Equality on What Basis? Evaluating Title IX's Requirements in the Transgender Context

*Seth Lucas**

Abstract. Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded education programs. In recent years, the transgender movement has sought to reinterpret Title IX to require treating a person consistent with that person's gender identity. Two federal courts of appeals have agreed with that proffered interpretation, determining that when a person's sex and gender identity conflict, Title IX prohibits treating the person in a manner consistent with that person's sex. In December 2022, however, the Court of Appeals for the Eleventh Circuit reached the opposite conclusion, holding that Title IX permits public schools to assign each student to a restroom corresponding with the student's sex.

That court interpreted Title IX correctly. This Comment will show that Title IX and its early implementing regulations reflect the contemporaneous view that a person is male or female based on that person's sex. At the time, "sex" was understood to refer to the wholistic organization of a person's body for reproductive function. Further, this Comment will argue that the Supreme Court's decision in Bostock v. Clayton County, Georgia*, which interpreted a ban on sex discrimination in the employment context to forbid discrimination because of transgender status, does not compel a contrary understanding of "sex" in Title IX. After all,* Bostock *did not define "sex" to include gender identity or transgender status. Moreover, although* Bostock *does not apply to Title IX, were its but-for test applied, Title IX would still permit treating a person consistent with that person's sex if the person's sex and gender identity do not align. Consequently, this Comment will argue that Section 1557 of the Affordable Care Act, which applied Title IX's nondiscrimination*

* George Mason University, Antonin Scalia Law School, J.D. Candidate, May 2025; Patrick Henry College, B.A. Government: American Politics and Policy, 2019. Thank you to Walker Anderson and the *George Mason Law Review* editorial team for their work on this comment; to Sarah Parshall Perry, Thomas Jipping, Jonathan Scruggs, and Daniel Cochrane, who provided excellent advice and insights; to J. Caleb Dalton, for his mentorship as I began my time at Scalia Law; and to my parents, who have encouraged and supported me through every step of this journey.

requirement to federally funded medical programs, does not require insurance coverage for or provision of medical procedures to conform a person's body to that person's desired expression of a particular gender identity.

Introduction

Of the many federal statutes prohibiting sex discrimination,[1] two have profoundly impacted women's educational and career opportunities.[2] The first, Title VII of the Civil Rights Act of 1964, prohibits, among other things, sex discrimination in certain employment decisions.[3] The second, Title IX of the Education Amendments of 1972, prohibits sex discrimination in federally funded education programs.[4] But like the sexes, these two statutes are fundamentally different.[5] Title VII bars covered employers from taking certain employment actions because an employee has particular traits, such as having the male or female sex.[6] In contrast, Title IX, a condition for receiving federal aid, requires covered aid recipients to give each person equal educational opportunities regardless of the person's sex.[7] But Title IX does not require sex-blind treatment. Title IX instead explicitly recognizes a person's sex as relevant to participation in certain activities and access to certain physical spaces—such as with

[1] See Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1791–96 (2020) (Alito, J., dissenting) (listing federal statutes that prohibit sex discrimination in various contexts).

[2] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 685–88 (1973) (discussing Title VII's enactment against the backdrop of historical and ongoing discrimination against women); Cannon v. Univ. of Chi., 441 U.S. 677, 694 n.16 (1979) (discussing hearings preceding Title IX's adoption that highlighted ongoing discrimination against women in higher education).

[3] Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703, 78 Stat. 241, 255–57 (codified as amended at 42 U.S.C. § 2000e-2); 42 U.S.C. § 2000e (defining "employer").

[4] Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, § 901(a), 86 Stat. 235, 373 (codified as amended at 20 U.S.C. § 1681(a)).

[5] *See* United States v. Virginia, 518 U.S 515, 533 (1996) ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible . . . .'" (quoting Ballard v. United States, 329 U.S 187, 193 (1946))).

[6] 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."); *see Bostock*, 140 S. Ct. at 1739.

[7] 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."); *see, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (requiring plaintiff to establish that sexual harassment "effectively denied equal access to an institution's resources and opportunities" for the harassment to be actionable); *Cannon*, 441 U.S. at 704 n.36 (discussing legislative debates emphasizing equal opportunity); Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993) ("Equal opportunity to participate lies at the core of Title IX's purpose.").

separate sports teams and locker rooms for boys and girls;[8] fraternities and sororities;[9] and father-son or mother-daughter activities.[10]

When Congress enacted Title VII and Title IX, Americans generally understood that "sex" refers to how a person's body is organized for reproduction and that sex defines whether a person is male or female.[11] But in recent years, the transgender movement challenged that understanding.[12] The transgender movement claims that what a person is depends not on biology but instead on gender—a person's inner "sense of being male, female, or something else."[13] It thus views biological traits like reproductive organs, chromosomes, or gamete production as having no ultimate bearing on whether a person is in fact male or female.[14]

In the transgender context, Title VII's and Title IX's protections consequently turn in part on the meaning of one three-letter word—

[8] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R. § 86.33, .41 (2022); Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71399, 71413 (Dec. 11, 1979) (discussing the history of 1975 regulation). Congress twice recognized these regulations as a correct interpretation of Title IX's requirements—including through legislation. *See infra* Part I.

[9] 20 U.S.C. § 1681(a)(6).

[10] *Id.* § 1681(a)(8).

[11] *See infra* Part I (examining the understanding of "sex" when Congress enacted Title VII and Title IX); *infra* Section III.A (restating the contemporary understanding of "sex").

[12] *See generally* RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT 78–85 (2019) (explaining the male-female sexual binary); Marybeth Herald, *Transgender Theories and Court Practice*, *in* QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 187 (Scott Barclay, Mary Bernstein & Anna-Maria Marshall, eds., 2009) (explaining the transgender movement's challenge to the male-female binary).

[13] ANDERSON, *supra* note 12, at 30 (describing the transgender movement's view that identity is rooted in something other than physical traits and is not limited to a male-female binary (quoting *A Glossary: Defining Transgender Terms*, AM. PSYCH. ASS'N (Sept. 2018), https://perma.cc/XW77-6L4P)); *see Transgender Facts*, MAYO CLINIC, https://perma.cc/37D3-R3MZ; *see also* CARL R. TRUMAN, THE RISE AND TRIUMPH OF THE MODERN SELF 340 (2020) ("[T]o identify one's gender by inner psychological conviction locates the LGBTQ+ within the world of expressive individualism and psychological man. Reality is inward and psychological, not outward and natural.").

[14] *See* ALLY WINDSOR HOWELL, TRANSGENDER PERSONS AND THE LAW 4 (2d ed. 2015) ("[A]mong the meanings we create are the meanings of . . . what body hair or long blond hair mean. In effect, gender is a language, a symbolic language . . . . Put another way, gender is a system of symbols and meanings . . . ." (quoting Nicole Ansonia, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 GEO. J. GENDER L. 871, 875 (2003))); *see also* YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 n.2 (Mar. 2007) [hereinafter YOGYAKARTA PRINCIPLES], https://perma.cc/Y75Q-9P8L, ("Gender identity . . . refer[s] to each person's deeply felt internal and individual experience of gender . . . including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech and mannerisms.").

"sex"—and its relationship to gender identity and transgender status.[15] In 2020, for example, the Supreme Court concluded in *Bostock v. Clayton County*[16] that Title VII prohibits discrimination because of transgender status, even assuming that "sex" in Title VII refers to whether a person is biologically male or female.[17] The Court explained that transgender status arises from an incongruence between the person's sex and gender identity, so an employer could not help but consider sex (albeit abstractly) by considering transgender status.[18]

But Title VII's and Title IX's protections also depend on what each statute says about sex.[19] *Bostock* declined to decide whether its reasoning applies to other statutes such as Title IX,[20] and rightly so. The text of Title IX, contemporary understandings, and subsequent early interpretations of Title IX by the executive branch and Congress all demonstrate that sex discrimination under Title IX means something very different than under Title VII. Like "[t]he two sexes," Title VII and Title IX are simply "not fungible."[21]

Although the Supreme Court has yet to interpret Title IX's requirements in the transgender context,[22] three federal courts of appeals have.[23] Two of these courts concluded that Title IX requires federal

15 The meaning of "sex" and its relationship to gender identity and transgender status is only part of the analysis. What the two statutes say about sex also matters. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) ("The question isn't just what 'sex' meant, but what Title VII says about it."). As this Comment argues, the text, contemporary understandings, and subsequent interpretations by an executive agency and Congress demonstrate that sex discrimination under Title IX means something very different than under Title VII.

16 140 S. Ct. 1731 (2020).

17 *Id.* at 1737, 1739, 1741.

18 *Id.* at 1741–42.

19 *See id.* at 1739 ("The question isn't just what 'sex' meant, but what Title VII says about it.").

20 *Id.* at 1753 ("The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. . . . But none of these other laws are before us . . . we do not prejudge any such question today.").

21 *See* United States v. Virginia, 518 U.S 515, 533 (1996) (quoting Ballard v. United States, 329 U.S 187, 193 (1946)) ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'").

22 *See* West Virginia v. B.P.J., 143 S. Ct. 889, 889 (2023) (mem.) (Alito, J., dissenting from denial of application to vacate injunction) (observing that the Court declined to decide "whether either Title IX . . . or the Fourteenth Amendment's Equal Protection Clause prohibits a State from restricting participation in women's or girls' sports based on genes or physiological or anatomical characteristics.").

23 A.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 764 (7th Cir. 2023), *petition for cert. filed*, No. 23-392 (Oct. 11, 2023); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796 (11th Cir. 2022); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1038–39 (7th Cir. 2017). Other federal courts of

funding recipients to treat a person consistent with that person's gender identity.[24] Put another way, they determined that where sex and gender identity conflict, Title IX *prohibits* treating a person in a manner consistent with that person's sex. Thus, if a student who has a male sex identifies as female, under these two decisions, Title IX requires treating that student as a female.

Those decisions misunderstood Title IX. Title IX does not impose such a requirement. And even if *Bostock*'s reasoning, which cannot be applied to Title IX, were applied, Title IX would still permit a federal aid recipient to treat a person in a manner consistent with that person's sex regardless of whether the person has transgender status.[25] Part I of this Comment outlines the development and early interpretations of Title IX. Part II outlines Title VII's and Title IX's respective disparate treatment standards, the Supreme Court's reasoning in *Bostock* interpreting Title VII, and the three federal courts of appeals' reasoning in interpreting Title

appeals have also addressed this issue but did so either in dicta or without a substantial analysis. For instance, although the Court of Appeals for the Sixth Circuit denied a stay of a preliminary injunction in a private facilities case, it did not reach the merits. *See* Dodds v. U.S. Dept. of Educ., 845 F.3d 217, 221–22 (6th Cir. 2016). In another decision, *Meriwether v. Hartop*, the court explained only briefly that a professor's refusal to use preferred pronouns did not amount to Title IX sexual harassment because the student was not effectively denied equal access to an educational program or activity. 992 F.3d 492, 511 (6th Cir. 2021). The *Meriwether* court focused the bulk of its analysis and decision on the professor's free speech claim and addressed the sexual harassment claim within that context. *See id.* at 503–12. The Court of Appeals for the Ninth Circuit similarly observed that *Bostock*'s reasoning applies to section 1557 of the Affordable Care Act. Doe. v. Snyder, 28 F.4th 103, 113–14 (9th Cir. 2022). In June 2023, citing *Doe v. Snyder* and *Grimm*, the Court of Appeals for the Ninth Circuit held that Title IX should be construed similarly to Title VII and applied *Bostock*'s holding regarding sexual orientation to a Title IX sexual harassment claim. *See* Grabowski v. Ariz. Bd. of Regents, 69 F.4th 1110, 1116 & n.1 (9th Cir. 2023) (citing *Doe*, 28 F.4th at 114). Again, however, the court did not address Title IX in the *transgender* context. *See id.* But the court will likely decide the question in the near future. *See* Order Granting Motion for Injunctive Relief, *Roe v. Critchfield*, No. 23-2807, slip op. at 1 (9th Cir. Oct. 27, 2023); *see also Roe v. Critchfield*, No. 23-cv-00315, 2023 WL 6690596, at *1, *15 (D. Idaho Oct. 12, 2023) (holding, *inter alia* that Title IX permits separate restroom facilities for each sex), *appeal filed* No. 23-2807 (Oct. 16, 2023). The Court of Appeals for the Fourth Circuit will also likely address the question again soon, this time regarding athletics. *See* B.P.J. v. W. Va. State Bd. of Educ., No. 22-1078, 2023 U.S. App. LEXIS 8379 (4th Cir. Feb. 22, 2023) (granting the student's motion for a stay). And as of October 2023, a petition for certiorari is pending before the U.S. Supreme Court in *Martinsville*.

[24] *Grimm*, 972 F.3d at 593, 616–17 (applying *Bostock*); *Whitaker*, 858 F.3d at 1038–39; *see also Martinsville*, 75 F.4th at 764 (applying *Whitaker* and *Bostock*).

[25] *But see Martinsville*, 75 F.4th at 769 ("Applying *Bostock*'s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes. As *Bostock* instructs, we ask whether our three plaintiffs are suffering negative consequences (for Title IX, lack of equal access to school programs) for behavior that is being tolerated in male students who are not transgender. Our decision in *Whitaker* followed this approach." (citations omitted)). As this Comment explains, this understanding of *Bostock* and Title IX is incorrect.

IX in the transgender context. Part III then explains that Title IX, as originally understood, permits treating a person as male or female based on that person's immutable sex. Part IV explains that *Bostock*'s reasoning cannot be applied to Title IX because of the fundamental differences between Title VII and Title IX. Part IV also explains that even if the but-for test in *Bostock* were applied, Title IX would still permit treating a person as male or female based on that person's sex. Because Congress in 2010 extended Title IX's requirements to cover federally funded medical programs,[26] Part V examines the implications of an original understanding of Title IX for insurance coverage and medical treatments in the transgender context.

As an initial matter, this Comment does not address the proper policy approach to questions surrounding gender identity and transgender status. It recognizes, however, that such questions are sensitive and controversial,[27] and that the use of certain terms or definitions over others may appear to be a statement on those questions. Where this Comment uses such terms or definitions, it does so solely for clarity. That said, two terms can and should be defined. "Gender identity" refers to a person's "internal sense of being male, female, or something else," such as genderqueer, agender, or nonconforming.[28] "Transgender status," in turn, indicates that a person has a gender identity that differs from that person's sex.[29] Thus, for instance, a transgender female is a person whose sex is male but who identifies as a female.[30]

I. Development and Early Interpretations of Title IX

The early twentieth century was marked by increasing women's activism, resulting in the Nineteenth Amendment and greater numbers of

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[26] Patient Protection & Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1557, 124 Stat. 260 (2010) (codified at 42 U.S.C. § 18116) (incorporating Title IX's nondiscrimination requirements to apply in "any health program or activity").

