CURIOUS CONTINUITY: HOW *BOSTOCK* PRESERVES SEX-STEREOTYPING DOCTRINE

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Alexandra R. Johnson, J.D. 2024, Yale Law School; B.A. 2019, University of Pennsylvania. I am enormously grateful to Douglas NeJaime for supervising and endlessly supporting this work, and to Reva Siegel, Alexandra Brodsky, and Miles Saffran for their critical insights, thoughtful suggestions, and constant generosity. I am also indebted to the editors of the *Dukeminier Awards Journal*—especially Isabel Lafky and Jet Harbeck—for their invaluable support in preparing this Note for publication. All errors and omissions are my own.

Introduction

After the Supreme Court granted certiorari[1] in *Bostock v. Clayton County, Ga.*,[2] several commentators[3] worried the Court would take the opportunity to overturn a key holding from *Price Waterhouse v. Hopkins*:[4] namely, that discrimination based on sex stereotypes is impermissible sex discrimination in violation of Title VII. This worry was not without its basis. The sex-stereotyping theory of sexual orientation and gender identity discrimination ("SOGI discrimination") had been developing in the lower courts (and in other arenas) for years, making it the leading theory of Title VII for LGBTQ+[5]—and thus a likely candidate for dispositive analysis in *Bostock*. The sex-stereotyping theory provides that SOGI discrimination amounts to sex discrimination under sex-stereotyping doctrine because to discriminate against someone on the basis of their sexual orientation or gender identity is to impose the stereotype of heteronormativity or cisnormativity upon them.[6]

Yet, when the Supreme Court handed down its decision in *Bostock*, the sex-stereotyping argument was invoked only as an example—not a rationale.[7] *Bostock* employed relatively formalistic reasoning in concluding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[8] The majority's syllogistic logic appears to sidestep the sex-stereotyping body of law preceding it, with the best articulation of a sex-stereotyping argument for SOGI-discrimination plaintiffs instead appearing in a dissent.[9]

While *Bostock* no doubt represents a monumental victory for LGBTQ+ rights, it arguably generated more questions than answers. In particular, academics have struggled with how to understand *Bostock*'s treatment of sex-stereotyping, given the decades during which sex-stereotyping doctrine

1. Bostock v. Clayton Cnty., Ga., 139 S. Ct. 1599 (2019).
2. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
3. *See, e.g.*, Mark Joseph Stern, *The Supreme Court's New LGBT Cases Could Demolish Sex Discrimination Law as We Know It*, Slate (Apr. 22, 2019, 1:08 PM), https://slate.com/news-and-politics/2019/04/john-roberts-brett-kavanaugh-supreme-court-lgbtq-cases-sexual-harassment.html ("If the conservative majority interprets Title VII by speculating how the law was originally understood, . . . *Price Waterhouse* will be gone."); Ian Millhiser, *The Absolute Worst Case Scenario in the Supreme Court's New Anti-LGBT Cases*, ThinkProgress (Apr.22, 2019, 12:59 PM), https://archive.thinkprogress.org/supreme-court-lgbtq-worst-case-scenario-1a2a05ed8dd2 (arguing a ruling favorable to defendants would require "the Supreme Court . . . to overrule—or, at least, drastically limit—its holding in *Price Waterhouse*").
4. 490 U.S. 228 (1989). Six justices agreed that Title VII bars sex-stereotyping.
5. *See infra* Section I.A.
6. For explanation of how "LGBT persons transgress sex-specific role expectations," including "[p]resumptive heterosexuality" and "presumptive cisgender identity," see Erik Fredericksen, Note, *Protecting Transgender Youth After* Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 Yale L.J. 1149, 1159–63 (2023).
7. *Bostock*, 140 S. Ct. at 1742–43; *id.* at 1749.
8. *Id.* at 1741.
9. *Id.* at 1765 (Alito, J., dissenting).

for LGBTQ+ plaintiffs built up.[10] Some academics see *Bostock* as abandoning sex-stereotyping entirely and are split on whether this is a commendable move). Meanwhile, others read *Bostock* as directly implicating sex-stereotyping logic, although they too are split on the merits of this position. However, these scholarly propositions were primarily published shortly after *Bostock* was handed down, leaving little time for lower courts to actually *apply* and *interpret* the decision.

Division over the meaning of a landmark decision like *Bostock* is nothing new. Scholars have often tussled over the meaning of landmark cases, especially civil rights cases that come to stand for values subsequent history will enshrine as authoritatively good ones. A classic example of this is *Brown v. Board of Education*,[11] which spawned fiery debates among scholars over whether the decision embraced an anticlassification or antisubordination understanding of the Fourteenth Amendment.[12] These disputes continue to inform the development of the Fourteenth Amendment jurisprudence.[13]

As the historic tussle over *Brown*'s legacy demonstrates, the confusion over *Bostock* is both natural and essential. Like *Brown*, one of the factors that makes *Bostock* such an important decision is that it was the product of a meticulous litigation strategy spearheaded by a national civil rights impact litigation organization,[14] meaning that it stands for a movement larger than itself. Thus, like *Brown*, the shape *Bostock*'s legacy takes is inextricably linked to the future evolution of the LGBTQ+ rights movement.

Specifically, the question of *Bostock*'s interaction with sex-stereotyping doctrine is crucial for the LGT claimants at issue in *Bostock* and those not clearly covered by its decision, such as non-binary and bisexual plaintiffs, as well as queer plaintiffs mounting challenges to sex-segregated dress codes and sex-separated bathroom policies. While *Bostock* removes any categorical bar to filing Title VII claims for gay, lesbian, and transgender plaintiffs, it offers little to clarify if such plaintiffs can prove the *merits* of those claims. By contrast, because sex-stereotyping law was largely developed by LGBTQ+

10. *See infra* Section I.C.

11. 347 U.S. 483 (1954).

12. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 Harv. L. Rev. 1470, 1473–75 (2004) (arguing that the dominant anticlassification approach to American law, which is rooted in *Brown*, stands in tension with the focus on "group harm" that characterized "the decision's immediate wake").

13. *Compare* Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll., 143 S. Ct. 2141, 2160 (2023) (citing *Brown* in holding race-based affirmative action in college admissions unconstitutional), *with id.* at 2225 (Sotomayor, J., dissenting) (citing *Brown* in reaching the opposite conclusion).

14. *See* Susan Bisom-Rapp, *The Landmark* Bostock *Decision: Sexual Orientation and Gender Identity Bias in Employment Discrimination Constitute Sex Discrimination Under Federal Law*, 43 T. Jefferson L. Rev. 1, 1 (2021) (explaining that the decision was the product "of a carefully constructed LGBTQIA rights litigation strategy that was decades in the making"); *see also infra* note 61 (discussing the ACLU's deliberate and delicate approach to the case).

claimants, the doctrine does meaningful work for these plaintiffs on the merits. The access to judicial review that *Bostock* provides loses some of its teeth without viable arguments to survive motions to dismiss or for summary judgment. Particularly given some of the most pressing forms of anti-LGBTQ+ discrimination—namely, sex-segregated intimate facilities (e.g., bathrooms) and sex-specific dress codes—this class of claimants requires an approach to SOGI-discrimination law that is not exclusively reliant on *Bostock* opinion, which specifically demurs on those exact forms of discrimination.

Additionally, members of other subgroups in the LGBTQ+ community, such as bisexual and nonbinary individuals, were not parties in *Bostock*. The *Bostock* majority opinion was unclear how the decision's holding applies to plaintiffs belonging to these groups, even if it at least indicates that they are not entirely locked out of Title VII. If *Bostock* is not read to foreclose sex-stereotyping arguments, sex-stereotyping law would provide an ample path forward for bisexual and nonbinary plaintiffs, given the myriad ways they transgress sex stereotypes.

It is thus imperative to understand how *Bostock* intersects with the LGBTQ+-protective sex-stereotyping doctrine that preceded it, to see how both classes of claimants (namely, LGT claimants, and nonbinary and bisexual claimants) can avail themselves of Title VII protections going forward. A new generation of LGBTQ+ plaintiffs will bring statutory sex discrimination claims to which *Bostock* alone does not provide clear answers, even if it opens the door. Particularly since these plaintiffs developed sex-stereotyping law and *Bostock* dedicates minimal time to discussing sex-stereotyping, plaintiffs and practitioners alike must understand whether and to what extent sex-stereotyping doctrine for SOGI-discrimination plaintiffs retains power after *Bostock*.

A classic method of historicizing a landmark decision is to simply look to how courts are interpreting it, as indicia of the shape its legacy will take.[15] This Note takes that approach by examining the fate of *Bostock*'s relationship to sex-stereotyping in the lower courts throughout the several years since the opinion was handed down. By canvassing each of the federal opinions that discuss sex-stereotyping in connection to SOGI-discrimination plaintiffs since *Bostock*, this Note presents a key finding that lower courts have emphatically refused to read *Bostock* as foreclosing the availability of sex-stereotyping arguments for SOGI-discrimination plaintiffs. In fact, courts have frequently read *Bostock* as legitimating the sex-stereotyping path to liability for SOGI-discrimination plaintiffs. *Bostock*'s legacy, like most legacies, is not being formed in a vacuum—rather, courts are ensuring that it is coherent and in conversation with other doctrines.

The Note proceeds in two parts. Part I traces SOGI-discrimination plaintiffs' fight to be included in Title VII jurisprudence. Due to the LGBTQ+ rights movement's prior coalescing around sex-stereotyping doctrine, *Bostock*'s mere

15. *See* Siegel, *supra* note 12, at 1501–32 (tracing the evolution and emergence of the antisubordination understanding of *Brown* in both Supreme Court and lower court jurisprudence).

reference to (rather than reliance on) sex-stereotyping doctrine has resulted in the academy's current tussle over this doctrine's future application in SOGI-discrimination jurisprudence.

Part II canvasses the post-*Bostock* landscape of statutory SOGI-discrimination claims by analyzing how lower courts are reading *Bostock* against, or alongside, sex-stereotyping claims. Twenty-eight of the 30 relevant lower court decisions suggest that courts have not interpreted *Bostock* to have mitigated or limited sex-stereotyping doctrine. For example, some courts have cited *Bostock* as a sex-stereotyping decision. Others have treated *Bostock* as explicitly and implicitly legitimating sex-stereotyping doctrine by explaining how their logics intersect. Finally, some courts have relied on pre-*Bostock* (and sometimes post-*Bostock*) sex-stereotyping holdings from federal appellate courts. Of these 30 opinions, only two dismissed the viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs in light of *Bostock*—and only for questions on which *Bostock* specifically demurred.

This Note argues that *Bostock* should be read as consistent with the sex-stereotyping line of cases preceding it. Moreover, reading Bostock consistent with these cases maintains fidelity to, rather than misconstrues, the holding and logic of *Bostock* and vindicates the decision's antidiscrimination commitment. Finally, this approach could resolve the handwringing over *Bostock*'s legacy by demonstrating that the decision built upon—rather than displaced—its forbearers.

I. The Road Not Taken?

A. *The Sex-Stereotyping Road to* Bostock

In Title VII law, sex-stereotyping doctrine proscribes adverse treatment of employees based on either descriptive sex-stereotypes—generalizations about how certain groups or people with certain characteristics behave, what they prefer, and what their competencies are—or prescriptive sex-stereotypes: how they should think, feel, or behave.[16] Sex-stereotyping doctrine functions by reference to our intuitions, presuming that we as a society each have access to a common bank of assumptions about the way sex governs our role in the world and prescribing that employers must not subject employees to adverse outcomes on account of those assumptions.[17]

Prior to *Bostock*, the sex-stereotyping theory of LGBTQ+ discrimination had been developing for years in lower courts as the leading theory of statutory protection for SOGI-discrimination plaintiffs, an outflow of the landmark

16. *See* Katharine T. Bartlett et al., Gender and Law: Theory, Doctrine, Commentary 135 (8th ed. 2020).

17. Sex-stereotyping also informs other areas of law, such as Title IX and equal-protection jurisprudence. *See generally* Jody Feder, *Sex Discrimination and the United States Supreme Court: Developments in the Law*, Cong. Rsch. Serv. (Dec. 30, 2015), https://sgp.fas. org/crs/misc/RL30253.pdf (discussing the relevance of sex-stereotyping to all three areas). This explanation is meant simply as an illustration of how it operates in Title VII law.

holding in *Price Waterhouse* (wherein the Supreme Court famously held that discrimination based on failure to conform to sex stereotypes violates Title VII). For instance, in the 2002 case *Centola v. Potter*, Judge Nancy Gertner became the first federal judge to explain how heterosexuality is a sex stereotype:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, *stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women*. . . . The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "*real men don't date men*." The gender stereotype at work here is that "real" men should date women, and not other men.[18]

Before *Centola*, other courts had gestured at a similar recognition—for example, by holding that gay men and transgender women could advance sex-stereotyping claims based on adverse treatment for being "too feminine" (vice versa for lesbians and transgender men).[19] For instance, in 2001, the First Circuit explained it would be "reasonable to infer that [Plaintiff's supervisor] told [Plaintiff, a man,] to go home and change because she thought that [Plaintiff's choice to wear feminine] attire did not *accord* with his male gender," concluding Plaintiff "may have a claim" under a statutory sex-discrimination prohibition—citing *Price Waterhouse* in doing so.[20]

As the 2000s progressed, multiple federal appellate courts made more explicit that sex-stereotyping was a path to Title VII protection for SOGI-discrimination plaintiffs.[21] For instance, for gay plaintiffs, in *EEOC v. Boh Bros. Construction Co., LLC*, the Fifth Circuit observed that the bad actor's use of "sex-based epithets" such as "gay," "homo," "fa**ot," and "queer" could allow "a jury [to] view [the bad actor's] behavior as an attempt to denigrate

18. 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (emphasis added); *see also* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring) (agreeing the gay plaintiff had stated a sex-discrimination cause of action and "point[ing] out that in my view, this is [also] a case of actionable gender stereotyping harassment").

19. *See, e.g.*, Nichols v. Azteca Rest. Enters. Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) ("*Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine."); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (since Title VII prohibits "[d]iscrimination because one fails to act in the way expected of a man or woman," a transgender woman could seek relief under the Gender Motivated Violence Act); *cf.* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (citing *Price Waterhouse*)).

20. Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) ("Indeed, under *Price Waterhouse,* 'stereotyped remarks [including statements about dressing more 'femininely'] can certainly be *evidence* that gender played a part.'" (quoting Price Waterhouse v. Hopkins*,* 490 U.S. 228, 251 (1989))) (alterations in original).

