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Protections for LGBTQ+ Students and Athletes: Title IX in Light of Bostock v. Clayton County

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INTRODUCTION

LGBTQ+ individuals in the United States are increasingly under attack, as shown by the rise in anti-LGBTQ+ legislation, anti-LGBTQ+ rhetoric, as well as violence against the community.¹ One LGBTQ+ issue that consistently makes headlines and is divisive in current politics is transgender athletes competing on the team that aligns with their gender identity. As of June 2022, nineteen states have enacted laws that prohibit transgender athletes from competing on teams that correspond with their gender identity.² One concern that arises from this surge in anti-LGBTQ+ sentiment is LGBTQ+ youth, particularly students. How can they be protected from discrimination in a country that seems to be moving backwards instead of forwards? One answer is Title IX. After its enactment in 1972, Title IX had a revolutionary impact in changing the educational landscape for women in the United States, particularly in athletics due to its broad prohibition of sex discrimination in any education program or activity by any recipient of federal funds.³ Looking forward, Title IX can do the same for LGBTQ+ students that it has done for American women over the past fifty years.

The Supreme Court's 2020 holding in *Bostock v. Clayton County*, that Title VII's prohibition on the sex discrimination in the workplace includes discrimination based on sexual orientation or gender identity, applies to Title IX.⁴ *Bostock* held that in order to discriminate based on sexual orientation or gender identity, one necessarily discriminates against an individual in part because of sex.⁵ Although *Bostock* was about Title VII, this definition of what

¹ Am. Civ. Liberties Union, *Mapping Attacks on LGBTQ Rights in State Legislatures*, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> (last visited Apr. 2, 2023); Helen Santoro, *How Anti-LGBTQ+ Rhetoric Fuels Violence*, *Sci. Am.*, (Dec. 12, 2022), <https://www.scientificamerican.com/article/how-anti-lgbtq-rhetoric-fuels-violence/>.

² Eddie Pells, *Title IX's Next Battle: The Rights of Transgender Athletes*, *A.P. News*, (June 19, 2022), <https://apnews.com/article/title-ix-transgender-athletes-rights-9adfe49a8e07f66f07b5e2302bb94730>.

³ Barbara Winslow, *The Impact of Title IX*, *Gilder Lehrman Inst. Am. Hist.*, <https://www.gilderlehrman.org/history-resources/essays/impact-title-ix> (last visited Apr. 2, 2023).

⁴ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020).

⁵ *Id.* at 1740.

constitutes sex discrimination applies to Title IX because of the similarities between the language of the two statutes and the history of using interpretations of Title VII to inform the meaning and scope of Title IX.⁶ The Department of Education should pass its proposed regulations explicitly applying *Bostock* to Title IX in order to carry out Executive Orders passed by the Biden Administration as well as to effectuate the purposes of Title IX. Title IX also prohibits preventing transgender athletes from competing on the team that aligns with their gender identity because this is discrimination on the basis of gender identity, and thus is discrimination in part on the basis of sex in violation of Title IX. The Department of Education should pass additional regulations governing transgender student athletes because courts, students, and schools are already facing these questions with uncertainty and inconsistency. The regulations should expressly prohibit schools under Title IX from barring transgender athletes from competing on teams that correspond with their gender identity in order to align Title IX with *Bostock*, the Department’s existing proposed regulations, and to ensure that Title IX provides broad protections against discriminatory practices in education.

I. History and overview of Title IX

Title IX of the Education Amendments of 1972 provides that, “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.”⁷ The U.S. Department of Education is directed and authorized to effectuate Title IX by “issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute...”⁸ The amendment was introduced in the Senate in 1972 by Indiana Senator Birch Bayh to combat the effects of sex discrimination as “one of the great failings of the American educational system” that reaches into “all facets of

⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,394 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

⁷ 20 U.S.C. § 1681(a).

⁸ 20 U.S.C. § 1682.

education.”⁹ The Supreme Court found that Title IX has two objectives: first, “To avoid the use of federal resources to support discriminatory practices,” and second, “To provide individual citizens effective protection against those practices.”¹⁰

The Department of Education first passed Title IX regulations in 1975 to address sex discrimination in hiring, admissions, athletics, and other aspects of the federal fund recipient’s educational programs or activities.¹¹ The regulations are intended to “effectuate Title IX...which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.”¹² Title IX has since been interpreted to prohibit sexual harassment, to prohibit discrimination related to pregnancy, and to prohibit sex-based distinctions based on parental, family, or marital status.¹³ These interpretations are consistent with the Supreme Court’s long standing Title IX directive that, “If we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.”¹⁴

II. Title IX prohibits discrimination based on sexual orientation or gender identity based on the Supreme Court’s holding in *Bostock v. Clayton County*

In light of the Supreme Court’s 2020 decision, *Bostock v. Clayton County*, holding that discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 includes discrimination based on sexual orientation and gender identity, Title IX also prohibits discrimination on the basis of sexual orientation and gender identity.¹⁵ The reasoning and holding of *Bostock* as applied to Title VII applies with equal force to enforcement of Title IX. Title

⁹ 118 Cong. Rec. 5,803-12 (1972).

¹⁰ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691-93 (1979).

¹¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,393.

¹² 34 C.F.R. § 106.1 (2022).

¹³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

¹⁴ *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982).

¹⁵ *Bostock*, 140 S. Ct. at 1754.

IX's prohibition on discrimination on the basis of sex under any education program or activity receiving Federal financial assistance should be interpreted as aligning with *Bostock* because of the similarities between Title IX and Title VII and because of the history of the Supreme Court and lower federal courts' reliance on interpretations of Title VII to inform Title IX.¹⁶ The Department of Education should pass their proposed regulations explicitly expanding Title IX's protections to LGBTQ+ individuals because of *Bostock*'s application to Title IX, but also to comply with the Biden Administration's Executive Orders and to effectuate the purposes of Title IX.

A. *Bostock v. Clayton County*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against their employees because of an individual's sex.¹⁷ In 2020, the Supreme Court held that Title VII's prohibition of discrimination because of an individual employee's sex includes discrimination based on the individual's sexual orientation or gender identity because "sex plays a necessary and undisguisable role" in that decision to discriminate.¹⁸ The Court reasoned that for an employer to discriminate against an employee because they are transgender or homosexual, "The employer must intentionally discriminate against individual men and women in part because of sex," which has always been prohibited by Title VII.¹⁹ Title VII thus prohibits employers from discriminating against individual employees because of their sexual orientation or gender identity because "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."²⁰

¹⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

¹⁷ *Bostock*, 140 S. Ct. at 1740.

