"RECOGNIZE ME AS WHO I AM":[1] NAMES, PRONOUNS, AND THE INTERSECTION OF TITLE VII AND TITLE IX

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ABSTRACT

In 2020, the Supreme Court decided *Bostock v. Clayton County*, a case about Title VII of the Civil Rights Act of 1964. *Bostock* interpreted Title VII to prohibit employers from using an employee's sexual orientation or gender identity in adverse employment decisions. Many federal circuit courts and the U.S. Department of Education (DOE) have used *Bostock*'s reasoning to conclude that Title IX of the Educational Amendments of 1972 prohibits schools from treating a student adversely based on that student's sexual orientation or gender identity. However, many states and school districts have mandated the intentional use of the incorrect name and pronouns of their transgender and nonbinary students. And even in school districts with gender-affirming policies, some teachers have asserted religious objections to using students' names and pronouns that match their gender identity.

This Note argues that Congress or the Supreme Court must settle the current circuit split to decide that Title IX, consistent with *Bostock*, prohibits discrimination based on gender identity. This will protect students who are transgender or nonbinary from being subjected to classroom environments where their teachers intentionally use incorrect names and pronouns. This Note further argues that this protection is especially important when public school teachers request that the school give them a religious accommodation that excuses them from using their transgender and nonbinary students' name and pronouns.

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INTRODUCTION

> I wouldn't describe it so much as an interpretation. It was just very, very clear at the meetings to see how much emotional harm was being caused towards Sam and Aidyn. It was clear for everyone at the meetings just to see how much of an impact [misgendering] was having on them. . . . [I]t was so clearly visible that I don't feel like there was anything necessarily to interpret.[2]

> "Within the public school setting, eradicating discrimination and harassment ensures that public school systems foster environments conducive to such individual self-realization."[3]

The power to name is an exercise of dominance, wielded throughout history as a homogenizing force.[4] The current target who those in power insist on naming—often motivated politically to do so—are some of the most precious and vulnerable among us: our transgender and nonbinary children.[5]

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2. *Id.* at *4 (quoting a school administrator discussing the negative impact transgender students felt when their orchestra teacher refused to call them by their names and pronouns).

3. Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 769 (Va. 2023).

4. Sik Hung Ng & Fei Deng, *Language and Power*, OXFORD RSCH. ENCYCLOPEDIA, COMMC'N 1, 8–9, 15 (2017), https://doi.org/10.1093/acrefore/9780190228613.013.436.

5. As of this writing, President Trump has issued several executive orders restricting people who are transgender and nonbinary from participating and being recognized in everyday American life. Among those executive orders are those that prohibit minors from receiving gender-affirming medical care, prohibiting discussion of gender identity in schools, mandating that the federal government only recognize two sexes that are defined by biological classification, and prohibiting people who are transgender from military service. *See, e.g.*, Exec. Order No. 14187, 90 Fed. Reg. 8771 (Jan.

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Gender identity is one's personal sense of being a "girl" or a "boy."[6] When that gender identity matches the biological sex doctors assigned a person at birth, that person is called "cisgender."[7] Some people have a gender identity that does not fit clearly within the categories of "girl" or "boy."[8] Transgender people are those whose gender identity does not match the biological sex doctors assigned them at birth.[9] Some people may also call themselves nonbinary when their gender identity does not fit neatly within the categories of "boy" or "girl."[10]

Transgender children make up only 1.4% of the United States population,[11] yet state legislatures and the federal government are treating this group as an existential threat to parental rights, sports, and religious liberty.[12] Throughout the last few years, politicians and state legislatures have enacted laws barring transgender student athletes from playing on sports teams that match their gender identities, restricting the use of bathrooms to that which aligns with a student's sex identified at birth, prohibiting instruction on LGBTQIA+ identities, banning gender-affirming medical care, and limiting the use of students' names and pronouns to those assigned on a student's birth certificate.[13]

Not only have states enacted laws barring transgender and nonbinary identities from educational settings but teachers have also instigated litigation against school districts that do have gender-affirming policies. These teachers claim using a transgender student's name and pronouns contradicts their religious beliefs.[14]

28, 2025) ("Protecting Children from Chemical and Surgical Mutilation"); Exec. Order No. 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025) ("Ending Radical Indoctrination in K-12 Schooling"); Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025) ("Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government"); Exec. Order No. 14183, 90 Fed. Reg. 8757 (Jan. 27, 2025) ("Prioritizing Military Excellence and Readiness").

6. *Transgender FAQ*, GLAAD, https://glaad.org/transgender/transfaq/ (last visited Nov. 15, 2024).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. JODY L. HERMAN, ANDREW R. FLORES, & KATHRYN K. O'NEILL, UCLA SCH. L.: WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 1 (2022), williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf.

12. *See 2024 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/ (last visited Oct. 28, 2024) (documenting that at the time of this writing, state legislatures proposed 662 anti-trans bills; 45 passed, and 125 are still active); *see also supra* note 5.

13. *Id.* (contrasting the number of anti-trans bills proposed and passed in 2023 (604 and 87, respectively) with the number proposed and passed in 2022 (174 and 26, respectively)).

14. *See, e.g.*, Meriwether v. Hartop, 992 F.3d 492, 511–12 (6th Cir. 2021) (finding for a professor on constitutional grounds when he refused to use students' pronouns); Ricard v. USD 475 Geary Cnty. Sch. Bd., No. 5:22-CV-04015-HLT-GEB, 2022 WL 1471372, at *9 (D. Kan. May 9, 2022) (finding a school district's pronoun policy burdened Kansas teacher's exercise of religious rights); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at *6 (Va. Aug. 30, 2021) (finding that a teacher may have First Amendment speech right to not follow school's policy related to transgender students; the case subsequently settled); Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 724 (Va. 2023) (holding that a teacher had a viable free exercise claim under the Virginia constitution after being fired for refusing to refer to a student by his pronouns).

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Title IX of the Educational Amendments of 1972 protects individuals in educational settings[15] that receive federal funding[16] from discrimination "on the basis of sex."[17] This Note asserts that repeated misgendering of primary and secondary transgender students can create a hostile educational environment, which is a form of sex-based discrimination under Title IX. Allowing a hostile environment can expose school districts to liability. Additionally, Title IX arguably preempts contrary state laws that require misgendering of transgender students. Another federal antidiscrimination law, Title VII of the Civil Rights Act of 1964, ensures that school districts do not discriminate against religious employees.[18] However, under Title VII, an employer does not need to accommodate religious requests that impose an undue hardship on the employer's business[19]—and exposure to Title IX liability could pose such an undue hardship to school districts. This means when primary and secondary school employees object to affirming the identities of transgender students on religious grounds, a school district could still put its students' well-being first.[20]

This Note proceeds in six parts. Part I identifies the effects that anti-transgender policies have on students, particularly as these policies pertain to transgender and nonbinary students' names and pronouns. Part II gives a brief statutory background on Titles VII and IX. Part III surveys how courts have historically interpreted Titles VII and IX in the context of sex discrimination and religion. Part IV analyzes two recent Title VII Supreme Court cases: *Bostock v. Clayton County*[21] and *Groff v. DeJoy*.[22] *Bostock* has shifted the legal landscape of sex discrimination, while *Groff* has shifted the legal landscape of religious accommodation. Finally, Part VI argues that the Supreme Court or Congress should determine that *Bostock*'s reasoning applies to Title IX. This would conclusively preempt the many state statutes that mandate intentional misgendering of students and

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15. 20 U.S.C. § 1681(c) (defining "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education").

16. *Id.* § 1681(a)(3) (exempting educational institutions controlled by religious organizations if Title IX's application would be inconsistent with the religious tenants of the organization).

17. *Id.* § 1681(a). As of this writing, the United States House of Representatives sent the Senate a bill that would amend Title IX itself to define sex as "based solely on a person's reproductive biology and genetics at birth." Protection of Women and Girls in Sports Act of 2025, H.R. 28, 119th Cong. (as received in the Senate, Jan. 15, 2025).

18. 42 U.S.C. § 2000e-2(a).

19. 29 C.F.R. § 1605.2(b) (2024).

20. The scope of this Note is cabined to religious accommodation under Title VII and will not explore constitutional objections to using a transgender student's name and pronouns, such as First Amendment Free Exercise or Free Speech assertions. As noted *supra* note 14, other cases have decided state and federal constitutional issues regarding the use of a transgender student's name and pronouns in a classroom. Contrasting the outcomes of these cases with the outcomes of Title VII religious accommodation cases should be the subject of another article. The author also recognizes that this is a rapidly changing area of law, and due to the time that passed between writing and publication, many developments related to federal law in this area occurred after the Note was completed. However, these recent developments only underscore the importance of this Note's argument that transgender and nonbinary youth need explicit legal protections codified by Congress or the Supreme Court.

21. 590 U.S. 644 (2020).

22. 600 U.S. 447 (2023).

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ensure that teachers' religious objections to using a transgender student's names and pronouns do not impermissibly harm students.

I. THE EFFECTS OF ANTITRANSGENDER POLICIES

The effects of antitransgender policies on children are catastrophic.[23] According to The Trevor Project, an LGBTQIA+ youth organization focused on suicide prevention and crisis intervention, LGBTQIA+ youth are four times more likely to attempt suicide than their peers, with one LGBTQIA+ student attempting suicide every forty-five seconds.[24] Transgender and nonbinary youth are two to three times more likely to suffer from severe anxiety and depression, and half of all transgender and nonbinary youth have seriously considered suicide just in the last year.[25] These statistics jump higher in transgender and nonbinary youth of color.[26] In addition, LGBTQIA+ youth are subject to high rates of bullying, harassment, physical violence, and homelessness.[27] This population also experiences high rates of school absenteeism, lower grade point averages, and lower graduation rates and postgraduation aspirations.[28]

School climate matters: where these students' schools and teachers support gender-inclusive and gender-affirming policies, students' rates of anxiety and depression and incidents of suicide attempts greatly decrease.[29] Overall well-being and academic engagement are much higher.[30] Names and pronouns are particularly important. Rates of depression and suicide decrease when transgender and nonbinary students' teachers and peers use their chosen names and respect their pronouns.[31] By contrast, intentional or repeated misgendering is acutely harmful.[32]

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23. Russell B. Toomey, Jenifer K. McGuire, Kristina R. Olson, Laura Baams, & Jessica N. Fish, *Gender-Affirming Policies Support Transgender and Gender Diverse Youth's Health*, SOC'Y FOR RSCH. CHILD DEV. (2022), https://www.srcd.org/research/gender-affirming-policies-support-transgender-and-gender-diverse-youths-health.

24. *Facts About Suicide Among LGBTQ+ Young People*, TREVOR PROJECT (Jan. 1, 2024) [hereinafter *Facts About Suicide*], https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/.

