Bostock and the Forgotten EEOC

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In Bostock v. Clayton County, Georgia, *the Supreme Court formally recognized that federal discrimination law prohibits discrimination based on sexual orientation and gender identity. The opinion barely mentioned the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal discrimination law. Reading* Bostock, *it would be easy to get the impression that the EEOC played little to no role in the outcome. This Essay reclaims and restores the EEOC's role.*

In restoring the EEOC's role in this story, two themes emerge. First, Bostock*'s methodology erases the administrative agency tasked with enforcing Title VII in ways that are inconsistent with the authority Congress gave to the agency. This idea is important because modern conversations about administrative agencies tend to focus on* Chevron *deference or the elimination of such deference. This Essay demonstrates how textualism is erasing the administrative agency outside of the* Chevron *context. This intervention comes at a particularly important time, given the rise of new textualism and progressive textualism.*

Second, the EEOC played an important role in developing the idea that Title VII prohibits discrimination on the basis of gender identity. This Essay demonstrates the mechanisms the agency used. It especially focuses on the EEOC's role under the federal-sector provision. Congress gave the EEOC extensive authority in this area. Even though the federal-sector provision also prohibits sex discrimination, the Supreme Court ignored the EEOC's federal-sector decisions holding that sex included gender identity. Given the power Congress gave the EEOC in this area and others, it is unlikely that Congress intended for the courts to ignore the agency.

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Introduction

On June 15, 2020, the Supreme Court issued a historic opinion. In *Bostock v. Clayton County, Georgia*,[1] the Supreme Court formally recognized that federal discrimination law prohibits discrimination based on sexual orientation and gender identity.[2] The Supreme Court barely mentioned the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal discrimination law.[3] Reading *Bostock*, it would be easy to get the impression that the EEOC played no or little role in the outcome.

This Essay reclaims and restores the EEOC's role. In restoring the EEOC's role in this story, two themes emerge. First, *Bostock*'s methodology erased the administrative agency tasked with enforcing Title VII in ways that are inconsistent with the authority Congress gave to the agency.[4] This erasure predated *Loper Bright Enterprises v. Raimondo*,[5] in which the Court

1. 140 S. Ct. 1731 (2020).

2. *Id.* at 1754.

3. *See infra* subpart I(A) (describing majority and dissenting opinions' references to EEOC).

4. *E.g.*, Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2034–35 (2022); Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW, 2021–2022, at 115, 129 (2022); Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. 1, 49 (2022); Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 98 (2021); Marc Spindelman, Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 557–58 (2021); Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y. REV. 158, 167 (2020); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 281 (2020); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 123 (2020).

5. 144 S. Ct. 2244 (2024).

jettisoned the *Chevron* doctrine.[6] Post-*Loper Bright*, it is likely that the scholarly critique will focus on the loss of the *Chevron* doctrine. In contrast, this Essay argues that the Court uses textualism to erase the agency's role in contexts that do not involve the *Chevron* doctrine.

Focusing on textualism at this time is important, given the rise of new textualism and progressive textualism.[7] This Essay challenges whether any of these methodologies are consistent with congressional intent in the context of Title VII.

Second, the EEOC played an important role in developing the idea that Title VII prohibits discrimination on the basis of gender identity. The EEOC acted through a diffuse set of mechanisms: filing amicus briefs,[8] litigating claims on behalf of litigants,[9] using its charge-processing authority,[10] and exercising its power to issue decisions in federal-sector cases that govern federal workers.[11] The EEOC was not the earliest nor the only advocate for the idea that Title VII prohibits gender identity discrimination. However, its advocacy came at a crucial point in the legal timeline.

A striking feature of *Bostock* is how little the majority or dissenting opinions mention the EEOC, especially because the EEOC originally brought one of the three cases considered in *Bostock*.[12] The majority opinion in *Bostock* ostensibly "sails under a textualist flag"[13] and claims that a fixed and clear reading of the text of the statute drives the outcome.[14]

The opinions in *Bostock* pretend as if the interpretive enterprise is between the courts and Congress and that the agency has no role. The

6. I am not suggesting that the Court eliminated all deference to administrative agencies. The Court's opinion left open some paths for deference. *Id.* at 2268; *see also id.* at 2309–10 (Kagan, J., dissenting) (discussing options for continued deference post-*Loper Bright*).

7. Eyer, *supra* note 4, at 117 (highlighting problems with conflating textualism and originalism); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1493 (2022) (discussing how new textualism "aims to interpret texts from the perspective of an *ordinary speaker of English*"); Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 355, 378 (2021) ("If textualism can help Progressives reshape the law, why not adopt it?"). The interest in progressive textualism predates *Bostock*. James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1527 (2011) ("[P]rogressive academics are engaging conservatives on their own turf and showing how numerous constitutional provisions are more in line with contemporary progressive values than conservative ones."); Edward J. Sullivan & Nicholas Cropp, *Making It Up—"Original Intent" and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 280 (2003) ("'[P]rogressive textualism' . . . starts with the text and goes from there.").

8. *See infra* subpart II(A) (describing the agency's amicus briefs).

9. *See infra* subpart II(B) (discussing agency's litigation).

10. *See infra* subpart II(C) (describing charge processing).

11. *See infra* Part III (discussing federal-sector authority).

12. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1731 (2020) (demonstrating, in the case caption, the cases that are considered in *Bostock*).

13. *Id.* at 1755 (Alito, J., dissenting).

14. *Id.* at 1737 (majority opinion) (stating that the answer to the question posed is "clear").

Supreme Court ignores that Congress explicitly gave the EEOC a key role in enforcing and interpreting Title VII, a role that does not solely relate to *Chevron* deference.[15] This role has grown over time.[16] While the clarity claimed in *Bostock* may seem like an attempt to avoid questions related to administrative deference,[17] the larger issue is whether it is appropriate for the Court to interpret Title VII while ignoring the EEOC.

It seems unlikely that Congress intended for the agency to play no interpretive role because Congress gave the EEOC numerous roles, provided broad and fairly undefined language in Title VII's key provisions,[18] and enacted Title VII before the rise of textualism. This is especially true in the federal-sector context, where Congress gave the EEOC enhanced powers, including an adjudicatory function.[19] This is an unrecognized source of the agency's power that receives little attention, and which is not accounted for in current debates about deference to administrative rulemaking.

In 2012, the EEOC held in *Macy v. Holder*[20] that Title VII prohibited gender identity discrimination.[21] To implicitly claim that the EEOC's decision in *Macy* and other cases is not part of the law that should be consulted, both as a matter of practical responsibility and statutory fidelity, ignores Congress' explicit directive about the EEOC's role in administering and enforcing Title VII.[22] This role goes beyond the EEOC's role in issuing regulations.

Mining the EEOC's efforts also illuminates a different way of understanding how gender identity became a protected class under Title VII. When the EEOC used this power, its approach differed from the approach used in *Bostock*. The EEOC opinion discussed the history of gender identity case law, and especially how the Supreme Court's interpretations of Title VII in *Price Waterhouse v. Hopkins*,[23] *Oncale v. Sundowner Offshores Servs., Inc.*,[24] and other cases created serious tensions with certain interpretations of Title VII in the gender identity context.[25] None of the opinions in *Bostock*

15. *Id.*; 42 U.S.C. §§ 2000e-4, 2000e-5. Under Title VII, the EEOC only possesses regulatory authority related to the procedural aspects of the statute. However, as discussed throughout this Essay, Congress assigned the EEOC many regulatory and interpretive roles related to the statute.

16. *See, e.g.*, 42 U.S.C. § 2000e-6(c) (providing the EEOC with additional enforcement powers).

17. For cases that discuss administrative deference, see Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) and Skidmore v. Swift & Co., 323 U.S. 134 (1944).

18. 42 U.S.C. § 2000e-2(a).

19. 42 U.S.C. § 2000e-16(b); 29 C.F.R. §§ 1614.401(a), 1614.402(a) (2023).

20. EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

21. *Id.* at *1.

22. 42 U.S.C. §§ 2000e-4(g), 2000e-5.

23. 490 U.S. 228 (1989).

24. 523 U.S. 75 (1998).

25. *Macy*, 2012 WL 1435995, at *5–10.

fully grapple with how precedent is playing a major role in the purportedly textual outcomes advocated by the Justices.

While many celebrate *Bostock*'s outcome, it is worth pondering whether a statutory interpretation methodology that ignores the EEOC is ideal or consistent with congressional intent.

Part II discusses the EEOC's erasure in *Bostock* and provides an overview of textualism, including progressive textualism. Parts III and IV develop a case study for how the EEOC acted in the gender identity space by filing amicus briefs, litigating cases, and using its federal-sector adjudicatory authority. Part IV demonstrates the important role that the EEOC's federal adjudicatory authority played in gender identity law. Part V offers a broader critique of the textualism used in both the majority and dissenting opinions in *Bostock* and demonstrates how *Macy* provides an alternative path for approaching and interpreting Title VII's language. This Part argues that as a matter of practicality and congressional fidelity, the Court should recount the EEOC's efforts and position in cases in which the Court is interpreting statutes over which Congress gave the agency enforcement and interpretive authority.

I. The EEOC's Erasure

In 2020, the United States Supreme Court issued its opinion in *Bostock*, holding that Title VII prohibits employment discrimination because of gender identity and sexual orientation.[26] The EEOC is the federal agency charged with enforcing Title VII and had been advocating that Title VII prohibited gender identity discrimination since 2011.[27] This Part illustrates how the Supreme Court erased the EEOC in *Bostock* and then provides an overview of textualism, focusing on progressive textualism.

A. Bostock

In *Bostock*, the Supreme Court interpreted Title VII.[28] Title VII is the cornerstone federal employment discrimination statute. Under Title VII, an employer may not take certain employment actions or "otherwise . . . discriminate" against a person with respect to the "terms, conditions, or privileges of employment" because of "race, color, religion,

26. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

27. *See infra* Part III (further discussing EEOC's efforts).

28. *Bostock*, 140 S. Ct. at 1738.

sex, or national origin."[29] In *Bostock*, the Court interpreted this provision to prohibit discrimination because of sexual orientation or gender identity.[30]

Bostock contains three opinions: a majority opinion authored by Justice Gorsuch,[31] a dissenting opinion authored by Justice Alito,[32] and a dissenting opinion authored by Justice Kavanaugh.[33] None of these opinions mentions the authority that Congress gave the EEOC to enforce Title VII, including the EEOC's authority to act as an adjudicator in certain federal-sector cases.

The majority opinion in *Bostock* contained only fleeting references to the EEOC, even though the EEOC is the federal agency charged with enforcing Title VII.[34] Reading the majority opinion, it is difficult to discern that the agency played any role in the outcome.

Justice Gorsuch's majority opinion quoted an unnamed EEOC Commissioner whose discussion of sex discrimination was mentioned in a law review article.[35] He also referred to early EEOC efforts related to sex-segregated job ads.[36] He cited to *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[37] which has the EEOC in the caption because the agency was one of the litigants in that case.[38]

The EEOC is mentioned in the caption of the *Bostock* case and the syllabus because the EEOC brought one of the three cases that were consolidated in *Bostock*: *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*.[39] When the majority recounted the facts of the case against Harris Funeral Homes, the Court did not mention that the EEOC was involved in any way in that suit.[40] Indeed, when describing the three consolidated cases, the majority claims that each "employee" brought suit under Title VII, eliding

29. 42 U.S.C. § 2000e-2(a)(1). Under Title VII's second subpart, it is unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of a protected trait. 42 U.S.C. § 2000e-2(a)(2). Congress amended Title VII in 1991. However, this does not change the fact that the foundational text of Title VII is contained in 42 U.S.C. § 2000e-2(a).

30. *Bostock*, 140 S. Ct. at 1737.

31. *Id.* at 1737.

32. *Id.* at 1754 (Alito, J., dissenting).

33. *Id.* at 1822 (Kavanaugh, J., dissenting).

34. 42 U.S.C. §§ 2000e-4, 2000e-5. The EEOC has enhanced responsibilities related to the federal-sector provision of Title VII. 42 U.S.C. § 2000e-16(b); 29 C.F.R. §§ 1614.401(a), 1614.402(a) (2023).

35. *Bostock*, 140 S. Ct. at 1752 (citing Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1338 (2012)).

36. *Id.* at 1752.

37. 565 U.S. 171 (2012).

38. *Id.* at 180.

39. *Bostock*, 140 S. Ct. at 1731.

40. *Id.* at 1738.

that the EEOC brought suit in one of the cases.[41] These are the only references to the EEOC in the majority opinion.

The majority opinion purported to rely on the "express terms"[42] of Title VII and the "ordinary public meaning" of its language.[43] The majority opinion relied on a causation analysis.[44] It used the "because of" language of Title VII to argue that the question of whether Title VII prohibits discrimination based on gender identity and sexual orientation can be determined through a "but for" cause analysis.[45]

Justice Gorsuch used the following example to show how this "but for" cause analysis leads to the holding:

> [T]ake 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.[46]

Justice Gorsuch insisted that the holding in the case represented the "straightforward application of legal terms with plain and settled meanings."[47]

One of the strangest features of the majority opinion is its insistence on enunciating the only proper interpretation of Title VII, while also noting how now commonly accepted applications of Title VII were contested and resolved over time.[48] For example, the opinion discussed how the EEOC changed its view about whether Title VII permitted sex-segregated job postings.[49] It also discussed how other areas of Title VII jurisprudence, including sexual harassment law, developed over time.[50]

The majority opinion used these paragraphs to make a point about textualism, that Title VII's broad language has repeatedly "produced unexpected applications."[51] However, these paragraphs also show that over time both the EEOC and the courts have played a critical role in uncovering

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41. *Compare id.* at 1738 (neglecting to mention that the EEOC brought suit in one of the three consolidated cases) *with* EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018) (stating that the EEOC brought the suit against defendant).

