TRANSITIONING YOUR WORKPLACE AFTER THE SUPREME COURT'S BLOCKBUSTER LGBTQ DECISION

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AGENDA

- **The *Bostock* Decision**
  - What SCOTUS Held
  - Justice Gorsuch's Explanation of Title VII law
  - The Facts
  - SCOTUS Rationale
  - The "Textualism" Dispute
  - The Bottom Line

AGENDA

- **The *Bostock* Decision (cont'd.)**
  - **Other Legal Implications**
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    - RFRA Still Stands
    - Title VII Protections Do Not Apply to Religious Employers
  - **What *Bostock* Means As a Practical Matter**
    - Employer transition plan
    - Practical situations impacted

AGENDA

- **Open Questions**
  - Impact on Religious Employers
  - Pending Legislation
    - The Equality Act in Congress
- **Protections Before *Bostock* Decision**
  - Federal
  - State
  - Municipal

AGENDA

- ❑ Q&A with audience

THE *BOSTOCK* DECISION

THE *BOSTOCK* DECISION

- ❑ BOOM! In 33 pages of U.S. Supreme Court writing, it was done. OVER.
- ❑ The 50+-year fight ended over whether Title VII of the Civil Rights Act of 1964 makes discrimination unlawful if based on sexual orientation (protecting gay and lesbian applicants and employees) or gender identity (protecting transgender applicants and employees).
- ❑ Less than an hour read. Just that fast. With the stroke of six pens.

THE *BOSTOCK* DECISION (Con't)

- **HERE IS WHAT SCOTUS HELD (6-3)** (involving 3 opinions):
  - 33 page majority opinion Justice Gorsuch wrote: Chief Justice Roberts + Justices Ginsburg, Breyer, Sotomayor & Kagan joined
  - Justice Alito dissented, and Justice Thomas joined
  - Justice Kavanaugh wrote separately in dissent
    - He helpfully explains the recent legal shift which turned the tide in favor of Title VII protection after years of consistent defeat in the lower federal courts.
    - While all Justices seemingly favor protection, the dissent's lament is that the Congress should have amended Title VII to protect those two statuses

THE *BOSTOCK* DECISION (Con't)

Let's start with Justice Kavanaugh's explanation and summary of this sudden shift in Title VII law.

Also, remember the following passage as we later get to the "textualism" spat which broke out among the more conservative Justices unhappy that Justice Gorsuch—writing for the majority--departed, in their view, from "textualism" and adopted "literalism: the magic sauce which changed the legal thinking about sexual orientation and gender identity protection, and changed Title VII law forever:

THE *BOSTOCK* DECISION (Con't)

"For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line.

In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway.

THE *BOSTOCK* DECISION (Con't)

If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. As James Madison stated: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul [spelling as in the original from 1788], for the judge would then be the legislator." The Federalist No. 47, at 326 (citing Montesquieu). If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives.

THE *BOSTOCK* DECISION (Con't)

Because judges interpret the law as written, not as they might wish it were written, the first 10 U. S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

THE *BOSTOCK* DECISION (Con't)

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

THE *BOSTOCK* DECISION (Con't)

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach." Ante, at 9–12. (Slip Op. pp. 4-5; Dissent of Justice Kavanaugh)

THE *BOSTOCK* DECISION (Con't)

Here Is Justice Gorsuch's Explanation of Title VII Law, Writing for The Majority

> "In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. 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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. (emphasis added)

THE *BOSTOCK* DECISION (Con't)

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." (Slip Op. p. 2; Majority Opinion of Justice Gorsuch)

THE *BOSTOCK* DECISION (Con't)

So, with those blunt and succinct words, Justice Gorsuch simply holds that Title VII has ALWAYS (since 1964) outlawed discrimination against gay, lesbian and transgender applicants and employees.

a. This is because the employer takes adverse action against gay, lesbian and transgender applicants and employees "because of" their sex
    i. These are actions which would not occur were the gay, lesbian or transgender applicant or employee the other sex.