21. *E.g.*, Prowel v. Wise Bus. Forms Inc., 579 F.3d 285, 290 (3d Cir. 2009) (citing, *inter alia*, *Nichols*, 245 F.3d at 874, and *Higgins*, 194 F.3d at 259).

[plaintiff[] because—at least in [the bad actor's] view—[plaintiff] fell outside of [the bad actor's] manly-man stereotype."[22] Meanwhile, on gender identity, the Sixth Circuit held in 2004 in *Smith v. City of Salem* that "discrimination against a plaintiff who is transsexual . . . is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*[.]"[23] Other circuit courts fell in line.[24] Many district court judges also embraced the theory that discrimination against transgender plaintiffs constituted statutorily prohibited sex-stereotyping[25]—including an Eastern District of Michigan judge in one of the cases that would eventually become *Bostock*.[26] Some courts even suggested sex-stereotyping doctrine was the *only* form of Title VII protection for SOGI-discrimination plaintiffs.[27]

The pre-*Bostock* sex-stereotyping theory for SOGI-discrimination plaintiffs is best represented by a 2017 trio of cases: *Christiansen v. Omnicom Grp., Inc.*,[28] *Hively v. Ivy Technical Community College*,[29] and *Whitaker v. Kenosha Unified School District*.[30] On sexual orientation, the Second Circuit in *Christiansen* held that a gay plaintiff's "gender stereotyping allegations . . . [we]re cognizable under *Price Waterhouse* and our precedents."[31] The panel in *Ivy Technical* reasoned that "all gay, lesbian and bisexual persons

22. 731 F.3d 444, 457–59 (5th Cir. 2013).

23. 378 F.3d 566, 574–75 (6th Cir. 2004); *see also* Barnes v. Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005), *cert. denied*, 546 U.S. 1003 (2005) (relying on *Salem*, holding transgender woman properly stated a Title VII claim because she "alleg[ed] that [her] failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions"); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009) (relying on *Schwenk*, holding transgender woman "states a prima facie case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were a motivating factor in [defendant's] actions against her").

24. *E.g.*, Hunter v. United Parcel Service, Inc., 697 F.3d 697, 702–704 (8th Cir. 2012); Glenn v. Brumby, 663 F.3d 1312, 1317–19 (11th Cir. 2011); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Dawson v. Bumble & Bumble, 398 F.3d 211, 217–218 (2d Cir. 2005).

25. *E.g.*, Valentine Ge v. Dun & Bradstreet, Inc., No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); Roberts v. Clark Cnty. Sch. Dist., 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008); Finkle v. Howard Cnty., 12 F. Supp. 3d 780, 789 (D. Md. 2014); Terveer v. Billington, 34 F. Supp. 3d 100, 115–16 (D.D.C. 2014); Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs, 197 F. Supp. 3d 1334, 1346–47 (N.D. Fla. 2016).

26. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015).

27. *See, e.g.*, Evans v. Ga. Regional Hospital, 850 F.3d 1248, 1253–57 (11th Cir. 2017) (holding a lesbian would have a Title VII claim for sex-stereotyping, but not just because she was romantically attracted to women).

28. 852 F.3d 195 (2d Cir. 2017).

29. 853 F.3d 339 (7th Cir. 2017).

30. 858 F.3d 1034 (7th Cir. 2017).

31. 852 F.3d at 201.

fail to comply with the *sine qua non* of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men,"[32] which was reaffirmed *en banc*.[33] Upon rehearing *en banc*, it declared that "Hively represents the ultimate case of failure to conform to the female stereotype (. . . heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."[34] On gender identity, the Seventh Circuit held in *Whitaker* that a transgender boy denied access to the boys' restroom "ha[d] sufficiently demonstrated a likelihood of success on his Title IX claim under a sex-stereotyping theory."[35] The court drew on *Price Waterhouse*'s "broad view of Title VII" in concluding that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[36]

Federal agencies and academics joined federal courts in coalescing around sex-stereotyping for SOGI-discrimination plaintiffs. The EEOC's 2012 decision in *Macy v. Holder* green-lit transgender Title VII administrative claimants to proceed under sex-stereotyping theories,[37] as did its 2015 decision in *Complainant v. Foxx* for their sexual-orientation peers.[38] When the Obama administration's Department of Health of Human Services (HHS) first promulgated regulations under Section 1557 of the Patient Protection and Affordable Care Act in 2016, it stipulated that "Section 1557's prohibition of discrimination on the basis of sex includes . . . sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes."[39]

William Eskridge, a leading voice in statutory interpretation, specifically pointed to sex-stereotyping doctrine as a viable path for sexual-orientation plaintiffs. In 2017, Eskridge, drawing on *Ivy Technical*, the legislative history of Title VII, and *Price Waterhouse*, framed "[h]omophobia as [p]rescriptive [s]ex [s]tereotyping."[40] For Eskridge, "the case for discrimination 'because of sex'" for lesbians and gay men "is much strengthened because such discrimination is fundamentally at odds with the central purpose of Title VII . . . to protect employees against employer insistence upon conforming to old-fashioned, rigid gender roles."[41] He concluded, "Sex-stereotyping claims . . . provide[] a

32. Hively v. Ivy Tech. Cmty. Coll., 830 F.3d 698, 711 (7th Cir. 2016).

33. Hively v. Ivy Tech. Cmty. Coll., 853 F.3d 339, 340 (7th Cir. 2017).

34. *Id.* at 346; *see also id.* at 342 (citing *Christiansen*).

35. 858 F.3d at 1039.

36. *Id.* at 1048.

37. EEOC Appeal No. 0120120821, 2012 WL 1435995, at *10–11 (Apr. 20, 2012).

38. EEOC Appeal No. 0120133080, 2015 WL 4397641, at *7 (July 15, 2015).

39. 81 Fed. Reg. 31376, 31390 (May 18, 2016). The regulations also offered protection for gender-identity discrimination by including "gender identity" in its definition of "sex," but did not specify that its reasons were doing so were rooted in sex-stereotyping theory. *Id.* at 31387.

40. William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 362–81 (2017).

41. *Id.* at 381.

way to understand how classification, class, and harmful ideology reconnect in Title VII cases involving LGBT claimants."[42]

Eskridge's statutory-interpretation argument capitalized on existing academic literature characterizing homophobia and transphobia as *unconstitutional* sex-role enforcement.[43] For example, in 1994, Andrew Koppelman argued that "[l]aws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex."[44] Similarly, Sylvia Law argued in 1988 that "disapprobation of homosexual behavior is a reaction to the violation of gender norms, rather than simple scorn for the sexual practices of gay men and lesbian women."[45] As Suzann Pharr put it the same year, "[a] lesbian is perceived as being outside the acceptable, routinized order of things . . . [and] as a threat to the nuclear family, to male dominance and control, to the very heart of sexism."[46]

Following Eskridge's lead, others in the academy proffered similar arguments about statutory SOGI-discrimination claims.[47] In 2007, Ilona Turner argued that "[d]iscrimination against someone for being transgender is discrimination based on that person's non-conformity with gender stereotypes," constituting "per se" sex discrimination under Title VII.[48] In 2014, Deborah Anthony synthesized the homophobia argument with the transphobia one:

> This gender stereotyping approach to employment discrimination law naturally extends to other individuals and groups who experience discrimination based on their unconventional gender performance and expression. Presumably, a gay male who is denied employment because of his sexual orientation does not suffer such a consequence because he is male, but

42. *Id.* at 362; *see also* Adele P. Kimmel, *Title IX: An Imperfect But Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2013 (2016 ("[C]ourts should interpret Title IX to cover all harassment of LGBT students because this harassment is always based on gender stereotypes").

43. *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 6–8 (1995).

44. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L. REV. 197, 219 (1994).

45. Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187.

46. SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 18 (1988).

47. *E.g.*, Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465; Zachary R. Herz, Note, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396 (2014); Olivia Szwalbnest, Note, *Discriminating Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 TEX. J. WOMEN & L. 75, 79–80 (2010).

48. Ilona M. Turner, Note, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562–63 (2007); *see also* Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423 (2012) (making a similar argument).

> because he is male and does not fit within the traditional norms of the male sex—i.e., acting masculine and engaging in romantic relationships with women only. The same can be said for a transsexual; someone who is fired after a transition from female to male, for example, may have been treated fine as a woman, and may have otherwise been treated fine as a man. The problem is neither her female nor male sex, but her unacceptable representation of what is expected of either one.[49]

Christiansen, *Ivy Technical*, and *Whitaker* were all handed down in 2017, the same year Eskridge's article was published, and the year before the *Bostock* petition for certiorari was filed.[50] Thus, as the case was being briefed, it was far from unreasonable to assume the *Bostock* Court would ground its position in sex-stereotyping (either in a ruling favorable to SOGI-discrimination claimants, or by disposing of the doctrine entirely[51]).

In fact, the lower court decisions in *Bostock* and the cases with which it was consolidated were based on sex-stereotyping. In *Zarda v. Altitude Express, Inc.*, the Second Circuit "conclude[d] that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination."[52] Similarly, in *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit held that "[u]nder any circumstances, '[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.'"[53] Originally, Mr. Bostock himself included an allegation of unlawful discrimination based on his failure to conform to a gender stereotype.[54] And the petition for certiorari insisted "[t]here is no reason in law, logic, or common sense why *Price Waterhouse* does not forbid discrimination against a gay person for failing to conform to a stereotype about how he should act in terms of who he should be attracted to or romantically involved with."[55] Petitioners continued to reaffirm the importance of sex-stereotyping doctrine to their argument,[56] arguing for nearly six full pages of their merits brief that "Sexual Orientation Discrimination is Sex Stereotype Discrimination Under *Price Waterhouse v. Hopkins*"[57] and proffering stereotyping arguments three separate times during

49. Deborah Anthony, *Sex at Work: Title VII Discrimination and the Application of "Because of Sex" to Transgender Employees*, 36 Women's Rts. L. Rep. 112, 121 (2014).

50. The petition was filed on May 25, 2018. Petition for Writ of Certiorari, Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020) (No. 17–13801).

51. *See supra* note 3.

52. 883 F.3d 100 (2d Cir. 2018).

53. 884 F.3d 560, 572 (6th Cir. 2018) (quoting Smith v. City of Salem, 378 F.3d 575 (6th Cir. 566, 2004)).

54. *See* Petition for Writ of Certiorari, *supra* note 50, at 7. Bostock abandoned this claim upon appeal to the Eleventh Circuit, the only unfavorable appellate court decision of those consolidated in *Bostock*. *Id.* at 10 n.2.

55. *Id.* at 27–28.

56. *See* Reply Brief of Petitioner at 3, 11, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17–13801).

57. Brief for Petitioner at 23–29, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17–13801).

oral argument.[58] The natural conclusion would have been for the *Bostock* majority to reason in sex-stereotyping terms.

B. *The* Bostock *Opinion Itself*

Despite the lengthy build-up to a Supreme Court case definitively answering the question of whether LGT plaintiffs would receive Title VII's protection, the *Bostock* Court only sparingly employs sex-stereotyping theory in the majority opinion. Instead, the *Bostock* Court employs a formalistic thought experiment to hold that Title VII's sex-discrimination prohibition encompasses a SOGI-discrimination prohibition because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex":[59]

> Consider, for example, an employer with two employees, both of whom are attracted to men. . . 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. . . . Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.[60]

This thought experiment eludes the sex-stereotyping reasoning that undergirded so much the case law preceding *Bostock*. That is, the *Bostock* majority could have explicitly included LGBTQ+ plaintiffs within Title VII's protection by explaining, as so many lower courts already had, that homophobia constitutes sex discrimination because it impermissibly imposes a classic descriptive sex stereotype—that "real" men like women, and vice versa. It could have made a similar move for transgender plaintiffs by explaining that discrimination based on transgender status constitutes sex discrimination because it impermissible imposes a different, prescriptive sex stereotype—that those assigned male at birth *should* identify as men, and vice versa. In other words, rather than reasoning in terms of presumptive or compulsory heterosexuality or cisgender status (or overly effeminate or masculine conduct), it favors a simple, nakedly textualist compare-and-contrast.[61]

58. *See* Transcript of Oral Argument at 6, 9, 65, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17–13801).

59. *Bostock*, 140 S. Ct. at 1741.

60. *Id.* at 1741–42.

61. This shift in the final majority opinion may be unsurprising given the ACLU's Supreme Court strategy. *See* Masha Gessen, *Chase Strangio's Victories for Transgender Rights*, New Yorker (Oct. 12, 2020), https://www.newyorker.com/magazine/2020/10/19/chase-strangios-victories-for-transgender-rights.

> In the Stephens case, the process was laced with dread. . . . Then Strangio read an article in the *Wake Forest Law Review* by Katie Eyer, [who] argued that a truly textualist interpretation of Title VII would leave the Justices no choice but to acknowledge that

Instead of grounding its holding in sex-stereotyping, the *Bostock* majority opinion only explicitly references sex-stereotyping a paltry three times. First, Justice Gorsuch explains that "just 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."[62] Second, when he clarifies the low threshold for "but-for" Title VII arguments"—namely, that "[w]hen a qualified woman applies for a mechanic position and is denied, the 'simple [but-for] test' immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire"[63]—Gorsuch again looks to sex-stereotyping as a key example: "Such a rule would create a *curious discontinuity* in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test."[64] Third, Gorsuch invokes *Price Waterhouse* directly—admittedly, for the simple proposition that "sex is 'not relevant to the selection, evaluation, or compensation of employees.'"[65] But given the wide range of cases he could have cited for such a basic point, it is notable that he selected *Price Waterhouse* (a plurality opinion), as it serves as a reminder that the sex-stereotyping claims it authorized remain both viable—and relevant to *Bostock*.[66]

C. *Commentators' Reactions*

There is open debate among academics about how to make descriptive and normative sense of *Bostock*'s treatment of sex-stereotyping arguments for SOGI-discrimination plaintiffs. Commentators have not landed on a decisive way of relating *Bostock* to the sex-stereotyping case law that preceded it, in part because most published their takes before lower courts had sufficient time to apply *Bostock*. This Note represents an important intervention into this debate by providing an account of what has happened in lower courts in the years following *Bostock*.

First, and most prominently, some commentators have lamented that *Bostock* failed to capitalize on the sex-stereotyping momentum that was building for LGBTQ+ plaintiffs in the lower courts. For example, a team of feminist professors led by Ann C. McGinley argue that, unlike *Ivy Technical* and its peers, "*Bostock* bypasses sex stereotyping as a necessary means to its

discriminating against people because they are gay, lesbian, or transgender is to discriminate against them on the basis of sex. "In the briefing room, I said, 'We can win this!'" Strangio said.