¹⁸ *Id.* at 1737.

¹⁹ *Id.* at 1743.

²⁰ *Id.* at 1747.

Title VII prohibits discrimination “because of” sex, which the Court interpreted to mean that for Title VII to apply, sex must be one but-for cause of a discriminatory decision.²¹ Title VII is triggered when sex is just one but-for cause of an employment decision.²² Discrimination need only be done “in part” because of an individual’s sex; sex does not need to be the only cause of a decision in order for Title VII liability to attach.²³ Thus, because an employer discriminates against an employee because of their sexual orientation or gender identity, an employer is still discriminating *in part* based on sex in violation of Title VII.²⁴ It is no defense to say that the employee’s sex was not the only cause and that the employer went a step further to consider sexual orientation or gender identity because the test under Title VII is whether an employee was discriminated against *in part* because of sex.²⁵ The plaintiff’s sex does not need to be the sole or primary cause of the employer’s discriminatory action and it is of “no significance here if another factor - such as the sex the plaintiff attracted to or presents as - might also be at work, or even play a more important role in the employer’s decision.”²⁶ It is enough that sex is one but-for cause; it does not need to be the only factor or even primary factor in the discriminatory decision.²⁷

The Court explained that in order to discriminate against an individual because of their sexual orientation or gender identity, an employer must first take into consideration that individual’s sex.²⁸ In order to discriminate against someone because of their sexual orientation, “The employer intentionally penalizes men for being attracted to men and women for being attracted to women.”²⁹ The employer first must take into account the employee’s sex to then

²¹ *Id.* at 1739.

²² *Id.*

²³ *Id.* at 1743.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1744.

²⁷ *Id.* at 1745.

²⁸ *Id.* at 1746.

²⁹ *Id.*

decide to discriminate against them based on their sexual orientation. Further, to discriminate against an individual because of their gender identity, “The employer unavoidably discriminates against persons with one sex identified at birth and another today.”³⁰ Again, the employer is first considering the employee’s sex in this decision. Expounding further on the but-for cause explanation, the Court reasoned that when an employer fires a male employee because they are attracted to other men, “The employer discriminates against him for traits or actions it tolerates in his female colleague.”³¹ In the same way, when an employer fires a transgender employee who was assigned male at birth and now identifies as female, “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.”³² These decisions are prohibited by Title VII because discrimination occurs where “an employer intentionally treats a person worse because of their sex - such as by firing the person for actions or attributes it would tolerate in an individual of another sex.”³³

The Court also explained that the focus of Title VII is on discrimination against individuals, not groups.³⁴ It is irrelevant that an employer may not have sexist policies or that the employer treats its female employees better on the whole because Title VII is concerned with the treatment of an individual.³⁵ Further, it is no defense that an employer treats both male and female employees in an equally discriminatory fashion or that the employer treats groups of employees the same because it only matters that an employer discriminates against an *individual* because of their sex.³⁶ Title VII protects both male and female employees equally.³⁷ The Court also found that Title VII should be construed broadly and generally, rejecting the

³⁰ *Id.*

³¹ *Id.* at 1741.

³² *Id.*

³³ *Id.* at 1740.

³⁴ *Id.*

³⁵ *Id.* at 1740-41.

³⁶ *Id.* at 1741.

³⁷ *Id.*

argument that Congress created an implied exception to Title VII by failing to expressly prohibit discrimination based on sexual orientation or gender identity.³⁸ The Court stated, “When Congress chooses not to include any exceptions to the broad rule, courts apply the broad rule.”³⁹ Title VII has consistently been interpreted broadly, as courts have found that discrimination includes sexual harassment and motherhood discrimination.⁴⁰ Because “homosexuality and transgender status are inextricably bound up with sex,” discrimination on these grounds requires an employer to intentionally discriminate in part because of sex, which is forbidden by Title VII.⁴¹

B. The holding and reasoning of *Bostock* apply with equal force to Title IX

The holding of *Bostock v. Clayton County* interpreting Title VII to prohibit discrimination based on sexual orientation and gender identity applies to Title IX, meaning that Title IX’s prohibition of discrimination on the basis of sex also applies to discrimination based on sexual orientation and gender identity. Although *Bostock*’s holding applies specifically to Title VII of the Civil Rights Act and does not reference Title IX, it applies to interpretations of Title IX because of the similarities between the statutes and because courts have consistently used interpretations of Title VII to inform interpretations of Title IX.⁴²

Title VII and Title IX are sufficiently similar to one another in statutory language for *Bostock*’s holding to apply to both statutes prohibiting sex discrimination.⁴³ Title VII prohibits discrimination “because of” sex and Title IX prohibits discrimination “on the basis of” sex, but the Supreme Court has used this language interchangeably so that these phrases can be

³⁸ *Id.* at 1747.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 1742.

⁴² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

⁴³ U.S. Dep’t. of Just., Civ. Rts. Div., *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>.

understood to have the same meaning.⁴⁴ In 1986 the Court in *Meritor Sav. Bank, FSB v. Vinson* explained that discrimination “because of sex” occurs where a supervisor sexually harasses their employee “on the basis of sex.”⁴⁵ In the language of *Bostock* itself the Court used these terms interchangeably, describing Title VII as “outlawing discrimination on the basis of sex.”⁴⁶ In addition to their similar prohibitions on sex discrimination, both Title IX and Title VII apply to discrimination against individuals, not groups.⁴⁷ *Bostock* emphasized that Title VII’s focus should be on discrimination against individuals, not on employers’ policies towards groups of people.⁴⁸ It is irrelevant for an employer to treat women as a group more favorably or to discriminate against males and females equally because Title VII is violated so long as an individual is discriminated against because of their sex.⁴⁹ Title IX is analogous to Title VII in its protections for individuals because it forbids “any person” from being discriminated against on the basis of sex.⁵⁰ The Supreme Court in *Cannon* stated that in enacting Title IX “Congress...wanted to provide individual citizens effective protection.”⁵¹

Title VII and Title IX are also similar in that neither one makes exceptions for discrimination based on an individual’s sexual orientation or gender identity.⁵² The Supreme Court emphasized this in *Bostock* as the reasoning why Title VII should be applied broadly.⁵³ The Court explained that where Congress does not create exceptions, the Court should not impute any just because Congress did not mention sexual orientation or gender identity.⁵⁴ Title

⁴⁴ *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 140 S. Ct. at 1740.

