Bear-stock: *Bear Creek*'s Errors and *Bostock*'s Implications on Bisexuals, Bathrooms, and Beyond

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In Bostock v. Clayton County*, the Supreme Court ushered in a new era of employment law by holding that workplace discrimination against gay and transgender people violates Title VII's prohibition of discrimination because of sex. The Court reached this historic result by using textualism to interpret Title VII and applying a simple "but-for" test. By focusing on individuals and stripping away linguistic labels, the Court created a bright-line rule for future courts: if changing an employee's sex changes the employer's discriminatory decision, then the decision was because of sex. While this decision modernized discrimination doctrine to the benefit of millions of LGBTQ+ Americans, it did not address whether its protections would extend to two groups: bisexual and nonbinary people. The decision also expressly left open whether it would prohibit sex-based dress codes and bathroom policies.*

This Note argues that Bostock*'s reasoning does not necessarily extend protections to bisexual and nonbinary people in every case. The decision does, however, render workplace enforcement of sex-based dress codes and bathrooms impermissible sex discrimination. This Note first explains the state of pre-*Bostock *Title VII jurisprudence and the* Bostock *decision, then analyzes* Bear Creek*, a Northern District of Texas court's failed attempt to answer* Bostock*'s open questions. Finally, to remedy the implications of* Bostock*'s limitations and* Bear Creek*'s errors, this Note analyzes how bisexual and nonbinary individuals can structure their sex discrimination arguments to win in court.*

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"As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[1]

INTRODUCTION

More than one out of every 15 people in the United States identifies as LGBTQ+.[2] In a July 2023 survey by the Williams Institute,[3] 22% of all LGBTQ+ respondents reported experiencing workplace discrimination due to their sexual orientation or gender identity within the past five years.[4] Over half reported trying to avoid discrimination and harassment by consciously engaging in behaviors to hide or reduce attention to their identities at work, such as by "changing their physical appearance; changing when, where, or how frequently they used the bathroom; and avoiding talking about their families or social lives."[5] Yet, as of January 2025, 16 U.S. states and two territories, home to a combined total of 19% of the country's LGBTQ+ population, provide no special statutory protections for LGBTQ+ employees from employment discrimination.[6] Individuals in these states, therefore, rely entirely on federal law.

In 2020, *Bostock v. Clayton County* expanded anti-discrimination law to at least partially cover LGBTQ+ status, holding that an "employer who fires an individual for being

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1. Bostock v. Clayton Cnty., 590 U.S. 644, 670 (2020).

2. *See* Jeffrey Jones, *U.S. LGBT Identification Steady at 7.2%*, GALLUP (Feb. 22, 2023), https://news.gallup.com/poll/470708/lgbt-identification-steady.aspx [https://perma.cc/XBD9-WZQQ]. LGBTQ+ refers to the entire community of lesbian, gay, bisexual, transgender, and queer people. *Glossary of Terms: LGBTQ*, GLAAD MEDIA REFERENCE GUIDE (11th ed.), https://glaad.org/reference/terms/ [https://perma.cc/99UK-S4Q9] [hereinafter GLAAD, *Glossary of Terms: LGBTQ*].

3. *See* BRAD SEARS ET AL., UCLA SCH. L. WILLIAMS INST., LGBTQ PEOPLE'S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 1 (2024), https://williamsinstitute.law.ucla.edu/publications/lgbt-workplace-discrimination/ [https://perma.cc/2WNW-M7UP].

4. Gender identity is a person's internal understanding of their gender; transgender describes someone whose gender identity is different from the one associated with their assigned sex at birth (e.g., a trans man was assigned female at birth and identifies as a man); cisgender describes someone whose gender identity matches their sex assigned at birth (e.g., a cis man was assigned male at birth and identifies as a man); nonbinary describes someone who "experience[s] their gender identity and/or gender expression as falling outside the binary gender categories of man and woman." *Glossary of Terms: Transgender*, GLAAD MEDIA REFERENCE GUIDE (11th ed.), https://glaad.org/reference/trans-terms/ [https://perma.cc/S2VZ-ZVMQ] [hereinafter GLAAD, *Glossary of Terms: Transgender*].

5. SEARS ET AL., *supra* note 3, at 5.

homosexual or transgender"[7] discriminates because of sex[8] in violation of Title VII of the Civil Rights Act of 1964.[9] There are open questions, however, about the extent of *Bostock*'s reach. For example, the Court used binary logic that may not extend to all instances of discrimination against bisexual and nonbinary people, thereby continuing the longstanding judicial practice of entirely excluding bisexuals from its analysis.[10] The Court also explicitly reserved for future cases whether the decision applies to sex-based dress codes and bathrooms.[11] As groundbreaking as *Bostock* was, it is not a panacea for LGBTQ+ workplace discrimination.

This Note proceeds in four parts. Part I discusses the evolution of Title VII jurisprudence as applied to LGBTQ+ people, culminating in an explanation of *Bostock* and its reasoning. Part

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6. *See* MOVEMENT ADVANCEMENT PROJECT, EMPLOYMENT NONDISCRIMINATION (2024), https://www.lgbtmap.org/equality_maps/employment_non_discrimination_laws/state [https://perma.cc/QEM2-DTQQ].

7. 590 U.S. 644, 651 (2020).

8. As the *Bostock* Court proceeded under the assumption that "sex" means only the "biological distinctions between male and female," *id.* at 655, this Note does the same for the sake of internal logical consistency and clarity when engaging in arguments. Quotes that rely on this understanding of sex but still use the terms "man/men" and "woman/women" in reference to sex are edited to "male/males" and "female/females," respectively. References to non-subjects of logic tests (e.g., the type of people to whom the subject of the test is attracted) are in gendered terms: "homosexual" or "gay" will refer to males attracted to men and females attracted to women, "transgender" or "trans" will refer to males who identify as women and females who identify as men, and "bisexual" will mean anyone attracted to more than one gender. This Note uses the term "bisexual" as an umbrella term encompassing "pansexual, fluid, queer and other words which describe people who have the potential to be attracted to more than one gender." GLAAD , *Glossary of Terms: LGBTQ*, *supra* note 2. Courts and commentators often approach the field of sex discrimination law with binary thinking, and this Note engages with these arguments on their own terms. While this Note uses phrases like "opposite," "the other," etc., in reference to sex and gender for the sake of argument, this author does not endorse such binaries as being the best way to understand sex, gender, and sexuality. For a discussion on the importance of using expansive, gender-inclusive language in the legal field, see Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMMC'N & RHETORIC: JAWLD 61 (2020).

9. 42 U.S.C. § 2000e *et seq*.

10. *See* Nancy C. Marcus et al., *Bridging the Gap in LGTBQ+ Rights Litigation: A Community Discussion on Bisexual Visibility in the Law*, 34 HASTINGS J. ON GENDER & L. 69, 81 (2023) [hereinafter Marcus et al., *Bridging the Gap*] (noting that the number of mentions of bisexuality in court decisions has been "pretty much donuts, zeros across the board for the past quarter century"). For additional scholarship explaining the harms that stem from this erasure of bisexual people in case law, see Nancy C. Marcus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 NW. UNIV. L. REV. 223, 230–35 (2020) [hereinafter Marcus, *The Problem of Bisexual Erasure*].

11. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 681 (2020) ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind.").

II critiques the analysis of *Bear Creek Bible Church v. EEOC*[12]—a Northern District of Texas case that attempted to answer some of the questions left open in *Bostock*—and argues that a proper application of the Court's reasoning does not necessarily protect bisexual and nonbinary individuals but does prohibit sex-based dress codes and bathroom policies. Part III suggests legal arguments that bisexual and nonbinary plaintiffs can use to win Title VII protections notwithstanding *Bostock*'s limits and *Bear Creek*'s errors.

I. TITLE VII AND BOSTOCK

This Part gives a brief history of Title VII's application to LGBTQ+ discrimination. It then explains *Bostock*'s path to the Supreme Court and how the Court reached its holding: that Title VII prohibits an employer from firing someone "simply for being homosexual or transgender."[13] It concludes that the Court gave lower courts a clear roadmap for applying the "but-for" test to answer the questions that it left open for bisexuals, nonbinary people, and dress code and bathroom policies.

A. TITLE VII AND THE ROAD TO *BOSTOCK*

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[14] The law was a product of the civil rights movement to address discrimination against Black Americans,[15] but Congress added the word "sex" to the bill just before it passed.[16] The old and oft-repeated story is that a racist Congressman inserted the word in an effort to tank the entire bill.[17] Scholarship

12. 571 F. Supp. 3d 571 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

13. *Bostock*, 590 U.S. at 651.

14. 42 U.S.C. § 2000e-2(a)(1).

15. *See* TODD D. RAKOFF ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 33–34 (13th ed. 2023).

16. *See* Mary Anne Case, *Legal Protections for the 'Personal Best' of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1339 (2014).

17. *See id.* at 1339.

casts doubts on that story, however, and supports the conclusion that Congress did seriously intend to ensure equal employment opportunities regardless of sex.[18]

For over 50 years after the Civil Rights Act's passage, no circuit held that Title VII extended specific protections to gay or transgender employees.[19] There were, however, two Supreme Court cases that laid the groundwork for this extension. The first, *Phillips v. Martin Marietta Corp.*, decided in 1971, held that refusing to hire mothers while hiring fathers violates Title VII.[20] This case was an example of "sex plus" discrimination[21]—though the Court did not use those exact words—because the employer's decision was based not only on the employees' sex, but on their sex "plus" the non-sex trait of having children.[22] The second case, *Price Waterhouse v. Hopkins*, decided in 1989, held that evidence of an employer relying on sex stereotypes for its decisions can show sex-based discrimination.[23] This case involved an employer's refusal to promote a female employee because she did not have a feminine personality.[24]

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18. *See id.*; *see generally* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997).

19. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 723–34 (2020) (Alito, J., dissenting) (citing cases from ten circuits decided between 1979 and 2017 to conclude that the majority's decision "disregard[s] over 50 years of uniform judicial interpretation of Title VII's plain text"); Wittmer v. Phillips 66 Co., 915 F.3d 328, 333 (5th Cir. 2019) (Ho, J., concurring) ("For four decades, it has been the uniform law of the land, affirmed in [11] circuits, that Title VII of the 1964 Civil Rights Act prohibits sex discrimination—not sexual orientation or transgender discrimination."). For a pre-*Bostock* analysis of why earlier courts held that Title VII does not protect gay and trans plaintiffs, see Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 87 (2019) (arguing that the pre-*Bostock* precedents "self-consciously deviated from the text of [Title VII], [and] invent[ed] limiting principles to leave gay, lesbian, and transgender plaintiffs unprotected" because the courts "were informed by prejudices and misunderstandings that obscured textual arguments").

20. *See* 400 U.S. 542, 544 (1971).

21. *See, e.g.*, Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1089 (5th Cir. 1975) (referring to "sex plus" as "involv[ing] the classification of employees on the basis of sex plus one other ostensibly neutral characteristic").

