UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF IDAHO; THE STATE OF INDIANA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF WEST VIRGINIA, Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of Education; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS, in her official capacity as Chair of the Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; KRISTEN CLARKE, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice, Defendants.	)	Case No. 3:21-cv-00308

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. President Biden directed federal agencies to rewrite federal law to implement the Administration's policy of "prevent[ing] and combat[ing] discrimination on the basis of gender identity or sexual orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021). In response, the Department of Education ("Department") and Equal Employment Opportunity Commission ("EEOC"), each flouting procedural requirements in their rush to overreach, issued "interpretations" of federal antidiscrimination law far beyond what the statutory text, regulatory requirements, judicial precedent, and the Constitution permit.

2. The Department and EEOC claim that their interpretations are required by the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). But *Bostock* was a narrow decision. The Court held only that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. *Bostock*, 140 S. Ct. at 1737-38 (quoting 42 U.S.C. § 2000e-2(a)(1)).

3. The Department interpreted a prohibition on discrimination "on the basis of sex" in Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a), to encompass discrimination based on sexual orientation or gender identity, notwithstanding that Title IX expressly permits sex separation on the basis of biological sex, *see id.* § 1686, and that *Bostock* expressly disclaimed any intent to interpret other federal or state laws that prohibit sex discrimination, 140 S. Ct. at 1753.

4. The Department compounded that erroneous interpretation by issuing further guidance in a "Fact Sheet" that similarly disregards Title IX's plain text. Among other things, the guidance warns that the Department can launch an investigation if a school prevents a student

from joining an athletic team or using the restroom that corresponds to the student's gender identity, or if a student's peers decline to use the student's preferred pronouns.

5. The EEOC Chair unilaterally issued a "technical assistance document" declaring, among other things, that requiring transgender employees to use the shower, locker room, or restroom that corresponds to their biological sex, or to adhere to the dress code that corresponds to their biological sex, constitutes discrimination under Title VII (which the EEOC administers and enforces in part), notwithstanding that the Supreme Court expressly declined to "prejudge" those issues. *Id.*

6. This recent guidance from the Department and the EEOC concerns issues of enormous importance to the States, employers, educational institutions, employees, students, and other individual citizens. The guidance purports to resolve highly controversial and localized issues such as whether employers and schools may maintain sex-separated showers and locker rooms, whether schools must allow biological males to compete on female athletic teams, and whether individuals may be compelled to use another person's preferred pronouns. But the agencies have no authority to resolve those sensitive questions, let alone to do so by executive fiat without providing any opportunity for public participation.

7. Plaintiffs—the States of Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia—sue to prevent the agencies from usurping authority that properly belongs to Congress, the States, and the people and to eliminate the nationwide confusion and upheaval that the agencies' recent guidance has inflicted on States and other regulated entities.

PARTIES

8. Plaintiff the State of Tennessee is a sovereign State and an employer subject to the requirements of Title VII.

9. Tennessee is home to political subdivisions and other employers that are subject to the requirements of Title VII.

10. Tennessee's legislature is constitutionally obligated to "provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, § 12. Tennessee's state board of education is responsible for developing "rules, policies, standards, and guidelines . . . that are necessary for the proper operation of public education in pre-kindergarten through grade twelve." Tenn. Code Ann. § 49-1-102(a).

11. Tennessee's legislature may also "establish and support . . . postsecondary educational institutions, including public institutions of higher learning." Tenn. Const. art. XI, § 12. Tennessee currently has 51 public institutions of higher learning, including nine public universities, two special-purpose institutes, 13 community colleges, and 27 colleges of applied technology.

12. Tennessee operates educational programs and activities that receive federal funding and thus are subject to Title IX's requirements. For example, the Tennessee Department of Education directly operates state special schools that receive federal funding, including the Tennessee School for the Blind; the Tennessee School for the Deaf, which has three campuses; and the Alvin C. York Agricultural Institute. Tennessee's public universities also receive federal funding.

13. Tennessee is also home to nearly 150 "local education agencies"—i.e., school districts—that are created or authorized by Tennessee's legislature, Tenn. Code Ann. § 49-1-103, and receive federal funding and thus are subject to Title IX's requirements, as well as

numerous private educational institutions that receive federal funding and thus are subject to Title IX's requirements.

14. In fiscal year 2020-2021, educational programs and activities in Tennessee that are funded through the Tennessee Department of Education are estimated to have received approximately $1.5 billion in federal funding. During the same period, public higher educational institutions in Tennessee are estimated to have received approximately $88 million in federal funding.

15. Plaintiffs the States of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia likewise are employers that are subject to the requirements of Title VII and oversee and operate educational institutions and other educational programs and activities that receive federal funding and thus are subject to the requirements of Title IX.

16. Plaintiffs the States of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia are also home to political subdivisions and other employers that are subject to the requirements of Title VII and to local school districts and private educational institutions that are subject to the requirements of Title IX.

17. Defendant United States Department of Education is an executive agency of the federal government responsible for enforcement and administration of Title IX. 20 U.S.C. §§ 3411, 3441.

18. Defendant Miguel Cardona is the United States Secretary of Education and is responsible for the operation of the Department of Education. *Id.* § 3411. He is sued in his official capacity.

19. Defendant Equal Employment Opportunity Commission is a federal agency charged with limited enforcement of, among other things, Title VII. 42 U.S.C. § 2000e-6.

20. Defendant Charlotte A. Burrows is the Chair of the EEOC. As Chair, she is responsible for implementation and administration of EEOC policy. She is sued in her official capacity.

21. Defendant United States Department of Justice ("DOJ") is an executive agency of the United States and is responsible for the enforcement of, among other things, Title VII. 42 U.S.C. § 2000e-6. DOJ also has the authority to enforce Title IX. Exec. Order No. 12,250, 28 C.F.R. part 41, app. A (1980).

22. Defendant Merrick B. Garland is the Attorney General of the United States and is responsible for the operation of the DOJ. He is sued in his official capacity.

23. Defendant Kristen Clarke is the Assistant Attorney General for Civil Rights at DOJ. She is assigned the responsibility to bring enforcement actions under Titles VII and IX. 28 C.F.R. § 42.412. She is sued in her official capacity.

JURISDICTION AND VENUE

24. This Court has federal-question jurisdiction under 28 U.S.C. § 1331, because this case concerns whether the Department and the EEOC acted in compliance with the Administrative Procedure Act and other federal laws.

25. This Court has jurisdiction under 28 U.S.C. § 1346, because this case involves a claim against agencies and employees of the federal government.

26. This Court has jurisdiction under 28 U.S.C. § 1361, because the Court has jurisdiction over any case "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

27. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1), because (1) Plaintiff Tennessee resides in this District; (2) Tennessee's agencies and employees subject to the agency actions at issue reside in the District; and (3) "a substantial part of the events or omissions giving rise to [Tennessee's] claim occurred" in this District.

28. This Court has the authority to grant Plaintiffs the relief they request under the Administrative Procedure Act, 5 U.S.C. §§ 705-06; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; and 28 U.S.C. § 1361.

FACTUAL ALLEGATIONS

A. The Supreme Court Narrowly Held in *Bostock v. Clayton County* That Terminating an Employee Simply for Being Homosexual or Transgender Constitutes Sex Discrimination Under Title VII.

29. In *Bostock*, the U.S. Supreme Court held that Title VII's prohibition on employment discrimination "because of [an] individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), includes terminating that individual simply for being homosexual or transgender, because—under Title VII's precise wording—"[s]ex plays a necessary and undisguisable role" in such decisions, 140 S. Ct. at 1737.

30. "[O]ther federal or state laws that prohibit sex discrimination," such as Title IX, were not "before" the Court. *Id.* at 1753. The Court thus expressly declined to "prejudge" whether its decision in *Bostock* would "sweep beyond Title VII" to those other laws. *Id.*

31. Similarly, the Court declined to consider whether employer conduct other than terminating an employee simply because the employee is homosexual or transgender—for

example, "sex-segregated bathrooms, locker rooms, and dress codes"—would constitute actionable discrimination under Title VII. *Id.*

32. The Court assumed that "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id.* at 1739.

33. And the Court held that "because of" sex means "by reason of" or "on account of" sex. *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

34. The Court concluded that Title VII's prohibition on discrimination because of sex imposes a "but-for" causation standard, which asks whether "a particular outcome would not have happened 'but for' the purported cause." *Id.* (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)).

35. The Court noted that "but-for" causation standards "can be" "sweeping." *Id.*

36. In the context of Title VII's but-for causation standard, a "defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* (citing *Burrage v. United States*, 571 U.S. 204, 211-12 (2014)).

37. The Court did not consider or decide what Title IX's statutory phrase "on the basis of sex" means.

38. Nor did the Court address Title IX's safe harbor for sex-separated living facilities. *See* 20 U.S.C. § 1686; 34 C.F.R. § 106.33.

39. Nor did the Court consider or decide questions about any other statute or any other form of alleged discrimination.

B. President Biden Directed Federal Agencies to Implement the Administration's Policy of Prohibiting Sexual Orientation and Gender Identity Discrimination by Unreasonably Interpreting Federal Antidiscrimination Laws.

40. As one of his first official acts as President, President Biden declared that *Bostock*'s analysis changed the meaning of all federal law regarding sex discrimination: "Under *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*), the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021).

41. Accordingly, President Biden directed federal agencies to "review all existing orders, regulations, guidance documents, policies, programs, or other agency actions" that either "(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations" or "(ii) are or may be inconsistent with the policy set forth" in the Executive Order. *Id.*

42. President Biden further directed that the "head of each agency shall, as soon as practicable, also consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy" set forth in the Executive Order. *Id.*

43. Finally, President Biden directed that, within "100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified." *Id.*

44. On March 26, 2021, the Civil Rights Division of the DOJ released a memorandum concluding that Title IX "prohibit[s] discrimination on the basis of gender identity and sexual

orientation." U.S. Dep't of Justice, Memorandum Regarding Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://bit.ly/2WpV5zq.

C. Department of Education

45. The Department of Education has engaged in at least two agency actions to implement President Biden's executive order.

46. *First*, on June 22, 2021, the Department published in the Federal Register its "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation") (attached as Exhibit A).

47. The Department acknowledged that it "at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity." *Id.*

48. In fact, *earlier this year*, the Department concluded that *Bostock* did not apply to Title IX or require a different interpretation of Title IX. *See* U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (Jan. 8, 2021), https://bit.ly/3mwKI7H.

49. The Department's current view, however, is that "Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity." Interpretation, 86 Fed. Reg. at 32,637.

50. The Department's Interpretation relied heavily on *Bostock*'s analysis of Title VII. *See id.* at 32,637-38.

51. The Department applied *Bostock*'s Title VII interpretation to Title IX. *See id.* at 32,638 ("Bostock's Application to Title IX"); *see also id.* ("[T]he Department has determined

that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination 'because of . . . sex' encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination 'on the basis of sex' under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.").

52. The Department first concluded that "[t]here is textual similarity between Title VII and Title IX." *Id.*

53. In fact, the texts of Title VII and Title IX are materially different:

- **Title VII:** "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 . . . sex[] . . . ; 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 . . . sex . . . ." 42 U.S.C. § 2000e-2(a).

- **Title IX:** "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 . . . ." 20 U.S.C. § 1681(a).

54. Nevertheless, the Department concluded that the phrase "on the basis of sex" in Title IX has the same meaning as the phrase "because of . . . sex" in Title VII. 86 Fed. Reg. at 32,638.

55. The Department also cited decisions from federal courts of appeals that "recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity." *Id.* at 32,639 (collecting cases).

56. Meanwhile, the Department failed to cite decisions from federal courts of appeals recognizing that "Title VII differs from Title IX in important respects" and that "principles announced in the Title VII context [do not] automatically apply in the Title IX context."

Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (noting that, "under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in 'maintaining separate living facilities for the different sexes.' 20 U.S.C. § 1686."); *cf. Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

57. The Department further "conclude[d] that the interpretation set forth in this document is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination." 86 Fed. Reg. at 32,639.

58. The Department also noted that the "U.S. Department of Justice's Civil Rights Division has concluded that *Bostock*'s analysis applies to Title IX." *Id.*

59. The Department failed to mention that, just two months before the DOJ reached that conclusion about *Bostock*, it had reached the exact opposite conclusion. U.S. Dep't of Justice, Memorandum for the Civil Rights Division Regarding Application of *Bostock v. Clayton County* 4 (Jan. 17, 2021) ("*Bostock* does not require any changes to . . . sex-specific facilities or policies.") (attached as Exhibit B).

60. Finally, the Department declared that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department." 86 Fed. Reg. at 32,638.

61. The Department also declared that its Interpretation "will guide the Department in processing complaints and conducting investigations." *Id.* at 32,639.

62. Plaintiffs operate and are home to programs and activities subject to Title IX, and thus the Department has pledged to enforce its Title IX interpretation against Plaintiffs.

63. *Second*, on June 23, 2021, Acting Assistant Secretary Suzanne B. Goldberg issued a "Dear Educator" letter notifying Title IX recipients of the Department's new Interpretation and reiterating that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." Letter to Educators on Title IX's 49th Anniversary (June 23, 2021), https://bit.ly/3ksLLDj.

64. The Dear Educator letter was accompanied by a "fact sheet" issued by the Civil Rights Division of the DOJ and the Office for Civil Rights ("OCR") at the Department of Education. U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM (together with the Dear Educator Letter, "Fact Sheet") (attached as Exhibit C).

65. The Fact Sheet purports to provide examples of what constitutes discrimination under Title IX.

66. *Bostock* did not address any of the examples of purported discrimination identified in the Fact Sheet.

67. In particular, the Fact Sheet indicates that preventing a "transgender high school girl" from using the "girls' restroom" would constitute discrimination, notwithstanding that *Bostock* expressly declined to resolve any questions about bathrooms, locker rooms, or the like. 140 S. Ct. at 1737.

68. The Fact Sheet also indicates that preventing a "transgender high school girl" from "try[ing] out for the girls' cheerleading team" would constitute discrimination, notwithstanding that *Bostock* did not address athletics.

69. And the Fact Sheet suggests that failing to use a transgender student's preferred name or pronouns would constitute discrimination, notwithstanding that *Bostock* did not address that issue.

70. On June 7, 2021, the EEOC Chair also revised a previously issued "fact sheet" regarding bathrooms and gender identity. *See* Fact Sheet: Facility/Bathroom Access and Gender Identity, https://bit.ly/2Wq3Jh3.

71. On June 17, 2021, the Department and DOJ filed a statement of interest in which they took the position that Title IX prohibits West Virginia from "categorically exclud[ing] transgender girls from participating in single-sex sports restricted to girls." Statement of Interest of the United States at 1, *B.P.J. v. W.V. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021), ECF No. 42 (footnote omitted).

D. Equal Employment Opportunity Commission

72. "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)).

73. Instead, Congress granted the EEOC "authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a).

74. Nevertheless, on June 15, 2021, the EEOC issued a "technical assistance document" "upon approval of the Chair of the U.S. Equal Employment Opportunity Commission." EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021), https://bit.ly/3zgP7iP ("EEOC Document") (attached as Exhibit D).

75. The EEOC Document purports to reflect the EEOC's interpretation of what constitutes discrimination under Title VII in certain circumstances.

76. The EEOC Document is posted on the EEOC website and is entitled "Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity."

77. The EEOC Document "briefly explains the Supreme Court's decision in *Bostock v. Clayton County* and the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues." *Id.*

78. And the EEOC Document applies to "[a]pplicants for employment, employees, employers covered by Title VII; related representatives and practitioners." *Id.*

79. Although the EEOC Document disclaims having any legal effect or setting new policy, it nevertheless purports to "explain[] what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country." *Id.*

80. After surveying Title VII's general requirements, the EEOC Document purports to define what constitutes discrimination under *Bostock* in a series of questions and answers. *Id.*

81. *Bostock* did not identify any of the following EEOC-defined forms of "discrimination" as discrimination under Title VII.