Id.; *see also id.* ("David Cole, the national legal director of the A.C.L.U., aimed his arguments plainly at Gorsuch.").

62. *Bostock*, 140 S. Ct. at 1742–43.

63. *Id.* at 1748.

64. *Id.* at 1749 (emphasis added).

65. *Id.* at 1471 (quoting *Price Waterhouse*, 490 U.S. at 239).

66. Meanwhile, Justice Alito's dissent in *Bostock* spends significant time considering and rejecting the sex-stereotyping theory. *See, e.g.*, *id.* at 1763 (Alito, J., dissenting).

end"[67]—an "absence that shortchanges the LGBTQ+ community by muzzling anti-essentialist feminist arguments and real-world storytelling that could have given names, faces, and histories to the countless LGBTQ+ employees who have been subjugated and marginalized for so long."[68] They argue that "the *Bostock* majority should have relied more heavily on the *Price Waterhouse* line of cases," because that "approach would have been rooted in solid precedent, . . . clarity[,] and truthfulness" and "laid a more solid foundation for future cases, including cases about bathroom rights and about the rights of persons who are gender non-binary."[69] Jeremiah Ho makes a similar point, arguing that "Gorsuch's textualism in *Bostock* functionally precludes the case's doctrinal anti-stereotyping potential" because it fails to "counterbalance or address the still relevant impact of heteronormative gender roles and stereotypes" that pervade "employment discrimination situations involving queer minorities."[70] Concurring, Naomi Schoenbaum criticizes *Bostock* as "fail[ing] to elucidate how transgender plaintiffs further the anti-stereotyping aims of sex discrimination law, treating these plaintiffs as marginal cases" for this body of law "rather than part of the core."[71]

Second, some academics agree that *Bostock* did not reason in sex-stereotyping terms, but endorse this move. For instance, John Towers Rice was "surpris[ed]" the *Bostock* "Court did not resolve this case on the theory of sex-based stereotyping under *Hopkins*," as many, including himself, had predicted,[72] but still frames *Bostock*'s "[s]ubstantive [l]egacy" positively: "[m]ore [p]rotection for [m]ore [p]eople on [m]ore [f]ronts[.]"[73]

Third, some commentators contend that Bostock has a sex-stereotyping holding and that that holding is correct. For example, in arguing that "*Bostock* [g]ot [i]t [r]ight," Rachel Slepoi claims "*Bostock*'s theory of sex discrimination is nothing new," because it collapses the "per se theory of queer protections" with the "one that derives from the sex-stereotyping holding of *Price Waterhouse*": "*Bostock* makes clear, once and for all, that these theories are one and the same."[74]

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67. Ann C. McGinley et al., *Feminist Perspectives on* Bostock v. Clayton County, Georgia, 53 Scholarly Works 1, 8 (2020).

68. *Id.* at 13.

69. *Id.* ("[T]he majority's wooden textualism represents an opportunity missed.").

70. Jeremiah A. Ho, *Queering* Bostock, 29 J. Gender, Social Pol'y, & L. 283, 346–47 (2021).

71. Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 Minn. L. Rev. 831, 879–80 (2020).

72. John Towers Rice, *The Road to* Bostock, 14 F.I.U. L. Rev. 423, 449–50 (2021).

73. *Id.*; *see also* A. Russell, Note, Bostock v. Clayton County*: The Implications of a Binary Bias*, 106 Cornell L. Rev. 1601, 1614 (2021) (arguing that "[m]any in the queer community see this [lack of sex-stereotyping] approach as superior, since it allows queer plaintiffs to directly claim antidiscrimination protection under Title VII, without having to inaccurately portray themselves as gender nonconformers or depend on the much less reliable sex stereotyping doctrine").

74. Rachel Slepoi, Bostock*'s Inclusive Queer Frame*, 107 Va. L. Rev. Online 67, 77–78 (2021).

Fourth, others concur that *Bostock* reasons in sex-stereotyping terms but disparage its doing so. For example, Lindsey Wells suggests, while "[t]he decision in *Bostock* focus[es] on sex-stereotype presentation," this move "fails to fully protect the rights of transgender [plaintiffs] because some transgender individuals may still present themselves in a way that could be considered 'sufficiently' in line with stereotypes asserted for men or women," but still face gender-identity discrimination on other grounds (e.g., if they "simply change their name" or "make certain biological transition choices that are not outwardly apparent").[75]

This handwringing about *Bostock*'s relationship to the sex-stereotyping doctrine that preceded it occurred before lower courts even had a chance to apply *Bostock* in conjunction with sex-stereotyping doctrine. Thus, the scholarship canvassed in this Section represents a purely theoretical take on this potential relationship—not an empirical one. By methodically analyzing how lower courts have elucidated this relationship, this Note offers some empirical clarity and helps assuage fears that *Bostock* represented a roadblock for sex-stereotyping doctrine's potential to advance LGBTQ+ rights. In fact, it represents a clear step forward.

II. The Road Preserved

This Part examines the 30 federal opinions that discuss stereotyping in connection to gay and transgender plaintiffs advancing statutory sex-discrimination claims ("SOGI-discrimination plaintiffs") from June 15, 2020, the day *Bostock* was handed down, until February 2, 2023.[76] These cases primarily concern statutory claims under Title VII (prohibiting sex discrimination in employment), Title IX (same for federally funded education),[77] and Section 1557 (same for federally funded healthcare).[78]

Despite arguments that *Bostock* foreclosed or limited the viability of sex-stereotyping theories for SOGI-discrimination plaintiffs, my analysis

75. Lindsey Wells, Comment, *How the Supreme Court Weakened the Pursuit of Transgender Individual Rights*: Bostock v. Clayton County, 140 S. Ct. 1731 (2020), 48 W. St. L. Rev. 45, 69–70 (2021).

76. To generate this dataset, I ran on two searches on Westlaw on February 2, 2023 ("All Federal," since June 15, 2020 (the date *Bostock* was handed down)): adv: gay /p disc! /p stereotyp!, and adv: transgender /p disc! /p stereotyp!. I also reran my search prior to publication to see if there were any additional relevant cases that arose from February 2, 2023, to August 31, 2023. Naturally, these searches generated some duds: cases where no stereotyping argument was made or analyzed, the stereotyping argument was collateral to the dispositive issues (e.g., mootness, statutes of limitations), and/or *Bostock*, nor its predecessors, were never cited. These searches also turned up multiple opinions within a case's history; this Note examines only the most recent merits decisions. And, of course, these two searches occasionally turned up the same cases, resulting in some duplicates. In total, these searches generated 30 unique, relevant opinions.

77. Courts regularly look to Title VII doctrine to interpret Title IX. *E.g.*, *Whitaker*, 858 F.3d at 1047.

78. Section 1557 explicitly incorporates Title IX by reference. 42 U.S.C. § 18116 (2018).

reveals that federal courts still routinely recognize sex-stereotyping arguments by these plaintiffs.[79] Two-thirds of these cases explicitly reaffirmed that sex-stereotyping arguments remain available to SOGI-discrimination plaintiffs, especially in cases regarding same-sex sexual harassment (i.e., where the harasser and harassee are of the same sex). These cases stated this reaffirmation in plain terms, allowed SOGI-discrimination plaintiffs to proceed under sex-stereotyping theories, and/or relied upon pre- and post-*Bostock* sex-stereotyping decisions. Even when courts ruled unfavorably for a *particular* plaintiff, they nonetheless confirmed that sex-stereotyping doctrine remains viable for this *general type* of plaintiff. Four of the cases implicitly reaffirmed the viability of these arguments, such as by citing to *Bostock* as a source of this cause of action, citing to pre-*Bostock* sex-stereotyping cases as examples or definitions of sex discrimination, and/or insisting that sex-stereotyping remains an available path despite how *Bostock* was decided.

Of the remaining six cases, two demurred on the statutory question but affirmed the availability of sex-stereotyping arguments to SOGI-discrimination plaintiffs under the Equal Protection Clause, and two failed to reach the question based solely on plaintiffs' factual allegations (not the doctrine's unavailability). Only two opinions straightforwardly denied the viability of a sex-stereotyping argument under Title VII for SOGI-discrimination plaintiffs—and only in the contexts of sex-specific dress codes and sex-segregated bathroom policies, issues on which *Bostock* is technically silent. These limited nature of these two exceptions demonstrates the breadth of the consensus reached by courts otherwise.

The courts in many of these cases also treated *Bostock* itself as a source of this viability, occasionally using a variety of methods. This pattern is particularly remarkable in light of the scholarly concerns described in Section I.C regarding whether and to what extent *Bostock* rejected sex-stereotyping doctrine. In three cases, the courts read *Bostock* as containing a sex-stereotyping holding. In another three cases, the courts held that Bostock constitutes an explicit legitimatization of sex-stereotyping arguments because *Bostock* reasons about sex discrimination the same way sex-stereotyping arguments do: namely, in terms of traits or behaviors employers tolerate in one sex but not the other. Nine of the courts more indicated that *Bostock* implicitly legitimates sex-stereotyping arguments for SOGI-discrimination plaintiffs. They indicate this by citing to *Bostock* when describing the sex-stereotyping cause of action, showing that *Bostock*'s logic produces the same conclusion as sex-stereotyping logic, and including *Bostock* in string cites with sex-stereotyping holdings. Although some of this treatment of *Bostock* does not clarify how much authority *Bostock* provides for sex-stereotyping, it shows that many courts have avoided treating *Bostock* as foreclosing of sex-stereotyping arguments. Nine

79. Other databases, such as LexisNexis or Bloomberg Law, may contain additional decisions. Sometimes Lexis and Bloomberg contain more decisions than Westlaw; other times, vice versa. *See* Meritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. 1101, 1126 (2020).

courts have also continued to rely on sex-stereotyping holdings predating *Bostock*, indicating that they are reading *Bostock* not as implicitly abrogating these holdings, but as an extension thereof. And after accounting for the two cases reading *Bostock* so narrowly as to not reach the stereotyping question (e.g., based on plaintiffs' factual allegations), four cases providing no indication which way the court was leaning, and two cases wherein the courts confirmed that at the very least sex-stereotyping remains a valid theory under the Equal Protection Clause for SOGI-discrimination plaintiffs, only two cases treat *Bostock* as providing no support for sex-stereotyping arguments for SOGI-discrimination plaintiffs—and, again, confined only to the two realms described above.

Courts have emphatically not read *Bostock* to foreclose the viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs bringing statutory sex-discrimination claims. Instead, courts have treated the sex-stereotyping theory as a surviving, viable theory for SOGI-discrimination plaintiffs and—what's more—found authority for this theory within *Bostock* itself.

A. *The Remaining Viability of Sex-Stereotyping Arguments*

Despite worries that *Bostock* represented a departure from sex-stereotyping reasoning for SOGI-discrimination plaintiffs advancing sex discrimination claims, an overwhelming majority of the surveyed cases confirm that sex-stereotyping doctrine remains a valid path to protection for these plaintiffs and claims after *Bostock*. Twenty of these cases confirmed this understanding explicitly, while four more did so implicitly. Four of the remaining six confirmed that sex-stereotyping doctrine is actionable on constitutional equal-protection claims of sex discrimination or did not reach the question. Only two denied that sex-stereotyping claims remain viable post-*Bostock* for SOGI-discrimination plaintiffs, and only on matters on which *Bostock* is technically silent.

1. Explicit Affirmation

A full two-thirds of these cases[80] explicitly reaffirmed the viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs. Even when the court issued an adverse ruling to plaintiff, the opinion's reasoning still held that sex-stereotyping remains an available theory for statutory SOGI-discrimination claims.

Several of these cases stated in plain language that sex-stereotyping remains available for SOGI-discrimination plaintiffs, including numerous Title VII cases. For instance, an Eastern District of Pennsylvania judge explained in *Doe v. DeJoy* that "there is no dispute as to this issue—claims of discrimination based on gender stereotyping have been and continue to be viable

80. This Part's analysis is limited to the cases located by the methodology in note 76. Of course, there are plenty of sex-discrimination cases outside these search parameters wherein plaintiffs advance sex-stereotyping claims (e.g., cisgender heterosexual women). The analysis here is limited to show that even in cases that were cause for concern, *see supra* Part I, sex-stereotyping doctrine has survived.

under Title VII."[81] In another case, the same judge noted that "even before the recent Supreme Court decision in *Bostock* . . . Title VII was construed to "prohibit[] gender stereotyping and discrimination because of sex," and now, "[a]fter *Bostock*, *there can be no doubt that discrimination in the form of gender stereotyping is, under Title VII, discrimination on the basis of sex*."[82] A Central District of California judge concurred, stating "[t]he prohibition of sex discrimination under Title VII encompasses both discrimination based on biological sex and gender stereotypes."[83] In another case, a Middle District of Georgia judge quoted *Bostock* in concluding that "[s]ex discrimination under Title VII includes discrimination based on sexual orientation and discrimination based on gender stereotyping because 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'"[84]

Cases concerning Title IX and Section 1557 contained similar language. On Title IX, a Southern District of Indiana judge similarly explained, "[by] definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth," such that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[85] And on Section 1557, a District of the District of Columbia judge observed "[t]here exists a fairly strong case . . . that application of Bostock's textual analysis to Title IX (by way of Section 1557's incorporation of that statute) would yield the conclusion that the statute forbids discrimination based on gender identity and sex-stereotyping, insofar as such stereotypes are based on the belief that an individual should identify with only their birth-assigned sex."[86] The clarity with which these opinions present the conclusion that sex-stereotyping claims remain viable for SOGI-discrimination plaintiffs is remarkable, in that it illustrates their complete lack of doubt that *Bostock* represented a roadblock to said claims.

Other courts demonstrated the continuing viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs without being as explicit. For

81. No. 5:19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020).

82. Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 135 (quoting Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546, 551 (E.D. Pa. 2017) (alterations in original) (emphasis added); *see also id.* at 129 n.14 ("Even before *Bostock*, courts in this jurisdiction 'recognized a wide variety of gender stereotyping claims.' *Ellingsworth* . . . (collecting cases).").

83. Maxon v. Fuller Theological Seminary, 549 F. Supp. 3d 1116, 1123 (C.D. Cal. 2020), *aff'd*, No. 20–56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021).

84. Lange v. Houston Cnty., Georgia, 608 F. Supp. 3d 1340, 1356 (M.D. Ga. 2022) (quoting *Bostock*, 140 S. Ct. at 1741).

85. A.M. by E.M. v. Indianapolis Pub. Schs., 617 F. Supp. 3d 950, 965 (S.D. Ind. 2022), *appeal dismissed sub nom.* A.M. by E.M. v. Indianapolis Pub. Schs. & Superintendent, No. 22–2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023) (quoting Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048–49 (7th Cir. 2017)).

86. Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 40 (D.D.C. 2020).

instance, many judges have sanctioned sex-stereotyping theory simply by permitting SOGI-discrimination plaintiffs to proceed under it.[87] Others have explained how different statutory sex-discrimination claims (1) are identical to those under Title VII and (2) permit sex-stereotyping arguments for SOGI-discrimination plaintiffs.[88]

Still others cited to post-*Bostock* court decisions endorsing sex-stereotyping doctrine, which themselves are proof of how the sex-stereotyping theory remains valid. One such post-*Bostock* decision that endorsed sex-stereotyping doctrine is the 2021 case *Roberts v. Glenn Industrial Group, Inc.*[89] In *Roberts*, the Fourth Circuit explained that *Oncale v. Sundowner Offshore Services* (the landmark Supreme Court case finding same-sex sexual harassment violates Title VII) did not "overturn[] or otherwise upset[] the Court's holding in *Price Waterhouse* [that] a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping."[90] A District of Maryland judge later cited *Roberts* in explaining "the Fourth Circuit has held that sexual harassment in violation of Title VII may be based on one of several forms of sex-based motivations, including 'a plaintiff's failure to conform to sex stereotypes.'"[91] This type of post-*Bostock* development illustrates the remaining viability of sex-stereotyping theory for SOGI-discrimination plaintiffs.

Some courts relied on pre-*Bostock* appellate court holdings to explain why sex-stereotyping arguments remain viable.[92] For instance, in *Walker*

87. Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 143 (E.D. Va. 2020) (sex-specific dress code "discriminated on the basis of sex" because it targeted a transgender woman employee "for 'failing to conform to the sex stereotype' expected of employees at the [workplace], and . . . treated [plaintiff] differently because of her sex" in violation of Title VII); Doe v. Univ. of Scranton, No. 3:19-CV-01486, 2020 WL 5993766, at *5 n.61 (E.D. Pa. Oct. 9, 2020) (finding "persuasive" plaintiff's argument that "Title IX contemplates peer-on-peer harassment on the basis of sexual orientation as a form of gender-based stereotyping); Kadel v. Folwell, 620 F. Supp. 3d 339, 376 (M.D.N.C. 2022) (state health plan "overtly discriminates against members for failing to conform to the sex stereotype propagated by the Plan" because it "expressly limits members to coverage for treatments that align their physiology with their biological sex and prohibits coverage for treatments that change or modify physiology to conflict with assigned sex," constituting "textbook sex discrimination" violative of Title VII and the ACA) (citing *Price Waterhouse*, 490 U.S. at 251); Sarco v. 5 Star Financial, LLC, No. 5:19CV86, 2020 WL 5507534, at *5 (W.D. Va. Sept. 11, 2020) ("Applying *Bostock* to Sarco's case, this court . . . will permit Sarco to proceed with his sex discrimination claim under" a "theor[y] of liability" based on "gender stereotype nonconformity discrimination[.]").

88. Fennell v. Comcast Cable Comms. Mgmt., LLC, No. CV 19–4750, 2022 WL 4296690, at *10 n.6 (E.D. Pa. Sept. 16, 2022) ("The [PHRA] . . . [is] to be interpreted as identical to Title VII[.] [A] plaintiff is entitled to protection under the PHRA if discrimination suffered is based on gender stereotypes as it is considered sex-based discrimination.").

89. 998 F.3d 111 (4th Cir. 2021).

90. *Id.* at 120 ("a plaintiff's failure to conform to sex stereotypes" is a "form[] of proof" "available to plaintiffs" to demonstrate the harassment was "based on sex") (referring to *Oncale*, 523 U.S. 75 (1998)).

91. 580 F. Supp. 3d 154, 172 (D. Md. 2022).

92. Shields v. Sinclair Media III, Inc., No. 1:18-CV-593, 2020 WL 3432754, at *10 (S.D. Ohio June 23, 2020), *report and recommendation adopted*, No. 1:18-CV-593, 2021

v. Azar, an Eastern District of New York judge relied on the Sixth Circuit's holding in *Harris Funeral Homes*[93]—one of the cases consolidated with *Bostock*—that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping."[94]

Several courts affirmed the continued legitimacy of sex-stereotyping doctrine by invoking the well-known doctrine from *Price Waterhouse* that "[t]he presence of stereotyping may support the inference that an adverse action was due to a protected characteristic."[95] A District of Maryland judge explained in *EEOC v. Ford* that "a reasonable jury could conclude that [plaintiff] . . . was being subjected to sex-based harassment based on failure to conform to gender stereotypes."[96] The plaintiff's supervisor "referred to men he deemed effeminate as 'gay'" and commented on plaintiff's clothing, which was "pink or colorful," while harassing women by instead "ma[king] inappropriate comments" about their bodies, telling "them to 'sit there and look pretty,'" "ask[ing] to see their dating applications," and "grop[ing] their bodies."[97] Similarly, the Fifth Circuit also found that a comment asking if a heterosexual man "was gay with that mess in his head" could "imply animus toward males who do not conform to stereotypical notions of masculinity."[98]

Even when the court ruled unfavorably for SOGI-discrimination plaintiffs, they nonetheless admitted the sex-stereotyping doctrine remains good law. For instance, in *Scott v. St. Louis University Hospital*, an Eastern District of Mississippi judge held that the plaintiff—whose employer refused to pay for her transgender son's gender-affirming care—failed to state a claim under Title

WL 4472520 (S.D. Ohio Sept. 30, 2021), *aff'd*, No. 21–3954, 2022 WL 19826867 (6th Cir. Nov. 1, 2022) (explaining at time of filing and summary judgment briefing, "the Sixth Circuit had . . . found that 'sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination' under Title VII" (quoting Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004))); Am. Coll. of Pediatricians v. Becerra, No. 1:21-cv-195, 2022 WL 17084365, at *13 (E.D. Tenn., Nov. 18, 2022) (because "[t]he Sixth Circuit held, before *Bostock* was even decided, that . . . Title IX prohibits discrimination based on sex-stereotyping and gender nonconformity," "Plaintiffs' proposed conduct of refusing to engage in the objectionable practices is at least arguably proscribed by Section 1557" (citing Dodds v. United States Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016))). For more post-*Bostock* decisions that have relied on pre-*Bostock* holdings, see *infra* Section II.B.3.

93. EEOC v. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).

94. 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020) (quoting *Harris Funeral Homes*, 884 F.3d at 576).

95. Bergesen v. Manhattanville Coll., No. 20-CV-3689 (KMK), 2021 WL 3115170, at *6 (S.D.N.Y. July 20, 2021) (citing *Price Waterhouse*, 490 U.S. at 251, for the proposition that "stereotyped remarks can certainly be evidence that gender played a part" in an adverse action (emphasis omitted)).

96. No. CV TDC-19–2636, 2021 WL 5087851, at *6 (D. Md. Nov. 2, 2021); *see also id.* ("[S]ame-sex sexual harassment . . . may be established based on . . . 'a plaintiff's failure to conform to sex stereotypes.'" (quoting *Roberts,* 998 F.3d at 120)).

97. *Id.*

98. Sewell v. Monroe City Sch. Bd., 974 F.3d 577, 584 (5th Cir. 2020) (citing EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 456–60 (5th Cir. 2013) (en banc) as "explaining that epithets targeting homosexuals can support inference of gender-based stereotyping").

VII.[99] Despite this holding, the judge confirmed that "[s]ex stereotyping, like other forms of sex discrimination, violates Title VII because the discrimination would not occur but for the victim's sex."[100] Of the other decisions discussed in this subsection, five were resolved unfavorably for their plaintiffs while still affirming the viability of sex-stereotyping doctrine.[101] That courts confirmed this doctrine remained available to this general type of plaintiff, even when ruling against the instant plaintiff in a given case, shows that they see this doctrine as solidly entrenched.

2. Implicit Affirmation

When courts did not state this continuing viability in plain terms, they often *implicitly* reaffirmed said viability. Some courts cited directly to *Bostock* when describing a plaintiff's sex-stereotyping cause of action,[102] or to pre-*Bostock* sex-stereotyping holdings as examples or definitions of prohibited sex discrimination.[103] Others suggested *Bostock*'s failure to locate its holding in sex-stereotyping doctrine was immaterial. For instance, in *B.E. v. Vigo County School Corp.*, defendants argued that "*Bostock* casts doubt upon *Whitaker* [which held transgender students could bring sex-discrimination claims under Title IX] because *Whitaker* premised its finding of sex discrimination upon a sex-stereotyping theory, which '*Bostock* does not embrace.'"[104] As the Southern District of Indiana judge in the case put it, however: "*This distinction misses the point.*"[105] On appeal, the Seventh Circuit affirmed the lower court's decision and further intertwined *Bostock* and *Whitaker*: "Both Title VII,

99. 600 F. Supp. 3d 956, 962–63 (E.D. Miss. Apr. 25, 2022) (plaintiff could not bring a discrimination claim when her own protected characteristics were not implicated).

100. *Id.* at 963.

101. *Bergesen*, 2021 WL 3115170; *DeJoy*, 2020 WL 4382010; *Fennell*, 2022 WL 4296690; *Eller*, 580 F. Supp. 3d 154; *Shields*, 2020 WL 3432754; *Maxon*, 549 F. Supp. 3d 1116.

102. Singer v. Univ. of Tenn. Health Sciences Ctr., No. 2:19-CV-02431, 2021 WL 3412445, at *1 & n.1 (W.D. Tenn. Aug. 4, 2021) (citing *Bostock* to explain plaintiff's "discriminatory treatment based on her nonconformity with gender stereotypes, and based on her transgender identity").

103. Joganik v. E. Tex. Med. Ctr., No. 6:19-CV-517-JCB-KNM, 2021 WL 6694455, at *10 (E.D. Tex. Dec. 14, 2021), *report and recommendation adopted*, No. 6:19-CV-00517, 2022 WL 243886 (E.D. Tex. Jan. 25, 2022) (in explaining "Title VII, and by extension Title IX, recognize that sex discrimination encompasses gender-identity discrimination," citing to *Bostock* and quoting *Glenn v. Brumby* (2011 Eleventh Circuit case) as holding "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes"); Howell v. STRM LLC - Garden of Eden, No. 20-CV-00123-JSC, 2020 WL 7319359, at *3 (N.D. Cal. Dec. 11, 2020) (concluding plaintiff experienced discrimination "on account of her gender and sexual orientation," with a *cf.* cite to *Nichols* (2001 Ninth Circuit case) which held "a male had a sex discrimination hostile work environment claim because he was verbally 'attacked' and 'derided' for not conforming to his peers' gender-based stereotypes").

104. 608 F. Supp. 3d 725, 731 (S.D. Ind. 2022), *aff'd sub nom.* A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023).

105. *Id.* (emphasis added) (concluding "transgender plaintiff was being subjected to impermissible discrimination").

at issue in *Bostock*, and Title IX, at issue here and in *Whitaker*, involve sex stereotypes and less favorable treatment because of the disfavored person's sex. *Bostock* thus provides useful guidance here, even though the application of sex discrimination it addressed was different."[106] Meanwhile, two decisions also confirmed that sex-stereotyping remains a valid path for SOGI-discrimination plaintiffs who advance constitutional equal-protection claims.[107]

Only two cases did not reach the question of whether sex-stereotyping remains a viable path for SOGI-discrimination plaintiffs. For instance, in *DeFrancesco v. Arizona Bd. of Regents*, the Ninth Circuit reported that plaintiff failed to "adequately allege discriminatory intent."[108] Similarly in *Crowley v. Billboard Magazine*, a Southern District of New York judge found that plaintiff's alleged "stereotyped remark" ("gay men are more inclined to be fans of female artists") to be "a classic stray remark that cannot support an inference of discrimination," since he was promoted soon after the remark was made.[109] These opinions thus disposed of these claims based on plaintiffs' fact-specific failures to meet threshold standards for employment-discrimination claims based on any theory, rather than the unavailability of sex-stereotyping doctrine specifically.

B. Bostock *as Preserving the Viability of Sex-Stereotyping Arguments*

Taken together, federal courts' treatment of *Bostock* in the years since it was handed down suggest they have decisively read *Bostock* as sanctioning, not foreclosing, sex-stereotyping arguments for SOGI-discrimination plaintiffs.

Court have specifically treated *Bostock* as a reason the sex-stereotyping path remains available to SOGI-discrimination plaintiffs. Three of the 30 opinions went so far as to treat Bostock itself as containing a sex-stereotyping holding by stating as much. Three more explained how the logic and/or text of *Bostock* explicitly legitimates the sex-stereotyping path to liability for SOGI-discrimination plaintiffs. Nine others implicitly treated *Bostock* as doing this legitimating through, for instance, giving *Bostock* the same treatment in a string cite given to sex-stereotyping holdings. And nine cases have relied

106. A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 769 (7th Cir. 2023) (proceeding to conclude that "*Bostock* strengthens *Whitaker*'s conclusion that discrimination based on transgender status is a form of sex discrimination").

107. In *Grimm v. Gloucester County School Board*, the Fourth Circuit held "Grimm was subjected to sex discrimination [in violation of the Equal Protection Clause] because he was viewed as failing to conform to the sex stereotype propagated by the Policy." 972 F.3d 586, 608 (2020). The court noted that "[m]any courts . . . have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Id.* (collecting cases). Two years later, an Eastern District of New York judge "follow[ed] *Grimm*," finding "discrimination against transgender persons is sex-based discrimination for Equal Protection purposes because such policies punish transgender persons for gender non-conformity, thus relying on sex stereotypes." Fain v. Crouch, 618 F. Supp. 3d 313, 323 n.3 (S.D. W. Va. 2022).

108. No. 21–16530, 2023 WL 313209, at *1 (9th Cir. Jan. 19, 2023).

109. 576 F. Supp. 3d 132, 145–46 (S.D.N.Y. 2021)

on pre-*Bostock* (and, occasionally, post-*Bostock*) sex-stereotyping holdings from appellate courts—often including those described in Section I.A—thus demonstrating they have not read *Bostock* as limiting those holdings.[110] Of course, six cases simply reiterated the basic holding of *Bostock* or demurred on the question. But overall, these opinions have treated *Bostock* as supporting sex-stereotyping doctrine.