22. *See Phillips*, 400 U.S. at 544.

23. *See* 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a [female] cannot be aggressive, or that she must not be, has acted on the basis of [sex].").

24. *See id.* at 235 (reciting how the employer recommended that the plaintiff "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" if she wanted to get promoted (internal citations omitted)). For further discussion, see *infra* Part III.B.

In the 21st century, attitudes and laws around LGBTQ+ people began to shift. Between 2004 and 2014, Americans' opinions on gay marriage flipped from 55% opposed to 55% supportive.[25] In the time since the Supreme Court legalized gay marriage nationwide in 2015,[26] support has risen to more than two-thirds of Americans.[27] In 2017, this societal shift finally reached the interpretation of Title VII when the Seventh Circuit found that *Price Waterhouse*'s sex-stereotyping reasoning also applies to gay people in *Hively v. Ivy Tech*.[28] Two more circuits quickly followed suit. The Second Circuit held in *Zarda v. Altitude Express* that Title VII extends to gay employees both because sexual orientation is "almost invariably rooted in stereotypes" and because it is a "function of sex."[29] The Sixth Circuit held in *EEOC v. R.G. & G.R. Harris Funeral Homes* that Title VII protects trans employees because firing them based on a "perception of how [they] should appear or behave based on [their] sex" is sex-stereotyping.[30] Meanwhile, the Eleventh Circuit was bound by an old precedent and could not extend protection in its hearing of *Bostock*.[31] With the circuits split, the issue was ripe for the Supreme Court to address.

B. *BOSTOCK*'S BACKGROUND, REASONING, AND OPEN QUESTIONS

In *Bostock*, the Supreme Court consolidated plaintiffs Donald Zarda's, Aimee Stephens', and Gerald Bostock's claims.[32] Each case involved "[a]n employer fir[ing] a long-time employee shortly

25. *See LGBTQ+ Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/S46D-QXW3].

26. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

27. *See* GALLUP, *supra* note 25.

28. *See* 853 F.3d 339, 346 (7th Cir. 2017) (en banc); *see also infra* Part III.B (analyzing how bisexual and nonbinary plaintiffs can use sex-stereotyping arguments).

29. 883 F.3d 100, 114, 119 (2d Cir. 2018) (en banc), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020) ("Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex.").

30. 884 F.3d 560, 574 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

31. *See* Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964, 964–65 (11th Cir. 2018) (affirming the district court's dismissal of Bostock's claim due to binding precedent from the Fifth Circuit—before it was split into the modern Fifth and Eleventh Circuits—holding that Title VII does not cover sexual orientation discrimination) (citing Blum v. Gulf Oil Corp., 579 F.2d 936, 938 (5th Cir. 1979), *rehearing en banc denied*, 894 F.3d 1335 (11th Cir. 2018), *rev'd and remanded sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020)).

32. Donald Zarda and Aimee Stephens passed away before the Supreme Court issued its opinion. *Bostock*, 590 U.S. at 653.

after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."[33] Zarda's employer fired him from his job as a skydiving instructor after he "mentioned that he was gay."[34] Stephens' employer fired her from her job at a funeral home after she came out as transgender and "explain[ed] that she planned to 'live and work full-time as a woman.'"[35] Bostock's employer fired him from his job as a child welfare advocate after "members of the community allegedly made disparaging comments about [his] sexual orientation."[36]

In an opinion by Justice Gorsuch, the Court held that Title VII prohibits employers from "firing employees on the basis of homosexuality or transgender status."[37] To reach this conclusion, the Court first interpreted Title VII's use of the phrase "because of" as triggering a "but-for" test, which "directs us to change one thing at a time and see if the outcome changes."[38] Because "sex" is a protected characteristic under Title VII,[39] applying the "but-for" test means that an employer discriminating against an employee violates Title VII "if changing the employee's sex would have yielded a different choice by the employer."[40] Under this test, an employer violates Title VII "[s]o long as the [employee's] sex was *one* but-for cause of [the] decision,"[41] which means the employer violates the law even if the employee's sex was not the *only* cause of the employer's decision.[42] Additionally, the Court interpreted Title VII's repeated use of the word "individual" as requiring courts to consider whether an employer discriminated against an

33. *Bostock*, 590 U.S. at 653.
34. *Id.*
35. *Id.* at 654.
36. Bostock v. Clayton Cnty., 590 U.S. 653, 680 (2020).
37. *Id.* at 680.
38. *Id.* at 656.
39. The Court proceeded "on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female." *Id.* at 655. The employees in *Bostock* argued that the definition of "sex" included gender identity but "concede[d] the point for argument's sake[.]" *Id.*; *cf. infra* Part III.C (arguing that future plaintiffs can and should argue for a broader definition of "sex" under Title VII).
40. *Id.* at 659–60.
41. Bostock v. Clayton Cnty., 590 U.S. 644, 656 (2020) (emphasis added).
42. *See id.* at 661 ("When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.").

individual employee, not whether the employer "treats males and females comparably as groups."[43]

In explaining how to properly apply the "but-for" test to individuals, the Court instructed lower courts to look beyond the linguistic labels that hide the fact that certain discriminatory practices are based on sex.[44] For example, the label "gay" may appear to be sex-neutral. After all, males *and* females can be gay. The label only attaches to a person, however, by referencing exactly two pieces of information: their sex plus the gender they like.[45] Both pieces of information are necessary, and neither is sufficient.[46] The same is true for the label "trans;" the label only attaches by referencing the person's sex assigned at birth plus their gender identity.[47] Therefore, when an employer fires an employee for being gay or trans, those labels merely obscure the fact that the employee is fired because of their sex plus another factor.[48]

Putting this concept into the language of the "but-for" test, the Court changed the employee's sex and kept the gender of attraction or gender identity constant.[49] Because the employer's decision

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43. *Id.* at 665; *see also id.* at 658 ("[Title VII] tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups[.]"); *id.* at 659 ("[I]t doesn't matter if the employer treated women as a group the same when compared to men as a group."); *id.* at 662 ("Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII.").

44. *See id.* at 664 ("[I]t's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.").

45. *See id.* at 660 ("If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."); *id.* at 669 ("By discriminating against homosexuals, the employer intentionally penalizes [males] for being attracted to men and [females] for being attracted to women.").

46. For example, someone only attracted to men could be gay or straight, depending on their sex.

47. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 660 (2020) ("[If an employer] fires a transgender person who was identified as a male at birth but who now identifies as a [woman] . . . [but] retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."); *id.* at 669 ("By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.").

48. *See id.* at 664–65 ("[E]mployers might describe their actions as motivated by their employees' homosexuality or transgender status[,] [b]ut . . . labels and additional intentions or motivations . . . cannot make a difference here.").

49. Justice Alito's dissent argued that the "but-for" test should change both the employee's sex and their gender of attraction or gender identity, which would keep their

changes when the employee's sex changes, the Court concluded that "[w]hen an employer fires an employee for being homosexual or transgender, the employer necessarily and intentionally discriminates against that individual in part because of sex."[50] In other words, because the labels "homosexual" and "transgender" require taking an employee's sex into account,[51] these labels are "inextricably bound up with sex,"[52] making it "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[53]

While *Bostock* definitively held that employers cannot legally fire employees for being gay or trans,[54] the decision left open questions regarding its reach, such as whether the reasoning extends to bisexual people, nonbinary people, and sex-based dress codes and bathroom policies.[55] The Court explicitly refused to

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sexual orientation or transgender status constant. *See id.* at 698 (Alito, J., dissenting) ("The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive."). The Court expressly rejected that alternative framing of the "but-for" test. *See id.* at 671 ("While the explanation is new, the mistakes are the same.").

50. *Id.* at 665; *see also id.* at 669 ("Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex[.]").

51. *See id.* at 669–70 ("To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should [self-identify as homosexual or transgender] without using the words man, woman, or sex (or some synonym). It can't be done.").

52. Bostock v. Clayton Cnty., 590 U.S. 644, 660–61 (2020). Another way to say this is to call a label a "function" of sex. *See, e.g.*, Joanna Grossman & Grant Hayden, *Holy Dictum: Federal Judge Rejects Protection Against Transgender Discrimination in "Elegant Aside"*, JUSTIA VERDICT (Feb. 26, 2019), https://verdict.justia.com/2019/02/26/holy-dictum-federal-judge-rejects-protection-against-transgender-discrimination-in-elegant-aside [https://perma.cc/8T47-AYLS] (stating that because "the very definition of sexual orientation means accounting for the sex of the person and the sex of the person to whom he or she is attracted[,] [s]exual orientation is . . . a function of biological sex.").

53. *Bostock*, 590 U.S. at 660.

54. *See id.* at 680–81.

55. *See, e.g.*, Justin Blount, *Sex-Differentiated Appearance Standards Post*-Bostock, 31 GEO. MASON U. C.R. L.J. 217, 218 (2021) (arguing that *Bostock* overrules existing case law on sex-based dress codes); Sarah Blazucki, *The Equal Rights Amendment and the Equality Act: Closing Gaps Post*-Bostock *for Sexual Orientation and Gender Identity Minorities*, 26 U.D.C. L. Rev. 1, 1 (discussing how *Bostock*'s use of the terms "homosexual and transgender" left unresolved whether "other minority sexual orientations and gender identities/ expressions are covered"); Megan Nicolaysen, *The Bathroom Stall: How Legal Indecision Regarding Transgender Bathroom Access Has Led to Discrimination*, 61 U. LOUISVILLE L. REV. 175, 176 (2022) ("[T]he lack of discussion surrounding transgender bathroom access [in *Bostock*] has created a controversial loophole for employer discrimination against transgender employees.").

extend its holding beyond gay and trans employees,[56] stating that "whether policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases."[57] After the Equal Employment Opportunity Commission (EEOC) published post-*Bostock* guidance advising employers to allow transgender employees to dress and use the bathroom in accordance with their gender identity,[58] the district court in *Texas v. EEOC* vacated this guidance,[59] in part because the *Bostock* Court "expressly refused to prejudge" these issues.[60]

How lower courts understand *Bostock*'s approach to statutory interpretation will impact how far they extend the decision's reach. For example, if *Bostock* used dynamic interpretation,[61] that might encourage lower courts to apply its holding broadly to match the Court's efforts to expand protections in light of modern society's views on LGBTQ+ people. In *Hively*, Judge Posner's concurrence clearly states that courts should take this kind of dynamic approach to Title VII.[62] On the other hand, if *Bostock* was purely

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56. *See Bostock*, 590 U.S. at 681 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind.").

57. Bostock v. Clayton Cnty., 590 U.S. 644, 681 (2020). At least one district court has held that religious employers do not have to comply with *Bostock* due to Title VII's exemption for religious organizations, RFRA, and the First Amendment freedoms of religion and association. *See* Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 608–616 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom*. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Commn, 70 F.4th 914 (5th Cir. 2023). Commentators have also discussed how Title VII's exception for bona fide occupational qualifications may apply in the LGBTQ+ discrimination context. *See* Blount, *supra* note 55, at 248, 255 (arguing that courts should employ a flexible test to determine whether sex-based dress codes are reasonably necessary for a particular business, but that transgender employees should be allowed to "follow the appearance standard with respect to the gender they identify as").

58. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (2021); *see also* Evandro Gigante et al., *Texas District Court Holds EEOC Guidance on Sexual Orientation and Gender Identity Discrimination Unlawful*, PROSKAUER (Oct. 7, 2022), https://www.lawandtheworkplace.com/2022/10/texas-district-court-holds-eeoc-guidance-on-sexual-orientation-and-gender-identity-discrimination-unlawful/ [https://perma.cc/QML5-NMPN] (explaining the EEOC guidance).

59. *See* 633 F. Supp. 3d 824, 847 (N.D. Tex. 2022). This case focused largely on administrative law and vacated the EEOC guidance for going beyond what *Bostock* demands without following statutory procedural requirements.

60. *Id.* at 832.

61. Dynamic interpretation means reading statutes "in light of their present societal, political, and legal context." William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).

62. *See* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 357 (7th Cir. 2017) (en banc) (Posner, J., concurring) ("[Reinterpreting statutes] is something courts do fairly frequently

textualist,[63] lower courts might only extend protections when the facts meet the Court's "but-for" standard. While Justice Alito's dissent clearly argues that the majority opinion was dynamic interpretation, even calling it "a pirate ship . . . sail[ing] under a textualist flag,"[64] other contemporary commentators praised Justice Gorsuch as the very model of a modern major-textualist.[65] This Note takes the *Bostock* majority at its word that it used textualism and assumes that its reasoning serves as a roadmap and constraint on lower courts.[66] Having established *Bostock*'s reasoning, this Note now analyzes one court's attempt to apply it.

II. *BEAR CREEK'S* ANSWERS AND ERRORS

The holding in *Bostock* followed from applying the "simple and traditional standard of but-for causation,"[67] but the result was

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to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. . . . We are taking advantage of what the last half century has taught.").

63. Broadly, textualism means interpreting statutes as they would have been "understood by the ordinary person . . . at the time the statute was enacted." William N. Eskridge, Jr. et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1613 (2023). A textualist approach does not consider sources external to the text, such as legislative history. *Id.*

64. Bostock v. Clayton Cnty., 590 U.S. 644, 683–85 (2020) (Alito, J., dissenting) ("There is only one word for what the Court has done today: legislation. . . . [W]hat it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society.").

65. *See, e.g.*, Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word is the Law"*, SCOTUSBLOG (June 15, 2020), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/4Q83-GLLA] ("Scalia's successor, Justice Neil Gorsuch, . . . erects a triumphal arch glorifying textualism in its narrowest literalist conception."); *see also* Arthur Sullivan & W.S. Gilbert, *I Am the Very Model of a Modern Major-General*, *in* THE PIRATES OF PENZANCE (D'Oyly Carte Opera Co. 1879).

66. The majority opinion certainly purports to be based on textualism. *See Bostock*, 590 U.S. at 674 ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). Justice Gorsuch is also a self-proclaimed textualist. *See generally* Neil Gorsuch, *A Case for Textualism*, *in* A REPUBLIC, IF YOU CAN KEEP IT 128–44 (2019). For a critique of *Bostock*'s approach to textualism, see Justice Kavanaugh's dissent, in which he accuses Justice Gorsuch and the majority of taking a literalist approach rather than a textualist one. *See Bostock*, 590 U.S. at 784 (Kavanaugh, J., dissenting) ("[T]he plaintiffs must establish that the ordinary meaning of 'discriminate because of sex'—not just the literal meaning—encompasses sexual orientation discrimination. . . . There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes.").

67. *Bostock*, 590 U.S. at 656 (internal citations omitted).

controversial.[68] While the Court left the questions discussed in Part I open for lower courts to address, few federal courts have had the opportunity to analyze the *Bostock* decision at length. The district court decision in *Bear Creek* presents a flawed attempt to demarcate the boundaries of *Bostock*'s reach. In this case, the court applied its understanding of *Bostock* to a set of employment policies—including policies regarding bisexual employees, dress codes, and bathrooms—to evaluate their legality under Title VII.[69] This Part explains the *Bear Creek* case, argues that the court's conclusions stemmed from errors in its analysis of *Bostock*, and explains the implications of those errors. Additionally, this Part explains how the *Bear Creek* court subverted theories of sex discrimination law and *Bostock* in an effort to reach a policy outcome.

A. BACKGROUND AND SUBSEQUENT HISTORY

In *Bear Creek*, two employers, a church and a business with a religious owner, sued the EEOC.[70] These plaintiffs had policies against employing gay, bisexual, and transgender people and codes of conduct that required employees to dress and use the bathroom according to their sex assigned at birth.[71] They sought declaratory judgments that they were exempt from Title VII on religious grounds and that *Bostock* does not extend to protect bisexuals nor prohibit the employers' "sex-neutral" codes of conduct.[72] The court agreed with the plaintiffs' religious exemption argument and further held that while *Bostock* does extend Title VII protections to bisexuals, it does not prohibit sex-based dress code and

68. *See, e.g.*, Alex Alam, *Celebrating the First Anniversary of* Bostock v. Clayton County, LEGAL AID AT WORK (June 15, 2021), https://legalaidatwork.org/celebrating-the-first-anniversary-of-bostock/ [https://perma.cc/L6DS-SQ3C] (calling *Bostock* "a huge victory for members of the LGBTQI+ community"); Burgess Everett, *Hawley on LGBTQ Ruling: Conservative Legal Movement is Over*, POLITICO (June 16, 2020), https://www.politico.com/news/2020/06/16/josh-hawley-lgbt-supreme-court-conservatives-323254 [https://perma.cc/J7D3-57JQ] (reporting that conservative Sen. Josh Hawley said that the *Bostock* decision "represents the end of the conservative legal movement").

69. *See* Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 621–25 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023). Much of the case is not directly relevant to this Note and involves issues around procedure, class certification, religious exemptions from Title VII, and the First Amendment.

70. *See Bear Creek*, 571 F. Supp. 3d at 585–86.

71. *See id.* at 596.

72. *Id.* at 586, 616.

bathroom rules.[73] The district court's holdings on *Bostock* applied to a certified class of all employers in the United States, effectively interpreting the case for the entire nation.[74]

On appeal, however, the Fifth Circuit reversed the district court's class certifications[75] while affirming the individual plaintiffs' religious exemption.[76] Because the individual plaintiffs obtained relief via exemption and no longer represented any classes, the appellate court did not need to rule on the questions of *Bostock*'s reach and vacated the district court's judgments addressing the Supreme Court decision, noting that the issues remained "open questions."[77] While the Fifth Circuit vacated the holdings discussed in this Part, the district court's opinion remains the most ambitious attempt to analyze *Bostock*'s reach to date.[78]

B. ERRORS EXTENDING *BOSTOCK* TO COVER BISEXUAL DISCRIMINATION

The *Bear Creek* court analyzed whether "employers are permitted to discriminate against bisexuals" and held that such discrimination violates Title VII because "[a]n individual who is bisexual inherently identifies as homosexual to some extent."[79] The court reasoned that, because *Bostock* protects gay employees, and bisexual employees are partially gay, *Bostock* extends to a "policy that prohibits *only* bisexual conduct."[80] This approach to

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73. *See id.* at 586, 622, 625.

74. *See id.* at 601, 622, 625.

75. The district court had certified two classes: employers who opposed "homosexual or transgender behavior" for religious reasons and employers who opposed the same for any reasons. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914, 934 (5th Cir. 2023). The Fifth Circuit found that neither class met the requirements of Rule 23 of the Federal Rules of Civil Procedure, stating that the classes were "impermissibly vague" and did not have "common questions of law and fact." *Id.* at 933–36.

76. *See id.* at 940.

77. *Id.*

78. Indeed, the State of Texas argued that the "analysis of *Bostock* (and its several hypotheticals) in *Bear Creek* . . . is the one that makes the most sense of the opinion" in its winning motion for summary judgment in *Texas v. EEOC*. Pl.'s Mem. in Supp. of its Opp'n to Defs.' Mot. for Summ. J. and its Cross-Mot. for Summ. J. at 19, Texas v. Equal Emp. Opportunity Comm'n, 633 F. Supp. 3d 824 (N.D. Tex. 2022) (No. 2:21-cv-194-Z). In that case, Texas argued that the EEOC's post-*Bostock* guidance advising employers to allow transgender employees to dress and use bathrooms according to their gender identity went beyond *Bostock*'s holding. Texas v. EEOC, 633 F. Supp. 3d at 829–830.

79. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 622 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

80. *Id.* at 622.

applying *Bostock* would certainly benefit the LGBTQ+ community,[81] as it extends Title VII's protection to bisexuals automatically without having to examine bisexual discrimination under *Bostock*'s but-for test.[82]

The court's reading of *Bostock*, however, was unfortunately incorrect. The Supreme Court clearly stated that it did not turn homosexuality into its own protected characteristic under Title VII.[83] Rather, *Bostock* reasoned that anti-gay discrimination *is* sex discrimination because it necessarily takes an individual's sex into account.[84] Bisexual discrimination, conversely, does not need to take an individual's sex into account. To know that a person is gay requires knowing both their sex and the gender they are attracted to, but to know that a person is bisexual only requires knowing which genders the person is attracted to; the person's sex is irrelevant.[85] Under *Bostock*'s but-for test, when an employer fires an employee for being bisexual, changing the employee's sex and keeping the employee's attraction to more than one gender constant would not change the employer's decision. The

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81. Recent polling shows that about 60% of LGBTQ+ adults in the United States identify as bisexual. *See* Daniel de Visé, *Bisexuals Are the 'Invisible Majority' in LGBTQ America*, THE HILL (Mar. 2, 2023), https://thehill.com/blogs/blog-briefing-room/3879668-in-lgbtq-america-bisexuals-are-the-invisible-majority/ [https://perma.cc/ZVD3-7ZJW].

82. *See* Marcus, *The Problem of Bisexual Erasure*, *supra* note 10, at 238 ("In future cases, bisexuals may be required to add additional layers of argument explaining why the *Bostock* holding should be interpreted as applying equally to them[.]").

83. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 655 (2020) ("The only statutorily protected characteristic at issue in today's cases is 'sex[.]'"); *id.* at 661 ("[I]ntentional discrimination based on sex violates Title VII, *even if* it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees.") (emphasis added); *id.* at 662 ("To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.").