82. *First*:

> **May a covered employer require a transgender employee to dress in accordance with the employee's sex assigned at birth?**
> No. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.

Id.

83. *Second*:

> **Does an employer have the right to have separate, sex-segregated bathrooms, locker rooms, or showers for men and women?**
> Yes. Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the

> position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

Id.

84. *Third*:

> **Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?**
> Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

Id.

85. *Finally*:

> **Could an employer's discriminatory action be justified by customer or client preferences?**
> No. As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)

Id.

86. After declaring that these examples constitute actionable discrimination under Title VII, even though they were not at issue in *Bostock*, the EEOC Document directs people to contact the EEOC with any reports of discrimination, including by filing a formal charge:

> For applicants and employees of private sector employers and state and local government employers, the individual can contact the EEOC for help in deciding

> what to do next. If the individual decides to file a charge of discrimination with the EEOC, the agency will conduct an investigation to determine if applicable Equal Employment Opportunity (EEO) laws have been violated. Because an individual must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early.

Id.

87. The EEOC Document fails to mention that, on January 17, 2021, the DOJ concluded that, even after *Bostock*, Title VII does not prohibit sex-separated bathrooms, locker rooms, or dress codes because "physiological differences between men and women are relevant for physical fitness standards, bathrooms, locker rooms, and dress codes" and those practices thus do not "treat similarly situated people differently." U.S. Dep't of Justice, Memorandum for the Civil Rights Division Regarding Application of *Bostock v. Clayton County* 4 (Jan. 17, 2021) (attached as Exhibit B).

88. On information and belief, the full EEOC did not approve the EEOC Document.

89. On information and belief, no other Commissioner joined Chair Burrows in issuing the EEOC document.

90. On information and belief, the full EEOC did not vote on whether to approve the contents of the EEOC Document.

91. On information and belief, the full EEOC did not vote on whether to issue the EEOC Document.

92. The EEOC Document nevertheless purports to represent the EEOC's interpretation of what Title VII demands of employers subject to Title VII.

E. The Department of Education and EEOC Guidance Irreparably Harms Plaintiffs.

93. The Department's Interpretation states that the Department's OCR "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in

education programs and activities that receive Federal financial assistance from the Department." 86 Fed. Reg. at 32,639.

94. The Interpretation also states that "OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities." *Id.*

95. The EEOC Document purports to "explain[] what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country."

96. The EEOC Document also purports to "explain" the EEOC's "established legal positions on LGBTQ+-related matters."

97. Private parties are relying on the EEOC Document and the Interpretation to challenge Plaintiffs' laws. *See, e.g.*, Compl. at ¶ 47, *Curb Records, Inc. v. Lee*, No. 3:21-cv-00500 (M.D. Tenn. June 30, 2021), ECF No. 1 ("The [EEOC] has issued guidance that makes clear that transgender employees must be allowed to access restroom facilities based on their gender identity."); Compl. at ¶¶ 67-69, *A.S. v. Lee*, No. 3:21-cv-00600 (M.D. Tenn. Aug. 2, 2021), ECF No. 1 (alleging that the Department of Education "issued an official interpretation to clarify its enforcement authority over discrimination based on sexual orientation and gender identity under Title IX").

98. Plaintiff the State of Tennessee maintains laws or policies that at least arguably conflict with the Interpretation, Fact Sheet, or EEOC Document. *See, e.g.*, 2021 Tenn. Pub. Acts, c. 40, § 1 (providing that "[a] student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth"); 2021 Tenn. Pub. Acts, c. 452, § 6 (giving public school students, teachers, and employees a private right of action against a school that "intentionally allow[s] a member of the opposite sex to enter [a] multi-occupancy restroom or

changing facility while other persons [are] present"); Tenn. Code Ann. § 49-6-2904(b)(2) (providing students a right to "[e]xpress religious viewpoints in a public school"); *id.* § 49-7-2405(a)(2), (a)(10) (providing, with certain limitations, that public higher educational institutions in Tennessee "shall be committed to giving students the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue" and that "no faculty will face adverse employment action for classroom speech").

99. Other Plaintiff States also maintain laws or policies that at least arguably conflict with the Interpretation, Fact Sheet, or EEOC Document. *See, e.g.*, Ala. Code § 16-1-52(a)(2) (providing that "[a] public K-12 school may not allow a biological female to participate on a male team if there is a female team in a sport" or "allow a biological male to participate on a female team"); Alaska Stat. § 14.18.040 (allowing schools to provide "[s]eparate school-sponsored teams . . . for each sex"); Ark. Code Ann. § 6-1-107(c) (providing that sex designations for school-sponsored "athletic teams or sports" must be "based on biological sex"); Gender Integrity Reinforcement Legislation for Sports (GIRLS) Act, 2021 Ark. Act 953 (Apr. 29, 2021) (creating Ark. Code Ann. § 16-129-101 *et seq.*) (chapter number subject to change in final codification) (similar); Idaho Code Ann. § 33-6203(1) (providing that sex designations for school-sponsored athletic teams must be "based on biological sex"); Save Women's Sports Act, 2021 Mont. Laws, ch. 405 (similar); Neb. Rev. Stat. § 79-2,124 (providing that the "Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes"); Okla. Stat. tit. 51, § 253(B) (prohibiting government entities from "substantially burden[ing] a person's free exercise of religion" unless the burden is the "least restrictive means of furthering [a] compelling governmental interest"); Okla. Stat. tit. 70, § 2119.2(B) (similar prohibition with respect to "public institution[s] of higher education"); Okla. Stat. tit. 70, § 2120 (protecting

freedom of expression in public higher educational institutions); Okla. Admin. Code § 335:15-3-2(b)(5) (providing, in the employment context, that "Oklahoma Law may require that separate restroom facilities be provided employees of each sex"); W. Va. Code Ann. § 18B-20-2 (providing for freedom of expression in higher education); W. Va. Code Ann. § 21-3-12 (providing for sex-separated water closets in workplaces and specifying that "[n]o person or persons shall be allowed to use the closets assigned to the opposite sex"); W. Va. Code Ann. § 21-3-13 (providing for separate dressing rooms and washing facilities in workplaces "for each sex"); W. Va. Const. art. 3, § 15 (guaranteeing religious liberty).

100. Plaintiffs face a credible threat that the Department will enforce the Interpretation and Fact Sheet against Plaintiffs.

101. Plaintiffs face a credible threat that the EEOC will enforce the EEOC Document against Plaintiffs.

102. Plaintiffs face a credible threat that the DOJ will enforce the Department's Interpretation and Fact Sheet against Plaintiffs.

103. Plaintiffs face a credible threat that the DOJ will enforce the EEOC Document against Plaintiffs.

104. Enforcement of the Department's Interpretation or Fact Sheet could cause Plaintiffs to lose significant federal funds.

105. Enforcement of the EEOC Document could subject Plaintiffs to significant liability.

106. Plaintiffs adopted their laws and policies, and established sex-separated restrooms, locker rooms, showers, residence halls, and other living facilities in reliance on their understanding that Title IX and Title VII do not prohibit those laws, policies, and practices. This

understanding was based on longstanding Department regulations and prior guidance, including initial post-*Bostock* guidance from the Department and the DOJ.

107. The Interpretation, Fact Sheet, and EEOC Document undermine Plaintiffs' reliance interests and create regulatory uncertainty for Plaintiffs and other regulated entities.

108. The Interpretation, Fact Sheet, and EEOC Document interfere with Plaintiffs' sovereign authority to enforce and administer their laws and to carry out important government functions.

109. The Interpretation, Fact Sheet, and EEOC Document impose administrative costs and burdens on Plaintiffs and other regulated entities by forcing them to assess whether their policies violate the guidance and whether to change those policies.

COUNT I
Department of Education
Agency Action Without Observance of Procedure Required by Law
5 U.S.C. § 706

110. The allegations in Paragraphs 1-109 are reincorporated herein.

111. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D).

112. The Department's Interpretation and Fact Sheet are final agency actions subject to judicial review. *Id.* § 704.

113. The Department's Interpretation and Fact Sheet are "rules" under the Administrative Procedure Act. *Id.* § 701(b)(2).

114. The Department is an "agency" under the Administrative Procedure Act. *Id.* § 701(b)(1).

115. The Administrative Procedure Act requires agencies to engage in "notice and comment" for legislative rules. *Id.* § 553(b).

116. The Department's Interpretation and the Fact Sheet are legislative rules because they "intend[] to create new law, rights or duties" and thus should have been subject to notice and comment. *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (quoting *Michigan v. Thomas*, 805 F.2d 176, 183 (6th Cir. 1986)).

117. The Interpretation and Fact Sheet "seek[] to amend, rather than merely clarify," what Title IX requires. *Id.* at 1043.

118. The Interpretation and Fact Sheet "effec[t] a substantive change in the regulations" the Department has already issued—and any agency action that "adopt[s] a new position inconsistent with any of the Secretary's existing regulations" is a legislative rule requiring notice and comment. *Id.* at 1042 (first alteration in original; quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)).

119. Because the Interpretation and Fact Sheet are legislative rules that were adopted without the required notice-and-comment procedures, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT II
Department of Education
Agency Action That Is Arbitrary and Capricious
5 U.S.C. § 706

120. The allegations in Paragraphs 1-119 are reincorporated herein.

121. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

122. An "arbitrary and capricious regulation . . . is itself unlawful and receives no *Chevron* deference." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

123. In adopting a new rule, "an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

124. Moreover, "[w]hen an agency changes its existing position, it . . . . must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id.* at 2125-26 (quoting *FCC*, 556 U.S. at 515). An "'[u]nexplained inconsistency' in agency policy 'is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Id.* (alteration in original) (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

125. The Department's Interpretation and Fact Sheet are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the Department disregarded the serious reliance interests that States and covered institutions developed on the Department's longstanding regulations allowing sex-separated living facilities and athletic teams and the Department's prior guidance, including its initial post-*Bostock* guidance.

126. The Department's Interpretation and Fact Sheet are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the Department failed to adequately acknowledge that the Interpretation and Fact Sheet were a change in position from its existing regulations and initial post-*Bostock* guidance.

127. The Department's Interpretation and Fact Sheet are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the Department failed to adequately explain its change in position or provide good reasons for its change in position.

128. Because the Department's Interpretation and Fact Sheet are arbitrary and capricious, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT III
Department of Education
Agency Action That Is Contrary to Title IX
5 U.S.C. § 706

129. The allegations in Paragraphs 1-128 are reincorporated herein.

130. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) . . . not in accordance with law; . . . [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

131. The Department's Interpretation and Fact Sheet are contrary to law and exceed the Department's statutory authority because *Bostock*'s interpretation of Title VII's language is inapplicable to Title IX's materially different language.

132. The Department's Interpretation and Fact Sheet are contrary to law because, properly interpreted, Title IX's prohibition of discrimination "on the basis of sex" does not encompass discrimination based on sexual orientation or gender identity.

133. The Department's Interpretation and Fact Sheet are contrary to law because Title IX and longstanding Department regulations expressly permit distinctions based on biological sex in certain circumstances.

134. Because the Department's Interpretation and Fact Sheet are contrary to Title IX, they are unlawful and should be "set aside." *Id.*

COUNT IV
Department of Education
Agency Action That Violates the Spending Clause
5 U.S.C. § 706, U.S. Const. art. I, § 8

135. The allegations in Paragraphs 1-134 are reincorporated herein.

136. The Department's Interpretation and Fact Sheet are "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A)-(C), because they violate the Spending Clause of the U.S. Constitution.

137. The Spending Clause authorizes Congress to "attach conditions on the receipt of federal funds," but the "spending power is of course not unlimited." *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987).

138. One such limit is that, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207 (cleaned up) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

139. Another limit is that Congress may not use its spending power to "indirectly coerce[] a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) (opinion of Roberts, C.J.).

140. The Interpretation and Fact Sheet violate the Spending Clause because they purport to impose obligations on Plaintiffs that Congress did not clearly impose when it enacted Title IX, contrary to the requirement that Congress must "unambiguously" notify the States of any conditions attached to the funds. *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17).

141. The Interpretation and Fact Sheet also violate the Spending Clause because they place in jeopardy a significant amount of Plaintiffs' education-related federal funding if they refuse or otherwise fail to comply with the Department's new interpretation of Title IX, leaving Plaintiffs with "no real option but to acquiesce" in the interpretation. *See NFIB*, 567 U.S. at 587 (opinion of Roberts, C.J.).

142. Because the Department's Interpretation and Fact Sheet violate the Spending Clause, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT V
Department of Education
Agency Action That Violates the Spending Clause and First Amendment
5 U.S.C. § 706, U.S. Const. art. I, § 8, U.S. Const. amend. I

143. The allegations in Paragraphs 1-142 are reincorporated herein.

144. The Department's Interpretation and Fact Sheet are "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A)-(C), because they violate the First Amendment to the U.S. Constitution and condition the receipt of federal funds on recipients violating the First Amendment rights of others.

145. The Sixth Circuit has held that requiring a state university professor to use a transgender student's preferred pronouns violates the professor's First Amendment rights. *See Meriwether*, 992 F.3d at 511-12.

146. The Interpretation and Fact Sheet also conflict with the First Amendment's protection of religious liberty.

147. The Interpretation and Fact Sheet infringe on Plaintiffs' sovereign authority to enact and enforce laws that protect the First Amendment rights of their citizens.

148. To the extent the Interpretation and Fact Sheet require Plaintiffs to adopt policies or engage in conduct that would infringe on First Amendment rights, the Interpretation and Fact Sheet impose unconstitutional conditions on Plaintiffs' receipt of federal funds. *See, e.g.*, *Dole*, 483 U.S. at 210 (explaining that the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional").

149. Because the Department's Interpretation and Fact Sheet violate the First Amendment and impose unconstitutional conditions on federal funding, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT VI
Department of Education
Agency Action That Exceeds Congressional Authorization and Violates the Separation of Powers
5 U.S.C. § 706, U.S. Const. art. I, § 1

150. The allegations in Paragraphs 1-149 are reincorporated herein.

151. The Department's Interpretation and Fact Sheet are "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A)-(C), because they are so removed from any reasonable reading of Title IX that they amount to an unconstitutional exercise of legislative power, *see* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in . . . Congress.").

152. Because the Department's Interpretation and Fact Sheet exceed the Department's authority and violate separation-of-powers principles, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT VII
Department of Education
Agency Action That Violates the Tenth Amendment
5 U.S.C. § 706, U.S. Const. amend. X

153. The allegations in Paragraphs 1-152 are reincorporated herein.

154. The Department's Interpretation and Fact Sheet are "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A)-(C), because they violate the Tenth Amendment to the U.S. Constitution. The Interpretation and Fact Sheet construe Title IX in a manner that intrudes on the States' historic and traditional authority to safeguard privacy

expectations in educational settings, absent any evidence that Congress intended that result. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (explaining that Congress must make "clear and manifest" its purpose to supersede powers historically reserved to the States).

155. Because the Department's Interpretation and Fact Sheet violate the Tenth Amendment, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT VIII
EEOC
Agency Action That Exceeds Statutory Authority
5 U.S.C. § 706

156. The allegations in Paragraphs 1-155 are reincorporated herein.

157. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

158. The EEOC Document is final agency action subject to judicial review. *Id.* § 704.

159. The EEOC Document is a "rule" under the Administrative Procedure Act. *Id.* § 701(b)(2).

160. The EEOC is an "agency" under the Administrative Procedure Act. *Id.* § 701(b)(1).

161. The EEOC lacks authority to issue binding regulations.

162. The EEOC only has "authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a).

163. The EEOC Document exceeds the EEOC's "statutory jurisdiction, authority, or limitations" and is therefore unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT IX
EEOC
Agency Action Without Observance of Procedure Required by Law
5 U.S.C. § 706

164. The allegations in Paragraphs 1-163 are reincorporated herein.

165. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2).

