Beyond Binary: *Bostock*'s Implications for Employer Dress Codes

I. Introduction

Gender identity in the United States has become increasingly complex, and employers have yet to reconcile themselves with the change. In the past, there were two choices: male or female; however, those are now just two of many gender subcategories with which an individual can identify.[1] Indeed, a recent study revealed that 1.6% of American adults self-report as transgender or nonbinary.[2] As gender fluidity becomes more commonplace, employers and the courts will be required to acknowledge these shifts in cultural viewpoint.[3] Even though society has become more aware of diversity in gender identity, nonbinary people and employers are still unsure about nonbinary and transgender rights under the law. And, in particular, employer grooming standards remain gounded in antiquated notions of traditional gender roles. "Gender-differentiated dress codes and norms… are premised on the basic assumption that gender is

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[1] Kate Reineck, *Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People*, 24 Mich. J. Gender & L. 265, 266 (2017). "Nonbinary people may identify with a specific label under a non-binary umbrella, such as neutrois, bigender, genderfluid, androgyne, or agender, or with a more general label such as genderqueer or non-binary."

[2] Daniel de Vise, *New Studies Find Millions of Young Nonbinary and Transgender Americans*, THE HILL (Jan. 13, 2023) https://thehill.com/changing-america/3811406-new-studies-find-millions-of-young-nonbinary-and-transgender-americans, noting that although the category of nonbinary has existed in society at large for many years, statistics on nonbinary people are relatively new because studies have not accounted for this gender classification. ˆ Bianca D.M. Wilson & Ilan H. Meyer, *Nonbinary LGBTQ Adults in the United States,* UCLA WILLIAMS INST. (June 2021) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf.

[3] *Annual GLAAD Accellerating Acceptance Study: Over 80% of non-LGBTQ Americans Expect Growing Familiarity with trans and nonbinary people*, GLAAD (Nov. 4, 2021) https://www.glaad.org/blog/annual-glaad-accelerating-acceptance-study-over-80-non-lgbtq-americans-expect-growing. "[n]on-LGBTQ Americans are becoming more understanding that the LGBTQ community is not just one homogenous group, but rather a diverse community of various identities across gender and sexuality… becoming increasingly aware that there are more than two genders."

binary. That basic assumption is now proved false. It is simply not sustainable for employers to continue to perpetuate policies that rely on a false premise.[4]

This article advances the argument that the U.S. Supreme Court's recent decision in *Bostock vs. Clayton County, Ga.*[5] extends Title VII protections beyond homsexual and transgender to nonbinary employees. Congress may not have anticipated Title VII to protect nonbinary people when it enacted the Civil Rights Act in 1964; however, it cannot be denied that the intent behind the legislation was and continues to be elimination of employment discrimination "because of… sex." In the 1970's and 1980's the judiciary ruled that airlines cannot cite to customer preference to justify sex discrimination.[6] Over 30 years ago, the U.S. Supreme Court not only held that sex-based stereotyping is impermissible under Title VII, but it clearly articulated that such employer discrimination would not be tolerated.[7] Thus, in *Bostock,* the Court capped a natural progression towards Title VII's intent to "strike at the entire spectrum of disparate treatment" in the workplace and, as a result, Title VII's broad protections should extend to nonbinary people, a subcategory of transgender.[8] That extension should include employer grooming codes, which

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[4] Rebekah Hanley & Malcolm MacWilliamson, *Model Dress Code: Promoting Genderless Attire Rules to Foster an Inclusive Legal Profession*, 34 J. Civ. Rts. and Econ. Dev., 125, 131. (Spring 2021). "Notwithstanding the emerging understanding of gender as a spectrum and the growing acceptance of gender fluidity…both written and unwritten binary profession attire expectations persist."

[5] 140 S. Ct. 1731, 1737 (2020). The Court held that Title VII prohibits employers from discriminating against transgender and gay employees per the statutory language, "because of…sex"). "Sex plays a necessary and undisguisable role… exactly what Title VII forbids."

[6] *See Diaz v. Pan Am. World Airways*, 442 F.2d 385, 387-89 (5th Cir. 1971); *Wilson v. Southwest Airlines Co*., 517 F. Supp. 292, 299 (N.D. Texas 1981).

[7] *Price Waterhouse v. Hopkins,* 490 U.S. 241, 252 (1989), "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group…"

[8] *Id.*, citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978).

dictate an employee's appearance based on a presumption that gender is binary.[9] "These enduring, outdated expectations perpetuate judgment of and discrimination against those who will not—or cannot—comply," proving problematic in today's workplaces.[10] This article charts the history of grooming code protection under Title VII up until the *Bostock* decision. It then identifies how the *Bostock* decision should culminate in the elimination of such antiquated rules and provides guidance on how an employer can comply under a broad interpretation of Title VII protections inclusive of nonbinary employees.

II. Background: Appearance Standards and Equal Burdens Test

A. Willingham v. Macon Tel. Publ'g Co.

In one of the earliest grooming standards cases, Alan Willingham was denied employment by The Macon Telegraph (Macon Telegraph) for refusal to cut his shoulder length hair in compliance with the newspaper's policy, which required all employees "to be neatly dressed and groomed in accordance with the standards customarily accepted in the business community."[11] In his claim against Macon Telegraph, Willingham asserted "sex plus" disparate treatment under Title VII because men with long hair were barred from employment while women with long hair were eligible for the very same job.[12]

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[9] Rebekah Hanley & Malcolm MacWilliamson, *Model Dress Code: Promoting Genderless Attire Rules to Foster an Inclusive Legal Profession*, 34 J. Civ. Rts. and Econ. Dev., 125, 131. (Spring 2021). "Notwithstanding the emerging understanding of gender as a spectrum and the growing acceptance of gender fluidity…both written and unwritten binary profession attire expectations persist."

[10] *Id.*

[11] *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1086 (5th Cir. 1975).

[12] *Id.* at 1089-90. The *Willingham* en banc majority defined "sex plus" discrimination as "to impose an equal protection gloss upon the statute [Title VII], i.e., similarly situated individuals of either sex cannot be discriminated against vis a vis members of their own sex unless the same distinction is made with respect to those of the opposite sex." Citing *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971). In *Phillips*, an employer's refusal to accept job applications from

The U.S. District Court for the Middle District of Georgia granted Macon Telegraph's motion for summary judgment, determining that the defendant employer's grooming code was not a Title VII violation.[13] Upon appeal, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) reversed the district court's decision, finding instead that Willingham had presented a prima facie case of disparate treatment, and remanded the case back to the district court for an evidentiary hearing.[14] However, the Fifth Circuit, sitting en banc, vacated the appellate court's decision, affirming the district court's ruling that Macon Telegraph's grooming policy did not amount to "sex plus" discrimination.[15] The court found that Congress's "slim guidance" on how to apply Title VII left it open for courts to draw limiting principles for claims of disparate treatment regarding an employer's appearance and grooming standards.[16] Further, the court maintained that Macon Telegraph did not deny Willingham a job because he was a man; rather, they denied him a job because he did not follow their grooming policy.[17] Additionally, Macon Telegraph's standard did not amount to "sex plus" discrimination, because the policy was based on mutable characteristics "related more closely to the employer's choice of how to run his

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women with school-aged children served as the foundation for unlawful "sex plus" discrimination.