84. *See id.* at 660–61 ("[H]omosexuality and transgender status are inextricably bound up with sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

85. There are two generally accepted definitions of bisexuality: the one this Note uses—attraction to "more than one gender"—and a more specific one—attraction to "genders the same as and different from one's own gender." *Bisexual FAQ*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/bisexual-faq [https://perma.cc/UT29-5BLJ]; GLAAD, *Glossary of Terms: LGBTQ*, *supra* note 4; *see also* Martha R. Rhodes, *A Short History of the Word 'Bisexuality'*, STONEWALL (June 13, 2022), https://www.stonewall.org.uk/about-us/news/short-history-word-bisexuality [https://perma.cc/QK2F-XM2S]. This Note adopts the first definition because it is more expansive. How a potential plaintiff chooses to define their own bisexuality would not change the legal analysis because the employer can always argue that they would not have fired the bisexual employee had they only been attracted to one gender.

employee's sex, therefore, is not a "but-for" cause, which means the bisexual employee has no protection under *Bostock*.[86]

Some scholars have argued that even under *Bostock*'s but-for test, the reasoning still extends to bisexual discrimination. They reason that bisexuality is based, at least in part, on an individual's attraction to a *specific* gender, and attraction to *that* gender is a trait the employer tolerates in employees of one sex but not in employees of the opposite sex.[87] The problem with this argument is that it relies on an assumption than all anti-bisexual employers are also anti-gay. Discrimination against bisexuals, however, is not necessarily coextensive with discrimination against gay people, and it can even come from within the LGBTQ+ community.[88] For example, a common form of bisexual discrimination is the demand to "pick a side"—gay or straight.[89]

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86. *See, e.g.*, Daniel Hemel, *The Problem with That Big Gay Rights Decision? It's Not Really About Gay Rights*, WASH. POST (June 17, 2020), https://www.washingtonpost.com/outlook/2020/06/17/problem-with-that-big-gay-rights-decision-its-not-really-about-gay-rights/ [https://perma.cc/3V9Q-EUQH] ("If an employer fires all bisexual workers, and only bisexual workers, is that discrimination because of those workers' sex? A [male] who is attracted to both men and women would be fired. A [female] who is attracted to both men and women would be fired. The same trait—being attracted to both men and women—is treated the same for both [males] and [females].").

87. *See, e.g.*, MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 27:2 (2020) ("By firing a bisexual [female], who is by definition a [female] attracted to women as well as men, an employer penalizes [the employee] for attraction to women, 'traits or actions it tolerates' in [the employee's] male colleagues.") (quoting *Bostock*, 590 U.S. at 660).

88. "Prejudice, fear or hatred directed toward bisexual people" is called biphobia, and it "occurs both within and outside of the LGBTQ+ community." *Bisexual FAQ*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/bisexual-faq [https://perma.cc/UT29-5BLJ]; *see also* Dani Blum, *The 'Double Closet': Why Some Bisexual People Struggle with Mental Health*, N.Y. TIMES (July 6, 2021) https://www.nytimes.com/2021/06/30/well/bisexual-mental-health-lgbt.html [https://perma.cc/6YEJ-J5WN] (noting that bisexual people face "'stereotypes of confusion, that it's a phase, [and] that they're promiscuous'" from both straight and LGBTQ+ communities); Greg Bishop, *Three Straights and You're Out in Gay Softball League*, N.Y. TIMES (June 29, 2011), https://www.nytimes.com/2011/06/30/sports/softball-case-raises-question-who-qualifies-as-gay.html [https://perma.cc/Q5MB-BWPT] (detailing a pre-*Bostock* case involving three bisexual men suing a gay softball league after the league stripped their team of its title for having more than two "nongay" players).

89. *See, e.g.*, Nikki Hayfield et al., *Bisexual Women's Understandings of Social Marginalisation: 'The Heterosexuals Don't Understand Us but nor Do the Lesbians'*, 24 FEMINISM & PSYCH. 352 (2014) ("[B]isexuality [is] perceived by others as a temporary (and confused) phase between 'straight' and 'gay' identities . . . . [B]isexual people are considered to have not yet realised their 'true' identity or 'made up their minds' and until they do they are considered emotionally immature, psychologically disturbed or confused."); Karis Leung, *The People Who Just Need to Pick a Side Already*, THE PUBLIC EAR (Nov. 6, 2019), https://medium.com/the-public-ear/the-people-who-just-need-to-pick-a-side-already-7280da712f0c [https://perma.cc/XW2D-T6GM] (giving examples from media of characters saying that bisexuals should pick a side).

Employers discriminating in this way may tolerate all employees attracted to men *or* women but no employees attracted to men *and* women. Therefore, while bisexuals may find de facto protections under *Bostock* when they are swept up in an employer's broader discrimination against gay employees,[90] the bisexual orientation itself remains unprotected.[91]

Although *Bostock*'s application to nonbinary people did not come up in the *Bear Creek* case, the same logic applies. If an employer fires an employee for being nonbinary, the employer based the decision on the employee identifying as neither a man nor a woman. Changing the employee's sex and keeping constant the employee's gender identity would not change the employer's decision.[92]

An argument for why *Bostock* does cover nonbinary people is that "nonbinary identities are understood against the backdrop of an individual person's biological sex."[93] This argument takes the same form as the argument for bisexual people discussed above;[94] nonbinary discrimination is based, in part, on people assigned male at birth *not* identifying as men—which the employer tolerates in people assigned female at birth—and vice versa.[95] The problem with this logic is also the same: it only works under the assumption that all nonbinary discrimination is part of a broader discrimination against all people who do not identify as the gender traditionally associated with their sex assigned at birth. If an employer tolerates transgender people but discriminates against nonbinary people, that employer never has to consider any employee's sex. Employers discriminating in this way may tolerate all employees who identify as men *or* women but no employees who identify as neither. Therefore, like bisexual discrimination, nonbinary discrimination does not necessarily

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90. *See infra* Part III.A.

91. A similar analysis leads to the same result for asexual people, who are not attracted to any gender. *See* GLAAD, *Glossary of Terms: LGBTQ*, *supra* note 4.

92. *See* Meredith Rolfs Severtson, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post*-Bostock, 74 VAND. L. REV. 1507, 1530 (2021) ("[T]he [e]mployer is requiring that [the nonbinary employee] present as either a man or a woman, *regardless* of [the employee's] sex as assigned at birth.").

93. *Id.* at 1528.

94. *See* ROSSEIN, *supra* note 87.

95. *See id.* at § 27:13 ("A person is understood as non-binary by virtue of sex-based characteristics. Thus, an employer who fires an employee for being non-binary penalizes the non-binary person for "traits or actions" tolerated in binary male or female colleagues, and inevitably sex is a but-for cause." (internal citations omitted)).

implicate sex, and nonbinary people only find Title VII protections under *Bostock* if their employers discriminate against them as part of a broader transgender discrimination policy.[96]

C. ERRORS RESTRICTING *BOSTOCK* FROM COVERING SEX-BASED DRESS CODES AND BATHROOMS

The *Bear Creek* court also analyzed whether employers can maintain a "sex-specific dress-and-grooming code" or "prohibit employees from using a restroom designated for the opposite biological sex."[97] The dress code required employees "to wear professional attire according to their biological sex."[98] For example, the policy stated that females "can wear skirts, blouses, shoes with heels, and fingernail polish, while [males] are forbidden to wear any of these items."[99] The court held that both policies were permissible because they "d[id] not treat one sex worse than the other."[100] In a similar vein, the court held that the dress code was permissible because a "male who wishe[d] to dress as a [woman] would be placed in the same position as a . . . female who wishe[d] to dress as a [man]."[101] If future courts were to adopt this reasoning, it would rob transgender employees of the benefits of socially transitioning to their gender identity,[102] effectively preventing *Bostock*'s holding from providing any practical protections to these employees.

Because the court made multiple errors in its application of *Bostock,* future courts should not adopt *Bear Creek*'s approach. First, it held that neither policy violated Title VII because each

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96. *See infra* Part III.A.

97. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 623–24 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

98. *Id.* at 623.

99. *Id.* at 623–24.

100. *Id.* at 625.

101. *Id.* at 624.

102. These benefits are well-established. *See, e.g.*, Jaclyn M. W. Hughto et al., *Social and Medical Gender Affirmation Experiences Are Inversely Associated with Mental Health Problems in a U.S. Non-Probability Sample of Transgender Adults*, 49 ARCH. SEX. BEHAV. 2635, 2635 (2020) (finding that "the number of gender affirmation experiences endorsed was inversely associated with depressive, anxiety, and stress symptoms" in transgender adults); Corina Lelutiu-Weinberger et al., *The Roles of Gender Affirmation and Discrimination in the Resilience of Transgender Individuals in the US*, 46 BEHAV. MED. 175, 175 (2020) (finding that "being recognized based on one's gender identity . . . was associated with lower odds of suicidal ideation and psychological distress" in transgender people).

treated males and females equally as groups.[103] The court interpreted *Bostock* as "reinforc[ing] the distinction between biological sexes and hold[ing] that treating one sex worse than the other constitutes sex discrimination."[104] This flies in the face of *Bostock*'s command to focus on individuals rather than groups.[105] The court's interpretation is also at odds with the Supreme Court's rearticulation of *Price Waterhouse*'s pronouncement that "Title VII's message is 'simple but momentous': [a]n individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'"[106] *Bear Creek*'s holding on bathrooms rested entirely on this error, as the court did not bother to apply any kind of but-for test to sex-based bathroom policies. For dress codes, the court did apply two different but-for tests, but both misinterpreted the elements laid out in *Bostock*.

Bostock's test requires courts to change the employee's sex, hold constant the employee's traits or actions (e.g., clothing choice, bathroom use, gender identity, etc.), and ask whether the employer's decision changes. For example, if the dress code states that only males can wear ties, the *Bostock* test asks whether a male and female would be treated differently for each wearing a tie. As only the female would be fired, this is clearly sex discrimination. The *Bear Creek* court, however, applied different tests to find that sex-based dress codes were permissible. In its first comparison, the court changed *both* the employee's sex *and* clothing choice.[107] This application would compare a female wearing a tie to a male wearing make-up. *Bostock*'s rejection of this version of the test is yet another binding precedent that the court ignored.[108] In its second attempt, the court kept constant the employee's sex and changed the employee's gender identity—thereby changing their status as cis or trans—and held that dress codes were permissible

103. *See* Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 625 (N.D. Tex. 2021) ("Like sex-specific dress codes, sex-specific bathrooms do not treat one sex worse than the other.").

104. *Id.*

105. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 658 (2020).

106. *Id.* at 660 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion)).

107. *See Bear Creek Bible Church*, 571 F. Supp. 3d at 624–25 ("A . . . male who wishes to dress as a [woman] would be placed in the same position as a . . . female who wishes to dress as a [man].").

108. *See Bostock*, 590 U.S. 644, 671. Applying *Bear Creek*'s logic, anti-gay discrimination would be permissible because a male who wishes to date men would be placed in the same position as a female who wishes to date women. That is, of course, the exact opposite of *Bostock*'s logic and holding.

because the "rules apply evenly" to cisgender and transgender employees because both could violate the policy by wearing "unprofessional" clothing.[109] Because the but-for test works by changing only the statutorily protected grounds, this version would only be proper if transgender status were the protected grounds rather than sex.[110] The court undermined its own analysis by correctly stating that, even after *Bostock*, "[t]ransgender individuals are not a protected class" while also holding that sex-based dress code policies are permissible *because* they do not specifically target trans employees.[111] The court reached its incorrect conclusion by refusing to apply the test laid out in *Bostock*.