166. The EEOC Document is a legislative rule because it "intends to create new law, rights, or duties" and thus should have been subject to notice and comment. *Tenn. Hosp. Ass'n*, 908 F.3d at 1042.

167. The EEOC Document "seeks to amend, rather than merely clarify," what Title VII requires. *Id.* at 1043 (quoting *Michigan*, 805 F.2d at 183).

168. The EEOC Chair did not submit the EEOC Document for notice and comment as required by the Administrative Procedure Act.

169. The EEOC Chair did not adhere to the EEOC's own regulations about promulgating "significant" guidance. 29 C.F.R. §§ 1695.2, 1695.5.

170. The EEOC was required to approve the EEOC Document through a vote of the Commission. *Id.* § 1695.5(a).

171. The EEOC was required to submit the EEOC Document for notice and comment. *See id.* § 1695.6.

172. Because the EEOC Chair did not adhere to the procedures in the Administrative Procedure Act or the EEOC's own regulations, the EEOC Document is unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT X
EEOC
Agency Action That Is Contrary to Title VII
5 U.S.C. § 706

173. The allegations in Paragraphs 1-172 are reincorporated herein.

174. The EEOC Document is "not in accordance with law" and exceeds the EEOC's statutory authority, 5 U.S.C. § 706(2)(A), (C), because *Bostock*'s interpretation of Title VII's language was limited to employment termination and did not address the myriad other forms of alleged discrimination the EEOC Document identifies as prohibited discrimination under Title VII.

175. The EEOC Document is contrary to law because *Bostock*'s reasoning does not support the Document's flawed interpretation of Title VII.

176. Because the EEOC Document is contrary to Title VII, it is unlawful and should be "set aside." *Id*. § 706(2).

COUNT XI
EEOC
Agency Action That Exceeds Congressional Authorization and Violates the Separation of Powers
5 U.S.C. § 706, U.S. Const. art. I, § 1

177. The allegations in Paragraphs 1-176 are reincorporated herein.

178. The EEOC Document is "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A)-(C), because it is so removed from any reasonable reading of Title VII that it amounts to an unconstitutional exercise of legislative power, *see* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in . . . Congress.").

179. Because the EEOC Document exceeds the EEOC's authority and violates separation-of-powers principles, it is unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT XII
EEOC
Agency Action That Unlawfully Abrogates Plaintiffs' Sovereign Immunity
5 U.S.C. § 706, U.S. Const. amend. XI

180. The allegations in Paragraphs 1-179 are reincorporated herein.

181. The EEOC Document is "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A)-(C), because its flawed interpretation of Title VII constitutes an unlawful attempt to abrogate Plaintiffs' sovereign immunity.

182. Congress may abrogate the States' sovereign immunity pursuant to its authority to enforce the Fourteenth Amendment only to remedy violations of the Constitution by the States; it may not substantively redefine a State's constitutional obligations. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (explaining that there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

183. Congress never identified any pattern of discrimination against homosexual or transgender individuals by the States, let alone one that amounted to a constitutional violation.

184. Because the EEOC Document is an unlawful attempt to abrogate Plaintiffs' sovereign immunity, it is unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT XIII
EEOC
Agency Action That Violates the Tenth Amendment
5 U.S.C. § 706, U.S. Const. amend. X

185. The allegations in Paragraphs 1-184 are reincorporated herein.

186. The EEOC Document is "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A)-(C), because it violates the Tenth Amendment to the U.S. Constitution. The EEOC Document interprets Title VII to intrude on the States' historic and traditional authority to safeguard privacy expectations in the workplace, absent any evidence that Congress intended that result. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Rice*, 331 U.S. at 230 (explaining that Congress must make "clear and manifest" its purpose to supersede powers historically reserved to the States).

187. Because the EEOC Document is contrary to the Tenth Amendment, it is unlawful and should be "set aside." 5 U.S.C. § 706(2).

COUNT XIV
Department of Education and EEOC
Declaratory Judgment
5 U.S.C. § 706, 28 U.S.C. § 2201

188. The allegations in Paragraphs 1-187 are reincorporated herein.

189. The Department's Interpretation and Fact Sheet are unlawful because they are legislative rules that did not undergo notice and comment.

190. The Department's Interpretation and Fact Sheet are unlawful because they are arbitrary and capricious.

191. The Department's Interpretation and Fact Sheet are contrary to law because they violate Title IX, Department regulations, and the Constitution.

192. Accordingly, Plaintiffs are entitled to a declaration that the Department's Interpretation and Fact Sheet are invalid and cannot be enforced against Plaintiffs.

193. The EEOC Document is unlawful because it exceeds the EEOC's statutory authority.

194. The EEOC Document is unlawful because it is a legislative rule that was adopted without notice and comment and in violation of the EEOC's own procedures.

195. The EEOC Document is contrary to law because it violates Title VII and the Constitution.

196. Accordingly, Plaintiffs are entitled to a declaration that the EEOC Document is invalid and cannot be enforced against Plaintiffs.

REQUEST FOR RELIEF AND DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief:

A. A declaratory judgment holding unlawful the Department's Interpretation and Fact Sheet.

B. A declaratory judgment holding that Plaintiffs are not bound by the Department's Interpretation and Fact Sheet.

C. A declaratory judgment affirming that Plaintiffs and Title IX recipients located therein may continue to separate students by biological sex in appropriate circumstances in accordance with Title IX's statutory text and longstanding Department regulations.

D. A declaratory judgment that Title IX does not prohibit Plaintiffs and Title IX recipients located therein from maintaining showers, locker rooms, bathrooms, residential facilities, and other living facilities separated by biological sex or from regulating each individual's access to those facilities based on the individual's biological sex.

E. A declaratory judgment that Title IX does not require a Title IX recipient's employees or students to use a transgender individual's preferred pronouns.

F. A declaratory judgment that Title IX does not prohibit Plaintiffs and Title IX recipients located therein from maintaining athletic teams separated by biological sex or from assigning an individual to a team based on the individual's biological sex.

G. A declaratory judgment holding that the Department lacked authority to issue the Interpretation and Fact Sheet.

H. A judgment setting aside the Interpretation and Fact Sheet.

I. A preliminary and permanent injunction prohibiting Defendants and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with those individuals from enforcing the Interpretation and Fact Sheet.

J. A declaratory judgment holding unlawful the EEOC Document.

K. A declaratory judgment holding that Plaintiff States are not bound by the EEOC Document.

L. A declaratory judgment that the EEOC Chair lacked authority to issue the EEOC Document.

M. A declaratory judgment that Title VII does not prohibit employers from maintaining showers, locker rooms, bathrooms, and other living facilities separated by biological sex or from regulating each individual's access to those facilities based on the individual's biological sex.

N. A declaratory judgment that Title VII does not prohibit employers from maintaining dress codes based on biological sex or from requiring an individual to comply with the dress code that corresponds to the individual's biological sex.

O. A declaratory judgment that Title VII does not require an employer or its employees to use a transgender individual's preferred pronouns.

P. A judgment setting aside the EEOC Document.

Q. A preliminary and permanent injunction prohibiting Defendants and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with those individuals from enforcing the EEOC Document.

R. All other relief to which Plaintiffs are entitled.

Respectfully submitted,

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***Pro Hac Vice Application Forthcoming**

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

The State of Tennessee, et al.

(b) County of Residence of First Listed Plaintiff Knox County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Matthew D. Cloutier; Office of the Tennessee Attorney General, P.O. Box 20207, Nashville, TN 37202; (615) 741-7908. (See attachment)

DEFENDANTS

The United States Department of Education, et al.

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
5 U.S.C. §§ 706

Brief description of cause:
Plaintiffs seek injunctive and declaratory relief setting aside administrative guidance published by Defendant federal agencies and their officers.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $ Injunctive and Declarat

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
Aug 30, 2021

SIGNATURE OF ATTORNEY OF RECORD
/s/ Matthew D. Cloutier

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT A

requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–057 to read as follows:

§ 165.T11–057 Safety Zone; Southwest Shelter Island Channel Entrance Closure, San Diego, CA.

(a) *Location.* The following area is a safety zone: The Northeast Shelter Island Channel Entrance and all navigable waters of San Diego Bay encompassed by by a three hundred yard circle centered on the coordinate 32°43′13.7″ N, longitude 117°13′7.8″ W.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from 8:30 a.m. until 10:30 a.m. on June 22, 2021.

Dated: June 16, 2021.

T.J. Barelli,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. 2021–13136 Filed 6–21–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter I

Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in *Bostock* v. *Clayton County.* This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.

DATES: This interpretation is effective June 22, 2021.

FOR FURTHER INFORMATION CONTACT: Alejandro Reyes, Director, Program Legal Group, Office for Civil Rights. Telephone: (202) 245–7272. Email: *Alejandro.Reyes@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background: Title IX of the Education Amendments of 1972, 20 U.S.C. 1681–1688, prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of Federal financial assistance. The Department's Office for Civil Rights (OCR) is responsible for the Department's enforcement of Title IX.

OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock* v. *Clayton County,* 140 S. Ct. 1731, 590 U.S. ____ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.,* which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.

Interpretation:

Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity.

Consistent with the Supreme Court's ruling and analysis in *Bostock,* the Department interprets Title IX's prohibition on discrimination ''on the basis of sex'' to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court's Title VII analysis in *Bostock,* this interpretation flows from the statute's ''plain terms.'' *See Bostock,* 140 S. Ct. at 1743, 1748–50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination.

I. The Supreme Court's Ruling in Bostock

The Supreme Court in *Bostock* held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity ''requires an employer to intentionally treat individual employees differently because of their sex.'' 140 S. Ct. at 1742.[1] As the Court also explained,

[1] The Court recognized that the parties in *Bostock* each presented a definition of ''sex'' dating back to Title VII's enactment, with the employers' definition referring to ''reproductive biology'' and the employees' definition ''capturing more than anatomy[.]'' 140 S. Ct. at 1739. The Court did not adopt a definition, instead ''assum[ing]'' the definition of sex provided by the employers that the employees had accepted ''for argument's sake.'' *Id.* As the Court made clear, it did not need to adopt

Continued

when an employer discriminates against a person for being gay or transgender, the employer necessarily discriminates against that person for ''traits or actions it would not have questioned in members of a different sex.'' *Id.* at 1737.

The Court provided numerous examples to illustrate why ''it is impossible to discriminate against a person'' because of their sexual orientation or gender identity ''without discriminating against that individual based on sex.'' *Id.* at 1741. In one example, when addressing discrimination based on sexual orientation, the Court stated:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Id.

In another example, the Court showed why singling out a transgender employee for different treatment from a non-transgender (*i.e.,* cisgender) employee is discrimination based on sex:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 1741–42.

II. Bostock's Application to Title IX

For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination ''on the basis of sex'' under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.

a. *There is textual similarity between Title VII and Title IX.*

Like Title VII, Title IX prohibits discrimination based on sex.

Title IX provides, with certain exceptions: ''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 . . . .'' 20 U.S.C. 1681(a).

Title VII provides, with certain exceptions: ''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 . . . sex[ ] . . .; 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 . . . sex[ ] . . . .'' 42 U.S.C. 2000e–2(a). (Title VII also prohibits discrimination based on race, color, religion, and national origin.)

Both statutes prohibit sex discrimination, with Title IX using the phrase ''on the basis of sex'' and Title VII using the phrase ''because of'' sex. The Supreme Court has used these two phrases interchangeably. In *Bostock,* for example, the Court described Title VII in this way: ''[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.'' 140 S. Ct. at 1737 (emphasis added); *id.* at 1742 (''[I]ntentional discrimination *based on sex* violates Title VII . . . .'' (emphasis added)); *see also Jackson* v. *Birmingham Bd. of Educ.,* 544 U.S. 167, 174 (2005) (''[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' '*on the basis of* sex,' in violation of Title IX.'' (second emphasis added)); *Meritor Sav. Bank* v. *Vinson,* 477 U.S. 57, 64 (1986) (''[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate's sex, that supervisor 'discriminate[s]' *on the basis of sex.*'' (emphasis added)).

In addition, both statutes specifically protect *individuals* against discrimination. In *Bostock,* 140 S. Ct. at 1740–41, the Court observed that Title VII ''tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals.'' The Court made a similar observation about Title IX, which uses the term *person,* in *Cannon* v. *University of Chicago,* 441 U.S. 677, 704 (1979), stating that ''Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide *individual* citizens effective protection against those practices.'' *Id.* (emphasis added).

Further, the text of both statutes contains no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity. As the Court stated in *Bostock,* ''when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.'' 140 S. Ct. at 1747. The Court has made a similar point regarding Title IX: ''[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.'' *N. Haven Bd. of Ed.* v. *Bell,* 456 U.S. 512, 521 (1982) (citations and internal alterations omitted). It also bears noting that, in interpreting the scope of Title IX's prohibition on sex discrimination the Supreme Court and lower Federal courts have often relied on the Supreme Court's interpretations of Title VII. *See, e.g., Franklin* v. *Gwinnett Cnty. Pub. Sch.,* 503 U.S. 60, 75 (1992); *Jennings* v. *Univ. of N.C.,* 482 F.3d 686, 695 (4th Cir. 2007); *Frazier* v. *Fairhaven Sch. Comm.,* 276 F.3d 52, 66 (1st Cir. 2002); *Gossett* v. *Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1176 (10th Cir. 2001).

Moreover, the Court in *Bostock* found that ''no ambiguity exists about how Title VII's terms apply to the facts before [it]''—*i.e.,* allegations of discrimination in employment against several individuals based on sexual orientation or gender identity. 140 S. Ct. at 1749. After reviewing the text of Title IX and Federal courts' interpretation of Title IX, the Department has concluded that the same clarity exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities. The Department also has concluded for the reasons described in this document that, to the extent other interpretations may exist, this is the best interpretation of the statute.

In short, the Department finds no persuasive or well-founded basis for declining to apply *Bostock's* reasoning—discrimination ''because of

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either definition to conclude that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity. *Id.* (''[N]othing in our approach to these cases turns on the outcome of the parties' debate . . . .''). Similar to the Court's interpretation of Title VII, the Department's interpretation of the scope of discrimination ''on the basis of sex'' under Title IX does not require the Department to take a position on the definition of sex, nor do we do so here.

. . . sex'' under Title VII encompasses discrimination based on sexual orientation and gender identity—to Title IX's parallel prohibition on sex discrimination in federally funded education programs and activities.

b. Additional case law recognizes that the reasoning of Bostock *applies to Title IX and that differential treatment of students based on gender identity or sexual orientation may cause harm.*

Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. *See, e.g., Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied,* 976 F.3d 399 (4th Cir. 2020), *petition for cert filed,* No. 20–1163 (Feb. 24, 2021); *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending,* No. 18–13592 (Aug. 28, 2020); *Koenke* v. *Saint Joseph's Univ.,* No. CV 19–4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe* v. *Univ. of Scranton,* No. 3:19–CV–01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

The Department also concludes that the interpretation set forth in this document is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination. As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm. *See, e.g., Grimm,* 972 F.3d at 617–18 (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment); *Adams,* 968 F.3d at 1306–07 (describing ''emotional damage, stigmatization and shame'' experienced by a transgender boy as a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1044–46, 1049–50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); *Dodds* v. *U.S. Dep't of Educ.,* 845 F.3d 217, 221–22 (6th Cir. 2016) (describing ''substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old'' transgender girl from denial of equal treatment); *Doe,* 2020 WL 5993766, at **1–3 (describing harassment and physical targeting of a gay college student that interfered with the student's educational opportunity); *Harrington ex rel. Harrington* v. *City of Attleboro,* No. 15–CV–12769–DJC, 2018 WL 475000, at **6–7 (D. Mass. Jan. 17, 2018) (describing '' 'wide-spread peer harassment' and physical assault [of a lesbian high school student] because of stereotyping animus focused on [the student's] sex, appearance, and perceived or actual sexual orientation'').

c. The U.S. Department of Justice's Civil Rights Division has concluded that Bostock*'s analysis applies to Title IX.*

The U.S. Department of Justice's Civil Rights Division issued a Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), *https://www.justice.gov/crt/page/file/1383026/download.*

The memorandum stated that, after careful consideration, including a review of case law, ''the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation.'' Indeed, ''the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly.''