⁴⁹ *Id.*

⁵⁰ U.S. Dep’t. of Just., Civ. Rts. Div., *supra* note 43, at 7.

⁵¹ 441 U.S. at 704.

⁵² 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, 32,638 (June 22, 2021) (to be codified at 34 C.F.R. pt. 1).

⁵³ 140 S. Ct. at 1747.

⁵⁴ *Id.*

IX is similar because it also does not contain exceptions for sexual orientation and gender identity and is meant to be interpreted broadly.⁵⁵ In 1982 the Supreme Court promulgated this broad interpretation of Title IX when it said, “If we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.”⁵⁶ Further, both statutes only require sex discrimination to be a but-for cause of the discriminatory decision.⁵⁷ *Bostock* stated that sex by itself need not be the only or even primary cause of an employer’s decision.⁵⁸ Title IX similarly employs only a but-for cause standard for determining liability.⁵⁹ Thus for Title IX, discrimination on the basis of sex alone is not the proper test; sex need only be just one but-for causal factor by a recipient of federal funding in education to trigger the protections of Title IX.

In addition to its statutory similarities, the holding of *Bostock* is applicable to Title IX because interpretations of Title VII have consistently been used by the Supreme Court and lower federal courts to guide their interpretations of Title IX.⁶⁰ Thus, to use the holding of *Bostock*, interpreting Title VII, to find that Title IX also protects individuals against discrimination based on sexual orientation or gender identity would not be a new development or require a radical stretch of statutory interpretation. In *Franklin v. Gwinnett Cnty. Pub. Sch.*, the Supreme Court used an interpretation of sexual harassment under a Title VII case to inform its definition of sexual harassment in the Title IX context.⁶¹ The Court held that same rule for what constituted sexual harassment by an employer in the workplace should apply for a teacher and student under Title IX.⁶² In the same way the Court in *Gwinnett* used the interpretation of what constituted sexual harassment under Title VII to be the controlling rule in a Title IX case, the

⁵⁵ 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. at 32,638.

⁵⁶ *N. Haven Bd.*, 456 U.S. at 521.

⁵⁷ *Bostock*, 140 S. Ct. at 1745; *Adams v. Sch. Bd.*, 968 F.3d 1286,1305 (11th Cir. 2020).

⁵⁸ 140 S. Ct. at 1745.

⁵⁹ *Adams*, 968 F.3d at 1305.

⁶⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

⁶¹ *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

⁶² *Id.*

interpretation of Title VII from *Bostock* that sex-based discrimination includes discrimination based on sexual orientation and gender identity should apply equally to Title IX.

The First Circuit held that a sexual harassment claim based on a hostile environment was actionable under Title IX because the Supreme Court previously held that this was also the case for Title VII.⁶³ The court reasoned that “there was no principled basis” for construing Title VII more strictly than Title IX in terms of what claims are actionable.⁶⁴ Further, the First Circuit held that a hostile environment claim fell under Title IX even though it was not the “principal evil Congress was concerned with” when enacting the statute in the same way a hostile environment claim was not the “principal evil” of Title VII but was still actionable.⁶⁵ The reasoning of the court in *Frazier* is instructive in terms of *Bostock*’s applicability to Title IX. Just as the First Circuit held that a Title VII case was fully applicable to Title IX in terms of actionable sexual harassment claims, *Bostock* as interpreting Title VII is fully applicable to Title IX in that both prohibitions of sex-based discrimination include claims of discrimination based on sexual orientation and gender identity.⁶⁶ Just as there was “no principled basis” for construing Title IX more strictly than Title VII in *Frazier*, there is similarly no principled basis for construing Title IX more strictly when it comes to determining what constitutes sex-based discrimination, especially considering the Supreme Court’s mandate that it must be given “a sweep as broad as its language.”⁶⁷ It is irrelevant that discrimination based on sexual orientation or gender identity was not the primary concern of Title IX because a claim may still be actionable even though it was not the “principal evil Congress was concerned with” when enacting the statute.⁶⁸

Other circuits also use interpretations of Title VII to inform decisions made under Title IX. The Fourth Circuit in 2007 used a Title VII case to determine what kinds of comments made by

⁶³ *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 276 F.3d at 66; *N. Haven Bd.*, 456 U.S. at 521.

⁶⁸ 276 F.3d at 66.

a coach to a student constituted sexual harassment and stated, “We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim under Title IX.”⁶⁹ The Tenth Circuit in 2001 explained that courts generally use the same legal analyses when assessing Title VII and Title IX discrimination claims.⁷⁰ Quoting an earlier Tenth Circuit case, the court described Title VII as “the most appropriate analogue when defining Title IX’s substantive standards.”⁷¹ These cases demonstrate that courts have been using interpretations of Title VII to inform their decisions about the meaning and scope of Title IX for decades. Courts apply the same rule language of Title VII to evaluate claims under Title IX and use the same standards to decide what kinds of claims are actionable.⁷² Thus it is not revolutionary to apply *Bostock’s* holding to Title IX, to interpret it as also prohibiting discrimination based on sexual orientation and gender because discriminating based on either status necessarily entails discrimination based on sex.⁷³ Far from being revolutionary, it would be consistent to construe Title IX in line with *Bostock’s* interpretation of Title VII since Title VII is “the most appropriate analogue when defining Title IX’s substantive standards.”⁷⁴

In the months post *Bostock*, circuits already began interpreting Title IX to prohibit discrimination based on sexual orientation and gender identity based on the similarities between the two statutes and because of the history of using interpretations of Title VII to inform decisions under Title IX.⁷⁵ The Fourth Circuit and the Eleventh Circuit both held that Title IX protects transgender students from discrimination and used *Bostock* to support their holdings.⁷⁶ Both circuits held that under *Bostock*, schools were in violation of Title IX when they prohibited a

⁶⁹ *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

⁷⁰ *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001).

