



# Supreme Court Rules Title VII Bars Discrimination Against Gay and Transgender Employees: Potential Implications

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On June 15, 2020, the Supreme Court [issued a decision](#) in a series of cases brought by gay and transgender workers alleging that their employers violated [Title VII of the Civil Rights Act of 1964](#) (Title VII) by discriminating against them “because of . . . sex.” The Court [held](#) 6-3 in *Bostock v. Clayton County, Georgia* that Title VII forbids employers from firing an individual for being gay or transgender. The Court’s decision in *Bostock* was consolidated with two other cases, *Altitude Express, Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*. (An earlier [Sidebar addresses lower court decisions in these cases and provides further background on](#) Title VII.)

This Sidebar explains the Court’s holding in *Bostock* and highlights some potential implications of the decision for other areas of the law, including the “bona fide occupational qualification” (BFOQ) [exception](#) in Title VII; constitutional [exceptions and](#) religious-based [exemptions to Title VII](#); various aspects of [Title IX](#) of the Education Amendments of 1972 (Title IX); and statutes that incorporate Title IX’s requirements, such as the [Affordable Care Act](#).

## Background on Title VII

Title VII [prohibits](#) employment discrimination on several different bases, including by barring covered employees from discriminating against any individuals “because of . . . sex.” The statute does not explicitly address whether that prohibition applies to sexual orientation or gender identity. In *Price-Waterhouse v. Hopkins*, a four-Justice plurality recognized that discriminating against individuals based on a failure to conform to stereotypes about how men or women should behave is unlawful discrimination under Title VII. Whether Title VII prohibits discrimination based on sexual orientation or gender identity has [split](#) lower federal courts.

## Supreme Court’s Decision

*Bostock* represents the Court’s decision for three consolidated cases. Originally, the Court granted certiorari in the consolidated cases of *Bostock* and *Altitude Express* on [whether](#) discrimination based on

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sexual orientation amounts to discrimination because of sex under Title VII. The Court also granted the petition for certiorari in *Harris Funeral Homes*, which [raised two related questions](#): whether Title VII prohibits discrimination against transgender individuals based on (1) their status as transgender; or (2) sex stereotyping under *Price Waterhouse*. The final decision in *Bostock* consolidates all of these cases in a majority opinion written by Justice Gorsuch. Justice Alito, joined by Justice Thomas, issued a [dissenting opinion](#); and Justice Kavanaugh issued a separate [dissent](#).

## Majority Opinion

Justice Gorsuch's [majority opinion](#) focused on the ordinary public meaning of Title VII. Irrespective of what the drafters of Title VII may have intended or anticipated, the majority concluded that the plain meaning of Title VII's [prohibition](#) of discrimination "because of" sex extends to discrimination based on sexual orientation or gender identity. That language, the Court explained, incorporates the "but-for" standard of causation: if an outcome would not have occurred "but-for" the purported cause, causation is established. There can be multiple but-for causes of the same event. The majority opinion gave an example: if a car crash occurred both because a defendant ran a red light and because a plaintiff failed to signal, both are but-for causes. Under Title VII, as long as sex is *one* thing that did cause discrimination, it counts. In other words, when testing whether discrimination occurred because of sex, the Court hypothetically "change[s] one thing at a time [to] see if the outcome changes." If so, the Court has "found a but-for cause." It doesn't matter, the Court explained, if an employer also considered factors other than sex. (It bears mention that the Court has [applied](#) a different causation standard for Title VII cases in the past; and the majority opinion [notes](#) that Congress amended the statute to provide an alternative "motivating factor" standard. Applying that standard, liability can sometimes attach "even if sex wasn't a but-for cause of the employer's challenged decision," but the *Bostock* majority believed it unnecessary to resolve the case under this more lenient standard for establishing liability.)

The Court emphasized that Title VII's prohibition against discrimination is focused on *individuals*, rather than different treatment across groups. That is, the law prohibits discrimination against an individual employee even if an "employer treated women as a group the same when compared to men as a group." The focus on individuals means an employer cannot successfully defend its discrimination because both sexes were subject to the same discriminatory policy.