    ii. So, the adverse action is because of their sex, and NOT because Title VII inherently protects sexual orientation or transgender status

    iii. **THINK ABOUT THAT:** Let that notion sink in

THE *BOSTOCK* DECISION (Con't)

THE FACTS: Briefly: Bostock v. Clayton County, Georgia

SCOTUS consolidated three cases under one caption: (one decision)

Each of the cases started the same way: An employer fired a long-term employee shortly after the employee revealed that he or she was homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status

- ***Bostock v. Clayton County, Georgia,*** No. 17-1618 (sexual orientation case: male child welfare advocate fired after coming out "gay")
- ***Altitude Express, Inc., et al. v Zarda*, et al.** No. 17-1623 (sexual orientation case: male skydiving instructor fired after coming out "gay")
- ***R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, et al.,*** No. 18-107 (gender identity case: transgender female funeral home employee fired after announcing to her employer her intent to "live and work full-time as a woman")

THE *BOSTOCK* DECISION (Con't)

❑ THE SCOTUS' RATIONALE

"…An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. 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

THE *BOSTOCK* DECISION (Con't)

tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. 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. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

THE *BOSTOCK* DECISION (Con't)

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." (Slip Op. p. 9-10; Majority Opinion of Justice Gorsuch)

THE *BOSTOCK* DECISION (Con't)

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"At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." (Slip Op. p. 12; Majority Opinion of Justice Gorsuch)

THE *BOSTOCK* DECISION (Con't)

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"We agree that homosexuality and transgender status are distinct concepts from sex. (emphases added) But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." (Slip Op. p. 19; Majority Opinion of Justice Gorsuch)

THE *BOSTOCK* DECISION (Con't)

THE "TEXTUALISM" DISPUTE CONTINUES TO SIMMER

The Debate: Do you interpret a statute (or the Constitution) from the frame of mind of the drafters decades (or centuries) ago, or do you interpret the statute to apply to today's modern problems the drafters could not possibly have conceived of, let alone addressed in their writing?

THE *BOSTOCK* DECISION (Con't)

…"Most pointedly, they [the employers in these three appeals] contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability? It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. (citations omitted) (Slip Op. pp. 23-24)

THE *BOSTOCK* DECISION (Con't)

Justice Gorsuch side-stepped the entire debate about "updating" statutes through "judicial activism" by concluding that the statute was "plain on its face", so one did not either have to seek to interpret it or seek to "update" it.

-The dissenters took their fellow conservative (and impliedly also Chief Justice Roberts) to task accusing Justice Gorsuch of straying from "textualism" (i.e. textualism is the concept of maintaining the discipline to interpret statutes to stay faithful to the Congress' original statutory language) and instead adopting "literalism" (as Justice Kavanaugh more pointedly decried in the above-quoted passage from his dissent).

THE *BOSTOCK* DECISION (Con't)

Here is Justice Alito's attack on Justice Gorsuch's adoption of "literalism":

> "The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. 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 Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing. [fn omitted]

THE *BOSTOCK* DECISION (Con't)

> Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is whether Congress did that in 1964. It indisputably did not." (Slip Op. pp. 3-4; Dissent of Justice Alito)

Justice Kavanaugh was more diplomatic and addressed to the plaintiffs generally, and not to Justice Gorsuch, his criticism of the departure from textualism he perceived in the Majority's opinion. This is the excerpt which began these PowerPoints and which I suggested you recall when we came upon the textualism spat

THE *BOSTOCK* DECISION (Con't)

Watch for this "textualism" issue to heat up in coming SCOTUS terms since sticking to the text is seen as the limit on federal power. The more conservative Justices see adherence to textualism as a way to prevent the federal agencies from inappropriately stretching Congressional intent through BROAD agency Rulemakings going beyond the true text of the statute. Please recall that Congressional statutes delegate authority to the Executive Branch of the federal government. The federal agencies implementing those statutes are then supposed to stay within their delegated authority (not re-write, diminish or expand the statute). If the permission or restriction is "plain" on the face of the statute, then the federal courts need NOT provide ***deference*** to the federal agency interpreting and prosecuting the Congressional statute at-issue.