⁷¹ 245 F.3d at 1176 (quoting *Mabry v. State Bd. of Cmty. Coll.*, 813 F.2d 311, 316 (10th Cir. 1987)).

⁷² *Franklin*, 503 U.S. at 75; *Frazier*, 276 F.3d at 66.

⁷³ *Bostock*, 140 S. Ct. at 1747.

⁷⁴ *Mabry*, 813 F.2d at 316.

⁷⁵ U.S. Dep’t. of Just., Civ. Rts. Div., *supra* note 43, at 7.

⁷⁶ *Adams*, 968 F.3d at 1305; *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020).

student from using the bathroom aligning with their gender identity because this constituted discrimination based on gender identity, which is discrimination in part based on sex.⁷⁷

In *Grimm*, the Fourth Circuit held that prohibiting the plaintiff, who identified as male, from using the boys restroom was discrimination on the basis of sex in violation of Title IX.⁷⁸ The court applied *Bostock* to the case even though the claim fell under Title IX because Title VII “guides interpretation of claims under Title IX.”⁷⁹ The Fourth Circuit explained that the school’s policy of excluding the plaintiff from the boys restroom because he is transgender - assigned female at birth and currently identifies as male - was discrimination on the basis of sex because the school could not exclude him without first referencing the sex on his birth certificate.⁸⁰ Thus, the plaintiff’s sex was a but-for cause of his exclusion from the boys restroom even though it may not have been the primary motivating factor for the school’s discriminatory decision.⁸¹ Further, the court held that the policy excluding the plaintiff from the bathroom aligning with his gender identity was unlawfully discriminatory under Title IX because he was treated worse than students similarly situated to him, who could use the bathroom corresponding with their gender identity.⁸² Other boys could use the boys restroom, but he was forced to use the single-stall option or the girls restroom because he identified as transgender.⁸³

The Eleventh Circuit in *Adams* came to a similar conclusion to the Fourth Circuit in another school bathroom case by applying the reasoning of *Bostock* to Title IX.⁸⁴ The court held that “with the guidance of *Bostock*,” Title IX prohibits discrimination against a person because they are transgender because this constitutes discrimination based on sex.⁸⁵ The school thus

⁷⁷ 968 F.3d at 1305; 972 F.3d at 616.

⁷⁸ 972 F.3d at 616.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 618.

⁸³ *Id.*

⁸⁴ 968 F.3d at 1305.

⁸⁵ *Id.*

violated Title IX when they barred a student from using the boys restroom in accordance with that student's gender identity.⁸⁶ Writing that, "*Bostock* has great import for Mr. Adams's Title IX claim," the Eleventh Circuit used *Bostock* to hold that Title IX prohibits discrimination based on gender identity because both statutes apply to individuals, only require but-for causation, and require a broad reading even if the outcome was not Congress's original intent.⁸⁷ The court in *Adams* used the Supreme Court's argument about transgender employees from *Bostock* to compare to transgender students who are excluded from the restroom aligning with their gender identify.⁸⁸ Just as discrimination on the basis of sex occurs where an employer fires a transgender female employee but does not fire a cisgender female employee, discrimination on the basis of sex occurs in a school where cisgender boys can use the boys restroom but transgender boys cannot.⁸⁹ The school subjected the plaintiff to differing treatment because he identifies as transgender, which necessarily requires the school to first consider his sex assigned at birth.⁹⁰

The Fourth and the Eleventh Circuits demonstrate that courts are already applying *Bostock's* Title VII interpretation to Title IX to hold that Title IX also prohibits discrimination on the basis of sexual orientation and gender identity because this kind of discrimination is based in part on sex.⁹¹ These courts in practice show that *Bostock* is applicable to Title IX cases because of the statutory similarities and history of using Title VII as a guide for evaluating Title IX.⁹² Thus, Title IX's prohibition of discrimination on the basis of sex also prohibits schools from discriminating against individuals because of their sexual orientation or gender identity under *Bostock*. *Bostock* is equally applicable to Title IX, even though it was a Title VII case, because

⁸⁶ *Id.* at 1306.

⁸⁷ *Id.* at 1305.

⁸⁸ *Id.* at 1306.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 968 F.3d at 1305; 972 F.3d at 616.

⁹² 968 F.3d at 1305; 972 F.3d at 616.

both statutes prohibit sex-based discrimination, apply to individuals, have no exceptions for discrimination based on LGBTQ+ status, and because of the tradition of using interpretations of Title VII to inform the scope and meaning of Title IX. In *Adams*, the Eleventh Circuit held that *Bostock* applied in both the educational setting and the workplace setting even though education is traditionally within the purview of local officials.⁹³ It is no counterargument to say that *Bostock* should not apply to Title IX because of deference to local school officials because Congress already interfered with local control and “saw fit” to outlaw sex discrimination in schools, just as it did in the workplace.⁹⁴ *Bostock* paves the way for the idea that Title IX, in addition to Title VII, is protective of LGBTQ+ individuals.

C. The Department of Education should pass their proposed regulations from June 2022 broadening the definition of sexual discrimination to include discrimination based on sexual orientation and gender identity

On June 23, 2022, the Department of Education announced proposed rules that would explicitly say that Title IX prohibits discrimination based on sexual orientation and gender identity.⁹⁵ During the announcement of the proposed rules, Secretary of Education Miguel Cardona stated, “Our goal was to give full effect to the law’s reach and to deliver its promise to protect all students from sex-based harassment and discrimination.”⁹⁶ Cardona also explained that the Department issued the proposed rules in order to align with the Supreme Court’s holding in *Bostock* that it was impossible to discriminate against sexual orientation and gender identity without discriminating on the basis of sex.⁹⁷ The 2022 proposed regulations expressly adding discrimination against sexual orientation and gender identity to Title IX came after the

⁹³ *Adams*, 968 F.3d at 1305.

⁹⁴ *Id.*

⁹⁵ Lauren Camera, *New Title IX Rules Would Extend Protections to Discrimination Based on Sexual Orientation, Gender Identity*, U.S. News, (June 23, 2022), <https://www.usnews.com/news/education-news/articles/2022-06-23/new-title-ix-rules-would-extend-protections-to-discrimination-based-on-sexual-orientation-gender-identity>.

⁹⁶ Camera, *supra* note 96, at 14.