III. Implementing This Interpretation

Consistent with the analysis above, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. As with all other Title IX complaints that OCR receives, any complaint alleging discrimination based on sexual orientation or gender identity also must meet jurisdictional requirements as defined in Title IX and the Department's Title IX regulations, other applicable legal requirements, as well as the standards set forth in OCR's Case Processing Manual, *www.ed.gov/ocr/docs/ocrcpm.pdf.*[2]

Where a complaint meets applicable requirements and standards as just described, OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities. This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity. OCR carefully reviews allegations from anyone who files a complaint, including students who identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways.

While this interpretation will guide the Department in processing complaints and conducting investigations, it does not determine the outcome in any particular case or set of facts. Where OCR's investigation reveals that one or more individuals has been discriminated against because of their sexual orientation or gender identity, the resolution of such a complaint will address the specific compliance concerns or violations identified in the course of the investigation.

This interpretation supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation and gender identity. This interpretation does not reinstate any previously rescinded guidance documents.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

[2] Educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets. *See* 20 U.S.C. 1681(a)(3).

your search to documents published by the Department.

Suzanne B. Goldberg,

Acting Assistant Secretary for Civil Rights.

[FR Doc. 2021–13058 Filed 6–21–21; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 11

[Docket No.: PTO–C–2013–0042]

RIN 0651–AC91

Changes to Representation of Others Before the United States Patent and Trademark Office; Correction

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule; correction.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) is correcting an earlier final rule, ''Changes to the Representation of Others Before the United States Patent and Trademark Office,'' that appeared in the **Federal Register** on May 26, 2021 and which takes effect on June 25, 2021. This document corrects a minor error. No other changes are being made to the underlying final rule.

DATES: This rule is effective June 25, 2021.

FOR FURTHER INFORMATION CONTACT: William R. Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, at 571–272–4097.

SUPPLEMENTARY INFORMATION: This document corrects an error pertaining to revisions to definitions made in the final rule. Specifically, the Office intended to change the listed definition of ''Roster'' to ''Roster or register.'' The Code of Federal Regulations editors informed the Office that the original **Federal Register** instruction to ''revise'' the definition was incorrect. Rather, the correct instruction should be to ''remove and add'' the intended definition. This document corrects that instruction.

In FR Doc. 2021–10528, appearing on page 28442 in the **Federal Register** of Wednesday, May 26, 2021, the following correction is made:

§ 11.1 [Corrected]

■ On page 28452, in the first column, in part 11, correct amendatory instruction 4 to read as follows:

■ 4. Amend § 11.1 by:

■ a. Revising the definitions of ''Conviction or convicted'' and ''Practitioner;''

■ b. Removing the entry for ''Roster'' and adding, in alphabetical order, an entry for ''Roster or register;'' and

■ c. Revising the definitions for ''Serious crime'' and ''State.''

The revisions and addition read as follows:

Andrew Hirshfeld,

Commissioner for Patents, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2021–13145 Filed 6–21–21; 8:45 am]

BILLING CODE 3510–16–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201, 202, 203, 210, and 370

[Docket No. 2021–3]

Technical Amendments Regarding the Copyright Office's Organizational Structure

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This final rule makes technical changes to the U.S. Copyright Office's regulations pertaining to its organizational structure in light of the agency's recent reorganization. It reflects recent structural changes, updates certain of the Office's division names, and adds a new section for the Copyright Claims Board established by the Copyright Alternative in Small-Claims Enforcement Act of 2020.

DATES: Effective July 22, 2021.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* Kevin R. Amer, Deputy General Counsel, by email at *kamer@copyright.gov,* or Joanna R. Blatchly, Attorney-Advisor, by email at *jblatchly@copyright.gov* or by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION: The Copyright Office is publishing this final rule pursuant to its May 2021 reorganization. This effort is intended to accomplish two goals: (1) Rename divisions and realign certain reporting structures to improve the Office's effectiveness and efficiency; and (2) reflect the agency structure for the new copyright small-claims tribunal established by the Copyright Alternative in Small-Claims Enforcement (''CASE'') Act of 2020.[1] The Register has determined that these changes will optimize business processes and aid in the administration of her functions and duties as Director of the Copyright Office.[2]

Operational reorganization. The reorganization reduces the number of direct reports to the Register of Copyrights and is expected to create administrative and cost efficiencies by consolidating operational organizations currently headed by senior-level positions. The reorganization brings the Office of the Chief Financial Officer (renamed the Financial Management Division) and the Copyright Modernization Office (renamed the Product Management Division) under the supervision of the Chief of Operations (renamed the Assistant Register and Director of Operations (''ARDO'')). Realigning these divisions under the ARDO consolidates operational support elements under one senior manager, in line with operational structures across the Library of Congress. This consolidation is expected to facilitate Office coordination with centralized Library services, and with similar functional elements of other service units. It is also expected to allow the Office to increase the effectiveness of communications across areas of operational responsibility, in alignment with strategic objectives.

The reorganization renames certain organizational elements and senior positions for purposes of greater clarity and consistency. The Office of Public Records and Repositories is renamed the Office of Copyright Records. As noted above, the Office of the Chief of Operations is renamed the Office of the Director of Operations. The following subordinate offices are also renamed: The Copyright Acquisitions Division (''CAD'') is renamed Acquisitions and Deposits (''A&D''); the Administrative Services Office (''ASO'') is renamed the Administrative Services Division (''ASD''); and the Receipt Analysis and Control Division (''RAC'') is renamed the Materials Control and Analysis Division (''MCA''). The Copyright Modernization Office (''CMO'') is renamed the Product Management Division (''PMD'').

Further, the Office of the Chief Financial Officer (''CFO'') is renamed the Financial Management Division (''FMD'') and work units under this division are also renamed, including by

[1] Public Law 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

[2] *See* 17 U.S.C. 701(a).

EXHIBIT B

Department of Justice

January 17, 2021

MEMORANDUM FOR THE CIVIL RIGHTS DIVISION

FROM: ACTING ASSISTANT ATTORNEY GENERAL JOHN B. DAUKAS

SUBJECT: Application of *Bostock v. Clayton County*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes it an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of, *inter alia*, such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). On June 15, 2020, the Supreme Court held that this provision prohibits covered employers from firing an individual "simply for being homosexual or transgender." *Bostock v. Clayton County*, 590 U.S. __, __, 140 S. Ct. 1731, 1737 (2020).

Perhaps unsurprisingly, questions have been raised about the consequences of the decision in *Bostock* for other applications and provisions of Title VII, as well as for other statutes. No one in 1964—whether the Member of Congress voting on the statute or the average person on the street—would have understood Title VII the way that the Supreme Court interpreted it in *Bostock*. The Court did not contend otherwise, acknowledging that its interpretation of Title VII "reaches 'beyond the principal evil' legislators may have intended or expected to address," but asserting that "many, maybe most, applications of Title VII's sex provision were 'unanticipated' at the time of the law's adoption." *Bostock*, 140 S. Ct. at 1749, 1752. It is thus unsurprising that questions would be raised about the unintended consequences of the *Bostock* decision. The Supreme Court acknowledged, but expressly reserved, such questions. *Id.* at 1753 ("Whether other policies and practices might or might not qualify as unlawful discrimination . . . are questions for future cases, not these.").

Because the federal government is tasked with enforcing many civil rights protections that could be implicated by *Bostock*, this memorandum provides guidance for Civil Rights Division Attorneys and staff on this subject, recognizing that many additional questions will need to be addressed individually as they arise.[1] Specifically, the memorandum first addresses whether

[1] Some have criticized the *Bostock* majority's literal and context-free interpretation of Title VII, and suggested such an approach dooms race-based affirmative action under Title VI, Title VII, and the Equal Protection Clause of the United States Constitution, if applied in those contexts. *See, e.g.*, Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 Federalist Soc. Rev. 158 (Aug. 6, 2020); Jason Mazzone, Bostock: *Were the Liberal Justices*

Bostock must lead to change in the Department's own employment practices. It then addresses federal law protections for religious liberty. Finally, it analyzes *Bostock*'s implications with regard to other statutory provisions, including provisions of Title VII not at issue in *Bostock*, DOJ's enforcement responsibilities under Title VII, Title IX, the Fair Housing Act, the Equal Credit Opportunity Act, the Justice System Improvement Act of 1979, and the Constitution.

As explained with greater detail in the attached analysis, I conclude as follows:

- The Department of Justice does not need to change its employment practices to comply with *Bostock*. The Department does not discriminate on the basis of sexual orientation or gender identity in its employment decisions.
- The Department, like any other entity subject to federal prohibitions on sex discrimination, may continue to maintain sex-specific facilities and policies, including bathrooms, locker rooms, dress codes, and physical fitness standards, where physiological differences between the sexes are relevant.
- The Department may hire individuals based on biological sex where sex is a bona fide occupational qualification for the position.
- The Civil Rights Division will apply *Bostock*'s reasoning to federal statutory provisions where the reasoning logically applies, but will not extend it to distinguishable contexts or language. Under that approach, the reasoning of *Bostock* likely applies to prohibit discrimination based on homosexual or transgender status as unlawful "sex" discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a), Title IX of the Educational Amendments Act, 20 U.S.C. § 1681, the Fair Housing Act, 42 U.S.C. §§ 3604(a), (b), (d), 3605, 3606, the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1), and the Justice System Improvement Act of 1979, 34 U.S.C. § 10228(c). The reasoning of *Bostock* also severely erodes the doctrinal underpinnings of Supreme Court decisions that allow employers to maintain affirmative action policies despite Title VII's prohibition on race discrimination. The reasoning does not necessarily, however, affect the interpretation of the Constitution; statutes that incorporate constitutional standards, *see, e.g.*, 42 U.S.C. 2000c-6; disparate impact liability under Title VII, 42 U.S.C. § 2000e-2(a)(2), or the Fair Housing Act, 42 U.S.C. § 3604(a); or other distinguishable statutory or regulatory language.
- The Civil Rights Division will continue to abide by, and provide guidance on, the multiple statutory and constitutional protections that may exempt religious employers and educational institutions from the rule announced in *Bostock*, or applications of *Bostock*'s reasoning to other statutes.

Namudnoed?, Balkanization (July 6, 2020). Others suggest *Bostock* was result driven, and the Court will not apply the same mode of analysis in other cases where the result would be to rein in applications of federal statutes. For the purposes of this memorandum, we take the Court at its word and seek to analyze what impact a fair reading of *Bostock* has on various statutes enforced by the Civil Rights Division. We will not, however, address in-depth broader questions about whether the reasoning of *Bostock* requires an end to all forms of race discrimination—including affirmative action—in employment, higher education, and other areas of society.

- Given the sea change effected by *Bostock*, the Civil Rights Division will exercise civil and criminal enforcement discretion relating to conduct predating *Bostock*.

Implementation

After studying the decision, I have advised leadership that the Department of Justice does not need to change its employment practices to comply with *Bostock*. A provision of Title VII not at issue in *Bostock* applies to the federal government, 42 U.S.C. § 2000e-16, but regardless of whether the reasoning in *Bostock* would apply to that provision, the Department has already committed itself to ensuring that "no applicant for employment or employee of our Department will be denied equal employment opportunity because of race, color, religion, national origin, sex, age, sexual orientation, disability (physical or mental), gender identity, protected genetic information, pregnancy, status as a parent, marital status, political affiliation, or any other nonmerit-based factor." DOJ EEO Statement. The Department may and should continue to adhere to this commitment, as well as to its commitment to equal justice and equal opportunity more broadly.

The Department likewise may and should continue its commitment to take "swift and appropriate corrective and/or disciplinary action when employees are found to have engaged in discrimination, retaliation, or harassment, including sexual harassment." DOJ EEO Statement. Although Justice Alito's dissent in *Bostock* suggests that the majority's logic might preclude a covered Title VII employer from refusing to hire an applicant with a history of sexual harassment, *Bostock*, 140 S. Ct. at 1761 (Alito, J. dissenting), and presumably from firing an employee who engages in such conduct, the Department need not read Title VII in that manner. The Supreme Court has held that "sexual harassment so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment violates Title VII," *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (cleaned up), and the Department need not read the *Bostock* decision to undermine its ability as an employer to prevent or address such harassment.

The Department has long expected all of its employees to behave professionally and respectfully toward each other. To be clear, Title VII does not impose a "general civility code," *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998), nor reach "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, [or] occasional teasing," *Faragher*, 524 U.S. at 788. "The prohibition of harassment on the basis of sex . . . forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale*, 523 U.S. at 81. But the Department has long recognized that respectful and professional behavior amongst its diverse workforce is important to the Department's ability to carry out its mission of ensuring fair and impartial administration of justice for all Americans. Thus, the Department may and should continue to respect its employees' right to express traditional views regarding marriage and gender identity, "view[s] long . . . held . . . in good faith by reasonable and sincere people here and throughout the world," *Obergefell v. Hodges*, __ U.S. __, __, 135 S. Ct. 2584, 2594 (2015), just as it continues to respect its employees' right to express contrary views.

Bostock does not require any changes to the Department's sex-specific facilities or policies. Although the Court refrained from opining on the validity of "sex-segregated bathrooms, locker rooms, and dress codes," 140 S. Ct. at 1753, its reasoning confirms that such practices do not run afoul of Title VII so long as they do not treat an individual "worse than others who are similarly situated," *id.* at 1740. That is because "discrimination"—as used in the statute—requires this type of difference in treatment between similarly situated individuals. *Id.* And men and women are not similarly situated where physiological differences are relevant. *See Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) ("Grooming standards that appropriately differentiate between the genders are not facially discriminatory."); *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1074 (1983) (recognizing that "physiologically based policies which set a higher maximum weight for men than for women of the same height" would not be problematic where "no significantly greater burden of compliance was imposed on either sex").

The physiological differences between men and women are relevant for physical fitness standards, bathrooms, locker rooms, and dress codes. These practices do not, like the odious practice of maintaining race-segregated bathrooms or locker rooms, treat similarly situated people differently. Rather, they treat *differently*-situated people differently—men and women are simply not similarly situated for policies under which physiological differences are relevant. Indeed, in effectively requiring Virginia Military Institute (VMI) to admit women, the Supreme Court stated that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996); *id.* (noting that, when the service academies admitted women, Congress specified that standards for women "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Although *Virginia* involved a claim under the Equal Protection Clause, rather than Title VII, the Supreme Court's implicit approval of policies that ensure privacy of the sexes from each other and that take into account the physiological differences between men and women for physical training purposes suggests that such policies are not inherently discriminatory.

It is thus no surprise that courts have repeatedly rejected challenges to sex-specific policies and facilities where physiological differences are relevant. For example, courts have held that the FBI does not violate Title VII when it "utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women." *Bauer v. Lynch,* 812 F.3d 340, 351 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 372 (2016) (discussing cases). Courts have also held that "regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII." *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (collecting cases). And for the more than 50 years that Title VII has been in place, no court has held that Title VII requires the *elimination* of sex-segregated bathrooms or locker rooms, even as some courts have struggled with the application of bathroom policies to transgender individuals in various stages of transition. Indeed,

some courts have suggested that failure to have sex-specific bathrooms and locker rooms could, in some circumstances, itself create liability under Title VII. *See, e.g.*, *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 118 (2d Cir. 2010) (concluding that evidence that "there was an attempt to force female employees to use restrooms that had no locks" could support a hostile work environment claim); *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (suggesting that failure to offer "toilet facilities sufficiently private to meet [a female] plaintiff's needs . . . may have been a perfectly good claim of sex discrimination"); *James v. Nat'l R.R. Passenger Corp.*, No. 02-civ-3915, 2005 WL 6182322, at *5 (S.D.N.Y. Mar. 28, 2005) (holding that a jury could reasonably conclude that a policy of offering only unisex bathrooms and changing rooms could have a disparate impact on women in violation of Title VII). *Bostock* did not disturb this body of case law.