-I believe, however, Justice Gorsuch just set up a trap to limit adventurous federal agencies in the future

THE *BOSTOCK* DECISION (Con't)

BOTTOM LINES OF THE SCOTUS DECISION:

1) Title VII protects gay, lesbian and transgender applicants and employees from adverse action because the action is otherwise "because of" their sex
2) This has been true since 1964
    a. Employment discrimination within Title VII's statute of limitations (complained of w/in 180 days from the discriminatory event; or, complained of w/in 300 days in "deferral jurisdiction" states) is CURRENTLY actionable UNLAWFUL discrimination limiting Title VII-covered employers
    b. Any discrimination in employment within Executive Order 11246's statute of limitations (within the two years prior to an OFCCP audit Scheduling Letter, or complained of within 180 days from the discriminatory event) is CURRENTLY UNLAWFUL & actionable

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c. Almost 50 years of federal Congressional bills never-enacted to protect gay, lesbian and (later) transgender applicants and employees now found to have been unnecessary, and just a waste of political energy

d. One of the greatest embarrassments of the Obama Administration to not pass a bill protecting gay, lesbian and transgender applicants and employees despite the two years Democrats controlled the White House, the Senate and the Congress will now be forgotten to history

THE *BOSTOCK* DECISION (Con't)

e. The decision also leaves hundreds of employment lawyers across the country on both sides of the question looking foolish. The EEOC and its lawyers had it wrong, we now learn, for almost its first 50 years, but still got the rationale for the protection of gay, lesbian and transgender employees wrong until 8 years ago.

i. -Enter EEOC Commissioner Chai Feldblum

f. The OFCCP got it entirely wrong at all times in history: first rejecting protections, and then amending, UNNECESSARILY, both Executive Order 11246, and its implementing Rules

THE *BOSTOCK* DECISION

❑ Other Legal Implications

- "Equal Opportunity" Harasser defense now gone
  - Circuit courts were divided
  - *Bostock* says sex-based bias is NOT legal, even when aimed at more than one gender (just doubles employer liability)
  - Defense still permissible as to bullying bosses engaging in gender-neutral discrimination

THE *BOSTOCK* DECISION

❑ Other Legal Implications

- Religious Freedom Reformation Act (RFRA) still stands
  - *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, et al.*, 140 S. Ct. 918 (July 8, 2020). https://www.supremecourt.gov/opinions/19pdf/19-431_5i36.pdf
    - Permits Trump Administration Rule expanding types of employers which may claim religious exemption to ACA requirement to provide free health coverage
    - Also permits opt-outs on moral grounds
    - Decision based on permissible administrative Rulemaking

THE *BOSTOCK* DECISION

❑ Other Legal Implications

- Title VII protections do not apply to religious employers
  - *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 679 (July 8, 2020). https://www.supremecourt.gov/opinions/19pdf/19-267_1an2.pdf
    - Religious nature of workers' duties more important than titles or other factors in determining if the "ministerial exception" to anti-bias laws apply.
    - Religious organization's views on nature of worker's duties deserve weight in determining whether employee is performing vital religious duties

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- What is the Employer Transition Plan as to those employers which have been discriminating against gay, lesbian and transgender applicants and employees?
  - When? (NOW! Yesterday! 180/300/730 days ago)
  - Updating policies and notifying workforce
  - Educating HR, supervisors and recruiters

THE *BOSTOCK* DECISION

- **What *Bostock* Means As a Practical Matter**
  - Practical Situations Impacted:
    - Hiring practices
    - Terms of employment
      - Medical benefits? Think *Little Sisters* decision