[13] *Willingham v. Macon Telegraph Publ'g Co*., 352 F.Supp. 1018 (M.D. Ga. 1972).

[14] *Willingham v. Macon Telegraph Publ'g Co*., 482 F.2d 535 (5th Cir. 1973).

[15] *Willingham v. Macon Telegraph Publ'g Co*., 507 F.2d 1084, 1088 (5th Cir. 1975).

[16] *Id.* at 1090. The Fifth Circuit was not convinced by past precedent or the EEOC's administrative decisions; instead, it decided that without authorization from Congress, dress codes and appearance standards were not within Title VII's protection. "We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate."

[17] *Id.* at 1092. "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications." *See also* Justin Blount, *Sex-Differentiated Appearance Standards Post-Bostock*, 31 GEO. MASON U. CIV. RTS. L.J. 217, 231 (Spring 2021). "In the mind of the court, hair length is just a personal preference, not an immutable characteristic of sex or a fundamental right, … In other words, 'Hippy, if you want a job, just cut your hair."

business than to equality of employment opportunity."[18] The court did note, however, that employers may not impose different policies on men and women if they were unevenly applied."[19]

B. *Carroll v. Talman Fed. Savings and Loan Ass'n of Chicago*

Just a few years after the Fifth Circuit decided *Willingham*, an appellate court in the Seventh Circuit determined that an employer's sex-based dress code was impermissible under Title VII. At Talman Federal Savings and Loan (Talman), Mary Carroll and all female tellers were required to wear a company-sanctioned uniform while male employees in the same positions were allowed to dress in "suitable business attire."[20] Female staff had to pay the cost of the uniforms, as well as cleaning and replacement.[21] Failure to adhere to Talman's uniform policy resulted in suspension.[22] On behalf of herself and similarly situated female employees, Mary Carroll filed an EEOC charge against Talman for sex discrimination.[23]

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[18] *Id.* Per the Fifth Circuit, Congress intended for Title VII to remove barriers for equal employment. Such barriers would be race, sex, religion, country of origin—immutable characteristics that place a person in a protected classification. Hairstyle, on the other hand, was mutable and thus not covered under Title VII.

[19] *Id.* at 1087, 1092-93. Unlike *Sprogis v. United Air Lines, Inc.* 444 F.2d 1194 (7th Cir. 1971) and *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971), where employers placed an unequal burden on women employees with their policies, Willingham's choice to wear his hair long was not protected by federal discrimination law. The court further opined that although eradicating sex stereotyping was a "laudable goal," Title VII did have such a broad reach as to protect mutable characteristics.

[20] *Carroll v. Talman Fed. Savings and Loan Ass'n of Chicago*, 604 F.2d 1028, 1029 (7th Cir. 1979).

[21] *Id.* at 1030.

[22] *Id.* The only day in which female employees of the bank were not required to wear their employer-provided uniforms was the last Tuesday of the month when the uniforms were cleaned and the holiday week between Christmas and New Year's. On the days where women employees were allowed to go without uniforms, they were required to dress in "appropriate business attire" like all male employees.

[23] *Id.* at 1029.

The U.S. Court of Appeals for the Seventh Circuit determined that Talman's sex-differentiated uniform policy violated Title VII because it discriminatorily affected the women's compensation as well as their "terms, conditions, or privileges of employment."[24] Unpersuaded by Talman's reasoning that its uniform policy for women was "job-related or reasonably necessary to the proper operation of its business," the Seventh Circuit emphasized less restrictive alternatives that would achieve the bank's goal of professional work attire.[25] Further, sex-differentiated appearance standards are lawful if "reasonable" and the disparity between men and women's uniforms only "differ[ed] somewhat."[26]

C. *Jespersen v. Harrah's Operating Co.*

Darlene Jespersen had a successful career as a bartender for Harrah's casino for over 20 years and, by all accounts, was an "outstanding employee" who garnered consistently positive feedback from her managers and customers throughout her tenure.[27] When Harrah's introduced a new "Personal Best" appearance standard, Jespersen took issue with the requirement that female service staff, including bartenders, wear makeup.[28] Harrah's Personal Best policy not only made it mandatory for women wear makeup but provided specifics on what makeup must be worn,

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[24] *Id at* 1030. With respect to compensation discrimination, Talman Federal Savings and Loan required women to purchase uniforms from the company and pay for upkeep of their uniforms, which directly affected their take home pay. And because bank policy necessitated women to wear their uniforms almost every day, women employees were barred from the same terms and conditions of employment as male employees.

[25] *Id.* One alternative suggested allowing women to wear "appropriate business attire" while at work, just like male employees. Another option would be to require men to wear a similar uniform, which the bank had done for over a decade.

[26] *Id.* at 1032. Though the Seventh Circuit did not delve into what constitutes "reasonable" dress codes or appearance standards generally but did indicate that there cannot be drastically different standards for men and women.

[27] *Jespersen v. Harrah's Operating Co.,* 392 F.3d 1076, 1077 (9th Cir. 2004). Jespersen was reported to have a "very positive" attitude and provided "excellent service," which encouraged loyal, repeat customers.

[28] *Id.*

how to apply it, what shades were appropriate.[29] Harrah's hired image consultants to conduct makeovers on its female staff and take photos to keep on-file as a measure of each employee's "Personal Best."[30] To Jespersen, wearing makeup "forced her to be feminine" and interfered with her ability to effectively bartend because she often had to deal with unruly customers and being made up heavily "took away [her] credibility to do so."[31] Just 30 days after Harrah's instituted its Personal Best policy, Darlene Jespersen was terminated for refusal to wear makeup while bartending.[32]

Jespersen brought a Title VII claim against Harrah's in the U.S. District Court in the District of Nevada, where Harrah's was successful in its motion for summary judgment.[33] In applying the unequal burdens test, the District Court found that Harrah's Personal Best program was not a violation of Title VII because it did not overly burden women over men.[34] On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, concluding that Jespersen did not meet the

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[29] *Id.* at 1078. See also Jespersen v. Harrah's Operating Co., Inc. 444 F.3d 1104, 1107 (9th Cir. 2005). The amended policy read as follows: "All Beverage Service Personnel… must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform."

[30] *Id.* The image consultants also showed female employees how to apply their makeup in accordance with the Personal Best policy and "tested their proficiency" in doing so.

[31] 444 F.3d at 1108. "It is not disputed that she found the makeup requirement offensive, and felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender."

[32] *Id.* Harrah's gave Jespersen the option to seek other positions within the company that did not have a makeup requirement, but Jespersen had not applied for any other jobs.

[33] *Jespersen v. Harrah's Operating Co, Inc.,* 280 F. Supp. 2d, 1189, 1192 (D.Nev. 2002).