To the contrary, *Bostock* made clear that special treatment for homosexual or transgender persons would itself constitute sex discrimination in some circumstances. The Court explained, for example, that "[a]n individual's homosexuality or transgender status *is not relevant* to employment decisions." 140 S. Ct. at 1741. That means that no one should be given either a preference or a demerit in hiring and firing decisions based on the person's sexual orientation or transgender status. It also means that exceptions for homosexual or transgender persons from sex-specific policies and facilities where physiological differences are relevant may themselves constitute unlawful sex discrimination. The Court said that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1747.

With respect to its enforcement responsibilities under Title VII, the Division will exercise enforcement discretion with respect to the pursuit of retroactive relief under *Bostock*. The Supreme Court has recognized that "Title VII does not require a district court to grant any retroactive relief. A court that finds unlawful discrimination 'may enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate.'" *City of Los Angeles, Dept of Water & Power v. Manhart*, 435 U.S. 702, 718 (quoting 42 U.S.C. § 2000e-5(g)). "To the point of redundancy, the statute stresses that retroactive relief 'may' be awarded if it is appropriate." *Id.* In *Manhart*, although the Court had "no doubt about the application of the statute," it reversed an award of retroactive relief. *Id.* at 719. In doing so, it "recognize[d] that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to [the Court], may well have assumed that a program like the Department's was entirely lawful," noting that "[t]he courts had been silent on the question and the administrative agencies had conflicting views." *Id.* at 719-20. The Court further noted that the rule announced in *Manhart* represented a "marked departure from past practice" and that it could have significant potential impact on the economy. *Id.* at 721-23.

Although *Bostock* did not arise out of the pension context at issue in *Manhart*, much of *Manhart*'s reasoning counsels against retroactive relief under *Bostock*. Specifically, many conscientious and intelligent employers may have assumed that discrimination based on sexual orientation or transgender status did not run afoul of Title VII's prohibition on discrimination

based on sex. As Justice Alito noted in his dissent in *Bostock*, "until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex." 140 S. Ct. at 1757 (Alito, J. dissenting). Indeed, "[s]ome 30 federal judges" to consider whether Title VII prohibited discrimination based on sexual orientation "said no, based on the text of the statute. 30 out of 30." *Id.* at 1824 (Kavanaugh, J., dissenting). For its part, the EEOC did not hold that Title VII prohibited discrimination based on transgender status and sexual orientation until 2012 and 2015 respectively. *Id.* at 1757-58 & n.7 (Alito, J. dissenting). Thus, "for the first 48 years after Title VII became law," the Commission "[d]ay in and day out" enforced Title VII under an interpretation contrary to the one announced by the Supreme Court in *Bostock*. *Id.* at 1575-58. Likewise, with the exception of a brief period from 2014 to 2017, the Department consistently interpreted the plain text of Title VII not to prohibit discrimination on the basis of transgender status or sexual orientation, and it vigorously argued that position to the Supreme Court. *See* Br. of the United States, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, Br. of the United States, *Bostock v. Clayton County, Ga.*, Nos. 17-1618, 17-1623. *Bostock* thus represents at least as equally significant a break in past practice as *Manhart*. Under these circumstances, the Civil Rights Division will exercise its enforcement discretion in individual cases not to seek back pay for conduct predating *Bostock* unless particular facts suggest that such relief is necessary and appropriate. *Cf. Manhart*, 435 U.S. at 720; *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2355 n.12 (2020) (plurality op.).

Protections for Religious Employers

The Department of Justice does not have primary responsibility for the enforcement of Title VII against private employers, but it has promulgated guidance on the federal protections for religious liberty, including those that may affect Title VII enforcement. *See* Memorandum for All Executive Departments and Agencies, 82 Fed. Reg. 49,668 (Oct. 26, 2017). The *Bostock* decision identified three such protections for religious liberty that may limit the reach of its decision: the "express statutory exception for religious organizations" in Title VII itself, the Religious Freedom Restoration Act, and the First Amendment's protection of "the employment relationship between a religious institution and its ministers." 140 S. Ct. at 1754. This memorandum addresses each of these protections, along with additional statutory protections in Title VII and the First Amendment. The expression of these protections should not be taken as a suggestion that they are the exclusive protections for religious liberty that may apply in any given case.

First, the Court acknowledged in *Bostock* that its decision does not disturb Title VII's exemption for religious organizations in 42 U.S.C. § 2000e-1(a), which states that Title VII "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." This provision protects the right of religious employers to "choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts." *See* 82 Fed. Reg. at 49,670, 49,677. As explained at greater length in the Memorandum regarding Federal Protections for Religious Liberty, that protection is not limited "to organizations that carry on only religious

activities, or to organizations established by a church or formally affiliated therewith." 82 Fed. Reg. 49,677. Instead, it applies broadly to organizations that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes. *Id.* Thus, for example, a religious charity that meets this test and holds traditional Christian views on marriage could choose to employ only those individuals who share those beliefs and conduct themselves accordingly.

And, although not expressly mentioned in *Bostock*, Title VII contains two additional protections for the hiring decisions of religious organizations. Specifically, Title VII makes clear that "it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e). Nor shall it be "an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* "Because Title VII defines 'religion' broadly to include 'all aspects of religious observance and practice, as well as belief,' 42 U.S.C. 2000e(j), these exemptions include decisions to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *See* 82 Fed. Reg. 49,677 (internal quotation marks omitted).

Second, as the Supreme Court noted in *Bostock*, employers that do not qualify for any of the Title VII religious exemptions may nevertheless qualify for an exemption under the Religious Freedom Restoration Act of 1993. *Cf. Bostock*, 140 S. Ct. at 1754 ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."). RFRA prohibits the federal government from imposing a substantial burden on the religious exercise of an employer unless doing so is the least restrictive means of achieving a compelling governmental interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014). Title VII may impose such a burden if it compels an act inconsistent with an adherent's religious observance or practice—as it would if, for example, an employer sincerely believes that employing someone who is publicly undergoing a gender transition would render the employer complicit in conduct that the employer's religion forecloses. *See* 82 Fed. Reg. 49,674 (describing the substantial burden test). The Civil Rights Division does not anticipate that there would be many employers who would face such a substantial burden, in light of the express Title VII exceptions for religious organizations described above, §§ 2000e-1(a), 2000e-2(e), and the general exception for employers with fewer than 15 employees, § 2000e(b).

Under RFRA, government may impose such a burden only if "application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened"—is the least restrictive means of furthering a compelling governmental

interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegatal*, 546 U.S. 418, 430-31 (2006) (quoting 42 U.S.C. § 2000bb-1(b)). In other words, as relevant here, RFRA requires the government to show that the "marginal interest in" substantially burdening a particular covered entity or person's religious exercise is sufficiently compelling to withstand strict scrutiny. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014). For example, in *O Centro*, the fact that a particular controlled substance, dimethyltryptamine (DMT), was "exceptionally dangerous" could "not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA" to justify its refusal to allow a particular church to use a sacramental tea (hoasca) containing that drug. 546 U.S. at 432. Rather, the Court explained any application of RFRA must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. As the Court observed, "there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the [church]." *Id.* at 432.

Although any application of RFRA will depend on the applicable facts, it is unlikely that the government would be able to justify imposing a substantial burden in this context. As the Supreme Court said "in *Sherbert v. Verner*, 374 U.S. 398 (1963), the decision that provides the foundation for the rule codified in RFRA, . . . only the gravest abuses, endangering paramount interest could give occasion for a permissible limitation on the free exercise of religion." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., joined by Gorsuch, J., concurring) (internal quotation marks omitted). As an initial matter, "Congress' determination that" sex "should be listed" as a protected characteristic in Title VII "simply does not provide a categorical answer that relieves the Government of its obligation to shoulder its burden under RFRA." *O Centro*, 546 U.S. at 432. As in *O Centro*, "there is no indication that Congress," in prohibiting covered employers from firing employees because of their sex, "considered the harms posed" by firing employees because of their sexual orientation or transgender status, much less concluded that the government had a compelling interest in forcing employers to violate their faith to prevent such harms. 546 U.S. at 432; *see supra* XX; *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. at 2392 (Alito, J., joined by Gorsuch, J., concurring) ("We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest."). And unlike racial discrimination, the Supreme Court has never held that a religious employer's decision not to hire homosexual or transgender persons "violates deeply and widely accepted views of elementary justice" or that the government has a "compelling" interest in the eradication of such conduct. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 592, 604 (1983). To the contrary, the Court has held that a government's interest in "ensur[ing] by statute [that] gays and lesbians desiring to make use of public accommodations . . . will not be turned away merely on the proprietor's exercise of personal preference" could not justify compelled modification of speech. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578 (1995) (applying heightened scrutiny). It likewise has held that the "state interests embodied in" a public "accommodations law" prohibiting discrimination on the basis of sexual orientation could "not justify" compelling the Boy Scouts to retain a gay man as an assistant scoutmaster in conflict with their expressive activity. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000)

(applying heightened scrutiny). In light of these precedents, and in the absence of a legislative judgment about the interests served by this application of Title VII, it is difficult to see how the government could show that any "marginal interest in enforcing" this unexpected construction of Title VII could be so compelling as to justify forcing certain employers to violate their faith. *Hobby Lobby*, 573 U.S. at 727.

The difficulty in establishing a compelling interest here may be heightened by the many employers not covered by the rule announced in *Bostock*. As described above, Congress expressly allowed religious organizations and educational institutions owned, supported, controlled, or managed in whole or in substantial part by a particular religion to hire only those employees whose beliefs and conduct are consistent with the employer's precepts. 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Congress also included an exemption for hiring on the basis of religion or sex where either characteristic is a bona fide occupational qualification. § 2000e-2(e). And Congress exempted all employers with fewer than 15 employees from Title VII's reach, § 2000e-2(b)—a category that, according to one recent estimate, covers 85 percent of U.S. employers, Reply Br. for the Resp. at 22-23 & n.90, *Altitude Express, Inc. v. Zarda*, No. 17-1623, *aff'd sub nom. Bostock v. Clayton County*, 2019 WL 4464222. These exemptions only further support the conclusion that it is hard to see how the government could demonstrate that it has a compelling interest in forcing certain employers to contravene their religious convictions in this particular context. *See O Centro*, 546 U.S. at 433 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (counseling that "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited").

Notably, RFRA controls whether an employer faces a lawsuit from a government actor or a private party. RFRA expressly "applies to all federal law, and the implementation of that law, whether statutory or otherwise," 42 U.S.C. § 2000bb–3(a), and broadly defines "government" to "include[]" every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," *id.* § 2000bb–2(1). That language covers actions by private plaintiffs seeking to enforce federal statutes such as Title VII: the federal judiciary is a "branch … of the United States" and its application of Title VII in a private lawsuit constitutes "implementation" of federal law. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (applying First Amendment because "[a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press"). RFRA also directs that "[a] person whose religious exercise has been burdened" by the government "may assert" the Act's protection as a "defense in a judicial proceedings," *id.* § 2000bb–1(c), and nothing in that provision limits that defense to suits brought by a government actor. Accordingly, "RFRA's language surely seems broad enough" to reach "an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute substantially burdens his or her exercise of religion." *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006). This reading also fits with RFRA's codified "declaration of purposes," one of which was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). The pre-*Smith* compelling interest regime that RFRA was designed to restore applied to suits among private parties, *see, e.g.*, *McDaniel v. Paty*, 435 U.S. 618 (1978), and limiting RFRA's scope to litigation involving government actors does

not guarantee the Act's application "in all cases" where religious exercise is substantially burdened. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705-06, 709-10, 714-15 (2014) (relying on pre-*Smith* cases to conclude that RFRA covered for-profit corporations).

That RFRA requires the "[g]overnment" to "demonstrate[]" that substantially burdening a person's religious exercise survives strict scrutiny, 42 U.S.C. § 2000bb–1(b), does not mean, as some courts have concluded, that the Act's protections vanish in suits bought by private parties, *see Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736–37 (7th Cir. 2015); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410–12 (6th Cir. 2010); *see also Hankins*, 441 F.3d at 114–15 (Sotomayor, J., dissenting). To the contrary, RFRA's strict-scrutiny provision is an "exception" to RFRA's "general" rule that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Compare* 42 U.S.C. § 2000bb–1(a), *with id.* § 2000bb–1(b). Reading that exception to give the government *carte blanche* to substantially burden religious exercise so long as it did so through private rights of action would turn RFRA's strict-scrutiny provision on its head. Instead, private parties must carry the government's burden when they seek to use federal law (and federal courts) to substantially burden another person's religious exercise. That is akin to how courts approached private suits involving the Free Exercise Clause under the pre-*Smith* regime. *See, e.g. Paul v. Watchtower Bible & Tract Soc. of New York*, Inc., 819 F.2d 875, 883 (9th Cir. 1987); *cf. Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (requiring private party invoking statute to impose liability on newspaper to show that the statute's application "serves 'a need to further a state interest of the highest order'" under the First Amendment).[2]

Third, *Bostock*, a statutory decision, cannot intrude upon the First Amendment's protections for religious autonomy, including in ecclesiastical and internal governance matters. The Free Exercise Clause and Establishment Clause prevent governmental intrusion into the autonomy of religious institutions "with respect to internal management decisions that are essential to the institution's central mission," including "the selection of the individuals who play certain key roles" for carrying out their missions. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). For example, "[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.* at 2055. In identifying which employees are covered by this protection, the Supreme Court has explained that "a variety of factors may be important," but "[w]hat matters, at bottom, is what an employee does." *Id.* at 2063, 2064. Employees whose "work lie[s] at the core of the[] mission" of a religious institution are covered by the ministerial exception. *Id.* at 2055. And because, "[i]n a country with the religious

[2] Similarly, RFRA's directive that anyone "whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief *against a government*," does not, as some courts have assumed, narrow the unqualified right to assert a RFRA "defense in a judicial proceeding." 42 U.S.C. § 2000bb–1(c) (emphasis added); *see, e.g.*, *Listecki*, 780 F.3d at 737. Rather, the relevant clause broadens the rights of a party asserting RFRA. "The narrowing interpretation—permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party—involves a convoluted drawing of a hardly inevitable negative implication." *Hankins*, 441 F.3d at 103.

diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition," "[a] religious institution's explanation of the role of such employees in the life of the religion in question is important" to this analysis. *Id.* at 2066. Neither Title VII in general, nor *Bostock* in particular, can overcome the First Amendment's protection for a religious institution's selection or supervision of these employees.

Fourth, although not mentioned in *Bostock*, "religious and secular groups alike" may claim a right to freedom of association under the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012). That right applies to any group engaged in public or private expressive activity—even if not associated primarily for that purpose. *Boy Scouts of America*, 530 U.S. at 648. And it generally protects such groups from being forced to accept members if the presence of such members would "affect[] in a significant way the group's ability to advocate public or private viewpoints." *Id.* The Supreme Court has described this right as "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48; *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring) ("Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."). Thus, the Supreme Court held in *Boy Scouts of America* that the Boy Scouts, which at that time "believe[d] that homosexual conduct is inconsistent with the values it seeks to instill in its youth members," could not be forced to accept a gay scoutmaster. *Boy Scouts*, 530 U.S. at 654-56. By comparison, in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court had allowed the forced inclusion of women because "the Jaycees had failed to demonstrate . . . any serious burdens on the male members' freedom of expressive association." *Boy Scouts*, 530 U.S. at 657-58. Employers who are able to show that they are engaged in expressive activity whose message would be significantly affected by application of the *Bostock* rule may be exempt from it.