THE *BOSTOCK* DECISION

❑ **What *Bostock* Means As a Practical Matter**

- Practical Situations Impacted:
  - Pronoun Use
    - Intentional use of incorrect pronouns evidence of discrimination? *EEOC v. Deluxe Financial Services Corp.*, Case No. 0:15-cv-02646-ADM-SER (D. Minn. January 20, 2016)
      - Deluxe agreed to pay $115,000 in damages and submit to three year consent decree after refusing to allow transgender female to use women's restroom, and supervisors and co-workers engaged in hostile work environment using hurtful epithets and intentionally using the wrong gender pronoun

THE *BOSTOCK* DECISION

❑ **What *Bostock* Means As a Practical Matter**

- Practical Situations Impacted:
  - Pronoun Use
    - Intentional use of incorrect pronouns evidence of discrimination?

      Lusardi v. McHugh, 2015 WL 1607756 (EEOC, April 1, 2015)

      - Dept. of Army manager subjected transgender female to hostile work environment by refusing to call her by her female name and by using male pronouns when referring to her

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Practical Situations Impacted:
  - Bias in referencing a person as “biologically male” or “biologically female” instead of current gender identity?
    - Ex.: https://www.albertahealthservices.ca/assets/info/pf/div/if-pf-div-terms-and-phrases-to-avoid.pdf
      - » If it is necessary to refer to an individual’s gender history, suggest a phrase similar to “assigned male/female at birth but is a woman/man”
    - https://www.outsports.com/2020/5/12/21256444/judge-adf-christian-hate-group-transgender-connecticut-teen-athletes

THE *BOSTOCK* DECISION

❑ What *Bostock* Means Practically (cont'd.)

- Practical Situations Impacted:
  - Should NOT ask for medical docs re: gender identity when an employee requests change to their sex designation
    - *Deluxe Financial Services Corp.* Consent Decree
      - Employer could not require any sort of medical documentation or conduct any other inquiry into a requesting employee's medical history in regard to any employee request to change their sex designation

THE *BOSTOCK* DECISION

❑ What *Bostock* Means Practically (cont'd.)

- Practical Situations Impacted:
  - Should NOT mention employee's past gender affirmation to others.
    - There is no practical need to do so, and can potentially expose employee to discrimination
  - BEST PRACTICE: No need to ask for medical documentation to "prove" that the employee is gender affirmed
    - Request for proof might itself be a discriminatory act: differential treatment concern

THE *BOSTOCK* DECISION

❑ **What *Bostock* Means As a Practical Matter**

- Practical Situations Impacted (cont'd.):
  - The Bathroom question…again
    - *Bostock* does not address dress codes, bathroom access, or locker room access
      - Gorsuch: "And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. **But none of these other laws are before us.**"

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Practical Situations Impacted (cont'd.):
  - BUT, applicants and employees use bathrooms (and locker rooms where they are in use), so the bathroom/locker room issue is in play at work

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Practical Situations Impacted (cont'd.):
  - The Bathroom question…again
    - Alito dissent: "Under the Court's decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify. . . The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed."

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Practical Situations Impacted (cont'd.):
  - The Bathroom question…again (cont'd.)
    - *Lusardi v. McHugh*, 2015 WL 1607756 (EEOC, April 1, 2015)
      - Dept. of Army violated Title VII by refusing restroom access of a transgender civilian employee
    - 2016 DOJ Advisory: Barring a student from a bathroom constitutes unlawful sex discrimination

THE *BOSTOCK* DECISION

- **What *Bostock* Means As a Practical Matter**
  - Practical Situations Impacted (cont'd.):
    - The Bathroom question…again (cont'd.)
      - OSHA Guidance: https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/TransgenderBathroomAccessBestPractices.pdf
        - CANNOT ask for medical docs re: gender identity as a condition of restroom access

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Practical Situations Impacted (cont'd.):
  - The Bathroom question…again (cont'd.)
    - NO laws exist requiring employers to use one type of bathroom over another (unisex versus separate bathrooms based on sex), or to construct new facilities