[34] *Id.* at 1192-93. Citing *Frank v. United Airlines, Inc*. 216 F.3d 845, 854 (9th Cir. 2000). "An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." In *Jespersen*, men were prohibited from wearing makeup and required to keep a clean-shaven appearance, whereas women were required to wear makeup and style their hair. This, in the court's view, was an even-handed policy. Even more, the District court noted that an employer's "reasonable regulations" when applied equally to male and female employees "to conform to different dress and grooming standards" was not actionable under Title VII.

burden of proof required to show that Harrah's unduly burdened female more than male employees with its policy.[35] The Ninth Circuit also affirmed the lower court's holding that gender-based appearance standards are not discriminatory per se; rather, different standards are lawful if the employer can demonstrate an equal burden between men and women.[36]

In his dissent, Judge Harry Pregerson argued that Jespersen did, in fact, present a prima facie case of discrimination because Harrah's policy was at least partially motivated by sex stereotyping, as Harrah's required women to don a "facial uniform" beyond the mere application of makeup.[37] Judge Pregerson further contended that the Ninth Circuit's unequal burdens analysis was incorrect; instead of comparing whether both men and women had to adhere to some appearance and uniform standards overall, the makeup requirement should be examined by itself to ascertain a burden to women.[38]

Judge Alex Kozinski also dissented, noting that Jespersen met her burden to defeat summary judgment.[39] Though Jespersen did not provide evidence that wearing makeup posed an equal burden on women in terms of cost or time, Judge Kozinski argued that a reasonable factfinder could conclude that female employees like Jespersen had to put more money and work

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[35] 392 F.3d at 1108. "Judicial notice is reserved for matters 'generally known within the territorial jurisdiction of the trial court… Our rules thus provide that a plaintiff may not cure her failure to present the trial court with facts sufficient to establish the validity of her claim by requesting that this court take judicial notice of such facts."

[36] *Id.* at 1110. Citing *Fountain v. Safeway Stores, Inc*. 555 F.2d 753 (9th Cir. 1977); *Barker v. Taft Broad. Co.,* 549 F.2d 400 (6th Cir. 1977); *Earwood v. Cont'l Southeastern Lines, Inc.,* 539 F.2d 1349 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 527 F.2d 1249 (8th Cir. 1976); *Knott v. Mo. Pac. R.R. Co*., 527 F.2d 1252 (8th Cir. 1975); *Willingham v. Macon Tel. Publ'g Co*., 507 F.2d 1084 (5th Cir. 1975); *Baker v. Cal. Land Title Co*., 507 F.2d 895 (9th Cir. 1975); *Dodge v. Giant Food, Inc*., 488 F.2d 1333 (D.C. Cir. 1973).

[37] *Id.* at 1114. (Kozinski, J., dissenting) "When Jespersen refused to wear makeup, she was terminated 'because of' her sex.'"

[38] *Id.* at 1116.

[39] *Id.* at 1117. (Kozinski, J., dissenting)

into compliance with Harrah's appearance standards.[40] Kozinski declared that under Harrah's Personal Best policy, Jespersen faced an unequal burden—wear makeup or lose her job— as compared to her male colleagues.[41]

D. *Schiavo v. Marina Dist. Dev. Co., LLC.*

When the Borgata Casino Hotel & Spa (Borgata) opened its doors in 2003, it "quickly became the largest grossing property in the city," partially because of its "BorgataBabes."[42] During the interview process, BorgataBabes were informed of the company's personal appearance standard (PAS) for both men and women, which included: (1) "be physically fit," including proportionate height/weight requirements; (2) "Display a clean, healthy smile." Female Babes "were to have a natural hourglass shape" and male Babes were to "have a natural 'V' shape with broad shoulders and a slim waist." Women were to wear their hair "clean and naturally styled" with "tasteful, professional makeup that complimented their facial features" and men were required to be either "clean shaven or have neatly trimmed and sculpted facial hair."[43]

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[40] *Id.* Judge Kozinski pointed out that "face powder, blush, mascara, and lipstick… don't grow on trees." And though he does not wear makeup, he has spent time waiting on women in his life to apply makeup. "It's hard to imagine that a woman could 'put on her face"… in the time it would take a man to shave —certainly not if she were to do the careful and thorough job Harrah's expects." Therefore, in J. Kozinski's opinion, the en banc should have denied Harrah's summary judgment and let the case go to trial.

[41] *Id.* Though the Ninth Circuit did not identify a catch-22 in Jespersen's claim, she was forced to choose between engaging in a "humiliating, alienating exercise" of putting on a full face of makeup to transform herself into Harrah's interpretation of her Personal Best or, alternatively, give up her job.

[42] *Schiavo v. Marina Dist.*, 123 A.3d 272 (N.J. Super. Ct. App. Div. 2015), citing *A Brief History of the Casino Control Commission*, ST. OF N.J. CASINO CONTROL COMMISSION, http://www.nj.gov/casinos/about/history (last visited June 17, 2022). In its brochure to guests, the Borgata described its "Babes" as "part fashion model, part beverage server, part charming host and hostess… the new ambassadors of hospitality representing our beautiful hotel casino and spa in Atlantic City."

[43] *Id.*

A year and a half later, Borgata's management team brought forth a modification to its PAS, with more specific standards for height/weight requirements and penalties for falling outside the PAS.[44] All BorgataBabes were subject to an initial weigh-in to determine each individual's baseline and required to sign a "clarifying" PAS, detailing the new weight standard and repercussions for non-compliance, leading up to and including termination.[45] The new PAS also included a weight exemption for BorgataBabes with either a "bona fide medical condition" or those who were pregnant.[46] BorgataBabes were often weighed in arbitrarily, when a larger costume size was requested, or a member of the management team noticed that perhaps a larger costume size would be necessary.[47]

Less than a decade after opening, current and former BorgataBabes brought a class action lawsuit against Borgata citing issues with the 7% PAS weight gain standard.[48] A New Jersey Superior Court granted Borgata's motions for summary judgment against each plaintiff, dismissing all claims.[49] Upon appeal, the Superior Court affirmed in part and reversed in part,

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[44] *Id.* at 281. The Borgata believed this update to its PAS policy would allow it "to enforce the PAS in an objective manner."

[45] *Id.* Right above the employee's signature line read the following statement in bold, capital letters: "I read and fully understand that costume requirements, personal appearance and weight standard[,] and the personal grooming standards, as set forth herein, are expectations and ongoing requirements for all costumed beverage servers." Some BorgataBabes testified that they added the words "under protest" next to their signature, as it was feared that failure to sign the new PAS would result in termination.

[46] *Id.* In their testimony, Plaintiffs often complained that Borgata would not recognize certain medical conditions as "bona fide." Even more, Plaintiffs returning to work after having a baby would not receive an exemption and were often disciplined for exceeding their 7% weight gain.

[47] *Id.*

[48] *Id.* During the relevant period for review of the case, February 2005 to December 2010, 686 females and 46 male Borgata Babes were weighed-in under the PAS, resulting in 25 women and no men being suspended for being outside their baseline weight. Plaintiffs alleged gender stereotyping and gender role discrimination, as well as hostile work environment in violation of New Jersey's Law Against Discrimination (LAD), as informed by Title VII.