25. *2022 National Survey on LGBTQ Youth Mental Health*, TREVOR PROJECT (2022), https://www.thetrevorproject.org/survey-2022/#anti-transgender-legislation.

26. *Id.*

27. *Id.*; *see also* TREVOR PROJECT, HOMELESSNESS AND HOUSING INSTABILITY AMONG LGBTQ YOUTH 11–12 (2021) (discussing the higher rates of homelessness among LGBTQIA+ youth).

28. JOSEPH G. KOSCIW, CAITLIN M. CLARK, & LEESH MENARD, GLSEN, THE 2021 NATIONAL SCHOOL CLIMATE SURVEY 34–45 (2021), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf.

29. *Facts About Suicide*, *supra* note 24; Toomey, McGuire, Olson, Baams, & Fish, *supra* note 23.

30. *Facts About Suicide*, *supra* note 24; GLSEN RSCH. INST., IMPROVING SCHOOL CLIMATE FOR TRANSGENDER AND NONBINARY YOUTH 4, 6 (2021) [hereinafter GLSEN RSCH.], https://www.glsen.org/research/improving-school-climate-transgender-and-nonbinary-youth.

31. *Facts About Suicide*, *supra* note 24; GLSEN RSCH., *supra* note 30, at 4.

32. Brenda Álvarez, *Why Pronouns Matter*, NEA TODAY (Oct. 5, 2022), https://www.nea.org/nea-today/all-news-articles/why-pronouns-matter; *National Survey on LGBTQ Youth Mental Health 2021*, TREVOR PROJECT (2021) [hereinafter *National Survey*], https://www.thetrevorproject.org/survey-2021/?section=SupportingTransgenderNonbinaryYouth.

Misgendering is refusing to use the name and pronouns that align with a student's gender identity, and it can have significantly harmful effects on a student's ability to fully participate in the educational environment.[33] Misgendering denigrates a student's lived experience and identity, communicating disrespect and social subordination.[34] Failure to use the names and pronouns that align with a student's gender identity in the school setting can result in depression and suicidal thoughts and behavior among transgender and nonbinary youth.[35] Misgendering interferes with learning and can lead to decreased academic outcomes, even for students who are not themselves being misgendered; awareness of gender prejudice can negatively impact students' self-perception and feelings of belonging at school.[36] On the other hand, both students and parents emphasize that recognition of a student's identity by using their name and pronouns is significant to their inclusion in the social fabric of their learning environment.[37]

In August 2024, the U.S. Department of Education (DOE) put into effect amended Title IX regulations that, for the first time, interpret "on the basis of sex" to also prohibit "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[38] DOE's amended Title IX regulations acknowledge that intentional misgendering can significantly interfere with a student's learning.[39] Some federal circuits recognize the same; for example, the Third Circuit noted that "[w]hen transgender students face discrimination in schools, the risk to their well-being cannot be overstated—indeed, it can be life threatening."[40]

However, at least twenty-six states immediately challenged DOE's amended regulations, claiming that they exceed executive authority and contradict the text and purpose of Title IX, and a federal district court vacated the new regulations after finding them unconstitutional and in violation of the Administrative Procedure Act.[41] The Trump Administration has

33. *See Facts About Suicide*, *supra* note 24; GLSEN RSCH., *supra* note 30, at 5; Álvarez, *supra* note 32; *National Survey*, *supra* note 32.

34. Gabrielle Dohmen, *Academic Freedom and Misgendered Honorifics in the Classroom*, 89 U. CHI. L. REV. 1557, 1598 (2022).

35. *See Facts About Suicide*, *supra* note 24; GLSEN RSCH., *supra* note 30, at 2, 4; Álvarez, *supra* note 32; *National Survey*, *supra* note 32.

36. Dohmen, *supra* note 34, at 1597–98.

37. Kathleen Conn, *Teachers' Religious Resistance to Gender-Identity Naming: Accommodations vs. Undue Hardship Under Title VII*, 411 EDUC. L. REP. 1, 2 (2023).

38. 34 C.F.R. § 106.10 (2024).

39. *See id.* § 106.1; *see also* Doe *ex rel* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 523 (3d Cir. 2018) ("[W]hen transgender students are addressed with gender appropriate pronouns . . . those students" have a healthy psychological profile).

40. *Doe*, 897 F.3d at 529.

41. *See* Libby Stanford, *Which States Have Sued to Stop Biden's Title IX Rule?*, EDUC. WK. (July 8, 2024), https://www.edweek.org/policy-politics/which-states-have-sued-to-stop-bidens-title-ix-rule/2024/07 (showing Indiana, Ohio, Kentucky, West Virginia, Virginia, Tennessee, Alabama, South Carolina, Georgia, Florida, Mississippi, Louisiana, Arkansas, Missouri, Iowa, South Dakota, North Dakota, Montana, Idaho, Wyoming, Nebraska, Utah, Kansas, Oklahoma, Alaska, and Texas as

instructed the DOE Secretary to comply with the vacatur and issued an executive order prohibiting transgender women and girls from participating on school sports teams.[42]

Given the vitriol and the stakes, the Supreme Court or Congress must settle Title IX's interpretation so it is not at risk of changing every time a new administration amends the regulations or a lower court disagrees with the DOE's interpretation of the law. The Court or Congress should follow most federal circuit courts, which justify using Title IX to prohibit discrimination based on gender identity by comparing it with another federal antidiscrimination statute: Title VII of the Civil Rights Act of 1964.[43]

II. Statutory Background: Title VII and Title IX

A. Title VII and Sex Discrimination

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace.[44] In relevant part, Title VII makes it unlawful for covered employers "to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[45] It generally applies to labor unions, employment agencies, and businesses with fifteen or more employees.[46] It prohibits discrimination in almost every aspect of employment, including in recruitment, hiring, wages, discipline, and discharge.[47] Like Title IX, Title VII contains some exceptions; for example, it allows sex-based decisions in employment where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[48]

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII.[49] The EEOC's guidelines further define what constitutes prohibited discrimination in employment settings,[50] which includes "[t]he refusal to hire an individual based on stereotyped characterizations of the sexes."[51] The Supreme Court has also defined prohibited sex discrimination in the workplace, and an early landmark case, *Price Waterhouse v. Hopkins*,[52] extended the scope of discrimination based on sex to include

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states challenging the rule); *see also* Tennessee v. Cardona, No. 2:24-CV-072-DCR, 2025 WL 63795, at *6 (E.D. Ky. Jan. 9, 2025) (vacating the final rule in its entirety).

42. *Keeping Men Out of Women's Sports*, The White House (Feb. 5, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/keeping-men-out-of-womens-sports/.

43. *See, e.g.*, *Doe*, 897 F.3d at 534–35 ("Title VII cases are therefore instructive" when determining a cause of action brought under Title IX).

44. 42 U.S.C. § 2000e-2.

45. *Id.* § 2000e-2(a)(1).

46. *Id.* §§ 2000e-2, 2000e(b).

47. *See id.* § 2000e-2(a)(1).

48. *Id.* § 2000e-2(e).

49. *See id.* § 2000e-4(a); 29 C.F.R. §§ 1600–95 (2024).

50. 42 U.S.C. § 2000e-4(g); *see* 29 C.F.R. §§ 1600–95 (2024).

51. 29 C.F.R. § 1604.2(a)(1)(ii) (2024).

52. 490 U.S. 228 (1989).

"disparate treatment of men and women resulting from sex stereotypes."[53] The Court has also held that sex-based discrimination includes discriminating against individuals because of their sexual orientation or transgender status.[54]

The Supreme Court has interpreted Title VII to prohibit sex-based harassment if it is sufficiently severe or pervasive as to alter the conditions of the victim's employment, creating a hostile or abusive work environment.[55] The Court has also held same-sex sexual harassment likewise violates Title VII.[56] The EEOC has incorporated these holdings into its guidelines: "Harassment on the basis of sex is a violation of section 703 of [T]itle VII."[57]

The EEOC's Title VII guidelines specifically prohibit hostile environment harassment,[58] which is "such conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[59] When determining whether conduct meets this standard, the EEOC considers the totality of the circumstances and the record in its entirety.[60]

As an antidiscrimination statute, Title VII parallels the antidiscrimination statute that Congress passed eight years later: Title IX. As a result, courts routinely turn to Title VII when interpreting Title IX, even though they adhere to different remedial processes.[61] Importantly, the Supreme Court has interpreted sexual harassment consistently between the two statutes.[62]

B. Title IX and Sex Discrimination

Title IX of the Educational Amendments of 1972 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."[63] In 1979, the Supreme Court described Title IX's two objectives: first, to "avoid the use of federal resources to support discriminatory

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53. *Id.* at 251 (citation omitted).
54. Bostock v. Clayton Cnty., 590 U.S. 644, 650–52 (2020).
55. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) ("[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").
56. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).
57. 29 C.F.R. § 1604.11(a) (2024).
58. *Id.*
59. *Id.*
60. *Id.* § 1604.11(b).
61. *Title IX Legal Manual*: *Overview of Title IX: Interplay of Title IX with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, U.S. DEP'T OF JUST.: CIV. RTS. DIV., https://www.justice.gov/crt/title-ix (Sept. 14, 2023).
62. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (citing an earlier Title VII case about sexual harassment in a Title IX case about sexual harassment); *Title IX Legal Manual*, *supra* note 61.
63. 20 U.S.C. § 1681(a).

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practices," and second, to "provide individual citizens effective protection against those practices."[64] Title IX's language is broad, generally prohibiting any form of sex discrimination in all federally funded educational programs but still allowing some exceptions. For example, it permits educational institutions to maintain "separate living facilities for the different sexes."[65] DOE's regulations also authorize sex-separate bathrooms, locker rooms, and shower facilities.[66]

Congress modeled Title IX after Title VI of the Civil Rights Act of 1964,[67] which prohibits discrimination "on the ground of race, color, or national origin" in all programs receiving federal funds.[68] Congress designed Title IX in part to close the loopholes in Title VI, which did not prohibit discrimination based on sex.[69] The two statutes operate similarly, conditioning federal funding on a promise by the program to not discriminate.[70] As such, courts interpret the two statutes similarly.[71] Title IX also parallels the language of Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in programs that are federally funded; as such, Section 504 likewise provides analytical guidance for Title IX claims.[72]

Since its enactment in 1972, little has changed for Title IX statutorily.[73] In 1974, Congress amended Title IX to direct what is now the DOE to issue regulations implementing Title IX protections, including a provision stating that the regulations cover intercollegiate athletic activities.[74] In 1988, Congress enacted the Civil Rights Restoration Act of 1987 in response to the Supreme Court's decision in *Grove City College v. Bell*,[75] clarifying that Title IX subjects the entire institution receiving federal funding to its regulations, not just specific programs.[76] In 1994, Congress passed the Equity in Athletics Disclosure Act requiring that educational institutions that receive federal funding must publish gender equity information about their athletic programs.[77] Additionally, the DOE

64. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

65. 20 U.S.C. § 1686.