Implications for other statutes

Provisions of Title VII not addressed by Bostock

Bostock will have consequences for the interpretation of Title VII beyond those addressed by the decision itself. The provision at issue in *Bostock* declares it 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 . . . sex." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court reasoned in *Bostock* that the words "because of" in the disparate treatment provision "incorporate the simple and traditional standard of but-for causation," which is "established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 140 S. Ct. at 1739 (internal quotation marks omitted). The Court further reasoned that this provision focuses on the employer's treatment of individuals, rather than groups, *id.* at 1740-41, and that, because "homosexuality and transgender status are inextricably bound up with sex," any "discriminat[ion] on those grounds requires an employer to intentionally treat individual employees differently because of their sex," *id.* at 1742.

The reasoning of *Bostock* raises significant concerns about the vitality of Supreme Court precedent permitting covered employers to adopt affirmative action policies. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court held that § 2000e-2(a)(1), the same provision at issue in *Bostock*, did not outlaw such policies. *Id.* at 197; *see also Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (permitting sex-based affirmative action policies under *Weber*). The *Weber* Court took the position that although a prohibition on affirmative action policies was "within the letter of the statute"—as a policy that "discriminate[s] against white employees solely because they are white" plainly constitutes "discriminat[ion] because of race"—it was "not within its spirit nor within the intention of its makers." 443 U.S. at 201 (quoting 42 U.S.C. § 2000e-2(a)(1) and *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)) (ellipses omitted). Based on an examination of "legislative history" and "historical context," the *Weber* Court concluded that an interpretation of Title VII "that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute'"—*i.e.*, to "open employment opportunities" for African Americans—and therefore "must be rejected." *Id.* at 201-02 (citation omitted).

Bostock squarely rejected that method of interpreting Title VII. In the Court's view, it was irrelevant whether its interpretation of § 2000e-2(a)(1) conflicted with "the legislature's purpose in enacting Title VII or certain expectations about its operations." *Bostock*, 140 S. Ct. at 1745; *see id.* at 1749-54. As the Court explained: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Id.* at 1737. There is no way to reconcile that analysis with the one in *Weber—i.e.*, that even if the express terms of § 2000e-2(a)(1) prohibit affirmative action policies, Congress in 1964 neither intended nor expected that result. In addition, *Bostock* concluded that § 2000e-2(a)(1)'s use of the term "individual" mandated that the judicial focus of that provision "be on individuals, not groups" and thus that Title VII did not permit inquiring as to "how a policy affects one sex as a whole versus the other as a whole." *Id.* at 1740-41. That reasoning also cannot be squared with *Weber*'s conclusion that discrimination against an individual because of his race is permissible so long as it benefits another racial group.

Accordingly, while employers presently may rely on *Weber* to adopt affirmative action policies, they should be on notice that its "doctrinal underpinnings" have been significantly "eroded" by *Bostock*. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 458 (2015). And that is important because the Supreme Court has observed that "'the primary reason' for overruling statutory precedent" is that "subsequent legal developments . . . have removed the basis for a decision." *Id.* (citation omitted); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) ("[W]here the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision.") (internal citations omitted). In addition, when, as here, civil-rights statutes are involved, the Supreme Court has often declined to "place on the shoulders of Congress the burden of the Court's own error." *Monell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978) (citation omitted); *see Johnson*, 480 U.S. at 672-73 (Scalia, J., dissenting). Covered employers therefore should not be surprised if the Supreme Court eventually overrules *Weber* and holds that 42 U.S.C. § 2000e-2(a)(1) prohibits affirmative action policies in the workplace.

Bostock also likely affects the traditional interpretation of the second general prohibition in Title VII. Under § 2000e-2(a)(2), it is an unlawful employment practice "to limit, segregate, or classify . . . 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 . . . sex." 42 U.S.C. § 2000e-2(a)(2). The Supreme Court has interpreted this provision to prevent both intentional discrimination and disparate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The *Bostock* reasoning may make a claim of intentional discrimination arising out of sexual orientation or transgender status discrimination cognizable under this provision, although it would not support a claim for disparate impact based on either group.

With respect to intentional discrimination, *Bostock* appears to contemplate that certain employer actions taken to limit, segregate, or classify employees based on sexual orientation or transgender status may run afoul of the prohibition on doing so "because of such individual's . . . sex," § 2000e-2(a)(2). Specifically, the Supreme Court discussed a hypothetical case in which "an employer asked homosexual or transgender applicants to tick a box on its application form" and concluded that even such a box implicates sex discrimination because "[t]here is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex." *Bostock*, 140 S. Ct. at 1746. In the Court's view, the employer that decides not to hire anyone who checks the hypothetical homosexual or transgender box "intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex." *Id.* Thus, a policy that limits, segregates, or classifies employees based on sexual orientation or transgender status may support a claim of intentional discrimination because of sex under § 2000e-2(a)(2) although such claim remains subject to the statutory requirement that, to be actionable, the limitation, segregation, or classification "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," § 2000e-2(a)(2). *See infra* p.14 (discussing this limitation).

The reasoning of *Bostock*, however, does not support a disparate impact claim based on a policy's effect on homosexual or transgender persons as such. Disparate impact may occur even when the employer has "good intent or absence of discriminatory intent," *see Griggs*, 401 U.S. at 432, and focuses on the effect of a policy on a particular group, *see id.* at 431 (considering an employment practice that operated to exclude African American employees from promotions or transfers to other jobs). The relevant group for purposes of the provision's reference to "sex" is men and women. *See Nashville Gas Co. v. Satty*, 434 U.S. 135, 141-42 (1977); *see also Bostock*, 140 S. Ct. at 1739 (proceeding on the assumption that sex in 1964 "[r]eferr[ed] only to biological distinctions between male and female). A policy targeted at homosexual or transgender status in general is not one targeted to either men or women and thus does not necessarily "cause[] a disparate impact on the basis of . . . sex," § 2000e-2(k).

To the extent that a policy had a disparate impact on a subset of men or women based on sexual orientation or transgender status—for example, biological men who identify as women—a disparate impact claim might be cognizable based on sex. *See Nashville Gas Co.*, 434 U.S. at 141 (finding liability based on disparate impact based on policy that deprived employees returning

from pregnancy leave of accumulated seniority). But that claim would have to satisfy the various limitations that Title VII imposes on disparate impact liability. Most notably, the disparate impact must be one that "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect[s] his status as an employee," § 2000e-2(a)(2). Moreover, the challenged policy must actually deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee. *See Nashville Gas Co.*, 434 U.S. at 143; *E.E.O.C. v. AutoZone, Inc.*, 860 F.3d 564, 570 (7th Cir. 2017) (lateral job transfer that entailed no loss in pay, benefits, or job responsibilities did not adversely affect employment opportunity or status). Mere discomfort in a work place would not meet that standard. *See Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487-89 (9th Cir. 1993), *cert denied*, 512 U.S. 1228 (1994) (rejecting claim by Spanish-speaking employees that an "English-only policy … deprives them of a privilege given by the employer to native-English speakers: the ability to converse on the job in the language with which they feel most comfortable" because "there is no disparate impact with respect to a privilege of employment if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference"). And in all events, the complaining party would need to meet the special burden of proof set forth in statute for Title VII disparate impact claims. 42 U.S.C. § 2000e-2.

Bostock also does not mean that employers cannot "hire or employ employees. . . on the basis of [employees'] . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." § 2000e-2(e)(1). *Bostock* proceeded on the assumption that, as used in Title VII, "'sex . . . referr[ed] only to biological distinctions between male and female." 140 S. Ct. at 1739. And the bona fide occupational qualification provision rests on the understanding that an employee's biological sex may, in some narrow circumstances, interfere with the employee's ability to perform the job. *See International Union, United Auto., Aerospace & Agri. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991); *see also Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (recognizing that male sex was a bona fide occupational qualification "for the job of correctional counselor in a 'contact' position in an Alabama male maximum-security penitentiary"); *Wilson v. Chertoff*, 699 F. Supp. 2d 364 (D. Mass. 2010) (recognizing that female sex is a bona fide occupational qualification for a TSA employee hired "to conduct pat-down searches of female passengers"). In these cases, employers may hire or employ employees based on their biological sex.

Other Statutes

Bostock is not directly relevant to the interpretation of statutes outside of Title VII. The Court in *Bostock* emphasized that its holding was rooted in a conclusion about "the ordinary public meaning" of Title VII in 1964. 140 S. Ct. at 1738.[3] Because the Court cautioned that "only the words on the page constitute the law adopted by Congress and approved by the President," *id.*, we must hesitate to apply the reasoning of *Bostock* to different texts, adopted at different times, in different contexts. As the Court noted, any attempt to "add to, remodel, update, or detract from

[3] Though the majority's assertion was vigorously contested by the dissent. 140 S. Ct at 1755 ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous.")(Alito, J dissenting).

old statutory terms" would "deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Id.* Although more than "100 federal statutes prohibit discrimination because of sex," *see Bostock*, 140 S. Ct. at 1778 & Appendix C (Alito, J., dissenting), this memorandum of necessity addresses only four for which the Civil Rights Division has some enforcement authority.

Title IX

The application of *Bostock*'s reasoning to Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*, requires due care. Both Title VII and Title IX relate to discrimination based on sex, and both use sex in its ordinary, binary meaning. Indeed, if there were any doubt on that point, Title IX includes express references to "one sex" and "the other sex," as well as to "both sexes," usage that confirms the ordinary, binary meaning of the term. § 1681(a)(2), (8). But Title VII is also "a vastly different statute from Title IX" in both text and context. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Title IX provides, subject to a number of express exemptions, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. It does not authorize disparate impact liability, nor does it use precisely the same "because of such individual's . . . sex" language that the Court relied upon in *Bostock*. *Compare* 42 U.S.C. § 2000e-2 *with* 20 U.S.C. § 1681. And while Title VII imposes a regulatory prohibition on covered employers, Title IX acts as a condition on the receipt of certain federal funding. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 275, 286-87 (1998). The Supreme Court has explained that, when Congress acts pursuant to its power under the Spending Clause, a "central concern . . . [is] ensuring that the receiving entity of federal funds [had] notice" of its prospective liability. *Id.*

Nevertheless, the similarities in language between Title VII and Title IX suggest that the *Bostock* reasoning may carry over in some respects. Justice Thomas has, for example, reasoned that the phrases "on the basis of sex" and "because of such individual's . . . sex" have been used by Congress "interchangeably." *Jackson*, 544 U.S. at 185-86 (Thomas, J., dissenting); *see also Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1016 (2020) ("When it first inferred a private cause of action under § 1981, this Court described it as 'afford[ing] a federal remedy against discrimination . . . *on the basis of* race,' language (again) strongly suggestive of a but-for causation standard."). If that is the case, then it seems to follow from the Supreme Court's reasoning in *Bostock* that an individual who is, on the basis of sexual orientation or transgender status, "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under any education program or activity receiving Federal financial assistance" may be able to make out a claim of intentional discrimination on the basis of sex in violation of Title IX. *See Bostock*, 140 S. Ct. at 1741. Like Title VII, Title IX recognizes that an individual's sex is "not relevant" to many, if not most, aspects of education programs or activities.

But where the physiological differences of the sexes *are* relevant to education programs or activities, sex may be taken into account. Several indicia from the statute establish this proposition, three of which are discussed here. First, Congress expressly provided that "notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to

prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The fact that this provision is phrased as a rule of construction, rather than an exemption, is a textual indicator that Congress did not believe that its general prohibition on sex discrimination must be read to cover different living facilities. That makes sense, as separate-sex living facilities do not generally exclude anyone from participation in education programs or activities, nor deny them the benefits thereof. Nor do separate-sex living facilities subject any person to discrimination, because discrimination requires treating an "individual worse than others who are similarly situated," *Bostock*, 140 S. Ct. at 1740, and men and women are not similarly situated for these purposes. Rather, the physiological differences between men and women may justify the additional privacy and security that can only be guaranteed by such separate facilities. This provision supports the conclusion that Title IX's prohibition on sex discrimination does not prohibit different treatment of the sexes where the physiological differences of the sexes are relevant.

Second, Congress expressly exempted certain single-sex activities from Title IX's reach where it is not clear that physiological differences are relevant. For example, Congress expressly exempted from Title IX the "membership practices of" sororities and fraternities, 20 U.S.C. § 1681(6)(A), or "voluntary youth service organization" that traditionally serve minors of a single sex, § 1681(6)(B); programs and activities undertaken in connection with Boys State, Boys Nation, Girls State, and Girls Nation, § 1681(7); and "father-son or mother-daughter activities at an educational institution," so long as "reasonably comparable activities [are] provided for students of the other sex," § 1681(8). The justification for the single-sex practices of these activities cannot be that men or women are particularly ill suited to partake of the activities given that parallel organizations or activities are available to men and women. Rather, the apparent justification is that the exempted activities have unique value as single-sex activities. Namely, because men and women are not fungible, they may gain unique perspectives and experiences from participating in these activities with only members of their own sex. *See United States v. Virginia*, 518 U.S. 515, 533, 535 (1996) (recognizing the "reality" that "[s]ingle-sex education affords pedagogical benefits to at least some students"). But Congress's decision to exempt these activities, rather than construe them as not covered by Title IX, confirms that Congress understood its prohibition on sex discrimination in the ordinary sense—as prohibiting discrimination based on sex only where men and women were similarly situated.

Third, Congress has long hailed the rise of women's athletics as one of the crowning achievements of Title IX. Although athletics was not expressly discussed in the text of Title IX, Congress tasked the Executive Branch with issuing regulations on the subject. *See* Pub. L. 93-380, § 844, 88 Stat. 484 (Aug. 21, 1974) ("The Secretary shall prepare and publish … proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs, which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."). These Title IX regulations have, from the very beginning, authorized schools to offer separate-sex teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport" and required recipients to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. 106.41. Congress extensively studied and

held hearings on these regulations before ultimately leaving them in place. *See North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 531-33 (1982). And agencies across the federal government have incorporated them into their implementing regulations. *See* 65 Fed. Reg. 52,857 (common rule for 21 federal agencies). Women's sports teams have accordingly flourished, allowing women to compete against other women, including in sports for which a school does not offer a men's team. Such separate teams would only be permissible under Title IX if the text prohibits differential treatment of the sexes only where the physiological differences between the sexes are irrelevant.

The Civil Rights Division will not lightly assume that Title IX should be interpreted in a way that "would frustrate the purposes" of that law, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). It would frustrate Title IX's purpose to read its text as prohibiting the single-sex teams that have ensured women equal opportunity in athletics for nearly 50 years. It would likewise frustrate those purposes to read Title IX to prohibit sex-specific facilities that allow men and women privacy from the other sex, particularly given that many boys and girls will be undergoing physiological changes associated with their biological sex at the same time that they are participating in, or attempting to participate in, education programs and activities. And it would frustrate the purposes of Title IX's express statutory and regulatory exemptions for single-sex activities to require such activities to admit members of the opposite sex in accordance with gender identity. A formerly single-sex activity that admits members of the opposite sex based on gender identity is by definition no longer single sex. And allowing admission of members of the opposite sex to a single-sex activity based on gender identity would actually end up discriminating on the very basis that it would be attempting to accommodate: A girls' volunteer organization that accepts all females and all males who identify as females *excludes* males who identify as males. But if the benefits from the single-sex nature of the activity were not a reason to exclude transgender members of the opposite sex from the group, it is hard to understand the reason for excluding non-transgender members of the opposite sex. At a bare minimum, no statute should be read to require or permit giving transgender individuals special—as opposed to equal—treatment. Discrimination in favor of transgender status is still discrimination on the basis of gender identity and, under the reasoning of *Bostock*, on the basis of sex.