⁹⁷ *Id.*

Department issued a post-*Bostock* notice of interpretation that was blocked from enforcement by the Eastern District of Tennessee.⁹⁸ Even though *Bostock*'s holding is already applicable to Title IX because of the statutory similarities and history of using Title VII to inform Title IX, the Department of Education should pass these proposed regulations in order to make clear that Title IX prohibits discrimination based on sexual orientation and gender identity. In addition to providing clarity about *Bostock*'s applicability, the Department should pass the regulations to comply with Executive Orders from the Biden Administration, to promote consistency between the statutes, and to best effectuate the purposes of Title IX.

The Department should pass the regulations expressly expanding Title IX's protections to comply with post-*Bostock* Executive Orders passed by the Biden Administration. In an order from January 25, 2021, President Biden stated that it was his Administration's policy that "children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."⁹⁹ The Executive Order explains that, "Under *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972...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."¹⁰⁰ President Biden ordered the head of each agency to consider whether to revise or promulgate new regulations to fully effectuate statutes prohibiting sex discrimination and the stated policy of the Administration.¹⁰¹

President Biden passed an additional Executive Order on March 8, 2021, specifically referencing discrimination based on sexual orientation and gender identity in the context of

⁹⁸ Bianca Quilantan, *Federal Judge Blocks Education Department's Title IX Guidance that Protects Transgender Students*, Politico, (July 16, 2022), <https://www.politico.com/news/2022/07/16/education-departments-title-ix-guidance-transgender-students-00046209>.

⁹⁹ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7,023 (Jan. 25, 2021).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 7,024.

education.¹⁰² The order states that it is the policy of the Biden Administration that “all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.”¹⁰³ The order compels the Secretary of Education to review existing policies that may be inconsistent with the policy set out in the order and to review and issue new guidance that is consistent with current governing law.¹⁰⁴ The Department should pass the proposed rules because it is the policy of the Biden Administration that the education environment should be free from discrimination based on sexual orientation and gender identity and that a child should not have to worry about being denied access to the restroom or locker room of their gender identity.¹⁰⁵ The proposed rules uphold the Biden Administration’s policy as well as comply with the orders to promulgate new regulations that are in line with current governing law on sex discrimination, which is *Bostock*.¹⁰⁶

In addition to complying with the Biden Administration’s Executive Orders, passing the proposed regulations makes explicit that *Bostock* applies to Title IX. The rules provide clarity, consistency, and strength against any counterarguments that could arise about *Bostock*’s applicability. Instead of leaving it up to courts to evenly apply *Bostock* to Title IX, the proposed rules leave less room for questions and uncertainty regarding the scope of Title IX. The regulations promote consistency in regards to the meaning of sex discrimination, whether that discrimination occurs in the context of employment or in education. In light of the history of using interpretations of Title VII to inform Title IX interpretations, consistency between the statutes

¹⁰² Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. 13,803 (Mar. 11, 2021).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. at 7,023; Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. at 13,803.

¹⁰⁶ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. at 7,023; Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. at 13,803.

would provide more clarity for courts and for individuals bringing claims based on sex-based discrimination. Echoing the call from the Biden Administration’s Executive Orders for consistency amongst governing law, the proposed rules note that stakeholders have called for consistency between the definitions of sex-based harassment in Title VII and Title IX.¹⁰⁷ The rules seek to provide this consistency, so it would be most effective to also provide consistency and clarity for stakeholders of Title IX in terms of the scope of sex-based discrimination.¹⁰⁸ Standardizing *Bostock*’s holding that sex-based discrimination necessarily includes discrimination on the basis of sexual orientation and gender identity would only make things clearer for judges, education administrators, and especially, for individuals seeking protection or redress from discrimination.

Further, the Department of Education should pass the proposed regulations expressly stating Title IX’s protections for LGBTQ+ individuals to best effectuate the purposes of Title IX. Title IX is meant to be construed broadly and to provide individuals with protections against discriminatory practices that interfere with education.¹⁰⁹ Explicitly providing protections against discrimination based on sexual orientation and gender identity would align with Title IX’s broad construction and enhance protections against discriminatory practices in the educational setting. It is insignificant that Title IX was originally passed to promote women in education and to combat discrimination against women in education because of the Supreme Court’s directive that Title IX must be given “a sweep as broad as its language.”¹¹⁰ When explaining that although applying Title VII “reaches beyond the principal evil” of Congress’s original intention, the Supreme Court in *Bostock* stated that the fact that a statute has been applied in circumstances not expressly conceived of by Congress serves to demonstrate the “breadth of legislative

¹⁰⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,415.

¹⁰⁸ *Id.*

¹⁰⁹ *N. Haven Bd.*, 456 U.S. at 521; *Cannon*, 441 U.S. at 704.

¹¹⁰ *N. Haven Bd.*, 456 U.S. at 521.

command.”¹¹¹ Additionally, the two driving purposes behind Title IX were to avoid the use of federal funds to support discriminatory practices in education and to give individual citizens effective protection against discriminatory practices.¹¹² Thus, Title IX is intended to be applied broadly to best prevent discriminatory practices from occurring in the education setting.

Expressly stating that Title IX prohibits discrimination based on sexual orientation and gender identity aligns with the Supreme Court’s mandate that Title IX be “given a sweep as broad as its language.”¹¹³ The language of Title IX is broad as it states, “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.”¹¹⁴ *Bostock* explained that language prohibiting sex-based discrimination necessarily encompasses discrimination based on sexual orientation or gender identity.¹¹⁵ Thus, in order to give Title IX a sweep as broad as its language, the Department should pass the regulations expressly applying the protections to LGBTQ+ individuals.

Passing the regulations fulfills the two overarching purposes of Title IX: to avoid the use of federal funds to support discriminatory practices in education and to give individual citizens effective protection against discriminatory practices.¹¹⁶ The Supreme Court in *Cannon* held that Title IX’s purposes were to prevent and protect individuals against discrimination in education and said nothing about limiting that protection to a narrow definition of what constitutes sex-based discrimination or only fulfilling Title IX’s original legislative focus on women.¹¹⁷ Title IX’s purpose is to end federal support of discriminatory practices in education, and discriminatory

¹¹¹ 140 S. Ct. at 1749.

¹¹² *Cannon*, 441 U.S. at 704.

¹¹³ *N. Haven Bd.*, 456 U.S. at 521.