66. 34 C.F.R. § 106.33 (2024).

67. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

68. 42 U.S.C. § 2000d.

69. Sarah W. Keller, *Battle of the Sexes: Disagreement About the Definition of Sex in Title IX and the Need for Judicial Review*, 28 VA. J. SOC. POL'Y & L. 135, 143–44, 143 n.46 (2021) (citation omitted).

70. *Gebser*, 524 U.S. at 286.

71. Schmitt v. Kaiser Found. Health Plan of Wash., 965 F.3d 945, 953 (9th Cir. 2020).

72. *Id.* at 952–53.

73. Margaret C. Hershiser, Jackie N. Ryan, John P. Barrett, & Baylie I. Moravec, *The Unintended Consequences of Title IX*, 56 CREIGHTON L. REV. 319, 321–22 (2023).

74. *Title IX Legal Manual*, *supra* note 61.

75. 465 U.S. 555, 572 (1984) (narrowing the scope of Title IX by holding that it only applied to the specific programs receiving federal funding, not the entire institution).

76. *Title IX Legal Manual*, *supra* note 61 (describing that the 1988 amendment clarified the definition of "education program" to include the entire educational institution and does not limit Title IX's coverage to the exact purpose or nature of the federal funding).

77. *Title IX Timeline: 50 Years of Halting Progress Across U.S.*, ASSOCIATED PRESS (June 13, 2022, 3:08 PM), https://apnews.com/article/title-ix-timeline-5fc023ca41d7d8c2489de24a23413938.

promulgates regulations to interpret and enforce the statute.[78] Before agency regulations are enacted, they must go through an extensive notice and comment period.[79]

Title IX can be enforced in two ways: through a private cause of action against the school district for injunctive relief or damages[80] or through an administrative enforcement scheme which can threaten to refer a case to the Department of Justice to withhold federal funding for noncompliance.[81]

The U.S. Department of Education, Office for Civil Rights (OCR) is the administrative agency that enforces Title IX by evaluating, investigating, and resolving Title IX complaints and conducting proactive investigations.[82] OCR's Title IX enforcement covers a broad range of issues, including discriminatory discipline and school admissions, sexual violence, harassment, and unequal access to educational or athletic opportunities.[83]

As it is in Title VII, sex-based harassment is a form of sex discrimination under Title IX,[84] and its 2024 regulations enumerated three kinds: quid pro quo harassment, hostile environment harassment, and specific offenses harassment.[85]

Proof of hostile environment harassment requires: (1) the school must have actual knowledge of acts of harassment; (2) the harassment must be severe, pervasive, and objectively offensive; (3) the harassment effectively bars the victim's access to an educational benefit or opportunity; and (4) the school acted with deliberate indifference to the known acts of harassment.[86] The definition under Title IX for hostile environment sex-based harassment is similar to the definition under Title VII,[87] demonstrating how courts can look to cases analyzing Title VII hostile environment claims when deciding those brought under Title IX.

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78. *See* 34 C.F.R. § 106 (2024).

79. 5 U.S.C. § 553(c).

80. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (finding an implied cause of action against a school district where the district was deliberately indifferent to a staff member's discriminatory behavior); Davis *ex rel*. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633, 643 (1999) (holding that a private action may be brought under Title IX in cases of student-on-student harassment).

81. 20 U.S.C. § 1682.

82. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (Aug. 23, 2024).

83. *Frequently Asked Questions: Sex Discrimination*, U.S. DEP'T OF EDUC., https://www.ed.gov/laws-and-policy/civil-rights-laws/frequently-asked-questions-sex-discrimination (Nov. 15, 2024).

84. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992); *see also* 34 C.F.R. § 106.30 (2024).

85. 34 C.F.R. § 106.2 (2024) (defining quid pro quo harassment as conditioning an aid, benefit, or service of the education program on a person's participation in unwelcome sexual conduct and defining specific offenses harassment as sexual assault); *see also* 34 C.F.R. § 106.30 (2020) (enumerating the three kinds of sex-based harassment but not naming them as the 2024 regulations did).

86. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999); *see also* 34 C.F.R. § 106.30 (2020).

87. *See* 29 C.F.R. § 1604.11(a) (2024).

C. Title VII, Title IX, and Religion

Individuals may object to complying with Title IX and Title VII's respective prohibitions on sex-based discrimination because of their religious beliefs,[88] so it is useful to examine each statute's intersection with religion.

Title VII broadly prohibits discrimination in employment because of an individual's religion.[89] However, it does allow religious educational institutions to hire and employ employees of a particular religion.[90] While an individual's religious practice or belief can be defined by religious observance and practice,[91] Title VII's regulations also define religious practices or beliefs to include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[92]

When an employee notifies their employer of a need for religious accommodation, such as a request not to work on a religious holiday or a request to wear a beard for religious reasons, their employer must accommodate that employee if those religious beliefs are "sincerely held,"[93] "unless the employer demonstrates th[e] accommodation would result in undue hardship on the conduct of its business."[94] Once an employer provides a reasonable accommodation to the requesting employee, such as allowing shift swapping with another employee or allowing a beard but requiring that the beard not grow beyond a certain length for workplace safety purposes, the employer does not need to further demonstrate that the employee's preferred accommodation would have resulted in undue hardship.[95]

While Title VII explicitly prohibits discrimination because of both sex and religion in the workplace, Title IX only prohibits sex discrimination in educational institutions receiving federal funding.[96] This prohibition does not apply to religious schools if application of Title IX would be inconsistent with their religious tenets.[97] Title IX also does not restrict rights "that would otherwise be protected from government action by the

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88. *See* Cory D. Halliburton, *The Collision of Title VII and Religious Freedom—The Aftermath of* Bostock v. Clayton County *for Religious Organizations*, https://freemanlaw.com/the-righteous-stand-bold-like-a-lion-bostock-religious-organization-employers-and-title-vii/ (last visited Dec. 17, 2024).

89. 42 U.S.C. § 2000e-2(a)(2).

90. *Id.* § 2000e-2(e).

91. *Id.* § 2000e(j).

92. 29 C.F.R. § 1605.1 (2024).

93. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2021-3, SECTION 12: RELIGIOUS DISCRIMINATION (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref38.

94. 29 C.F.R. § 1605.2(b)(1) (2024).

95. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986).

96. 42 U.S.C. § 2000e-2(a)(2); 20 U.S.C. § 1681(a).

97. 20 U.S.C. § 1681(a)(3). For example, a religious school may require uniforms that conform to sex stereotypes, such as skirts for girls and ties for boys, if conforming to sex stereotypes is part of the religious school's sincerely held religious mission.

First Amendment of the U.S. Constitution."[98] Additionally, schools have a concurrent obligation to adhere to Title IX and other federal antidiscrimination laws, including Title VII.[99]

As a result of the obligation to adhere to both Title IX and Title VII, the two statutes can be complementary, or they can be at odds. For example, a teacher can file a complaint against their school for alleged sex discrimination under either statute.[100] A teacher can also claim they have a religious objection to adhering to Title IX, and a school would be obligated to comply with both Title IX and Title VII's prohibition of discrimination based on religion,[101] which is the topic of this Note.

III. Historical Interpretations of Title VII and Title IX

Because of the parallels between the statutes, it is useful to understand how courts historically have interpreted each. The first Section of this Part will describe how the Supreme Court interpreted the scope of sex discrimination under Title VII before it decided *Bostock* in 2020. The next Section will describe how federal district and circuit courts have historically relied on these Title VII interpretations to interpret the scope of sex discrimination under Title IX. The final Section in this Part will describe how the Supreme Court and lower federal courts interpreted religious discrimination under Title VII before the Court decided *Groff* in 2023, specifically as it relates to an employer's obligation to give religious employees reasonable accommodations. This Part will serve as a backdrop for the current legal debate around (1) whether Title IX prohibits discrimination based on gender identity and (2) whether Title VII requires schools to accommodate employees when they object on religious grounds to affirming the identity of transgender students.

A. Title VII and Sex Discrimination Before Bostock

Price Waterhouse and *Oncale v. Sundowner Offshore Services, Inc.*[102] are early Supreme Court cases that are foundational to understanding why Title VII's prohibition on sex-based discrimination necessarily protects transgender and nonbinary individuals.

Price Waterhouse involved Ann Hopkins, the only woman nominated for partnership at her local office, who was denied the promotion after she received several criticisms, including that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[103] The Court said that an employer was impermissibly relying on gendered stereotypes when it acted because of a belief that a woman cannot or must not be aggressive, placing women

98. 34 C.F.R. § 106.6(d)(1) (2024).
99. *Id.* § 106.6(a), (f).
100. *See Title IX Legal Manual*, *supra* note 61.
101. *See* 34 C.F.R. § 106.6(a), (f) (2024).
102. 523 U.S. 75 (1998).
103. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (citation omitted).

in an impossible position where they are "out of a job" if they act aggressively and "out of a job" if they do not act aggressively.[104] Title VII, the Court held, prohibits employers from relying on such sex stereotypes for employment decisions.[105]

Oncale involved a male employee, Oncale, who was part of an eight-man crew on an oil platform.[106] His crew included three other men who repeatedly and forcibly subjected Oncale to sex-related, humiliating actions; two of the three sexually assaulted Oncale, and the other threatened to rape him.[107] Oncale eventually quit, saying he "voluntarily left due to sexual harassment and verbal abuse."[108] The Court held that Title VII's prohibition on discrimination "because of . . . sex" includes same-sex harassment because Title VII's scope "must extend to sexual harassment of any kind that meets the statutory requirements."[109] The Court reasoned: "[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[110] It further emphasized that the severity of harassment must be judged from an objective perspective in the plaintiff's position, considering all the surrounding circumstances, including the expectations and relationships involved.[111] "Common sense, and an appropriate sensitivity to social context," the Court concluded, will enable courts and juries to determine whether "a reasonable person in the plaintiff's position would find [the conduct] severely hostile or abusive."[112]

After the Court decided *Price Waterhouse* in 1989 and *Oncale* in 1998, some lower federal courts began applying the Court's reasoning to claims that an employer impermissibly fired or harassed an employee for being transgender. In *Smith v. City of Salem*,[113] Jimmie Smith, a lieutenant in the Salem Fire Department for seven years, told her supervisor that she was coming out as a transgender woman and was undergoing medical treatment for her transition.[114] During this time, her coworkers made comments about her appearance and mannerisms and told her she was not acting "masculine enough."[115] Because she had come out as transgender, her supervisor and the city's executive body devised a plan to ensure Smith was either forced to resign or was terminated.[116] The Sixth Circuit reasoned:

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104. *Id.* at 250–51.
105. *Id.* at 251.
106. *Oncale*, 523 U.S. at 77.
107. *Id.*
108. *Id.* (quotations in original).
109. *Id.* at 79–80.
110. *Id.* at 80.
111. *Id.* at 81–82.
112. *Id.* at 82.
113. 378 F.3d 566 (6th Cir. 2004).
114. *Id.* at 568.
115. *Id.* (quotations in original).
116. *Id.*

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against [transgender women] because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[117]

It went on to hold: "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior . . . ."[118]

The underlying premise articulated by cases like *Price Waterhouse*, *Oncale*, and *Smith* is that Title VII, as an antidiscrimination statute, prohibits one from using another's sex as a basis for adverse treatment in employment settings.[119]

B. Title IX and Sex Discrimination Before Bostock

Just as in Title VII cases, courts have applied the prohibition against sex stereotyping from *Price Waterhouse* and *Smith* to Title IX claims alleging discrimination against transgender students, reasoning that transgender students, by definition, do not conform to sex-based stereotypes.[120] This Section provides an overview of some of these key decisions.