1. *Bostock* as Explicit Legitimation

Two district court judges and one Court of Appeals have treated *Bostock* as containing a sex-stereotyping holding. Most prominently, in *Roberts*, the Fourth Circuit observed that "[t]he Court [in *Bostock*] . . . applied its reasoning broadly to employees who fail to conform to traditional sex stereotypes," and concluded that "*the Supreme Court's holding in* Bostock *makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes*."[111] Similarly, in *Ford*, a District of Maryland judge said *Bostock* "not[ed] that an employer who discriminates against both men and women based on their sex as a result of different stereotypes does not 'avoid[ ] Title VII exposure' but instead 'doubles it[.]'"[112] The judge went on to cite *Bostock* for the proposition that, "[w]here the evidence shows that male and female employees were subjected to harassment based on different gender stereotypes, a reasonable factfinder could conclude that [the bad actor] was engaged in sexual harassment of both men like [plaintiff] and also women."[113] Such use of *Bostock* evinces a clear understanding of the case as consistent with, and in support of, sex-stereotyping doctrine for SOGI-discrimination plaintiffs. Finally, a Middle District of Georgia judge quoted *Bostock* in stating "[s]ex discrimination under Title VII includes . . . discrimination based on gender stereotyping because 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'"[114]

Other courts have articulated that Bostock confirms the continued viability of sex-stereotyping arguments because *Bostock* sounds in the same register as sex-stereotyping arguments, in that the reasoning of *Bostock* mirrors the reasoning of sex-stereotyping doctrine. For instance, as a District of the District of Columbia judge explained, "'sex plays an unmistakable and impermissible role' in any decision to treat otherwise identical individuals differently simply because they possess different gender identities" in violation of Title VII and Title IX (quoting *Bostock*).[115] Accordingly, he concluded, "application

110. Some cases used multiple methods, such as both implicitly suggesting *Bostock* legitimates sex-stereotyping claims *and* citing to pre-*Bostock* sex-stereotyping holdings.

111. 998 F.3d 111, 121 (4th Cir. 2021) (emphasis added).

112. EEOC v. Lindsay Ford LLC, No. CV TDC-19–2636, 2021 WL 5087851, at *6 (D. Md. Nov. 2, 2021) (quoting Bostock, 140 S. Ct. at 1741).

113. *Id.*

114. Lange v. Hous. Cnty., Ga., 608 F. Supp. 3d 1340, 1356 (M.D. Ga. 2022) (quoting *Bostock*, 140 S. Ct. at 1741).

115. Whitman-Walker Clinic, Inc. v. HHS, 485 F. Supp. 3d 1, 40 (D.D.C. 2020).

of *Bostock*'s textual analysis to Title IX . . . would yield the conclusion that the statute forbids discrimination based on . . . sex stereotyping, insofar as such stereotypes are based on the belief that an individual should identify with only their birth-assigned sex."[116] (The judge even cited Justice Alito's *Bostock* dissent, which warned about the "potential 'consequences' of [the] Court's Title VII holding for statutes such as Title IX and Section 1557"—in effect, bringing Alito's fears to life.[117]) This judge's reasoning spells out exactly how *Bostock* does in fact rely upon and provide support for the logic undergirding sex-stereotyping arguments.

Similarly, in *DeJoy*, an Eastern District of Pennsylvania judge argued that "*Bostock*'s majority opinion is explicit about the continued viability of such claims of sex stereotyping," quoting the *Bostock* opinion's Hannah/Bob thought experiment example as proof.[118] The judge also noted that *Bostock*'s failure to address an earlier Third Circuit holding[119] does not "abrogate the still-valid portion of [said holding] recognizing the validity of gender-stereotyping discrimination claims under Title VII."[120] If this were not enough, the judge rejected this counterargument for a third time: "Despite Doe's suggestion otherwise . . . *Bostock* did not somehow undermine gender stereotyping as a way of proving sex-based discrimination."[121]

In another case, the same judge hit these same points again, explaining "[it] naturally follows from [*Bostock*'s holding] that discrimination based on gender stereotyping falls within Title VII's prohibitions."[122] Relying on key language from *Bostock* (an "individual employee's sex plays an unmistakable and impermissible role in the discharge decision" if they are discharged for being transgender), he concluded: "After *Bostock*, there can be no doubt that discrimination in the form of gender stereotyping is, under Title VII, discrimination on the basis of sex."[123]

These decisions conceive of *Bostock* as existing within a larger nexus of sex-discrimination law. Each of these cases connects the reasoning and holding of *Bostock* to the logic of the sex-stereotyping doctrine that preceded it.

2. *Bostock* as Implicit Legitimation

More subtly, nine courts have suggested that *Bostock* implicitly legitimates sex-stereotyping arguments. Such treatment of *Bostock* is not as overt, but still supports the conclusion that courts are reading *Bostock* as endorsing and building upon sex-stereotyping doctrine, rather than eroding it.

116. *Id.*

117. *Id.*

118. Doe v. DeJoy, No. 5:19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020).

119. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001).

120. *DeJoy*, 2020 WL 4382010, at *12.

121. *Id.* at *8 n.23.

122. Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (citing key language from *Bostock*, 140 S. Ct. at 1741–42).

123. *Id.* at 135 (citing *Bostock*, 140 S. Ct. at 1741–42).

For instance, in *Walker*, an Eastern District of New York judge rejected HHS's 2020 Section 1557 regulations, which did not protect against sexual orientation and gender-identity discrimination, and resurrected HHS's 2016 rules, which did (by including protections against gender-identity discrimination and sex-stereotyping discrimination in defining sex discrimination).[124] The court explained that because HHS "continued on the same path [of excluding these protections] even after *Bostock*," its repeal of the 2016 rules "was a disagreement with a concept of sex discrimination later embraced by the Supreme Court" in *Bostock* and therefore "was contrary to law."[125] The judge also cited *Bostock* specifically in restoring the 2016 HHS rules' protection against sex-stereotyping (in which the rules had housed protections against sexual-orientation discrimination). This move implicitly treated *Bostock* as legitimating sex-stereotyping arguments by saying that *Bostock*'s holding, which provides that sex discrimination includes sexual orientation and gender identity discrimination, requires HHS to also include protections against sex-stereotyping. In other words, the court determined that *Bostock* mandated the continued viability of sex-stereotyping claims.

Courts also simply cited to *Bostock* when observing that a SOGI-discrimination plaintiff has made sex-stereotyping claims. This move suggests that *Bostock* is a source of a sex-stereotyping cause of action,[126] or at least indicates that *Bostock* provides support for plaintiff's sex-stereotyping claims, even if the opinion does not necessarily unpack the connection between the two.

For example, the plaintiff in *Doe v. University of Scranton*, argued that "Title IX contemplates peer-on-peer harassment on the basis of sexual orientation as a form of gender-based stereotyping."[127] In response, a Middle District of Pennsylvania judge observed that *Bostock* "addressed a similar argument in the context of Title VII . . . and explained that 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'"[128] In proceeding to rule for the plaintiff based on *Bostock* and a lack of contradictory Third Circuit precedent, he thus implicitly relied on *Bostock* in handing down a stereotyping decision favorable to the SOGI-discrimination plaintiff, indicating that *Bostock* provides a source of support for such holdings.

Another way that courts have implicitly legitimized sex-stereotyping post-*Bostock* is by demonstrating that sex-stereotyping reasoning and *Bostock*-style reasoning produce the same conclusion. For instance, in *Monegain v. DMV*, an Eastern District of Virginia judge concluded that the Department of

124. Walker v. Azar, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020); 85 Fed. Reg. 37160 (June 19, 2020); 81 Fed. Reg. 31376 (May 18, 2016).

125. *Walker*, 480 F. Supp. 3d at 429.

126. Singer v. Univ. of Tenn. Health Scis. Ctr., No. 2:19-CV-02431, 2021 WL 3412445, at *1 & n.1 (W.D. Tenn. Aug. 4, 2021).

127. No. 3:19-CV-01486, 2020 WL 5993766, at *5 n.61 (M.D. Pa. Oct. 9, 2020).

128. *Id.* (quoting *Bostock*, 140 S. Ct. at 1741).

Motor Vehicle's (DMV) dress code policy discriminated on the basis of sex.[129] In evaluating plaintiff's equal-protection claim, the court noted that, "[l]ike the bathroom policy in *Grimm*" (a landmark Fourth Circuit decision holding that excluding transgender children from bathrooms consonant with their gender identities violates the Fourteenth Amendment and Title IX), the DMV "instituted a sex classification that 'punished a transgender person for gender nonconformity' with that classification," i.e., "for 'failing to conform to the sex stereotype' expected of employees at the DMV[.]"[130] The judge then analyzed the policy "pursuant to *Bostock*," where she again found that the policy discriminated on the basis of sex.[131] She concluded: "Under either decision . . . the Dress Code Policy impermissibly treated Monegain on the basis of sex."[132] This opinion shows how courts have reasoned to the same conclusion—a violation of a prohibition of sex discrimination—based on either *Bostock* or sex-stereotyping reasoning, is proof that they have a great deal in common.

A common, albeit more ambiguous, version of this implicit legitimation is simply listing *Bostock* in the same string cite as sex-stereotyping decisions—many of which pre-date *Bostock*. By listing pre-*Bostock* sex-stereotyping cases alongside *Bostock*, these courts indicate that *Bostock* should not be read as limiting sex-stereotyping holdings.[133]

For example, in *Kadel v. Fowell*, a Middle District of North Carolina judge classified a public health plan's exclusion of gender-affirming care as "textbook sex discrimination." He support his reasoning by citing first to *Grimm*'s holding that a policy discriminating for "failing to conform to the [prescribed] sex stereotype" is unconstitutional, then *Price Waterhouse*, and then *Bostock*.[134] Similarly, in *Maxon v. Fuller Theological Seminary*, a Central District of California judge held "that Title IX's prohibition of discrimination on the basis of gender stereotypes encompasses educational institutions that discriminate against an individual for marrying a person of the same sex."[135] After explaining that Title VII and Title IX apply "similar substantive standards," he reached his conclusion by noting Title VII's "encompasses both discrimination based on biological sex and gender stereotypes"—citing *Schwenk v. Hartford*,

129. 491 F. Supp. 3d 117, 143 (E.D. Va. 2020).

130. *Id.* (quoting Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020)).

131. *Id.* (quoting *Bostock*, 140 S. Ct. at 1746).

132. *Id.* Notably, the court used *Bostock* to supplement its constitutional reasoning, even though there was no statutory claim at issue.

133. *E.g.*, Howell v. STRM LLC – Garden of Eden, No. 20-CV-00123-JSC, 2020 WL 7319359, at *3 (N.D. Cal. Dec. 11, 2020) (citing *Bostock*, 140 S. Ct. at 1747 and Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001)); Joganik v. E. Tex. Med. Ctr., No. 6:19-CV-517-JCB-KNM, 2021 WL 6694455, at *10 (E.D. Tex. Dec. 14, 2021) *report and recommendation adopted*, No. 6:19-CV-00517, 2022 WL 243886 (E.D. Tex. Jan. 25, 2022) (citing *Bostock*, 140 S. Ct. 1731 and Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)). For more on this line of analysis, *see infra* Section II.B.3.

134. Kadel v. Folwell, 620 F. Supp. 3d 339, 375 (M.D.N.C. 2022).

135. 549 F. Supp. 3d 1116, 1123–24 (C.D. Cal. 2020), *aff'd*, No. 20–56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021).

a 2000 (pre-*Bostock*) Ninth Circuit decision based on sex-stereotyping doctrine,[136] and then *Bostock*.[137] While it is ambiguous to what extent each judge intended to *accord Bostock* authority associated with sex-stereotyping in compiling these string cites, they at least indicate that the courts intended to treat both *Bostock* and sex-stereotyping holdings with equal or similar weight. This move once again serves as further evidence that courts are not reading *Bostock* as abrogating the sex-stereotyping holdings that preceded it.

3. Reliance on Appellate Sex-Stereotyping Decisions

Nine cases have cited to pre- (and post-) *Bostock* lower court decisions which held that statutory sex-discrimination protections include protection against SOGI discrimination under sex-stereotyping theory. These cases position *Bostock* as part of sex-stereotyping lineage, rather than as a doctrinal island. A clear example of this is *Maxon*, described in the preceding paragraph.[138] In a similar vein, an Eastern District of Pennsylvania judge in *Doe v. Triangle Donuts* relied on *Ellingsworth v. Hartford Fire Ins. Co.*,[139] a 2017 case from the same court adopting a sex-stereotyping holding, in explaining that "even before . . . *Bostock* . . . , Title VII was construed to 'prohibit gender stereotyping and discrimination because of sex'" and "courts in this jurisdiction 'recognized a wide variety of gender stereotyping claims.'"[140] He then concluded: "After *Bostock*, there can be no doubt that discrimination in the form of gender stereotyping is, under Title VII, discrimination on the basis of sex."[141] In both *Maxon* and *Triangle Donuts*, neither judge is reading *Bostock* to abrogate or limit *Schwenk*/*Ellingsworth*. Rather, they are suggesting that *Bostock*'s holding either encompasses or implicitly legitimates these lower court holdings. Thus, they again indicate that the sex-stereotyping path to liability for SOGI-discrimination plaintiffs remains viable post-*Bostock*.

Many of these citations are to the seminal sex-stereotyping cases described in Section I.A—proof of their continued relevance. For instance, in *Sewell v. Monroe City Sch. Bd.*, the Fifth Circuit explained that the bad actor's stereotype-laden "verbal abuse" of plaintiff (namely, asking if plaintiff's hairstyle was gay) "could imply animus toward males who do not conform to stereotypical notions of masculinity."[142] The court cited *Boh Bros.*, the 2013 Fifth Circuit case holding that "epithets targeting homosexuals can support [an] inference of gender-based stereotyping[.]"[143] The Fourth Circuit in *Roberts*

136. *Id.* at 1123 (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000), which held "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII").

137. *Id.*

138. *See* text accompanying note 135.

139. 247 F. Supp. 3d 546, 551 (E.D. Pa. 2017) (collecting cases).

140. Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 135, 129 n.14 (E.D. Pa. 2020).

141. *Id.*

142. 974 F.3d 577, 584 (5th Cir. 2020).