A proper application of *Bostock*'s command to apply the "but-for" test to individuals and to only change sex leads to the conclusion that any "sex plus"[112] discrimination, including punishment for using the bathroom of the opposite sex and dressing as the opposite sex,[113] violates Title VII.[114] Like homosexuality and transgender status, these labels are functions of sex that an employer can only apply to an individual by reference to that individual's sex—i.e., an employer cannot say that an employee is dressing as or using the bathroom of the *opposite* sex without knowing the *employee's* sex.

One argument against this conclusion is that, while sex-specific dress codes and bathroom policies do treat individual males and females differently, such policies do not "discriminate" under Title

109. *Bear Creek Bible Church*, 571 F. Supp. 3d at 624 ("Since the policy requires [males] to wear slacks, a [cis man] employee who wears jeans and a [trans woman] employee who wears dresses are equally in violation of the rule. Because the dress code is enforced evenhandedly [and does not] . . . target[] transgender individuals, [the employer's] dress code policy does not violate Title VII.").

110. *Bostock* was based on sex and did not make transgender status into a separate protected grounds under Title VII. Bostock v. Clayton Cnty., 590 U.S. 644, 655 (2020) ("The only statutorily protected characteristic at issue in today's cases is 'sex[.]'").

111. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 624 (N.D. Tex. 2021).

112. *See* Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1089 (5th Cir. 1975).

113. *See, e.g.*, Blount, *supra* note 55, at 228 ("Based upon the straightforward logic of *Bostock*, another significant change is required—all sex-differentiated employer appearance standards[] . . . likely constitute sex discrimination under Title VII.").

114. *Bostock*, 590 U.S. at 670 ("As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."); *see also* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1048 (10th Cir. 2020) (stating that after *Bostock*, "termination is 'because of sex' if the employer would not have terminated [an employee of the opposite sex] with the same 'plus'-characteristic" and applying this reasoning to sex-plus-age discrimination claims).

VII.[115] The statute only prohibits discrimination that affects an individual's "compensation, terms, conditions, or privileges of employment,"[116] and policies that force an employee to dress and use the bathroom according to the employee's sex may not rise to that level.[117] Some commentators have supported this argument by referencing the Supreme Court's statements in *Oncale v. Sundowner Offshore Services, Inc.* that Title VII "requires neither asexuality nor androgyny in the workplace" and that the key question for courts "'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"[118] These quotes, however, do not support the commentators' argument. *Oncale* was about sexual harassment, not an employer's official policies.[119] The famous quote about "asexuality [and] androgyny" merely emphasizes that Title VII is not a "general civility code" with specific directions for how people should behave in the workplace to avoid sexually harassing their colleagues.[120] Likewise, the quote about "disadvantageous terms or conditions of employment" articulates the standard for what constitutes actionable sexual

115. *See* 42 U.S.C. § 2000e-2(a)(1).

116. *Id.*

117. *See, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018) (en banc) (responding to the dissenters' concern that the majority opinion would preclude such policies by stating that "[w]hether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question"), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020). *But see* Wedow v. City of Kansas City, 442 F.3d 661, 671–72 (8th Cir. 2006) (upholding jury verdict that city's failure to provide female firefighters adequate protective clothing and restroom and shower facilities violated Title VII).

118. 523 U.S. 75, 81 (1998); *id.* at 80 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)); *see* Ryan Anderson, *Symposium: The Simplistic Logic of Justice Neil Gorsuch's Account of Sex Discrimination*, SCOTUSBLOG (June 16, 2020), https://www.scotusblog.com/2020/06/symposium-the-simplistic-logic-of-justice-neil-gorsuchs-account-of-sex-discrimination/ [https://perma.cc/YUF9-AEKY] (referencing these *Oncale* quotes to argue that *Bostock*'s reasoning was wrong because it "entails asexuality and androgyny"); Pl.'s Mem. in Supp. of its Opp'n to Defs.' Mot. for Summ. J. and its Cross-Mot. for Summ. J. at 7, Texas v. Equal Emp. Opportunity Comm'n, 633 F. Supp. 3d 824 (N.D. Tex. 2022) (No. 2:21-cv-194-Z) (referencing *Oncale* to argue that "*Bostock* did not prohibit all sex-based distinctions in employment" because *Bostock* cites *Oncale* as authority).

119. *See Oncale*, 523 U.S. at 82 (holding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII"); *see also Harris*, 510 U.S. at 22 (holding that, in sexual harassment context, courts need not find "concrete psychological harm" to find that a work environment was hostile under Title VII).

120. *Oncale*, 523 U.S. at 81.

harassment.[121] Out-of-context quotes about sexual harassment do not save sex-based dress codes and bathrooms from being sex discrimination. Furthermore, even if the argument that dress code and bathroom policies are not per se discrimination is correct, it ignores the simple fact that when an employee violates these policies, they get fired, and "[f]iring employees because of [sex] surely counts" as discrimination.[122]

The "reasonableness" theory likely motivates this argument defending sex-based dress codes and bathrooms. This theory holds that, even if punishing employees under these policies is sex discrimination, courts should not hold employers liable under Title VII because this kind of sex discrimination is so common that it must be reasonable.[123] While this theory has support from pre-*Bostock* circuit law,[124] the *Bostock* decision instructs courts to take a textualist approach,[125] and "Title VII does not say [that] 'reasonable' sex discrimination is acceptable."[126] Lower courts must apply *Bostock* rather than their own notions of what is and is not "reasonable" sex discrimination.

D. HOW THE *BEAR CREEK* COURT REACHED ITS POLICY OUTCOME

The *Bear Creek* court's errors stemmed from its attempt to analyze *Bostock* using the "favoritism and blindness framework"

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121. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) ("[The] inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance.").

122. *Bostock*, 590 U.S. at 681; *see also* Wittmer v. Phillips 66 Co., 915 F.3d 328, 337 (5th Cir. 2019) (Ho, J., concurring) ("The [*Zarda*] majority tried to avoid employer liability for separate bathrooms by suggesting that bathroom assignments are not significant enough to constitute terms and conditions of employment protected under Title VII[.] But that only begs the question: What if an employee is fired for using the wrong bathroom or changing room? The majority does not say." (citing Zarda v. Altitude Express, Inc., 883 F.3d 100, 118–19 (2d Cir. 2018) (en banc), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020))).

123. *See* Blount, *supra* note 55, at 232 (stating that many pre-*Bostock* cases "read like policy-based decisions in which the courts predetermined that sex-differentiated policies seem like a common and acceptable practice in most employment contexts that should continue, and then backed into the reasoning necessary to justify this result").

124. *See id.* at 229 n.90 (collecting cases from seven different circuits that held that sex-based appearance standards do not violate Title VII). Blount concludes that these cases "built a zone of reasonableness around sex-differentiated appearance standards." *Id.* at 233.

125. *See Bostock*, 590 U.S. 644, 674.

126. Blount, *supra* note 55, at 236 (arguing also that any "allowance for reasonable sex discrimination . . . is judicial gloss that is difficult to make sense of in light of the text of Title VII").

articulated by Judge Ho in *Wittmer v. Phillips 66 Company*, a pre-*Bostock* Fifth Circuit case.[127] Judge Ho had identified two opposing legal theories, favoritism and blindness, under which Title VII would and would not allow discrimination based on homosexuality and transgender status.[128] The favoritism theory prohibits employers from generally favoring one sex over the other as a whole, while the blindness theory prohibits employers from basing individual decisions on an employee's sex.[129] While the *Bear Creek* court purported to use this framework, it diverged from Judge Ho's definitions, which resulted in its errors expanding *Bostock* to bisexual people and cabining *Bostock* from reaching all "sex-plus" discrimination. Evidence from the court's and the plaintiff employers' language suggests that the court made these errors as part of a policy-driven approach.

1. *Favoritism and Blindness Framework*

Judge Ho defined favoritism as "prohibit[ing] employers from favoring [males] over [females], or vice versa."[130] In his analysis, under the favoritism theory, anti-gay and anti-trans discrimination do not violate Title VII as long as the discrimination targets gay and trans males *and* females equally.[131] Such

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127. *See* Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 618 (N.D. Tex. 2021) ("Two diverging tests have emerged in Title VII sex discrimination litigation: favoritism and blindness." (citing 915 F.3d 328, 333–34 (5th Cir. 2019) (Ho, J., concurring))). The *Wittmer* case involved a transgender woman who sued an employer for discrimination. The district court granted summary judgment for the employer, stating that, while Title VII *does* cover transgender and sexual orientation discrimination, the plaintiff had failed to establish a prima facie case of discrimination. The Fifth Circuit affirmed but admonished the district court for ignoring Fifth Circuit precedent establishing that Title VII *does not* prohibit sexual orientation discrimination—a precedent that would also apply to transgender discrimination. *Wittmer*, 915 F.3d at 330. In a separate concurrence to his own majority opinion, Judge Ho explained his views on why the Circuit's precedent was correct and why cases like *Zarda*, which would later be affirmed in *Bostock*, were wrong. *Id.* at 333 (Ho, J., concurring).

128. *See id.* at 334 (Ho, J., concurring).

129. *See id.* (Ho, J., concurring).

130. *Id.* (Ho, J., concurring).

131. *See id.* (Ho, J., concurring) ("Imagine that a company discriminates against transgender women. Is that 'discrimination *because of* sex'? The anti-favoritism theory would say no, not if the company also discriminates against transgender men. After all, that would not be favoring men over women, or women over men—it would be favoring non-transgender persons over transgender persons. So too as to sexual orientation: A company that refuses to hire either gay men or lesbian women is not favoring men over women, or vice versa—it is favoring straight men and women over gay men and lesbian women.").

discrimination favors heterosexual and cisgender employees, but it does not favor either *sex*, as a class, over the other.[132]

As an alternative to the favoritism theory, Judge Ho proposed a "blindness" theory that asks whether, "'[h]olding all other things constant and changing only . . . sex, [the employee would] have been treated the same way.'"[133] In his analysis, under the blindness theory, sexual orientation and transgender status discrimination *do* violate Title VII because discrimination on these grounds treats individuals of different sexes differently.[134]

If Judge Ho's explanation of "blindness" sounds familiar, that is because it is the exact approach the Supreme Court later used in *Bostock*.[135] The Court expressly placed the focus on individuals, not sexes as classes,[136] and articulated a "but-for" test changing only sex.[137] Because *Bostock*'s holding rested entirely on this

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132. *See id.* (Ho, J., concurring).

133. Wittmer v. Phillips 66 Co., 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) (quoting Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 345 (7th Cir. 2017) (en banc)) (using the "but-for" test to find that sexual orientation discrimination is sex discrimination); *see Hively*, 853 F.3d at 345 (" . . . the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?").