In *Dodds v. U.S. Department of Education*,[121] the Sixth Circuit concluded that a transgender student was entitled to access restrooms that aligned with her identified gender rather than her biological sex determined at birth.[122] This case involved an eleven-year-old transgender girl with disabilities who experienced severe distress—including multiple suicide attempts—when barred from using her Ohio school's girls' bathroom.[123] The court relied on *Smith* and other federal appellate decisions in its sister circuits to rule that different treatment based on a person's gender

117. *Id.* at 574.
118. *Id.* at 575.
119. Martin Katz, *Bostock and the Limits of Textualism: A Doctrinal Structuralist Approach*, 66 WM. & MARY L. REV (forthcoming 2025) (manuscript at 36), https://ssrn.com/abstract=4773633 (noting that discrimination based on gender identity cannot occur without first discriminating based on sex).
120. *See, e.g.*, Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (relying on *Smith*'s definition of gender nonconformity in a Title VII claim); Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1047–50 (7th Cir. 2017) (relying on *Price Waterhouse*'s interpretation of Title VII to interpret Title IX as including gender identity in its meaning of sex); Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 536 (3d Cir. 2018) (agreeing with the Eighth Circuit that being transgender in a women's bathroom did not create a hostile environment under Title VII).
121. 845 F.3d 217 (6th Cir. 2016).
122. *Id.* at 221–22.
123. *Id.*

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nonconforming behavior is sex stereotyping, which is impermissible discrimination based on sex under Title IX.[124]

In 2017, the Seventh Circuit ruled similarly in *Whitaker v. Kenosha Unified School District*.[125] There, a seventeen-year-old transgender boy brought suit against his Wisconsin high school for barring him from using the boys' bathroom, arguing that doing so violated Title IX.[126] The court relied on *Price Waterhouse* in determining that discrimination based on sex stereotyping was discrimination "on the basis of sex," and discriminating against a transgender student was impermissible sex stereotyping.[127] The court held that a policy requiring a student to use a bathroom that does not conform to their gender identity "punishes that individual for his or her gender nonconformance, which in turn, violates Title IX."[128] It further held that the school was still in violation when it provided a gender-neutral alternative because it subjected transgender students to different treatment than nontransgender students.[129]

The Third Circuit faced a slightly different issue in *Doe ex rel. Doe v. Boyertown Area School District*[130] in 2018. Unlike the former two cases, here, cisgender students claimed that their Pennsylvania school district violated Title IX for its policy allowing transgender students to use the locker rooms and bathrooms that align with their gender identities.[131] Like its sister circuits, the court looked to Title VII for guidance.[132] It determined that the policy did not discriminate based on sex: it allowed all students to use bathrooms and locker rooms that align with their gender identities.[133] While the court declined to decide whether discriminating against a transgender student violated Title IX, it noted the holding of *Whitaker* and acknowledged the school district's policy was proactive in avoiding similar Title IX claims.[134]

Throughout this litigation, the Obama and Trump Administrations took differing approaches to the meaning of Title IX's prohibition of discrimination "on the basis of sex." In 2016, at President Obama's direction, the Departments of Education and Justice published a "Dear Colleague Letter"[135] issuing guidance that Title IX and its implementing regulations

124. *Id.* at 221.
125. 858 F.3d 1034 (7th Cir. 2017).
126. *Id.* at 1038–39.
127. *Id.* at 1047–48.
128. *Id.* at 1049.
129. *Id.* at 1050.
130. 897 F.3d 518 (3d Cir. 2018).
131. *Id.* at 521.
132. *Id.* at 535.
133. *Id.*
134. *Id.* at 536.
135. *See* 5 U.S.C. § 553(b)(B) (allowing agencies to issue interpretations of existing laws without having to go through the notice-and-comment rulemaking process).

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prohibited discrimination based on gender identity.[136] A federal district court in Texas later issued a nationwide injunction on the guidance, concluding that the language "based on sex" in Title IX was not ambiguous and meant the "biological and anatomical differences between male and female students as determined at their birth."[137] A few months later, the Trump Administration's Departments of Education and Justice formally rescinded the Obama Administration's guidance, claiming that states and local school districts are better suited to establish educational policy.[138] The Trump Administration's Title IX interpretation remained in effect until President Biden took office in 2021, almost a year after the Court decided *Bostock*.[139]

C. Title VII and Religious Accommodation Before Groff

This Section briefly considers how courts have historically interpreted Title VII's prohibition on discrimination "because of . . . religion," and specifically how they have interpreted Title VII when an employee's religious accommodation poses an undue hardship on the employer. This historical backdrop is relevant to when Title IX liability may pose an undue hardship on a school district if one of its employees asserts a religious objection to using a transgender student's name and pronouns.

Before the 2023 Supreme Court case *Groff*, courts relied on the meaning of undue hardship articulated in the 1977 Supreme Court case *Trans World Airlines, Inc. v. Hardison*.[140] Under the *Hardison* standard, an employee's religious accommodation was an undue hardship on their employer if the employer was required to bear "more than a *de minimis* cost."[141] The Court envisioned economic cost as a component in the calculation of whether an accommodation posed an "undue hardship" to the business,[142] and it also recognized noneconomic costs, like violating a seniority system by denying the shift or job preferences of coworkers and depriving coworkers of their contractual rights.[143]

This Note focuses on schools, not businesses, so a determination of whether an employee's religious accommodation poses an undue hardship on the school must involve both economic and noneconomic costs of the

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136. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13, 2016), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (*rescinded*).

137. Texas v. United States, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016).

138. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf (*under review*, Apr. 30, 2021); *see also* REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016, at 35 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf (claiming that the Obama Administration's interpretation of Title IX is "illegal" and "dangerous").

139. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

140. 432 U.S. 63 (1977).

141. *Id.* at 84.

142. *Id.* at 84–85.

143. *Id.* at 81–82.

accommodation. In the for-profit business context, courts have determined that noneconomic costs include burdens on coworkers[144] and have held that an employee's accommodation poses an undue hardship on an employer when it causes the employee's coworkers severe emotional distress[145] or discriminates against fellow coworkers.[146]

In one illustrative Ninth Circuit case, *Peterson v. Hewlett-Packard Co.*,[147] Peterson objected to his employer's diversity campaign featuring, in relevant part, a poster in the office with a photograph of a fellow employee who was gay.[148] In response, Peterson, a devout Christian, posted two biblical scripture passages in his cubicle in typeface large enough to be read by a passersby.[149] These passages condemned homosexuality as "evil" and an "abomination."[150] After his supervisor asked him to remove the passages, Peterson explained over a series of meetings that he hoped his "gay and lesbian coworkers would read the passages, repent, and be saved."[151] He insisted he would not remove his passages unless his supervisors removed the diversity campaign poster, and he was ultimately fired for insubordination.[152]

In his Title VII action against Hewlett-Packard, Peterson claimed that his former employer failed to accommodate his religious beliefs.[153] The court found both of Peterson's proposed accommodations—allowing Peterson to keep the passages posted or taking down the poster promoting diversity—would have imposed undue hardships on Hewlett-Packard.[154] Regarding the proposed accommodation of allowing Peterson to keep the passages posted, the court held that "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against [the employee's] coworkers or deprive [their coworkers] of contractual or other statutory rights . . . nor [must it] accommodate an employee's desire to impose [their] religious beliefs upon [their] coworkers."[155] The court acknowledged that Title VII does not prohibit general employee discomfort, but recognized that it does prohibit actions that demean or degrade other coworkers.[156] Regarding the proposed

144. *Id.* at 80–81.
145. *See* Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339–41 (8th Cir. 1995) (finding that an employee's wearing of a pin with an image of an aborted fetus on it posed an undue hardship where her coworkers were greatly disturbed by the image).
146. Peterson v. Hewlett-Packard Co., 358 F.3d 599, 601, 606–07 (9th Cir. 2004).
147. 358 F.3d 599 (9th Cir. 2004).
148. *Id.* at 601.
149. *Id.* at 601–02.
150. *Id.*
151. *Id.* at 602.
152. *Id.*
153. *Id.* at 606–07.
154. *Id.* at 607.
155. *Id.*
156. *Id.* at 607–08.

accommodation of taking the poster down, the court said Hewlett-Packard had a right to promote diversity and encourage tolerance in the workplace.[157]

Other cases considered whether an accommodation contradicted the employer's mission to determine whether that accommodation posed a noneconomic undue hardship under the *Hardison* standard.[158] One of these cases is *Baz v. Walters*,[159] in which a federal agency, the Department of Veterans Affairs (VA), assigned a Christian chaplain to its medical center in Danville, Illinois, which served primarily psychiatric patients.[160] His role was to be a "passive listener and cautious counselor," not to evangelize or preach.[161] However, the chaplain used opportunities with patients to proselytize, which was against VA regulations, and interacted with the patients in otherwise inappropriate ways given their vulnerable position as psychiatric patients.[162] The court determined it was an undue hardship to accommodate the chaplain's use of theology because doing so was "antithetical" to the VA's established theory and practice.[163]

When courts applied the *Hardison* standard to educational settings specifically, they considered costs of an employee's religious accommodation where it involved regularly hiring a substitute teacher[164] and noneconomic costs such as overloading another teacher's class,[165] causing the school to violate an otherwise valid statute[166] or collective bargaining agreement,[167] disrupting the learning environment,[168] and harming students.[169] These noneconomic costs are analogous to those earlier recited in that courts that found compliance with Title VII did not require employers to impose increased burdens on third parties (such as coworkers or students) or to violate others' rights.

157. *Id.* at 608.