Applying that analysis to discrimination based on sexual orientation or gender identity, the Court [ruled](#) that singling out an employee on either basis constituted discrimination based on sex in violation of Title VII. The Court reasoned that it is impossible to act on either basis without considering sex. As an example, the Court pointed to a situation where two employees, a man and a woman, are attracted to men. If an employer fires the man for being attracted to men, but not the woman who is also attracted to men, the employer discriminates against him for traits the employer tolerates for a woman. The employee is singled out in part because of his sex—a but-for cause of the discrimination. Likewise, the Court noted, if an employer fires a transgender man (assigned female gender at birth who now identifies as a man) for being transgender, the employer penalizes that person for being assigned the female gender at birth for traits that it would tolerate in a person assigned the male gender at birth.

The majority opinion, while acknowledging the potential implications of the Court's decision for other areas of the law, such as other statutes that prohibit discrimination based on sex, as well as religious liberty under the Constitution, [declined](#) to examine the application of its reasoning to circumstances outside the cases before it.

## Dissenting Opinions

Justice Alito's [dissenting opinion](#) claimed that the majority was creating legislation through the guise of a judicial decision. He argued that virtually no one in 1964 would have understood the statute to prohibit

discrimination on these bases. He highlighted arenas in which the Court's reasoning would have "far-reaching consequences"; for Justice Alito, whether Title VII bars discrimination based on sexual orientation and gender identity should be the product of legislative deliberation, rather than judicial construction. He argued, among other things, that the Court's holding *will* "threaten freedom of religion, freedom of speech, and personal privacy and safety." Justice Kavanaugh's *dissent* similarly criticized the majority opinion for judicially amending the text of Title VII. He contended that the majority relied on a "literalist" reading of the statute, an approach that conflicted with the ordinary meaning of "discriminate because of sex," which Justice Kavanaugh argued was not commonly understood to encompass discrimination related to sexual orientation or gender identity.

## Potential Implications of *Bostock*

In responding to the dissenting opinion of Justice Alito, the majority opinion seemed to acknowledge that its decision could have implications for other statutory and constitutional provisions, but noted that those *were* "questions for future cases." As noted by Justice Alito's *dissent*, the reasoning of *Bostock* may raise questions in such future cases under various legal doctrines and statutory provisions. While not exhaustive, the following areas might see such developments. First, courts have already wrestled with the circumstances in which sex is a BFOQ necessary to the operations of a business; they may now need to determine how *Bostock* applies in those circumstances. Second, courts have examined the interaction between Title VII's requirements and its religious exemptions, as well as with religious liberty claims under the Constitution; courts will likely be asked to apply *Bostock* in those same situations. Finally, because Title VII and Title IX both prohibit discrimination because of sex, courts often draw on Title VII to interpret Title IX; courts will now be asked whether *Bostock* demands that discrimination based on sexual orientation and gender identity also violates Title IX, as well as statutes that incorporate Title IX's provisions.

### Bona Fide Occupational Qualification (BFOQ)

Title VII contains an *exception* permitting sex discrimination when sex is a "bona fide occupational qualification reasonably necessary to the normal operation" of employment. Generally this means that employers may, in narrow circumstances, make employment decisions based on an individual's sex when the "essence" of a job would be undermined by hiring members of both sexes. This exception, courts have *ruled*, "reaches only special situations." For example, the Supreme Court has *ruled* that requiring prison guards at a maximum-security men's prison to be male is a policy that falls under the BFOQ exception, because hiring women could create a security problem linked to their sex. Likewise, some courts have *reached* the analogous conclusion for women's prisons, deciding that requiring guards to be women in that situation is a BFOQ. In a recent case, one appellate court looked to therapeutic and privacy concerns to *conclude* that sex-based considerations in staffing decisions made at a mental health facility for minors could fall within the BFOQ exception.

The Court's reasoning in *Bostock* may have implications for how future courts construe Title VII's BFOQ exception. Although the Court did not address how its reasoning might affect that provision, based on *Bostock*'s holding, transgender employees may bring a Title VII claim alleging that a certain practice or policy discriminates based on gender identity. How this narrow exception to Title VII would apply to claims brought by transgender employees is difficult to predict given the range of employee positions, but application of *Bostock* may present novel questions of interpretation for Title VII's BFOQ exception.

### Religious Exemptions

The Court's decision may also implicate Title VII's provisions and other legal doctrines that permit religious institutions to make employment decisions on religious grounds. Justice Alito's *dissent* *argued*

that the Court’s holding would “threaten freedom of religion” by forcing religious employers to hire employees whose conduct offends their religious teachings. In response, the majority opinion [noted](#) several protections religious entities have against such claims, including in Title VII itself, the First Amendment, and the [Religious Freedom Restoration Act](#) (RFRA). Generally, the [Court](#) in recent terms has [expanded legal protections](#) for [religious](#) entities. Some of these protections, discussed in more detail below, could limit the reach of *Bostock* in certain employment decisions.