[49] *Id.* at 278.

finding that LAD does not protect plaintiffs from employer's PAS weight requirements because LAD does not recognize weight as a protected class, nor does Title VII "proscribe discrimination based upon an employee's excessive weight."[50] As long as employers create and enforce sex-differentiated grooming policies evenhandedly, Title VII allows them to do so.[51] Moreover, the policy excepted pregnant employees and those with bona fide medical conditions; thus, the PAS was equally burdensome.[52]

The Superior Court also ruled, however, that the plaintiffs' presented a prima facie case of hostile work environment when Borgata management treated female BorgataBabes differently than their male counterparts.[53] Several Plaintiffs testified that supervisors insisted on weighing female BorgataBabes multiple times, ignoring or rejecting medical documentation claiming an exemption.[54] Other female BorgataBabes testified to being placed on "medically impossible" diets after having a baby.[55] Thus, the Plaintiffs presented a prima facie case of sex discrimination that overcame Borgata's motion for summary judgement.[56]

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[50] *Id.* Citing *Taylor v. Small*, 350 F.3d 1286, 1292 (D.C. Cir. 2003).
[51] *Id.* at 289-90. Citing *Fagan v. Nat'l Cash Register Co.,* 481 F.2d 1115, 1124-25 (D.C. Cir. 1973), "No facet of business life is more important than a company's place in public estimation… We make take judicial notice of an employer's proper desire to achieve favorable acceptance."
[52] *Id.* at 291. Comparing the outcomes of *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) and *Frank v. United Airlines, Inc*., 216 F.3d 845, 847 (9th Cir. 2000), where in the former, the employer's sex-differentiated standards were equally burdensome and, therefore, lawful. In the latter, the employer's weight requirements for women were more stringent for women and deemed unlawful.
[53] *Id.* at 279, 296.
[54] *Id.*
[55] *Id.* Several physicians testified to the dangerous diets that Borgata recommended. Another Plaintiff was told to go on a diet after returning to work, which her doctor said was unsafe if the mother continued to breastfeed. Plaintiff brought a doctor's note to work, which was recognized by Borgata, but Plaintiff was then required to weigh-in every few months.
[56] Id. at 298. Citing *Lehmann v. Toys "R" Us, Inc.,* 626 A.2d 445, 453 (N.J. 1993).

II. How *Bostock* Upended Title VII Sex Discrimination

In *Bostock v. Clayton County, Georgia,* three consolidated cases were presented to the Supreme Court, posing the question: May an employer terminate an employee based on their status as gay or transgender?[57] In case one of three, Gerald Bostock, a county social worker, was fired after his employer found out that he participated in a gay intramural sports league.[58] The United States Court of Appeals for the Eleventh Circuit had held that "discharge for homosexuality is not prohibited by Title VII," and the county was within their rights to fire an employee simply for being gay.[59] In a second case, Donald Zarda was terminated from his job as a skydiving instructor just days after mentioning to his employer that he was gay.[60] The United States Court of Appeals for the Second Circuit ruled that Title VII protected employees from employer discrimination and that "sexual discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination."[61] Lastly, Aimee Stephens sued Harris Funeral Home for terminating her after she disclosed she was transitioning from male to female and intended to follow the dress code for women employees.[62] The United States Court of Appeals for the Sixth Circuit held that employers may not discriminate against employees based on their transgender status.[63] Though each case was prompted due to similar circumstances—long standing employees who were let go from their positions shortly after the employer discovered they were

[57] 140 S.Ct. 1731, 1737 (2020).
[58] *Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 Fed.Appx. 964 (11th Cir. 2018) (per curiam).
[59] *Id.*, citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).
[60] *Zarda v. Altitude Express, Inc.,* 883 F.3d 100, 107 (2nd Cir. 2018).
[61] *Id*. The Second Circuit had previously held that Title VII claims based on a person's sexual preference was not cognizable, thus overruling *Simonton v. Runyon*, 232 F.3d 33, 35 (2nd Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-23 (2nd Cir. 2005).
[62] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560, 566 (6th Cir. 2018).
[63] *Id*. at 574.

either gay or transgender—the federal courts were not in agreement of the outcome; thus, the Supreme Court granted certiorari to make a determination.

In an opinion written by Justice Gorsuch, the 6-3 majority held that under Title VII, "it is impossible to discriminate against a person for being homosexual and transgender without discriminating against a person based on sex."[64] Citing precedent[65] expanding Title VII's reach, the majority held that "homosexuality and transgender are inextricably bound with sex" and, therefore, an employer's intentional discrimination grounded in either characteristic has the effect of treating an individual differently because of sex.[66] As a result, "an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules… discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."[67] The majority reasoned that Title VII's language "because of…sex" triggers a but-for causation test, a "sweeping standard… established whenever a

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[64] *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1741 (2020).
[65] *Oncale v. Sundowner,* 523 U.S. 75, 79 (1998); *City of L.A. Dep't of Water & Power v. Manhart,* 435 U.S. 702, 702 (1978); *Phillips v. Martin Marietta Corp,* 400 U.S. 542, 544 (1971) (per curiam). In *Marietta*, the Supreme Court ruled that sex-based hiring practices are not a bona fide occupational qualification (BFOQ) because there was no business necessity to preferring men over women. Also, the Court noted that an employer's overall hiring practices which benefit one sex (here, defendant employer preferred hiring women over men) do not protect them from discrimination claims, as Title VII was intended to protect individuals from adverse employment actions in the workplace. In *Manhart*, The Supreme Court determined that employers may not apply generalizations regarding a class of employees when discriminating against an individual person within that class because Title VII demands equal treatment of individual employees. Just because women tend to live longer than men did not give the defendant employer the right to require larger pension payments from all female employees. In *Oncale*, the Supreme Court ruled that same-sex harassment falls under Title VII protections and should not be limited to "the principal evil Congress was concerned with when it enacted" the statute.
[66] *Bostock v. Clayton Cnty., Ga* at 1742. "Just as sex is necessarily a but-for *cause* when an employer discriminates against gay or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decision making."
[67] *Id.* at 1745, 1747.

particular outcome would not have happened 'but for' the purported cause."[68] The majority also noted that Title VII explicitly focuses on protecting individuals from discrimination and, therefore, an employer's argument that treatment of men or women is generally equal, is not a valid argument in a case of sex discrimination.[69]

Addressing dissenting arguments that Congress could not have anticipated the broad application of Title VII when it was enacted, the majority clarified, "…just because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text."[70] In other words, when interpreting Title VII or any ambiguous statutory language, courts may not consider whether Congress, when enacting a piece of legislation, anticipated the outcome of a particular case.[71] Because Title VII is such an integral piece of civil rights legislation, the majority argued,"[i]t is written in starkly broad terms. It has repeatedly produced unexpected applications"; therefore, the limiting principles suggested by the defendants and dissenting justices are improper.[72] Finally, the majority assured its dissenters that *Bostock*'s holding did not attempt to resolve challenges of sex-segregated locker rooms or bathrooms, though "dress codes will prove unsuitable after our decision today."[73] The Court instead left such

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[68] *Id.* at 1739, citing *University of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013), where the majority indicated that "Title VII's 'because of' test incorporates the 'simple' and 'traditional standard' of but-for causation." The Court also cited *Gross v. FBL Fin. Serv., Inc.,* 667 U.S. 167, 176 (2009), explaining "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."

[69] *Id.* at 1739-40.

[70] *Id.* at 1750-51. Pointing to Title VII complaints filed by transgender and gay persons, the majority indicated that "at least *some* people foresaw this potential application."

[71] *Id*. at 1751 "Applying protective laws to groups that were politically unpopular—whether prisoners in the 1990's or homosexual and transgender employees in the 1960's may be seen as unexpected." *See also Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 208 (1998).

[72] *Id.* at 1753. "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us."