158. *See, e.g.*, Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 477 (7th Cir. 2001) (ruling that a religious accommodation could be restricted if the employer's legitimate interests are impaired).

159. 782 F.2d 701 (7th Cir. 1986).

160. *Id.* at 703.

161. *Id.* at 704.

162. *See id.* at 703.

163. *Id.* at 706–07.

164. Slocum v. Devezin, 948 F. Supp. 2d 661, 669–70 (E.D. La. 2013).

165. *Id.* at 669.

166. United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 891 (3d Cir. 1990).

167. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977); Antoine v. First Student, Inc., 713 F.3d 824, 840 (5th Cir. 2013).

168. *See* Niederhuber v. Camden Cnty. Vocational & Tech. Sch. Dist. Bd. of Ed., 495 F. Supp. 273, 280 (D.N.J. 1980) (recognizing that an accommodation that has a "substantial harmful effect on the educational program" may pose an undue hardship on a school); Wangsness v. Watertown Sch. Dist., 541 F. Supp. 332, 338 (D.S.D. 1982) (same).

169. Kane v. De Blasio, 623 F. Supp. 3d 339, 363 (S.D.N.Y. 2022) (finding that accommodating teachers by allowing them to remain unvaccinated against COVID-19 presented a risk to the vulnerable student population, posing an undue hardship).

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IV. THE CHANGING LEGAL LANDSCAPE: *BOSTOCK* AND *GROFF*

Bostock and *Groff* have changed the legal landscape pertaining to Title VII and Title IX claims of gender identity discrimination and Title VII claims of religious discrimination. This Part summarizes each of the cases and the impact each has had on claims of discrimination in schools.

A. Bostock

In *Bostock*, employers fired longtime employees after the employees revealed that they were gay or transgender.[170] Each employee brought suit under Title VII, alleging their employers fired them because of sex.[171] The issue presented to the Court was whether an employer violates Title VII by firing someone just for being homosexual or transgender.[172] The Court held that "[s]ex plays a necessary and undisguisable role in the decision [to fire a homosexual or transgender employee], exactly what Title VII forbids."[173]

Writing for the majority, Justice Gorsuch declined to determine a legal meaning of "sex," saying, "The question isn't just what 'sex' meant, but what Title VII says about it."[174] Unlike the sex stereotyping that *Price Waterhouse* said Title VII prohibits, here, the Court reasoned that Title VII prohibits sex as a "but for" cause of the employer firing the employee.[175] A "but for" cause, the Court explained, means that a specific outcome would not have happened "but for" the employee's sex.[176] Using this test, the Court concluded that discrimination based on sexual orientation or transgender status is necessarily discrimination "because of sex."[177] The Court stated: "Just as sex is necessarily a but for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decision making."[178] According to some legal scholars, another way to understand this is that in order for an employer to discriminate against an individual based on sexual orientation or being transgender, they must first determine the biological sex of the employee, which is forbidden disparate treatment under Title VII.[179]

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170. Bostock v. Clayton Cnty., 590 U.S. 644, 650–53 (2020) (describing each of the separate cases consolidated in this decision).

171. *Id.* at 654; *see also* 42 U.S.C. § 2000e-2(a)–(b) (prohibiting employment discrimination based on race, color, religion, sex, and national origin).

172. *Bostock*, 590 U.S. at 650–51.

173. *Id.* at 652.

174. *Id.* at 655–56 (proceeding on the assumption that "sex" refers only to biological distinctions between male and female for argument's sake).

175. *Id.* at 656.

176. *Id.*

177. *Id.* at 664–65.

178. *Id.* at 661 (first emphasis added).

179. Katz, *supra* note 119 (manuscript at i, 36) (noting that while the Court wrongly focuses on "ungrounded textualism," it nevertheless has reached the right result in finding that discrimination based on transgender status or sexual orientation is predicated by discrimination based on sex).

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The Court declined to extend the reasoning beyond cases involving an employer firing an employee; for example, it said it would not "pre-judge" questions involving statutes beyond Title VII that prohibit sex discrimination or those that allow sex-segregated facilities, such as Title IX.[180] Notwithstanding this disclaimer, lower courts have begun to battle over whether *Bostock* reasonably extends to other antidiscrimination statutes. When considering how this debate pertains to Title IX, circuit courts are split; most have relied on *Bostock* to decide Title IX prohibits discrimination against students based on gender identity, but some have vigorously disagreed.

Grimm v. Gloucester County School Board[181] first brought the so-called "bathroom debate" to the mainstream.[182] There, a transgender boy sued his Virginia high school for violating Title IX when it prohibited him from using a bathroom that did not align with his biological sex.[183] The Fourth Circuit relied on *Bostock* to analyze the boy's Title IX claim.[184] The court reasoned that "the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause of the discriminator's actions."[185] The court conceded that *Bostock* explicitly refrained from addressing questions around sex-segregated bathrooms, which Title IX's implementing regulations allow.[186] However, it concluded that Title IX's prohibition against sex discrimination is invoked where an individual is treated worse than others similarly situated, and forcing students to use either a single-stall or a bathroom consistent with their biological sex is treating that student worse than others similarly situated.[187] The court held that Title IX "resoundingly" protects students from such a policy.[188]

In 2023, the Seventh Circuit ruled on *A.C. by M.C. v. Metropolitan School District of Martinsville*,[189] also using *Bostock* in its evaluation of a Title IX claim of discrimination on the basis of gender identity.[190] Similar to *Grimm*, the facts involve three transgender boys who brought suit against their school district and principals for violating Title IX by

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180. *Bostock*, 590 U.S. at 681.
181. 972 F.3d 586 (4th Cir. 2020).
182. *See, e.g.*, Gavin Grimm, *I'm a Transgender Boy and I Should Be Able to Use the Bathroom in Peace*, TIME (Apr. 20, 2016, 2:52 PM), https://time.com/4301340/transgender-restroom-rights/; Deirdre Grimm, *My Transgender Son Is Graduating from High School. But His Fight Isn't Over*, WASH. POST (June 8, 2017, 7:55 PM), https://www.washingtonpost.com/opinions/my-transgender-son-is-graduating-from-high-school-but-his-fight-isnt-over/2017/06/08/4c068518-4a41-11e7-9669-250d0b15f83b_story.html.
183. *Grimm*, 972 F.3d at 593.
184. *Id.* at 616.
185. *Id.*
186. *Id.* at 618; 34 C.F.R. § 106.33 (2024) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for . . . the other sex.").
187. *Grimm*, 972 F.3d at 618.
188. *Id.* at 593.
189. 75 F.4th 760 (7th Cir. 2023).
190. *Id.* at 769.

prohibiting them from using the boys' bathroom at their schools.[191] The court analogized to *Price Waterhouse*, *Whitaker*, and *Bostock*.[192] It reasoned that *Bostock* strengthens *Whitaker*'s conclusion that discrimination against transgender students is a form of sex discrimination under Title IX, and it further concluded that while *Bostock* did not decide the issue of sex-segregated bathrooms, the court here had "no trouble concluding" that *Bostock*'s reasoning supports extending protection for transgender persons under Title IX just as it does for Title VII.[193]

However, not all federal courts have agreed with *Bostock*'s application to Title IX. For example, in *Neese v. Becerra*,[194] a federal district court in Texas declined to "export" *Bostock*'s reasoning to Title IX. It claimed that *Bostock* only applied to Title VII and that one cannot apply *Bostock*'s reasoning to what the Court in *Bostock* explicitly stated it was not prejudging (i.e., non-Title VII claims).[195] The district court further saw no analogy between Title IX's "on the basis of sex" and Title VII's "because of sex," claiming that the latter allows for the but-for causation test *Bostock* implemented, but the former cannot.[196] Reasoning that because the two statutes use different phrasing, the interpretation of one cannot be applied to the other; therefore, looking at Title IX as a whole, the district court concluded that it operates in binary terms of male and female—meaning biological sex—when it references "sex".[197] On appeal, the Fifth Circuit found the plaintiffs lacked Article III standing and instructed the district court to dismiss the case.[198]

The Eleventh Circuit also disagreed with *Bostock*'s extension to Title IX. On a rehearing en banc, it concluded in *Adams ex rel. Kasper v. School Board of St. Johns County*[199] that the Court's *Bostock* reasoning could not guide its analysis for the case's Title IX claim.[200] School officials gave plaintiff Adams, a transgender boy attending a Florida high school, the option of using either a sex-neutral single-stall bathroom or a girls' bathroom that aligned with his biological sex.[201] He brought suit, claiming that the district's policy prohibiting him from using the boys' bathroom was discrimination on the basis of sex, violating Title IX.[202]

The Eleventh Circuit concluded that Title IX does not protect transgender students, reasoning that *Bostock* did not resolve the issue

191. *Id.* at 764.
192. *Id.* at 767–69.
193. *Id.* at 769.
194. 640 F. Supp. 3d 668 (N.D. Tex. 2022).
195. *Id.* at 676.
196. *Id.* at 677, 680.
197. *Id.* at 680.
198. Neese v. Becerra, 123 F.4th 751, 752 (5th Cir. 2024).
199. 57 F.4th 791 (11th Cir. 2022) (en banc).
200. *Id.* at 808.
201. *Id.* at 798.
202. *Id.*

before them.[203] The court decided that a policy can lawfully separate and classify on the basis of biological sex without discriminating against transgender students.[204] It further concluded that the bathroom options provided to transgender students were equivalent to those provided to students of the same biological sex.[205] It declined to apply the prohibition against sex stereotyping from *Price Waterhouse*, saying that the bathroom policy separated bathrooms based on biological sex, and biological sex is not a stereotype.[206] It also dismissed any claims of disparate or different treatment of transgender students based on the school policy, saying it affected only .04% of the students in the district.[207]

The court also applied a textual analysis, looking to dictionaries for the ordinary meaning of "sex" at the time of Title IX's enactment and concluding the term is unambiguous and defined by an individual's biology and reproductive function.[208] It also looked to the statute and regulations to conclude that it could not use *Bostock*'s reasoning because Title IX, unlike Title VII, has express statutory and regulatory carve outs for segregating students based on sex,[209] which would be meaningless if they applied to transgender persons.[210] Thus, the court held that Title IX allows schools to enact and enforce policies prohibiting transgender students' access to the bathroom that aligns with their gender identity, both because Title IX only prohibits discrimination on the basis of "biological" sex and because its regulations allow schools to provide and enforce the use of facilities segregated by "biological" sex.[211]

While the Eleventh Circuit decision in *Adams* does not acknowledge the circuit split in Title IX's interpretation, the Seventh Circuit noted it in *A.C. by M.C.*[212] Contrasting the Fourth Circuit's decision in *Grimm* with the Eleventh Circuit's decision in *Adams*, the Seventh Circuit determined it alone could not resolve the split.[213] Congress and the Supreme Court must resolve the meaning of "on the basis of sex."