[27] *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2476 (2018) (describing "gender identity" as one of several "sensitive political topics, and . . . [a] matter[ ] of profound 'value and concern to the public.'" (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011))).

[28] *A Glossary: Defining Transgender Terms*, AM. PSYCH. ASS'N (Sept. 2018), https://perma.cc/XW77-6L4P); *see Transgender Facts*, *supra* note 13; *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, https://perma.cc/9PW9-CM45 (listing several gender identities).

[29] *A Glossary: Defining Transgender Terms*, *supra* note 28; *Transgender Facts*, *supra* note 13; *Understanding the Transgender Community*, *supra* note 28.

[30] *See Transgender Facts*, *supra* note 13; *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

women entering both the workforce and higher education.[31] Although this activism ignited debates on everything from the vote to hemlines, women's social roles did not change significantly for most of the century.[32] Indeed, even as women's participation in the workforce rose significantly during the Second World War, American society largely retained longstanding views on women's roles.[33] But by the middle of the century, the feminist movement that brought about the Nineteenth Amendment was evolving.[34] As the United States plunged into the second half of the twentieth century, a new wave of feminism began to challenge the idea that a woman's body defined her role in society.[35] A more ambitious wing of the movement went further, however, and argued that physical distinctions between men and women should be completely irrelevant.[36]

Although this unlinking of the body from social roles would later have implications for social views on sex and gender,[37] in the 1960s and 1970s, biological distinctions were still viewed as fixed and defining whether a person is male or female. For instance, one 1966 article explained that "[t]he standard outcome in the biological development of the individual is a predominance of anatomical and physiological structures and functions that are the basis of either maleness or femaleness."[38] Numerous dictionaries from that time echoed a similar understanding of sex as either male or female and defined by how a person's body is reproductively

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[31] SUSAN CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY SPORTS 7–9, 164–65, 181–84 (1994), *reprinted in* EQUAL PLAY: TITLE IX & SOCIAL CHANGE 9 (Nancy Hogshead-Maker & Andrew Zimbalist eds., 2007).

[32] *Id.* at 9; DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 29–34 (1989) (explaining that views on women and their roles remained largely unchanged from the 1920s to the 1960s).

[33] *See id.*

[34] *See id.* at 11–14, 34 (explaining early feminist efforts to achieve legal equality while not challenging "natural roles," and noting that a "substantial" challenge to social roles did not arise until the 1960s); ANDERSON, *supra* note 12, at 150 (contrasting early feminist efforts to challenge the loss of women's legal identity in marriage and obtain equal rights with men with mid-twentieth century feminist challenges to social roles).

[35] *See* RHODE, *supra* note 32, at 34; ANDERSON, *supra* note 12, at 150.

[36] *See* ANDERSON, *supra* note 12, at 151–52 (quoting SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 11 (Farrar, Straus & Giroux 2003) (1970)) (explaining Shulamith Firestone's argument for replacing natural forms of procreation with artificial forms to make sex distinctions irrelevant).

[37] *See id.* at 151–54; Kathleen Lennon, *Feminist Perspectives on the Body*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2019), https://plato.stanford.edu/entries/feminist-body/#Bib (noting connection between second wave feminism and the sex-gender dichotomy).

[38] Daniel G. Brown & David B. Lynn, *Human Sexual Development: An Outline of Components and Concepts*, 28 J. MARRIAGE & FAM. 155, 156 (1966).

organized.[39] Even Leo Kanowitz in his influential 1969 text, *Women and the Law: The Unfinished Revolution*, recognized "basic anatomical differences between male and female."[40]

Indeed, the feminist movement did not challenge the idea that men and women are biologically different.[41] It instead challenged the perception of womanhood as understood in relation to social and domestic roles.[42] Feminist Betty Friedan, for example, argued in 1963 that a woman's "biological function" should not be interpreted to require a woman to be a mother and thus stifle any "goal," "purpose," or "ambition."[43] And Shulamith Firestone, arguing that "the end goal" is a world where sex distinctions "would no longer matter culturally," implicitly acknowledged that biological distinctions exist and define whether a person is male or female.[44]

In 1970, these social currents converged with greater federal involvement in education to spark conversations about sex discrimination in higher education.[45] That year, a special subcommittee of the House of Representatives' Committee on Education held hearings on legislation

[39] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1784–1791 (2020) (Alito, J., dissenting) (listing dictionary definitions of "sex" from dictionaries published throughout the twentieth century, including dictionaries from the years 1964, 1966, and 1969); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 812 (11th Cir. 2022) (listing definitions from dictionaries published between 1970 to 1980); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 632–33 (4th Cir. 2020) (Niemeyer, J., dissenting) (listing definitions from dictionaries published between 1970 and 1980).

[40] LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 18 (1969); *see also* Bob Egelko, *Leo Kanowitz, Early Proponent of Women's Rights, Dies at 81*, SFGATE (Aug. 24, 2007), https://perma.cc/UA7P-XHUM.

[41] *See* Mari Mikkola, *Feminist Perspectives on Sex and Gender*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman, eds. 2022), https://plato.stanford.edu/entries/feminism-gender/ (explaining that feminists viewed "sex" as defining whether a person is male or female).

[42] *See* ANDERSON, *supra* note 12, at 150–52 (outlining feminist thinkers' views). *But see* Mikkola, *supra* note 41 (arguing that feminist thinker Simone de Beauvoir saw "sex" as existential rather than biological).

[43] *See* ANDERSON, *supra* note 12, at 150 (quoting BETTY FRIEDAN, THE FEMININE MYSTIQUE 462 (W.W. Norton & Co. reprt. ed. 2010) (1963)).

[44] *See id.* at 151–52 (quoting SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 11 (Farrar, Sraus & Giroux 2003) (1970)) (describing Firestone's view that women's "seizure of control of reproduction" through "artificial reproduction" would give women "ownership of their bodies").

[45] *See* DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 17 (2010) ("Title IX emerged from a broader social movement seeking the recognition and vindication of women's rights."); *Education Amendments of 1972*, 61 GEO. L.J. 1067, 1067–68 (1973) (discussing the development of federal involvement in higher education).

that would make "sex" a protected classification in Title VI.[46] Title VI made nondiscrimination regarding race, color, and national origin a condition for receiving federal funds.[47] The bill sought to bar federal funding recipients from also engaging in sex discrimination.[48] During the hearings, "it became clear that educational institutions were the primary focus of complaints concerning sex discrimination."[49] But witnesses from the United States Justice Department and the Civil Rights Commission, while supporting the legislation's general goal, raised concerns about its "significant public policy consequences."[50] Such consequences included denial of funding to single-sex institutions, elimination of sex-specific housing, denial of funding and government surplus to the Boy and Girl Scouts, and a dismantling of "bona fide distinctions" between men and women.[51] These and other witnesses proposed that Congress should instead adopt separate legislation that would "achieve . . . sexual equality without eradicating bona fide distinctions based on sex."[52]

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[46] *Discrimination Against Women: Hearing on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the H. Comm. on Educ. and Lab.*, *Part 1*, 91st Cong. (1970) [hereinafter *1970 Hearings, Part 1*]; Cannon v. Univ. of Chi., 441 U.S. 667, 694 n.16 (1979).

[47] Civil Rights Act of 1964, Pub. L. 88-352, tit. VI, § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d).

[48] *Cannon*, 441 U.S. at 694 n.16 ("H. R. 16098 . . . would simply have added the word 'sex' to the list of discriminations prohibited by § 601 of Title VI.").

[49] *Id.*; *see, e.g.*, *1970 Hearings, Part 1*, *supra* note 46, at 237–38 (statement of Dr. Ann Sutherland Harris, Assistant Professor of Art History at Columbia University, as spokeswomen for Columbia Women's Liberation) (arguing that the amendment was needed to remedy discrimination against women in higher education); *id.* at 584 (statement of Diane Blank and Susan D. Ross, members of the Women's Rights Committee of New York University Law School) (testifying "about certain discriminatory policies practiced by the law school against women members, especially in the area of admission and scholarship"); *Discrimination Against Women: Hearing on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the H. Comm. on Educ. and Lab.*, *Part 2*, 91st Cong. 664 (1970) [hereinafter *1970 Hearings, Part 2*] (statement of Frankie Freeman, Commissioner on the U.S. Commission on Civil Rights).

[50] *1970 Hearings, Part 2*, *supra* note 49, at 664 (statement of Frankie Freeman, Commissioner, U.S. Commission on Civil Rights); *see id.* at 677 (statement of Jerris Leonard, Assistant Attorney General, Civil Rights Division, Department of Justice) ("[W]e are not able to support this legislation in its present form . . . .").

[51] *1970 Hearings, Part 2*, *supra* note 49, at 664.

[52] *Id.*; *see Cannon*, 441 U.S. at 694 n.16 (noting proposal for separate provision parallel to but more limited than Title VI); *see also 1970 Hearings Part 2*, *supra* note 49, at 678 (proposing "separate legislation . . . which would prohibit discrimination on the ground of sex" but which "would make the prohibition inapplicable where sex is a bona fide basis for differential treatment"). The Civil Rights Commission proposed that the first section of such legislation should mirror Title VI but refer only to "sex." *Id.* at 665 (statement of Frankie Freeman, Commissioner, U.S. Commission on Civil Rights). The second part of the proposal permitted "reasonable classification, separation or exclusion of persons on the basis of sex where such classification, separation or exclusion is based upon bona fide

The proposed legislation failed.[53] But much of the language proposed in the hearings resurfaced in the House version of the Education Amendments of 1972.[54] Like the original proposals, the new proposal was also framed as an amendment to Title VI.[55] When the legislation emerged from the House Committee and then the Joint Committee, however, the language was moved into its own separate title, Title IX.[56] Unlike the original proposals in 1970, the language did not include a general exemption for bona fide distinctions.[57]

Title IX, in its advocates' eyes, had two reciprocal goals.[58] First, Title IX aimed to increase opportunities for women to access and participate in higher education.[59] Second, it sought to prevent federal funding recipients

qualifications or standards of propriety which are not inconsistent with the purposes of this title." *Id.* The second section thus sought to prevent "unreasonable" applications of the title, such as "integrating rest rooms and dormitories." *Id.* The Justice Department's proposal read as follows:

> Sec. 2. (a) No person in the United States shall, on the ground of sex, be excluded from participation in, denied the benefits of, or subjected to discrimination under, any education program or activity receiving Federal financial assistance, except where sex is a bona fide ground for differential treatment.
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> . . . .
>
> Sec. 6. For the purposes of this act, the term "education" includes pre-school, elementary, secondary and post-secondary education.

Id. at 690–91 (statement of Jerris Leonard). The language would have barred sex discrimination in, for instance, "availability of scholarships and fellowships; admission to graduate programs; and hiring, compensation, and promotion of faculty and staff members." *Id.* at 678. It would have also exempted single-sex institutions as they "could satisfy the exception regarding bona fide distinctions." *1970 Hearings, Part 2*, *supra* note 49, at 678. And it would have permitted "separate dormitories and separate gymnasiums for men and women" while allowing regulating agencies to otherwise define the extent of the proviso "on the basis of particular situations which arise." *Id.* The proposal "would not reach federally assisted programs outside the area of education." *Id.*

53 *See Cannon*, 441 U.S. at 694 n.16.

54 *Id.*; *compare 1970 Hearings, Part 2*, *supra* note 49, at 665, 690–91 (detailing proposals for separate legislation) *with* Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, § 901(a), 86 Stat. 235, 373–74 (codified as amended at 20 U.S.C. § 1681(a)).

55 *Cannon*, 441 U.S. at 694 n.16; *see* 117 CONG. REC. 30155–76 (1971) (statement of Sen. Birch Bayh) (observing that "[t]he antidiscrimination provisions of the Civil Rights Act . . . do not deal with sex discrimination" and that "[w]e allow this gap in our civil rights laws to continue"); *id.* at 30407–08 (statement of Sen. Birch Bayh) (noting that "[t]his is identical language, specifically taken from title VI" and that "we really are not doing anything to the private school that is not now in the law under title VI . . . . We are only adding the 3-letter word 'sex' to existing law").

56 Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235 (codified as amended at 20 U.S.C. § 1681); *Cannon*, 441 U.S. at 694 n.16.

57 *Compare 1970 Hearings, Part 2*, *supra* note 49 at 678 (including exemption) *with* 20 U.S.C. § 1681 (omitting any general exemption for bona fide distinctions).

58 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (citing *Cannon*, 441 U.S. at 704).

59 *See id.*; 117 CONG. REC. 30155 (1971) (statement of Sen. Birch Bayh) (observing that the bill aimed to aid "victims of economic discrimination" and urging, "let us ensure that no American will be

from using tax dollars to bar women from educational opportunities.[60] Advocates emphasized that Title IX would do for sex what Title VI did for race in the context of federal funding.[61] But unlike with the treatment of race, no one disputed that bona fide differences existed between the two sexes,[62] even if debate did exist at the time over the extent and implications of those differences.[63] No one, for instance, contested that the housing exemption undermined Title IX's objectives.[64] In 1974 and then again in 1976, Congress amended Title IX to clearly exempt various single-sex associations and programs from its nondiscrimination provision.[65]

Moreover, shortly after Title IX's adoption, Congress permitted the then-Department of Health, Education, and Welfare ("HEW") to promulgate regulations that explicitly allowed separate sports programs for males and females.[66] Congress did not create a statutory exception

denied access to higher education because of . . . sex. Today, I am submitting an amendment . . . which will guarantee that women, too, enjoy the educational opportunity every American deserves"); *see also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982) (treating Senator Bayh's remarks as an authoritative statement of congressional intent).

60 *See Gebser*, 524 U.S. at 286 (citing *Cannon*, 441 U.S. at 704).

61 117 CONG. REC. 39256 (1971) (statement of Rep. Edith Green) ("It is really the same as the Civil Rights Act in terms of race."); 117 CONG. REC. 30407 (statement of Sen. Birch Bayh) ("This is identical language, specifically taken from title VI of the 1964 Civil Rights Act . . . ."); 117 CONG. REC. 30155 (statement of Sen. Birch Bayh) (emphasizing equal opportunity for women); 117 CONG. REC. 39251 (statement of Rep. Edith Green) (denying that bill requires quotas of women); 118 CONG. REC. 18437–38 (1972) (statements of Sen. Birch Bayh, Rep. Edith Green, and Rep. Thomas Pell) (expressing objections to concerns that Title IX would require quotas).