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Practical Situations Impacted (cont'd.):
  - The Bathroom question…again (cont'd.)
    - States specifically outlining bathroom requirements for transgender use:
      - California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and District of Columbia

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *Carcano v. Cooper*, 2019 U.S. Dist. LEXIS 123497 (M.D.N.C. July 23, 2019): alleging violation of 14th Amendment and Title IX. https://casetext.com/case/carcano-v-cooper-2
    - » Case involving North Carolina's infamous H.B. 2 statute
    - » Court-granted consent decree permanently enjoining State Executive Branch from barring, prohibiting, or impeding transgender individuals from using public facilities in accordance with gender identity

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp.3d 444 (E.D. Va. 2019). https://www.leagle.com/decision/400199718fsupp3d444418
    - » School board violated Title IX and discriminated against former student by permitting students to use restrooms corresponding with their gender identity except for transgender students

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *Evancho v. Pine-Richland Sch. Dst.*, 237 F. Supp.3d 267 (3d Cir. 2017). https://scholar.google.com/scholar_case?case=17675559125282084520&hl=en&as_sdt=6&as_vis=1&oi=scholarr
    - » Transgender students entitled to preliminary injunction because likely to succeed on Equal Protection Clause claim related to use of school bathrooms

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *Adams v. Sch. Bd.*, 318 F. Supp.3d 1293 (M.D. Fla. 2018). https://www.leagle.com/decision/infdco20180727b61
    - » Refusal to allow transgender student to use boys' bathroom at school a violation of Title IX and the Equal Protection Clause of the 14th Amendment

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp.3d 536 (M.D. Penn. 2019). https://www.leagle.com/decision/infdco20191002m67
    - » Transgender female granted summary judgment to use women's bathroom on school field trips
    - » Refusal a violation of Title IX and Equal Protection Clause of the 14th Amendment

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *Doe v. Clenchy*, 2011 Me. Super. LEXIS 70 (April 1, 2011). https://law.justia.com/cases/maine/superior-court/2011/pencv-09-201.html
    - » Maine Superior Court refused to dismiss transgender female's claim that forcing her to use a staff bathroom may be unlawful discrimination under the Maine Human Rights Act
    - » Dismissed claim that defendants had affirmative obligation to accommodate status

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *Johnston v. University of Pittsburgh, et al.*, 97 F. Supp.3d 657 (W.D. Penn. 2015). https://www.leagle.com/decision/infdco20150406762
    - » School's refusal to allow transgender male to use male locker room and bathrooms not discrimination on basis of sex under 14th Amendment and Title IX.

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *Students & Parents for Privacy v. U.S. Dept. of Education*, 2016 U.S. Dist. LEXIS 150011 (E.D. Ill. October 18, 2016). https://www.aclu.org/legal-document/students-and-parents-privacy-v-department-education-township-211-report-and
    - » Plaintiffs seeking preliminary injunction that U.S. Dept. of Education violated the Administrative Procedures Act in ruling that segregating restrooms and locker rooms based on students' biological sex a violation of Title IX denied as unlikely to succeed on merits.

THE *BOSTOCK* DECISION

❑ What *Bostock* Means As a Practical Matter

- Relevant case law:
  - *J.A.W. v. Evansville Vanderburgh Sch. Dist.*, 323 F. Supp.3d 1030 (S.D. Ind. 2018). https://www.leagle.com/decision/infdco20180806840
    - » Plaintiff transgender male granted preliminary injunction to use boys' restrooms based on likelihood of success on claim that refusal is impermissible discrimination prohibited by Title IX.