134. *See Wittmer*, 915 F.3d at 334 (Ho, J., concurring) ("The blindness theory, by contrast, would hold that Title VII prohibits both transgender and sexual orientation discrimination. Because under that theory, it would not matter that the company isn't favoring [males] over [females], or [females] over [males]. All that matters is that company policy treats people differently based on their sex: Because only [females], not [males], may identify as women—and only [females], not [males], may marry men[.]").

135. Of course, as Judge Ho's analysis is not binding on the Supreme Court, the *Bostock* opinion does not have to fit neatly into the "favoritism or blindness" framework. Judge Ho did cite *Zarda*, one of the cases later consolidated and affirmed in *Bostock*, as an example of a circuit adopting the blindness test. *See Wittmer*, 915 F.3d at 337 (Ho, J., concurring) (citing Zarda v. Altitude Express, Inc., 883 F.3d 100, 150, 118–19 (2d Cir. 2018) (en banc), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020)). He argued, however, that *Zarda* was wrongly decided because the blindness test's result—i.e., *Bostock*'s eventual holding—does not comport with common usage of the word "sex" and represents courts making social policy decisions better left to Congress. *See id.* at 338.

136. *See Bostock*, 590 U.S. at 658 ("[Title VII] tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups[.]"); *id.* at 659 ("[I]t doesn't matter if the employer treated women as a group the same when compared to men as a group."); *id.* at 662 ("Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII."); *id.* at 665 ("[A]n employer cannot escape liability by demonstrating that it treats males and females comparably as groups.").

137. *See id.* at 659–60 (describing the "but-for" test as determining whether "changing the employee's sex would have yielded a different choice by the employer").

approach,[138] using Judge Ho's descriptions, *Bostock* must be read as adopting the blindness theory as a valid test for sex discrimination. Despite *Bostock*'s clear choice, *Bear Creek* still managed to muddy the waters.

2. Bear Creek's *Subversion*

As the Supreme Court did not directly reference either of Judge Ho's theories in *Bostock*, the *Bear Creek* court was correct in stating that "*Bostock* did not *explicitly* endorse one or the other."[139] The court was incorrect, however, in stating that "[i]t is unclear what approach the Supreme Court adopted in *Bostock*, if either."[140] As described above, under Judge Ho's description, *Bostock* adopted blindness via its "but-for" test focused on individuals. Curiously, however, the *Bear Creek* court departed from Judge Ho and wrote that the "but-for" test implicates "favoritism" rather than "blindness."[141] The court then introduced a new description for "blindness": an individual's "sex [being] 'not relevant' to employment decisions or policies,"[142] which "would indicate that an employer cannot consider an individual's biological sex at all . . . when making employment decisions."[143]

At first glance, the *Bear Creek* court's articulations of "favoritism" and "blindness" appear to be the same. After all, there is no difference between demanding that a decision be the same regardless of sex—i.e., *Bostock*'s "but-for" test—and demanding that a decision not consider sex at all. In other words, sex being "not relevant" is not a separate theory; it is simply the inevitable result of using *Bostock*'s "but-for" test, as the Court clearly stated.[144] A court can call the theory whatever it wants—so long

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138. *See id.* at 662 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that should be the end of the analysis." (citation omitted)).

139. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 618 (N.D. Tex. 2021) (emphasis added).

140. *Id.*

141. *Id.* ("[The *Bostock* Court's] general statement of [the "but-for" test changing only the employee's sex] indicates that the proper approach is favoritism because the employer violates Title VII if it intentionally fires an individual "based on" or "but-for" the person's biological sex.").

142. *Id.* (citing Bostock v. Clayton Cnty., 590 U.S. 644, 660 (2020)).

143. *Id.*

144. *Bostock*, 590 U.S. at 659–60 ("[I]f changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message

as it applies the "but-for" test changing only the sex of the employee and keeping constant all other traits and actions, the result should comport with *Bostock*.

The *Bear Creek* court, however, proceeded to apply a different "but-for" test. Rather than changing the employee's sex and keeping constant the employee's gender of attraction (or gender identity), the court changed both the employee's sex *and* attraction (or gender identity). This version kept constant the employee's homosexuality or transgender status. Of course, applying the test in this way leads to the opposite outcome as *Bostock*—i.e., that discrimination on these grounds would not violate Title VII. Indeed, in referencing a hypothetical from *Bostock*,[145] the court wrote that "an employer that would fire both males and females who are homosexual or transgender satisfies" this version of the test.[146]

This departure from *Bostock* illuminates why the *Bear Creek* court sought to maintain a distinction between the "but-for" test and its "blindness" theory. Because the court was bound by *Bostock*'s holding while its own version of the "but-for" test led to a different result, it had to eliminate the conflict by inserting an additional rule. The court called this new rule "blindness" and stated that it "is activated only if the secondary trait"—i.e., the non-sex trait—"is 'inextricably bound up with sex.'"[147] The court limited traits that are "inextricably bound up with sex" to only homosexuality and transgender status.[148] This maneuver of logic cabined *Bostock*'s holding so that it would not apply to all "sex plus" traits and conduct, including dressing as the opposite sex and using the bathroom of the opposite sex.

This approach fails for two reasons. First, *Bostock* is clear about how to perform the "but-for" test for homosexuality and

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is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'" (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion))).

145. *See* Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 620 (N.D. Tex. 2021) ("[J]ust as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same." (quoting *Bostock*, 590 U.S. at 662)).

146. *Id.*

147. *Id.* at 621 (quoting *Bostock*, 590 U.S. at 660–61).

148. *Id.* at 619 ("The Court concludes that absent guidance from the Circuit the proper test must be favoritism, plus blindness to sex if the secondary trait is homosexuality or transgenderism.").

transgender status,[149] and it is controlling. Therefore, lower courts are precluded from performing the test by holding sexual orientation and transgender status constant. Second, *Bostock* did not treat homosexuality and transgender status as secondary, non-sex traits for the purposes of the "but-for" test. Rather, the Court treated attraction to a certain gender and gender identity as the secondary traits. These traits combined with sex to create the labels "gay/straight" and "trans/cis," which then formed the basis for the employer's decisions.[150] Therefore, even if the *Bear Creek* court were correct that "the 'blindness' test is activated only if the secondary trait or conduct considered by the employer is 'inextricably bound up with sex,'"[151] its conclusion that only homosexuality and transgender status are "inextricably bound up with sex" does not logically follow. The *Bostock* majority wrote that "homosexuality and transgender status are inextricably bound up with sex[,] [n]ot because [these terms] are related to sex in some vague sense . . . , but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[152] Under this reasoning, any "sex plus" traits or conduct are equally as "inextricably bound up with sex" as homosexuality and transgender status, including dressing as the opposite sex and using the bathroom of the opposite sex.[153] Yet, the *Bear Creek* court did not reach this conclusion because it obscured the straightforward logic of *Bostock*.

While the court may have misinterpreted *Bostock* in good faith, there is evidence suggesting that it made its moves to reach its desired policy outcome. The court made its logical maneuver sua sponte; the plaintiff employers acknowledged that they never made these arguments.[154] In fact, on appeal, the employers did not

149. *See supra* Part I.B.2.

150. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 660 (2020). Rather than comparing a gay male to a gay female, the Court compared a male who likes men to a female who likes men. Likewise, rather than comparing a trans male to a trans female, the Court compared a woman assigned male at birth to a woman assigned female at birth.

151. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 621 (N.D. Tex. 2021) (quoting Bostock v. Clayton Cnty., 590 U.S. 644, 660–61 (2020)).

152. *Bostock*, 590 U.S. at 660–61.

153. *See supra* Part II.C. If "homosexuality" is sex plus attraction, and "transgender status" is sex plus gender identity, then "dressing as the opposite sex" is sex plus dress, and "using the bathroom of the opposite sex" is sex plus bathroom usage. All of these labels consist of sex plus a secondary, non-sex trait.

154. *See* Br. of Appellants/Cross-Appellees at 51–52, Braidwood Mgmt., Inc., v. Equal Emp. Opportunity Comm'n., 70 F.4th 914 (5th Cir. 2023) (No. 22-10145) ("The plaintiffs did not argue in the district court that *Bostock* allows employers to enforce sex-segregated

attempt to defend the court's reasoning in their favor, admitting that the court's holding "is difficult to square with the statements in *Bostock*."[155] The *Bear Creek* court showed its hand when it stated that a "universally applied blindness test" would lead to "absurdities."[156] The court did not even attempt to explain why it would be absurd for anti-discrimination law to protect transgender employees' ability to act in accordance with their gender, which suggests that the court merely relied on a transphobic policy preference. Indeed, by bringing claims for declaratory judgment,[157] the discriminatory employers were able to "judge shop" for a district known for socially conservative judges who strike down government regulations.[158]

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restrooms or sex[-]specific dress-and-grooming codes. . . . The district court, however, went a step further and held that restroom and dress-code policies do not implicate Title VII's prohibition on 'sex' discrimination, even in the wake of *Bostock*'s holding." (internal citations omitted)).

155. *Id.* ("[T]here is language throughout *Bostock* that confidently proclaims that employers violate Title VII whenever an employee's biological sex is the 'but-for cause' of an adverse employment action—which seems to leave no room for sex[-]segregated restrooms or sex[-]specific dress-and-grooming codes. . . . The defendants are correct to observe that the district court's holding on these issues is difficult to square with the statements in *Bostock* that equate 'sex' discrimination with but-for causation. An employee's biological sex is a 'but-for' cause that determines how he must dress and which restrooms he must use, and if the employee's biological sex were different he would be subjected to a different set of rules." (internal citations omitted)).

156. *Bear Creek Bible Church*, 571 F. Supp. 3d at 618 n.31 ("Justice Alito recognized the potential absurdities that result from a universally applied blindness test."). For example, Justice Alito worried that applying Title VII to "everything that is related to" sex would prevent employers from "refus[ing] to hire an employee with a record of sexual harassment[,] . . . sexual assault or violence." *Bostock*, 590 U.S. at 694 (Alito, J., dissenting).

157. "Employers who take the initiative and sue first [for declaratory judgment] may gain some significant advantages[,] . . . including . . . select[ing] a federal circuit more favorably disposed to its position." Ronald M. Green, *'Preemptive' Employment Litigation: When an Employer's Best Defense May Be a Good Offense*, EPSTEIN BECKER GREEN (Aug. 6, 2007), https://www.ebglaw.com/insights/publications/preemptive-employment-litigation-when-an-employers-best-defense-may-be-a-good-offense [https://perma.cc/4VS5-PC8M].

158. Jacqueline Thomsen, *Shopping for the Judge You Want Honed to Perfection in Texas*, BLOOMBERG L. (May 9, 2024), https://news.bloomberglaw.com/us-law-week/shopping-for-the-judge-you-want-honed-to-perfection-in-texas [https://perma.cc/ZQ67-R6PP]. Judge Reed O'Connor, who decided *Bear Creek*, criticized recent efforts by the U.S. Judicial Conference to adopt policies to reduce this "judge shopping," stating that the Judicial Conference was "'cav[ing] to criticism from commentators and political officials.'" Nate Raymond, *Texas Judge Favored by Conservatives Blasts 'Judge Shopping' Reform*, REUTERS (Sept. 23, 2024), https://www.reuters.com/legal/government/texas-judge-favored-by-conservatives-blasts-judge-shopping-reform-2024-09-23/ (on file with the *Columbia Journal of Law & Social Problems*).