62 *See* 118 CONG. REC. 5807 (statement of Sen. Birch Bayh) ("Under this amendment, each Federal agency which extends Federal financial assistance is empowered to issue implementing rules and regulations effective after approval of the President. These regulations would allow enforcing agencies to permit differential treatment by sex only—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved."); 117 CONG. REC. 39251 (statement of Rep. Edith Green) ("As I said before, it does not go as far as the equal rights amendment. I see no reason why anybody who supported the equal rights amendment should hesitate in the least to support title X as it is now written."); *see also* 117 CONG. REC. 35317 (statement of Rep. Charles Thone) (explaining that the Equal Rights Amendment "is not a unisex measure" and noting that under the ERA, "legislation and administrative actions may take into account a physical characteristic unique to one sex"); *id.* (statement of Rep. William Keating) ("This amendment makes clear that women are to be treated as equal human beings with men, but not as human beings identical to men in every respect."); *supra* notes 50–52 and accompanying text.

63 *See* BRAKE, *supra* note 45, at 8–10 (discussing how Title IX reflected differing feminist views).

64 *See, e.g.*, 117 Cong. Rec. 39263 (statement of Rep. Green) (raising "no objection" to the exemption).

65 *See* S.J. Res. 40, 93d Cong. § 3(a), 88 Stat. 1862 (1974); Education Amendments of 1976, Pub. L. No. 94-482, § 412(a), 90 Stat. 2081, 2234 (codified as amended at 20 U.S.C. § 1681).

66 BRAKE, *supra* note 45, at 18–21.

from the nondiscrimination requirement for sports, however. When HEW began developing regulations addressing sports at Congress's direction, it grappled with two conflicting policy positions.[67] Some stakeholders urged the full integration of sports, even if gradually accomplished by temporarily allowing sex-specific teams.[68] Other stakeholders, however, argued that separate but equal programs were necessary for women to develop and pursue their own opportunities.[69] HEW chose the latter approach.[70] And despite attempts in Congress to reject the final regulations, Congress allowed them to go into effect.[71]

Under the final 1975 HEW athletic regulations, equal opportunity did not mean that women and men must be treated identically. Rather, equal opportunity required that "male and female athletes should receive equivalent treatment, benefits, and opportunities" and that "athletic interests and abilities of male and female students must be equally effectively accommodated."[72] The regulations required, for instance, housing and locker rooms provided on a sex-specific basis to be "comparable" in quality.[73] Scholarships had to be available "substantially proportionate" to men's and women's "participation rates."[74] As HEW acknowledged in its 1979 interpretation, the regulations countenanced that "[s]ome aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic

67 *Id.* at 18–20.

68 *Id.* at 20–21.

69 *Id.*

70 *Id.* at 21–22.

71 *Id.* at 21; Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71399, 71413 (Dec. 11, 1979) (discussing the history of 1975 regulation). Some commenters on recent proposed changes to these rules have argued that by reviewing and accepting the 1975 rule and HEW's 1979 interpretation, and then adopting the executive branch's understanding of Title IX in the 1988 Civil Rights Restoration Act, Congress shut the door to further rulemaking on athletics without express legislative authorization. *See* Alliance Defending Freedom, Comment Letter on the Notice of Proposed Rulemaking on Title IX of the Education Amendments of 1972, at 4–5 (May 15, 2023), https://perma.cc/4R6E-ABWR; Sarah Parshall Perry, Comment Letter on the Notice of Proposed Rulemaking on Title IX of the Education Amendments of 1972, at 9–10 (May 15, 2023), https://perma.cc/7VVA-M242.

72 Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71414 (summarizing HEW's policy interpretation of the 1975 regulation).

73 Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24128, 24141 (June 4, 1975).

74 Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415; *see* 45 C.F.R. § 86.37.

activities."[75] As long as the unique needs of male and female students in each program were "met equivalently," however, such differences were justifiable.[76] Again, "identical benefits, opportunities, or treatment [were] not required, provided the overall effect of any differences is negligible."[77] Under the regulations, equality did not require ignoring biological differences.[78]

Title IX and its early implementing regulations thus incorporated some feminist views while rejecting others.[79] The statute and implementing regulations effectively made a woman's body irrelevant to the educational opportunities that a woman could pursue. But it did not make physical distinctions between men and women entirely irrelevant as some feminists and groups urged.[80] Title IX and its implementing regulations affirmed distinctions between the two sexes while ensuring that such distinctions are not the basis for unequal treatment that could limit opportunities for either sex. As HEW stated regarding athletics, Title IX requires "equal"—not "identical"—treatment.[81]

II. Title IX, Title VII, and Interpretations in the Transgender Context

A. Title IX's Disparate Treatment Standard

Shortly after Title IX's adoption, the U.S. Supreme Court recognized a private right of action to enforce Title IX's nondiscrimination requirements.[82] To establish a Title IX cause of action, a plaintiff must demonstrate exclusion from, denial of benefits of, or discrimination under an educational program that receives federal financial assistance, and that the discrimination occurred on the basis of the plaintiff's sex.[83]

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[75] Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415.

[76] *Id.* at 71416.

[77] *Id.* at 71415.

[78] *See id.*

[79] *See* BRAKE, *supra* note 45, at 8 (discussing how Title IX reflects different strands of feminist legal theory).

[80] *See id.* at 20 (discussing views regarding integrated sports).

[81] Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415.

[82] Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).

[83] Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996); *see also* G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016) ("G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm."), *vacated and remanded*, 580 U.S. 1168 (2017).

That a person was merely treated differently on the basis of sex is insufficient in itself to establish Title IX liability.[84] Liability can arise either from intentional discrimination or deliberate indifference to discrimination.[85] For liability to arise from deliberate indifference, a plaintiff must also show that the defendant had "actual knowledge" of the discrimination and chose to not act.[86]

Generally, courts agree that Title IX prohibits only intentional discrimination—disparate treatment—but not disparate impact.[87] Although Title IX did not replicate Title VI, because Title IX was modeled on Title VI, courts have looked to how Title VI operates as informative when interpreting Title IX.[88] Initially, federal courts of appeals split over whether Title IX permitted disparate impact claims because of disagreement over whether Title VI prohibited only intentional discrimination.[89] Disparate impact discrimination occurs when a facially neutral policy or practice causes unequal outcomes for a protected class, but it does not require a showing of discriminatory intent.[90] That said,

[84] *See, e.g.*, Grabowski v. Ariz. Bd. of Regents, 69 F.4th 1110, 1113–14 (9th Cir. 2023) (affirming dismissal of harassment claim for "fail[ure] to allege a deprivation of educational opportunity"); *Seamons*, 84 F.3d at 1232 (reciting the elements of a Title IX cause of action).

[85] Poloceno v. Dall. Indep. Sch. Dist., 826 F. App'x. 359, 362 (5th Cir. 2020).

[86] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289 (1998); *see* Doe v. Edgewood Indep. Sch. Dist., 964 F.3d 351, 358–59 (5th Cir. 2020) (applying *Gebser* to an employee-on-student harassment claim).

[87] *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (describing Title IX as a "prohibition on intentional sex discrimination"); Alexander v. Sandoval, 532 U.S. 275, 282 (2001) (observing that *Cannon* "created a private right of action to enforce [Title IX's] ban on intentional discrimination"); *Gebser*, 524 U.S. at 290 (requiring that indifference to discrimination be "deliberate" and "an official decision" to be actionable under Title IX); Biediger v. Quinnipiac Univ., 691 F.3d 85, 97–98 (2d Cir. 2012) (recognizing that Title IX prohibits intentional discrimination); *Poloceno*, 826 F. App'x at 362 (rejecting disparate impact claim because Title IX prohibits "only *intentional* discrimination").

[88] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 699–701, 717 (looking to Title VI to find private right of action).

[89] Doe v. Univ. of Denver, 952 F.3d 1182, 1193 n.8 (10th Cir. 2020) (noting early circuit split over disparate impact claim); *see* Fort v. Dallas Indep. Sch. Dist., No. 95-10323, 1996 U.S. App. LEXIS 44677, at *3 n.3 (5th Cir. Mar. 11, 1996) (comparing cases); *see also* Horner *ex rel.* Horner v. Ky. High Sch. Ath. Ass'n, 206 F.3d 685, 689–92, 690 n.2 (6th Cir. 2000) (citing Guardians Ass'n v. Civ. Serv. Comm'n of N.Y.C, 463 U.S. 582, 602 (1983)) (explaining that in *Guardians*, "a majority of the Court held that Title VI supports a private right of action providing limited declarative and injunctive relief for unintentional violations" while a different majority rejected monetary damages for unintentional discrimination). While *Horner* read Title IX in light of *Guardians* as permitting claims of unintentional discrimination, other courts have not reached the same conclusion. *See Fort*, 1996 U.S. App. LEXIS 44677, at *3 n.3 (comparing cases).

[90] *See Univ. of Denver*, 952 F.3d at 1193 n.8 (noting lack of requirement for intent).

courts required plaintiffs to prove intent to obtain money damages.[91] But in 2001, the Supreme Court held in *Alexander v. Sandoval*[92] that Title VI prohibits only intentional discrimination and that a right of action therefore did not exist under Title VI for disparate impact discrimination.[93] Although the Court of Appeals for the Seventh Circuit indicated that Title IX might provide non-monetary relief for unintentional discrimination,[94] since *Sandoval*, courts have generally viewed Title IX as prohibiting only intentional forms of discrimination.[95]

In *Poloceno v. Dallas Independent School District*,[96] for example, a parent sued the school district after her daughter was hospitalized due to punishment for not wearing appropriate gym attire.[97] The Court of Appeals for the Fifth Circuit held that the punishment—increasing numbers of "ceiling jumps" for repeat violations—was not intentional

[91] *See, e.g.*, *Horner*, 206 F.3d at 689–92; *Edgewood Indep.*, 964 F.3d at 358 ("Essentially, schools are liable only for *intentional* sex discrimination."); *cf.* Parker v. Franklin Cnty. Cmty. Sch. Corp., 667 F.3d 910, 925 (7th Cir. 2012) (barring money damages against a party where plaintiffs failed to examine that party's practices and any resulting harm).

[92] 532 U.S. 275 (2001).

[93] *Id.* at 293.

[94] *See Parker*, 667 F.3d at 925 (noting that schools that may have contributed to a scheduling disparity might be affected by an injunction but that plaintiffs could not recover monetary damages because the plaintiffs did not examine those schools' overall practices or the resulting harm from those practices).

[95] *See, e.g.*, Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 75 (1st Cir. 2019) ("We have never recognized a private right of action for disparate-impact discrimination under Title IX." (citing *Sandoval*, 532 U.S. at 283)); Biediger v. Quinnipiac Univ., 691 F.3d 85, 97–98 (2nd Cir. 2012) (recognizing that Title IX prohibits intentional discrimination, and that disputes about equal opportunities when sports are separated "on the basis of sex" involve "a disparate treatment rather than disparate impact claim"); Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 865 (8th Cir. 2011) ("[P]roof of sex-based motivation is required for a Title IX deliberate indifference claim."); Weinreb v. Xerox Bus. Servs., No. 16-cv-6823, 2020 U.S. Dist. LEXIS 132134, at *9–10 (S.D.N.Y. July 27, 2020) (observing that the majority of "reasoned district court opinions interpreting Section 1557" do not affirm that Section 1557 creates a uniform standard, and holding that disparate impact claims are unavailable under Section 1557); Briscoe v. Health Care Serv. Corp., 281 F. Supp. 3d 725, 737–39 (N.D. Ill. 2017) (finding that grouping of sex and other protected classifications in Section 1557 of the Affordable Care Act did not create a private right of action for disparate impact claims for sex discrimination and rejecting Office of Civil Rights' interpretation that the same standards applied to all protected classifications); Tsuruta v. Augustana Univ., No. 15-CV-04150, 2015 U.S. Dist. LEXIS 136796, at *8–9 (D.S.D. Oct. 7, 2015) (observing that although the Court of Appeals for the Tenth Circuit allowed disparate impact claims under Title IX based on a pre-*Sandoval* reading of Title VI, cases looking to Title VI to interpret Title IX after *Sandoval* concluded that Title IX does not allow disparate impact claims). *But see Univ. of Denver*, 952 F.3d at 1193 n.8 (observing that a different Court of Appeals for the Tenth Circuit case suggested availability of disparate impact claim but declining to resolve the question (citing Mabry v. State Bd. of Cmty. Colls. & Occupational Educ., 813 F.2d 311, 316 n.6, 318 (10th Cir. 1987))).

[96] 826 F. App'x 359 (5th Cir. 2020) (unpublished).

[97] *Id.* at 361.

discrimination because it was equally applied to boys and girls.[98] The court rejected the parent's disparate impact claim, that girls were disproportionately affected, because "only *intentional* discrimination, not disparate impact, is actionable under Title IX."[99]

B. *Title VII's Disparate Treatment Standard*

The disparate treatment analysis under Title VII is markedly different than under Title IX. Under Title VII, to establish prima facie disparate treatment, an employee must generally show that the employee (1) "is a member of [a] protected class," (2) "was qualified for [the] position," (3) "experienced an adverse employment action," and (4) was treated worse than "similarly situated individuals outside [the] protected class."[100] A plaintiff can meet the fourth prong of the test by showing that "other circumstances surrounding the adverse employment action give rise to an inference of discrimination."[101] The employer must then give a nondiscriminatory reason for the action, which the plaintiff can overcome "by a preponderance of the evidence" that the proffered basis was "a pretext."[102]

Because Title VII prohibits discrimination "because of" sex, sex stereotyping can evidence sex discrimination under Title VII.[103] In *Price Waterhouse v. Hopkins*,[104] a plurality of the Supreme Court resolved a circuit split on the burdens of proof required for each party in a Title VII suit.[105] In doing so, the plurality explained that sex stereotyping can be evidence of sex discrimination, even though engaging in stereotyping is

98 *Id.* at 362.

99 *Id.* at 362–63.

100 Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004); *see* Mandell v. Cnty. of Suffolk, 316 F.3d 368, 377 (2d Cir. 2003) (listing the same factors); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating test as applied to race).

101 *Peterson*, 358 F.3d at 603; *see Mandell*, 316 F.3d at 377; *see also McDonnell Douglas*, 411 U.S. at 802.

102 Young v. United Parcel Serv., Inc., 575 U.S. 206, 213 (2015) (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)) (explaining burden shifting).

103 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) (relying on *Price Waterhouse* for proposition that Title VII prohibits any consideration of sex in employment decisions); *id.* at 1763–64 (Alito, J., dissenting) (observing that *Price Waterhouse* stands for the proposition that evidence of sex stereotyping "may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex").

104 490 U.S. 228 (1989).