143. *Id.* (citing EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 456–60 (5th Cir. 2013)).

also directly quoted *Boh Bros.* in confirming the continued viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs.[144]

Other examples of post-*Bostock* cases citing to the seminal pre-*Bostock* sex-stereotyping holdings from Section I.A include *Scott* (citing a 2010 Eighth Circuit case and, by extension, *Salem*),[145] *B.E.* (citing *Whitaker*),[146] and *A.M. by E.M. v. Indianapolis Public Schools* (citing *Whitaker* in conjunction with *Bostock*).[147] In *Shields v. Sinclair Media III, Inc.*, a Southern District of Ohio judge cited both *Salem* and *Harris Funeral Homes*[148]—one of the cases consolidated in *Bostock*—in concluding that the Sixth Circuit had held that sex-stereotyping arguments were legitimate ways of articulating sexual-orientation discrimination claims.[149] The court in *Shields* simply noted that *Harris Funeral Homes* had been affirmed by *Bostock* without explaining the daylight between the appellate and Supreme Court holdings.[150] This move indicates that the court believed the latter naturally followed from the former, as a belief in any more attenuated connection would have entailed additional explanation. An Eastern District of New York judge also cited to the holding from *Harris Funeral Homes* in *Walker* when rejecting an argument that sex-stereotyping arguments had lost their viability in the Section 1557 context.[151] Courts have treated *Walker* as legitimating sex-stereotyping claims for SOGI-discrimination plaintiffs. For instance, the Fifth Circuit explained that *Walker* "reanimate[d] the [Obama HHS 2016 rule's] 'sex-stereotyping' prohibition" and "further reasoned that, in light of *Bostock*, sex-stereotyping discrimination encompasses gender identity discrimination."[152] The Eight Circuit concurred, noting that in *Walker*, the court "reasoned that, in light of *Bostock*, sex-stereotyping discrimination encompasses gender identity discrimination."[153]

Some courts relied on both pre- *and* post-*Bostock* lower court decisions in concluding that sex-stereotyping arguments remain available for SOGI-discrimination plaintiffs. In *American College of Pediatricians v. Becerra*, an Eastern District of Tennessee judge observed that "[t]he Sixth Circuit held,

144. Roberts v. Glenn Indus. Grp., Inc., 998 F.3d 111, 120 (4th Cir. 2021).

145. Scott v. St. Louis Univ. Hosp., 600 F. Supp. 3d 956, 963 (E.D. Mo. 2022).

146. B.E. v. Vigo Cnty. Sch. Corp., 608 F. Supp. 3d 725, 731 (S.D. Ind. 2022), *aff'd sub nom*. A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023), *cert. denied sub nom*. Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024).

147. 617 F. Supp. 3d 950, 965–66 (S.D. Ind. 2022), *appeal dismissed sub nom.* A.M. by E.M. v. Indianapolis Pub. Sch. & Superintendent, No. 22–2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023).

148. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

149. No. 1:18-CV-593, 2020 WL 3432754, at *10 (S.D. Ohio June 23, 2020), *report and recommendation adopted,* No. 1:18-CV-593, 2021 WL 4472520 (S.D. Ohio Sept. 30, 2021), *aff'd,* No. 21–3954, 2022 WL 19826867 (6th Cir. Nov. 1, 2022).

150. *Id.*

151. Walker v. Azar, 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020).

152. Franciscan All., Inc. v. Becerra, 47 F.4th 368, 372–73 (5th Cir. 2022) (citing *Walker*, 480 F. Supp. 3d at 429–30).

153. Religious Sisters of Mercy v. Becerra, 55 F.4th 583, 595 (8th Cir. 2022) (citing *Walker*, 480 F. Supp. 3d at 429–30).

before *Bostock* was even decided, that . . . Title IX prohibits discrimination based on sex-stereotyping and gender nonconformity."[154] The court supported this observation by citing a 2016 Sixth Circuit case, which itself referenced *Salem*).[155] The court also cited *Grimm*, a post-*Bostock* sex-stereotyping decision,[156] in noting that courts have "applie[d [this reasoning] equally" to Title IX, such that "Plaintiffs' proposed discrimination against transgender patients is at least arguably proscribed."[157] The judge concluded: "Section 1557, by incorporating Title IX, at least arguably proscribes Plaintiffs' proposed conduct [of, *inter alia*, refusing to provide gender-affirming care]."[158]

Other courts have relied only on post-*Bostock* sex-stereotyping holdings, demonstrating that these holdings flow from, rather than run counter to, *Bostock*. In *Eller*, a District of Maryland judge collapsed *Bostock* and *Roberts* as follows:

> As the Court stated [in *Bostock*], "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." [140 S. Ct.] at 1741. Likewise, the Fourth Circuit has held that sexual harassment in violation of Title VII may be based on one of several forms of sex-based motivations, including "a plaintiff's failure to conform to sex stereotypes." *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 120 (4th Cir. 2021).[159]

4. Neutral or Demurring Treatment

Many courts have not felt the need to assess the stereotyping question when applying *Bostock*, instead simply citing *Bostock* for its limited holding (that Title VII forbids SOGI discrimination) without elaborating.[160] Naturally,

154. No. 1:21-CV-195, 2022 WL 17084365, at *13 (E.D. Tenn. Nov. 18, 2022).

155. Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (holding the school district did not show a likelihood of success on appeal because "settled law in this Circuit" reflected that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination" (quoting *Salem*, 378 F.3d at 575)).

156. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021). While *Grimm* itself does not contain a statutory sex-stereotyping holding, this judge's move to discuss *Grimm* immediately after discussing a case relying on *Salem* places them in a similar position.

157. 2022 WL 17084365 at *13.

158. *Id.*

159. Eller v. Prince George's Cnty. Pub. Schs., 580 F. Supp. 3d 154, 172 (D. Md. 2022).

160. Fennell v. Comcast Cable Commc'ns Mgmt., LLC, 628 F. Supp. 3d 554, 571 (E.D. Pa. 2022); Crowley v. Billboard Mag., 576 F. Supp. 3d 132, 142 (S.D.N.Y. 2021); *Eller*, 580 F. Supp. 3d at 172; DeFrancesco v. Ariz. Bd. of Regents, No. 21–16530, 2023 WL 313209, at *1 (9th Cir. Jan. 19, 2023); *Grimm*, 972 F. 3d at 616; A.M. by E.M. v. Indianapolis Pub. Schs., 617 F. Supp. 3d 950, 964–65 (S.D. Ind. 2022), *appeal dismissed sub nom.* A.M. by E.M. v. Indianapolis Pub. Schs. & Superintendent, No. 22–2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023); Shields v. Sinclair Media III, Inc., No. 1:18-CV-593, 2020 WL 3432754, at *11 (S.D. Ohio June 23, 2020), *report and recommendation adopted*, No. 1:18-CV-593, 2021 WL 4472520 (S.D. Ohio Sept. 30, 2021), *aff'd*, No. 21–3954, 2022 WL 19826867 (6th Cir. Nov. 1, 2022); *Am. Coll. of Pediatricians*, 2022 WL 17084365 at *4.

these cases make it difficult to understand how these courts understanding *Bostock*'s relationship to sex-stereotyping doctrine, but they at least do not serve as affirmative evidence that *Bostock* foreclosed sex-stereotyping arguments for SOGI-discrimination plaintiffs. For instance, the court in *Bergesen v. Manhattanville College* could not even reach this question.[161] Although the judge confirmed that sex-stereotyping remains a legitimate way of making Title VII arguments, he disposed of plaintiff's stereotyping argument because "the Amended Complaint does not plausibly allege that [the bad actor] was influenced by [the relevant homophobic] stereotype."[162]

Two judges have pinpointed the gap between *Bostock*'s result and the explicit sex-stereotyping road not taken in that decision. However, crucially, they still did not read *Bostock* as foreclosing the viability of the latter.

In *B.E.*, a Southern District of Indiana judge noted that a 2017 Seventh Circuit case[163] had reached the same conclusion as *Bostock*—that Title VII, and therefore Title IX, "prohibits discrimination because of an individual's transgender status"—"*albeit under a different theory of sex discrimination*."[164] Specifically, the Seventh Circuit had held in 2017 that discrimination against a transgender plaintiff "for his failure to conform to sex-based stereotypes of the sex he was assigned at birth" violated Title IX.[165] By framing *Bostock* as a "different theory of sex discrimination," the judge made clear that he understood the difference between *Bostock*'s formalism and the sex-stereotyping theory that the Seventh Circuit as adopted. However, the judge dismissed defendants' attempts to rely upon this difference, explaining that "[t]his distinction misses the point" because it does not "alter the conclusion that the transgender plaintiff was being subjected to impermissible discrimination."[166]

Similarly, in *Sarco v. 5 Star Financial, LLC*, a Western District of Virginia judge held that although "after Bostock there is substantial overlap between" "gender stereotype nonconformity discrimination" and "sexual orientation discrimination," the latter "claim rests on some distinct facts."[167] Specifically, he reasoned that the stereotyping claim "rests on [plaintiff's] perceived adherence to expectations of 'masculinity'" (conduct), and his sexual orientation discrimination claim "hinges on demonstrating adverse action taken due to the mere

161. No. 20-CV-3689 (KMK), 2021 WL 3115170, at *7 (S.D.N.Y. July 20, 2021).

162. *Id.*; *see also Grimm*, 927 F.3d at 616.

163. Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046–50 (7th Cir. 2017).

164. B.E. v. Vigo Cnty. Sch. Corp., 608 F. Supp. 3d 725, 730 (S.D. Ind. 2022), *aff'd sub nom*. A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023), *cert. denied sub nom.* Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024).

165. *Id.*

166. *Id.* at 731 n.2.

167. No. 5:19CV86, 2020 WL 5507534, at *7 (W.D. Va. Sept. 11, 2020).

fact of his homosexuality" (status).[168] By contrasting *Bostock* and pre-*Bostock* sex-stereotyping decisions[169] the judge suggested he did not see *Bostock* as a sex-stereotyping case.[170] But, while the judge was right that any legitimate sexual-orientation discrimination claim requires a demonstration of adverse action, "the mere fact" of non-heterosexuality itself constitutes a violation of expected "adherence to expectations of 'masculinity'" or femininity. Indeed, his peers in the judiciary have spelled out their recognition of this proposition for decades.[171] Regardless, his reasoning preserves the viability of sex-stereotyping claims for sexual-orientation plaintiffs, which demonstrates that sex-stereotyping claims remain available for SOGI-discrimination plaintiffs post-*Bostock*.

C. *The Sole Outliers*

Only two cases of those surveyed in this Note explicitly dismissed the viability of the sex-stereotyping theory for SOGI-discrimination plaintiffs (with reference to *Bostock*), and only on the issues of sex-specific dress codes and sex-segregated bathroom policies. Notably, both of these issues were explicitly specified in *Bostock* as issues *not* addressed by the opinion.[172]

In *Bear Creek Bible Church v. EEOC*, Braidwood Management, Inc., a "Christian business," "enforce[d] a sex-specific dress-and-grooming code that require[d] men and women to wear professional attire according to their biological sex."[173] A Northern District of Texas judge rejected the EEOC's argument that the defendant "must allow an employee to dress in accordance with the employee's professed gender identity."[174] The EEOC's argument relied in part on *Price Waterhouse*'s "holding that sex stereotyping may be evidence of sex discrimination under Title VII."[175] The judge held that the policy did not violate Title VII "because the dress code [was] enforced evenhandedly": namely, because both "men and women must abide by equally professional, but distinct, standards[.]"[176] The judge also rejected the EEOC's argument "that transgender individuals deserve special protection under *Bostock*," since "Defendants cannot have it both ways" ("that an employer should be completely blind to sex, and . . . that employers should give special preference to individuals who

168. *Id.*

169. *Id.* The judge argued that *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143–44 (4th Cir. 1996), "suggest[s] that a plaintiff's actual orientation was not relevant for the purposes of a gender stereotype claim," and that *Henderson v. Labor Finders of Virginia, Inc.*, No. 3:12CV600, 2013 WL 1352158, at *5–6 (E.D. Va. Apr. 2, 2013), "permitt[ed] a sex discrimination claim by a heterosexual male who was perceived to be effeminate and called a 'woman' and a 'faggot.'"

170. *Id.*

171. *See supra* Section I.A.

172. *Bostock*, 140 S. Ct. at 1753.

173. 571 F. Supp. 3d 571, 623 (N.D. Tex. 2021).

174. *Id.* at 623–24.

175. *Id.*

176. *Id.* at 623–24 (internal quotation marks omitted).

identify as the opposite sex").[177] Notably, the judge had favorably quoted the sex-stereotyping example from *Bostock* just a few pages earlier.[178]

On appeal, the Fifth Circuit, among other dispositions, vacated the *Bear Creek* court's judgment on the scope of Title VII claims.[179] Specifically, the court rejected defendant's "request[for] a declaratory judgment that Title VII, as interpreted in *Bostock*, permits employers to discriminate against bisexuals and to establish sex-neutral codes of conduct that may exclude practicing homosexuals and transgender persons."[180] The Fifth Circuit's decision to ground this rejection in denying class certification to plaintiffs[181] reflects a decision by a conservative circuit to demur on these "open questions."[182] Such a maneuver reflects an implicit understanding that *Bostock* and its predecessors cannot be obfuscated so directly. If it were so easy to treat *Bostock* as a roadblock to sex-stereotyping doctrine's continued viability, presumably the Fifth Circuit—arguably more than any other court—would be champing at the bit to do so as a way to limit the arguments available to SOGI-discrimination plaintiffs.

The Eleventh Circuit, in *Adams ex rel. Kasper v. School Board of St. Johns County*, also held that sex-segregated bathroom policies (that prevent transgender students from using the bathrooms consistent with their gender identities) were not a violation of statutory sex-discrimination protections.[183] But, unlike the Northern District of Texas judge, it specifically disposed of plaintiff's sex-stereotyping argument. First, on plaintiff's constitutional claim, the Eleventh Circuit held that the bathroom policy did not violate the Equal Protection Clause because the policy "separate[d] bathrooms based on biological sex, which is not a stereotype."[184] It insisted that "[t]o say that the bathroom policy relies on impermissible stereotypes because it is based on the biological differences between males and females is incorrect."[185]

Second, on plaintiff's statutory claim, the Eleventh Circuit rejected the district court's claim that *Price Waterhouse* and *Glenn v. Brumby* (an Eleventh Circuit case) "provided support for [the] conclusion that 'the meaning of sex in Title IX includes gender identity for purposes of its application to transgender students."[186] Instead, it concluded that Title IX does not proscribe its sex-segregated bathroom policy because "'sex' is not a stereotype."[187] The court based this conclusion on the idea that "the Supreme Court in *Bostock* actually 'proceed[ed] on the assumption' that the term 'sex,' as used in Title

177. *Id.* at 624.
178. *Id.* at 620 (emphasis added) (quoting *Bostock*, 140 S. Ct. at 1742–43).
179. Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 940 (5th Cir. 2023).
180. *Id.*
181. *Id.*
182. *Id.*
183. 57 F.4th 791 (11th Cir. 2022).
184. *Id.* at 809.
185. *Id.* at 810.
186. *Id.* at 813.
187. *Id.*

VII, 'refer[red] only to *biological* distinctions between male and female.'"[188] In other words, the Eleventh Circuit took *Bostock* to pertain exclusively to discrimination based on sex in biological terms, rather than to sex in stereotypical terms. This distinction, while subtle, allowed the court in *Adams* to conclude that transphobic bathroom policies did not run afoul of Title IX because they did not implicate sex stereotypes, per *Bostock*.