To sum up, after *Bostock*, it would behoove recipients to ensure that they do not discriminate on the basis of sexual orientation or transgender status. In most cases, sex (and therefore sexual orientation and transgender status) are not relevant in decisions relating to admissions, employment, or grading. Homosexual or transgender persons should thus not be treated either more or less favorably than other persons. *Bostock* does not prevent recipients from adopting sex-specific policies and facilities when the physiological differences of the sexes *are* relevant, including with respect to living assignments, bathrooms, locker rooms, and competitive sports teams. Men and women are not "materially identical in all respects," *Bostock*, 140 S. Ct. at 1741, and nothing in *Bostock* requires recipients to treat them as if they are. With respect to such policies, however, *Bostock*'s reasoning forecloses special preferences based on homosexual or transgender status. Thus, for example, a women's volleyball team, ice hockey team, weightlifting team, or rugby team may not allow men who identify as women to play on the team if other men are not allowed to, because doing so would discriminate against non-transgender men and in favor of transgender men based on sex, which is unlawful under *Bostock*. Sex is relevant to the team

assignment policy; transgender status is not, and transgender individuals may have no more and no less opportunity than non-transgender individuals.[4]

As with Title VII, it is worth noting the religious exemptions that may be applicable to Title IX recipients. The statute expressly provides that its prohibition "shall not apply to an educational institution which is controlled by a religious organization if the application of [the prohibition] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3); *see also* § 1687 (defining "program or activity" to exclude "any operation of an entity which is controlled by a religious organization if the application of section 1681 . . . would not be consistent with the religious tenets of such organization"). Although under existing regulations "eligible institutions may 'claim the exemption' in advance by 'submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions . . . [that] conflict with a specific tenet of the religious organization,' 34 CFR § 106.12(b), they are not required to do so to have the benefit of it." 82 Fed. Reg. at 49,679. Organizations that do not qualify for that exemption may still be able to claim the protection of RFRA, *id.*, as well as the constitutional protections described *supra*.

Fair Housing Act

The reasoning of *Bostock* is also applicable to some provisions of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* Like Title VII, the Fair Housing Act imposes a series of prohibitions, rather than conditions on federal funding. And like Title VII, the Act uses the phrase "because of," which the Supreme Court interpreted in *Bostock* to require but-for causation. *Bostock*, 140 S. Ct. at 1739 For example, as made applicable, and subject to some exemptions, § 3604(a) makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . sex." § 3604(a).[5] This language incorporates the legal test of but-for causation. *Cf. Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013). And under the reasoning of *Bostock*, but-for causation is established in the case of discrimination because of homosexuality or transgender status "because to discriminate on those grounds requires an employer to treat individual[s] . . . differently because of their sex." *Bostock*, 140 S. Ct. at 1742. Thus, after *Bostock*,

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[4] *Bostock* addressed "transgender status" only in the binary, *see, e.g.*, 140 S. Ct. at 1741, and, as noted above, did not define "sex" to include "gender identity," *id.* at 1739. It is unclear how some of the sex-specific provisions of Title IX could even operate if "sex" were defined to include "gender identity," given that these provisions presuppose a binary view of sex and according to the American Psychiatric Association, gender identity may include "an individual's identification as . . . some category other than male or female." Diagnostic and Statistical Manual of Mental Disorders Fifth Edition 451 (2013).

[5] The Supreme Court has interpreted the phrase "otherwise makes unavailable" in § 3604(a) to authorize disparate-impact liability as well. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, __ U.S. __, 135 S. Ct. 2507, 2518 (2015). Because such liability focuses on the effects on groups, rather than individuals, *see supra* at 8, the *Bostock* reasoning does not support liability for disparate impact based on sexual orientation or transgender status under the Fair Housing Act.

a person who refuses to sell or rent a dwelling because of sexual orientation or transgender status may violate this provision.

The same reasoning applies to several other provisions of the Fair Housing Act. It applies, for example, to § 3604(b), which makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin," to § 3604(d), which makes it unlawful "[t]o represent to any person because of . . . sex . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," and to § 3605, which makes it unlawful "for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of . . . sex." Those provisions use the same "because of . . . sex" language discussed above. In addition, the phrase "discriminate against any person" in § 3604(b) is similar to the phrase "discriminate against any individual" in Title VII, which the Court in *Bostock* interpreted to support its conclusion that to "discriminate" because of homosexuality or transgender status necessarily requires one to discriminate because of sex. 140 S. Ct. at 1741.[6] And a similar conclusion may be reached with respect to § 3606, which provides, that "it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of . . . sex." The language "on account of . . . sex" is not identical to the language in *Bostock*, but it is similar to the "on the basis of" language discussed above that the Supreme Court has used interchangeably with "because of," *see supra* XX, and it shares the focus on the individual that the *Bostock* court relied so heavily upon in its analysis, *see Bostock*, 140 S. Ct. at 1740-41.

This interpretation of the Fair Housing Act will likely come as a surprise to any ordinary reader of the Act, which includes no mention of sexual orientation or transgender status. Indeed, until very recently, all courts to have considered such claims had rejected them. *See, e.g.*, *Lath v. OakBrook Condominium Owners' Ass'n*, 2017 WL 1051001, at *4 n.5 (D. N.H. 2017) (collecting

[6] It is less clear how the *Bostock* reasoning applies to § 3604(c) and § 3604(e). Section 3604(c) makes it unlawful to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." Section 3604(e) makes it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular . . . sex." These provisions are not focused on the but-for causation of any act, but rather on the particular language used in advertisements and representations. Because a notice that indicates a preference, limitation, or discrimination on sexual orientation or transgender status does not necessarily indicate "any preference, limitation, or discrimination based on . . . sex," it is unclear how the Supreme Court would apply the *Bostock* reasoning to these provisions.

cases); *Miller v. 270 Empire Realty LLC*, 2012 WL 193798, at *5 (E.D.N.Y. 2012); *Neithamer v. Brenneman Property Services, Inc.*, 81 F. Supp. 2d 1, 4 (D.D.C. 1999). The same, of course, may be said of *Bostock* itself.

But to those concerned about overbroad enforcement, the Civil Rights Division notes that the Act expressly does not apply to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence," § 3603(b)(2), nor to certain sales or rentals of small-scale owners, § 3604(b)(1). It also exempts a "religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin." § 3607. In addition, RFRA applies to the Fair Housing Act and may prevent courts from imposing liability under the reasoning of *Bostock*. § 2000bb-3(a) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.").

The Civil Rights Division will exercise its enforcement discretion, in both civil and criminal matters, in a manner that takes into account the unexpected nature of this interpretation. On the civil side, for many of the same reasons that retroactive liability under Title VII for the rule announced in *Bostock* may not be appropriate, retroactive liability under the Fair Housing Act may also not be appropriate. 42 U.S.C. § 3612(g)(3) (noting that in administrative enforcement proceedings, an administrative law judge "shall promptly issue an order for such relief as may be appropriate, which *may* include actual damages suffered by the aggrieved person and injunctive or other equitable relief" and "may, to vindicate the public interest" include a civil penalty); § 3613(c) (noting that in civil actions by private persons a court "*may* award to plaintiffs actual and punitive damages"); § 3614(d) (noting that in enforcement proceedings by the Attorney General a court "*may* award . . . preventive relief" and "*may* award such other relief as the court deems appropriate, including monetary damages to persons aggrieved"). On the criminal side, *see* 42 U.S.C. § 3631, "the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985). It would be a rare case in which prosecution would be appropriate for conduct that appears to violate the Fair Housing Act under the *Bostock* reasoning but predated that decision—indeed there likely is none.

Equal Credit Opportunity Act

The Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, declares that it "shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of . . . sex," § 1691(a)(1). The Act contains a number of provisions outlining activities that do not constitute discrimination, *id.* § 1691(b), (c), and provides for administrative enforcement, in addition to civil enforcement by private parties, *id.* § 1691e. The Act caps any damages that may be available under the Act to aggrieved individuals. *Id.*

For much the same reason discussed above with respect to the Fair Housing Act, the *Bostock* reasoning is likely applicable to claims that a creditor has discriminated on the basis of sexual orientation or transgender status with respect to any aspect of a credit transaction. To succeed, however, any potential plaintiff would need to make an actual showing of discrimination—that is, treatment of an applicant worse than other applicants similarly situated. § 1691(a). Moreover, the claim must not fall within any applicable statutory or regulatory exclusions. *See, e.g.*, § 1691(b), (c) (setting forth certain exemptions); § 1691(b) (authority to grant regulatory exemptions). The Civil Rights Division again recognizes that this reading of ECOA is unanticipated for many Americans, and it will take notice concerns into account in deciding whether to institute a civil action, including upon referral, for any conduct that appears to violate ECOA under the *Bostock* reasoning but predated that decision.

Justice System Improvement Act of 1979

The Justice System Improvement Act of 1979, as amended, 34 U.S.C. 10101 *et seq.*, added a nondiscrimination provision to the Omnibus Crime Control and Safe Streets Act of 1968. Specifically, under that provision, "[n]o person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title." 34 U.S.C. § 10228(c). The language is similar to that of Title IX of the Education Amendments Act of 1972, except that it uses the phrase "on the ground of" instead of "on the basis of" and prohibits not just discrimination on the ground of sex, but on the grounds of race, color, religion, or national origin as well. *Compare* 34 U.S.C. § 10228(c) *with* 20 U.S.C. § 1681. The language also has narrower application, in that it applies to State and local governments receiving federal funds, rather than the many private parties who are subject to Title IX. Finally, the Justice System Improvement Act expressly provides for enforcement by both the Attorney General and, after exhaustion, by private parties. *See* 34 U.S.C. § 10228(c)(3), (4). A violation of this Act may also provide grounds for an enforcement action by the Department under 34 U.S.C. § 12601, which declares it "unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," § 12601(a).

For many of the same reasons discussed above with respect to Title VII and Title IX, the *Bostock* reasoning suggests that this nondiscrimination provision prohibits intentional discrimination on the basis of sexual orientation or transgender status, but does not require law enforcement agencies to alter longstanding sex-specific practices or facilities where physiological differences between the sexes are relevant. *See Curl v. Reavis*, 740 F.2d 1323, 1326, 1331 (4th Cir. 1984) (affirming district court decision treating the discrimination on the basis of sex in violation of Title VII as sufficient also to violate the nondiscrimination provision of the Justice System Improvement Act). As with the other statutes discussed, the Civil Rights Division will

exercise enforcement discretion that takes due account of the unanticipated interpretation of this statutory condition on grants to state and local governments.

Implications for the Constitution (and statutes that incorporate constitutional standards)

Finally, *Bostock* has no bearing on the proper interpretation of the Constitution, including on whether classifications based on sexual orientation or transgender status should be treated as sex-based classifications (or otherwise trigger heightened scrutiny). The Supreme Court in *Bostock* interpreted a specific phrase in Title VII—"discriminate against any individual because of such individual's . . . sex." 140 S. Ct. at 1753 (ellipsis omitted). That text does not appear in either the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, or the Fifth Amendment's Due Process Clause in which the Supreme Court has identified an equal protection principle, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Supreme Court's assessment that it did not need to consult "historical sources" to interpret the meaning of Title VII does not suggest that it would approach the Constitution in like manner. 140 S. Ct. at 1750. To the contrary, the Court recognized that it had repeatedly "consulted the understandings of the law's drafters" in order to discern "subtle distinctions between literal and ordinary meaning" in the context of older statutes. *Id.* And it has done so likewise in the context of constitutional provisions. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (Sixth Amendment right to jury trial); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122-23 (2019) (Eighth Amendment); *Timbs v. Indiana*, 139 S. Ct. 682, 688-89 (2019) (Excessive Fines Clause); *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (Confrontation Clause). In short, there is no indication the Supreme Court will apply its literal and context-free mode of interpretation to the Constitution, as doing so would upend over two centuries of precedent. *Bostock* may simply be an aberration.

Given the very different context of Title VII from the Constitution, it should be no surprise that the Supreme Court has not imported its construction of Title VII into the Constitution. The Court has, for example, refused to import disparate-impact liability from its Title VII precedents to the constitutional context, stressing that "[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Conversely, the Supreme Court has also imposed more stringent limits on affirmative action under the Equal Protection Clause than Title VII. *See Johnson*, 480 U.S. at 627 n.6. The Court has also recognized that "[t]he Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike," and thus is not limited to the protected categories listed in Title VII. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). But most governmental classifications—including those related to sexual orientation and transgender status—continue to be subject only to rational basis review, and nothing in *Bostock* casts doubt on those precedents. *See Romer v. Evans*, 517 U.S. 620, 632 (1996). In all events, as with Title VII, *Bostock* does not undermine the authority of government to draw distinctions based on sex where, due to physiological differences, the sexes are not similarly situated. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (recognizing that "[p]hysical differences between men and women . . . are enduring" and that the "two sexes are not fungible").

EXHIBIT C

Letter to Educators on Title IX's 49th Anniversary
Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語, 或者使用英语有困难, 您可以要求獲得向大眾提供的語言協助服務, 幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊, 請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339), 或電郵: Ed.Language.Assistance@ed.gov。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức củaBộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800- USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkolsa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вампредоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877- 8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

June 23, 2021

Dear Educator:

On this 49th anniversary of the passage of Title IX of the Education Amendments of 1972—our nation's most powerful legal tool for combating sex discrimination in education—I take this opportunity to highlight a selection of resources available for you to ensure that the education environment you provide is free from sex discrimination in all forms. Among these resources is our recent public notice clarifying Title IX's protection against discrimination based on sexual orientation and gender identity.

The U.S. Department of Education's Office for Civil Rights works to ensure that Title IX's mandate protects students in all aspects of their education, including recruitment, admissions, and counseling; financial assistance; athletics; protections from sex-based harassment, which encompasses sexual assault and other forms of sexual violence; treatment of pregnant and parenting students; discipline; equal access to classes and activities; and treatment of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) students.

I encourage you to review OCR's recent report, Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students, in which we address the disparities based on sex, including sexual orientation and gender identity, as well as race, disability, and other characteristics experienced by students both before and during the pandemic in K-12 and postsecondary settings. On this anniversary of Title IX, I recognize the particular vulnerability of LGBTQI+ students and the often overwhelming challenges these students face in education compared to their peers, including feeling less safe, experiencing poor mental health, facing a higher risk of suicide, being more likely to miss school, and facing a disproportionate risk of being homeless.

I also want to bring to your attention OCR's public notice based on the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020), which clarifies that Title IX's protection against sex discrimination encompasses discrimination based on sexual orientation and gender identity. Specifically, OCR clarifies that the Supreme Court's decision in *Bostock* applies to the Department's interpretation of Title IX. In its decision, the Supreme Court explained that "it is impossible to discriminate against a person" because of their sexual orientation or gender identity "without discriminating against that individual based on sex." *Id.* at 1741. That reasoning applies regardless of whether the individual is an adult in a workplace or a student in school.

Consistent with this notice, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. For more information, please see our accompanying fact sheet in which OCR and the U.S. Department of Justice's Civil Rights Division provide examples of the kinds of incidents we can investigate.

OCR has also updated its website to provide the resources mentioned above and to provide additional information and resources for LGBTQI+ students.

On Title IX more generally, you might find it useful to review this Overview of the Law and these Answers to Frequently Asked Questions about Sex Discrimination.

We realize educators may have questions about the Department's 2020 amendments to the Title IX regulations, and we appreciate that so many of you shared your insights and experiences during our virtual public hearing on Title IX held on June 7-11, 2021. We are reviewing the comments we received and, as previously noted, anticipate issuing a notice of proposed rulemaking to amend the regulations. In addition, we plan to issue a question-and-answer document to provide additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment.

If you have questions or would like additional information or technical assistance, please visit us at www.ed.gov/ocr or contact OCR at 800-421-3481 (TDD: 800-877-8339) or at ocr@ed.gov.

We at OCR share with you the responsibility to ensure that all students have equal access to education, regardless of race, color, national origin, sex, disability, or age. Thank you for all that you do to support all of our nation's students and to ensure that they have the opportunity to learn and thrive in school.

Sincerely,

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Confronting Anti-LGBTQI+ Harassment in Schools

A Resource for Students and Families

Many students face bullying, harassment, and discrimination based on sex stereotypes and assumptions about what it means to be a boy or a girl. Students who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender non-conforming may face harassment based on how they dress or act, or for simply being who they are. It is important to know that discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by federal law. It is also important that LGBTQI+ students feel safe and know what to do if they experience discrimination.