42. *Bostock*, 140 S. Ct. at 1737.

43. *Id.* at 1738.

44. *Id.* at 1739.

45. *Id.* This analysis is strange because Title VII's text contains a motivating factor standard. 42 U.S.C. § 2000e-2(m).

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

47. *Id.* at 1743.

48. *Id.* at 1752.

49. *Id.*

50. *Id.*

51. *Id.* at 1753.

the meaning within Title VII's broad language—language that is susceptible to multiple meanings.[52] Strangely, the majority opinion does not recite this history for those purposes. While the majority recognized the EEOC's efforts in sex-segregated advertising, it ignored the EEOC's efforts in the gender identity context.[53]

Although still not robust, the bulk of the EEOC's presence in *Bostock* is in Justice Samuel Alito's dissenting opinion. Justice Alito supported his argument that Title VII does not prohibit discrimination based on sexual orientation and gender identity by stating that the EEOC did not recognize these features of sex discrimination for the "first 48 years after Title VII became law."[54] Then in footnote 7, Justice Alito briefly noted an amicus brief in which the EEOC argued that transgender discrimination violated Title VII and also noted the two federal-sector cases in which the EEOC found that Title VII prohibited discrimination based on gender identity and sexual orientation.[55] Justice Alito's dissent also mentioned that the EEOC had held that Title VII does not prohibit sexual orientation and gender identity discrimination.[56]

While Justice Alito's dissenting opinion mentioned the EEOC, the opinion also omitted or elided important information. In footnote 7, Justice Alito stated that the EEOC first held that Title VII prohibited "discrimination against a transgender individual because that person is transgender" in a 2012 federal-sector decision in *Macy v. Holder*.[57] He cited *LaBate v. USPS* for the idea that the EEOC had held in 1987 that transgender status is not a protected trait under Title VII.[58]

However, as discussed in more detail below, there are multiple arguments that support reading Title VII to include gender identity. Prior to *Macy*, courts had recognized that gender stereotyping violated Title VII and

52. *Id.* at 1752–53.

53. *Id.*

54. *Id.* at 1757 (Alito, J., dissenting).

55. *Id.* at 1757 n.7 (citing Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012)); Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (July 15, 2015); Brief of U.S. Equal Emp. Opportunity Comm'n as Amici Curiae Supporting Defendant at 1, Pacheco v. Freedom Buick GMC Truck, Inc., No. 7:10-CV-116-RAJ (W.D. Tex. Nov. 1, 2011), 2011 WL 5410751.

56. *Id.* at 1777 & n.41 (citing Dillon v. Frank, EEOC Appeal No. 01900157, 1990 WL 1111074, at *3–*4 (Feb. 14, 1990) and LaBate v. USPS, EEOC Appeal No. 01851097, 1987 WL 774785, at *2 (Feb. 11, 1987)). In footnote 55, Justice Alito also cited cases related to Title VII and religious organizations and the EEOC is mentioned in the footnote because its name is in the case captions as a litigant. *Id.* at 1781, n.55.

57. *Bostock*, 140 S. Ct. at 1757 n.7 (Alito, J., dissenting) (quoting *Macy*, 2012 WL 1435995, at *11).

58. *Id.* at 1777 & n.41 (citing *Labate*, 1987 WL 774785, at *2).

a person could pursue a gender stereotyping theory without reference to gender identity.[59]

The EEOC did not reject all gender identity claims in its 1987 *LaBate* decision. It appears the agency would have allowed the plaintiff's claim to proceed if she alleged that the discrimination occurred because of her gender.[60] The agency noted that the plaintiff "underwent gender change surgery and is now legally considered to be a female."[61] The EEOC did not reject the idea that gender stereotyping violated Title VII. Instead, it rejected the plaintiff's claim because she insisted that the protected trait was not gender, but "transsexualism."[62] In other instances, the EEOC supported the idea that Title VII provided a sex stereotyping claim.[63] Justice Alito's description of the EEOC's positions lacked important nuance.

Additionally, Justice Alito used the *LaBate* decision to support his chosen outcome.[64] However, if the EEOC's efforts in 2011 and 2012 are irrelevant to the outcome in *Bostock*, it is unclear why the *LaBate* decision from 1987 would affect the outcome either.

Justice Kavanaugh also filed a dissenting opinion in *Bostock*.[65] This dissenting opinion only referred to the EEOC once.[66] Justice Kavanaugh cited *Newport News Shipbuilding & Dry Dock Co. v. EEOC*[67] for the idea that discrimination on the basis of sex includes discrimination against men and women.[68] The EEOC is only noted in the caption of the case because it was a party to that case.

Both of the dissenting opinions relied on understandings of Title VII that were not originally obvious and that evolved over time. However, the opinions treated these interpretations of Title VII as always settled.

Here are a couple of examples. Justice Alito's dissenting opinion makes conflicting claims about gender stereotyping. At the beginning of his dissent, Justice Alito stated that in 1964, "it was as clear as clear could be" that the word "sex" in Title VII "meant discrimination because of the genetic and

59. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (reversing a dismissal because of stereotyping claim without reference to gender identity).

60. *See LaBate*, 1987 WL 774785, at *2 (noting that the court's rejection is based on her claim that her sex is "transsexual" instead of "female.").

61. *Id.*

62. *Id.*

63. *E.g.*, Castello v. Donahoe, EEOC Appeal No. 0120111795, 2011 WL 6960810, at *2 (Dec. 20, 2011).

64. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1777 & n.41 (2020) (Alito, J. dissenting) (citing *LaBate*, 1987 WL 774785, at *2).

65. *Id.* at 1822 (Kavanaugh, J., dissenting).

66. *Id.* at 1834 (Kavanaugh, J., dissenting).

67. 462 U.S. 669 (1983).

68. *Bostock*, 140 S. Ct. at 1834.

anatomical characteristics that men and women have at the time of birth."[69] However, later in the dissenting opinion, Justice Alito mentioned that Title VII also includes gender discrimination and that some transgender individuals could prevail on a gender stereotyping theory under Title VII.[70]

Whether Title VII covered gender stereotyping was highly contested.[71] In 1989, the Supreme Court recognized that sex stereotyping violates Title VII in *Price Waterhouse v. Hopkins*.[72] Justice Alito's dissenting opinion in *Bostock* accepted some gender stereotyping claims, even though they appear to conflict with his chosen definition of sex.[73] He never explained this choice.

Additionally, Justice Alito's opinion included sexual harassment and male-on-male sexual harassment as actions clearly prohibited under Title VII.[74] Justice Alito ignored that these interpretations of Title VII were contested, evolved over time, and involved the efforts of the EEOC.[75] Justice Kavanaugh also reiterated that Title VII prohibits sexual harassment, but never explained why this understanding falls within the permissible bounds of textualism, but a similar argument related to gender identity could not be considered.[76]

Before leaving the Supreme Court's *Bostock* opinion, it is critical to discuss three other wrinkles: the lack of a *Chevron* issue, the Court's failure to grapple with its own decisions, and the disagreement between the positions of the Solicitor General and the EEOC.

Bostock is not a case that involved *Chevron* deference. Congress only gave the EEOC the power to issue regulations under Title VII related to procedural issues.[77]

Bostock not only erased the EEOC, it also erased the Court's own role in the development of gender identity discrimination law. For example, neither the majority nor the dissenting opinions in *Bostock* fully addressed how the Court's recognition of sex stereotyping altered the landscape for gender identity claims.

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69. *Id.* at 1756 (Alito, J. dissenting).

70. *Id.* at 1764.

71. Franklin, *supra* note 4, at 192–93.

72. 490 U.S. 228, 251–52 (1989). This portion of the opinion is joined by a plurality. However, there are six votes for the ultimate outcome in *Price Waterhouse* when counting the concurring opinions of Justices White and O'Connor.

73. *Bostock*, 140 S. Ct. at 1756–57, 1764 (2020) (Alito, J., dissenting).

74. *Id.* at 1774.

75. Franklin, *supra* note 4, at 192–93.

76. *Bostock*, 140 S. Ct. at 1835 (Kavanaugh, J., dissenting).

77. 42 U.S.C. § 2000e-12.

As discussed in more detail below, in 1989, *Price Waterhouse* recognized that sex stereotyping violates Title VII.[78] After *Price Waterhouse*, federal courts allowed plaintiffs to proceed on a sex stereotyping theory, arguing that employers discriminated against them when they failed to comply with gender-related norms. Some of these cases involved transgender plaintiffs, and the claims were completely consistent with the theory the Court itself sanctioned in *Price Waterhouse*.[79] Justice Gorsuch's majority opinion sidelined the sex stereotyping theory.[80]

Justice Alito's dissenting opinion briefly mentioned that some transgender plaintiffs might be able to prevail on a sex stereotyping theory under a limited set of circumstances but did not fully explore the body of case law related to gender identity that developed between *Price Waterhouse* and *Bostock*.[81] Justice Kavanaugh's dissenting opinion focused largely on sexual orientation and did not address *Price Waterhouse*.[82]

The Court also failed to discuss the EEOC's role in litigating one of the three consolidated cases in *Bostock*. The case against Harris Funeral Homes reached the Supreme Court during the Trump Administration. When the EEOC is a litigant in a case, the agency litigates the case until it reaches the Supreme Court.[83] The Solicitor General represents the federal government at the Supreme Court. In its brief, the Solicitor General argued that Title VII did not prohibit discrimination because of gender identity,[84] contradicting the position taken by the EEOC in the lower courts. Lawyers representing Aimee Stephens, who had intervened in the case on appeal, filed a respondent's brief arguing that Title VII did prohibit discrimination because of gender identity.[85] At oral argument the Solicitor General argued that Title VII did not prohibit discrimination because of gender identity.[86]

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78. Price Waterhouse v. Hopkins, 490 U.S 228, 251–52 (1989).

79. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (discussing cases where courts held that discrimination against a transgender individual is sex discrimination); Smith v. City of Salem, 378 F.3d 566, 571–74 (6th Cir. 2004) (clarifying that courts should no longer rely on pre-*Price Waterhouse* decisions in transgender discrimination cases).

80. *Bostock*, 140 S. Ct. at 1742, 1749.

81. *Id.* at 1764 (Alito, J., dissenting).

82. *Id.* at 1822–37 (Kavanaugh, J., dissenting).

83. *EEOC Office of General Counsel Litigation Services to the Public*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 21, 2024), https://www.eeoc.gov/eeoc-office-general-counsel-litigation-services-public [https://perma.cc/ZJ9E-Y9QT].

84. Brief for the Federal Respondent Supporting Reversal at 12, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 3942898.

85. Brief for Respondent Aimee Stephens at 20, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 2745392.

86. Transcript of Oral Argument at 52–53, 62, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107). Additionally, the Solicitor General argued that Title VII did not prohibit sexual orientation discrimination. *Id.* at 52–53, 62.

B. Statutory Interpretation

Bostock provides a good example of how textualism erases the ways communities build legal meaning. It provides an impoverished view about the role that agencies and other legal actors play in identifying and constructing the potential meaning of statutory words. This erasure is especially problematic with statutes like Title VII which predate modern textualism, have broad operative language, and provide an agency multiple roles in enforcing and interpreting the statute.

Demonstrating these flaws of textualism is especially important at this time for two reasons. *Bostock* has spawned an interest in progressive textualism.[87] Post-*Loper Bright*, it is likely that the scholarly focus will be on *Chevron*. This Essay focuses on how textualist theories of statutory interpretation can diminish the role of agencies, even outside the context of *Chevron*.

When judges interpret statutes, they often invoke one or more interpretive methodologies, such as textualism,[88] intentionalism,[89] and purposivism,[90] among others.[91] At times, judges use these methodologies to express their views about the proper balance of power between the judiciary and the legislature.[92]

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87. *See supra* note 7 (listing articles discussing progressive textualism).

88. *See generally* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287 (2010) [hereinafter Manning, *Second-Generation Textualism*] (exploring move from first-generation to second-generation textualism); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085 (1995) (analyzing the role of linguistics in textualism and legal interpretation); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995) (analyzing the impact of hypertextualism on the *Chevron* doctrine); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (evaluating the new textualism movement).

89. *See generally* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various statutory interpretation techniques); *see, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?* 106 COLUM. L. REV. 70, 75–76 (2006) [hereinafter Manning, *What Divides Textualists from Purposivists?*] (describing the division between textualism and intentionalism and purposivism); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) [hereinafter Manning, *Textualism and Legislative Intent*] (analyzing the role of legislative intent in textualism and intentionalism).

90. Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 278–79 (2019) (characterizing the statutory interpretation debate as between textualists and purposivists); Manning, *What Divides Textualists from Purposivists?*, *supra* note 89, at 75 (discussing textualism and purposivism).

91. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (discussing dynamic statutory interpretation); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEXAS L. REV. 661, 662–66 (1982) (discussing common-law interpretation).

92. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995) (noting that to engage in statutory construction courts must adopt "at least implicitly—a theory about [their] own role by defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature").