¹¹⁴ 20 U.S.C. § 1681(a).

¹¹⁵ 140 S. Ct. at 1744.

¹¹⁶ *Cannon*, 441 U.S. at 704.

¹¹⁷ 441 U.S. at 704; U.S. Dep’t. of Just., *Title IX Legal Manual: Synopsis and Purpose of Title IX, Legislative History, and Regulations* (Aug. 21, 2021), <https://www.justice.gov/crt/title-ix#I.%C2%A0%C2%A0%20Synopsis%20of%20Purpose%20of%20Title%20IX,%20Legislative%20History,%20and%20Regulations>.

practices encompass discrimination against individuals because of their sexual orientation and gender identity.¹¹⁸ If Title IX was meant to stop the use of federal funds from aiding discrimination in education, then that purpose is best accomplished by preventing federal funds from aiding LGBTQ+ based discrimination.¹¹⁹ Additionally, passing the regulations also fulfills Title IX's purpose of providing individuals with protection against discriminatory practices because the rules provide individuals with express claims for discrimination based on sexual orientation and gender identity.¹²⁰

The Department of Education should pass the proposed rules announced in June 2022 that explicitly apply *Bostock's* holding to Title IX.¹²¹ These rules would promote clarity and consistency for courts, schools, and individuals about the meaning of sex-based discrimination by expressly aligning Title IX with Title VII and leaving no room for misinterpretation. Further, the proposed rules effectuate the Supreme Court's directive about Title IX's enforcement by affording it a "sweep as broad as its language" because discrimination on the basis of sex necessarily includes sex-based discrimination.¹²² The rules also best ensure that Title IX fulfills its purpose of preventing federal funds from aiding discriminatory practices in education and affording individuals protection against such discrimination because the regulations allow for a more comprehensive approach to all forms of sex-based discrimination.¹²³ The regulations answer the Biden Administration's call that the education environment should be free from discrimination based on sexual orientation and gender identity.¹²⁴ It is clear that *Bostock's* holding applies to Title IX and the regulations only serve to reinforce the Supreme Court's

¹¹⁸ *Cannon*, 441 U.S. at 704.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,390.

¹²² *N. Haven Bd.*, 456 U.S. at 521; *Bostock*, 140 S. Ct. at 1744.

¹²³ *Cannon*, 441 U.S. at 704.

¹²⁴ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. at 7,023; Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. at 13,803.

holding that sex plays an “essential but-for role” in discrimination because of sexual orientation or gender identity.¹²⁵

III. Title IX prohibits banning transgender students from sports or preventing students from playing on a team that aligns with their gender identity

As the Department of Education announced its proposed regulations to bring Title IX in express alignment with *Bostock* and Title IX, Secretary Cardona explained that the Department would undergo a separate rule-making process for transgender student athletes, specifically to determine how schools should decide eligibility for transgender male and female athletes.¹²⁶ The reasoning behind reserving time for rules that are specifically applicable to transgender student athletes is because “standards are evolving in real time” and because of the rise in state legislation barring transgender female athletes from competing in sports in accordance with their gender identity.¹²⁷ Although the Department plans to wait to promulgate rules for schools and transgender athletes, even without further amendments, Title IX already prohibits banning transgender students from sports or preventing students from playing on a team that aligns with their gender identity because of *Bostock*’s application to Title IX. If the Department passes its proposed regulations, even considering their intent to create additional guidance for transgender athletes, these regulations as-is would prohibit schools from preventing transgender students from playing on a team that aligns with their gender identity because this constitutes discrimination on the basis of gender identity, which is expressly prohibited by the proposed rules. While it is not necessary for the Department to create these additional rules, the Biden Administration should pass additional regulations governing transgender student athletes to bring schools and courts in line with *Bostock*, the proposed regulations, the purposes of Title IX, and to avoid unnecessary confusion.

¹²⁵ *Bostock*, 140 S. Ct. at 1748.

¹²⁶ *Camera*, *supra* note 96, at 14.

¹²⁷ *Id.*

Applying the holding of *Bostock* to Title IX, which is proper due to the statutory similarities, means that it is a violation of the statute to prohibit transgender students from competing in sports or from competing with a team in accordance with their gender identity because this constitutes discrimination based on gender identity, which is in part discrimination on the basis of sex.¹²⁸ As the *Bostock* court explained, “By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.”¹²⁹ The same applies to transgender student athletes who are discriminated against because their sex assigned at birth is different from the one they identify with. Sex is thus a but-for cause of a school’s decision to prevent a transgender athlete from playing on the team that aligns with their gender identity. When an employer fires a transgender person because they were assigned male at birth and now identify as female but retains a cisgender female employee, “The employer intentionally penalizes a person identified male at birth for traits or actions it tolerates in an employee identified as female at birth.”¹³⁰ This argument applies with equal force to schools and transgender athletes. A school that prohibits a transgender female student athlete from playing on the women’s team but that allows a cisgender female student to play on the women’s team penalizes a person assigned male at birth for traits or actions it tolerates in a student assigned female at birth.

A discriminatory scenario involving a transgender student athlete is similar to a school that prevents a transgender student from using the bathroom that aligns with their gender identity, which courts have held is discriminatory in violation of Title IX.¹³¹ The Fourth Circuit held that a school policy precluding a transgender male student from using the boys restroom discriminated against him on the basis of sex in violation of Title IX.¹³² The court in *Grimm* held

¹²⁸ *Bostock*, 140 S. Ct. at 1746.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1741.

¹³¹ *Adams*, 968 F.3d at 1305; *Grimm*, 972 F.3d at 616.

¹³² *Grimm*, 972 F.3d at 616-17.

that the school's policy unlawfully discriminated against the student because discrimination in the context of Title IX "means treating that individual worse than others who are similarly situated."¹³³ The school treated the plaintiff worse than other students similarly situated because he was the only student who was not allowed to use the restroom that corresponded with his gender identity.¹³⁴ Other boys could use the boys restroom, but he was only allowed to use the girls restroom or a single-stall bathroom.¹³⁵ A transgender student athlete who is prohibited from playing on a team that corresponds to their gender identity is similar to the plaintiff in *Grimm* who was unlawfully discriminated against in violation of Title IX.¹³⁶ A transgender athlete who cannot play on the team that aligns with their gender identity is treated worse than other similarly situated students because every other student is allowed to play on the team that corresponds to their gender. A cisgender male can play on a men's sports team, but a transgender male cannot, meaning that the transgender male athlete is treated worse than other male-identifying athletes in the school in violation of Title IX.

