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***Bostock* and Its Consequences for School Districts
– Title VII...and Beyond?**

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On June 15, 2020, the Supreme Court of the United States issued its decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which also decided the companion cases of *Altitude Express, Inc. v. Zarda, as Co-Independent Executors of the Estate of Zarda and R. G. & G. R. Harris Funeral Homes, Inc. v. EEOC, Et. Al.* The question presented in *Bostock* and *Zarda* was whether sexual orientation employment discrimination was prohibited sex discrimination under Title VII. The question presented in *Harris Funeral Homes* was whether gender identity employment discrimination was prohibited sex discrimination under Title VII. The Court held that both sexual orientation and gender identity employment discrimination are prohibited sex discrimination under Title VII. The most immediate and obvious impact of the *Bostock* collection of cases will be felt in employment litigation, in sexual orientation and identity cases specifically, but also in Title VII discrimination cases, generally, because of *Bostock*'s discussion of the appropriate causation standard that must be met. In Texas, this also means that cases brought under the Texas Labor Code, which typically follow the federal courts' interpretation of Title VII, may also be affected.

More broadly, *Bostock* and its companion cases have had, and will likely continue to have, an effect on Title IX litigation, not only as to discrimination and retaliation claims, but also as to student-athlete and facilities issues.

This paper will discuss the holdings and reasoning of *Bostock* and its companion cases and their impact on school districts' obligations under Title VII, the appropriate burden of proof to be applied as a result of *Bostock*, and *Bostock*'s impact on Title IX issues. In other words, we will explore *Bostock*'s impact on school districts and their relationships with their employees and students.

Sex Discrimination Under Title VII, the Standard of Proof, and Title VII's Original Public Meaning

In Title VII of the Civil Rights Act of 1964, Congress prohibited workplace discrimination based on sex (and on other characteristics). In *Bostock*, relying on the text of Title VII, the Court held that discrimination based on sex includes discrimination based on sexual orientation or transgender status because 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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

The Court began its analysis by considering Title VII’s original public meaning, specifically with regard to its prohibition on sex discrimination. The Court assumed that “sex” in the 1960s meant only the biological differences between male and female.

Next, the Court looked to what Title VII says about “sex.” Title VII prohibits employers from taking certain actions “because of” sex, and, based on Supreme Court precedent: “the ordinary meaning of ‘because of’ is by ‘reason of’ or ‘on account of.’” In support of this proposition, the Court cited *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), neither of which decided the standard of proof for Title VII discrimination claims, but instead considered the standards of proof for Title VII retaliation claims (*Nassar*) and age discrimination claims under the Age Discrimination in Employment Act (*Gross*). Relying on those precedents, the Court reasoned that Title VII’s “because of” test “incorporates the ‘simple’ and ‘traditional’ standard of but-for causation.” The Court interpreted the “but-for” test to require courts to “change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.” A defendant employer “cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for

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