Judges often assert that one goal of statutory interpretation is to find the plain meaning of a statute.[93] This search often begins with the text of the statute.[94]

One method of statutory interpretation—textualism—elevates the text of the statute as a primary source of statutory meaning.[95] There are varying forms of textualism, some of which eschew the use of legislative history as a valid source for statutory meaning.[96] To determine meaning, a textualist methodology often relies on the dictionary meaning of words, whether the words are terms of art, the grammatical structure of a statute, and how the words fit within the overall context of the statute.[97] Even within textualism there are debates about what meaning should govern when the language of the statute appears to conflict with the accepted public meaning of that language at the time Congress enacted the statute.[98]

In *Bostock*, Justice Gorsuch relied heavily on textualism to support the holding that Title VII prohibits gender identity discrimination.[99] Justice Gorsuch's opinion gives the impression that one only needs to read the language of Title VII and properly understand causation to reach the outcome. Justices Alito and Kavanaugh make similar claims about reaching the opposite outcome.[100]

Given *Bostock*'s claimed reliance on textualism, the case has received a flurry of attention from scholars and other commentators about what the case means for this theory of statutory interpretation. Some have noted that *Bostock* illustrates textualism's political neutrality, while others have noted that the three *Bostock* opinions demonstrate "that textualism is no more capable of providing a neutral truthmaker or of cabining the influence of evolving social values than any other leading method of statutory

93. *See, e.g.*, Yates v. United States, 574 U.S. 528, 537 (2015) (discussing "ordinary meaning"); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (discussing "plain meaning").

94. *Yates*, 574 U.S. at 537; *Household Credit*, 541 U.S. at 239.

95. Grove, *supra* note 4, at 272. For critiques of textualism, see, for example, Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2076 (2017) and Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668–69 (2019).

96. *See, e.g.*, Grove, *supra* note 4, at 267 (describing different strains of textualism); Eskridge, *supra* note 88, at 623 (discussing new textualism).

97. Manning, *Second-Generation Textualism*, *supra* note 88, at 1309 n.101.

98. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (demonstrating the majority and dissenting opinions disagree about how to construe text of Title VII).

99. *Id.* at 1738–39.

100. *See id.* at 1754–56 (Alito, J., dissenting) (asserting that Title VII "indisputably" does not outlaw discrimination because of sexual orientation, and suggesting otherwise is "preposterous"); *id.* at 1835–36 (Kavanaugh, J., dissenting) (asserting that "[m]ost everyone familiar" with the English language understands sexual orientation discrimination to be distinct from sex discrimination and that "[c]ommon sense distinguishes the two").

interpretation."[101] After *Bostock*, several scholars have understandably expressed interest in a new strain of textualism—progressive textualism.[102]

Bostock illuminates particularly serious flaws with textualism in the discrimination context. In *Bostock*, the majority and dissenting opinions claimed that Title VII's main language only allowed one possible interpretation. The EEOC's efforts in the gender identity context illustrate how these claims are patently false. If the text of Title VII provided an absolutely clear answer about gender identity discrimination claims, it seems strange that the EEOC would need to engage in a decades-long effort to explain that outcome.

The Court also did not fully grapple with how its own opinions, and opinions by other federal courts, provided a more fulsome understanding of the reach of Title VII and also how this case law created tensions about interpreting Title VII to exclude gender identity discrimination. All of the *Bostock* opinions fail to grapple with how textualism intersects with precedent. By claiming that Title VII only allows one possible outcome, all of the opinions provide an impoverished view of Title VII and statutory interpretation.

The *Bostock* opinions also ignored the fact that Congress explicitly gave the EEOC multiple ways to enforce, administer, and interpret the statute. As discussed in the next Part, this role is especially robust in the federal-sector context. While the text of Title VII is part of the law, the EEOC's opinions in federal-sector cases are also part of that law. *Bostock* should be understood as a project to diminish the role of the EEOC in Title VII, even though Congress gave the agency certain powers to enforce and interpret the statute.

These critiques should be added to a growing list of issues with textualism generally and the embrace of progressive textualism that *Bostock* surfaced or re-surfaced.[103] Much of the scholarly attention has focused on

101. Franklin, *supra* note 4, at 123 (discussing claims of textualism's neutrality and disagreeing with those claims).

102. *See supra* note 7 (noting articles that discuss progressive textualism).

103. This is in addition to a long list of criticisms, many of which predate *Bostock*. *See, e.g.*, Encarnacion, *supra* note 4, at 2029–30 (noting "familiar disputes" about whether textualism "is theoretically coherent, is incompatible with the faithful agent model of judicial interpretation, . . . is successfully constrained by canons of construction, or whether textualism is otherwise theoretically 'bankrupt'"); Desai, *supra* note 4, at 3 (recognizing that "statutory interpretation is unavoidably a multimodal enterprise that involves consideration of, at least, text, semantic context, statutory purpose, history (statutory, legislative, social, and political), social context, precedent, moral judgment, and consequentialist reasoning"); Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1410–12 (2017) (discussing problem of warring texts and how textualism often hides choices the Justices are making).

what *Bostock* means for textualism.[104] For example, in *Bostock* the majority and dissenting opinions frame that inquiry differently. Justice Gorsuch claims to analyze gender identity discrimination by exploring the original public meaning of Title VII's text but, in reality, the majority opinion takes more of a semantic approach to the text, asking what the words in Title VII's operative provision mean when put together, whether or not Congress imagined or intended the particular meaning.[105] Justice Alito's dissenting opinion purports to frame the textualist inquiry as a question of original public meaning.[106]

Professor Cary Franklin has relied on *Bostock* to challenge textualism's claim of neutrality. Professor Franklin noted that textualism rests on an illusion "that original public meaning is something fixed and determinate that judges merely uncover by consulting period sources."[107] Professor Franklin argued that "original public meaning is a judicial construct. It is not something judges find, but something they produce" because "in the kind of conflicts that reach the Court, there generally is not a single truth of the matter from a semantic standpoint."[108]

Professor Franklin also noted how Justice Alito's dissenting opinion treated certain aspects of current Title VII jurisprudence as if they represented the long-held understanding of the text of Title VII, even though basic historical research will show that these ideas were not static over time.[109] Professor Franklin outlined the work of advocates and changes in constitutional law that contributed to the outcome in *Bostock* and yet are missing from its explicit rationale.[110]

Professor Katie Eyer has noted how some applications of textualism in the discrimination context require careful attention to the differences

104. *See, e.g.*, Lund, *supra* note 4, at 159–163 (comparing the "living originalism" textual interpretation in *Bostock* with competing versions, such as the textualism adopted by Justice Scalia); Grove, *supra* note 4, at 266 (noting that *Bostock* reveals "important tensions *within* textualism"); Anita S. Krishnakumar, *Three Lessons About Textualism from the Title VII Case*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2020), https://www.yalejreg.com/nc/three-lessons-about-textualism-from-the-title-vii-case-by-anita-s-krishnakumar/ [https://perma.cc/SQ2P-XB2Z] (discussing how the case undermines textualism).

105. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738, 1749 (2020).

106. *Id.* at 1756–60 (Alito, J., dissenting). By describing the opinions in this way, I am not advocating that the Justices faithfully adhered to the claimed approach. *See, e.g.*, Desai, *supra* note 4, at 14 (noting that an original public meaning approach cannot resolve the questions in *Bostock*).

107. Franklin, *supra* note 4, at 125.

108. *Id.*

109. *Id.* at 175–76, 190–91 (discussing shifts in policies regarding the employment of married women and mothers, as well as male-on-male sexual harassment).

110. *Id.* at 136–37, 169–70. It is worth noting that the constitutional law cases are related to sexual orientation and not explicitly to gender identity.

between textualism and originalism.[111] She argues that textualism is a fidelity to text, while originalism is fidelity to history.[112] Professor Eyer explained:

> Although textualism and originalism are commonly conflated, it is of course possible to have a textualist methodology that is entirely decoupled from originalist commitments. Thus, an interpreter could hold the view that it is important to adhere to textual meaning—whether of a statute, the constitution, or a regulation—but not that it is important to look to history or historical context in so doing. Such an interpretive approach might be deemed a "living" or "dynamic" textualism, i.e., the idea that the content or meaning of the words of a legal text can evolve over time.[113]

Professor Eyer also noted that textualism and originalism can function as "allies" or "antagonists," emphasizing that there are times when original meaning methodologies conflict with statutory text.[114] Professor Eyer makes a powerful argument that the issue presented in *Bostock* potentially sat at the intersection of these two ideas, where the text of Title VII allowed outcomes that may have been inconsistent with the original expected application of that text.[115]

The current scholarship on *Bostock* ignores another important issue. Congress chose to use broad language in Title VII's main provisions and chose to give a federal agency increased power for enforcing and administering that statute. All of this happened in an era that predates modern textualism. It seems highly unlikely that Congress thought the language of Title VII allowed only one meaning or that Congress intended the EEOC to play no role in expounding that meaning.

II. A Case Study

The EEOC's actions related to gender identity discrimination serve as a case study for the powers that Congress gave the EEOC and how the agency exercises that power when a statutory ambiguity exists. This Part recounts the EEOC's efforts related to gender identity discrimination as it filed amicus briefs, litigated cases in federal courts, and took part in charge processing. Part III focuses on the EEOC's power to adjudicate federal-sector cases.

There are three important ideas to keep in mind. When the Supreme Court issued its decision in *Bostock*, the majority opinion did not recognize any of the efforts discussed in the case study. Additionally, the EEOC's efforts were not the first efforts in the gender identity context, but they

111. Eyer, *supra* note 4, at 117.
112. *Id.* at 118.
113. *Id.*
114. *Id.* at 120.
115. *Id.* at 135–36.

happened at an important time in the trajectory of this area of jurisprudence.[116] Finally, the EEOC does not possess the power to issue substantive regulations for the non-federal-sector operative provisions of Title VII. Instead, it can only issue procedural ones.[117] Thus, the issues discussed in this Essay are not strictly about administrative deference in the traditional sense.

The EEOC is an independent federal agency that administers several federal discrimination laws. It describes itself as "the nation's lead enforcer of employment antidiscrimination laws and chief promoter of equal employment opportunity."[118] This Essay focuses on four roles of the agency that were important in the gender identity context: the EEOC's power to file amicus briefs, the agency's ability to litigate, the agency's role in charge processing, and the EEOC's adjudicatory role in federal-sector cases. The EEOC's power to issue decisions in federal-sector cases is especially important because these decisions can serve as persuasive authority for federal and state courts in discrimination cases that do not involve federal-sector employees.

On July 2, 1964, President Lyndon Johnson signed the Civil Rights Act of 1964 into law.[119] Title VII of that Act covers employment discrimination, making it illegal for many employers to discriminate against workers because of the worker's race, sex, national origin, color, or religion.[120]

Title VII also created a new federal agency, the EEOC,[121] which began operating on July 2, 1965.[122] Five commissioners lead the EEOC.[123] They are nominated by the President and confirmed by the Senate.[124] Only three of the commissioners can be from one political party, and the commissioners serve

116. While focusing on the EEOC's efforts, it is important to recognize that the EEOC was not the only actor in this space. In the past, the EEOC's position was that Title VII did not cover gender identity as a separately protected status. Faulkner v. Mineta, EEOC Appeal No. 01A54932, 2005 WL 3526016, at *1 (Dec. 19, 2005); Loran v. O'Neill, EEOC Appeal No. 01A13538, 2001 WL 966123, at *1 (Aug. 17, 2001).

117. 42 U.S.C. § 2000e-12(a).

118. *United States Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012–2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/united-states-equal-employment-opportunity-commission-strategic-plan-fiscal-years-2012-2016 [https://perma.cc/6ZTW-NHEE].

119. Lyndon B. Johnson, Remarks upon Signing the Civil Rights Bill (July 2, 1964) (transcript available at http://millercenter.org/president/speeches/speech-3525 [https://perma.cc/4WED-AWT5]).

120. 42 U.S.C. § 2000e-2(a).

121. 42 U.S.C. § 2000e-4(a).

122. *Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/timeline-important-eeoc-events#:~:text=President%20Lyndon%20B.,labor%20unions%20and%20employment%20agencies [https://perma.cc/2SS5-KRMW].

123. 42 U.S.C. § 2000e-4(a).

124. *Strategic Plan for Fiscal Years 2012–2016*, *supra* note 118.

for five-year terms.[125] The President selects one commissioner to serve as the chair of the EEOC.[126]

The EEOC's role has grown since 1964. Several of those expansions are important to this Essay. In 1972, Congress gave the EEOC the power to litigate some Title VII claims.[127] It also created the General Counsel position.[128] The General Counsel oversees the EEOC's litigation. The General Counsel is nominated by the President and confirmed by the Senate.[129]

This Essay focuses on four powers the EEOC used in the gender identity context: its ability to file amicus briefs, its ability to litigate, its role in charge processing, and its role in deciding federal-sector cases.