Public elementary and secondary schools, as well as public and private colleges and universities, have a responsibility to investigate and address sex discrimination, including sexual harassment, against students because of their perceived or actual sexual orientation or gender identity. When schools fail to respond appropriately, the Educational Opportunities Section of the Civil Rights Division (CRT) at the U.S. Department of Justice and the Office for Civil Rights (OCR) at the U.S. Department of Education can help by enforcing federal laws that protect students from discrimination. CRT and OCR can also provide information to assist schools in meeting their legal obligations.

Examples of the kinds of incidents CRT and OCR can investigate:

A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is "not appropriate for school." Teachers suggest that the student attend alone or bring a boy as a date.

When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates "out" him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school's administrators, they dismiss it, saying: "you can't expect everyone to agree with your choices."

A community college student discloses he's gay during a seminar discussion. Leaving class, a group of students calls him a homophobic slur, and one bumps him into the wall. A professor witnesses this, but does nothing. Over the next month, the harassment worsens. The student goes to his dean after missing several lectures out of fear. The college interviews one, but not all, of the harassers, does nothing more, and never follows up with the student.

An elementary school student with intersex traits dresses in a gender neutral way, identifies as nonbinary, and uses they/them pronouns. The student's teacher laughs when other students ask if they are "a boy or a girl" and comments that there is "only one way to find out." The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks "you have to be able to laugh at yourself sometimes."

On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as "male." Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her "those are the district's policies."

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

What if a Student Experiences Discrimination in School?

If you have been treated unfairly or believe a student has been treated unfairly—for example, treated differently, denied an educational opportunity, harassed, bullied, or retaliated against—because of sexual orientation or gender identity, there are a number of actions you can take:

1. **Notify a teacher or school leader** (for example, a principal or student affairs staff) immediately. If you don't get the help you need, file a formal complaint with the school, school district, college, or university. Keep records of your complaint(s) and responses you receive.

2. **Write down the details** about what happened, where and when the incident happened, who was involved, and the names of any witnesses. Do this for every incident of discrimination, and keep copies of any related documents or other information.

3. If you are not proficient in English, you have the right to **ask the school to translate or interpret information** into a language you understand. If you have communication needs because of a disability, you have the right to receive accommodations or aids and services that provide you with effective communication.

4. Counseling and other mental health support can sometimes be helpful for a student who has been harassed or bullied. **Consider seeking mental health resources** if needed.

5. **Consider filing a complaint** with the Civil Rights Division of the U.S. Department of Justice at **civilrights.justice.gov** (available in several different languages), or with the Office for Civil Rights at the U.S. Department of Education at **www.ed.gov/ocr/complaintintro.html** (to file a complaint in English) or **www.ed.gov/ocr/docs/howto.html** (to file a complaint in multiple languages).

"All students should be able to learn in a safe environment, free from discrimination and harassment. The Civil Rights Division stands with LGBTQI+ students and will fight to protect their right to an education regardless of who they are or whom they love."

- Kristen Clarke, Assistant Attorney General for Civil Rights, Department of Justice

"The Department of Education strives to ensure that all students—including LGBTQI+ students—have access to supportive, inclusive school environments that allow them to learn and thrive in all aspects of their educational experience. Federal law prohibits discrimination based on sexual orientation and gender identity, and we are here to help schools, students, and families ensure that these protections are in full force."

- Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, Department of Education

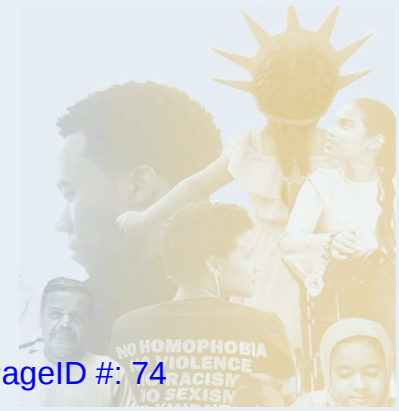

EXHIBIT D

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

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Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

Issue Date:

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General Topics:

Sex Discrimination, Sexual Orientation, Gender Identity, Sex Harassment, Retaliation

Summary:

This document briefly explains the Supreme Court's decision in Bostock v. Clayton County and the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues

Citation:

Title VII

Document Applicant:

Applicants for employment, employees, employers covered by Title VII; related representatives and practitioners

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No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*,**[1] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn1)** which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status.

This fact sheet briefly explains what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country. It also explains the Equal Employment Opportunity Commission's (EEOC or Commission) established

legal positions on LGBTQ+-related matters, as voted by the Commission.
Before *Bostock*, the Commission decided an array of matters involving employment discrimination based on sexual orientation and gender identity. For example, the EEOC has authority under Title VII to decide employment discrimination appeals by employees of the federal government and, in 2012, decided that discrimination against an applicant for federal employment based on gender identity is discrimination based on sex.**[2] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn2)** In 2015, in a federal sector matter involving a decision not to permanently hire an individual, the Commission decided that sexual orientation discrimination states a claim of sex discrimination under Title VII.**[3] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn3)** More recently, the Commission also applied the *Bostock* decision in the federal sector.**[4] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn4)**

This information is not new policy. This publication in itself does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law.

1. What happened in the *Bostock* case?

The *Bostock* case involved a trio of cases alleging discrimination against LGBTQ+ workers, which the Supreme Court decided together in a single opinion. Gerald Bostock, a child welfare services coordinator, was fired after his employer learned he had joined a gay softball league. Donald Zarda, a skydiving instructor, was fired after his employer learned he was gay. In a case filed by the EEOC, funeral director Aimee Stephens was fired after her employer learned that she was going to transition from male to female. In deciding these cases, the Supreme Court held that employment discrimination based on sexual orientation (Bostock and Zarda) or transgender status (Aimee Stephens) is discrimination "because of sex," and is therefore unlawful under Title VII.

The Supreme Court in *Bostock* recognized that to discriminate against a person based on sexual orientation or transgender status is to discriminate against that individual based on sex. Therefore, the Supreme Court held that Title VII makes it unlawful for a covered employer to take an employee's sexual orientation or

transgender status into account in making employment-related decisions. The Court explicitly reserved some issues for future cases.

2. Does Title VII protect all workers?

Title VII protects job applicants, current employees (including full-time, part-time, seasonal, and temporary employees), and former employees, if their employer has 15 or more employees. Employers with fewer than 15 total employees are not covered by Title VII.

Title VII protects employees regardless of citizenship or immigration status, in every state, the District of Columbia, and the United States territories.

Title VII generally does not apply to individuals who are found to be independent contractors. Figuring out whether someone is an employee or an independent contractor is a fact-specific inquiry. To find out more, see the EEOC's guidance on ***Threshold Issues*** **(https://www.eeoc.gov/laws/guidance/section-2-threshold-issues)** .

3. Does Title VII apply to all employers?

Title VII applies to private-sector employers with 15 or more employees, to state and local government employers with 15 or more employees, and to the federal government as an employer. Title VII also applies to unions and employment agencies.

Title VII does not apply to Tribal nations. However, private employers with 15 or more employees are covered by the statute, even if they operate on a Tribal reservation.

Title VII allows "religious organizations" and "religious educational institutions" (those organizations whose purpose and character are primarily religious) to hire and employ people who share their own religion (in other words, it is not unlawful religious discrimination for a qualifying employer to limit hiring in this way). Courts also apply a "ministerial exception" that bars certain employment discrimination claims by the employees of religious institutions because those employees perform vital religious duties at the core of the mission of the religious institution. Courts and the EEOC consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws. For more information on those defenses and other issues related to religious organizations

and discrimination based on religion, see **EEOC Compliance Manual, Section 12: Religious Discrimination (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)** .

Other defenses might also be available to employers depending on the facts of a particular case.

4. Does Title VII protect employees who work in places where state or local law does not prohibit employment discrimination based on sexual orientation or gender identity?

Yes. As a federal law, Title VII applies nationwide and protects employees from discrimination based on sexual orientation or gender identity regardless of state or local laws.

5. What kind of discriminatory employment actions does Title VII prohibit?

Title VII includes a broad range of protections. Among other things, under Title VII employers cannot discriminate against individuals based on sexual orientation or gender identity with respect to:

- hiring
- firing, furloughs, or reductions in force
- promotions
- demotions
- discipline
- training
- work assignments
- pay, overtime, or other compensation
- fringe benefits
- other terms, conditions, and privileges of employment.

Discrimination also includes severe or pervasive harassment. It is unlawful for an employer to create or tolerate such harassment based on sexual orientation or gender identity. Further, if an employee reports such harassment by a customer or client, the employer must take steps to stop the harassment and prevent it from

happening again. For more information, visit the EEOC's harassment page at **https://www.eeoc.gov/harassment (https://www.eeoc.gov/harassment)** .

6. Are non-LGBTQ+ job applicants and employees also protected against sexual orientation and gender identity discrimination?

Yes—employers are not allowed to discriminate against job applicants or employees because the applicants or employees are, for example, straight or cisgender (someone whose gender identity corresponds with the sex assigned at birth). Title VII prohibits harassment and other forms of discrimination based on sexual orientation or gender identity.

7. Could an employer's discriminatory action be justified by customer or client preferences?

No. As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)

8. Is an employer allowed to discriminate against an employee because the employer believes the employee acts or appears in ways that do not conform to stereotypes about the way men or women are expected to behave?

No. Whether or not an employer knows an employee's sexual orientation or gender identity, employers are not allowed to discriminate against an employee because that employee does not conform to a sex-based stereotype about feminine or masculine behavior. For example, employers are not allowed to discriminate against men whom they perceive to act or appear in stereotypically feminine ways, or against women whom they perceive to act or appear in stereotypically masculine ways.

9. May a covered employer require a transgender employee to dress in accordance with the employee's sex assigned at birth?

No. Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.**[5]**

(https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn5)

10. Does an employer have the right to have separate, sex-segregated bathrooms, locker rooms, or showers for men and women?

Yes. Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.**[6] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn6)** In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

11. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?

Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*,**[7] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_edn7)** the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

12. If a job applicant's or an employee's Title VII rights have been violated, what can the applicant or employee do?

For applicants and employees of private sector employers and state and local government employers, the individual can contact the EEOC for help in deciding what to do next. If the individual decides to file a charge of discrimination with the EEOC, the agency will conduct an investigation to determine if applicable Equal

Employment Opportunity (EEO) laws have been violated. Because an individual must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early.

For more information about filing a charge, visit **https://www.eeoc.gov/how-file-charge-employment-discrimination (https://www.eeoc.gov/how-file-charge-employment-discrimination)** . To begin the process of filing a charge of discrimination against a private company or a state or local government employer, go to the EEOC Online Public Portal at **https://publicportal.eeoc.gov (https://publicportal.eeoc.gov/)** or visit your local EEOC office (see **https://www.eeoc.gov/field-office (https://www.eeoc.gov/field-office)** for contact information). For general information, visit the EEOC website at **https://www.eeoc.gov (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity)** , or call 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces regulations that prohibit certain federal contractors from engaging in employment discrimination based on sexual orientation and gender identity, under Executive Order 11246, as amended. Executive Order 11246 applies to businesses with federal contracts and federally assisted construction contracts totaling more than $10,000. For more information, see **https://www.dol.gov/agencies/ofccp/faqs/lgbt (https://www.dol.gov/agencies/ofccp/faqs/lgbt)** and **https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2 (https://www.dol.gov/agencies/ofccp/jurisdictional-thresholds#Q2)** .

For applicants and employees of the federal government, the process for seeking legal redress for Title VII violations is different than the process that individuals in the private sector and state and local governments must use. Federal applicants and employees must first contact the EEO Office at the specific federal agency that they believe committed the unlawful employment discrimination. In general, federal applicants and employees must start this federal sector EEO process by contacting the relevant federal agency's EEO office to request EEO counseling. *Most federal agencies list contact information for their internal EEO offices on their external agency website.*

A federal applicant or employee generally must request EEO counseling from the appropriate agency **within 45 calendar days of the date of the incident(s) the employee or applicant believes to be discriminatory. Failure to adhere to this time limitation could result in an individual forfeiting legal rights and remedies that otherwise would be available. Nevertheless, if a federal applicant or employee alleges that they were subjected to a hostile work environment, and at least one incident occurred within 45 calendar days of contacting an EEO counselor, then incidents occurring outside of the 45-calendar day window may still be considered for investigation.**

Federal applicants and employees can also find out more information on the federal sector process for alleging employment discrimination on the EEOC's website **here (https://www.eeoc.gov/federal-sector/federal-employees-job-applicants)** .

Other processes may be available for federal applicants and employees seeking relief for sexual orientation or gender identity discrimination, including filing grievances under applicable collective bargaining agreements and/or filing a prohibited personnel practice complaint under the Civil Service Reform Act of 1978 with the **U.S. Office of Special Counsel (http://www.osc.gov/)** .

13. If I contact the EEOC or file a charge or complaint of discrimination, could I be fired?

It is unlawful for an employer to retaliate against, harass, or otherwise punish any employee for:

- opposing employment discrimination that the employee reasonably believed was unlawful;
- filing an EEOC charge or complaint;
- or participating in any investigation, hearing, or other proceeding connected to Title VII enforcement.

Retaliation is anything that would be reasonably likely to discourage workers from making or supporting a charge of discrimination. To learn more about retaliation, see **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)** .

[1] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref1) 590 U.S. ___, 140 S. Ct. 1731 (2020).

[2] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref2) In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), a Commission-voted decision involving an applicant for federal employment, the EEOC determined that transgender discrimination, including discrimination because an employee does not conform to gender norms or stereotypes, is sex discrimination in violation of Title VII based on a plain interpretation of the statutory language prohibiting discrimination because of sex. Specifically, the Commission explained that discrimination based on an employee's gender identity is sex discrimination "regardless of whether an employer discriminates against an employee [for expressing the employee's] gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person."

[3] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref3) In *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), a Commission-voted decision involving a failure to permanently hire an individual as an air traffic controller, the Commission concluded that a claim alleging discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

[4] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref4) *See Bart M. v. Dep't of the Interior*, EEOC Appeal No. 0120160543 (Jan. 14, 2021).

[5] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref5) *See Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

[6] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref6) *See Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC

decision involving a federal employee that Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity).

[7] (https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity#_ednref7) *Id.*

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***Pro Hac Vice Application Forthcoming**

UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

The State of Tennessee, et al.

Plaintiff(s)

v.

The United States Department of Education, et al.

Defendant(s)

Civil Action No. 21-cv-00308

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Commissioner and Chair Charlotte Burrows
Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew D. Cloutier
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

The State of Tennessee, et al.

Plaintiff(s)

v.

The United States Department of Education, et al.

Defendant(s)

Civil Action No. 21-cv-00308

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew D. Cloutier
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

The State of Tennessee, et al.

Plaintiff(s)

v.

The United States Department of Education, et al.

Defendant(s)

Civil Action No. 21-cv-00308

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew D. Cloutier
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

The State of Tennessee, et al.

Plaintiff(s)

v.

The United States Department of Education, et al.

Defendant(s)

Civil Action No. 21-cv-00308

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew D. Cloutier
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

The State of Tennessee, et al.

Plaintiff(s)

v.

The United States Department of Education, et al.

Defendant(s)

Civil Action No. 21-cv-00308

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The Honorable Kristen Clarke
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew D. Cloutier
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

The State of Tennessee, et al.

Plaintiff(s)

v.

The United States Department of Education, et al.

Defendant(s)

Civil Action No. 21-cv-00308

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew D. Cloutier
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

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Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

The State of Tennessee, et al.

Plaintiff(s)

v.

The United States Department of Education, et al.

Defendant(s)

Civil Action No. 21-cv-00308

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The Honorable Miguel Cardona
Secretary of the U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew D. Cloutier
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

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Signature of Clerk or Deputy Clerk