B. Groff

Three years after *Bostock*, the Court announced its decision in *Groff*.[214] The Court used this case as an opportunity to correct what it saw as a misinterpretation of *Hardison* by courts determining whether a

203. *Id.* at 808–09.
204. *Id.* at 809.
205. *Id.*
206. *See id.* at 809–10.
207. *Id.* at 810.
208. *Id.* at 812–13.
209. *Id.* at 811, 813.
210. *Id.* at 813.
211. *Id.* at 814–15.
212. 75 F.4th 760, 770–71 (7th Cir. 2023).
213. *Id.* at 771.
214. 600 U.S. 447 (2023).

religious employee's accommodation poses an undue hardship on the employer under Title VII.[215]

Gerald Groff, a Christian who worked for the United States Postal Service (USPS), held a religious belief that Sundays should be devoted to worship.[216] While he was not required to work on Sundays when he took the job, that changed after he transferred to a small regional USPS hub that had only seven employees.[217] Groff's Sunday assignments were redistributed to his coworkers, and USPS disciplined him for not working on Sundays.[218] Groff sued under Title VII, claiming USPS could have accommodated his religious practice without undue hardship.[219] The Supreme Court agreed, saying this case presented the opportunity to "explain the contours of *Hardison*."[220] The Court held that "showing more than a *de minimis* cost, as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII."[221] It determined "undue hardship . . . is substantial in the overall context of an employer's business . . . [a] burden, privation, or adversity [that] must rise to an 'excessive' or 'unjustifiable' level."[222] To determine whether an accommodation rises to this level, the test must take into account "all relevant factors," including the "particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."[223] The Court also pointed out that bias or hostility toward a religious practice or accommodation does not constitute undue hardship.[224]

Courts have decided only a few cases pertaining to schools using the *Groff* standard, and most of them related to teachers who requested a vaccination exemption when their school district required staff to be vaccinated. Courts considering religious accommodation cases have determined that a teacher's accommodation poses an undue hardship on a school when it poses a health and safety risk to students and staff,[225] when it would disrupt the teacher's ability to provide for the particular educational needs of their students,[226] when it would contravene the school's legitimate mission by imposing substantial harm on students,[227] and when

215. *Id.* at 469.
216. *Id.* at 454.
217. *Id.* at 454–55.
218. *Id.* at 455.
219. *Id.* at 456 (citation omitted).
220. *Id.*
221. *Id.* at 468 (citation omitted).
222. *Id.* at 468–69 (citation omitted).
223. *Id.* at 470–71 (citation omitted).
224. *Id.* at 472.
225. Beickert v. N.Y.C. Dep't of Educ., No. 22-CV-5265(DLI)(VMS), 2023 WL 6214236, at *5 (E.D.N.Y. Sept. 25, 2023) (finding that a teacher's religious objection to getting a COVID-19 vaccine could not be accommodated).
226. *Id.* at *6.
227. Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-CV-02462-JMS-KMB, 2024 WL 1885848, at *17, *20 (S.D. Ind. Apr. 30, 2024), *appeal filed*, No. 24-1942 (7th Cir. May 31, 2024). This case is discussed more in Part VI.

it would expose the school to liability by causing it to potentially violate the law.[228]

Bostock and *Groff* have set the stage for the latest political and legal debate related to transgender students: (1) whether Title IX prohibits discrimination based on gender identity, and (2) whether accommodating a school district employee when they object on religious grounds to affirming a transgender student's identity poses an undue hardship on that school district. The next Part argues that the answer to both of these questions is yes.

V. TITLE IX MUST PROHIBIT INTENTIONAL MISGENDERING

Based on Title IX's purpose, the Supreme Court's reasoning in *Bostock*, and the reasoning most federal circuit courts applied when considering other forms of gender identity discrimination under Title VII and Title IX, Congress or the Supreme Court should act to interpret Title IX consistently with *Bostock* so every new administration cannot issue contrary regulations and so lower federal courts cannot disagree with the DOE's interpretation of Title IX. This will protect students from discrimination that is legalized by state statute and will give students legal recourse when teachers' misgendering creates a hostile environment.

Adopting the meaning of Title IX is especially pressing in light of the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo*.[229] The Court overturned *Chevron v. Natural Resources Defense Council*[230] and forty years of precedent by holding that courts may not defer to an agency interpretation of a statute just because the statute's language is ambiguous.[231] Under *Loper Bright*, lower federal courts who find Title IX ambiguous must conduct their own statutory analysis rather than deferring to the DOE's interpretation. Given the ongoing circuit split regarding the interpretation of Title IX, the new *Loper Bright* rule will likely result in uncertainty and disparate applications of what should be the same federal rights regardless of judicial district.[232] It is the responsibility of Congress and the Supreme Court to ensure federal law applies equally across the nation.

A. Fulfilling Title IX's Purpose

Extending Title IX protections to students' gender identities fulfills the broad original purpose of the legislation: to provide for equal educational access for all students and to "avoid the use of federal resources to support discriminatory practices."[233] Senators Patsy Mink, Edith Green,

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228. *Id.* at *22.
229. 144 S. Ct. 2244 (2024).
230. 467 U.S. 837 (1984).
231. *Loper*, 144 S. Ct. at 2273.
232. Kathleen Conn, *Transgender Students' Use of School Bathrooms: Is the* Adams v. St. Johns County School Board *Decision an Omen of the Political Times?*, 408 EDUC. L. REP. 639, 662 (2023).
233. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

and Birch Bayh introduced Title IX on the Senate floor in 1972.[234] Title IX's purpose was to provide nationwide legal protection from "persistent, pernicious discrimination"[235] against women. Fifty years later, transgender and nonbinary students feel the brunt of this "persistent, pernicious discrimination," even if Congress was not considering gender identity discrimination when creating Title IX. As Justice Scalia wrote in *Oncale*, the case in which the Court held that same-sex harassment is prohibited discrimination based on sex under Title VII, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[236] Justice Gorsuch echoed this reasoning in *Bostock* when explaining why Title VII forbids an employer from firing someone for being gay or transgender: "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . [b]ut the limits of the drafters' imagination supply no reason to ignore the law's demands."[237] Today, the reasonably comparable evil is unequal educational access for transgender and nonbinary students because of their perceived nonconformance with their sex assigned at birth. Regardless of whether Senators Mink, Green, and Bayh originally envisioned Title IX protecting these students, as discussed below, the law demands that we do.

B. Bostock*'s Logical Extension to Title IX*

Not only does prohibiting discrimination based on gender identity fulfill Title IX's purpose of equal educational access for all students but *Bostock*'s reasoning also logically extends to Title IX's interpretation. According to *Bostock*, one cannot discriminate against a transgender employee without first determining their sex (the discrimination would not occur "but for" their sex), a determination that would guide the adverse treatment, which is forbidden disparate treatment under Title VII.[238] The circuits lean heavily in favor of using this reasoning in Title IX cases.[239]

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234. *See* Noelani Kirschner, *Title IX: Protecting Equality in the U.S. for 50 Years*, SHARE AM. (June 21, 2022), https://share.america.gov/title-ix-protecting-equality-in-the-us-for-50-years/.

235. *Title IX: Building on 30 Years of Progress: Hearing Before the Comm. on Health, Educ., Lab., and Pensions*, 107th Cong. 2 (2002) (statement of Senator Kennedy).

236. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

237. Bostock v. Clayton Cnty., 590 U.S. 644, 653 (2020).

238. *Id.* at 660–61; Katz, *supra* note 119 (manuscript at 36).

239. *See* Grabowski v. Ariz. Bd. of Regents, 69 F.4th 1110, 1116 (9th Cir. 2023) ("In *Bostock v. Clayton County* . . . the Supreme Court brought sexual-orientation discrimination within Title VII's embrace. . . . We conclude that the same result applies to Title IX.") (internal citations omitted); A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 769 (7th Cir. 2023) ("Applying *Bostock*'s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination . . . . As *Bostock* instructs, we ask whether . . . plaintiffs are suffering negative consequences . . . for behavior that is being tolerated in [others] who are not transgender."); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) ("After the Supreme Court's recent decision in *Bostock v. Clayton County*, we have little difficulty holding that a bathroom policy precluding [plaintiff] from using the boys restrooms discriminated against him 'on the basis of sex.'") (citation omitted). *Contra* Adams *ex. rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 808

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Circuit courts that have used *Bostock* to interpret Title IX have explicitly said the parallel is meaningful,[240] and the Court should join the circuits by extending its own Title VII analysis to Title IX.[241]

Title VII and Title IX are both antidiscrimination statutes, and violations of antidiscrimination statutes occur only when discrimination is based on an enumerated characteristic.[242] As previously explained, to decide to discriminate against a transgender or nonbinary student, one must first determine their sex, which is forbidden under Title IX.[243] While Title IX prohibits discrimination "on the basis of sex" and Title VII prohibits it "because of . . . sex," this linguistic difference does not undermine their common purpose of prohibiting adverse decision-making by first determining an individual's sex.[244] Furthermore, the Court in *Bostock* uses the phrases "because of" and "on the basis of" interchangeably throughout the opinion, suggesting an interpretive consistency between the statutes.[245] To the extent that the case law interpreting Titles VII and IX depart, that is because of different remedial procedural requirements, not differences in what constitutes sex discrimination.[246]

The Eleventh Circuit's decision in *Adams*, an outlier among the circuits, held that a bathroom policy that classifies students on the basis of biological sex does not facially discriminate on the basis of transgender identity because the bathroom options for transgender students are the same as they are for students of the same biological sex.[247] However, this belies the logic of *Bostock*: cisgender students can use a bathroom matching both their sex assigned at birth and gender identity, while transgender students cannot. The only reason they cannot is because of their sex assigned at birth, which is discrimination on the basis of sex, prohibited by

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(11th Cir. 2022) ("*Bostock* involved employment discrimination under Title VII . . . . [a]nd the instant appeal is about schools and children—and the school is not the workplace. . . . *Bostock* does not resolve the issue before us.").

240. *See Grimm*, 972 F.3d at 616 ("Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX." (citation omitted)); *A.C. by M.C.*, 75 F.4th at 769 ("Both Title VII, at issue in *Bostock*, and Title IX, at issue here . . . involve sex stereotypes and less favorable treatment because of the disfavored person's sex. *Bostock* thus provides useful guidance here, even though the particular application of sex discrimination it addressed was different."); *Grabowski*, 69 F.4th at 1116 ("And '[w]e construe Title IX's protections consistently with those of Title VII' when considering a Title IX discrimination claim." (quoting Doe v. Snyder, 28 F.4th 103, 114 (9th Cir. 2022))).