A. Amicus Briefs

The EEOC can file amicus briefs in state courts, federal trial courts, and federal appellate courts, subject to those courts' rules.[130] This ability comes with an important exception: The EEOC does not file amicus briefs in the United States Supreme Court.[131] When cases reach the Supreme Court, the Solicitor General is responsible for filing amicus briefs.[132]

Prior to *Bostock*, the EEOC filed numerous amicus briefs arguing that Title VII prohibited discrimination because of a person's gender identity.[133] These briefs signaled the EEOC's evolving position on this type of discrimination and provided well-researched blueprints for courts and

125. *Id.*

126. *Id.*

127. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(e). The Attorney General has the authority to litigate claims against governmental actors. 42 U.S.C. § 2000e-5(f)(1). The agency also has power to intervene in some litigation. 42 U.S.C. § 2000e-4(g)(6).

128. Office of General Counsel, *Annual Report Fiscal Year 2002*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/reports/office-general-counsel-1 **[**https://perma.cc/9HBZ-GQ64].

129. *Id.*

130. *Office of General Counsel Fiscal Year 2020 Annual Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/office-general-counsel-fiscal-year-2020-annual-report [https://perma.cc/8PYF-XTA7].

131. *Amicus Curiae Program*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/amicus-curiae-program#:~:text=EEOC%20will%20not%20file%20an, made%20as%20early%20as%20possible [https://perma.cc/46V2-SG39].

132. 28 C.F.R. § 0.20(a)-(c) (2023); Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1328 (2010).

133. Order Denying EEOC's Motion for Leave to File Brief as Amicus Curiae at *1, Pacheco v. Freedom Buick GMC Truck, Inc., No. MO-10-CV-116, 2011 WL 13234884 (W.D. Tex. Nov. 1, 2011); *see also* Chai Feldblum, *Law, Policies in Practice and Social Norms: Coverage of Transgender Discrimination Under Sex Discrimination Law*, 14 J.L. SOC'Y 1, 21–22 (2013) (discussing the impact of the EEOC's *Pacheco* amicus brief on future Commission decisions).

litigants. Some of the EEOC's briefs tried to preserve the pathway for litigants to pursue claims.[134]

The Supreme Court issued its opinion in *Bostock* on June 15, 2020.[135] In 2011, almost a decade before *Bostock*, the EEOC sought leave to file an amicus brief in a federal trial court in Texas.[136] In the case, Alex Pacheco sued Freedom Buick GMC Truck, Inc., alleging that the defendant fired her because of her gender identity.[137] The trial court denied the EEOC leave to file the brief,[138] but the brief is important. It was the first time the EEOC had argued in an amicus brief that Title VII prohibited gender identity discrimination.[139] Additionally, the Commission voted to file the amicus brief, and this vote signaled the Commission's changed view on this subject.[140]

The *Pacheco* amicus brief provided a multi-pronged argument regarding why Title VII prohibits discrimination based on transgender status.[141] It argued that when the Supreme Court formally recognized sex stereotyping as a way of thinking about discrimination, it necessarily "eviscerated" the reasoning of prior district court and appellate decisions that held Title VII did not prohibit discrimination based on transgender status because those prior cases did not fully grapple with the stereotyping theory.[142] The agency also argued that transgender status was a "subcategory" of sex discrimination.[143] The agency's brief also brought together recent case law from Title VII and other contexts to support the idea that Title VII prohibited gender identity discrimination.[144]

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134. *See, e.g.*, Brief of U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae in Opposition to Summary Judgment at 9, Pacheco v. Freedom Buick GMC Truck, Inc., No. 7:10-CV-116-RAJ (W.D. Tex. dismissed Oct. 17, 2011), 2011 WL 5410751 (providing cases that demonstrate it is "well-established" that a plaintiff's transgender status "does not provide a basis for excluding him or her from Title VII's protections").

135. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

136. Order Denying EEOC's Motion for Leave to File Brief as Amicus Curiae at *1, Pacheco v. Freedom Buick GMC Truck, Inc., No. MO-10-CV-116, 2011 WL 13234884 (W.D. Tex. Nov. 1, 2011); Feldblum, *supra* note 133, at 21–22.

137. Complaint at *1, Pacheco v. Freedom Buick GMC Truck, Inc., No. 7:10-cv-116, 2010 WL 11252154 (W.D. Tex. Sept. 27, 2010).

138. Order Denying EEOC's Motion for Leave to File Brief as Amicus Curiae at *1, Pacheco v. Freedom Buick GMC Truck, Inc., No. MO-10-CV-116, 2011 WL 13234884 (W.D. Tex. Nov. 1, 2011).

139. Feldblum, *supra* note 133, at 21–22.

140. *See id.* at 22 (noting the Commission approved the amicus brief).

141. Brief of U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae in Opposition to Summary Judgment at 1–2, Pacheco v. Freedom Buick GMC Truck, Inc., No. 7:10-CV-116-RAJ (W.D. Tex. dismissed Oct. 17, 2011), 2011 WL 5410751.

142. *Id.* at 5 (noting that the "rationales undergirding these decisions" had been "eviscerated").

143. *Id.* at 6.

144. *Id.* at 5.

This multi-prong argument would be repeated and refined in subsequent amicus briefs. In *Wittmer v. Phillips 66 Co.*,[145] the EEOC argued that discrimination based on transgender status is discrimination because of sex since the employer would not have taken the same action if the plaintiff had presented as the opposite sex.[146] The EEOC analogized sex to religion, in the sense that people can change their religion and still be protected by Title VII.[147] The EEOC also relied on a sex stereotyping theory[148] and argued that Title VII could prohibit gender identity discrimination even if it were not the principal evil Congress intended to address when crafting Title VII.[149]

In *Eure v. The Sage Corp.*,[150] the EEOC submitted a friend-of-the-court brief arguing that a person does not need to prove additional gender stereotyping to prevail on a Title VII claim if the person can show a negative outcome happened because of the individual's transgender status.[151]

The EEOC also worked to shore up plaintiffs' abilities to bring retaliation claims based on reporting transgender discrimination. In *Brandon v. The Sage Corp.*,[152] the EEOC argued that a person can state a viable retaliation claim against an employer if the employer takes an adverse action because the person reported transgender discrimination.[153] In the brief, the EEOC sought to clarify the trial court's conclusion, which seemed to suggest a transgender individual could only proceed on a stereotyping theory if they proved stereotyping beyond just their transgender status.[154] In its amicus brief, the EEOC argued that discriminating against a person because of that person's transgender status is "inherently animated by gender stereotypes."[155]

In the intervening years between *Pacheco* and *Bostock*, the EEOC also filed amicus briefs in district courts throughout the United States, arguing

145. 915 F.3d 328, 331 (5th Cir. 2019).

146. Brief of the Equal Emp. Opportunity Comm'n as Amicus Curiae in Support of Neither Party at 9, Wittmer v. Phillips 66 Co., 915 F.3d 328 (5th Cir. 2019) (No. 18-20251), 2018 WL 3878952. The brief is also available here: https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/litigation/briefs/wittmer.html **[**https://perma.cc/L5C6-LYCQ**].**

147. *Id.* at 12.

148. *Id.* at 13.

149. *Id.* at 20.

150. 61 F. Supp. 3d 651 (W.D. Tex. 2014).

151. Brief of the U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae in Support of the Plaintiff-Appellant Loretta Eure and Reversal 10-11, Eure v. The Sage Corp., 61 F. Supp. 3d (W.D. Tex. 2014) (No. 14-51311), 2018 WL 3878952.

152. 808 F.3d 266 (5th Cir. 2015).

153. Brief of U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae in Support of Plaintiff-Appellant Margie Brandon and Reversal at 10, Brandon v. Sage Corp., 808 F.3d 266 (5th Cir. 2015) (No. 14-51320), 2015 WL 1906285.

154. *Id.*

155. *Id.* at 16.

that Title VII prohibited discrimination because of gender identity.[156] This is notable because the EEOC's amicus program is focused on appellate courts, and the agency only files such briefs in district court "if the case presents a particularly important issue that falls within the EEOC's expertise."[157]

Some of the amicus briefs the EEOC filed in district courts also sought to keep the procedural pathway open for people who wanted to assert these claims. In *Chavez v. Credit Nation Auto Sales*,[158] the plaintiff asserted that she was fired after she told her employer of her intent to transition from male to female.[159] The defendant argued that the plaintiff's claim could not proceed because she did not exhaust her administrative remedies.[160]

The EEOC filed an amicus brief arguing that the plaintiff's claim should be allowed to proceed because the plaintiff tried to timely file a charge "but EEOC staff refused to accept it, believing incorrectly that transgender individuals were not covered under Title VII's sex discrimination provision."[161] Although the trial court judge granted summary judgment in the employer's favor, it rejected the defendant's argument that plaintiff had failed to exhaust her administrative remedies, concluding that

> by January 2010, an overwhelming number of federal courts had concluded that Title VII sex discrimination includes discrimination against an employee, transsexual or not, based on gender non-conformity, making the EEOC investigator's comments to Plaintiff misleading regardless of how the EEOC viewed the applicability of Title VII to transsexuals at that time.[162]

156. The EEOC filed an amicus brief in *Lewis v. High Point Regional Health System*, a case in which the plaintiff claimed that the defendant refused to hire her because she is transgender. Brief of the Equal Emp. Opportunity Comm'n as Amicus Curiae in Support of Plaintiff and in Opposition to the Motion to Dismiss Plaintiff's Complaint at 2–3, Lewis v. High Point Regional Health System, 79 F. Supp. 3d 588 (E.D.N.C. 2015) (No. 5:13–CV–838–BO), 2014 WL 8060914. It also filed a friend-of-the-court brief in *Dawson v. H & H Electric, Inc.*, in which the plaintiff argued her company fired her after she informed her employer she was a transgender woman. Brief of the Equal Emp. Opportunity Comm'n as Amicus Curiae Statement of Interest at 1–2, Dawson v. H & H Electric Inc., No. 4:14CV00583 SWW (E.D. Ark. Sept. 15, 2015), 2015 WL 10960800. The EEOC also filed a brief in *Robinson v. Dignity Health*, arguing that Title VII requires health care plans not to discriminate because of transgender status. Amicus Brief of the Equal Emp. Opportunity Comm'n in Support of Plaintiff and in Opposition to Defendant's Motion to Dismiss, No. 4:16-cv-03035 YGR (N.D. Cal. Aug. 22, 2016), 2016 WL 11517056.

157. *Amicus Curiae Program*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/amicus-curiae-program [https://perma.cc/TD9A-M8SY].

158. 49 F. Supp. 3d 1163 (N.D. Ga. 2014).

159. *Id.* at 1174–75, 1187.

160. *Id.* at 1187.

161. P. David Lopez, *Office of General Counsel Fiscal Year 2014 Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/reports/office-general-counsel-fiscal-year-2014-annual-report [https://perma.cc/UDE6-X7DL].

162. *Chavez*, 49 F. Supp. 3d at 1192; Lopez, *supra* note 161.

Similarly, in *Jamal v. Saks & Co.*,[163] the EEOC argued that a person who filed a Charge of Discrimination based on sex discrimination should be counted as exhausting administrative remedies when the charge indicated that the plaintiff was discriminated against because of "my gender, male (transgender)."[164] The EEOC argued that this charge was sufficient for administrative exhaustion purposes when the plaintiff alleged that she identified as female.[165] In the same case, the EEOC also argued that a person can proceed on a Title VII retaliation claim if the person reports discrimination based on transgender status.[166]

In addition, the EEOC filed amicus briefs arguing that Title VII prohibited discrimination based on sexual orientation and relied on arguments related to transgender status to bolster its arguments.[167]

Prior to *Bostock*, the EEOC filed numerous amicus briefs in federal trial and appellate courts. These briefs highlighted the Commission's position on whether Title VII prohibited gender identity discrimination, provided a blueprint of potential arguments supporting this position, and argued in favor of protecting the procedural pathway for gender identity claims.

B. Litigation

The EEOC also has the power to litigate cases. Congress granted the EEOC litigation authority in two different provisions of Title VII: Section 707[168] and Section 706.[169] Under Section 707, Title VII authorizes the EEOC to prosecute actions where a defendant has engaged in a "pattern or practice" of illegal discrimination.[170] Section 706 allows the EEOC to file suit in its own name in cases that do not allege a pattern or practice of discrimination.[171] These sections do not apply to the federal-sector provisions of Title VII, which are discussed below.

163. Jamal v. Saks & Co., No. 4:14-CV-02782 (S.D. Tex. dismissed Mar. 10, 2015).

164. Brief of the U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae at 10, Jamal v. Saks & Co., No. 4:14-CV-02782 (S.D. Tex. dismissed Mar. 10, 2015), 2015 WL 5723864.

165. *Id.* at 11.

166. *Id.* at 14–15.

167. Brief of the U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae in Support of Hively's Petition for Rehearing and Suggestion for Rehearing En Banc at i–ii, 5, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (No. 15-1720).

168. 42 U.S.C. § 2000e-6.

169. 42 U.S.C. § 2000e-5.

170. Equal Emp. Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54, 67 n.19 (1984); 42 U.S.C. § 2000e-6(e).

171. Congress gave the EEOC this authority in 1972 in the Equal Employment Opportunity Act of 1972. Pub. L. No. 92-261, 86 Stat. 103, 105 (1972) (codified in pertinent part at 42 U.S.C. § 2000e-5(f)(1)). The Attorney General, not the EEOC, has the power to sue state and local governments under Title VII. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. §§ 1601.27, 29 (2023).

If a case filed by the EEOC reaches the Supreme Court, the EEOC no longer represents itself. Instead, the agency is formally represented by the Office of the Solicitor General.[172] If a case is remanded by the Supreme Court to another federal court, the agency will again represent itself in that proceeding.