III. Endorsing the Consistency Approach

Not all of these treatments of *Bostock* are created equal. Most egregiously, the outlier approach to *Bostock* in Section II.C ignores *Bostock*'s logic by categorically concluding that "[t]ransgender individuals are not a protected class."[189] Similarly, when courts throw *Bostock* into a string cite with a sex-stereotyping holding or drop *Bostock* in a footnote when describing sex-stereotyping, they are being more accurate but still generally unhelpful, as such spare citations do little to explain a court's thinking about the case's interaction with that doctrine. Courts need to articulate how *Bostock* builds upon or disrupts the doctrine that came before it. Similarly, courts' neutral treatment of *Bostock* described in Section II.B.4 leaves *Bostock* where it found it, rather than positioning it within the wider web of sex-discrimination law.

The reading of *Bostock* as containing a stereotyping holding, described in the first part of Section II.B.1, is slightly more plausible. For instance, Gorsuch summarizes *Bostock*'s holding as follows:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.[190]

"A more direct and succinct description of gender stereotyping would be hard to imagine."[191] Compare this reasoning to the key language from *Price Waterhouse*: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[192] Both opinions reason in terms of characteristics typically tolerated in one sex (in *Price Waterhouse*, men), but not the other (in *Price Waterhouse*, women). Of course, it is important to observe

188. *Id.* (quoting *Bostock*, 140 S. Ct. at 1739) (alterations and emphasis in original). In any event, it also noted that Title IX's carve-out for "separate bathrooms on the basis of sex" renders "any action by the School Board based on sex stereotypes . . . not relevant to [plaintiff's] claim[.]" *Id.* at 814.

189. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 624 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom. Braidwood*, 70 F.4th 914 (5th Cir. 2023).

190. *Bostock*, 140 S. Ct. at 1737 (emphasis added).

191. Brief for Indiana Youth Group & GLSEN as Amicus Curiae at 13, A.C. by M.C. v. Metropolitan Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023).

192. *Price Waterhouse*, 490 U.S. at 250.

that, unlike *Bostock*, *Price Waterhouse* gestures at the *relevance* of opposite-sex tolerance, but does not *require* it—and *Price Waterhouse* is considered the standard for sex-stereotyping claims.[193]

Although this *Bostock*-as-stereotyping reading is plausible, *Bostock* is better read as consistent with, though not a member of, the sex-stereotyping line of cases. This consistency approach is described in the latter half of Section II.B.1 and suggested by the cases in Sections II.B.2–3. Unlike the first cases in Section II.B.1, which ascribe a sex-stereotyping holding to *Bostock*, the consistency approach does not require interpreters to pretend *Bostock* replicated *Price Waterhouse*. To do so obfuscates *Price Waterhouse*'s more permissive standard, with its above-described lack of an explicit opposite-sex tolerance requirement. Rather, the consistency approach furnishes a clear link between *Bostock*, which held that SOGI discrimination is a form of sex discrimination, and sex-stereotyping doctrine, which explains how sex stereotypes can constitute sex discrimination.

The consistency approach is best executed when done explicitly, as in *Whitman-Walker Clinic*.[194] There, the court detailed how *Bostock*, even strictly construed, produces a "fairly strong case" that Title IX prohibits sex-stereotyping for SOGI-discrimination plaintiffs, since "such stereotypes are based on the belief that an individual should identify only with their birth-assigned sex."[195] Another example that demonstrates the consistency approach is *Dejoy*, wherein a District of Maryland judge properly characterized *Bostock*'s usage of sex-stereotyping without referring to it as a holding.[196] In *Triangle Doughnuts*, the same judge reasoned that "[i]t naturally follows [from *Bostock*] that discrimination based on gender stereotyping falls within Title VII's prohibitions."[197]

This Part demonstrates that the consistency approach properly maintains fidelity to *Bostock*'s holding without mischaracterizing or underexplaining it. On this view, *Bostock* is part of a larger, cohesive constellation of holdings that comprise sex-discrimination law, legitimating the preexisting sex-stereotyping doctrine which it cited approvingly and on which it drew. *Bostock* does not purport to reject sex-stereotyping doctrine,[198] and the Court has never otherwise overturned one of its sex-stereotyping holdings—suggesting this line of cases persists and *Bostock* is consistent with the insights it provides.

193. "Relying on *Price Waterhouse*, numerous courts interpreting federal and state statutes have concluded that employees may rely on evidence of sex stereotyping to show discrimination occurred because of sex." Matthew W. Green, Jr., *Using Price Waterhouse v. Hopkins to End the Conduct-Status Divide in Sex Stereotypes and Sexual Orientation*, JURIST (Dec. 1, 2019), https://www.jurist.org/commentary/2019/12/matthew-green-price-waterhouse.

194. 485 F. Supp. 3d 1, 40 (D.D.C. 2020).

195. *Id.* (quoting *Bostock*, 140 S. Ct. at 1741–42).

196. No. 5:19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020).

197. 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (citing *Bostock*, 140 S. Ct. at 1741–42).

198. *See supra* Section I.B.

The consistency approach to *Bostock* is the most appropriate one for two reasons. First, it addresses claims that *Bostock* can be read to have left untouched when construed narrowly: specifically, sex discrimination claims advanced by nonbinary and bisexual plaintiffs, and sex discrimination claims made against transphobic dress code and bathroom policies. Second, it more accurately captures the reality experienced by SOGI-discrimination plaintiffs, making it a vehicle well-suited to vindicate the law's promise of equality and provide them with justice. As the consistency approach makes clear, *Bostock* cannot do alone what it can when combined with sex-stereotyping doctrine. The consistency approach not only assuages many of the concerns about *Bostock*'s scope,[199] but also vindicates the values of the movement that produced *Bostock* in the first place.

A. *Applications Outside the* Bostock *Scope*

First, the consistency approach addresses claims that Bostock might appear to leave untouched if read in a vacuum, including claims by nonbinary and bisexual plaintiffs and claims against sex-segregated bathrooms and sex-specific dress codes. The Bostock Court had two kinds of claims before it—that of gay individuals and a transgender individual facing employment discrimination[200]—with which it dealt, but many other claims existed before the decision and continue to do so now. The consistency approach to Bostock combines Bostock's understanding of SOGI discrimination as sex discrimination with sex-stereotyping logic, in a way that addresses these persisting claims of discrimination. An adequate and consistent policing of sex discrimination includes applying sex-discrimination statutes to claims that a narrow construction of Bostock does not reach.

1. Other LGBTQ+ Subgroups

The consistency approach can clarify the ambiguity *Bostock* generates when it stands alone, such as whether nonbinary and bisexual plaintiffs have the same statutory protections against sex discrimination as their LGT peers. These plaintiffs comprise an important part of the LGBTQ+ community, but are at risk of lacking these protections if *Bostock* is historicized in a way that leaves them stranded. Luckily, the consistency approach folds them into the ambit of *Bostock*'s protection.

199. *See supra* Section I.C.
200. *Bostock*, 140 S. Ct. at 1740.

As several pieces have observed,[201] *Bostock* is silent on the applicability of its holding to nonbinary plaintiffs[202] and in fact employs binary language throughout the opinion.[203] Particularly worrisome is that Justice Alito writes in his *Bostock* dissent with the greatest awareness of nonbinary gender identity.[204] *Bostock* also does not mention bisexual plaintiffs, which concerns some commentators because "bisexuality can be defined without reference to the sex of the employee."[205] However, nonbinary and bisexual plaintiffs can avail themselves of *Bostock*'s SOGI-discrimination prohibition when *Bostock* accommodates an understanding of how these identities contravene established sex stereotypes: namely, cisnormativity (the presumption that it is normal to be cisgender) and monosexuality (the presumption that it is normal to only be attracted to one sex, rather than multiple).

The logic of sex-stereotyping doctrine naturally extends to nonbinary plaintiffs because nonconformity to gender stereotypes includes not conforming to gender at all. Consider the hypothetical nonbinary plaintiff "Robin": by not identifying or presenting as one of the binary genders, Robin is disrupting gendered stereotypes, regardless of what sex they were assigned at birth. Requiring Robin to present as either a man or a woman is to require them to conform to sex stereotypes[.]"[206] Unlike *Bostock* itself, which describes behavior an employer would tolerate in an employee of a different sex, *Price Waterhouse*'s stereotyping doctrine does not require tolerance of those traits elsewhere.[207] Rather, it simply requires that the employer discriminate based on *in*tolerance (i.e., of behavior or dress inconsistent with stereotypes based on birth-assigned sex).[208]

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201. *E.g.*, Russell, *supra* note 73; Meredith R. Severtson, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post*-Bostock, 74 Vand. L. Rev. 1507, 1527 (2021); Nancy C. Marcus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 Nw. U. L. Rev. 223 (2020); Elizabeth Gross, *Where Is the 'B' in* Bostock*? An Overview of the Supreme Court's Expansion of Title VII's Protection to LGBTQ+ Employees and the Impact of the Supreme Court's Exclusion of Bisexual, Nonbinary, and Other Minority Sexual Identities and Gender Orientation:* Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)*, 48 W. St. U. L. Rev. 23 (2021).

202. "Although the Court uses the term 'transgender,' a term that includes non-binary individuals, the Court uses examples only of transgender individuals who identify as either male or female." McGinley et al., *supra* note 67, at 15. McGinley worries, under *Bostock*, "an employer could claim that it does not care what sex an individual employee is or was identified as at birth: it simply will not tolerate any individual who does not identify as either male or female." *Id.*

203. *See* Severtson, *supra* note 201, at 1525–27 (reporting the majority opinion "repeatedly used language like 'the other sex; and 'opposite sex'" and its "hypotheticals presupposed a gender binary": "'Hannah' (a woman) and 'Bob' (a man)").

204. *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (worrying "individuals who are 'gender fluid' . . . may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies").

205. Severtson, *supra* note 201, at 1531.

206. *Id.*

207. *See supra* text accompanying notes 190–194.

208. *Id.*

For example, a narrow reading of *Bostock* would say that an employer who discriminates against an employee assigned male at birth for using they/them pronouns would only be liable if the employer explicitly tolerated an employee assigned female at birth using those pronouns. Satisfying this condition would be unlikely if the employer believes in a strict gender binary and thus detests all uses of they/them. But under a reading of *Bostock* as legitimating *Price Waterhouse*'s stereotyping holding, which lacks that opposite-sex tolerance requirement and simply says that discrimination based on failure to conform to sex stereotypes is enough, discrimination based on the use of they/them pronouns alone would be sufficient for liability, and the plaintiff would not need to find an employee assigned female at birth to be a comparator. *Bostock* provides that if an employee's sex is an inextricably part of the adverse action, it is sex discrimination. In this example, where the employer is discriminating against the employee because they are not using the pronouns the employer stereotypically associates with those assigned male at birth, sex is indeed an inextricable part of the adverse action. Accordingly, the employer would be liable for a Title VII violation.

It is in this way that the consistency approach allows *Bostock* to enable nonbinary plaintiffs to bring statutory sex-discrimination claims.[209] As Catharine MacKinnon recently put it, "*Bostock* does not address discrimination against nonbinary persons as such, but it could arguably be developed . . . to cover them with a beefed up anti-stereotyping analysis . . . ."[210] A District of the District of Columbia judge, for instance, gestures towards a definition of *Bostock*'s protection of transgender plaintiffs that would include nonbinary ones, noting the "fairly strong case" that *Bostock* "yield[s] the conclusion that the [Title IX] forbids discrimination based on . . . sex stereotyping, insofar as such stereotypes are based on the belief that an individual should identify with only their birth-assigned sex."[211] This correctly identifies the relevant stereotype as cisgenderism—meaning that the transgression of the stereotype includes non-cisgender plaintiffs. This "non-cisgender plaintiffs" category necessarily includes transgender *and* nonbinary individuals. Moreover, the extent to which nonbinary plaintiffs experience discrimination as a function of nonconforming behavior[212] suggests that sex-stereotyping doctrine would

209. *See, e.g.*, Roberts v. Glenn Industrial Corp., 998 F.3d 111, 121 (4th Cir. 2021) ("[T]he Supreme Court's holding in *Bostock* makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes.").

210. Catharine A. MacKinnon, *A Feminist Defense of Transgender Sex Equality Rights*, 34 Yale J.L. & Feminism 88, 93 n.30 (2023).

211. Whitman-Walker Clinic, Inc. v. HHS, 485 F. Supp. 3d 1, 40 (D.D.C. 2020) (emphasis added).

212. *See, e.g.*, S.E. James, et al., *The Report Of The 2015 U.S. Transgender Survey*, Nat'l Ctr. Transgender Equality 154 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (finding nonbinary employees nearly twice as likely as transgender men and women employees to not ask employers to use correct pronouns, due to fear of discrimination).

provide nonbinary plaintiffs with ample protection in practice. The consistency approach thereby preserves a key path to statutory protection from sex discrimination for nonbinary plaintiffs.

Bisexual plaintiffs similarly fail to conform to gender stereotypes by not being heterosexual, which, as Judge Gertner wrote, is a definitive sex stereotype.[213] And, just as how sex-stereotyping works for their nonbinary peers,[214] bisexual plaintiffs are uniquely protected when sex-stereotyping doctrine is not interpreted as requiring tolerance of their traits elsewhere (i.e., as when possessed or performed by individuals assigned a different sex at birth).

Bisexuals' nonconformity to sex stereotypes arises not just from same-sex attraction—but also from lack of *exclusiv*e opposite-sex attraction. Indeed, to describe discrimination against bisexual plaintiffs as just homophobic erases bisexuality lumping all bisexuals in with gays/lesbians, adding oxygen to the biphobic argument that all bisexuals (particularly bisexual men) are simply gay and not a distinct subgroup who face a correspondingly distinct kind of discrimination that deserves redress.[215] By contrast, the consistency approach to *Bostock* definitively includes bisexual plaintiffs as potential claimants and describes the discrimination they face in accurate terms, rather than ones that exacerbate biphobia. Monosexuality is a sex stereotype, and a reading of *Bostock* that maintains the viability of sex-stereotyping allows bisexual plaintiffs to name how their transgression of said stereotype gives rise to the discrimination they experience. The presumption of monosexuality is itself a stereotype that, even if it plagues both men and women, is nonetheless inextricably tied to sex.

