PRESCRIBING BASED ON SEX: TITLE VII AND THE EXCLUSION OF GENDER-AFFIRMING CARE IN LANGE V. HOUSTON COUNTY

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This Article explores Lange v. Houston County*, an Eleventh Circuit case with significant implications for Title VII's prohibition against sex-based discrimination and for the accessibility of gender-affirming healthcare. Central to the case are two pivotal issues: whether Title VII's protection against discrimination "because of sex" extends to transgender individuals, and whether employers can lawfully exclude coverage for medically necessary "sex change" surgeries. By analyzing relevant Supreme Court precedent and critically examining the parties' arguments, this Article concludes that excluding gender-affirming treatment solely because it is sought for transition purposes constitutes unlawful sex discrimination under Title VII.*

Introduction

A transgender employee diagnosed with gender dysphoria is prescribed vaginoplasty as a medically necessary treatment. Seeking to rely on her employer-sponsored health insurance, she submits a claim for coverage – only to have it denied based on a blanket exclusion for gender-affirming care. Its exclusion raises a critical legal question: does the denial of coverage for medically necessary, transition-related treatment constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964?

In this paper, I examine whether such exclusions amount to unlawful sex discrimination under Title VII. Specifically, I explore two core issues: *first,* the meaning of "because of sex" under Title VII and its application to transgender status; and *second,* whether Title VII prohibits employers from excluding "sex change" surgeries from health insurance coverage. Part I of this paper explores the Supreme Court precedent in this area, drawing upon *Bostock v. Clayton County*, *Gilbert v. General Electric*, *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, and *Young v. United Parcel Service, Inc.* Part II turns to *Lange v. Houston County,* a recent case that presents this issue. Lastly, Part III offers my analysis of the lower court's reasoning and argues that excluding medically necessary treatment in-part because it is used for gender transition purposes constitutes sex discrimination under Title VII.

I. Relevant Supreme Court Precedent

Although the Supreme Court has yet to squarely address whether Title VII prohibits the exclusion of gender-affirming care from employer-sponsored health

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insurance, several of its decisions provide important guidance on this issue. This Section explores four such precedents. First, in *Bostock v. Clayton County*, the Court held that Title VII's prohibition on discrimination "because of sex" includes discrimination based on transgender status or gender identity.[2] *Bostock* thus provides the most recent framework for evaluating facial discrimination under Title VII and, as a requisite matter, allows transgender individuals to invoke Title VII protections when discriminated against due to their gender identity.[3] Second, in *General Electric v. Gilbert*, the Court remanded on an employer-sponsored health insurance plan that excluded pregnancy-related disabilities, holding that an exclusion does not constitute sex discrimination so long as it is justified by a legitimate, non-discriminatory reason.[4] *Gilbert* was later overturned by the Pregnancy Discrimination Act, which prevents employers from discriminating against sex-based health conditions, even where an employee lacks a comparator. Next, in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, the Court held that an employer-sponsored insurance plan that offered expansive pregnancy-related benefits to female employees, while providing less comprehensive coverage to the spouses of male employees, unlawfully discriminated against male employees in violation of Title VII.[5] This decision clarified that "health insurance and other fringe benefits" fall within Title VII's protection of "compensation, terms, conditions, or privileges of employment."[6] Lastly, in *Young v. United Parcel Service, Inc.,* the Court applied Title VII's traditional burden-shifting framework to a disability policy, and clarified that employers retain discretion in crafting accommodation and health policies so long as their reasons are non-discriminatory.[7]

A. *Bostock* & The Meaning of "Because of Sex"

Bostock v. Clayton County, Georgia consolidated cases involving several employees who were terminated by their employers due to their sexual orientation or transgender status.[8] Each plaintiff filed suit under Title VII, alleging that such termination constituted discrimination "because of sex." The Supreme Court agreed, finding that Title VII's prohibition of discrimination "because of sex" encompasses discrimination based on sexual orientation and transgender status.[9]

The majority opinion in *Bostock*, authored by Justice Gorsuch, began with an analysis of the "ordinary public meaning" of Title VII's prohibition that it is "unlawful... for an employer to fail or refuse to hire or to discharge any individual, or

[2] 590 U.S. 644 (2020).
[3] *Id.*
[4] 429 U.S. 125 (1976).
[5] 462 U.S. 699 (1983).
[6] *Id.* at 682.
[7] 575 U.S. 206, 229 (2015).
[8] 590 U.S. 644 at 653.
[9] *Id.*