THE *BOSTOCK* DECISION

- **What *Bostock* Means As a Practical Matter**
  - The Bathroom question…again (cont'd.)
    - So, what is the recommendation?
      - Given the weight of the case law from Circuit Courts in regard to Title IX and 14th Amendment claims, the various states enacting specific protections, and *Bostock*:

ALLOW BATHROOM USE CONSISTENT WITH GENDER IDENTITY AND NOT BIOLOGICAL SEX ASSIGNED AT BIRTH

OPEN QUESTIONS

OPEN QUESTIONS

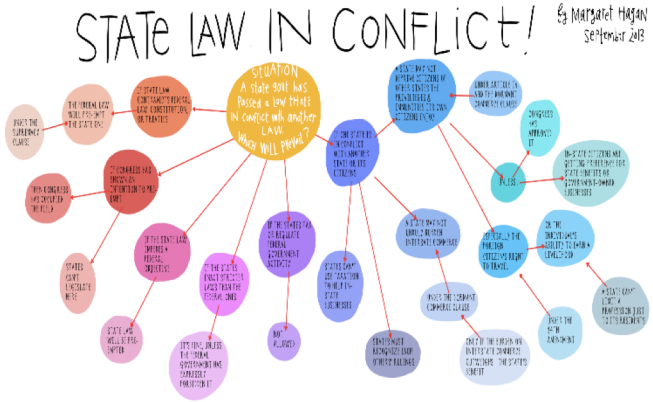
❑ Impact on religious employers

- *Bostock* specifically notes it does not address religious liberty protections under the Religious Freedom Restoration Act
  - "How these doctrines protecting religious liberty interact with Title VII are questions for future cases."
  - RFRA "might supersede Title VII's commands in appropriate cases."

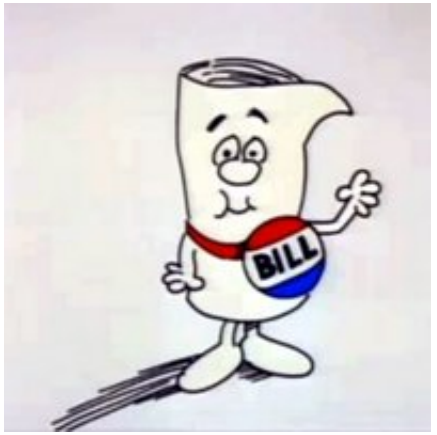
OPEN QUESTIONS

❑ Impact on religious employers

- But federal RFRA does not limit how **states** enforce their non-discrimination protections
  - Need to determine if state has its own RFRA-like law



OPEN QUESTIONS



- **Pending legislation**
  - The Equality Act in Congress
- **Pending regulations**
  - OFCCP Proposed Rule
    - 84 Fed. Reg. 41677 (August 15, 2019)
      - Proposed rule clarifying scope and application of religious exemption precluding discrimination liability for “closely held” religious contractors
      - Adds definitions for “exercise of religion,” “particular religion,” “religion,” “religious corporation, association, educational institution, or society,” and “sincere”

OPEN QUESTIONS

❑ Litigation in response to *Bostock*

- *Whitman-Walker Clinic, et al. v. U.S. Dept. of Health and Human Services, et al.*, Case No. 1:20-cv-01630 (D.D.C. June 22, 2020). https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/whitman_us_20200622_complaint.pdf
  - Complaint attempting to throw out HHS Final Rule reverting definition of sex discrimination. Final Rule argues binary biological character of sex takes on special importance in health care context.

OPEN QUESTIONS

- **Litigation in response to *Bostock***
  - *Whitman-Walker Clinic, et al.* (cont'd.)
    - HHS Final Rule overturned 2016 Obama Administration rule defining sex discrimination such as to protect termination of pregnancy and gender identity in the provision of health care.