241. Abbey Widick, *It Is Time to Move Forward . . . On the Basis of Sex: The Impact of* Bostock v. Clayton County *on the Interpretation of "Sex" Under Title IX*, 68 WASH. U. J.L. & POL'Y 303, 344 (2022) ("The Supreme Court's reliance on the plain meaning of sex discrimination, implicating the but-for causation test . . . is beneficial to LGBTQ students.").

242. Katz, *supra* note 119 (manuscript at 36).

243. *Id.*

244. *Contra* Neese v. Becerra, 640 F. Supp. 3d 668, 675, 677, 679–80 (N.D. Tex. 2022) (arguing that because Title IX is phrased differently than Title VII, the latter is not analogous to the former).

245. Grabowski v. Ariz. Bd. of Regents, 69 F.4th 1110, 1116 (9th Cir. 2023); *see also* Bostock v. Clayton Cnty., 590 U.S. 644, 650 (2020) ("[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.") (emphasis added).

246. Widick, *supra* note 241, at 351.

247. Adams *ex rel*. Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022).

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Title IX.[248] The Eleventh Circuit also makes the argument that Title IX has explicit statutory and regulatory carve outs for sex-segregated facilities, which precludes a comparison to Title VII.[249] Again, this misses the point: *Bostock*'s reasoning applies still to sex-segregated facilities, as illustrated by the EEOC's reliance on *Bostock* to prohibit employers from refusing to allow employees to use the bathroom that aligns with their gender identity.[250]

Furthermore, whether there are carve-outs for sex-segregated facilities does not bear on whether misgendering violates Title IX, because there is no carve-out for repeatedly calling someone by the wrong name and pronouns based on their perceived sex. Again, the EEOC, guided by *Bostock*, has already acknowledged that misgendering—which "may include repeated, deliberate use of the wrong name or gender pronouns, . . . shaming an employee for not acting or dressing in a way that reflects the sex the employee was assigned at birth . . . or other offensive comments or conduct related to gender identity"—has the potential to constitute sex-based harassment.[251] Courts have also extended *Bostock*'s reasoning to Title VII cases of intentional misgendering, finding that this conduct can create a hostile environment;[252] the next two cases illustrate the legal standard that must be met for these types of cases.

In *Doe v. Triangle Doughnuts, LLC*,[253] coworkers and supervisors of a transgender female employee regularly misgendered her, using a male name and male pronouns despite her requests for them to use her female name and female pronouns.[254] Because Doe's supervisors regularly misgendered her, her coworkers were encouraged to do so as well, and they also asked her inappropriate questions related to her body and sexuality.[255] After customers complained about being served by a transgender woman, Doe's supervisors assigned her to duties where she would not interact with customers and told her she could not use the women's bathroom because it made customers uncomfortable.[256] After a customer made threatening statements to Doe, her employer fired her.[257] She brought a Title VII

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248. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616–17 (4th Cir. 2020).

249. *Adams*, 57 F.4th at 811, 813.

250. U.S. Equal Emp. Opportunity Comm'n, NVTA-2021, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender#_edn6.

251. U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-2004-14, Sex Discrimination (2004), https://www.eeoc.gov/laws/guidance/sex-discrimination.

252. *See* Copeland v. Ga. Dep't of Corr., 97 F.4th 766, 780 (11th Cir. 2024) ("[E]ach day, when [the transgender employee] reported to work, his supervisors, subordinates, and peers publicly humiliated him because his gender identity differs from the sex he was assigned at birth. . . . Title VII does not countenance such behavior.").

253. 472 F. Supp. 3d 115 (E.D. Pa. 2020).

254. *Id.* at 122.

255. *Id.*

256. *Id.*

257. *Id.* at 123.

action, in part asserting hostile environment harassment.[258] Applying *Bostock*'s reasoning, the federal district court concluded that the facts that Doe asserted in her complaint met the legal standard for hostile environment harassment: the conduct to which Doe was subjected was severe or pervasive, it detrimentally affected the conditions of her employment, and the conduct would have similarly affected a reasonable person in her circumstances.[259]

However, some instances of misgendering do not rise to the level of hostile environment harassment, meaning neither Title VII nor Title IX applies. In *Teeter v. Loomis Armored US, LLC*,[260] Hayden Teeter, a transgender man, worked as an armored service technician.[261] He transitioned to male during his employment, alerted his supervisor, and alleged hearing his supervisor refer to him using feminine pronouns approximately ten times.[262] Teeter said no other coworkers said anything negative to him.[263] After being disciplined for missed time, he resigned and found a new job.[264] Teeter brought a Title VII action asserting hostile environment harassment, but the federal district court concluded his allegations were insufficient.[265] The court ruled that a handful of incidents of misgendering does not "approach the severity or frequency of harassment" required under Title VII.[266] The court stated, "Regrettably, some measure of incivility and callous mistreatment persists in modern workplaces."[267]

Courts' reliance on *Bostock* to determine when coworkers' or supervisors' misgendering of a transgender employee constitutes hostile environment harassment under Title VII can also be applied to determine when school employees' misgendering a transgender student meets this legal standard under Title IX.[268]

Courts can look to the reasoning underlying *Bostock*:[269] to refuse to use a transgender student's name and pronouns, a teacher must first determine a student's "biological" sex.[270] The teacher next determines which name and pronoun the student should use (in the teacher's opinion) based on the student's biological sex. When a school employee's resulting

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258. *Id.* at 127–28.
259. *Id.* at 129–30.
260. No. 7:20-CV-00079, 2021 WL 6200506 (E.D.N.C. Nov. 23, 2021).
261. *Id.* at *2.
262. *Id.* at *3.
263. *Id.*
264. *Id.* at *5–6.
265. *Id.* at *1, *11–12.
266. *Id.* at *13.
267. *Id.* at *11.
268. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (interpreting sexual harassment consistently between Title VII and Title IX).
269. *See id.*; *see also* cases cited *supra* note 240.
270. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (emphasizing that the antidiscrimination statute prohibits determining another's sex in order to then treat them adversely); *see also* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (explaining that the statute prohibits one from determining another is acting in nonconformity with their sex and then treating them adversely as a result, no matter the underlying motivation).

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conduct toward a student reaches a level beyond the conduct in *Teeter* and is instead similar to that in *Triangle Doughnut*, that employee creates a hostile environment. If a school knows about the hostile environment and fails to adequately remediate it, then the school violates Title IX.[271]

Oncale, *Smith*, *Triangle Doughnuts*, and *Teeter* each involved hostile environment harassment involving adults in workplace settings; when courts consider the totality of the circumstances in a Title IX claim, they should consider that the conduct is happening in a school to children.[272] As Part II discussed, transgender students are particularly vulnerable to misgendering, and such repeated conduct can significantly interfere with learning: for example, they might stop participating in class or avoid it altogether, their grades might drop, or they might suffer from depression or suicidality.[273]

The next two Sections discuss how Title IX, interpreted consistently with *Bostock*, could protect students from conduct that creates sex-based hostile environment harassment. Section C addresses states that mandate intentional misgendering and argues these state laws should be preempted by Title IX, a federal law. Section D evaluates situations in other states and school districts that mandate gender-inclusive policies where individual school employees object to using transgender students' names and pronouns on religious grounds. Section D argues that exposure to Title IX liability in these instances should overcome the *Groff* undue hardship standard, making religious accommodations for these objections unreasonable whenever the accommodation would create a hostile environment.

C. Title IX in States and School Districts Mandating Intentional Misgendering

In more than a fifth of the country, state-level legislation prohibits classroom use of transgender students' pronouns.[274] Often this legislation defines "sex" as that which is assigned at birth; Florida's law, illustrative of state legislation in this area, requires public schools to create policies codifying that a "person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex."[275] At least ten other states likewise require one's sex as

271. 34 C.F.R. § 106.44 (2024).

272. *See* Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-CV-02462-JMS-KMB, 2024 WL 1885848, at *22 (S.D. Ind. Apr. 30, 2024) (finding a teacher's refusal to use transgender students' names and pronouns inflicted substantial harm on the students, who are particularly vulnerable); *see also* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (discussing the differences between adult's behavior in workplaces and children's behavior in schools).

273. Dohmen, *supra* note 34, at 1597–98.

274. *See* Eesha Pendharkar, *Pronouns for Trans, Nonbinary Students: The States with Laws that Restrict Them in Schools*, EDUC. WK. (June 14, 2023), https://www.edweek.org/leadership/pronouns-for-trans-nonbinary-students-the-states-with-laws-that-restrict-them-in-schools/2023/06.

275. *Id.*

assigned at birth to be their defined identity in school, requiring continued misgendering of transgender students by teachers and schools.[276]

As a federal law, Title IX preempts conflicting state law if compliance with each is a physical impossibility or if the state law poses an obstacle to a federal objective.[277] Therefore, if Title IX's scope extends to prohibiting gender identity discrimination, then state laws that outright conflict with the federal law are likely to be preempted.[278] The DOE's regulations recognize this: "The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part."[279] School districts could refuse to comply with Title IX and continue to permit discrimination against transgender students, but they would risk being subject to damages in a private action or to the loss of federal funds in an agency action.[280]

D. Title IX in States and School Districts Promoting Gender-Affirming Policies

In states or school districts with gender-affirming policies that require teachers to use transgender students' names and pronouns, some teachers have refused to adhere to the policy on religious grounds.[281] Some teachers have successfully brought constitutional claims under the First Amendment's Free Exercise and Free Speech Clauses to justify their refusal to call a transgender student by the student's name and pronouns.[282]

Alternatively, a teacher who opposes using transgender students' names and pronouns could attempt to bring a claim under Title VII, which, as previously discussed, prohibits discrimination against employees based on their religion.[283] While schools must be mindful that their compliance with Title IX cannot violate compliance with Title VII,[284] if Title IX is

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276. *Id.*

277. *See* Hillsborough Cnty. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985) (discussing federal law preemption).

278. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33541–42 (Apr. 29, 2024).

279. *Id.* at 33542, 33885 (citing 34 C.F.R. § 106.6(b)) (explaining in the preamble, "Generally, a State law would create a conflict with the final regulations if, for example, it requires a recipient to discriminate based on a student's sexual orientation or gender identity. . . . [I]n such a circumstance, Title IX or its implementing regulations would preempt the conflicting State law.").

280. *Title IX Legal Manual*, *supra* note 61; Nondiscrimination, *supra* note 278, at 33542 ("[T]his rulemaking process has afforded recipients notice and opportunity to comment, as well as the opportunity to decline Federal funding.").