The Eleventh Circuit also held that a transgender male student who was barred from using the boys restroom was discriminated against because of gender identity in violation of Title IX.¹³⁷ The court in *Adams* held that the plaintiff could show discrimination by the school because discrimination under Title IX means that a school "cannot subject any person to separate or different rules of behavior, sanctions, or other treatment on the basis of sex."¹³⁸ Because discrimination based on gender identity is discrimination at least in part on the basis of sex, the plaintiff in *Adams* was discriminated against in violation of Title IX since he was subjected to different rules, sanctions, and treatment because he was a transgender student.¹³⁹

¹³³ *Id.* at 618.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 617.

¹³⁷ *Adams*, 968 F.3d at 1307.

¹³⁸ *Id.* at 1306.

¹³⁹ *Id.* at 1307.

Other cisgender boys were permitted to use the boys restroom, but since he was transgender, he could not.¹⁴⁰ Cisgender students were also not subject to sanctions for using the restroom that corresponded with their gender identity, but as a transgender student, the plaintiff was.¹⁴¹ Thus the school was in violation of Title IX because they subjected the plaintiff to different rules and treatment on the basis of sex since he could not use the boys restroom while other cisgender male students could.¹⁴² A transgender athlete unable to compete with the team of their gender identity would similarly be subject to different rules of behavior, sanctions, or treatment on the basis of sex because cisgender athletes can play with the team of their gender identity. Thus, schools that prohibit this would also be in violation of Title IX when they allow cisgender athletes to compete with the team of their gender identity but not transgender athletes.

Since *Bostock* is applicable to Title IX and courts have already been holding this in cases of discrimination against transgender students, it is violative of Title IX to discriminate against transgender *athletes* specifically because discrimination in “education program or activity” includes school athletics. The language of Title IX prohibits discrimination on the basis of sex under any education program or activity receiving Federal financial assistance.¹⁴³ Any counterargument that *Bostock’s* applicability to Title IX does not reach transgender student athletes is not persuasive because school athletics fall under the category of “any education program or activity receiving Federal financial assistance.”¹⁴⁴ In its definition of education program or activity, the Code of Federal Regulations specifies the inclusion of athletics.¹⁴⁵ The Title IX regulations state, “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be

¹⁴⁰ *Id.* at 1306.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 20 U.S.C. § 1681(a).

¹⁴⁴ *Id.*

¹⁴⁵ 34 C.F.R. § 106.41 (2022).

discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient.”¹⁴⁶ Thus, a school cannot exclude a transgender athlete from sports, treat a transgender athlete differently than a cisgender athlete by prohibiting them from playing on a team that aligns with their gender identity, or otherwise discriminate against a transgender student athlete because this is explicitly forbidden under Title IX’s current regulations.¹⁴⁷ Just as the Fourth and Eleventh Circuits held that transgender students barred from using the restroom in accordance with their gender identity were being treated differently than their cisgender counterparts, transgender athletes unable to play on the team in accordance with their gender identity are being treated differently on the basis of sex, which the regulations of Title IX specifically prohibit.¹⁴⁸

The proposed regulations strengthen these prohibitions on discriminating against transgender athletes even further. The regulations expressly incorporate the holding of *Bostock* into Title IX, explicitly prohibiting discrimination based on sexual orientation or gender identity.¹⁴⁹ Further, the proposed regulations also directly address athletics. The proposed rules state that a recipient’s education program or activity “would include all of its academic and other classes, extracurricular activities, athletics programs, and other aspects of the recipient’s education program or activity.”¹⁵⁰ Transgender student athletes would be expressly protected under the proposed regulations because Title IX by its terms would prohibit discrimination based on gender identity and this prohibition would apply to athletics programs. Even though the Department of Education is waiting to promulgate additional regulations to govern transgender students in sports, in the meantime, transgender student athletes are protected from being denied the ability to play with the team that corresponds with their gender identity expressly

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Adams*, 968 F.3d at 1305; *Grimm*, 972 F.3d at 616; 34 C.F.R. § 106.41 (2022).

¹⁴⁹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

¹⁵⁰ *Id.* at 41,401.

under the proposed rules and outside of the new regulations because of *Bostock*'s applicability to Title IX.

While it is not necessary because transgender student athletes are already protected, the Biden Administration should pass additional clarifying rules stating that schools would violate Title IX if they prevented transgender athletes from playing in sports or from competing with the team that aligns with their gender identity.¹⁵¹ This guidance should be passed in order to avoid any confusion about Title IX's applicability to transgender athletes and to best provide protections to transgender students. These rules would bring Title IX into direct alignment with *Bostock* and Title VII, promoting clarity for courts, schools, students, and individuals seeking protection. Passing these rules would also most comprehensively effectuate the broad purposes of Title IX to avoid using federal funds to support discriminatory practices and to provide individuals with protections against discrimination in education.¹⁵² Rules specifically protecting transgender student athletes from discrimination also would ensure that there is consistency with the Department's already existing proposed regulations applying *Bostock* to Title IX.¹⁵³

Federal courts are already being asked to decide questions of transgender student athletes' ability to play on teams in accordance with their gender identity under Title IX without clear guidance from the courts or executive branches. The lack of clarity about Title IX and its protections of transgender athletes is leading to inconsistent results and confusion for judges, schools, students, and their families. The Biden Administration should pass regulations holding that Title IX prohibits preventing transgender student athletes from playing on the team that aligns with their gender identity in order to provide clear and incontrovertible rules that uphold Title IX's "broad sweep" of protecting against discrimination in the educational context.¹⁵⁴ The

¹⁵¹ *Camera*, *supra* note 96, at 14.

¹⁵² *Cannon*, 441 U.S. at 704.

¹⁵³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

¹⁵⁴ *N. Haven Bd.*, 456 U.S. at 521; *Cannon*, 441 U.S. at 704.