Pre-*Bostock* SOGI-discrimination decisions based on sex-stereotyping reflect this understanding of bisexuality as a sex-stereotype transgression. For instance, the Seventh Circuit panel's pre-*Bostock* decision in *Ivy Technical* explicitly included bisexual plaintiffs in its understanding of the wrongs of sexuality-based sex-stereotyping, by explaining how compulsory heterosexuality intersects with compulsory monosexuality.[216] The panel noted that "all gay, lesbian and bisexual persons fail to comply with the *sine qua non* of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men."[217] The court confirmed this understanding *en banc*.[218]

Maxon, a post-*Bostock* decision, echoes this reasoning:

213. Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (referring to "heterosexually defined gender norms").

214. *See supra* text accompanying note 208.

215. *See* Beth A. Firestein, Bisexuality: The Psychology and Politics of an Invisible Minority 223 (1996) ("[P]olitical conservatives and the religious right consistently categorize bisexuals together with lesbians and gay men."); *id.* at 222 (observing that despite "considerable overlap between homophobia and biphobia," there are also "specific ways in which each is unique").

216. Hively v. Ivy Tech. Cmty. Coll., 830 F.3d 698, 711 (7th Cir. 2016).

217. *Id.*

218. *Id.* at 246.

> Plaintiffs allege[d] that they were treated differently than similarly situated persons of the opposite sex based on the stereotype that *men are married to women*. . . . [I]t is impossible to distinguish between discrimination on the basis of "gender stereotypes" and discrimination on the basis of "sexual orientation."[219]

As Gorsuch put it in *Bostock*, the stereotype that men are married to women—and thus impliedly, *only* to women—"doubles rather than eliminates Title VII liability."[220] It bakes in an assumption of monosexuality which, demonstrates that discrimination based on bisexuality is a form of sex-stereotyping. The consistency approach to *Bostock* provides a path forward for bisexual plaintiffs advancing statutory sex-discrimination claims by drawing a through line from pre-*Bostock* sex-stereotyping cases (such as *Ivy Technical*) to *Bostock* to post-*Bostock* sex-stereotyping cases (such as *Maxon*).

2. Other Forms of LGBTQ+ Subjugation

In addition to key subgroups in the LGBTQ+ community, key contexts—specifically, sex-segregated bathrooms and sex-specific dress codes—were also left out of *Bostock*. In demurral, *Bostock* itself said that laws regarding "sex-segregated bathrooms, locker rooms, and dress codes" were not "before us today."[221] Yet they may be soon: in the 2023 legislative session alone, half of the laws introduced in state legislatures were to prevent transgender people from using bathrooms and other intimate facilities consistent with their gender identities.[222]

However, *Bostock* may still provide a path forward for plaintiffs advancing claims against these bathroom and dress code policies under the consistency approach, given that these policies violate sex-stereotyping principles. After all, *Bostock* was simply silent on these policies—not explicitly permissive. But, because of the *Bostock* Court's demurral, plaintiffs challenging these policies under statutory sex-discrimination prohibitions cannot rely on *Bostock* alone. Accordingly, only through synthesizing *Bostock* with sex-stereotyping doctrine can plaintiffs in these cases avail themselves of *Bostock*'s pro-LGBTQ+ promise. Sex-segregated bathrooms and sex-specific dress codes are rife with stereotypical assumptions, which *Bostock* helps unearth. Based on birth-assigned sex, sex-segregated bathrooms presume patterns of behavior, and sex-specific dress codes impose sex-role performance.

On bathrooms, admittedly even the foremost post-*Bostock* victory for transgender bathroom rights thus far has construed *Bostock* narrowly. In *Grimm*, the Fourth Circuit found a Title IX violation, but only because Grimm

219. 549 F. Supp. 3d 1116, 1124 (C.D. Cal. 2020), *aff'd*, No. 20–56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021) (emphasis added).

220. *Bostock*, 140 S. Ct. at 1742–43.

221. *Id.* at 1753; *see also id.* ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind.").

222. *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, Am. Civ. Liberties Union, https://www.aclu.org/legislative-attacks-on-lgbtq-rights.

challenged the "exclusion of *himself* from the sex-separated restroom matching his gender identity," not the *policy* of "sex-separated restrooms themselves"—including in part because he had "consistently and persistently identified as male," was "clinically diagnosed with gender dysphoria," and had been prescribed "using the boys restroom as part of the appropriate treatment[.]"[223] The Fourth Circuit declined to address whether sex-stereotyping doctrine applied because, "having had the benefit of *Bostock*'s guidance," it did not feel the "need [to] address whether Grimm's treatment was also 'on the basis of sex' for purposes of Title IX under a *Price Waterhouse* sex-stereotyping theory."[224] In other words, because *Bostock* provided one path to its holding, the court did not feel as though it need to take a second path there.

For less perfect plaintiffs than *Grimm*, however, sex-stereotyping claims may be a lifeline, not an afterthought. A trans boy without a clinical diagnosis of gender dysphoria, let alone a treatment plan that includes using the boys' restroom, is not protected under *Grimm*, wherein the plaintiff had both of those things. And that boy may be fine with, and indeed prefer, a boys' bathroom that is separate from the girls', so long as his access to the former is not conditioned on being cisgender. This result exemplifies the harms of relying on *Bostock* alone. Here, then, the sex-stereotyping argument would provide redress through the consistency approach.

For an articulation of the sex-stereotyping theory applied to bathrooms, one need only look to the Fourth Circuit's equal-protection analysis in Grimm, which explained how categorical discrimination against transgender individuals (rather than individualized treatment based on specific diagnoses or prescriptions) still constitutes impermissible sex-stereotyping.[225] Ultimately, the Eleventh Circuit rejected the sex-stereotyping argument for bathroom access, holding that a sex-segregated bathroom policy was "based on biological sex, which is not a stereotype."[226] Still, the Fourth Circuit's equal-protection analysis in *Grimm* demonstrates that courts can recognize that categorizations based on biological sex can *amount* to sex-stereotyping when they impose the cisnormative stereotype that those assigned male at birth must identify as boys or men, and therefore must use the boys' or men's bathroom. The consistency approach to *Bostock* for transgender plaintiffs extends that reasoning to the bathroom/intimate-facility context.

Sex-specific dress codes similarly comprise sex-stereotypical burdens, despite *Bostock*'s demurral on them. Of course, some courts have taken *Bostock*'s demurral as permission. For example, a Northern District of Texas judge recently upheld a sex-specific dress code in spite of *Bostock*,[227] includ-

223. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618–19 (4th Cir. 2020) (emphasis added).

224. *Id.* at 617 n.15.

225. *Id.* at 608–10.

226. Adams v. Sch. Bd. of St. Johns Cnty., Fla., 57 F.4th 791, 809 (11th Cir. 2022).

227. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 624 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70

ing by reading *Bostock* as permitting "sex-neutral codes of conduct that apply equally to each biological sex."[228] (The Fifth Circuit, on appeal, declined to categorically hold that *Bostock* expressly permits these dress codes, instead evading the question on a procedural technicality.[229]) But, if transgender men are being told to apply makeup, wear traditionally feminine clothing, and engage in other behavior inconsistent with their gender identity that is textbook sex-stereotyping—especially if cisgender men are receiving parallel instructions regarding traditionally masculine standards of appearance.

Notably, there has long been ample room in dress-code cases for sex-stereotyping doctrine. Well before *Bostock*, courts have been willing to strike down sex-specific dress codes when they perpetuate sex stereotypes for women—even if sex-specific dress codes are not per se impermissible. For instance, in 1987, a Southern District of Ohio judge struck down a dress code requiring female sales clerks to wear a "smock," while their male counterparts were allowed to wear shirts and ties," because it "perpetuate[d] sexual stereotypes" even without a discriminatory motive.[230] Other examples abound.[231]

More broadly, courts have recognized that instructions or pressure to dress more in accordance with stereotypes for one's birth-assigned sex can amount to evidence of impermissible sex discrimination.[232] The consistency approach to *Bostock* extends this longstanding principle of statutory sex-discrimination law to SOGI-discrimination plaintiffs, as the consistency approach to *Bostock* makes clear that transgender and gay plaintiffs have joined cisgender women in the ambit of Title VII's protection.

B. *Tracking Reality*

Perhaps the greatest argument for the consistency approach to *Bostock* is that the discrimination faced by SOGI-discrimination plaintiffs often takes the form of sex-stereotyping. The consistency approach thus better captures the reality of SOGI discrimination, which often turns not on the *fact* of plaintiffs' protected class (status), but on their *behavior's* contravention of expected sex stereotypes (conduct). Ensuring that both claims are actionable allows more adverse employment actions to be recognized as actionable Title VII

F.4th 914 (5th Cir. 2023).

228. *Id.* at 606.

229. *Braidwood*, 70 F.4th at 940.

230. O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987); *compare* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006) (declining to strike down a gender-specific code, but in part because "[t]here is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear").

231. *See, e.g.*, Carroll v. Talman Fed. Savings & Loan Ass'n of Chicago, 604 F.2d 1028, 1033 (7th Cir. 1979) (striking down a dress code requiring women to wear two-piece, color-coordinated uniforms supplied by the employer (while men could wear "customary business attire") because it was "based on offensive stereotypes prohibited by Title VII").

232. *See, e.g.*, Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000)("[U]nder *Price Waterhouse*, 'stereotyped remarks' [such as statements about dressing more 'femininely'] can certainly be evidence that gender played a part.").

violations—meaning that plaintiffs will not just be able to state their claims and survive motions to dismiss, but prove their claims and receive justice. Indeed, treating sex-stereotyping law as distinct from *Bostock* risks triggering the problem raised by plaintiff's lawyers in *Zarda*, a lower court case consolidated in *Bostock*:

> If this Court were to reverse the decision below [holding "sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination"[233]] . . . it would launch the lower courts on the futile exercise of trying to distinguish between sexual-orientation and sex-stereotyping claims involving appropriate sex presentation and sex roles.[234]

Consider the fact pattern from *Sarco*, which illustrates just how precisely courts can and do delineate between status and conduct—often to the detriment of plaintiffs who faced discrimination on both fronts. In *Sarco*, plaintiff was "'confident' everyone in the office was aware he identified as homosexual"—not because he discussed having a boyfriend, husband, or male sexual partners, but "due to his openness about his orientation, as well as his effeminate mannerisms and clothing, long hair, flamboyant apparel, and a high-pitched voice which resulted in some clients presuming he was female on the phone."[235]

Sarco advanced both a sex-stereotyping claim under *Price Waterhouse* and a sexual-orientation discrimination claim under *Bostock*, but was forced to artificially disaggregate the underlying facts in order to support both counts. For the sex-stereotyping claim, Sarco emphasized that he was "a man who openly flouts gender norms and possesses an 'effeminate' manner" and pointed out "that the office singled him out in giving him additional work that did not involve client interactions and that his superiors were more stringent in applying or adapting the office dress code to penalize his choices in clothing."[236] For the sexual-orientation discrimination claim, Sarco pointed to comments made about his status as a homosexual man, the fact that his boyfriend (of whom his employer later became aware) was denied an interview, "his superiors' decision to cater a work event from Chik-fil-A, and his superior's hesitation to enter a bathroom when he was occupying it[.]"[237] The former set of events related to his conduct (as a man transgressing sex stereotypes) were adverse employment actions experienced by Sarco himself; the latter set related to his status (as a gay man) were mostly "stray remarks" that could be dismissed as irrelevant or adverse actions experienced by Sarco's boyfriend. Clearly, it was important to Sarco's case that the former set make their way into the pleadings in order for him to build up a sufficient *prima facie* case of employment discrimination that would survive a motion to dismiss.

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233. Zarda v. Altitude Express, Inc., 883 F.3d 100, 122 (2d. Cir 2018).

234. Opening Brief for Respondents at 29, Zarda v. Altitude Express, Inc., 140 S. Ct. 1731, *sub nom. Bostock* (No. 17–1623).

235. No. 5:19cv86, 2020 WL 5507534, at *2 (W.D. Va. Sept. 11, 2020).

236. *Id.* at *7.

237. *Id.*

Sarco ultimately prevailed on both claims, but only despite—not because of—the hurdle about which plaintiff's lawyers warned in their *Zarda* brief. The court in *Sarco* noted that "[t]hough after *Bostock* there is substantial overlap between the two theories of liability, *the sexual orientation discrimination claim rests on some distinct facts*," and the sex-stereotyping claim "rests on his perceived adherence to expectations of 'masculinity,' not his actual sexual orientation[.]"[238]

Had the *Sarco* court relied on *Bostock* alone, rather than incorporating the sex-stereotyping approach, important adverse actions—exclusion from client interactions, disparate treatment regarding dress code—would not have been actionable under Title VII. At best, they would have amounted to atmospheric evidence of discrimination, which does little to establish a *prima facie* case. Moreover, although *Sarco* demonstrates the persistent availability of sex-stereotyping arguments for SOGI-discrimination plaintiffs, its reasoning engages in the exact kind of "futile exercise" of which Zarda's lawyers warned. By instead taking the consistency approach to *Bostock*, courts can be better positioned to see and name homophobia and transphobia as what it so often is: "[p]rescriptive [s]ex [s]tereotyping."[239]

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The project of interpreting landmark cases is technically never-ending. Even the most settled precedents have been subject to novel framings, leaving their legacy up for debate.[240] However, amid mass handwringing about the fate of sex-stereotyping doctrine after *Bostock*, the consensus post-*Bostock* lower courts are forming on the question of sex-stereotyping is a useful indication of the shape *Bostock*'s legacy is taking. In the wake of *Bostock*, SOGI-discrimination plaintiffs have continued to avail themselves of sex-stereotyping doctrine, often explicitly *because* (not in spite) of *Bostock*. Interpretation of *Bostock* as consistent with the sex-stereotyping cases that preceded it avoids what Gorsuch might term a "curious discontinuity"[241] in statutory sex-discrimination law. Rather, it represents a curious *continuity*.

238. *Id.* (emphasis added).

239. *See* Eskridge, *supra* note 40, at 362.

240. *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022) (implying *Dobbs* stands with *Brown v. Bd. of Educ.*, 347 U.S. 493 (1954)) *with id.* at 2316 (Roberts, J., concurring) (noting the *Brown* opinion was "unanimous and eleven pages long" but "this one is neither"); *see also id.* at 2341 (Breyer, Sotomayor & Kagan, JJ., dissenting) (rejecting the majority's invocation of *Brown*).

241. *Bostock*, 140 S. Ct. at 1479.