PROTECTIONS BEFORE *BOSTOCK* DECISION

LGBTQ PROTECTIONS PRE-*BOSTOCK*

❑ FEDERAL LAW PROTECTIONS

- Title VII: What was before *Bostock*
  - However, EEOC under President Obama interpreted Title VII protections to include prohibition of discrimination based on sexual orientation and transgender identity
    - *Macy v. Holder*, 2012 WL 1435995 (April 20, 2012)
    - *Baldwin v. Fox*, 2015 WL 4397641 (July 16, 2015)
    - EEOC-NVTA-2016-2 (issued April 29, 2014)

LGBTQ PROTECTIONS PRE-*BOSTOCK*

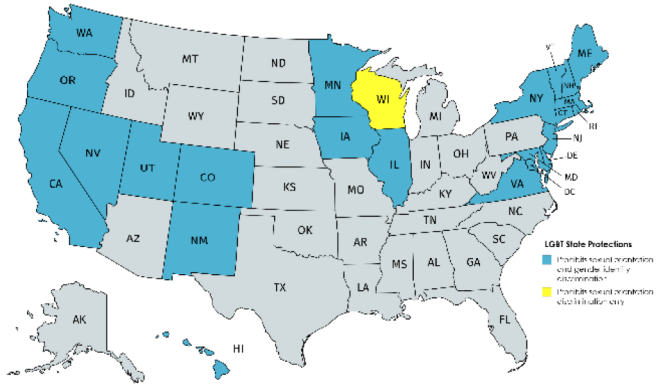
❑ FEDERAL LAW PROTECTIONS

- Title VII: What was before *Bostock* (cont'd.)
  - Abandoned under Trump Administration
    - Attorney General Memo to all U.S. Attorneys and Department Heads (issued October 4, 2017)
  - Obama Administration holdings back in play?
- Federal Contractor obligations still valid after *Bostock*
  - Executive Order 13672: Prohibited discrimination on basis of sexual orientation and gender identity by covered federal "Government" Kors/SubKors

LGBTQ PROTECTIONS PRE-*BOSTOCK*

❑ STATE LAW PROTECTIONS

- 23 states plus District of Columbia have state laws prohibiting discrimination based on sexual orientation
  - Some form of religious exemption in each law, but definition of "religious employer" differs greatly



LGBTQ PROTECTIONS PRE-*BOSTOCK*

❑ STATE LAW PROTECTIONS

- Some states limit exemption to “religious organizations” and the scope to employees performing work related to the religious mission
- Delaware, Iowa, Maryland, New Mexico, Vermont: states apply exemption to just sexual orientation and gender identity discrimination prohibitions
- Utah: exempts religious organizations, corporations affiliated with religious organizations, religious leaders, and the Boy Scouts

LGBTQ PROTECTIONS PRE-*BOSTOCK*

❑ STATE LAW PROTECTIONS

- 22 states plus District of Columbia have state laws prohibiting discrimination based on gender identity
  - Wisconsin: has prohibition against sexual orientation discrimination, but not against gender identity discrimination

LGBTQ PROTECTIONS PRE-*BOSTOCK*

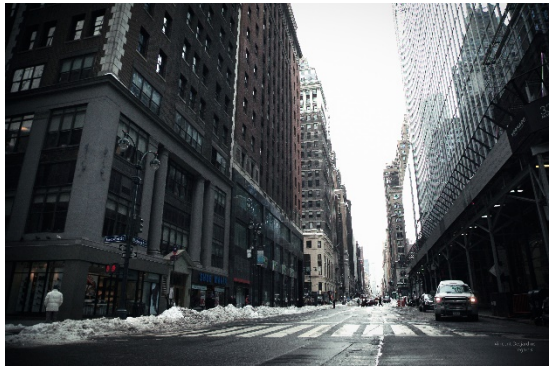
❑ STATE LAW PROTECTIONS

- Municipalities with sexual orientation and gender identity protections in states with no state law:
  - Arizona: Phoenix, Tempe, Tucson
  - Florida: Miami-Dade County, Orlando, Tampa
  - Georgia: Atlanta
  - Indiana: Marion County: Sec. 581-403
  - Kansas: Topeka
  - Michigan: Ann Arbor, Detroit

LGBTQ PROTECTIONS PRE-*BOSTOCK*

❑ STATE LAW PROTECTIONS

- Municipalities with sexual orientation and gender identity protections in states with no state law:
  - Pennsylvania: Philadelphia



Q & A DISCUSSION

Thank You

QUESTIONS?

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