Department of Education needs athlete-specific rules to avoid the problem of federal courts coming to different conclusions under *Bostock* and Title IX. Courts allowing bans on transgender students in sports cut against the very purposes of Title IX as described in *Cannon*, so the Department should step in as soon as possible to clarify that Title IX does protect transgender athletes.¹⁵⁵

Some current examples of the legal battles taking place over Title IX and transgender athlete bans are in the Second Circuit and Fourth Circuit. In the Second Circuit, the court dismissed a suit by four cisgender female athletes claiming that a Connecticut school's policy of allowing transgender athletes to play on the team aligning with their gender identity was violative of Title IX because it hurt the cisgender female athlete's ability to play.¹⁵⁶ The Second Circuit ruled in favor of the transgender athletes by dismissing the suit for lack of standing and because the schools did not have adequate notice that their policy violated Title IX.¹⁵⁷ The court invoked *Bostock* in holding that the school was not on notice that their transgender-inclusive policy violated Title IX and cited with approval cases which hold that prohibiting transgender athletes from playing on the team that aligns with their gender identity violates Title IX.¹⁵⁸ The Second Circuit stated, "Such authority nonetheless establishes that discrimination based on transgender status is generally prohibited under federal law."¹⁵⁹

In West Virginia, a District Court held that a law barring transgender female student athletes from competing on teams aligning with their gender identity was not in violation of Title IX.¹⁶⁰ The court held that the West Virginia law barring transgender female student athletes from playing on women's sports teams largely mirrored Title IX and was not in violation because it did

¹⁵⁵ *Cannon*, 441 U.S. at 704.

¹⁵⁶ *Soule v. Conn. Ass'n of Sch.*, 57 F.4th 43, 47 (2d Cir. 2022).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 56.

¹⁵⁹ *Id.*

¹⁶⁰ *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2023 U.S. Dist. LEXIS 1820, at *29 (S.D. W. Va. Jan. 5, 2023).

not ban transgender students from sports entirely.¹⁶¹ The court reasoned that transgender female students were still allowed to try out for the men's teams and that a transgender female is not similarly situated to a cisgender female because "transgender girls are biologically male."¹⁶² The court focuses solely on "biological sex" to hold that "biological males are not similarly situated to biological females for purposes of athletics."¹⁶³ On appeal, the Fourth Circuit granted the plaintiff's motion for an injunction pending appeal that blocked enforcement of West Virginia's law against her.¹⁶⁴ The District Court errs in only considering biological sex as opposed to also considering gender identity in its similarly situated analysis. The court held that transgender females were not similarly situated to cisgender females because of their sex assigned at birth, but this narrow analysis ignores the fact that transgender females and cisgender females are similarly situated in terms of their gender identity.¹⁶⁵ Cisgender females are allowed to play on the women's team in correspondence with their gender identity, but similarly situated transgender females are not, and are thus being discriminated against in part on the basis of sex, as informed by *Bostock*.¹⁶⁶

The Biden Administration must pass additional regulations stating that schools who prevent transgender athletes from playing on the team that corresponds with their gender identity are in violation of Title IX because this question is already in the federal courts, with judges coming up with different answers. The defendants in *B.P.J.* appealed to the U.S. Supreme Court to vacate the enjoinder of the exclusionary law, so this issue may be decided sooner than anticipated.¹⁶⁷ The Department of Education needs to step in to clarify immediately to avoid holdings such as the one in West Virginia ruling that cisgender females and

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Am. Civ. Liberties Union, *B.P.J. v. West Virginia State Board of Education*, <https://www.aclu.org/cases/bpj-v-west-virginia-state-board-education> (last visited Apr. 2, 2023).

¹⁶⁵ *B.P.J.*, 2023 U.S. Dist. LEXIS at *29; *Grimm*, 972 F.3d at 618.

¹⁶⁶ 140 S. Ct. at 1747.

¹⁶⁷ Am. Civ. Liberties Union, *supra* note 165, at 27.

transgender females were not similarly situated and thus the transgender students did not have recourse under Title IX.¹⁶⁸ There is an urgent need for clear regulations governing schools and transgender student athletes due to the confusion, lack of clarity, and disagreements over transgender athletes' ability to play with the team that aligns with their gender identity. The Biden Administration should act quickly and pass specific regulations for transgender student athletes that align with *Bostock*, the existing proposed rules, and with the purposes of Title IX.

CONCLUSION

Bostock v. Clayton County was monumental in its holding that Title VII's prohibition on discrimination because of sex includes discrimination based on sexual orientation and gender identity because it necessarily requires an employer to first make a discriminatory decision in part based on sex.¹⁶⁹ While it was a decision about Title VII, *Bostock* applies with equal force to Title IX, meaning that Title IX also prohibits discrimination based on sexual orientation and gender identity in the education context. *Bostock* applies to both because of their statutory similarities and the longstanding history of using interpretations of Title VII to inform Title IX.¹⁷⁰ The circuits have already begun applying *Bostock* to Title IX, holding that schools who prohibit transgender students from using the bathroom that aligns with their gender identity are in violation of Title IX.¹⁷¹ Thus, the Department of Education should pass their proposed regulations that explicitly incorporate *Bostock* into Title IX and prohibit schools receiving federal funds from discriminating on the basis of sexual orientation or gender identity.¹⁷² The proposed rules effectuate the policy of the Biden Administration to ensure that no LGBTQ+ student is

¹⁶⁸ *B.P.J.*, 2023 U.S. Dist. LEXIS at *29.

¹⁶⁹ 140 S. Ct. at 1747.

¹⁷⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

¹⁷¹ *Adams*, 968 F.3d at 1305; *Grimm*, 972 F.3d at 616.

¹⁷² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,394.

discriminated against as well as the purposes of Title IX to afford individuals protection against discriminatory practices in education.¹⁷³

Title IX also protects transgender students who want to compete on the sports team that aligns with their gender identity. The Department of Education under the Biden Administration should quickly create and pass regulations to that effect to ensure that transgender student athletes are protected. Transgender athlete-specific regulations should be passed because they would provide clarity to courts who are currently facing these questions and are coming to inconsistent answers. These rules would bring Title IX fully in line with *Bostock* to promote consistency as well as uphold Title IX's broad promise of affording protection in the educational setting. It is becoming increasingly urgent for the Department to pass additional guidance on transgender athletes in schools, so the Biden Administration should pass its existing proposed regulations as well as additional rules setting out explicit protections for transgender student athletes.

¹⁷³ Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. at 7,023; Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. at 13,803; *Cannon*, 441 U.S. at 704.