[73] *Id.*

questions unanswered for future consideration, focusing instead on an outcome where federal law protected transgender and gay persons from discrimination in the workplace.[74]

Justice Alito, joined by Justice Thomas, filed the first of two dissenting opinions, accusing the majority of creating new legislation instead of interpreting existing law.[75] Pointing to failed Congressional efforts[76] to add "sexual orientation" and "gender identity" as protected classes under Title VII, Justice Alito argued that the statute is limited to race, color, religion, sex, and national origin.[77] According to Justice Alito, the majority merely borrowed a portion of the Equality Act of 2019[78] and applied it to their opinion in *Bostock* in an attempt to modernize the application of Title VII.[79] Under Justice Alito's originalist interpretation, it would be next to impossible to find anyone in 1964 willing to agree that discrimination "because of…sex"

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[74] *Id.* Citing *Burlington N. & S.F.R., v. White*, 548 U.S. 53, 59 (2006). "As used in Title VII, the term "'discriminate against'" refers to "'distinctions or differences that injure protected individuals.' Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."

[75] *Id.* at 1754. (Alito, J., dissenting). "The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive."

[76] *Id.* at 1754-55. (Alito, J., dissenting). From 1975 to 2019, multiple Title VII amendments have been introduced during Congressional sessions, which would be more inclusive to gay and transgendered individuals. To-date, no such amendments have passed muster by both the House and Senate.

[77] *Id.*

[78] *Id.* at 1755. (Alito, J., dissenting). Justice Alito specifically mentions the Equality Act of 2019, approved by the House of Representatives but "stalled in the Senate." The Equality Act aimed to extend beyond employment protections, prohibiting discrimination based on sex, sexual orientation, and gender identity when granting access to places of public accommodation (i.e., restrooms, housing, education). *See also* H.R. 5, 116th Cong., 1st Sess. (2019).

[79] *Id.* at 1755-56. (Alito, J., dissenting). "The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation…that courts should 'update' old statutes so they better reflect the current values of society. If the Court finds it appropriate to adopt this theory, it should it own up to what it's doing." *See also Hively v. Ivy Tech Community College of Ind*., 853 F.3d 339, 357 (7th Cir. 2017) (Posner, J., concurring).

included sexual orientation or gender identity.[80] Even more, Justice Alito argued that Congress did not intend to protect gay or transgender employees when enacting Title VII because "sex"—back in 1964 and today—only refers to "the genetic and anatomical characteristics that men and women have at the time of birth."[81]

> "Title VII prohibits discrimination based on five specified grounds, and neither sexual orientation nor gender are identity are on the list. As long as an employer does not discriminate based on one of the listed grounds, the employer is free to decide for itself which characteristics are 'relevant to its employment decisions.'"[82]

Justice Alito made a clear distinction from *Bostock* and precedent on which the Court relied in its decision, indicating that *Oncale, Marietta*, and *Manhart* were "thoroughly unremarkable," as they dealt with discrimination based on biological sex.[83] Towards the end of his dissent, Justice Alito highlighted some of the "far-reaching" consequences of the decision, with "effects that extend well beyond the domain of federal antidiscrimination statues," as a result of the Court's decision, like sex-assigned locker rooms, bathrooms, "or anything else of the kind."[84]

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[80] *Id.* (Alito, J., dissenting). "[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable at the time they were written." According to Justice Alito, gender identity was an "essentially unknown" concept in 1964.

[81] *Id.* at 1756-57. (Alito, J., dissenting). "If 'sex' in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender."

[82] *Id.* at 1761. (Alito, J., dissenting). "By proclaiming that sexual orientation and gender identiy are 'not relevant to employment decisions,' the Court updates Title VII to reflect what it regards as 2020 values."

[83] *Id.* at 1774-75. (Alito, J., dissenting).

[84] Id. at 1778, 1783. (Alito, J., dissenting). "The Court's brusque refusal to consider the consequences of its reasoning is irresponsible… The Court should have given some thought to where its decision would lead." Justice Alito went on to specify what other areas of law would be affected by the majority's decision, including sports, employment by religious organizations, healthcare, freedom of speech and Constitutional claims.

The second *Bostock* dissent by Justice Kavanaugh accused the Court of "rewrit[ing] the law simply because of their own policy views," offending the separation of powers between Congress and the courts.[85] By defining the term "because of… sex" literally, instead of using its ordinary meaning, Justice Kavanagh argued that the Court's interpretation of Title VII "destabilizes the rule of law and thwarts democratic accountability."[86] Like Justices Alito and Thomas, Justice Kavanaugh believed sex discrimination and discrimination based on sexual orientation to be "two distinct harms caused by two distinct biases that have two different outcomes," today and back in 1964 when Title VII was enacted.[87] Historically, argued Justice Kavanaugh, both Congress and the Court have set the terms apart from one another; therefore, it was impermissible for the majority to find any other meaning within the statute beyond sex discrimination.[88] Further, if it were proper to assume that sexual orientation and sex discrimination were linked, high-profile cases that deemed discrimination based on sexual

[85] *Id.* at 1824. (Kavanaugh, J., dissenting). "If judges could rewrite laws based on their own policy views…the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse."
[86] *Id.* at 1825-27. (Kavanaugh, J., dissenting). "The ordinary meaning principle is long-standing and well-settled… When there is a divide between the literal meaning and the ordinary meaning, the courts must follow the ordinary meaning."
[87] Id. at 1828. (Kavanaugh, J. dissenting). "Contrary to the majority's opinion approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how 'most people' 'would have understood' the text of a statute when enacted." Citing *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 538-39 (2019).
[88] *Id.* at 1829. (Kavanaugh, J., dissenting). "When Congress chooses distinct phrases to accomplish distinct purposes, and it does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork… And the Court has likewise stressed that we may not read 'a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify the concept." Citing *University of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 357 (2013); *Arlington Cent. Sch. Dist. Bd. Of Ed. v. Murphy*, 548 U.S. 291, 297-98 (2006); *Jama v. Immigr. And Customs Enf't*, 543 U.S. 335, 341-42 (2005); *Custis v. United States*, 511 U.S. 485, 491-93 (1994).

orientation unlawful would not have been so difficult for the Court to decide.[89] In his concluding paragraphs, Justice Kavanaugh warned that the decision would have longstanding, negative effects on the separation of judicial and lawmaking powers:

> "Instead of a hard-earned victory won through the democratic process, today's victory is brought by judicial dictate… Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that way… And the implications of the legislative process will likely reverberate in unpredictable ways for years to come."[90]

Part III: Post-*Bostock* Implications

A. Criticism: Reconciling *Bostock* and Appearance Standard Precedent

It has been argued that the Court's literalist interpretation of Title VII in *Bostock* did not align with past precedent, which previously "allow[ed] companies to have reasonable variances in standards to account for societally common differences between sexes."[91] Thus, because of *Bostock*, employers have no flexibility with sex-based appearance standards, even in situations where such a policy may seem "facially reasonable."[92] Further, *Bostock's* holding contradicts the undue burdens test upon which courts previously relied for grooming policy cases; instead of examining whether a policy affected a class of persons as a whole, courts must now look to the

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[89] *Id.* at 1833. (Kavanaugh, J., dissenting). "All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation were just a form of sex discrimination…" All the cases which Justice Kavanaugh cited were subject to strict scrutiny analysis and deemed a violation of the Fourteenth Amendment's Equal Protection clause.

[90] Id. at 1836-37. (Kavnaugh, J. dissenting).