105 *Id.* at 232.

not always itself Title VII sex discrimination.[106] It reached this conclusion because an employer who acts based on a sex stereotype considers the person's sex, which Title VII prohibits.[107] Even with evidence of sex stereotyping, however, a plaintiff still must prove that the employer would not have made the employment decision in question but for the employee's sex.[108] And an employer can show through a preponderance of the evidence that even if sex were a but-for cause, the employer is not liable because it would have arrived at the same decision without considering the employee's sex.[109]

C. *Courts' Interpretations of Title VII and Title IX*

1. *Bostock* and Title VII

In 2020, the Supreme Court held in *Bostock v. Clayton County, Georgia* that Title VII prohibits "fir[ing] an individual for being . . . transgender."[110] Such firing violates Title VII, the Court explained, because the employer "fire[d] that person for traits or actions it would not have questioned in members of a different sex."[111] Thus, sex impermissibly "play[ed] a necessary and undisguisable role in the decision."[112]

Bostock began by outlining a framework to determine whether a basis for an adverse employment action is intentional sex discrimination under Title VII.[113] Title VII prohibits "taking certain actions 'because of' sex."[114] In prior decisions, the Court, defined "because of" as "by reason of" or "on account of."[115] Put simply, Title VII bars an employer from making certain employment decisions because an employee has a particular sex.[116] Thus, Title VII incorporates a "but-for causation" test, which examines whether

106 *Id.* at 251.

107 *Id.* at 241, 250.

108 *Id.* at 251.

109 *Id.* at 242, 253.

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

111 *Id.*

112 *Id.*

113 *Id.* at 1739 ("The question isn't just what 'sex' meant, but what Title VII says about it."); *id.* at 1740 ("In so-called 'disparate treatment' cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII." (citations omitted)).

114 *Id.*

115 *Id.* (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013)).

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

"a particular outcome would not have happened 'but for' the purported cause."[117] To determine whether "sex" was the "but-for" cause, the test "directs . . . chang[ing] one thing at a time and see[ing] if the outcome changes."[118] Even if multiple but-for causes are found, if the outcome changes when the only difference is sex, sex is one but-for cause in violation of Title VII.[119]

The but-for test led the Court to conclude that firing an employee because of the employee's transgender status constitutes sex discrimination.[120] The Court did not explicitly define "sex" in Title VII. Rather, it "proceed[ed] on the assumption that 'sex' . . . referr[ed] only to biological distinctions between male and female."[121] Applying the but-for test, the Court explained that when an employer discriminates against an employee for having transgender status, "two causal factors may be in play—*both* the individual's sex *and* something else (the sex . . . with which the individual identifies)."[122] To illustrate why, the Court gave the example of two employees, one "who was identified as male at birth but now identifies as a female" and "an otherwise identical employee who was identified as female at birth."[123] If the employer fires the employee who was male at birth, the employer fired that employee "for traits or actions that it tolerates in an employee identified as female at birth."[124]

The Court viewed the discrimination in dispute as against an employee for having a transgender status.[125] Transgender status, as the *Bostock* Court understood it, arises from an incongruence between sex and gender identity.[126] Thus, transgender status is a signal that a person has a particular combination of sex and "something else"—a particular gender identity. The question, in the Court's eyes, is thus whether the trait

117 *Id.* (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)).

118 *Id.*

119 *Id.*

120 *Id.* at 1737, 1741 ("[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.").

121 *Id.* at 1739. The Court proceeded on such an assumption because the employees "concede[d] the point for argument's sake" and "nothing in [the Court's] approach . . . turn[ed] on the outcome of the parties' debate." *Id.*

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

123 *Id.* at 1741.

124 *Id.*

125 *Id.* at 1737.

126 As earlier noted, the Court proceeding on the assumption that "sex" in Title VII refers to a biological male-female binary. *Id.* at 1739. The Court, however, never uses the term "gender identity" except when referencing the employees' understanding of "sex," which it declined to adopt. *See id.* at 1739. Rather, it describes a transgender employee as having one sex at birth but now identifying with a different sex. *Id.* at 1742.

is problematic alone or whether the trait is only a problem because it occurs in combination with a particular sex.[127] Comparing two employees with the same trait—identifying as a female—but with different sexes produces different outcomes.[128] Thus, in the Court's analysis, the adverse action turned on the employees' sex.[129]

The Court did not reach this conclusion by finding that transgender status is "related to sex in some vague sense or because discrimination on [the basis of transgender status] has some disparate impact on one sex or another."[130] The Court reached this conclusion because discrimination "on [this] ground[ ] requires an employer to intentionally treat individual employees differently because of their sex."[131] Put another way, firing a person for having transgender status treats that person worse "for traits or actions [the employer] would not have questioned in members of a different sex."[132] The tolerance of the traits thus depends on sex.[133]

The Court further presumed, however, that considering "sex" in the abstract is sufficient to trigger Title VII liability. As the dissent observed, merely stating that a person has transgender status says nothing about the person's specific sex or specific gender identity.[134] The majority recognized as much, explaining that Title VII liability is triggered if an employer merely considers that the employee's identity and sex do not align—even if the employee's exact sex is otherwise unknown.[135]

In sum, the Court reached its conclusion by assuming a binary, biologically rooted understanding of "sex" as used in the statute.[136] *Bostock* neither redefined "sex" to encompass gender identity[137] nor held that discrimination because of gender identity is sex discrimination. On the contrary, it explicitly treated gender identity and sex as concepts that exist

127 *See id.* at 1744–45 (discussing objections to the Court's conclusion).

128 *Bostock*, 140 S. Ct. at 1741.

129 *Id.* at 1741–42.

130 *Id.* at 1742.

131 *Id.*

132 *Id.* at 1737.

133 *Id.* at 1737, 1742.

134 *See Bostock*, 140 S. Ct. at 1758–59 (Alito, J., dissenting) (noting that an employer could refuse to hire a transgender person without knowing the person's specific sex).

135 *See id.* at 1746 (majority opinion) ("[I]magine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex .... It can't be done. ... Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.").

136 *See* A. Russell, Note, Bostock v. Clayton County*: The Implications of a Binary Bias*, 106 CORNELL L. REV. 1601, 1614 (2021) (citing *Bostock*, 140 S. Ct. at 1739).

137 *See Bostock*, 140 S. Ct. at 1739*; see also* Russell, *supra* note 136, at 1614–15.

independent of each other.[138] Whether a person is transgender, in the Court's eyes, turns on the relationship between sex and gender identity. If the two don't align, the person has transgender status. If they do align, the person does not.

2. Title IX in the Transgender Context

Although the Supreme Court declined to address Title IX in the transgender context,[139] three federal courts of appeals have directly addressed whether Title IX permits treating a person consistent with that person's biological sex when the person has transgender status.[140] The Courts of Appeals for the Fourth and Seventh Circuits, on different legal theories, concluded Title IX does not permit such treatment.[141] In contrast, the Court of Appeals for the Eleventh Circuit, sitting en banc, held Title IX does allow such treatment.[142] Although the precise details vary, the overarching facts of the first three of these cases are similar.[143] Each plaintiff—Whitaker, Grimm, and Adams—was born female but identified as male.[144] When the plaintiffs sought to use the male restrooms in their

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

139 *See id.* at 1753; West Virginia v. B.P.J., 143 S. Ct. 889, 889 (2023) (mem.) (Alito, J., dissenting from denial of application to vacate injunction).

140 *See* A.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 764 (7th Cir. 2023), *petition for cert. filed*, No. 23-392 (Oct. 11, 2023); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796 (11th Cir. 2022); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1038–39 (7th Cir. 2017). Other federal courts of appeals have also addressed the question but did not do so substantively or on the merits. *See supra* note 23.

141 *Compare Grimm*, 972 F.3d at 618 (conducting disparate treatment analysis) *with Whitaker*, 858 F.3d at 1047–48 (applying sex stereotyping theory), *and Martinsville*, 75 F.4th at 771–72 (applying both *Whitaker* and *Bostock*).

142 *Adams*, 57 F.4th at 796 (holding that Title IX permits treating a person consistent with that person's biological sex when the person has transgender status).

143 Although the Court of Appeals for the Seventh Circuit addressed the issue twice, first in *Whitaker* and then in *Martinsville*, the latter followed *Whitaker* with no new analysis other than to also apply *Bostock*. *See Martinsville*, 75 F.4th at 769, 771–72. Because this examination of the circuit split seeks to illuminate the different lines of reasoning and *Martinsville* charted no new course, this section only examines *Whitaker*, *Grimm*, and *Adams*. That said, Part IV explains why the applications of *Bostock* in *Grimm* , the *Adams* dissent, and *Martinsville* were incorrect.

144 *Whitaker*, 858 F.3d at 1040; *Grimm*, 972 F.3d at 597–98 (explaining that Grimm was "identified as female" at birth but "always knew he was a boy"); *Adams*, 57 F.4th at 796 ("Adams identifies as male, while Adams's biological sex—sex based on chromosomal structure and anatomy at birth—is female.").

respective schools, however, they were ultimately denied access.[145] Each school instead offered the alternative of using a unisex restroom in addition to the female restroom.[146]

a. Whitaker v. Kenosha Unified School District

The Court of Appeals for the Seventh Circuit was the first of the three courts to decide whether Title IX compels a school to treat a student consistent with that student's gender identity.[147] Applying Title VII sex-stereotyping precedents, the court explained that by barring Whitaker, a transgender male, from the male bathroom, Kenosha's actions constituted a penalty for "gender non-conformance."[148] The court therefore held that the school violated Title IX under a sex-stereotyping theory.[149]

The court began its Title IX analysis by explaining that a plaintiff can bring a claim under Title VII under a sex-stereotyping theory.[150] The dispute, the court observed, was whether a "student who alleges discrimination on the basis of . . . transgender status can state a claim of sex discrimination" under Title IX.[151] Title IX neither defined "sex" nor used the modifier "biological."[152] Although the court had previously read "sex" in Title VII narrowly to "exclude transsexuals," the court explained that *Price Waterhouse* afterwards embraced "a broad view" that Title VII prohibits "disparate treatment . . . resulting from sex stereotypes."[153] And the Court of Appeals for the Seventh Circuit, as well as other courts, since then "have recognized a cause of action . . . when an adverse action is taken because of [a] . . . failure to conform to sex stereotypes."[154]

Next, the court observed that transgender status arose from a person's non-conformity with "sex-based stereotypes of the sex that he or she was assigned at birth."[155] Thus, as other courts have concluded, Title VII allows

145 *Whitaker*, 858 F.3d at 1040, 1042; *Grimm*, 972 F.3d at 598–600 (explaining that Grimm was initially permitted to use the male bathroom but ultimately denied access under a new school board policy); *Adams*, 57 F.4th at 797–98.

146 *Whitaker*, 858 F.3d at 1040, 1042; *Grimm*, 972 F.3d at 599–600; *Adams*, 57 F.4th at 797–98.

147 *Whitaker*, 858 F.3d at 1038–39.

148 *Id.* at 1049.

149 *Id.* at 1039.

150 *Id.* at 1047 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)).

151 *Id.*

152 *Id.*

153 *Whitaker*, 858 F.3d at 1047–48 (first quoting Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085–86 (7th Cir. 1984) and then quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)).

154 *Id.* at 1048.

155 *Id.*

claims of discrimination based on transgender status.[156] The school district contended that "this reasoning flies in the face of Title IX" because Congress failed to make transgender status a protected classification under Title IX, but the court disagreed.[157] Congressional inaction, the court explained, could also indicate that the law already included the proposed change.[158]

Whitaker was thus likely to prevail under Title IX because his complaint alleged that the district "denied him access . . . because he is transgender."[159] In the court's eyes, requiring a student "to use a bathroom that does not conform with his or her gender identity punishes that [student] for his or her gender non-conformance."[160] In other words, Kenosha subjected Whitaker "to different rules, sanctions, and treatment than non-transgender students."[161] And by making Whitaker the only student to use the single-user bathrooms, the district further extended this differential treatment.[162]

b. Grimm v. Gloucester County School Board

The Court of Appeals for the Fourth Circuit reached the same conclusion in *Grimm*[163] as the court did in *Whitaker*[164] but on a disparate treatment theory.[165] Relying on *Bostock*, the majority determined that the school board discriminated on the basis of sex.[166] *Bostock*, the court observed, held that discrimination because of transgender status "is discrimination 'on the basis of sex.'"[167] That follows, the court explained, because the discriminator must "necessarily refer[ ] to the individual's sex to determine incongruence between sex and gender."[168] Because the school board had to refer to Grimm's sex to determine that Grimm could not use the male bathroom, Grimm's sex was the "but-for cause" of the

156 *Id.* at 1048–49.

157 *Id.* at 1049.

158 *Id.*

159 *Whitaker*, 858 F.3d at 1049.

160 *Id.*

161 *Id.*

162 *Id.* at 1050.

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

164 858 F.3d at 1039.

165 *Grimm*, 972 F.3d at 618 (comparing the school's treatment of Grimm to its treatment of "other boys").

166 *Id.* at 616–17.

167 *Id.* at 616.

168 *Id.* (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741–42 (2020)).

exclusion.[169] Moreover, although *Bostock* did not address Title IX,[170] discrimination under Title IX "mean[s] treating that individual worse than others who are similarly situated."[171] Grimm, the court stated, was treated worse than "other boys" because Grimm "could not use the restroom corresponding with his gender."[172]

Although Title IX permitted sex-separate bathrooms, the court further noted, the regulation cannot override the statute's prohibition on sex discrimination.[173] That said, Grimm challenged "discriminatory exclusion" from sex-separate restrooms, not those restrooms' existence.[174] And so the board could maintain sex-separate restrooms but could not "rely on its own discriminatory notions of what 'sex' means."[175] Put simply, the court explained, the board invented its own classification ("biological gender"), defined it as the sex marker on a birth certificate, and then refused to recognize an updated birth certificate.[176] The court therefore affirmed the district court's grant of summary judgment on Grimm's Title IX claim.[177]

Judge Paul Niemeyer, dissenting, countered that Title IX in fact allowed separate restrooms on the basis of biological sex.[178] The term "sex" in Title IX, he argued, "must be understood as referring to the traditional biological indicators that distinguish a male from a female," not a person's gender identity or gender expression.[179] First, he argued, dictionaries uniformly defined sex in that manner.[180] Even *Bostock*, he noted, assumed that "sex" in Title VII—which was adopted about the same time as Title IX—referred to such biological distinctions.[181] Second, Title IX allows sex-separate facilities to protect individuals' privacy interest in shielding their undressed bodies from members of the opposite sex.[182] Indeed, the Supreme Court recognized that "'physical differences between men and

169 *Id.*

170 *Id.* (citing *Bostock*, 140 S. Ct. at 1753).

171 *Grimm*, 972 F.3d at 618 (quoting *Bostock*, 140 S. Ct. at 1740).

