibit the board from "rely[ing] on its own discriminatory notions of what 'sex' means" when implementing sex-specific bathroom policies.[278]

As in the Eleventh Circuit case, the panel's decision was split. Arguing that the school board policy complied with Title IX,[279] the dissenting opinion emphasized that the term "sex" in Title IX refers to biological characteristics, and the *Bostock* decision did not hold otherwise.[280] The reason Title IX and its regulations contain certain exceptions, including separate living facilities based on sex,[281] is because of "physical differences between males and females."[282] The school board's policy of prohibiting the plaintiff from using the boys bathroom, but allowing him to use a unisex bathroom or the girls' restroom, is "explicitly authorized by" the exceptions in Title IX.[283] According to the dissent, forcing a school to allow the plaintiff to use the boys' bathroom ignores these biological differences between the sexes. The dissent also rejected the majority's conclusion that the school board applied its own discriminatory opinion of what the term "sex" means. Rather, the dissent claimed, the board simply "relied on the commonly accepted definition of the word 'sex' as referring to the anatomical and physiological differences between males and females."[284] The Fourth Circuit's decision was appealed, but the Supreme Court denied certiorari in the case.[285]

Apart from the two decisions discussed above, no other federal appellate courts have reached the question of *Bostock*'s applicability to Title IX claims. As other courts address the issue, it is possible that they may adopt different or varying approaches. Some courts, for example, may examine certain aspects of the analysis in more detail, such as causation under Title IX. As noted earlier, while *Bostock* applied a "but for" causation standard under Title VII, federal appellate courts have differed on which causation standard(s) apply to Title IX claims. In addition, courts could engage in more detailed comparisons between Title VII and Title IX. As discussed in an earlier section, the Supreme Court's decisions interpreting Title IX have analyzed that statute in light of Title VII to both analogize *and* distinguish it from the latter. Relatedly, the Court has at times emphasized unique features of Title IX that differ from Title VII, such as Title IX's administrative enforcement schema, its Spending Clause basis, and the statute's operation in the specific context of education.[286] More generally, while both statutes include a similarly-phrased mandate against sex-based discrimination, Title IX textually differs from Title VII in notable ways, including its nine exceptions to the statute's general bar against sex-based distinctions, and

[276] *Id*.

[277] *Id*.

[278] *Id*.

[279] *Id*. at 628 (Niemeyer, J., dissenting).

[280] *Id*. at 633.

[281] *See* 20 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes"); 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

[282] *Grimm*, 972 F.3d at 634.

[283] *Id*.

[284] *Id*. at 634.

[285] -- S.Ct. -- (2021) (denying certiorari).

[286] *See supra* section "Supreme Court Precedent Addressing Title IX in Relation to Title VII."

its other provisions.[287] It is thus possible that some reviewing courts may view these differences as relevant when determining whether to apply *Bostock* to Title IX.

It is also possible that courts may adopt analyses similar to the Fourth and Eleventh Circuit decisions and hold that Title IX's mandate prohibiting sex discrimination generally encompasses claims alleging discrimination based on sexual orientation or gender identity. Should courts adopt that interpretation, however, the resolution of statutory coverage does not necessarily settle other legal questions, such as how Title IX liability may be established for such claims. Nor would that application of *Bostock* resolve how to construe and apply Title IX's various exceptions permitting sex-based distinctions in certain circumstances.[288] As the Court's analysis in *Bostock* did not reach such questions, it remains to be seen how lower courts approach the interpretation and resolution of such legal issues.

# Legislative Considerations

Federal courts and agencies have begun to address the potential application of *Bostock*'s reasoning to other statutes. Congress, however, can directly amend these statutes to clarify their scope, including to expressly include or exclude sexual orientation or gender identity as characteristics protected under a given statute. Apart from amending current law, Congress can also enact new standalone statutes addressing protections and prohibitions concerning sexual orientation or gender identity, as it has done in the past through legislation focusing on one major protected characteristic, such as the Equal Pay Act of 1963 (addressing unequal wages based on sex),[289] Title IX of the Education Amendments of 1972 (addressing sex discrimination in federally funded educational programs and activities),[290] and the Americans with Disabilities Act of 1990 (addressing various protections and requirements relating to disability).[291] Congress may also direct federal agencies to promulgate regulations for the antidiscrimination statutes a particular agency applies; such regulations could, consistent with relevant statutory requirements, specifically address issues that have prompted debate or uncertainty.

Clarifying the scope of a statute, however, does not necessarily resolve other novel legal issues that may arise concerning the analysis or resolution of claims under it. As discussed earlier, for example, federal courts have adopted different views concerning causation, including with respect to Title IX, in the absence of express statutory text addressing causation. To resolve ambiguities and debates regarding the causation standards for relevant statutes, Congress can amend those statutes to specify the applicable standard(s). While the Court's reasoning in *Bostock* coupled "but for" causation with the text of Section 703(a)(1) to determine the scope of that provision's coverage, a legislative amendment could clarify both statutory coverage and causation standards as independent matters. For example, Congress could amend a statute to expressly prohibit discrimination based on sexual orientation, and incorporate another causation standard apart from "but for" to show a violation.

In addition, whether amending an existing statute or enacting a new standalone statute, Congress may opt to specify the discriminatory acts that constitute a statutory violation and the available

[287] *Compare* 20 U.S.C. § 1681(a)(1)-(9), *with* 42 U.S.C. § 2000e, *et seq*.

[288] *See* 20 U.S.C. § 1681(a)(1)-(9).

[289] *See* The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963).

[290] *See* Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972).

[291] *See* The Americans with Disabilities Act of 1990, P.L. 101-336, 104 Stat. 327 (1990). *See also* The ADA Amendments Act of 2008, P.L. 110-325, 122 Stat. 3553 (2008).

remedies for such violations; and establish particular legal standards for establishing liability as well as exceptions to liability in certain circumstances.

## Author Information

Christine J. Back
Legislative Attorney

Jared P. Cole
Legislative Attorney

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