[91] Justin Blount, *Sex-Differentiated Appearance Standards Post-Bostock*, 31 GEO. MASON U. CIV. RTS. L.J., 217, 235-36 (Spring 2021). The majority's distinction between textualist and literal interpretations of the Title VII "undercuts the logic" behind decisions in cases like *Willingham v. Macon Tel. Publ'g Co*., 507 F.2d 1084, 1087 (5th Cir. 1957) and *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006). "Title VII does not say 'reasonable' sex discrimination is acceptable," but "allowance for reasonable sex discrimination in appearance standards is judicial gloss that is difficult to make sense of in light of the text of Title VII."

[92] *Id.* at 237. "[U]nder Bostock, there is no room for inquiring whether the policy is reasonable, based upon social norms, or demeaning or sexualizing to women."

effect on the individual who takes issue with a sex-specific appearance standard.[93] In response, employers and their human resource teams are advised to adopt gender-neutral appearance policies while staying informed on EEOC guidance for additional clarity.[94] Some fear that gender-neutral standards pose long-term negative risks to company culture,[95] and others question the practicality of implementing sex-neutral appearance policies in the workplace.[96]

Even if an employer does not care about societal conventions surrounding "appropriate" grooming standards, some assert that employers must consider client opinions about an employee's appearance.[97] And, because Title VII protections were expanded in *Bostock*, the Bona Fide Occupational ("BFOQ")[98] affirmative defense should also be expanded, as Title VII does not "expressly preclude companies from consideration of issues like business profits or

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[93] *Id.* at 239. "Determining what appearance standards violate Title VII's prohibition… is far simpler... Employers must simply answer one question – is the appearance standard in any predicated upon the employee's sex?"

[94] Alex Valenti, *Employment Rights in an Evolving Legal Landscape: The Impact of the Supreme Court's Decision in Bostock v. Clayton County, Georgia*, 33 EMP. RESP. AND RTS. J. 19, 23 (2021). *See also* Erin Ebeler Rolf & Andrea Woods*, Labor and Employment Risk in the Real World: A Practical Guide to Understanding Recent Trends and Laws Intersecting the Construction Industry*, 41 CONSTR. LAW. 6, 11 (2021).

[95] Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 301. "A requirement of neutrality… might take several forms… Such strong neutrality principles tend to perpetuate the male-oriented status quo."

[96] Jessica Clarke, *They, Them, and Theirs,* 132 HARVARD L.REV. 894, 941 (2019). "As a matter of theory – what would it mean to end gender? Would it mean no one could wear frilly dresses or suits and ties?... 'gender neutrality' would be difficult to implement and likely to encounter political resistance.

[97] Blount, *supra* note 91 at 241-42. In the context of a law firm, "[c]ertain clients may determine that it is not in their best interest to have an attorney represent them…who is not attired in a way that comports with social norms. Some may wish for a society in which this is not the case, but businesses have to function within society as it exists now."

[98] 42 U.S.C. § 2000e-2(e)(1) provides an exception to Title VII's discriminatory prohibitions for all protected classes besides race, where "a bona fide occupational qualification [is] reasonably necessary to the normal operation of that particular business or enterprise."

efficiency of operations.[99] Though it is well established that customer preference is not an appropriate application of the BFOQ defense,[100] some feel that courts should adopt a more flexible test to determine if an appearance policy is "reasonably necessary to the normal operation of the business."[101] In particular, Justin Blount, Associate Professor of Business Law at Stephen F. Austin State University puts forth a three-pronged approach to the BFOQ defense:

> "(1) What is the nature of the business at issue? (2) Does the appearance standard bear a reasonable relationship to the carrying on of the business, and if so, how strong is the relationship? and (3) If the necessity of the appearance standard is based upon customer preference, are the preferences rooted in harmful stereotypes or normal, reasonable societal expectations?"[102]

Blount admits that his proposed approach may not be perfect and applicable in every scenario, but it does allow employers more freedom to set forth reasonable expectations without violating Title VII.[103] And, to accommodate transgendered employees when the BFOQ is appropriate, Blount puts forth a "simple answer" for employers: allow the individual to choose the appearance standard with which they identify (male or female), rather than forcing the employee

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[99] Blount, *supra* note 91 at 248. "[T]here is no reason rooted in the statutory text of Title VII to interpret the BFOQ exception as narrowly as some courts and commentors, and even the EEOC, have."

[100] *See Diaz v. Pan Am. World Airways*, 442 F.2d 385, 387-89 (5th Cir. 1971) (just because a male customer prefers to have female flight attendants and ticket agents servicing their needs does not mean a BFOQ defense is appropriate); *Wilson v. Southwest Airlines Co*., 517 F. Supp. 292, 299 (N.D. Texas 1981). "While possession of female allure and sex appeal have been made qualifications for Southwest [airlines]'s contact personnel by virtue of the 'love' campaign, the functions served the employee sexuality in Southwest's operations are not dominant ones."

[101] *Id.* Blount, *supra* note 91 at 248, 244-45. If "sex appeal is part of the product being offered by the business, and a broader scope of sexual stereotyping or sexualization of dress should be allowed… For a non-sexually based business, customer preferences based upon sex-based stereotypes should be disqualifying for the BFOQ exception."

[102] *Id.* at 249.

[103] *Id.* at 254-55. "[G]iven the societal norms surrounding differences in dress and appearance between the sexes, employers should be allowed to have a degree of sex differentiation in their appearance standards. Courts can and should provide this flexibility to employers…"

to groom themselves in accordance to the gender they were born.[104] However, Blount concedes that his proposed solution does not apply to certain groups of employees, including individuals who do not identify as male or female at any given time, and may have difficulties adhering to an employer's gender-based appearance standards.[105]

B. Criticism: *Bostock* Did Not Resolve Much

Although the *Bostock* decision was considered a "significant step towards meaningful quality for people of all genders and sexual identities,"[106] many criticized the Court for its failure to clarify how far and to whom Title VII extends.[107] On one hand, the majority declared that employers may not discriminated based on sexual orientation or gender, while on the other hand, the dissent argued that sexual orientation and gender identity are not the same as "sex."[108] For many, including nonbinary people, *Bostock* "left too much to interpretation in the lower courts, and the decisions will not be applied consistently" in sex discrimination cases.[109]

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[104] *Id.*

[105] *Id.* "The more difficult question is the employee who might identify as both male and female but at different time, or who the employer suspects of falsely claiming to identify as a particular gender. These are issues that are not clearly addressed by Title VII or existing case law, and that courts may have to confront in the future."

[106] Meredith Rolfs Severston, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74:5 VANDERBILT L.REV.1507, 1538 (2021).

[107] Susannah Coehn, *Redefining What it Means to Discriminate Because of Sex: Bostock's Equal Protection Implications*, 122 COLUM L. R. 407, 410 (2022). "*Bostock v. Clayton County*… waded into this muddled jurisprudence and immediately made a splash; however, its full meaning and scope are not immediately clear."

[108] *Id.* at 446. "It remains unclear whether Bostock's rationale is amenable to a radical rethinking of sex discrimination jurisprudence, including rejecting a legal definition of sex as binary or biological…"

[109] Lindsey Wells, *How the Supreme Court Weakened the Pursuit of Transgender Individual Rights*, 48 W. ST. L. REV. 45, 50 (Spring 2021). "Gender is an essential element when allocating and receiving fundamental rights... therefore, those whose gender identity is not legally recognized may be left without access." *See also* Valenti, *supra* note 94 at 16. "[E]ven when textualism is used to interpret a statute, very different results can occur."