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.* at 619.

177 *Grimm*, 972 F.3d at 619. The court also held that by refusing to update Grimm's transcript, the school treated Grimm worse than other students because other students' transcripts "reflect[ed] their correct sex" while Grimm's did not. *See id.*

178 *Id.* at 637 (Niemeyer, J., dissenting).

179 *Id.* at 632.

180 *Id.* at 632–33.

181 *Id.* at 633 (citing Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020)).

182 *Id.* at 633–34.

women' are 'enduring' and render 'the two sexes . . . not fungible.'"[183] Third, Grimm was born a biological female and thus was not similarly situated to students born biologically male.[184] Because Title IX expressly authorized separate bathrooms based on sex, Judge Niemeyer concluded, the majority's opinion was a statement on how transgender students should be treated, not what Title IX requires.[185]

c. Adams v. School Board of St. Johns County

Echoing Judge Niemeyer's argument in *Grimm*, the Court of Appeals for the Eleventh Circuit held in December 2022 that the "unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex" did not violate Title IX.[186] Beginning with the text of Title IX and its implementing regulations, the court explained that the appeal required interpretation of the term "sex."[187] Because Title IX included statutory and regulatory "carve-outs for differentiating between the sexes," the court could not simply determine whether discrimination on the basis of transgender status is sex discrimination.[188] After all, the court noted, if "sex" refers to "biological sex," then the carve-out for separate bathrooms "on the basis of sex" permits the Board's policy.[189]

Title IX is not ambiguous, the court concluded.[190] As "[r]eputable dictionary definitions" demonstrate, including the dictionary relied on by the district court, "sex" when Title IX was adopted referred to "biological sex."[191] And because ambiguity arises from a statute's context rather than possible definitions, Title IX's lack of a definition of "sex" does not evidence ambiguity.[192] On the contrary, the court explained, Title IX's carve-outs reveal that sex must refer to biology.[193] Title IX, for instance, permits sex-separate living facilities.[194] If sex were ambiguous or included gender identity, the court reasoned, then a transgender student could live

183 *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting) (quoting United States v. Virginia, 518 U.S. 515, 533, 550 n.19 (1996)).

184 *Id.*

185 *Id.* at 635.

186 Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796 (11th Cir. 2022). The panel also resolved Adams' equal protection claim in favor of the school. *Id.*

187 *Id.* at 811–12.

188 *Id.* at 811.

189 *Id*.

190 *Id.* at 812–13.

191 *Id.* at 812.

192 *Adams*, 57 F.4th at 813 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).

193 *Id.*

194 *Id.*

in housing corresponding with the student's sex and housing corresponding with the student's gender identity.[195] The carve-out for sex-separate housing would make no sense.[196]

The court then rejected the argument that prior cases had read "gender identity" or "transgender status" into the meaning of "sex."[197] *Bostock*, the court explained, proceeded on the assumption that "sex" in Title VII referred to "*biological* distinctions" and did not define sex to include transgender status.[198] *Price Waterhouse* and the Court of Appeals for the Eleventh Circuit's own precedent only dealt with sex stereotypes in the workplace and did not "depart[ ] from the plain meaning of 'sex.'"[199] And "'sex' is not a stereotype," the court added.[200] Contrary to the district court's assumption, "sex" does not mean one thing for a transgender person and another for a non-transgender person.[201] Because Title IX expressly allows bathrooms separated on the basis of sex, the majority further observed, a non-transgender biological female would fail legally in a demand to use the male restroom.[202] Adams' claim, therefore, failed as well.[203]

The court further noted that the district court's interpretation would create a "dual protection" that elevates protections for transgender status over protections for sex.[204] Under the district court's reading, "an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity."[205] This, the majority charged, does not align with Title IX's purpose or the plain meaning of "sex" when Title IX was adopted.[206]

Even if Title IX was ambiguous, the majority concluded, the Spending Clause compelled ruling in the school's favor on Adams's Title IX claim.[207] Congress is expected to speak clearly when it places a condition on federal

195 *Id*.

196 *Id.*

197 *Id.*

198 *Adams*, 57 F.4th at 813–14 (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020)).

199 *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); Glenn v. Brumby, 663 F.3d 1312, 1318–19 (11th Cir. 2011)).

200 *Id*.

201 *Id.* at 813–14.

202 *Id.* at 814.

203 *Id.* at 814–15.

204 *Adams*, 57 F.4th at 814.

205 *Id.*

206 *Id.*

207 *Id.* at 815.

funds.[208] The widespread practice of separating bathrooms and living facilities based on biological sex, the majority argued, belies the notion that the School Board should have been on notice that its policy violated Title IX.[209] Moreover, Adams's interpretation would impact not only bathrooms but also living facilities, locker rooms, and sports.[210] "Absent a clear statement from Congress," the majority concluded, "such a reading . . . would offend first principles of statutory interpretation and judicial restraint."[211]

The opinion was accompanied by a brief concurrence and four dissents. Judge Barbara Lagoa, concurring, argued that redefining sex would adversely impact women's sports.[212] Judge Charles Wilson, dissenting, charged that sex is "not static" based on intersex conditions.[213] Because intersex students might change their respective sexes or have genitalia that do not align with their sex, Judge Wilson argued, the Board's policy discriminates on the basis of biological sex and does not solve privacy concerns.[214] Judges Adalberto Jordan and Robin Rosenbaum, also dissenting, only focused on Adams's equal protection claim.[215] Judge Jill Pryor, however, offered a substantive critique of the majority's Title IX analysis.[216]

First, Judge Pryor argued, the majority reframed the case.[217] The school board, she stated, defined "biological sex" as "anatomical" or "physiological" sex but declined to define either term.[218] The board's definition of biological sex, she wrote, was "the sex a doctor assigns an infant in the moments after birth by examining the infant's external genitalia."[219] This definition, she proceeded to argue, broke with the scientific communities' understanding of sex, which she asserted encompassed physical traits as well as gender identity.[220] And it ignored that biological components might diverge and that gender identity is the

208 *Id.* at 815–16.

209 *Id.* at 816.

210 *See Adams*, 57 F.4th at 816.

211 *Id.* at 817.

212 *Id.* at 817–21 (Lagoa, J., concurring).

213 *Id.* at 821–23 (Wilson, J., dissenting).

214 *Id.* at 822–24.

215 *Id.* at 824 (Jordan, J., dissenting); *id.* at 830 (Rosenbaum, J., dissenting).

216 *Adams*, 57 F.4th at 832–33, 856–59 (Pryor, J., dissenting). Judge Pryor also offered an equal protection analysis, but that is beyond the scope of this Comment. *See id.* at 832, 844–55.

217 *Id.* at 842.

218 *Id.* at 836–37, 836 n.3.

219 *Id.* at 836.

220 *Id.* at 836–37.

primary determinant of sex.[221] By defining "biological sex" as "sex based on chromosomal structure and anatomy at birth," Judge Pryor charged, the majority ignored the record, including the School Board's definition of sex.[222] Moreover, the case was about discrimination against transgender students, she contested, not "the legality of sex-separated bathrooms."[223]

Judge Pryor proceeded to determine that the exclusion was discriminatory.[224] Cisgender students, she explained, could use the restroom corresponding with their gender identities, but transgender students could not.[225] Assuming that sex in Title IX refers unambiguously to biological sex, she then explained that sex includes gender identity.[226] Thus, a person "can be male if some biological components of sex, including gender identity, align with maleness."[227]

Next, Judge Pryor argued that "on the basis of" imposed the but-for causation test.[228] Applying *Bostock*, she explained that "Adams was excluded from the boys' bathroom under the policy . . . because he had one specific biological marker traditionally associated with females, genital anatomy (or, put differently, because he lacked that one specific biological marker traditionally associated with males)."[229] Thus, Judge Pryor concluded, Adams was excluded on the basis of sex.[230]

Judge Pryor further argued that the carve-outs did not rescue the policy.[231] The carveouts do not address, she stated, what facility a person should use when the person's "biological markers of . . . sex point in different directions."[232] Adams, she observed, has both male and female biological markers as a transgender boy.[233] Thus, Adams's claim "is not foreclosed by the Title IX carveouts."[234]

Judge Pryor concluded by asserting that allowing transgender students to use the bathroom corresponding with their respective gender identities would not turn private facilities or sports teams "into sex-

221 *Id.* at 836–37, 836 n.4.

222 *Adams*, 57 F.4th at 842.

223 *Id.* at 843.

224 *Id.* at 856.

225 *Id*.

226 *Id.* at 856–57.

227 *Id.* at 857.

228 *Adams*, 57 F.4th at 857.

229 *Id.* at 857–58.

230 *Id.* at 858.

231 *Id.* at 859.

232 *Id.*

233 *Id.*

234 *Adams*, 57 F.4th at 859.

neutral areas and activities."[235] Adams' case, she explained, did not address "how to assign gender fluid individuals"—individuals "whose gender changes between male and female."[236] Moreover, she argued, that "sex is a but-for cause of differential treatment does not necessarily mean that actionable discrimination exists."[237] But "[w]here exclusion implies inferiority, as it does here, principles of equality prevail."[238] By excluding Adams from the boys' bathroom, she emphasized, the school placed on Adams "a 'badge of inferiority.'"[239]

III. The Original Understanding of Title IX

Title IX permits treating a person as male or female based on that person's sex, even if that person has transgender status. As originally understood, "sex" in Title IX refers to whether a person is male or female based on how the person's body is reproductively organized. And as the text, contemporary understandings, and subsequent early interpretations of Title IX by the executive branch and Congress demonstrate, Title IX's requirement is one of equal opportunity, not sex blindness. Title IX's disparate treatment test thus looks at whether students are given equal opportunities and access to benefits or are subject to the same standards—not whether sex was ever considered.

A. *The Meaning of "Sex"*

1. Historical Understandings of "Sex"

The *Adams* majority rightly understood Adams's sex as female because the sex of a claimant in the Title IX context must be understood as it would have been when Title IX was adopted. After all, Title IX prohibits discrimination "on the basis of sex." What that means, however, depends on what "sex" is.[240] And as the majority and Judge Pryor's disagreement in *Adams* illustrates, in the transgender context, the definition of "sex" matters.[241]

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235 *Id.* (quoting *id.* at 817 (majority opinion)).

236 *Id.*

237 *Id.* at 860.

238 *Id.*

239 *Id.* (quoting Grimm v. Gloucester Cnty. Sch. Bd., 976 F.3d 399, 403 (4th Cir. 2020) (Wynn, J., concurring in denial of reh'g en banc).

240 *See id.* at 811.

241 *See also* A.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 775 (7th Cir. 2023) (Easterbrook, J., concurring in the judgment) (observing that if Title IX uses "sex" in "a genetic sense," as he believes

But "sex" is not whatever anyone says it is. Once a term is embedded in a statute, its definition is static rather than evolving over time.[242] Terms and phrases bear the ordinary public meaning they bore when Congress placed them into the statute.[243] What a statute means is the same as what it meant when enacted, regardless of what the same words or terms mean today.[244] By prohibiting discrimination on the basis of sex, Title IX prohibits discrimination on the basis of sex as sex was understood when Title IX was adopted.

"Sex" at the time of Title IX's enactment—and for years afterwards—referred to a male-female binary determined by the wholistic organization of a person's body for reproductive function.[245] Societal views at the time

it does "given that word's normal usage when the statute was enacted," Title IX "does not compel states" to treat as a male an individual who presents as male but has a female sex), *petition for cert. filed*, No. 23-392 (Oct. 11, 2023).

242 *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President."); *id.* at 1766 (Alito, J., dissenting) ("The words of a law . . . 'mean *what they conveyed to reasonable people at the time*.'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012))); *id.* at 1825 (Kavanaugh, J., dissenting) ("[C]ourts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase. . . . The ordinary meaning that counts is the ordinary public meaning at the time of enactment . . . ."); Wisc. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070 (2018) ("[O]ur job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" (quoting Perrin v. United States, 444 U.S. 37, 42 (1979))).

243 *See Bostock*, 140 S. Ct. at 1738 (looking to the "ordinary public meaning of [the statute's] terms at the time of its enactment"); *id.* at 1766 (Alito, J., dissenting) (likewise examining the terms' original meaning); *id.* at 1825 (Kavanaugh, J., dissenting) (looking at "the ordinary public meaning at the time of enactment"); *Wisc. Cent.*, 138 S. Ct. at 2070.

244 *See Bostock*, 140 S. Ct. at 1750 ("Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption . . . .").

245 *See, e.g.*, *Bostock*, 140 S. Ct. at 1784–91 (Alito, J., dissenting) (listing various dictionary definitions of "sex" published between 1953 and 2011); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 632–33 (4th Cir. 2020) (Niemeyer, J., dissenting) (listing definitions from dictionaries published between 1970 and 1980); *Adams*, 57 F.4th at 812 (listing definitions from dictionaries published between 1970 to 1980); *Sex,* BLACK'S LAW DICTIONARY (6th ed. 1990) ("The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female."); *Sex*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1991) (defining "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female respectively," or "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned"). *See also Gender*, BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995) ("[G]ender has long been used as a grammatical distinction of a word according to the sex referred to. It has newly been established in the language of the law in phrases such as *gender-based discrimination*, a use disapproved as jargonistic

of Title IX's enactment also reflected this understanding.[246] By arguing that a woman's social roles should not be defined by her body, for instance, the feminists of the mid-twentieth century reaffirmed that a woman is a woman because of how her body is reproductively organized. Witnesses in the 1970 hearings repeatedly recognized the existence of bona fide sex distinctions. And the policy debates following Title IX's adoption reflected the view that the fundamental difference between males and females is physical.[247] Title IX's adoption sent a clear message: one's body should not determine one's opportunities. Unlike in the Title VII context, where the Court recognized debate over whether "sex" includes societal norms,[248] in the Title IX context, "sex" unequivocally does not refer to such norms.

Moreover, as the *Adams* majority observed, the context of Title IX further demonstrates that the ordinary meaning of sex referred to a male-female binary, not gender identity.[249] Today, far more than two gender identities are recognized.[250] But Title IX speaks in terms of a binary.[251] For instance, the 1979 HEW Interpretation repeatedly referred to "the other sex" and "male and female" in outlining standards for treating both sexes equally.[252] Even today, the Department of Education's regulations require

by some authorities. What this adds to *sex discrimination*, aside from eight letters and one hyphen, one can only guess."); *Gender*, WEBSTER'S DICTIONARY OF ENGLISH USAGE (1989) (explaining the use of "gender" to refer to "sex").

246 *See supra* Part I; *see also 1970 Hearings, Part 1*, *supra* note 46, at 437 (statement of Daisy Shaw, Director of Educational and Vocational Guidance of New York City) (noting that the concentration of women in certain professions seems "cultural" rather than "biological" because it "is based on cultural factors and societal expectations rather than on *sex-linked characteristics* or aptitudes." (emphasis added)).