Aiming to balance the statute’s prohibitions with the protections of the First Amendment, for example, Congress provided in Title VII itself that religious entities [could sometimes make](#) employment decisions based on an individual’s religion. The Court’s holding in *Bostock* necessarily allows employees to bring Title VII claims alleging discrimination based on sexual orientation or gender identity, including against employers that may qualify for a religious-based exemption under Title VII. These claims might thus raise new questions or issues about how Title VII’s religious-based exemptions should be interpreted and applied. Though the full range of these provisions is beyond the scope of this Sidebar, courts have differed in their [application](#) and [understanding of these](#) Title VII exemptions, and it seems likely that the courts will need to determine how those exemptions apply to antidiscrimination claims related to sexual orientation or gender identity post-*Bostock*.

Religious organizations might also claim that other legal doctrines shield them from complying with Title VII. The First Amendment-derived “ministerial exception,” for instance, [permits](#) churches to make employment decisions about their ministers even if those decisions would otherwise violate civil rights laws. A [case](#) addressing the scope of this exception, about who qualifies as a “minister,” is pending before the Court. Some religious entities may claim that the ministerial exception applies to employment decisions regarding certain gay or transgender employees.

Finally, entities may have a defense in Title VII suits through the RFRA in certain contexts. RFRA prohibits government actions—including rules of general applicability—from substantially burdening someone’s exercise of religion unless the government shows that applying the burden (1) furthers a compelling government interest; and (2) is the least restrictive means of doing so. Justice Gorsuch’s majority opinion in *Bostock* [described](#) RFRA as a “super-statute” that displaces other federal laws and noted that it might sometimes supersede Title VII’s requirements.

## **Title IX: Athletics and Related Statutes**

Outside the Title VII context, the Court’s consolidated decisions in *Bostock* may potentially have important consequences for the proper interpretation of [Title IX](#), which prohibits discrimination based on sex in education programs that receive federal financial assistance. Such implications are likely given that Title IX, like Title VII, contains a similarly phrased prohibition; and courts have already [debated](#) whether Title IX does or does not reach discrimination based on gender identity. Indeed, given the substantial similarity between the two statutes, courts often [rely](#) on Title VII to inform their interpretation of Title IX. Now that *Bostock* has determined that discrimination based on sexual orientation or gender identity constitutes discrimination because of sex under Title VII, courts might apply that reasoning to Title IX. And certain other statutes incorporate Title IX’s prohibitions, such as the Affordable Care Act (ACA), which [prohibits](#) discrimination in federally funded health programs on a basis prohibited by Title IX. Accordingly, *Bostock*’s reasoning may also affect [interpretations](#) of that statute.

One developing issue arising directly under Title IX concerns the statute’s athletic requirements for transgender athletes. The Department of Education’s [implementing regulations](#) for Title IX contain requirements that schools receiving federal funding must follow in their athletics programs. While covered schools [may](#) field separate teams for males and females, they may not, on the basis of sex, deny benefits or treat students differently in athletics. Even before *Bostock*, applying these requirements for transgender students [generated disagreement](#). The reasoning of *Bostock* seems likely to be cited by those

seeking to challenge policies that prohibit transgender athletes from participating on sports teams consistent with their gender identity; courts will likewise face balancing these claims against the competing interests of students who argue that doing so prevents them from obtaining the equal athletic opportunities required by Title IX's regulations.

## Considerations for Congress

While the Court's decision in *Bostock* will assuredly have important results for employees and employers nationwide, the majority opinion's analysis rested on the text of Title VII. Congress may amend the law if it disagrees with the Court's decision. In the past, Congress has sometimes responded to judicial decisions interpreting Title VII by amending the text of the statute. For instance, when the Court held in *General Electric Co. v. Gilbert* that Title VII did not prohibit discrimination based on pregnancy, Congress amended Title VII to do so.

Likewise, Congress may modify provisions in other statutes addressing sex discrimination, such as Title IX or the ACA, including to clarify whether, post-*Bostock*, these statutes should be understood to apply to discrimination on the basis of sexual orientation or transgender status. Options might include supplying an explicit definition of what discrimination "because of ... sex" means or otherwise modifying their scope.

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