E. TAKEAWAYS FROM *BEAR CREEK*

This Part has shown how *Bear Creek*'s analysis of *Bostock*'s reach, despite being the most detailed by a federal court to date, improperly applied the Supreme Court's reasoning. The *Bear Creek* court's oversimplification of bisexual discrimination collapses upon deeper analysis.[159] Additionally, the court's effort to effect a policy outcome led it away from properly applying *Bostock* against sex-based dress codes and bathroom policies.[160] Because *Bear Creek*'s rulings on *Bostock* were vacated on appeal,[161] potential plaintiffs, especially bisexual and nonbinary plaintiffs, remain in the dark as to their Title VII protections under *Bostock*. The next Part analyzes how such plaintiffs can make multiple arguments to further their chances of success.

III. LEGAL ARGUMENTS FOR BISEXUAL AND NONBINARY PLAINTIFFS

Potential bisexual and nonbinary plaintiffs may be tempted to argue that all LGBTQ+ identities are now protected classes.[162] Indeed, almost every circuit has referenced the *Bostock* holding using broad language, implying that *Bostock* covers all sexual

159. Indeed, the conclusion that *Bostock* does not always protect bisexuals has led some commentators to argue that lawyers seeking to expand anti-discrimination law should not rely on "but-for" causation theories. *See, e.g.*, Guha Krishnamurthi, *Not the Standard You're Looking For: But-For Causation in Anti-Discrimination Law*, 108 VA. L. REV. 1, 12 (2022) ("This strikes me as a deeply concerning result for the *Bostock* majority's simple but-for test."). *But see* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621 (2021) (arguing that "but-for" causation has the potential to expand anti-discrimination law).

160. Judges and commentators hostile to expanding anti-discrimination law have argued against the logic adopted in *Bostock* because of its inevitable application against dress codes and bathrooms. *See* Witmmer v. Phillips 66 Co., 915 F.3d 328, 337 (Ho, J., concurring) ("No one to my knowledge has suggested how the blindness theory of Title VII could prohibit transgender and sexual orientation discrimination, while still allowing employers to maintain separate bathrooms for men and women. That is presumably because no such limiting principle exists."); Bostock v. Clayton Cnty., 590 U.S. 644, 726 (2020) (Alito, J., dissenting) ("The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed."); Anderson, *supra* note 118 (arguing that *Bostock*'s reasoning will destroy sex-based bathrooms and dress codes).

161. *See* Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914, 940 (5th Cir. 2023) ("[W]e decline to answer these open questions for [the employers'] policies because the class certifications have been reversed.").

162. For example, the *Bear Creek* court held that *Bostock* protects bisexual people because it protects gay people. *See* Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 622 (N.D. Tex. 2021).

orientations and gender identities.[163] None of these circuit cases, however, required a court to apply *Bostock* to LGBTQ+ identities not at issue in *Bostock*.[164] The statements in these cases suggesting a broad reading of *Bostock*, would, therefore, only be dicta in a case directly addressing bisexual discrimination.[165] Similarly, some commentators have argued that *Bostock* covers

163. *See* Frith v. Whole Foods Market, Inc., 38 F.4th 263, 271 (1st Cir. 2022) ("In *Bostock*, the Court considered whether Title VII prohibits employment actions taken at least in part on the basis of a plaintiff's *sexual orientation* or *gender identity*[] . . . [and] held that such employment actions are . . . prohibited by Title VII's plain language." (emphases added) (internal citations omitted)); New Hope Family Services, Inc. v. Poole, 966 F.3d 145, 161 (2d Cir. 2020) (stating that the *Bostock* Court "construe[ed] Title VII . . . to prohibit discrimination on the basis of *sexual orientation*" (emphasis added)); Roberts v. Glenn Industrial Group, Inc., 998 F.3d 111, 121 (4th Cir. 2021) (stating that the *Bostock* Court "held that discrimination based on *sexual orientation* or transgender status violates Title VII" (emphasis added)); Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 598 (5th Cir. 2021) (stating that under *Bostock*, "discrimination on the basis of *sexual orientation* or *gender identity* is a form of sex discrimination under Title VII" (emphases added)); Ames v. Ohio Dep't. Youth Services, 87 F.4th 822, 825 (6th Cir. 2023) (stating that the plaintiff's 'claim is based on *sexual orientation*, which is a protected ground under Title VII" after *Bostock* (emphasis added)); Marshall v. Indiana Dep't. of Correction, 973 F.3d 789, 791 (7th Cir. 2020) (stating that "[i]n *Hively*, the Seventh Circuit extended Title VII to include *sexual-orientation* discrimination[ ] [and] . . . in *Bostock*, the Supreme Court did the same" (emphasis added) (internal citations omitted)); Sch. of the Ozarks, Inc. v. Biden, 41 F.4th 992, 995 (8th Cir. 2022) ("*Bostock* held that [Title VII's] prohibition on employment discrimination 'because of sex' encompasses discrimination on the basis of *sexual orientation* and *gender identity*." (emphases added) (internal citations omitted)); Maner v. Dignity Health, 9 F.4th 1114, 1122 (9th Cir. 2021) (stating the *Bostock* Court "concluded that discrimination based on *sexual orientation* and *gender identity* is sex discrimination under Title VII" (emphases added)).

164. *See Frith*, 38 F.4th at 267 (racial discrimination); *New Hope Family Services*, 966 F.3d at 149 (religious adoption agency challenging application of a New York anti-discrimination law to its practice of not recommending adoption by same-sex couples); *Roberts*, 998 F.3d at 114–15, (same-sex sexual harassment and retaliation); *Olivarez*, 997 F.3d at 598 (transgender discrimination); *Ames*, 87 F.4th at 825 (sexual-orientation discrimination against a straight person); *Marshall*, 973 F.3d at 790 (sexual-orientation discrimination against a gay person); *School of the Ozarks*, 41 F.4th at 995 (standing issue in a religious college's challenge to an executive agency memorandum that could impact its practice of sex-segregated student housing); *Maner*, 9 F.4th at 1116 (sex discrimination based on a supervisor's preferential treatment of a romantic partner over other employees). One circuit case, *Crowe v. Wormuth*, did apply *Bostock* to a bisexual employee, but the employee lost the case on factual grounds. *See* 74 F.4th 1011, 1036 (9th Cir. 2023) (stating that the "Supreme Court has now held that sexual orientation discrimination is actionable under Title VII" in a case involving a plaintiff suing for bisexual discrimination, but granting summary judgment to the employer because the employer "articulated sufficient, non-discriminatory reasons" for firing the employee).

165. *See, e.g.*, Cohens v. Virginia, 19 U.S. 264, 399 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

bisexual people because it affirmed *Zarda v. Altitude Express*,[166] which used broader language in holding that "Title VII prohibits discrimination on the basis of *sexual orientation*."[167] *Zarda*, however, only involved a gay man and so also did not directly address whether its "but-for" test could apply to bisexual people.[168] Even if the broad statements in the circuit cases were not dicta,[169] movement lawyers should be wary of achieving victories based on shaky legal reasoning; entire lines of case law arising from it could be wiped out upon clarification by the Supreme Court.[170] Instead of hoping that courts will automatically extend *Bostock*'s reasoning without further analysis, bisexual and nonbinary plaintiffs should bolster their arguments using legal theories grounded in analogous holdings from parallel contexts or argue for a broader definition of "sex."

A. BISEXUAL AND NONBINARY DISCRIMINATION AS GAY AND TRANS DISCRIMINATION

While *Bostock*'s logic does not protect all bisexual and nonbinary employees directly, it will still likely cover most of their discrimination cases. When an employer fires a bisexual employee specifically because of the employee's same-sex attraction or conduct, the fact that the employee happens to be bisexual rather than gay is no defense for the employer.[171] Likewise, when an employer fires a nonbinary employee specifically because they do not identify as the gender associated with their sex assigned at

166. *See* Marcus et al., *Bridging the Gap*, *supra* note 10, at 227; Heron Greensmith, *Supreme Court LGBTQ Protections Cover Bisexual and Pansexual Workers, Too*, TEEN VOGUE (June 18, 2020), https://www.teenvogue.com/story/supreme-court-lgbtq-protections-bisexual-pansexual-workers [https://perma.cc/9GDS-ZQAZ].

167. 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (internal quotations removed) (emphasis added), *aff'd sub nom*. Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

168. *See id.* at 108, 119.

169. *See Cohens*, 19 U.S. at 399.

170. For example, the Supreme Court overturned almost 50 years of precedent protecting the right to an abortion in Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022), on grounds that the holding in Roe v. Wade, 410 U.S. 113 (1973), was "far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed."

171. *See* Marcus et al., *Bridging the Gap*, *supra* note 10, at 228 ("[W]hen a bisexual person is discriminated against for having a picture of her same-sex partner on her desk, it is unlikely that a person will stop to clarify whether she is bisexual or gay before discriminating against her. It is her sex in relation to her female romantic partner that triggers the discrimination, not necessarily where precisely she lies on the sexual orientation 'Kinsey scale.'").

birth, the fact that they also happen to not identify as the opposite gender is no defense.[172] If the employers also discriminate against gay and trans employees, or if the employers harassed the employees about their same-sex attraction or gender identity, that would suggest that the employers' proffered reasons for firing the employees (i.e., putatively unprotected bisexuality or nonbinary status) were mere pretext for anti-gay and anti-trans discrimination.[173] In this way, many cases of bisexual and nonbinary discrimination will fit under *Bostock*'s description of gay and trans discrimination, and plaintiffs will be able to lean on the facts to argue that their cases fit under *Bostock*'s protections.

B. BISEXUAL AND NONBINARY DISCRIMINATION AS SEX STEREOTYPING

As discussed in Part I, the Court in *Price Waterhouse* held that plaintiffs can establish a sex discrimination claim by showing that sex stereotyping played a motivating role in the employer's decision.[174] The Court reasoned that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"[175] because Title VII "strike[s] at the entire spectrum of disparate treatment of [males] and [females] resulting from sex stereotypes."[176] In *Price Waterhouse*, the sex stereotyping involved an employer who refused to promote a female employee because

172. Courts may muddle the distinctions between nonbinary and trans identities. *See* Lammers v. Pathways to a Better Life, LLC, No. 18-C-1579, 2021 WL 3033370, at *1 (July 19, 2021) (stating that the plaintiff "is a person who, in the language of the gender identity movement, identifies as non-binary, more commonly known as transgender" and is, therefore, protected under *Bostock*).

173. This assumes that the employers would even dare to proffer bisexuality and nonbinary status as their reasons for firing the employees. Doing so may be a risky legal strategy for the employers considering that courts may take for granted that *Bostock* categorically covers sexual orientation and gender identity. *See supra* note 163.

174. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("In saying that [sex] played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a [female]. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a [female] cannot be aggressive, or that she must not be, has acted on the basis of [sex].").

175. *Id.* at 251.

176. *Id.* (quoting L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

she was not sufficiently feminine.[177] Two circuits have since held that anti-gay discrimination is a form of sex stereotyping, and one circuit has held that transgender discrimination is as well.[178]

Bisexual and nonbinary plaintiffs may overcome not being clearly covered by *Bostock* by arguing their cases under this theory. Complicating this argument, however, is the fact that the existing case law on sex stereotyping tends to focus on the expressive characteristics of "masculine" females and "effeminate" males.[179] Citing this case law, employers could argue that the sex stereotyping theory does not extend to the *identity* of being bisexual or nonbinary where the plaintiffs' outward presentation does not clearly confound the employers' stereotypes.

Bisexual plaintiffs can respond by arguing that sex stereotyping does not merely reject "effeminate" males and "masculine" females; it rejects any orientation other than heterosexuality.[180] In other words, "discrimination on the basis of characteristics such as sexual orientation" is an "attempt[ ] to police the gender line."[181] In *Hively v. Ivy Tech*, the Seventh Circuit sitting en banc made multiple statements that support this argument. The court wrote that the gay female plaintiff "represent[ed] the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms

177. *See id.* at 235 (employer recommended that the plaintiff "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" if she wanted to get promoted (internal citations omitted)).

178. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (en banc) ("We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination."), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 346 (7th Cir. 2017) (en banc) ("Our panel described the line between a [sex stereotyping] claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all."); Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018) (holding that the employer fired the trans woman plaintiff due to both her "status" as transgender "her failure to conform to [male] sex stereotypes" (emphasis added), *aff'd sub nom.* Bostock v. Clayton Cnty., 590 U.S. 644 (2020)).

179. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 235 (stating that coworkers called the female plaintiff "macho" and "masculine" (internal quotations removed)); Prowel v. Wise Business Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009) (holding that a gay male plaintiff brought enough evidence of sex stereotyping to survive summary judgment based on "his effeminacy" rather than his sexual orientation).

180. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988) ("The presumption and prescription that erotic interests are exclusively directed to the opposite sex define an important aspect of masculinity and femininity.").

181. Grossman & Hayden, *supra* note 52.

of sexuality as exceptional): she is not heterosexual."[182] The court also favorably referenced its earlier statement that "all gay, lesbian *and bisexual* persons fail to comply with the sine qua non of [sex] stereotypes—that all [males] should form intimate relationships *only* with women, and all [females] should form intimate relationships *only* with men."[183] While there is little to no case law for nonbinary plaintiffs to call upon,[184] the argument functions for them the same way. If American society expects gender and sex to conform,[185] then *being* a man is a stereotype for males, and *being* a woman is for females.[186]

C. TITLE VII'S DEFINITION OF SEX AS INCLUSIVE OF GENDER

Finally, nonbinary plaintiffs may find Title VII protections by arguing that the proper definition of "sex" under Title VII includes gender identity. While the *Bostock* majority proceeded "on the assumption" that sex means "biological distinctions between male[s] and female[s]," the case does not preclude a more expansive definition, and the Court stated that "nothing in [its] approach . . . turns on the outcome of the parties' debate" about the definition of sex.[187] When Congress included "sex" as a protected trait in the Civil Rights Act in 1964, it likely took for granted that an employee would be cisgender and, therefore, likely intended

182. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

183. *Id.* at 342 (citing Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698 (7th Cir. 2016) (emphasis added), *vacated on reh'g en banc sub nom. Hively*, 853 F.3d 339).

184. *But see* Lammers v. Pathways to a Better Life, LLC, No. 18-C-1579, 2021 WL 3033370, at *1 (July 19, 2021) (conflating the terms "nonbinary" and "transgender").

185. *See, e.g.*, Jonathan Weisman, *A Demand to Define 'Woman' Injects Gender Politics into Jackson's Confirmation Hearings*, N.Y. TIMES (Mar. 23, 2022), https://www.nytimes.com/2022/03/23/us/politics/ketanji-brown-jackson-woman-definition.html (on file with the *Columbia Journal of Law & Social Problems*) (explaining how Senator Marsha Blackburn asked then-Judge Ketanji Brown Jackson to define "woman" during her Supreme Court confirmation hearings before discussing a "biological man" in women's sports); Ja'han Jones, *Republicans Tried to Define 'Woman' and . . . Yikes*, MSNBC: THE REIDOUT BLOG (Apr. 7, 2022), https://www.msnbc.com/the-reidout/reidout-blog/republicans-define-woman-rcna23392 [https://perma.cc/M8SX-83P6] (describing how, when asked to define "woman," United States Senators responded with answers like "chromosomes," "female," and "uterus").

186. Indeed, courts and commentators often conflate the concepts of gender and sex or treat them as synonymous, as evidenced by the extensive use of brackets throughout this Note changing "men" and "women" to [males] and [females] in quotations for the sake of maintaining internal logical consistency.

187. Bostock v. Clayton Cnty., 590 U.S. 655, 655 (2020).

"sex" to mean some combination of biology, gender identity, and gender expression.[188]

The following hypothetical illustrates that a narrow definition based only on biology actually defeats the anti-discrimination purpose of Title VII: Matthew fires Samantha, a cis woman. He gives a clear reason for firing her—his wife is divorcing him, and he cannot stand the sight of another woman at work. He replaces her with Bob, a trans man. In this scenario, because Samantha and Bob were both assigned female at birth, Matthew based his decision entirely on each employees' gender identity—i.e., because Samantha is a woman and Bob is a man. If "sex" does not implicate gender identity and only indicates biological differences, then Matthew's action—firing Samantha for being a woman—would not violate Title VII. This hypothetical shows that a purely biological definition of sex would mean that Title VII, put simply, does not protect women.[189] To borrow a phrase from Justice Gorsuch, "No one thinks *that*."[190]

Another awkward implication of the narrow definition of sex is that people who identify as both gay and trans may not fall under *Bostock*'s protection. For example, assume that Bob, the trans man from the hypothetical, is attracted to men and identifies as gay. If his employer fires him for being gay, changing his sex to male and keeping constant both his attraction to men and gender identity as a man would not change his employer's decision. He would be a gay cis man instead of a gay trans man. In other words, it is Bob's identity as a man that makes his attraction to men "gay," not his biological sex. If "sex" only means biological differences, then *Bostock* may protect gay people and trans people but not gay trans people.

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188. *See* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & C.R. L. REV. 573, 618 (2009) ("[W]hen the Civil Rights Act of 1964 was passed, sex . . . referred to a whole constellation of biological characteristics inextricably intertwined with correlative social, behavioral, and psychological conventions.").

189. That is to say, Title VII would not protect individual women from disparate treatment. If an employer had a policy of not hiring *any* women (i.e., neither cis women nor trans women), then female plaintiffs might succeed in a lawsuit under disparate *impact* theory, because a "no women" policy would certainly disproportionately impact females. Disparate impact claims only require plaintiffs to show that an employer "uses a particular employment practice that causes a disparate impact on the basis of . . . sex." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

190. *Bostock*, 590 U.S. at 673.

If nonbinary plaintiffs successfully make this argument to expand the definition of sex to include gender,[191] they would likely find protections under Title VII regardless of *Bostock*.[192] At least one post-*Bostock* circuit court has recently acknowledged that "sex" may mean more than biological sex, and others may follow.[193] Defendant employers may argue in response that, even if sex encompasses gender, Congress only had men and women as genders in mind when it passed Title VII in 1964.[194] The plaintiffs could respond with the same textualist counterargument the *Bostock* Court offered its dissenters: "it is 'the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'"[195]

Using the three strategies described in this Part—pleading facts that fit *Bostock*'s logic, arguing the sex stereotyping theory, and expanding the definition of sex—bisexual and nonbinary plaintiffs may successfully obtain protections from workplace discrimination. Plaintiffs' advocates should proactively advance these arguments rather than assume that courts will take a broad reading of *Bostock* without further analysis.

CONCLUSION

Bostock's holding represented a massive shift in sex-discrimination jurisprudence. The case has been rightly celebrated as a victory for the LGBTQ+ community and equality

191. Defining sex as inclusive of gender identity would likely lead to greater legal equality for all LGBTQ+ people. *See, e.g.*, Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335 (2024) (tracing the legal understanding of sex over time and arguing that the current anti-trans conservative legal movement is a backlash to the progress toward LGBTQ+ equality made possible in part by a more inclusive definition of sex). This approach may spread faster if courts adopt the dynamic approach to statutory interpretation, especially if they believe that the *Bostock* Court already did so. *See generally* William N. Eskridge Jr. et al., *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1502 (2021).

192. *See, e.g.*, Severtson, *supra* note 92, at 1533 ("'Sex' in Title VII has . . . been operating as 'gender' since at least *Price Waterhouse*, and likely since enactment, at least with regard to people with cis, binary gender identities.").

193. *See* A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 770 (7th Cir. 2023) ("There is insufficient evidence to support the assumption that sex can mean only biological sex."), *cert. denied sub nom.* Metro. Sch. Dist. v. A. C., No. 23-392, 2024 WL 156480 (U.S. Jan. 16, 2024).

194. *See, e.g.*, Bostock v. Clayton Cnty., 590 U.S. 655, 714–15 (2020) (Alito, J., dissenting) (stating that Americans in 1964 would have been "bewildered" to hear that Title VII covers "gender identity," as the term first appeared in an article that same year).

195. *Id.* at 664 (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998)).

under the law. While *Bostock*'s reasoning strongly supports the elimination of mandatory sex-based dress codes and bathroom-usage policies, it fails to specifically protect bisexual and nonbinary people, whose identities do not fit into sexual orientation and gender binaries. The Court's simple, straightforward reasoning provides a clear rule, but the *Bear Creek* court and other commentators have put forward flawed arguments that both prevent the decision's logical conclusions and extend its reach beyond what its logic can support. Other courts have signaled, but not held, that they adopt a broad view of *Bostock*'s protections without further analysis. Bisexual and nonbinary plaintiffs should not assume that these courts will protect their identities and should leverage their facts to fit into *Bostock*'s "but-for" test whenever possible. These plaintiffs may also find protections by arguing for broader understandings of sex-stereotyping and the definition of sex under Title VII. Such arguments may prove helpful for plaintiffs in the 16 U.S. states that do not currently protect LGBTQ+ employees from employment discrimination.[196] For these plaintiffs, legal advocates must adhere to *Bostock*'s logic while also pushing the boundaries of what constitutes sex discrimination under Title VII. In doing so, they can prevent the errors of *Bear Creek* from being repeated and achieve lasting, stable protections for LGBTQ+ employees.

196. These states are: Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Montana, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming. *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT (Jan. 14, 2024), https://www.lgbtmap.org/equality_maps/employment_non_discrimination_laws/state [https://perma.cc/R3NG-4A27].