247 *See supra* Part I.

248 *See Bostock*, 140 S. Ct. at 1739.

249 *See Adams*, 57 F.4th at 813 (critiquing impact of redefinition of sex on housing); J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass "Gender"?*, 51 J. MARSHALL L. REV. 225, 230–32 (2018) (observing that "Title IX . . . reflected a then binary sex worldview" and "recognized just two sexes (male and female)").

250 Reich, *supra* note 249, at 231 (explaining that "the number of potential genders is infinite"); Kendall Tietz, *Over 100 Gender, Sexuality Options on Application for San Francisco's Guaranteed Transgender Income Program*, FOX NEWS (Nov. 19, 2022, 1:01 PM), https://perma.cc/TS4A-XRWH; Perri O. Blumberg, Emily Becker & Sabrina Talbert, *Here's Your Comprehensive Gender Identity List, as Defined by Psychologists and Sex Experts*, WOMENSHEALTH (July 21, 2022), https://perma.cc/84YB-4FQC (listing several gender identities); Carlo Moleiro & Nuno Pinto, *Sexual Orientation and Gender Identity: Review of Concepts, Controversies and Their Relation to Psychopathology Classification Systems*, 6 FRONTIERS IN PSYCH., Oct. 2015, at 1, 2, https://perma.cc/9CSN-WLKG ("The concept of gender identity evolved over time to include those people who do not identify either as female or male . . . .").

251 Reich, *supra* note 249, at 232.

252 *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71399, 71416–18 (Dec. 11, 1979); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R.

that "toilet, locker room, and shower facilities" that are provided "on the basis of sex . . . for students of one sex" are "comparable to such facilities provided for students of the other sex."[253]

Bostock does not compel a contrary understanding of sex in Title IX. Even if its reasoning did apply in the Title IX context, it would not require finding that the term "sex" encompasses gender identity or transgender status. *Bostock* stated that "transgender status [is] inextricably bound up with sex," but not because transgender status and sex are related.[254] The Court of Appeals for the Fourth Circuit in *Grimm* explained why:

> As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions.[255]

The court in *Grimm* correctly understood what *Bostock* said about the relationship between sex, gender identity, and transgender status. Under *Bostock*, transgender status arises from an incongruence between a person's sex and gender identity.[256] Moreover, *Bostock* treats gender identity as an independent trait distinct from sex.[257] After all, the Court in *Bostock* "proceed[ed] on the assumption that 'sex' signified . . . only to biological distinctions between male and female."[258] *Bostock* did not weave

§ 106.41 (2023). Courts have given the 1975 HEW Regulations and 1979 HEW Interpretation "particularly high" deference. *See* Biediger v. Quinnipiac Univ., 691 F.3d 85, 97 (2d Cir. 2012) (quoting McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004)); Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993) (giving the Department of Education's replication of HEW's regulations after HEW was divided into two agencies "particularly high" deference "because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX"); *see also supra* note 71 and accompanying text (explaining that some commenters to the notice of proposed rulemaking argued that by reviewing and accepting the 1975 rule and HEW's 1979 interpretation, and then adopting the executive branch's understanding of Title IX in the 1988 Civil Rights Restoration Act, Congress ratified HEW's 1975 and 1979 understanding of Title IX).

253 34 C.F.R. § 106.33.

254 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742 (2020).

255 Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) (citing *Bostock*, 140 S. Ct. at 1741–45).

256 *Bostock*, 140 S. Ct. at 1742 ("When an employer fires an employee because she is . . . transgender, two causal factors may be in play—both the individual's sex and something else (the sex . . . with which the individual identifies).").

257 *Id.* at 1737, 1742 (describing discrimination because of transgender status as discrimination for having a sex in combination with another trait); *id.* at 1739, 1741 (applying the but-for test, which tests for discrimination by changing "one thing at a time," and comparing two individuals with the same gender identity but different sexes).

258 *Id.* at 1739.

gender identity or transgender status into any definition of sex or make gender identity and sex even somewhat conceptually related.[259]

In sum, contrary to the definition proposed by the *Adams* dissent, "sex" was not defined by gender identity at the time of Title IX's adoption. Nor was it understood as determined by gender identity in the years following when Title IX's implementing regulations were promulgated.[260] Rather, "sex" was defined solely by the wholistic organization of the body for reproductive function.[261] This definition of sex has endured and continues to be used today.[262] Because of that historical understanding of "sex," the Courts of Appeals for the Fourth and Seventh Circuits erred when they treated students having the female sex but who identified as male as boys.[263] Those cases were not about two classes of boys, one transgender and one not. Regardless of how the students identified,

259 *But see, e.g.*, Amy Post, Ashley Stephens & Valarie Blake, *Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights After* Bostock, 11 CAL. L. REV. ONLINE 545, 546 (2021) (arguing that "sex discrimination under Section 1557 necessarily encompasses gender identity . . . discrimination after *Bostock*"); Abbey Widick, *It is Time to Move Forward…On the Basis of Sex: The Impact of* Bostock v. Clayton County *on the Interpretation of "Sex" Under Title IX*, 68 WASH. U.J.L. & POL'Y 303, 304 (2022) (arguing for the application of *Bostock*'s but-for test to prohibit gender identity discrimination under Title IX). This reasoning is incorrect, however, for the reasons stated by the Court of Appeals for the Fourth Circuit in *Grimm* and as explained above in Section II.C.2.b.

260 *See supra* note 245 and accompanying text.

261 *See supra* note 245 and accompanying text.

262 *See Bostock*, 140 S. Ct. at 1784–91 (Alito, J., dissenting) (listing dictionary definitions of "sex" from many different years, including 2001 and 2011); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 632–33 (4th Cir. 2020) (Niemeyer, J., dissenting) (listing definitions from 2011 and 2014 and explaining that "even today, the word 'sex' continues to be defined based on the physiological distinctions between males and females"); *Sex*, BRITANNICA.COM, https://perma.cc/3NAG-34UZ (explaining that "sex" is "the sum of features by which members of species can be divided into two groups—male and female—that complement each other reproductively" and that "[d]ifferentiation between the sexes exists, therefore, as the primary difference represented by the distinction between eggs and sperm, by differences represented by nature of the reproductive glands and their associated structures, and lastly by differences, if any, between individuals possessing the male and female reproductive tissues, respectively"); *Sex*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The sum of the peculiarities of structure and function that distinguish a male from a female organism; gender."); *see also* ANDERSON, *supra* note 12, at 78 & nn.1–3 (discussing three prominent embryology texts' definition of sex as defined by chromosomes at the moment of fertilization); BRIAN MOULTON & LIZ SEATON, HUM. RTS. CAMPAIGN FOUND.,TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING 5 (2005), https://www.bsu.edu/-/media/www/departmentalcontent/counselingcenter/pdfs/safezone-transgender/transgendered-issues-handbook.pdf (contrasting gender identity with "physical sex"). *But see* ANDERSON, *supra* note 12, at 28–33 (discussing newer definitions of sex that distinguish, for instance, between biological sex and sex assigned at birth).

263 *See Grimm*, 972 F.3d at 618; Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017); A.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 764 (describing the plaintiffs, biological females who identify as male, as "three boys [who] are transgender"), *petition for cert. filed*, No. 23-392 (Oct. 11, 2023).

through the lens of Title IX, those cases were about girls who wanted to be treated identically to boys. That should have been the courts' starting point, as it was in *Adams*. No matter a person's gender identity, in a Title IX disparate treatment analysis, that person must be viewed as male or female based solely on that person's sex.

2. Intersex Conditions

Moreover, contrary to the *Adams* dissent's claims, intersex conditions do not demonstrate that a person's sex can change and thus do not prove that a person with transgender status could in fact become a different sex for the purposes of Title IX. Judge Wilson's dissent in *Adams* makes much of intersex conditions to argue that sex is fungible, but his argument misses the point of the evidence he relies on. As he recognizes, intersex conditions are "conditions of physiological development."[264] In other words, the body deviated from a biological norm in development.[265] When a person has 5-alpha reductase, for instance, the person might physically appear as female until puberty or later, when testosterone triggers the development of male genitalia.[266] In that circumstance, the dissent explains, the discovery of underlying male physiological traits "would most certainly" cause medical professionals to "recategorize" the individual as male.[267] Contrary to the dissent's inference, the changing of a sex marker as more becomes known about a person's body does not demonstrate that the person's *sex* changes. It only demonstrates that the *recognition* of sex changes. The underlying attributes that define what sex is recognized remain constant.

Put simply, having an intersex condition is very different from having transgender status.[268] Attempts to change the sex marker or physical attributes of an individual with an intersex condition are attempts to bring the body and recognition of sex into wholistic alignment with the underlying physical determinant of reproductive function.[269] And while

264 Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 822 (11th Cir. 2022) (Wilson, J., dissenting); *see also Ambiguous Genitalia*, MAYO CLINIC, https://perma.cc/D6DF-ZCT2 ("Ambiguous genitalia isn't a disease; it's a disorder of sex development."); *see also* ANDERSON, *supra* note 12 at 88–91 (observing that intersex status is not a third sex but a disorder of development).

265 *See Ambiguous Genitalia*, *supra* note 264.

266 *Adams*, 57 F.4th at 822–23 (Wilson, J., dissenting).

267 *Id.* at 823.

268 *See id.* at 822 (observing that having an intersex condition is not the same as having a transgender identity).

269 *See id.* at 822–23 (observing that when a person's physical attributes and chromosomes differ, once the disparity becomes apparent, the medical community "would most certainly" change its recognition of the person's sex to reflect chromosomes rather than the maldeveloped genitalia).

such a change reduces disharmony with gamete production and other biological traits determinative of reproductive function, aligning a person's body with a gender identity increases disharmony.[270] The implication is that under Title IX's understanding of sex, changes to the body or sex marker of an intersex person means something very different than the same changes for a transgender individual. Perhaps, under the *Adams* dissent's understanding of sex,[271] such changes might mean the same thing for both, but that is not the definition of sex that Title IX employs. Sex is simply "not fungible."[272] Under Title IX, a biological male who identifies as a female and undergoes surgical and hormonal treatments to appear as female does not become a biological female.

B. *What Title IX Says About "Sex"*

All that said, "[t]he question isn't just what 'sex' meant, but what Title [IX] says about it."[273] As explained above, courts have traditionally interpreted Title IX as employing a disparate treatment test focused on equal opportunity.[274] And that is correct. The text and original

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[270] *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 596 (4th Cir. 2020) (observing that person with gender dysphoria may change their sex characteristics via hormonal treatment and surgery).

[271] *Adams*, 57 F.4th at 836–37 (Pryor, J., dissenting). Note that the dissent's understanding of sex appears to be a minority view among the scientific and medical community. *See, e.g.*, Sex and Sexuality, AM. PSYCH. ASS'N, https://perma.cc/6465-UGG4 ("Sex usually refers to the biological aspects of maleness or femaleness, whereas gender implies the psychological, behavioral, social, and cultural aspects of being male or female (i.e., masculinity or femininity). . . . Sexuality encompasses all aspects of sexual behavior, including gender identity, orientation, attitudes, and activity."); *Sex*, BRITANNICA.COM, https://perma.cc/3NAG-34UZ (explaining that "sex" is "the sum of features by which members of species can be divided into two groups—male and female—that complement each other reproductively" and that "[d]ifferentiation between the sexes exists, therefore, as the primary difference represented by the distinction between eggs and sperm, by differences represented by nature of the reproductive glands and their associated structures, and lastly by differences, if any, between individuals possessing the male and female reproductive tissues, respectively"); *Sex, Gender, and Sexuality*, NAT'L INSTS. OF HEALTH, https://perma.cc/V26T-4BVX (defining "sex" as "[a] biological category based on reproductive, anatomical, and genetic characteristics" but "gender identity" as a "sense of being a man, woman, boy, girl, genderqueer, nonbinary, etc. . . . [that] is not necessarily visible to others"); *Sex and Gender: What's the Difference*, PSYCHCENTRAL, https://perma.cc/X3MR-Z9QG (observing that sex and gender identity may not align, not that sex is determined by gender identity).

[272] United States v. Virginia, 518 U.S 515, 533 (1996) (quoting Ballard v. United States, 329 U.S 187, 193 (1946) ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible . . . .'")).

[273] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) (discussing Title VII).

[274] *See supra* note 7 and accompanying text; *see also supra* Section II.A.

understandings of Title IX demonstrate that Title IX mandates equal opportunity, not sex-blind treatment.

Turning to the text, Title IX states, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a federally funded education program or activity.[275] This language resembles Title VI's, which simply states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[276] The resemblance is unsurprising considering that Title IX was modeled on Title VI.[277] But unlike Title VI, which applies to "any" federally funded program or activity, Title IX applies only to federally funded education programs or activities.[278] And while Title VI contains no exceptions, Title IX is riddled with them.[279]

Moreover, unlike Title VI, which bans any consideration of race,[280] Title IX does not mandate sex blindness. Within the context of education programs and activities, Title IX prohibits exclusion, the denial of benefits, and discrimination on the basis of sex. "Discrimination" at the time of Title IX's adoption referred to "improper distinctions,"[281] such as not treating people "alike according to the standards and rule of action prescribed."[282] Put another way, it referred to treating a person "worse than others . . . similarly situated."[283] But as contemporaneously understood, "inherent differences" exist between the sexes; "[p]hysical differences

275 20 U.S.C. § 1681(a).

276 42 U.S.C. § 2000d.

277 *See supra* Part I (describing the development of Title IX).

278 *Compare* 42 U.S.C. § 2000d (banning discrimination under "*any* program" (emphasis added)), *with* 20 U.S.C. § 1681(a) (banning discrimination under "any *education* program" (emphasis added)).

279 *Compare* 42 U.S.C. § 2000d (listing zero exceptions), *with* 20 U.S.C. § 1681(a) (listing nine exceptions).

280 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2209 (2023) (Gorsuch, J., concurring) ("[A] recipient of federal funds may never discriminate based on race, color, or national origin—period.").

281 *Discrimination*, RADIN LAW DICTIONARY (Lawrence G. Greene ed., 2d ed. 1970).

282 *Discrimination*, BALLANTINE'S LAW DICTIONARY (2d ed. 1969); *see also Students for Fair Admissions*, 143 S. Ct. at 2208–09 (2023) (Gorsuch, J., concurring) (defining "discrimination" as "to make a difference in treatment or favor on a class or categorical basis" (quoting *Discrimination*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961))).