281. *See* Meriwether v. Hartop, 992 F.3d 492, 511–12 (6th Cir. 2021) (finding for a professor on constitutional grounds when he refused to use students' pronouns); Ricard v. USD 475 Geary Cnty. Sch. Bd., No. 5:22-CV-04015-HLT-GEB, 2022 WL 1471372, at *9 (D. Kan. May 9, 2022) (finding a school district's pronoun policy burdened Kansas teacher's exercise of religious rights); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at *6 (Va. Aug. 30, 2021) (finding that a teacher may have First Amendment speech right to not follow school's policy related to transgender students; the case subsequently settled); Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 724 (Va. 2023) (holding that a teacher had a viable free exercise claim after being fired for refusing to refer to a student by his pronouns).

282. *See* cases cited *supra* note 281.

283. 42 U.S.C. § 2000e–2(a)(1).

284. 34 C.F.R. § 106.6(a), (f) (2024).

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interpreted consistently with *Bostock*, misgendering of students by school staff that satisfies the requirements for sex-based harassment would expose a school to liability. This would constitute an undue hardship even under the tougher standard articulated in *Groff* because the threat of withheld federal funds from an agency action or costly litigation from a private cause of action would be "substantial in the overall context of [the] employer's business."[285]

While decided under the *Hardison* standard, *Groff* did not eliminate consideration of the kinds of factors that persuaded the Ninth Circuit in *Peterson*, where an employee requested a religious accommodation to post scripture in response to his workplace's diversity initiative.[286] These factors include whether the accommodation results in discrimination against others, demeans others, or deprives others of statutory rights.[287] A teacher that repeatedly and intentionally misgenders students for religious reasons is analogous to *Peterson* in that the teacher is discriminating against those third-party students and denying them their statutory right to equal education under Title IX. As in *Peterson*, effects like these on third parties create an undue hardship for the school employer.

If the presence of these factors alone does not meet the *Groff* standard, when taken together in a misgendering sex-based harassment claim, they could contribute to finding a violation under Title IX that would put a school "on the razor's edge of liability."[288] Misgendering that discriminates, demeans, and deprives a student of their right to equal access to education may trigger a Title IX violation in this respect. This kind of school-wide exposure to liability would likely be a "burden, privation, or adversity [that would] rise to an 'excessive' or 'unjustifiable' level"[289] under *Groff*.

As of September 2024, the U.S. District Court for the Southern District of Indiana's decision in *Kluge v. Brownsburg Community School Corp.*[290] is the only federal court opinion addressing a misgendering sex-based harassment claim since *Groff*, finding that exposure to Title IX liability does meet *Groff*'s undue hardship standard.[291]

Kluge served as his Indiana public high school's only music and orchestra teacher.[292] His school implemented a "Name Policy" requiring staff to address students by the name and pronouns appearing in the

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285. Groff v. DeJoy, 600 U.S. 447, 468 (2023).
286. Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607 (9th Cir. 2004).
287. *Id.*
288. *See* Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552, 554 (7th Cir. 2011) (citation omitted).
289. *Groff*, 600 U.S. at 469 (citation omitted).
290. Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-CV-02462-JMS-KMB, 2024 WL 1885848 (S.D. Ind. Apr. 30. 2024), *appeal filed*, No. 24-1942 (7th Cir. May 31, 2024).
291. *Id.* at *22 (finding that exposure to Title IX liability met the *Groff* undue hardship standard).
292. *Id.* at *2.

school's database.[293] Transgender students could change their name and pronouns in the database by presenting letters from a parent and healthcare professional.[294]

Kluge informed the school's principal that he could not follow the Name Policy.[295] Kluge identified as a Christian and believed "transgenderism" is a sin, and therefore he believed it would be sinful for him to "encourage" transgender students by referring to them by their name and pronouns rather than their "sexually correct birthname[]."[296] In a meeting with administrators, Kluge proposed a religious accommodation—that he address all students by their last names only and not be required to distribute gender-specific uniforms to students—and the administrators agreed.[297]

Teachers, parents, and students began to complain that the last-names-only accommodation was harming students.[298] They alleged that transgender students understood the reason for the accommodation and felt isolated and targeted; these students also observed that Kluge would sometimes refer to students by the first names on their birth certificates or by the honorifics "Mr." or "Ms."[299] They further claimed Kluge would avoid acknowledging transgender students in class when they raised their hands.[300] Both transgender and cisgender students reported experiencing emotional distress.[301] One transgender student reported feeling alienated, upset, and dehumanized and stated he dreaded going to orchestra class.[302] This student stopped attending the high school.[303]

After several months, administrators met with Kluge and told him that they would not permit him to use the last-names-only accommodation moving forward because it was not reasonable,[304] and he could either follow the Name Policy, resign, or be terminated.[305] Kluge sent a resignation email, effective at the end of the school year.[306] He later requested reinstatement and to continue his employment using the last-names-only accommodation, but the school board declined.[307]

Kluge brought a Title VII action against the school district, claiming in part that the district failed to accommodate his sincerely held religious

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293. *Id.* at *3.
294. *Id.*
295. *See id.* at *2–3.
296. *Id.* (citations omitted).
297. *Id.* at *4.
298. *Id.* at *5–6.
299. *Id.*
300. *Id.*
301. *Id.* at *6–7.
302. *Id.* at *6.
303. *Id.*
304. *Id.* at *8.
305. *Id.* at *9.
306. *Id.* at *9–10.
307. *Id.* at *11.

beliefs.[308] The case reached the Southern District of Indiana twice.[309] After the district court first decided the case for the school district on summary judgment in 2021, Kluge appealed.[310] The Seventh Circuit affirmed, but before the mandate issued, the Supreme Court decided *Groff*.[311] The Seventh Circuit vacated its prior opinion and remanded for the district court to apply *Groff*'s clarified undue hardship standard to Kluge's religious accommodation claim.[312]

On remand, the district court again found for the school district.[313] Pursuant to *Groff*, the court first determined the nature of the school district's "business,"[314] looking to the school's mission of affirming the well-being of students.[315] The court observed that *Groff* still allowed analyzing whether an accommodation poses an undue hardship if, as in the VA chaplain case *Baz*, it would contradict an employer's legitimate mission.[316] The district court went on to find Kluge's religious accommodation did contradict the district's mission of fostering a safe, inclusive learning environment for all students because the accommodation caused substantial student harm and exposed the district to liability.[317]

First, the court found the accommodation caused substantial student harm and resulted in significant disruptions to the learning environment.[318] It dismissed Kluge's argument that the majority of students were unaware of or unbothered by Kluge's last-names-only practice.[319] It stated that the school's mission was to meet the needs of all students, and because it could not do so if it allowed Kluge's accommodation, it would incur "substantially increased cost to its mission to provide adequate public education that is equally open to all."[320]

Second, the court found the last-names-only accommodation exposed the district to liability in a Title IX action.[321] It pointed to the Seventh Circuit's decision in *Whitaker* and to others such as *Baz*, *A.C. by M.C.*, and *Bostock* to determine that continuing Kluge's accommodation could have subjected the district to Title IX liability.[322] It ruled that the accommodation placed the district at risk of "substantial and disruptive litigation, all the more serious given that Title IX violations [also] place the entire

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308. *Id.*
309. *Id.* at *12.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at *22.
314. *Id.* at *16.
315. *Id.* at *17.
316. *Id.*
317. *Id.* at *22.
318. *Id.* at *19.
319. *Id.*
320. *Id.*
321. *Id.* at *21.
322. *Id.*

school's funding at risk," and therefore the accommodation posed an undue burden as a matter of law.[323]

Significantly, the court concluded that the potential for Title IX liability was an independent and substantial increased cost, notwithstanding the harm and disruption to the school's mission.[324] However, the court did not analyze the basis for a potential Title IX claim, which likely would be a sex-based hostile environment harassment claim because the court found the accommodation resulted in substantial harm to students and disrupted the learning environment. Because the school knew about the hostile environment, a decision to continue to allow Kluge's accommodation would potentially violate Title IX. Kluge appealed the district court's decision on May 31, 2024, sending the case back up to the Seventh Circuit.[325]

This case and its pending appeal underscore the salience of this Note's argument. Since Kluge's appeal was docketed, a federal district court has vacated the 2024 regulations, and the Trump Administration issued an executive order instructing the DOE to investigate schools that have gender-affirming policies and practices.[326] This will have catastrophic consequences. As one transgender student of Kluge's stated: "I truly believe that if everyone in my life had refused, like Mr. Kluge, to use my corrected name, I would not be here today."[327] In order to provide consistent federal protections for transgender and nonbinary students regardless of state, judicial district, or presidential administration, the Supreme Court or Congress must decide that Title IX prohibits discrimination based on gender identity.

CONCLUSION

Over half of transgender and nonbinary youth feel unsafe at school.[328] Over sixty percent of transgender and nonbinary youth have been bullied or harassed at school in the last year.[329] Fifty-five percent of transgender and nonbinary youth were victimized at school because of their identity.[330] When adults in a transgender student's life do not use the student's name and pronouns, the student is more likely to feel unsafe, unseen, and unprotected, which can lead to severe depression, anxiety, self-harm, and suicide.[331] However, as the Third Circuit noted in *Boyertown Area School District*, "[W]hen transgender students are addressed with gender

323. *Id.* at *22.
324. *Id.*
325. *See* Appellant's Opening Brief at 1, Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-CV-02462-JMS-KMB, 2024 WL 1885848 (S.D. Ind. Apr. 30. 2024) (No. 24-1942).
326. *See supra* notes 41–42.
327. *Kluge*, 2024 WL 1885848, at *7 (citation omitted).
328. HUM. RTS. CAMPAIGN FOUND., 2023 LGBTQ+ YOUTH REPORT (2023), https://reports.hrc.org/2023-lgbtq-youth-report.
329. *Id.*
330. *Id.*
331. *See id.*

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appropriate pronouns," those students have a psychological profile as healthy as their cisgender peers.[332]

Most federal circuit courts agree that interpreting Title IX to prohibit discrimination against transgender students best effectuates Title IX's purpose. Congress or the Supreme Court should determine, consistent with the DOE's revised regulations, that Title IX's prohibition of discrimination on the basis of sex necessarily includes gender identity. Doing so would expose school districts to Title IX liability, regardless of the jurisdiction or the current administration, when their state, schools, or teachers create an unsafe educational environment by misgendering students to the point of creating sex-based hostile environment harassment—either because the law requires it or because teachers have a religious objection to using transgender students' names and pronouns. Protecting transgender students is critical to enabling all students to access education equally. It may even save their lives.[333]

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332. Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 523 (3d Cir. 2018) (citing Brief for Amici Curiae of the National PTA at 7).

333. Deborah Temkin Cahill & Claudia Vega, *Research Shows the Risk of Misgendering Transgender Youth*, CHILD TRENDS: YOUTH & YOUNG ADULTS (Oct. 23, 2018), https://www.childtrends.org/blog/research-shows-the-risk-of-misgendering-transgender-youth (finding that for each additional context a transgender youth's name is used, their risk of suicide is reduced by more than half).