In 2012, the EEOC issued a Strategic Enforcement Plan and identified as one of the agency's priorities protections of "lesbian, gay, bisexual and transgender individuals" under Title VII.[173] The same Strategic Enforcement Plan also emphasized that the EEOC would protect the procedural pathway for claims.[174] The Commission formed "an LGBT working group that provides advice and input to the Agency's litigators on developing related litigation vehicles."[175] This working group also coordinates "internal initiatives and policies, trains internal staff, and conducts outreach with external stakeholders."[176]

The EEOC litigated several cases on behalf of people claiming gender identity discrimination in the years leading up to *Bostock*. In *Bostock* itself, the Court considered three consolidated cases, one of which the EEOC filed on behalf of plaintiff Aimee Stephens.[177]

On September 25, 2014, the EEOC filed a case against R.G. & G.R. Harris Funeral Homes, Inc. in the United States District Court for the Eastern District of Michigan.[178] The EEOC alleged that the employer fired Aimee Stephens, a transgender woman, because of her sex.[179] The EEOC alleged that on July 31, 2013, Stephens informed her employer that she was transitioning from male to female and that the employer fired her two weeks later.[180] More specifically, the EEOC claimed that "Defendant Employer fired Stephens because Stephens is transgender, because of Stephens's

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172. Fed. Election Comm'n v. NRA Pol. Victory Fund, 513 U.S. 88, 93 (1994) (quoting United States v. Providence Journal Co., 485 U.S. 693, 700 (1988)); *Office of General Counsel Fiscal Year 2020 Annual Report*, *supra* note 130.

173. *Draft for Public Release U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/draft-public-release-us-equal-employment-opportunity-commission-strategic-enforcement-plan [https://perma.cc/C9M2-PG3X].

174. *Id*.

175. *Fact Sheet on Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www1.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm? **[**https://perma.cc/N7YX-59F4**]**.

176. *Id*.

177. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1731, 1738 (2020).

178. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 596 (E.D. Mich. 2015), rev'd and remanded, 884 F.3d 560 (6th Cir. 2018), aff'd sub nom. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

179. *Id*. at 596. The EEOC also alleged that the employer provided men with work clothing but did not provide women with work clothing. *Id.*

180. *Id*.

transition from male to female, and/or because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes."[181]

The defendant filed a motion to dismiss, arguing that the EEOC did not state a cognizable claim against it. The trial court held that Title VII did not prohibit discrimination based on transgender status alone, but that the EEOC could proceed on a gender stereotyping theory.[182] The district court relied heavily on the Sixth Circuit's opinion in *Smith v. City of Salem*, which was decided in 2004.[183]

The parties filed cross motions for summary judgment, and the district court granted summary judgment in favor of the employer, finding that the Religious Freedom Restoration Act prohibited the EEOC from enforcing Title VII against the defendant without exploring other less restrictive options.[184] The EEOC appealed this outcome, and the Sixth Circuit ultimately reversed the grant of summary judgment in the employer's favor on the unlawful termination claim and granted summary judgment in the EEOC's favor on that claim.[185]

On January 20, 2017, Donald Trump became President. Stephens moved to intervene in the EEOC's case against her former employer and asserted that potential changes in government policy might prevent the EEOC from robustly representing her interests.[186] The Sixth Circuit granted Stephens' motion to intervene.[187]

Stephens' concerns were warranted. The employer sought review in the Supreme Court, and the Court granted a writ of certiorari on the question of whether Title VII prohibits discrimination based on transgender status.[188] When the Solicitor General filed the Brief for the Federal Respondent, it argued that Title VII does not prohibit discrimination because of transgender status, thus taking a position contrary to the position argued by the EEOC before the trial court and the appellate court.[189] Stephens submitted her own

181. *Id.*

182. *Id.* at 599.

183. *Id.* at 599–602 (discussing and citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)). It also relied on Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), which held that a plaintiff could proceed on a gender identity claim under Title VII through a sex stereotyping theory. *Id.* at 602–03.

184. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 570 (6th Cir. 2018).

185. *Id.* at 600.

186. *Id.* at 570.

187. *Id.*

188. R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019).

189. Brief for the Federal Respondent Supporting Reversal at 6–7, 12, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 3942898.

brief, arguing that Title VII does prohibit terminating someone based on being transgender.[190] Unfortunately, Stephens died before the Supreme Court issued its opinion in *Bostock*.[191] Her estate continued to prosecute the suit.[192]

As discussed earlier, the Supreme Court barely mentioned the EEOC's role in Stephens' claim in *Bostock*, even though the Stephens case was the only one of the three consolidated cases raising the gender identity issue, and the Supreme Court held that Title VII prohibits discrimination because of gender identity.[193]

Stephens was not the only plaintiff for whom the EEOC sought relief based on transgender discrimination. On September 24, 2015, the EEOC filed suit alleging that an employer fired a worker because she is transgender.[194] The case ended with a consent decree providing monetary relief to the terminated worker and with the employer agreeing to "implement a gender discrimination policy addressing transgender status and gender transitions."[195]

In July of 2016, the EEOC filed a suit on behalf of Megan Kerr, who alleged her employer fired her because of her gender identity.[196] On September 8, 2017, the federal district court denied the employer's motion for summary judgment, finding that the plaintiff's claim could proceed.[197] Although the Seventh Circuit had previously held that Title VII did not prohibit gender identity discrimination,[198] the district court found that the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins* and an intervening Seventh Circuit decision under Title IX altered the legal landscape.[199] The trial court judge noted, "[t]his court agrees with the EEOC that it follows logically that discrimination because a person is transgender

190. *Id.* at 7, 12.

191. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

192. *Id.*

193. *Id.* at 1737–38, 1753.

194. U.S. Equal Emp. Opportunity Comm'n v. Lakeland Eye Clinic, P.A., No. 8:14-cv-02421-T-35AEP (M.D. Fla. April 9, 2015). The EEOC also intervened in a suit in which a worker argued that Title VII prohibits discrimination because of gender identity. Press Release, U.S. Equal Emp. Opportunity Comm'n, Court Allows EEOC to Join Transgender/Sex Discrimination Lawsuit Against First Tower Loan (Sept. 17, 2015), http://www.eeoc.gov/eeoc/newsroom/release/9-17-15c.cfm [https://perma.cc/2Z3C-FH9K].

195. P. David Lopez, *Office of General Counsel Fiscal Year 2015 Annual Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/reports/office-general-counsel-fiscal-year-2015-annual-report [https://perma.cc/CLM7-9QS8].

196. U.S. Equal Emp. Opportunity Comm'n v. Rent-A-Ctr. E., Inc., 264 F. Supp. 3d 952, 954 (C.D. Ill. 2017).

197. *Id.* at 956.

198. *Id.* at 955–96 (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984)).

199. *Id.* at 956 (discussing and citing Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034 (7th Cir. 2017) and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

is encompassed within the definition of sex discrimination set forth in *Price Waterhouse*."[200]

The EEOC also filed suit on behalf of a transgender woman arguing that the employer treated her differently and subjected her to a hostile environment because of her sex.[201] The employer entered into a consent decree providing monetary relief to the worker.[202] The employer also agreed to provide the worker "with a reference that does not mention her prior legal name and indicates she is eligible for rehire" and to issue a letter of apology.[203] The employer also agreed to change its EEO policies and complaint procedures, to make sure that transgender employees have appropriate access to restrooms, and to change its health care plans to make sure care exclusions were not made based on transgender status.[204]

During this same time, the EEOC was arguing that Title VII prohibited discrimination because of sexual orientation.[205] These efforts were important to gender identity discrimination because they were relying on similar legal arguments about the breadth of Title VII's prohibition on sex discrimination.[206] Also, in some cases, the EEOC obtained relief in sexual orientation cases that affected gender identity. For example, in one case, the employer agreed to retain an expert on "sexual orientation, gender identity, and transgender issues to help develop EEOC-approved training on LGBT workplace issues."[207]

C. Charge Processing

The EEOC also can exercise power through its role in charge processing. Title VII requires many people seeking relief under the statute to first file a charge of discrimination with the EEOC or a comparable state agency.[208] The charge is the document that triggers the enforcement process. The charge sets in motion the investigation and conciliation efforts of the

200. *Id.*

201. Equal Emp. Opportunity Comm'n v. Deluxe Fin. Servs., Inc., No. 15-cv-2646 (D. Minn. Jan. 20, 2016).

202. P. David Lopez, *Office of General Counsel Fiscal Year 2016 Annual Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (citing Equal Emp. Opportunity Comm'n v. Deluxe Fin. Servs., Inc., No. 15-cv-2646, 4, 7 (D. Minn. Jan. 20, 2016)), https://www.eeoc.gov/reports/office-general-counsel-fiscal-year-2016-annual-report [https://perma.cc/NH4F-B79H].

203. *Id.* (citing *Deluxe Fin. Servs., Inc.*, No. 15-cv-2646, at 6).

204. *Id.* (citing *Deluxe Fin. Servs., Inc.*, No. 15-cv-2646, at 8–11).

205. Complaint at 1, 3, U.S. Equal Emp. Opportunity Comm'n v. Pallet Cos., No 1:16-cv-00595-RDB (D. Md. June 24, 2016); Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *4–5 (July 15, 2015).

206. *Foxx*, 2015 WL 4397641, at *4–5.

207. Lopez, *supra* note 202.

208. 42 U.S.C. § 2000e-5(b), (e).

EEOC, and it establishes the scope of any claims that can later be filed in court.[209]

Once the charge is before the EEOC, the EEOC notifies the respondent of the charge. The EEOC is directed to investigate the charge for the initial purpose of determining whether there is "reasonable cause" to believe that the charge is true.

After its investigation, the EEOC may make a determination on the charge. If reasonable cause exists, the Commission is directed to "endeavor to eliminate any such practice by informal methods of conference, conciliation, and persuasion."[210] After a reasonable cause finding, the EEOC often will encourage the parties to settle the dispute. Parties often agree to settle because it is rare for the EEOC to issue a reasonable cause finding. This is because the EEOC does not have the resources to fully investigate most of the charges presented to it.[211] However, one way the EEOC uses its limited resources is by focusing its investigative powers on charges of discrimination that align with its strategic priorities.

In January of 2013, the agency started tracking charges of discrimination that included allegations of gender identity or sexual-orientation discrimination.[212] During this time, the EEOC also was issuing reasonable cause determinations in some of the gender identity charges submitted to it.[213] The EEOC does not issue reasonable cause determinations in many cases, so it is notable that the agency did so in multiple gender identity cases during this time.

During this same time, the EEOC used its administrative process to resolve claims of discrimination because of gender identity. For example, in September of 2013, the EEOC announced a public conciliation through its administrative conciliation process in which a worker obtained relief after

209. Smith v. Cheyenne Ret. Invs., 904 F.3d 1159, 1164 (10th Cir. 2018).

210. 42 U.S.C. § 2000e-5(d). The EEOC may encourage conciliation and perhaps reach a formal settlement prior to a formal finding of reasonable cause. 29 C.F.R. § 1601.20 (2023).

211. If the parties settle the suit, the dispute is resolved. If they do not settle it, the EEOC may decide to pursue a suit in court on behalf of the charging party. The EEOC may decline to file such a suit and provide the charging party with a right-to-sue letter, so that the charging party may begin a private suit. In some cases, the EEOC allows the charging party to start a private lawsuit, and the EEOC intervenes in that case. 42 U.S.C. § 2000e-5(b), (f).

212. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://content.govdelivery.com/accounts/USEEOC/bulletins/1456e7e [https://perma.cc/Q9NL-S7ZK].

213. *See, e.g.*, Amended Complaint at 6, Bost v. Sam's East, Inc., No. 1:17-cv-1148 (M.D.N.C. Dec. 27, 2017) (asserting that EEOC issued a reasonable cause determination); Complaint at 3, Brown v. Mac's Convenience Stores LLC, No. 19-cv-5639 (N.D. Ill. Aug. 21, 2019) (noting that the EEOC found reasonable cause).

asserting termination because of transgender status.[214] The employer provided monetary relief, agreed to provide annual anti-discrimination training, and agreed to provide a letter of apology to the former employee.[215] In another instance, the EEOC resolved a gender identity claim in which a person alleged the employer barred her from access to her workplace after she informed her co-workers she intended to transition.[216] In addition to a monetary settlement, the employer also agreed "to modify its code of conduct to include gender identity as a protected basis in its anti-discrimination provisions" and to "provide training for all of its employees in the U.S. on gender identity discrimination."[217]

Although this Essay focuses on four specific ways the EEOC used its authority, these are not the only efforts the agency took during this time related to gender identity discrimination. For example, the EEOC also developed materials explaining gender identity discrimination and conducted training and outreach related to gender identity discrimination.[218]

III. Federal-Sector Adjudication

Title VII authorizes the EEOC to lead the federal government's workplace anti-discrimination efforts.[219] In this role, the EEOC serves as the "Chief EEO Officer for the Executive Branch."[220] Title VII has a separate federal-sector provision that applies to many federal workers. It requires that personnel actions "shall be made free from any discrimination based on race,

214. *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, *supra* note 175; *Rapid City Market to Pay $50,000 to Settle EEOC Finding of Discrimination Against Transgender Employee*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/newsroom/rapid-city-market-pay-50000-settle-eeoc-finding-discrimination-against-transgender [https://perma.cc/R8VR-FRBN].