283 *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740 (2020) (defining "discrimination" in Title VII as it was understood in 1964); *see also* CSX Transp., Inc. v. Ala. Dept. of Revenue, 562 U.S. 277, 286 (2011) (defining "discrimination" as a "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored" (quoting *Discrimination*, BLACK'S LAW DICTIONARY (5th ed. 1979))).

between men and women . . . are enduring."[284] Consequently, as witnesses from the Department of Justice and the Civil Rights Commission in the 1970 hearings, members of Congress at the time of Title IX's adoption, and HEW shortly thereafter all recognized, men and women are not similarly situated in all circumstances.[285] In those circumstances, Title IX's plain language permits differentiating between the sexes so long as neither is denied equal access to an education program, activity, or benefit.

This perhaps explains why Title IX lacked an exemption for bona fide distinctions between the sexes.[286] An explicit exemption was unnecessary. And it also explains why, despite Title IX's lack of an express exemption for athletics, Congress permitted the 1975 HEW regulations to take effect—and then in 1988 expressly reaffirmed without qualification that the executive branch's understanding of Title IX was correct.[287] As Congress's approval of both those rules and the later 1979 interpretation illustrates, under Title IX, the physical differences between the sexes may be considered as long as each sex is not denied equal educational

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284 United States v. Virginia, 518 U.S. 515, 533 (1996); *see supra* Part I and Section III.A.1 (describing contemporaneous understandings of "sex").

285 *See supra* Part I and notes 50–52, 62 (discussing concerns about bona fide distinctions between men and women and the need to account for differences between the two); Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24128, 24132 (June 4, 1975). In its 2020 Title IX regulations, the Department of Education reaffirmed this view:

> In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department's justification for not allowing schools to use "a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex" was that "if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex."

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30178 (May 19, 2020) (quoting Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance , 40 Fed. Reg. at 24132).

286 *Compare 1970 Hearings, Part 2*, *supra* note 49, at 678 (describing proposals that included an exemption), *with* 20 U.S.C. § 1681 (omitting any general exemption for bona fide distinctions).

287 *See, e.g.*, Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 23–24 (2003) ("Congress thus confirmed the strong message it had sent when the regulations were first promulgated—that those regulations and, by 1987, the 1979 Policy Interpretation explaining them—correctly reflected Congress' intent with regard to Title IX's application to athletics."); Alliance Defending Freedom, Comment Letter, *supra* note 71, at 4–5; Sarah Parshall Perry, Comment Letter, *supra* note 71, at 9–10.

opportunities.[288] In sum, Title IX requires equal treatment, not identical treatment.

Of course, this all begs the question of what an "improper" distinction or "worse" treatment—discrimination—is in the context of education programs and activities. After all, Title IX doesn't simply bar federal-funding recipients who maintain such programs from ever engaging in sex discrimination; on the contrary, it bars subjecting someone to such discrimination "under" those programs. Under the canon of *noscitur a sociis*—"it is known by its associates"—when terms are used "in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar."[289] Title IX's requirements collectively focus on access to education programs, activities, and benefits.[290] Immediately before prohibiting subjecting a person to discrimination, Title IX prohibits both exclusion from and denial of benefits.[291] And Title IX prohibits specifically subjecting a person to discrimination "under" a federally funded education program or activity.[292] In sum, looking to the associates of "discrimination," "discrimination" cannot refer to mere differential treatment. Instead, it refers to disparate treatment that denies a person equal educational opportunities because that person is either male or female.

IV. (Mis)Applying *Bostock* to Title IX

Despite Title IX's unique structure and operation, courts disagree on whether Title VII's principles regarding sex discrimination in the employment context apply under Title IX. Some courts of appeals look to Title VII as an informative analogue for defining Title IX standards.[293] This

288 *See* Samuels & Galles, *supra* note 287, at 22–24.

289 SCALIA & GARNER, *supra* note 242, at 195.

290 *See* 20 U.S.C. § 1681.

291 *Id.*

292 *Id.*

293 *See, e.g.*, Doe v. Snyder, 28 F.4th 103, 114 (9th Cir. 2022) ("We construe Title IX's protections consistently with those of Title VII."); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX."); Pederson v. La. State Univ., 213 F.3d 858, 881 (5th Cir. 2000) (referencing Title VII standard for intent in defining intent under Title IX); Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) ("[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."); Lakoski v. James, 66 F.3d 751, 757–58 (5th Cir. 1995) (holding sex discrimination provisions in Title VII and Title IX are the same regarding employment discrimination); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (explaining that although Title IX was explicitly modeled after Title VI, Title VII is "the most appropriate analogue" for

reliance appears to arise from the Supreme Court's reference to Title VII standards when interpreting Title IX in the sexual harassment context even though the Court did not explicitly hold or state that Title VII standards apply.[294] That said, the Supreme Court has recognized that Title VII and Title IX are not the same in all respects.[295] Other courts of appeals, while acknowledging that some Title VII standards might apply in the Title IX context, assert that Title VII principles do not always apply. For instance, the Court of Appeals for the Fifth Circuit has treated Title VII's and Title IX's employment principles the same but declined to otherwise import Title VII standards into the Title IX context.[296] The Court of Appeals for the Sixth Circuit also affirmed that Title VII principles do not "automatically apply."[297] And the Courts of Appeals for the First and Ninth Circuits both have observed that a different analysis is required in athletics than in employment.[298]

Declining to apply Title VII's standards when interpreting Title IX makes sense. The statutory schemes are fundamentally different. Title VII

determining what Title IX requires (quoting Mabry v. State Bd. of Cmty. Colls. & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987))).

294 *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (citing two Supreme Court cases, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) and *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75, 82 (1998), both of which resolved Title VII claims when defining parameters of actionable Title IX sex harassment); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (stating that teacher-on-student sexual harassment constitutes discrimination on the basis of sex without explicitly referencing Title VII (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (finding that sexual harassment constitutes Title VII sex discrimination))); *see also, e.g.*, *Jennings*, 482 F.3d at 695 (citing *Davis*, 526 U.S. at 651, and *Franklin*, 503 U.S. at 75, for the proposition that Title VII interpretation guides claims brought under Title IX); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655 (5th Cir. 1997) (discussing reasons courts have read *Franklin* broadly to justify applying Title VII standards to Title IX claims).

295 *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283–86 (1998) (observing that Title IX does not include a reference to an employer's agents, unlike Title VII, and that Title IX is a condition on federal funds while Title VII is an outright, economy-wide prohibition).

296 *See Rosa H.*, 106 F.3d at 656 (retaining intentional discrimination requirement and explaining that "*Franklin*'s single citation to *Meritor Savings* . . . does not . . . justify the importation of other aspects of Title VII law"); Chance v. Rice Univ., 984 F.2d 151, 153 (5th Cir. 1993) (affirming district court's application of Title VI rather than Title VII standards in Title IX context); *see also* Beasley v. St. Tammany Parish Sch. Bd., No. CIV.A. 96-2333, 1997 U.S. Dist. LEXIS 9844, at *9 (E.D. La. July 8, 1997) (noting that the Court of Appeals for the Fifth Circuit "does not blindly apply Title VII standards to the Title IX context").

297 See Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

298 *See* Cohen v. Brown Univ., 101 F.3d 155, 177 (1st Cir. 1996) (stating that "[i]t is imperative to recognize" that employment and athletics require different analysis because "athletics presents a distinctly different situation"); Neal v. Bd. of Trs., 198 F.3d 763, 772 n.8 (9th Cir. 1999) (explaining that Title VII principles "are not relevant in the context of collegiate athletics" because "[u]nlike most employment settings, athletic teams are gender segregated").

states in part, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[299] Unlike Title VII, which looks at the grounds for an employment decision, Title IX looks at the effect of treating a person differently on the basis of that person's sex. And while Title IX permits distinguishing between the sexes in education programs and activities, Title VII never permits consideration of sex in employment decisions. Although both prohibit sex discrimination, each does so in a unique manner.

Title VII and Title IX also differ in another way. Although no court appears to have resolved the issue directly, courts implicitly recognize that Title IX prohibits denying a person equal opportunity because the person has a particular sex.[300] In contrast, the Court in *Bostock* concluded that Title VII liability is triggered if sex is considered even abstractly and without knowledge of a person's exact sex.[301] If a person is treated differently for having transgender status, under *Bostock*, that treatment constitutes sex discrimination under Title VII. But it does not under Title IX because transgender status only explains the relationship between a person's gender identity and sex (that they differ). It does not say what the person's sex is. Unlike in the Title VII context under *Bostock*, where a person can discriminate against someone on the basis of sex without knowing the person's exact sex, in the Title IX context, such discrimination is not possible.

Bostock's reasoning and holding cannot be unmoored from Title VII and attached to Title IX. To do so would be to fundamentally change how Title IX operates. If Title VII's standards, as understood by *Bostock*, were fully imported, Title IX would prohibit any differential treatment except where expressly permitted—an effect which clashes directly with the text

299 42 U.S.C. § 2000e-2(a).

300 *See supra* Section II.A; *see, e.g.*, Doe v. Columbia Coll. Chi., 933 F.3d 849, 856 (7th Cir. 2019) (finding that the plaintiff failed to allege denial of "an educational benefit because of his sex"); Tumminello v. Father Ryan High Sch., Inc., 678 Fed. App'x 281, 284 (6th Cir. 2017) (requiring a student to show—as proof of prima facie sexual harassment—that the harassment occurred "on the basis of his or her sex"); G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016) (asking whether discrimination was based on "[the plaintiff's] sex"), *vacated and remanded on other grounds*, 580 U.S. 1168 (2017).

301 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1746 (2020) ("Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.").

and early understandings.[302] Indeed, the 1975 HEW regulations—which permit separating boys and girls into separate sports teams—would be upended, as they were adopted under only a congressional directive to issue rules concerning athletics and without explicit statutory exemptions for sex-based athletic programs. But as previously explained, Congress twice approved of those requirements—demonstrating that equal treatment, not sex blindness—is Title IX's mandate. Applying *Bostock* to Title IX would change that.

Even the *Grimm* majority and *Adams* dissent did not go so far as to import *Bostock* wholesale into Title IX. They didn't ask if sex was abstractly considered. Instead, they viewed the *exclusion* of Grimm and Adams from the bathroom each wanted to use as relevant to whether the schools violated Title IX. And both relied on *Bostock*'s but-for test solely to argue that sex was a but-for cause of the exclusion, and thus that the schools engaged in sex discrimination.

But therein lies the *Grimm* majority's and *Adams* dissent's error in relying upon *Bostock*. Not only did both fail to properly understand whether Grimm and Adams were similarly situated to students having a male sex, but they also imported a standard for when sex may never be considered into a circumstance in which no one disputed that it may be considered.[303] After all, Grimm and Adams were asking to be treated the same as biological males—not to abolish separate bathrooms.[304] And as the *Adams* majority points out, Title IX's implementing regulations explicitly allow consideration of sex in the context of bathrooms.[305]

Even employing the but-for test as used in *Bostock*, however, to determine whether sex discrimination occurs when a school requires a student to use a restroom corresponding with the student's sex, *Adams* remains correctly decided, and *Grimm* wrongly decided. When Title IX recognizes that sex is relevant for access to a physical space like a restroom,

302 *See* Section III.B (explaining that the text of Title IX and Congress's approval of the 1975 regulations and 1979 Interpretation demonstrate that Title IX does not require sex-blind treatment).

303 The U.S. Court of Appeals for the Seventh Circuit similarly erred in *A.C. v. Metropolitan School District of Martinsville*. 75 F.4th 760, 769 (7th Cir. 2023) ("Applying *Bostock*'s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes. As *Bostock* instructs, we ask whether our three plaintiffs are suffering negative consequences (for Title IX, lack of equal access to school programs) for behavior that is being tolerated in male students who are not transgender. Our decision in *Whitaker* followed this approach." (citations omitted)).

304 That said, the effect of their request would be to abolish separate bathrooms as permitted by Title IX by changing the *basis* for the separation from sex to gender identity.

305 *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 814 (11th Cir. 2022).

the question is whether the standard is applied equally to boys and girls—not whether sex is ever considered.[306]

In the transgender context, any request for a federal-funding recipient to treat a person consistent with that person's gender identity assumes that Title IX permits differential treatment in that circumstance. After all, a person with a female gender identity would likely not want to be treated like a male. Treating a person consistent with a gender identity of "female" means to treat that person as that person believes a female should be treated—such as referring to that person by female rather than male pronouns.[307] If a request for such treatment arises in the Title IX context, the request is an implicit assumption that Title IX permits such differential treatment. After all, if Title IX did *not* permit such treatment, the past five decades of teachers using different pronouns in accord with English grammar to refer to male and female students was illegal.

To set up the but-for test as the Court used it in *Bostock*, imagine that two students are similar in every respect except their sexes. One is a biological male who identifies as a female (like Whitaker, Grimm, and Adams), the other is a biological female who identifies as a female. Again, Title IX concerns itself with whether the person experienced discrimination on the basis of sex *as understood when Title IX was adopted*—not on the basis of sex and gender as understood today. And even *Bostock* set up the test under Title VII by comparing two individuals with different sexes. Unlike in *Bostock*, where one suffers an adverse employment action and the other does not, here, both are given access to a restroom corresponding with their respective biological sexes (and maybe also are given access to unisex bathrooms). No matter the sex, the rule applies the same.

As an additional matter, *Bostock* and *Adams* reveal why *Whitaker*'s sex-stereotype theory also fails. Neither *Bostock* nor *Price Waterhouse* made sex stereotypes anything more than evidence of disparate treatment. Indeed, *Bostock* focused on whether discrimination on the basis of a given trait involved consideration of sex.[308] And *Price Waterhouse* emphasized that a stereotype is a view that certain traits should or should not exist in conjunction with a given sex. Treating "sex" as a stereotype inverts the

306 *See supra* Section III.B; *see also* Poloceno v. Dall. Indep. Sch. Dist., 826 Fed. App'x 359, 362 (5th Cir. 2020) (finding no disparate treatment where the standard was applied equally to boys and girls).

307 *See, e.g.*, YOGYAKARTA PRINCIPLES, *supra* note 14, at 6 n.2 ("Gender identity . . . refer[s] to each person's deeply felt internal and individual experience of gender . . . including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech and mannerisms.").

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

analysis.[309] After all, the purpose of examining acts based on stereotypes is to determine whether the act was really based on sex—not whether discrimination on the basis of sex veils discrimination on the basis of something else. Contrary to what *Whitaker* held, doing what Title IX explicitly says is permitted—separating private facilities on the basis of sex—is far from acting on stereotypes. The separation is based on sex itself without regard to any other traits, and it treats each sex equally by imposing the same standard on both sexes.