Those believing that *Bostock* did little to settle what "sex" really means under the Act point to Justice Gorsuch's commentary directed at dissenter's fears of "undesirable consequences" stemming from this decision: *Bostock* was limited to gay and transgender persons in an employment discrimination context.[110] In addition, the Court expressly noted that dress codes, among other employer policies, were not impacted by *Bostock.*[111] Also, there have been longstanding issues with Supreme Court's confusion with the concepts of sex and gender.[112] And, given the legislative history of sex as a protected class under the Act, a nonbinary plaintiff's argument that Title VII applies to them may raise judicial suspicion.[113] Under such a narrow lens, a nonbinary plaintiff is unlikely to succeed in a Title VII claim because their lack of

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[110] *Bostock v. Clayton Cnty, Ga.*, 140 S.Ct. 1731, 1753 (2020). "What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws."

[111] *Id.* [U]nder Title VII itself, they say sex-segregated bathrooms, locker rooms, and <u>*dress codes*</u> will prove unsustainable after our decision today. But none of these laws are before us…. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these." (emphasis added).

[112] Coehn, *supra* note 107 at 412, 414. "Throughout the decades, the Court has used "sex" and "gender" inconsistently—sometimes treating them as interchangeable, and other times as distinct." *See also* William N. Eskirdge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503 (2021); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1 (1995); Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudenc*e, 105 Yale L.J. 1 (1995).

[113] Meredith Rolfs Severtson, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74 Vanderbilt L.Rev., 1508, 1534 (2021). "Title VII's sex-discrimination provision is popularly understood as an amendment introduced with the purpose of scuttling the entire bill, since the idea of sex equality was considered outlandish at the time." *See also* Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 67-68 (2016); Kate Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. OF GENDER L. & POL'Y 169, 171-72 (2009).

gender identity "is utterly detached from sex, not inextricably connected to it."[114] A defendant could simply argue that any adverse action taken against a nonbinary employee was due solely the employee's failure to conform to one gender.[115] Therefore, in the context of appearance standards, an employer is within its rights to terminate a nonbinary employee for their failure to comply with its gender based dress code because "sex" is not defined as a lack of gender identity according to the Supreme Court.[116]

Conversely, there are contentions that *Bostock*'s broad definition of "sex" extends to gender identity, "even if that gender identity is not associated with biological sex."[117] In fact, there are experts in the legal field who believe that *Bostock*, "leaves no coherent way to exclude non-binary people from protections against sex discrimination."[118] Although the only hint that "gender fluid" persons would be included in the *Bostock* decision was in Justice Alito's dissent,[119] this was considered a step forward because nonbinary people are often left out of judicial decisions altogether.[120] And, given the Court's inability to keep up with the ever-changing terminology within the LBGTQ+ community, it is likely that the Court intentionally

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[114] *Id*. at 1528, citing Vin Gurrieri, *Questions About "Nonbinary' Bias Linger After LGBT Ruling*, Law360 (June 19, 2020), https://www.law360.com/articles/1284955/questions-about-nonbinary-bias-linger-after-lgbt-ruling.
[115] *Id.* at 1529-30. "The Employer does not care what the [nonbinary employee's] is – so long as it is clearly defined as either a man or a woman."
[116] *Id.* at 1531. "[D]iscrimination against people with nonbinary gender identities is less clearly linked to the narrowest definition of 'sex'… this raises potential problems for nonbinary plaintiffs seeking protection under Title VII."
[117] *Id.* at 1533. "Though the Court studiously avoided defining the term, it did not foreclose future arguments for an expansive understanding of 'sex' in Title VII."
[118] Merrick T. Rossein, *Title VII and Employees with Non-Binary Identity—Generally*, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION, §27:13.
[119] *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1779 (2020) (Alito, J., dissenting).
[120] A. Russell*, Bostock v. Clayton County: The Implications of a Binary Bi*as, 106 CORNELL L. REV. 1601, 1606 (2021). "Despite making up about one third of the transgender population, gender nonbinary people remain largely unrepresented in both case law and legal scholarship, often acknowledged in no more than a footnote."

limited their language as "the simplest way to articulate the decision."[121] More importantly, in reviewing the legislative history of Title VII and past precedent,[122] many argue that the Court intended for "sex" and "gender" to extend beyond "mere biological categorization" to nonbinary people.[123] Accordingly, "[b]y including discrimination based on traits that are 'inextricably bound up with sex,' the Court expanded the legal definition of sex discrimination and with it the types of discrimination the law can remedy."[124] Applying a more liberal interpretation of "sex" under *Bostock*, a nonbinary plaintiff could triumph in a sex discrimination case against any employer policy which requires its employees to comply with gender-based appearance standards.[125] "If the plaintiff can point out where sex played a role in the employer's decision, *Bostock*, with its strong statement against the consideration of sex in employment decisions, may be a helpful precedent."[126]

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[121] *Id.* at 1620. "[S]ince the Supreme Court has been slow to adopt queer terminology in the past, such as gay and lesbian, its failure to explicitly use the word nonbinary in Bostock should not render the case inapplicable to identity."

[122] *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252(1989). "[I]n forbidding employers to discriminate against individuals because of their sex, Congress *intended to strike at the entire spectrum of disparate treatment*…'" citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978). (emphasis added). *See also Price Waterhouse v. Hopkins,* 490 U.S. 228, 263 (1989) (O'Connor, J., concurring) "The legislative history [of Title VII] makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting…"

[123] Severtson, *supra* note 113 at 1533. "*Bostock's* deferral of the definitional question of 'sex' provides opportunities for future nonbinary sex discrimination plaintiffs…"

[124] Coehn, *supra* note 107 at 438, citing *Bostock v. Clayton Cnty.*, *Ga.*, 140 S. Ct. 1731, 1742 (2020). "This redefinition offers a pathway out of the muddled sex discrimination jurisprudence [from *Bostock*]… that can both clarify how the law defines sex discrimination and increase the law's ability to eradicate sex discrimination in all its forms."

[125] Severtson, *supra* note 113 at 1528-29. "[D]iscrimination against nonbinary people is clearly sex discrimination because an employer that discriminates against a nonbinary person almost certainly objects to sex-associated characters or gender presentations in the nonbinary employee that it tolerates in binary male or female employees".

[126] *Id.* at 1529. [I]t seems almost certain than an employer who discriminates against a nonbinary employee will consider sex and gender-related characteristics in taking adverse employment actions…"

Even though the Court noted that its decision in *Bostock* was limited in its application,[127] the majority's rationale has already made an impact on the courts and employer policies. For example, in *Hatcher v. Birmingham-Jefferson County Transit Auth*., a discrimination case initially dismissed because "sexual orientation claims were not cognizable under Title VII…," had their decision vacated and remanded by United States Court of Appeals for the Eleventh Circuit "after review and in light of *Bostock*."[128] Likewise, in *Redmon v. Yorozu Auto. Tenn., Inc.,* a United States Court of Appeals for the Sixth Circuit vacated and remanded a United States District Court decision to dismiss for failure to state a claim, citing to *Bostock* rationale.[129] Further, *Bostock* has been a primary source of authority for Title IX claims of gender identity discrimination[130] – "these courts looked to the reasoning of Bostock for guidance on determining whether such policies discriminate because of sex."[131]

Moreover, *Bostock's* impact has been felt by employers and their trusted advisors, as evidenced in various employment law guidance:

> "Employers should respect an employee's preferred name, pronoun, and title, regardless of the sex assigned at birth… Employers who want to implement dress codes would be best served instituting those that require neat, clean, and professional appearance, or gender-

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[127] *Bostock v. Clayton Cnty., Ga.,* 140 S.Ct. 1731, 1753 (2020). "The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"

[128] 816 Fed.Appx. 426, No. 2:19-cv.00184-RDP (11th Cir., Aug. 11, 2020).