215. *Rapid City Market to Pay $50,000 to Settle EEOC Finding of Discrimination Against Transgender Employee*, *supra* note 214.

216. *Ellucian to Pay $140,000 to Resolve Discrimination Against Transgender Employee*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/newsroom/ellucian-pay-140000-resolve-discrimination-against-transgender-employee [https://perma.cc/GFK9-LGTZ].

217. *Id.*

218. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, *supra* note 212; *Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/preventing-employment-discrimination-against-lesbian-gay-bisexual-or-transgender [https://perma.cc/58FV-URSH]; *Agencies Release Guide on LGBT Discrimination Protections for Federal Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/newsroom/agencies-release-guide-lgbt-discrimination-protections-federal-workers [https://perma.cc/MP59-J2DB].

219. *United States Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012–2016*, *supra* note 118.

220. *FY 2003 Performance and Accountability Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/fy-2003-performance-and-accountability-report [https://perma.cc/MQ44-L6XS].

color, religion, sex, or national origin."[221] Although the federal-sector provision contains different language than Title VII's main operative provisions, the words containing the protected traits are the same under both.

Congress gave the EEOC the power to enforce the federal-sector provision.[222] Part of that enforcement process allows appeal to the Commission.[223] Thus, the Commission has an adjudicatory role in some cases submitted through the federal-sector process. The EEOC's Office of Federal Operations, operating on behalf of the Commission, issues written decisions for these appeals.[224] If the Commission finds that discrimination has occurred, it can provide appropriate remedies.[225]

The EEOC issued several important federal-sector decisions in the gender identity context, especially *Macy v. Holder*.[226] This Part focuses on *Macy* because the *Macy* decision came first and because subsequent decisions addressed narrower issues and do not contain as much reasoning as *Macy*.

In 2012, the EEOC issued a decision in *Macy*, a federal-sector case.[227] In that decision, the EEOC held that Title VII protects many federal employees from discrimination because of their gender identity.[228] This decision played an important role in how the EEOC exercised its power to influence gender identity discrimination jurisprudence. The agency's federal-sector power is often overlooked.

The EEOC's role in federal-sector cases is important in several respects. First, Congress specifically gave the EEOC a role in interpreting Title VII's language when it gave the agency the authority to adjudicate certain federal-sector claims.[229] *Macy* provided the EEOC an opportunity to formally use this power and to announce its interpretation of Title VII's sex discrimination provision. When *Bostock* ignored *Macy*, it also ignored the power that Congress gave to the administrative agency to interpret the statute.

When the EEOC issued its opinion in *Macy v. Holder*, this allowed federal employees covered by the federal-sector provision to file sex

221. 42 U.S.C. § 2000e-16(a).

222. 42 U.S.C. § 2000e-16(b). The EEOC also has enhanced regulatory authority over the federal-sector provision. For the non-federal-sector provisions of Title VII, the agency does not have the authority to issue regulations on substantive issues. Instead, it can only issue procedural ones. 42 U.S.C. § 2000e-12(a). For the federal-sector provision, the EEOC has the authority to issue rules and regulations it deems necessary to carry out its responsibilities. 42 U.S.C. § 2000e-16(b).

223. 29 C.F.R. § 1614.401 (2023).

224. 29 C.F.R. § 1614.405(a) (2023).

225. *Id.*

226. Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

227. *Id.*

228. *Id.*; Feldblum, *supra* note 133, at 2.

229. 42 U.S.C. § 2000e-16(b); 29 C.F.R. §§ 1614.401(a), 1614.402(a) (2023).

discrimination claims under Title VII based on gender identity. Given the number of people covered by the federal-sector provision, this change alone is significant.

Finally, *Macy* provides a contrast to the methodology used in *Bostock*. It recognized the breadth of Title VII's main operative language and that the language is capable of multiple potential interpretations. It relied on numerous arguments to justify the outcome. One subset of these arguments demonstrated how court opinions heavily influenced the trajectory of gender identity discrimination law.

The EEOC issued this decision at an important time in the development of gender identity discrimination law. *Macy* was not the first decision to find that Title VII prohibited gender identity discrimination, but the decision acted as a catalyst to push the law in this area. *Macy* serves as an alternative model for *Bostock*, one that is more accurate and descriptive than any of the opinions in *Bostock*.

A. Macy*'s Facts*

A brief description of the facts in the *Macy* case provides context for the EEOC's actions and recognizes the important work that claimants and their attorneys play in advancing law. Mia Macy is a transgender woman who served as a police detective in Phoenix.[230] In December of 2010, Macy moved to San Francisco.[231] Her supervisor in Phoenix recommended that she apply for an open position in a crime laboratory operated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[232]

Macy spoke with the director of the lab via telephone.[233] At the time, Macy still presented as a man. According to Macy, the director assured Macy he was qualified for the job and that he would be able to attain the job, assuming he passed a background check.[234] The director also let Macy know that the job would be a civilian contractor job and would be filled through the outside contractor.[235] Macy checked back with the director in January.[236] Macy said the director reiterated that Macy would obtain the job subject to the background check.[237] The contractor responsible for hiring for the job

230. Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

reached out to Macy to start the paperwork for the position and started the background check process.[238]

In late March of 2011, Macy let the contractor know that he was transitioning to female.[239] Macy also asked the contractor to let the director of the lab know.[240] On April 3, the contractor let Macy know that it provided the agency with information about her transition.[241] Five days later, Macy received a letter from the contractor, stating that the open position at the crime lab had been eliminated for budget reasons.[242] Macy was suspicious about the quick turn of events. In May of 2011, she started the process for pursuing a discrimination claim.[243]

Macy took the first step in the federal-sector process by contacting an EEO counselor.[244] The EEO counselor told Macy that the crime lab position still existed and that another person was hired for it.[245] Macy believed that she did not receive the job because she was transitioning to a new gender.[246] The counselor told Macy that another individual received the job because that person was farther along in the background check process.[247]

In June, Macy took the next step in the process and filed a formal EEOC Complaint.[248] Macy alleged that the agency discriminated against her based on her "sex" and then noted that her complaint was related to "gender identity" and "sex stereotyping."[249] In a later letter, Macy's lawyer wrote, "'[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency],' and that the discrimination against Complainant was based on 'separate and related' factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity."[250]

There was one major procedural problem with Macy's claim: It was not clear whether the EEOC had authority to hear it. At the time, it was uncertain whether a federal employee or applicant could bring a claim for gender

238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at *2.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* The procedural history of Macy's claim was complicated. At the time she submitted her complaint, a separate process applied to gender identity discrimination claims than to other sex discrimination claims. *Id.* at *4.
250. *Id.* at *3.

identity discrimination under Title VII.[251] There was a separate Department of Justice adjudicatory system for such claims, but it fell outside of the purview of Title VII and also outside the EEOC's jurisdiction.[252]

Macy asked the EEOC to answer the jurisdictional question, which required the agency to determine whether gender identity discrimination violated Title VII. The EEOC decided that it did. The Office of Federal Operations writes most of the opinions handed down through the EEOC federal-sector adjudication process.[253] In a handful of cases each year, the Office of Federal Operations seeks a full vote of the Commission.[254] *Macy* was one of these handful of cases.[255]

B. Macy *as a Model*

On April 20, 2012, the EEOC found that when Title VII prohibits sex discrimination against federal employees, this includes gender identity discrimination.[256] This subpart restores *Macy*'s role in the development of federal gender identity discrimination law. It also provides another model of statutory interpretation, one that stands in stark contrast to claims made by the Justices in *Bostock*.

At the time the EEOC decided *Macy*, few courts had allowed Title VII gender identity claims, and sex stereotyping was the prevailing theory justifying those claims.[257] Just a few months before the EEOC issued its decision in *Macy*, the Eleventh Circuit had found that a public employer violates the Equal Protection Clause when it discriminates against a transgender individual.[258] The Eleventh Circuit relied heavily on sex stereotyping for its reasoning.[259]

In ruling on Macy's case, the EEOC invoked its obligations to enforce federal EEO laws and to lead "the Federal government's efforts to eradicate workplace discrimination" and "ensure that uniform standards be

251. Feldblum, *supra* note 133, at 23–24.

252. *Id.*

253. *Id.* at 2–3.

254. *Id.* at 2.

255. *Id.*

256. Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (Apr. 20, 2012). At that time, the Department of Justice had a separate process for evaluating gender identity claims that were outside the perceived scope of Title VII. *Id.* at *2.

257. Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 659–60 (S.D. Tex. 2008); Schroer v. Billington, 424 F. Supp. 2d 203, 211 (D.D.C. 2006); Kastl v. Maricopa Cnty. Comm. Coll. Dist., No. Civ.02–1531PHX–SRB, 2004 WL 2008954, at *2–3 (D. Ariz. June 3, 2004); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03–CV–0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003).

258. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

259. *Id.* at 1316–19.

implemented defining the nature of employment discrimination under the statutes we enforce."[260]

Unlike the Justices in *Bostock*, the EEOC never claimed that Title VII's language only allowed one potential outcome. Instead, the *Macy* opinion walked readers through various arguments about the meaning of that language.[261]

The most important arguments in *Macy* related to how court cases, including several Supreme Court cases, interpreted the language of Title VII. *Macy* drew heavily on the Supreme Court's reasoning in *Price Waterhouse*. The EEOC relied on the case for the idea that the word "sex" in Title VII refers to both biological sex and gender.[262] As the EEOC recounted:

> If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.[263]

Price Waterhouse also recognized that sex stereotyping violates Title VII.[264] The *Macy* decision noted this feature of *Price Waterhouse*.[265] The EEOC then pulled together the case law after *Price Waterhouse* related to transgender discrimination and found that since that case, "courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex' in scenarios involving transgender individuals."[266]

The EEOC also cited three appellate court cases, one that had addressed the issue under Title VII and two that addressed transgender discrimination under other federal laws.[267] The EEOC discussed *Schwenk v. Hartford*, a case in which the Ninth Circuit found that if a prison guard sexually assaulted a pre-operative male-to-female transgender prisoner because of that status, the assault violated the Gender Motivated Violence Act (GMVA).[268]

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260. *Macy*, 2012 WL 1435995, at *4.

261. The EEOC also noted that Title VII does allow sex to be used in some decisions. *Id.* at *6. Title VII has a provision that allows an employer to use sex when it is a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e)(1).

262. *Macy*, 2012 WL 1435995, at *5.

263. *Id.* at *6.

264. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989).

265. *Macy*, 2012 WL 1435995, at *6.

266. *Id.* at *7.

267. *Id.* at *5 (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)).

268. *Id.* at *7 (discussing and citing *Schwenk*, 204 F.3d at 1201–02).

The EEOC also cited the Sixth Circuit opinion in *Smith v. City of Salem*, the first federal appellate court to hold that Title VII prohibited gender identity discrimination.[269] Although the Sixth Circuit opinion focused on sex stereotyping, the EEOC emphasized that in her complaint filed with the trial court, the plaintiff had alleged her employer discriminated against her "both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual."[270] The EEOC also emphasized that *Smith* stood for the proposition that a person who fails to either act or identify with their gender had a Title VII claim.[271]

Finally, the EEOC relied on *Glenn v. Brumby* from the Eleventh Circuit.[272] The EEOC focused on the evidence in *Brumby*, noting that the supervisor in that case testified that he made the decision to fire the plaintiff "based on his perception of Glenn as 'a man dressed as a woman and made up as a woman,' and admitted that his decision to fire her was based on 'the sheer fact of the transition.'"[273] The EEOC characterized the Eleventh Circuit as holding that such testimony provided "'ample direct evidence' to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her."[274]

The EEOC also pulled together what it called "a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex."[275]

However, *Macy* does not rest solely on existing interpretations of Title VII or *Price Waterhouse*, instead setting forth an expansive reading of this case. The EEOC reasoned, "Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms."[276]

Macy embraced sex stereotyping as a way to prove sex discrimination, but importantly framed it as a form of proof, rather than as a separate claim. In *Macy*, the EEOC recognized that a plaintiff can establish a sex discrimination claim based on gender identity "regardless of whether an employer discriminates against an employee because the individual has

269. *Id.* at *5; Wittmer v. Phillips 66 Co., 915 F.3d 328, 336 (5th Cir. 2019) (Ho, J., concurring).

270. *Macy*, 2012 WL 1435995, at *8 (quoting *Smith*, 378 F.3d at 571 (emphasis added)).

271. *Id.*

272. *Id.* at *8–9 (citing Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011)). Glenn did not proceed under Title VII and instead argued constitutional violations. *Brumby*, 663 F.3d at 1313.

273. *Id.* at *8 (quoting *Brumby*, 663 F.3d at 1320–21).

274. *Id.* (quoting *Brumby*, 663 F.3d at 1321).

275. *Id.* at *9.

276. *Id.* at *6.

expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person."[277] The EEOC noted:

> Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.[278]

The EEOC noted that Macy could prevail by "showing that she did not get the job . . . because the employer believed that biological men should consistently present as men and wear male clothing."[279] She could also prove her case by showing "the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman."[280] The EEOC also noted that this latter theory would not need to depend on any evidence related to gender stereotyping. This argument is important because it cut against the grain of the existing Title VII case law, which largely required the plaintiff to establish a gender identity case through stereotyping evidence.