V. Title IX, the Affordable Care Act, and Federally Funded Medical Programs

A. *Title IX's Incorporation into Section 1557 of the Affordable Care Act and Subsequent Interpretations*

In 2010, Congress passed the Patient Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), which extended Title IX's requirements to cover federally funded medical programs.[310] Section 1557 of the Act prohibits discrimination "on the ground prohibited under" several federal statutes, including Title IX, in "any health program or activity."[311] The ACA further incorporated Title IX's nondiscrimination requirements by providing "[t]he enforcement mechanisms provided for and available under . . . title IX" for addressing violations of Section 1557.[312] Section 1557 also delegated authority to the Secretary of Health and Human Services ("HHS") to create implementing regulations.[313]

Each of HHS's attempts to interpret Section 1557 in the transgender context were struck down, however.[314] In 2016, HHS issued a series of rules ("2016 Rules") explaining Section 1557's nondiscrimination requirement. The rules restated that the ACA prohibits discrimination "on the basis of

309 *See Adams*, 57 F.4th at 813 (observing that "'sex' is not a stereotype").

310 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1557, 124 Stat. 260 (2010) (codified at 42 U.S.C. § 18116); *see also* Walker v. Azar, 480 F. Supp. 3d 417, 420–21 (E.D.N.Y. 2020) (recounting the history of the ACA and the Department of Health and Human Services' interpretation).

311 42 U.S.C. § 18116(a).

312 *Id.*; *see also Walker*, 480 F. Supp. 3d at 420.

313 42 U.S.C. § 18116(c).

314 *See* Neese v. Becerra, 640 F. Supp. 3d 668, 687 (N.D. Tex. 2022) (granting declaratory relief); *Walker*, 480 F. Supp. 3d at 420; Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health and Hum. Servs., 485 F. Supp. 3d 1, 64 (D.D.C. 2020) (granticing injunctive relief); Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016) (granting injunctive relief).

. . . sex," among other classifications.[315] The rules then explained that "on the basis of sex" includes "on the basis of . . . sex stereotyping[ ] or gender identity."[316] HHS defined "sex stereotyping" as "stereotypical notions of *gender*, including expectations of how any individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, *or body characteristics*."[317] And it defined "gender identity" as "an individual's internal sense of gender, which may be different from that individual's sex assigned at birth."[318] HHS argued that its reading of Title IX was consistent with existing nondiscrimination law as well as "agencies' and courts' interpretations that discrimination on the basis of sex includes discrimination on the basis of gender identity."[319]

This interpretation was enjoined in December 2016.[320] In June 2019, HHS gave notice that it was withdrawing the 2016 Rules' "novel definition of 'sex'" to make the regulation "more consistent" with other agencies' Title IX regulations.[321] And a year later, HHS issued revised rules ("2020 Rules").[322] Unlike the 2016 Rules, the 2020 Rules did not define "sex" and instead merely referenced Title IX.[323] The preamble went further, declaring that the withdrawal was based on a different reading of Title IX.[324] It emphasized that "sex" should be understood to refer to a "biological binary of male and female"; that Title IX adopted this understanding; that distinctions based on sex—a biological binary—are permissible and sometimes necessary; and that no agency had previously accepted the 2016 Rules' understanding of sex and gender identity.[325] Recognizing pending litigation and that the Supreme Court had not yet interpreted "sex" in Title VII, HHS noted that its elimination of the definition of "sex"

315 *Walker*, 480 F. Supp. 3d at 420–21 (quoting Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172, 54218 (Sept. 8, 2015) (codified as amended at 45 C.F.R. § 92.2)).

316 *Id.* (quoting Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54216).

317 *Id.* at 421 (quoting Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54216–17 (emphasis added)).

318 *Id.* (quoting Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54216).

319 *Id.* (quoting Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31388 (May 18, 2016)).

320 *See* Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 669–70 (N.D. Tex. 2016).

321 *Walker*, 480 F. Supp. 3d at 422 (quoting Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846, 27856 (June 14, 2019)).

322 *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020).

323 *See id.* at 37244.

324 *Walker*, 480 F. Supp. 3d at 422–23 (citing Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37175–94) (reciting statements in the preamble that conflict with the 2016 Rules).

325 *Id.* (quoting Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37178).

"would not preclude application of" judicial construction.[326] The 2020 Rules, like the prior 2016 Rules, were subsequently enjoined in legal challenges.[327]

HHS reversed its stance yet again in May 2021.[328] In its "Notification of Interpretation and Enforcement" ("2021 Notification"), HHS stated its intent to apply *Bostock v. Clayton County* to Section 1557.[329] HHS would read Section 1557 to prohibit discrimination "on the basis of gender identity."[330] This interpretation was struck down, too.[331] But in July 2023, again citing *Bostock*, HHS issued a notice of proposed rulemaking which would interpret "13 HHS authorities that prohibit discrimination on the basis of sex"—including Section 1557—to also prohibit discrimination on the basis of gender identity.[332]

B. *Applying the Original Understanding of Title IX to Section 1557*

Section 1557 uses almost identical language as Title IX, stating that "an individual shall not, on the ground prohibited under . . . title IX . . . *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under*, any health program or activity."[333] HHS's 2020 Rules correctly understood that by incorporating Title IX, Section 1557 incorporated the original understanding of "sex" in Title IX. Indeed, as explained above, *Bostock* does not compel reading "sex" in Title IX to mean anything different than what it originally meant. HHS's attempts to rely on *Bostock* to add gender identity to the traits protected by Section 1557 is thus unfounded.

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326 *Id.* at 422 (quoting Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37168).

327 *See id.* at 420, 429; *see also* Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health and Hum. Servs., 485 F. Supp. 3d 1, 10, 64 (D.D.C. 2020).

328 Am. Coll. of Pediatricians v. Becerra, No. 21-cv-195, 2022 U.S. Dist. LEXIS 209569, at *15 (E.D. Tenn. Nov. 18, 2022) (citing Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984, 27984 (May 25, 2021)).

329 *Id.* (citing Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. at 27984).

330 *Id.* (quoting Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. at 27984).

331 *See* Neese v. Becerra, 640 F. Supp. 3d 668, 687 (N.D. Tex. 2022) (granting declaratory relief).

332 *See* Health and Human Services Grants Regulation, 88 Fed. Reg. 44750, 44753 (proposed July 13, 2023) (to be codified at 45 C.F.R. pt. 75).

333 42 U.S.C. § 18116 (emphasis added); *see* 20 U.S.C. § 1681(a).

But more than that, Section 1557 incorporated what Title IX said *about* sex.[334] Consequently, Section 1557 mandates equal treatment, not sex blindness or identical treatment. Indeed, if it did require sex blindness, the statute would ignore the numerous circumstances when medical treatment *should* account for whether a person is male or female.[335] And just like under Title IX, if no disparate treatment occurs on the basis of sex, no discrimination occurs. After all, because Section 1557 incorporates the standard from Title IX's statutory language, it only prohibits disparate treatment, not disparate impact.

To illustrate the effect of this understanding of Section 1557, consider an insurance provider that offers coverage for mastectomies. With an advance apology for the candor necessary for the analysis, insurance coverage for mastectomies provides a unique test case because both men and women can undergo the procedure.[336] And unlike in *Adams*, where an explicit carve-out permitted separate bathrooms on the basis of sex, here, no carve-out exists for mastectomies. Returning to the hypothetical, one mastectomy the insurance provider covers is for gynecomastia, a condition where a biological male develops excess breast tissue.[337] But it refuses coverage if the purpose of the surgery is to make a biological female appear physically like a male, and the breast tissue is otherwise physically healthy and naturally developing (or has naturally developed). These two surgeries are not identical—one is to remove tissue that developed because of an abnormality, the other to remove tissue that developed naturally but is now undesirable because of how the biological female identifies.[338] Even if the biological male wants the breast tissue removed because of psychological discomfort, his discomfort arises from

334 *See, e.g.*, Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 686 (N.D. Tex. 2016) ("Section 1557 clearly incorporates Title IX's prohibition of sex discrimination."); Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health and Hum. Servs., 485 F. Supp. 3d 1, 12 ("By outlawing discrimination 'on the ground prohibited' by Title IX, Section 1557 bars discrimination 'on the basis of sex.'" (quoting 20 U.S.C. § 1681(a))).

335 *See, e.g.*, Vera Regitz-Zagrosek, *Sex and Gender Differences in Health*, 13 SCI. & SOC'Y 596, 596 (2012) (observing "important biological and behavioural differences" that "affect manifestation, epidemiology and pathophysiology of many widespread diseases and the approach to health care").

336 *See Surgery for Breast Cancer in Men*, AM. CANCER SOC'Y, https://perma.cc/KQ72-RDE3; *see also Mastectomy,* MAYO CLINIC, https://perma.cc/JU8Q-XSCW; *Enlarged Breasts in Men (Gynecomastia)*, MAYO CLINIC, https://perma.cc/84HZ-ZH3P.

337 Gynecomastia occurs when a biological male's body experiences an imbalance of estrogen and testosterone, causing an increase of breast tissue. *See Enlarged Breasts in Men (Gynecomastia)*, *supra* note 336.

338 At puberty, a biological male's breasts cease to develop any further absent a biological irregularity such as gynecomastia, while a biological female's will continue to develop naturally. *See, e.g.*, Asma Javed & Aida Lteif, *Development of the Human Breast*, 27 SEMINARS PLASTIC SURGERY 5, 5, 11 (2013); *Normal Breast Development and Changes*, JOHNS HOPKINS MED., http://perma.cc/WT2M-U7XG.

fact that the male body does not naturally develop this excess tissue.[339] In contrast, a woman who now identifies as male—or something else—and wants the tissue removed no longer desires to have naturally developed female breasts. The denial of coverage is rooted in whether the breast tissue developed in the course of normal biological development and is physically healthy. Coverage depends solely on the reason for the surgery.

At least one court, however, has concluded that a denial of coverage for surgeries to make a person's physical traits align with that person's gender identity violates Section 1557.[340] Applying *Bostock*, it reasoned that Section 1557 prohibits sex discrimination based on transgender status.[341] Moreover, the court reasoned, considering that a person has gender dysphoria requires referring to sex.[342] And a person who has gender dysphoria "cannot" but identify as transgender.[343] Thus, the court held, the denial of coverage is on the basis of transgender status and is unlawful sex discrimination under Section 1557.[344]

That is incorrect, as well as confusing. As explained above, *Bostock* cannot be applied to Title IX. And so it cannot be applied to Section 1557 either. Even if *Bostock* were applied, the insurance provider in the hypothetical would not violate Section 1557. Two things are in play—sex and the nature of the surgery. And a male who has abnormally enlarged breasts, identifies as a male, and seeks surgical removal of his excess breast tissue and a woman who has naturally developed breasts, identifies as a male, and seeks surgical removal of her breast tissue are dissimilar in *three* ways: their sexes, the conditions of their breasts (natural versus abnormal development), and their reasons for seeking a mastectomy. For that reason, the *Bostock* framework is inapplicable here.

Even if the hypothetical is reframed and squeezed into *Bostock*'s framework, the outcome remains the same. Imagine that the provider provides coverage for all surgeries except for what it deems as "transition surgeries"—surgeries that alter a person's physical traits to align with that person's gender identity. A biological man wants a transition surgery to appear as a woman, and a biological woman wants a transition surgery to appear as a man. The surgeries for each would be different—after all, the biological man wants to look like a woman while the biological woman

339 *See Enlarged Breasts in Men (Gynecomastia), supra* note 336.

340 C.P. v. Blue Cross Blue Shield, No. 20-cv-06145, 2022 U.S. Dist. LEXIS 227832, at *1 (W.D. Wash. Dec. 19, 2022).

341 *Id.* at *6. In March 2022, the Court of Appeals for the Ninth Circuit also concluded in a similar case, without reaching the merits, that *Bostock* applies to Section 1557 because in its view, Title IX's and Title VII's protections are similar. *See* Doe v. Snyder, 28 F.4th 103, 112–14 (9th Cir. 2022).

342 *Blue Cross*, 2022 U.S. Dist. LEXIS, at *16.

343 *Id.*

344 *Id.*

wants to look like a man. Each seeks to remove or add different organs and body parts. And so there are still three differences in the comparison analysis: (1) the purpose of the surgery, (2) the type of surgery involved, and (3) the person's sex. But assuming for the sake of argument that the reason for and nature of the surgery are classified the same (alignment of one's physical traits with one's gender identity), coverage is denied regardless of sex. The denial turns on the *reason* for the procedure, not the person's sex. Because both sexes are denied coverage, no sex discrimination occurs under Section 1557—even if *Bostock*'s but-for test is applied.[345]

It could be argued that the real basis for the denial of coverage is the view that a person's physical traits must correspond with a person's sex. And so, the argument might conclude, the insurance provider is impermissibly denying coverage based on sex. Again, however, Title IX is concerned with equal opportunity. Unlike Title VII, Title IX does not forbid ever accounting for a person's sex. When a rule is applied equally to the sexes, no violation of Title IX occurs—even if the rule involves consideration of a person's sex. That's why, after all, the 1975 HEW sports regulations and 1979 interpretation were acceptable under Title IX without a statutory exemption to Title IX's nondiscrimination requirement. Here, if the insurance provider offers coverage unless the treatment or surgery reduces the alignment of the person's body with that person's sex, the rule applies regardless of whether a person has a male or female sex. To be sure, sex is not entirely out of the picture. But, again, the test under Title IX and thus under Section 1557 is not whether sex was considered at all. Under *Bostock*'s but-for test, no sex discrimination has occured.

In sum, Section 1557 permits treating a person as a male or female based on that person's biological sex. And it does not compel providing insurance coverage for medical treatments that reshape a person's body away from alignment with that person's sex and into conformity with how a person seeks to express a particular gender. Under that same reasoning, it does not require providing the actual surgeries or treatments either. An interpretation to the contrary—such as in HHS's 2016 Rules, 2021 Notification, or 2023 proposed changes to its grants regulation—is without basis in law.

[345] Providing coverage for intersex surgeries but not for transition surgeries would not alter this conclusion. As explained above, surgeries to address intersex conditions seek to increase the harmony between a person's body and the person's sex. Such surgeries are fundamentally different than a surgery that seeks to reduce that harmony by altering a person's body away from that person's sex and into conformity with how a person seeks to express a particular gender identity.

Conclusion

Title IX was adopted to ensure that women receive equal educational opportunities as men. It embodied the view that although women and men have immutable, biological differences, those differences should not disqualify a woman from pursuing her dreams. And it reflects the common understanding at the time of its adoption that a woman is a woman because of her sex, which is immutable. Consequently, equality based on gender identity is not the equality that Title IX promises or was created to deliver. Title IX forbids only discrimination based on sex, not discrimination based on gender identity or transgender status. Treating a person as male or female based on that person's sex does not run afoul of that protection.