[129] 834 Fed.Appx. 234, No. 19-5395 (6th Cir. Jan 26, 2021). "Yorozu Automotive acknowledges that this case should be remanded to the district court for further proceedings in light of the Supreme Court's intervening decision in Bostock v. Clayton County, which concluded that discrimination against an individual for being homosexual constitutes discrimination because of that individual's sex under Title VII."

[130] *Grimm v. Glouchester Cnty. Sch. Bd.,* 972 F.3d 586, 593 (4th Cir. 2020, as amended (Aug. 28, 2020), cert denied. No.20-1163, 2021 WL 2637992 (U.S. June 28, 2021); *Adams ex rel. Kasper v. Sch. Bd.*, 3 F.4th 1299 (11th Cir. 2021), reh'g en banc granted, 9 F4th 1369 (11th Cir. 2021); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs*., 485 F. Supp. 3d 1, 40 (D.D.C. 2020); *Clark Cnty. Sch. Dist. V. Bryan*, 478 P.3d 344, 351 (Nev. 2020).

[131] Coehn, *supra* note 107 at 440-41.

neutral uniforms—rather than stating that 'women' should dress in certain clothing and 'men' in other clothing." [132]

"Gendered dress codes often may be premised upon outdated sex-based stereotypes, and they may make transgender and gender-non-binary employees feel excluded. Therefore, employers that currently maintain sex-specific dress codes and grooming standards without a bona fide occupational qualification… may want to consider implementing gender-neutral dress codes and grooming standards. Some employers have chosen to be very succinct, telling employees simply to 'dress appropriately.' Other companies prefer to spell out dress codes and grooming standards in more detail. When doing so, they key is to focus on the clothing or accessories themselves and avoid dictating gender-specific rules."[133]

"Customer preferences do not trump an employee's rights. Employers are not allowed to segregate or discriminate against employees based on actual or perceived customer preferences as to sexual orientation or gender identity (or other protected classes). Dress codes are fine, but you must allow a transgender person to dress consistent with his or her identity. Employers may not discriminate against employees based on nonconformity with sex-based stereotypes."[134]

"Companies can often achieve their objectives through simple, natural directives, like a requirement that employees always present a 'professional appearance' or a requirement that employees wear 'professional business attire' on days that they interact with clients. This gives employees the flexibility to choose their own clothing and present an appearance that conforms with their gender identity and expression… Any dress, grooming, or appearance policy should generally be gender-neutral and applicable to all employee, except in limited circumstances where the company has some specific, work-related reason for a gender-specific requirement.[135]

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[132] Erin Ebeler Rolf & Andrea Woods*, Labor and Employment Risk in the Real World: A Practical Guide to Understanding Recent Trends and Laws Intersecting the Construction Industry,* 41 WTR CONSTRUCTION LAW (2021).

[133] Kelly S. Huges, *Practical Questions for Employers Following the Bostock Decision, Part 2: Dress Codes and Grooming Standards,* OGLETREE DEAKINS (Jul. 1, 2020) https://ogletree.com/insights/practical-questions-for-employers-following-the-bostock-decision-part-2-dress-codes-and-grooming-standards/ (last visited May 8, 2023).

[134] Colin Bond & Anne R. Yuengert, *EEOC Locks onto Bostock: New Guidance on Sexual Orientation and Other Gender Issues*, LABOR & EMPLOYMENT INSIGHTS (Jul. 20, 2021) https://www.employmentlawinsights.com/2021/07/eeoc-locks-onto-bostock-new-guidance-on-sexual-orientation-and-other-gender-issues/ (last visited May 8, 2023).

[135] Jennifer G. Prozinski & Karel Mazanec, *Dress Codes in the Modern Workplace: An Employer's Guide to Avoiding Pitfalls and Liability*, VENABLE LLP (Aug. 2, 2021) https://www.venable.com/insights/publications/2021/08/dress-codes-in-the-modern-workplace (last visited May 8, 2023).

No matter the advice offered to employers, one thing is clear: sex-based grooming standards are outdated and unnecessary. Even more, forcing employees to adhere to proscribed social norms does nothing to improve employee performance; in fact, such gender-based appearance policies have shown to negatively impact transgender and nonbinary employees.[136]

C. Recommendations and Conclusion

Grooming code jurisprudence in the past relied on the unequal burdens test, looking to whether an employer's policy burdened men and women the same. However, as a direct result of *Bostock*, employers who continue to enforce antiquated gender-based appearance standards are at risk of claims for sex discrimination. Moreover, employers who wish to attract and retain talent, should heed the advice of employment law and human resource professionals cited above—retire any gender-based appearance standards in favor of a policy (or set of policies) that ensures optimal employee performance. Most employers and their advisors can determine what attire/facial policies are appropriate for the workplace. This seems self-explanatory and likely would not change in an industrial environment, where the primary concern is safety and not appearance. However, in a professional setting, management may choose to introduce an overarching "dress for your day," policy in which the firm would articulate a general policy and outline the various appearance expectations. Below is an example of how a law firm could communicate its dress code for all employees, regardless of their gender identity:

> *Workplace Appearance, generally:* It is our firm's philosophy that all employees, when representing the company in court or at the office should present themselves in a professional, neat, and tidy manner. Although we trust our team to understand what it means to "dress for your day," many have found it helpful for the firm to specify what is expected in terms of appearance in the typical scenarios an employee would find themselves in while

[136] *Id.* at 142. Dress codes have "permitted employers to impose sex-based workplace policies that have a pernicious effect on people whose gender identity does not fit within the traditional norms."

employed at our firm. Any deviation from this policy should be approved by the employee's supervising attorney.

Personal Hygiene: All employees are expected to be clean and always appear groomed. Please avoid excessive makeup, long nails, cologne, or accessories that draw attention to your appearance rather than your work product.

Courtroom Attire: All employees appearing in court should wear a neatly pressed blue or black suit with a solid colored, collared shirt. Shoes, either black or brown, must be polished. Dress socks or hosiery are required. Ties in a neutral hue (navy, gray, brown) may be worn.

Office Attire: When working from the office, meeting with clients, or participating in video conference calls from home, we expect all employees to dress in business casual attire. A list of appropriate clothing choices is provided below that meet the "business casual" definition:

- Dress pants
- Sweater
- Blazer
- Collared shirt
- Close-toe shoes
- Blouse
- Mid-length or longer skirt

Attempts to take client/customer preferences into consideration of sex-based appearance standards ignore *Bostock's* holding: any adverse employment action taken because of an employee's sex—including those who identify as gay, lesbian, nonbinary, or transgender—violate Title VII.

In conclusion, *Bostock* provides nonbinary plaintiffs an opportunity to challenge employer's outdated sex-based grooming standards. We no longer live in a world where employees must identify as male or female and, as such, the workplace must reflect these changes.