The EEOC recognized that Congress was not explicitly thinking about transgender discrimination when it enacted Title VII. Nonetheless, the EEOC argued that the Supreme Court's opinions in *Oncale v. Sundowner Offshore Services, Inc.*[281] and *Newport News Shipbuilding & Dry Dock Co. v. EEOC*[282] stand for the idea that the text of the statute is not bound by the "principal evil" Congress addressed but can extend to "any kind" of sex discrimination "that meets the statutory requirements."[283]

In *Oncale*, the Supreme Court held that Title VII prohibited same-sex sexual harassment, even though the Court recognized that Congress did not contemplate the possibility of same-sex sexual harassment at the time it enacted Title VII.[284] As the Court noted in *Oncale*, "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover

277. *Id.* at *7.
278. *Id.* at *10 (citations omitted).
279. *Id.*
280. *Id.*
281. 523 U.S. 75 (1998).
282. 462 U.S. 669 (1983).
283. *Macy*, 2012 WL 1435995, at *10.
284. *Oncale*, 523 U.S. at 79.

reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[285] Thus, the EEOC reasoned, Title VII's prohibition on discrimination because of sex must extend to any sex-based discrimination that meets the statutory requirements.

In *Newport News*, the Supreme Court held that an employer's health care plan that provided less extensive pregnancy benefits for the spouses of employees than for employees violated Title VII.[286] In so holding, the Court rejected the idea Title VII should be limited to the "specific problem that motivated its enactment."[287]

Macy also considered a practical problem with reading the term "sex" to only include biology. If the courts interpreted Title VII in this limited way, "the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa."[288] *Macy* argued that if transgender individuals could not bring claims under Title VII, this would undermine sex stereotyping for all men and women under Title VII.

The EEOC also analogized gender discrimination to religious discrimination through a hypothetical. The EEOC imagined a scenario in which an employer assumed that an employee was a Muslim and terminated her based on that belief, even though the employee was actually Christian. In such a case, the EEOC reasoned, there "would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype."[289]

It would be a mistake to think that *Macy* was derivative of the earlier circuit court cases. Instead, *Macy* pulled together a more cogent and comprehensive framework than any of these cases individually and it refused to view sex stereotyping as the primary basis for gender identity discrimination claims under Title VII. *Macy* recognized that stereotyping was one of many ways to establish a gender identity claim.

As discussed in more detail below, *Macy* also provides a blueprint for an alternative way to approach statutory interpretation. This alternative way recognizes the EEOC as an entity to which Congress gave statutory authority to interpret the statute. It is a way that does not claim that the text of Title VII is only capable of one outcome. *Macy* explicitly recognized that Supreme Court precedent and the federal courts' response to that precedent illuminated Title VII's meaning.

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285. *Id.*
286. *Newport News*, 462 U.S. at 676.
287. *Id.* at 679.
288. *Macy*, 2012 WL 1435995, at *6.
289. *Id.* at *11.

Unfortunately, it is difficult to read *Macy* and immediately grasp the EEOC's contributions. *Macy* relied on a multi-faceted approach, weaving together arguments about statutory text, practical issues, prior case law, and theory. This approach obscures some of *Macy*'s key contributions. The agency does not claim what it is adding to the jurisprudence. This is not necessarily a criticism of the agency, as it makes persuasive sense to ground arguments using existing case law. It is just that this approach makes it hard to see the value the EEOC added.

C. Other Federal-Sector Decisions

Macy was not the only EEOC federal-sector decision; however, it was the broadest decision and contained the most detailed legal reasoning. Here is a brief discussion of other significant EEOC decisions related to gender identity.

In its 2013 decision in *Jameson v. Donahoe*, the EEOC held that "supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with in employee records and in communications with and about the employee."[290] The EEOC further held that "[i]ntentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."[291] In 2014, the agency held that a plaintiff may state a claim for sex discrimination when a federal employer refused to change the employee's name in a computer system so that the computer system reflected the plaintiff's new name.[292]

In 2015, the EEOC issued its decision in *Lusardi v. McHugh*.[293] Tamara Lusardi complained that a federal agency violated Title VII when it "restricted her from using the common female restroom, and a team leader [] intentionally and repeatedly referred to her by male pronouns and made hostile remarks."[294]

The EEOC held that the agency violated Title VII.[295] It relied heavily on its prior decision in *Macy*.[296] The EEOC found that the employee had the right under Title VII to use the restroom consistent with her gender.[297] Again

290. Jameson v. Donahoe, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013).

291. *Id.*

292. Eric S. v. Shinseki, EEOC Appeal No. 0120133123, 2014 WL 1653484, at *2 (Apr. 16, 2014).

293. Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *1 (Apr. 1, 2015).

294. *Id.*

295. *Id*. at *10.

296. *Id.* at *7.

297. *Id*. at *8.

citing *Macy*, the EEOC held that Title VII "prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."[298] The EEOC also noted that Title VII prohibits segregation because of a protected trait.[299]

In 2016, the agency held that a person could state a viable harassment claim under Title VII if a federal employer prevents the individual from dressing consistently with their chosen gender.[300]

These cases demonstrate the EEOC's efforts to interpret the federal-sector provision of Title VII to prohibit discrimination because of gender identity. *Bostock* barely mentioned them.

IV. Main Themes

The case study describes numerous EEOC efforts related to gender identity discrimination from 2011 until *Bostock*. Yet, the Supreme Court failed to recognize these efforts in *Bostock*, largely erasing the EEOC from the outcome.

In *Bostock*, the Court pretended that the interpretive enterprise is between Congress and the courts, even when Congress gave the administrative agency extensive powers related to Title VII. The Court especially failed to appreciate the EEOC's role in the federal-sector context, where Congress gave the agency the power to adjudicate federal-sector claims.

This Part explores two key ideas. First, is a method of statutory interpretation valid if it ignores the efforts of an agency like the EEOC? Second, the EEOC's efforts and its decision in *Macy* rebuke key pillars of both the majority and dissenting opinions in *Bostock*. At the same time, *Macy* provides an alternative approach to statutory interpretation that can serve as a model for advocates and the courts. This alternative account demonstrates that the Court's own precedents fundamentally altered the textualist inquiry.

A. The EEOC's Erasure in Bostock

Bostock has unleashed a flurry of commentary about textualism.[301] To date, no one has focused on how *Bostock* erased the EEOC's efforts related to gender identity discrimination. Modern textualism is a methodology that attempts to hide the contributions of agencies in the development of law. This

298. *Id.* at *9.

299. *Id.* at *10. The EEOC stated that the bathroom restriction segregated the plaintiff from "other persons of her gender." *Id.*

300. Hillier v. Lew, EEOC Appeal No. 0120150248, 2016 WL 1729907, at *3 (Apr. 21, 2016).

301. *See supra* note 7 (listing articles discussing progressive textualism).

issue is especially important given recent turns toward progressive textualism, especially after *Bostock*.[302]

Indeed, hiding the EEOC is one of the central features of *Bostock*. All of the opinions rest on the conceit that the text of Title VII is driving the outcome and that the text of Title VII permits only one interpretation. This is not true. The language of Title VII is broad, and Congress did not define it precisely.[303] Indeed, as discussed throughout this Essay, Congress intended for the EEOC to play a major role in the statute's enforcement and development, a role that only grew over time.[304]

It is especially understandable why the majority opinion hid the EEOC's efforts. The majority opinion strangely rested on a claim that Title VII's language is clear and allows only one potential outcome.[305] The EEOC's efforts in the gender identity context are a stark rebuke to the claims made in *Bostock*'s majority opinion. If the meaning of Title VII's sex discrimination was so clear just based on the text, why did the nation's leading enforcer of that statute need to engage in so many efforts to elucidate that clear meaning?

The majority opinion would have been stronger if it had admitted the potential ambiguity in Title VII's statutory language and then explained why the majority chose one of many potential outcomes.

This way of proceeding is also consistent with how Congress chose to structure responsibility for Title VII. In *Bostock*, the Supreme Court acted as if responsibility for Title VII is only allocated between Congress and the courts. However, this ignores the power that Congress explicitly provided the agency to interpret and enforce Title VII, especially in the federal-sector context.

Both the majority and dissenting opinions ignore this foundational concept about Title VII. It was a concept that the Supreme Court understood better in the 1970s and 1980s. While the Supreme Court did not always follow the EEOC in these early decades after Title VII's passage, it often referred to the agency's interpretations and efforts as it interpreted the statute.[306] Whether the current Court acknowledges it or not, Congress chose for the EEOC to play an important role in the Title VII context.

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302. Tobia et al., *supra* note 7, at 1493; Tracz, *supra* note 7, at 378.

303. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 48 (1995) (arguing that "[a]ttention to the language of the statute may therefore lead to something of a paradox—the stricter a constructionist one is, the more seriously one takes statutory language, the more inescapably one is led to a quite radical view of the effect of Title VII").

304. 42 U.S.C. §§ 2000e-4, 2000e-5; 2000e-6(c); 2000e-16(b); 29 C.F.R. §§ 1614.401(a), 1614.402(a) (2023).

305. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

306. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (finding the EEOC's construction of Section 703 comports with congressional intent that employment tests must be job

The Supreme Court's first opinion in the sexual harassment context demonstrates this fact about Title VII and the EEOC. Title VII does not contain the words "sexual harassment." Instead, it prohibits employers from engaging in certain conduct, including discriminating against a person in the "terms, conditions, or privileges" of employment because of sex.[307]

The courts struggled with whether plaintiffs could prevail on a Title VII claim by showing evidence of sexual harassment.[308] In *Meritor Savings Bank FSB v. Vinson*, the Supreme Court recognized that Title VII prohibited sexual harassment.[309] Justice William Rehnquist authored the *Meritor* opinion.

The opinion recited the language of Title VII. It noted that the words "'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[310] The opinion discussed the EEOC's efforts related to sexual harassment for several pages and how courts had adopted the EEOC's reasoning.[311] The opinion specifically noted that the Guidelines issued by the EEOC related to sexual harassment were an "administrative interpretation of the Act by the enforcing agency."[312] Rather than viewing Title VII's language as a detailed blueprint, *Meritor* viewed the language as broad and also in need of further clarification by the EEOC and courts over time.

The methodological change between *Meritor* and *Bostock* is stark. It demonstrates modern textualism's efforts to diminish the administrative state. This is especially problematic in the context of Title VII, where Congress explicitly gave the EEOC responsibility for enforcing the statute and, in the federal-sector context, for interpreting its provisions. None of the opinions in *Bostock* recognize this feature of Title VII, a feature that the Supreme Court understood as it interpreted Title VII in its early decades.

Under the now-defunct *Chevron* doctrine, courts would defer to an agency's construction of a statute when the underlying statutory regime was silent or ambiguous regarding the particular question, when the agency's interpretation was permissible, and when Congress had granted authority to the agency to interpret the statute.[313] However, *Chevron* focused on agency regulations and not the many other ways that Congress gave agencies power

related); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65–67 (1986) (holding that EEOC Guidelines are fully consistent with existing case law).

307. 42 U.S.C. § 2000e-2(a)(1).

308. Franklin, *supra* note 4, at 189–91.

309. *Meritor*, 477 U.S. at 64.

310. *Id*. (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

311. *Id.* at 65–67.

312. *Id.* at 65 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971)).

313. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

that might affect the interpretive enterprise.[314] Post-*Loper Bright*, it is important not to forget that agency power related to interpretation is not centered solely on the agency's ability to issue regulations.

Even *Skidmore* deference poses similar problems. Under *Skidmore*, a court will defer to an agency's interpretation of a statute after looking at a number of factors and determining that the agency's reasoning is persuasive, even if the court is not technically required to defer to it.[315] The universe of sources courts tend to review includes less formal documents, such as guidance issued by the agency.[316]

What both these doctrines miss is that agency interpretation is happening in a number of different ways. For the EEOC, this includes its amicus briefs, charge processing, litigation, and its authority in the federal-sector context. It is unlikely that Congress wanted the courts to ignore all of these efforts.

What is especially strange about the *Bostock* opinions is that, outside of the gender identity discrimination context, they rely on interpretations of Title VII that were contested and evolved over time and that did not approach Title VII through a modern textualist lens. In some of these areas, the EEOC played an important role in the eventual outcome. For example, in the majority opinion, Justice Gorsuch relied on the EEOC's efforts related to sex-segregated advertising and harassment.[317] Justices Alito and Kavanaugh both agreed that sexual harassment is covered by Title VII.[318]

While the Justices are all content to rely on these past contested issues, they did not admit that the question before them in *Bostock* presented similar ambiguities and that the EEOC played an important role in understanding the language of Title VII.

Making arguments based on the text of a statute is not itself problematic; however, using text is not the only marker of textualism. It is critical to

314. Ryan H. Nelson, *Sexual Orientation Discrimination Under Title VII After* Baldwin v. Foxx, 72 WASH. & LEE L. REV. ONLINE 255, 277 (2015) (arguing that an EEOC decision in the sexual orientation context is not entitled to *Chevron* deference); Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?*, 32 ABA J. LAB. & EMP. L. 93, 94 (2016) (discussing how often the Supreme Court has deferred to the EEOC); James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 500 (2014) (conducting a review of deference in discrimination cases); Laura Anne Taylor, *A Win for Transgender Employees:* Chevron *Deference for the EEOC's Decision in* Macy v. Holder, 2013 UTAH L. REV. 1165, 1184 (2013) (arguing that *Macy* is entitled to *Chevron* deference); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 389–90 (2010) (noting the Supreme Court's and EEOC's similar interpretations of Title VII in some areas and disagreements in others).

315. *Skidmore*, 323 U.S. at 140.

316. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1942 (2006).

317. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1752 (2020).

318. *Id*. at 1774 (Alito, J., dissenting); *id*. at 1835 (Kavanaugh, J., dissenting).

understand foundational principles of any form of textualism, whether progressive or not. This is especially important in the context of Title VII and federal discrimination law, in which several key concepts such as sexual harassment, reverse discrimination, and same-sex harassment might not be part of the law if the Supreme Court used certain strains of textualism to interpret the statute.

Bostock is not only about textualism. It is also a statement about how the Court perceives its role in relation to the EEOC. As scholars call for a new progressive textualism, they will need to grapple with this feature of *Bostock*.

Indeed, all forms of textualism need to address a foundational issue related to statutes like Title VII. When Congress produces a broad statute, gives a federal agency increasing authority to enforce and interpret that statute, and does so in a pre-textualist era, is it likely that Congress intended for that agency's efforts to play no role in statutory interpretation? Is it a good idea from a practical perspective for the Court to ignore the EEOC?

B. Restoring the EEOC

While the language of Title VII supports the outcome in *Bostock*, it also supports multiple possible interpretations. Both the majority and dissenting opinions in *Bostock* want to claim the mantle of possessing the one clear answer and all the opinions suffer as a result. The EEOC had played a significant role in the question resolved in *Bostock*. Yet, the majority opinion barely mentioned the EEOC's role in developing gender identity discrimination law.

This subpart highlights important information missing from the *Bostock* opinion. This enhanced timeline focuses on cases decided in the employment discrimination context or in closely related areas. It restores the EEOC's role in the development of gender identity law and provides a more complete view of the role that the federal agency played in this area. It also highlights the important role that Supreme Court precedent played in the outcome.

In doing so, the addendum provides a more nuanced picture of how legal change happens. This version of events still focuses heavily on certain legal actors, such as the courts and the EEOC. As discussed throughout this Essay, legal change occurs through numerous vectors and with additional actors, such as plaintiffs, their attorneys, and even the employers that implemented anti-discrimination policies that included gender identity protections when it was not clear whether Title VII prohibited such conduct. Additionally, this

story also includes advocates and others. Focusing on the EEOC does not diminish the efforts of others related to gender identity discrimination.[319]

In 1983, the first federal trial court held that Title VII prohibited discrimination because of transgender status,[320] but that decision was quickly reversed by the United States Court of Appeals for the Seventh Circuit a year later.[321] The outcome in the Seventh Circuit was consistent with the general trajectory of the law at the time.[322] In the late 1970s and early 1980s, several federal appellate courts held that Title VII did not prohibit discrimination because of gender identity.

In 1989, the Supreme Court issued its opinion in the case *Price Waterhouse v. Hopkins*.[323] In *Price Waterhouse*, the Court held that an employer discriminates against an employee when it makes its employment decisions based on gender stereotypes.[324] The Court noted, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[325]

Almost a decade later, the Court, in *Oncale v. Sundowner Offshore Servs., Inc.*, held that Title VII prohibited same-sex sexual harassment.[326] In doing so, the Court acknowledged that Congress was likely not focusing on the problem of men sexually harassing other men at work when it drafted Title VII. Nonetheless, the Court reasoned that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[327]

Neither *Price Waterhouse* nor *Oncale* explicitly addressed gender identity discrimination. Nonetheless, they are both important to the development of gender identity discrimination jurisprudence. In the early 2000s, courts began to recognize that the judicial approach to Title VII and gender identity taken in earlier cases was "overruled by the logic and

319. For additional historical reading, see generally Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEXAS L. REV. ONLINE 83 (2019).

320. Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 839 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984). This history also intertwines with other areas of law. *See* David M. Neff, *Denial of Title VII Protection to Transsexuals:* Ulane v. Eastern Airlines, Inc., 34 DEPAUL L. REV. 553, 561–65 (1985) (discussing changes in law related to gender identity).

321. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984).

322. Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749–50 (8th Cir. 1982) (per curiam); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977); Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 46 (1995) (noting that courts had held Title VII does not prohibit discrimination because of transgender status).

323. 490 U.S. 228 (1989).

324. *Id.* at 251.

325. *Id.*

326. 523 U.S. 75, 79 (1989).

327. *Id.*

language" of *Price Waterhouse*.[328] In 2004, in *Smith v. City of Salem*, the Sixth Circuit held that a transgender individual could proceed on a sex discrimination claim under Title VII based on assertions that the employer acted because the employee failed to conform to gender stereotypes.[329] The Sixth Circuit relied on a sex stereotyping theory of discrimination in reaching this result.[330] The Sixth Circuit reiterated this holding in 2005 in *Barnes v. City of Cincinnati*.[331] A handful of federal trial courts also allowed gender identity claims to proceed under Title VII based on a sex stereotyping theory.[332] These outcomes were not uniform.

This is the legal landscape that existed when the EEOC's interventions started. In October of 2011, the Commission authorized the EEOC's General Counsel to file an amicus brief in *Pacheco*.[333] Even though the district court denied the agency's motion to file the brief, *Pacheco* played an important role in the legal development of Title VII. Not only did it show the EEOC's changed position on gender identity discrimination, but it also embraced a multi-pronged approach to interpretation. The safe argument at the time would have been to cling to a sex stereotyping theory, the theory that was overwhelmingly accepted by the few courts that had allowed gender identity claims to proceed.

While the EEOC's amicus brief used a sex stereotyping theory,[334] the agency also argued that discriminating against people because of their transgender status was sex discrimination.[335] The agency's brief also brought together recent case law from Title VII and other contexts to support the idea that Title VII prohibited gender identity discrimination.[336]

328. Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (recognizing a claim under the Gender Motivated Violence Act); *see also* Rosa v. West Bank & Trust Co., 214 F.3d 213, 216 (1st Cir. 2000) (upholding claim under the Equal Credit Opportunity Act).

329. Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004).

330. *Id.* at 573–75.

331. 401 F.3d 729, 737 (6th Cir. 2005).

332. Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 659–661 (S.D. Tex. 2008) (describing case law); Schroer v. Billington, 424 F. Supp. 2d 203, 211 (D.D.C. 2006) Kastl v. Maricopa Cnty. Comm. Coll. Dist., No. Civ.02–1531PHX–SRB, 2004 WL 2008954, at *2–3 (D. Ariz. June 3, 2004); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03–CV–0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003).

333. Feldblum, *supra* note 133, at 22 (noting the Commission approved the amicus brief in *Pacheco*).

334. Brief of U.S. Equal Emp. Opportunity Comm'n as Amicus Curiae in Opposition to Summary Judgment at 4, Pacheco v. Freedom Buick GMC Truck, Inc., No. 7:10-CV-116-RAJ (W.D. Tex. Oct. 17, 2011), 2011 WL 5410751.

335. *Id.*

336. *Id.* at 4–5.

The EEOC issued *Macy v. Holder* on April 20, 2012.[337] *Macy* changed the way the EEOC interpreted the federal-sector provision of Title VII; and given the number of workers that fall within this protection, the change alone was significant. However, *Macy*'s power lies not in its impact in federal-sector law, but also on its overall contributions to gender identity jurisprudence.

Macy made important contributions to the development of gender identity discrimination law. *Macy* emphasized that discrimination based on transgender status alone violated Title VII, even if the discrimination did not involve gender stereotyping.[338] This is significant because the cases prior to *Macy* largely conceived of gender identity claims as separate claims that could only be based on a sex stereotyping theory.

Macy added the EEOC's voice to the still small, but growing chorus of published decisions advocating the position that Title VII included discrimination based on gender identity. Several courts relied on *Macy* and its reasoning to hold that Title VII prohibits discrimination because of transgender status.[339] One court noted that when the EEOC's position was persuasive, it should adhere to the agency's position.[340]

Macy was not the EEOC's only effort. In the federal-sector context, the agency also issued opinions related to appropriate pronoun use,[341] how refusing to change a person's name might constitute sex discrimination,[342] and bathroom use.[343]

The EEOC's efforts in other areas complemented the federal-sector efforts. Although it is unlikely that the Supreme Court would ever recount all the agency's efforts, in *Bostock*, it should have at least discussed how the only gender identity case before it originated because the EEOC filed suit.

Perhaps most importantly, *Macy* demonstrates a major flaw in *Bostock*—how the Court treats its own precedent. *Macy* relies heavily on *Price Waterhouse v. Hopkins*, *Oncale v. Sundowner Offshores Servs., Inc.*, and other cases that created serious tensions with certain interpretations of

337. Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

338. *Id.* at *7.

339. Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 524, 527 (D. Conn. 2016); Doe v. Arizona, No. CV-15-02399-PHX-DGC, 2016 WL 1089743, at *2 (D. Ariz. Mar. 21, 2016); Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016).

340. *Roberts*, 215 F. Supp. 3d at 1014 n.103.

341. Jameson v. Donahoe, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013).

342. Eric S. v. Shinseki, EEOC Appeal No. 0120133123, 2014 WL 1653484, at *2 (Apr. 16, 2014).

343. Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *1 (Apr. 1, 2015).

Title VII in the gender identity context.[344] *Macy* takes the import of the Court's holdings seriously, unlike *Bostock*. By trying to maintain the conceit that the words Congress used in Title VII are only capable of one meaning, the majority and dissenting opinions fail to grapple with how their own opinions impacted how people interpreted Title VII's language. This is especially true of *Price Waterhouse*.

Justice Alito's dissenting opinion in *Bostock* is especially problematic in this regard. Justice Alito would grant that some transgender plaintiffs would be able to prevail on a sex stereotyping claim based on sex,[345] but it is not clear why such a claim would exist under his chosen definition of sex as about biological sex.[346]

While the outcome in *Bostock* is important, much of its reasoning is unsatisfactory. It would have benefitted from a more accurate view of the breadth of Title VII's language, how little guidance Congress provided about that language, and how the Court's own precedent affects the way people understand that language. Given that the modern form of textualism did not take hold until recently, the Court will need to address how it will marry its views about language with decades of precedent that, while consistent with the text of Title VII, is not driven by the underlying tenets of modern textualism.

When it chose to ignore the EEOC, the Court in *Bostock* made an important statement about modern textualism and administrative agencies. Unfortunately, this view also yielded an impoverished interpretation of Title VII and an inaccurate view of how legal change happens.

Addressing this issue is even more important post-*Loper Bright*.[347] In that opinion, the Supreme Court held that it would no longer use the *Chevron* doctrine to defer to administrative agency regulations and that the Court's role in statutory interpretation was to determine the "best" interpretation of the statute.[348] In doing so, the Court mentioned that while it would no longer defer, it would respect agency interpretations, at least in some instances.[349] It also mentioned that it should evaluate whether an agency's views are reasonable and within the bounds of the statute.[350] However, it is difficult to understand how the Supreme Court respects an agency and arrives at the "best" interpretation, if it does not even mention the agency's interpretation of the statute. The textualist methodology contributes to this lack of respect.

344. Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5–10 (Apr. 20, 2012).

345. *Bostock*, 140 S. Ct. at 1764 (2020) (Alito, J., dissenting).

346. *Id.* at 1756–57 (Alito, J., dissenting).

347. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

348. *Id.* at 2263, 2266. *But see id.* at 2297 (Kagan, J., dissenting) (disagreeing with this view).

349. *Id.* at 2257–58 (majority opinion).

350. *Id.* at 2263.

At a minimum, this Essay advocates that in the Title VII context, respect for Congress demands that courts at least recount relevant agency actions, whether in regulations or outside of them. If the Court is truly searching for the best answer, it should at least mention the views of the EEOC, the agency that Congress appointed to be the expert in this area.

Of course, doing so will often undermine the supposed clarity of the textualist methodology and lead to a different view of statutes as documents. In *Loper Bright*, the Court imagined statutes as possessing only one possible meaning on each contested statutory interpretation issue.[351] For statutes like Title VII, this is not an accurate view. While Title VII is unambiguous on certain questions, its language is often broad and also undefined by Congress.[352] Congress thus delegated at least some of the interpretative enterprise to the EEOC. While it is correct to say that courts will be required to interpret the statute and ultimately choose one interpretation for each contested issue, it is not correct to view the statute as only capable of one true meaning for these issues. Some portions of Title VII allow multiple outcomes. The Court should recognize this and show why it is picking one outcome over other possible outcomes. When it rejects the EEOC's view, it should at least respect the agency enough to explain why.

Conclusion

It is important to reclaim and restore the EEOC's role related to gender identity discrimination. While the EEOC was neither the first nor only actor in this space, its multi-faceted efforts contributed to social change. Importantly, Congress gave the EEOC a key role to play in the development of Title VII, especially in the federal-sector context. This role is entitled to acknowledgement, if not respect, by the Supreme Court.

Recent academic commentary has largely positioned *Bostock* as a battle about competing forms of textualism. This is true. It is also a story of erasure. The Supreme Court ignored the role that Congress gave the EEOC to enforce and interpret the statute. Progressive and non-progressive textualism must explain why ignoring the agency is consistent with congressional intent, as well as consider whether erasing the agency leads to an impoverished view of language and meaning creation.

351. *Id.* at 2266.

352. 42 U.S.C. §§ 2000e-4, 2000e-5.