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's... sex."[10] The Court accepted the employers' narrow definition of "sex," agreeing that it refers to the binary of male and female as determined by reproductive anatomy at birth.[11] However, the majority focused additionally on the phrase "because of," concluding that it incorporates the "simple" and "traditional" but-for causation standard: whether the outcome would have been different but for the individual's sex.[12] The Court explained that this test requires changing one variable at a time to determine if the outcome shifts.[13] It also emphasized that an event may have multiple but-for causes, and that Title VII protects individuals, not groups.[14] Applying this logic, the Court articulated a rule for facial discrimination: "an employer violates Title VII when it intentionally fires an individual employee based *in part* on sex."[15]

The majority then applied its reasoning to the facts before it. With respect to both sexual orientation and gender identity, the Court concluded that it is "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[16] Both necessarily involve sex-based considerations, as such discrimination relies on stereotypes about how individuals should behave and would not occur "but for" an individual's sex.[17] A transgender employee, the Court explained, would not have faced discrimination had their gender identity aligned with their birth-assigned sex—making sex a but-for cause of the adverse employment action.[18] Regarding sexual orientation, if the employee were of a different sex, the employer would not object to the relationship.[19] In both cases, the Court concluded, the employer's adverse action "inescapably intends to rely on sex in its decision-making," thus violating Title VII.[20] Incorporating this reasoning, the majority rejected the defendants' assertion that they did not discriminate because they would treat LGBTQIA+ men and women equally.[21] The majority clarified that Title VII prohibits discrimination against the *individual*, so the probative analysis was not whether the employer treated "males and

[10] *Id.* at 655. *See* 42 U.S.C. § 2000e.
[11] 590 U.S at 655. *See* 42 U.S.C. § 2000e.
[12] 590 U.S. at 655.
[13] *Id.* at 656, 658.
[14] *Id.*
[15] *Id.* at 660 (emphasis added).
[16] *Id.*
[17] 590 U.S. at 600.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 661.
[21] *Id.*

females comparably as groups."[22] That the employer in-part relied on sex when discharging the employees was sufficient.[23]

B. *Newport News*, *Gilbert*, *Young*, & Pregnancy Benefits

Newport News Shipbuilding and Dry Dock Co. v. EEOC involved a challenge to an employer-sponsored health insurance plan that provided less favorable pregnancy-related benefits to the spouses of male employees than it did to female employees.[24] A male employee sued under Title VII, contending that the plan unlawfully discriminated by offering certain benefits exclusively to female employees, thereby denying comparable benefits to male employees and their spouses.[25] Although the district court initially rejected this claim, the Fourth Circuit reversed, holding that the plan violated Title VII. The court reasoned that "the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses."[26] The issue before the Supreme Court was whether such a disparity constituted discrimination against male employees with respect to the "compensation, terms, conditions, or privileges of employment" protected under Section 703(a)(1) of Title VII.[27]

The Court began its analysis by revisiting *General Electric Co. v. Gilbert*.[28] While superseded by the Pregnancy Discrimination Act (PDA), *Gilbert* addressed a similar question regarding the legality of excluding pregnancy from a disability benefits plan.[29] In *Gilbert*, the Supreme Court drew on Fourteenth Amendment precedent, particularly *Geduldig v. Aiello*, to conclude that an employer does not violate Title VII by excluding pregnancy from a general disability benefits plan.[30] The *Gilbert* majority characterized the plan as neutral, arguing it distinguished between types of disabilities rather than between men and women.[31] The *Gilbert* dissent strongly disagreed, contending that the plan inherently discriminated based on sex because it afforded men comprehensive coverage for all risks while offering women only partial protection.[32] As the dissenters emphasized, such a plan rendered "conditions of employment for females…less favorable than for similarly situated males."[33] In response to the *Gilbert* decision, Congress enacted the Pregnancy Discrimination Act

[22] 590 U.S. at 658. ("The statute tells us three times – including immediately after the words "discriminate against" – that our focus should be on individuals, not groups.").
[23] *Id.* at 659.
[24] 462 U.S. 669, 671-72 (1983).
[25] *Id.* at 674.
[26] *Id.* at 674-75.
[27] *Id.* at 675.
[28] *Id.* at 676.
[29] 462 U.S. at 676.
[30] *Id.* at 676-77.
[31] *Id.* at 677.
[32] *Id.* at 677-78.
[33] *Id.* at 678.

in 1978, amending Title VII to clarify that discrimination "because of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[34] In analyzing *Gilbert* and the PDA, the *Newport News* Court extracted two key principles: first, that Congress intended Title VII to broadly protect individuals from sex-based employment discrimination, not just pregnant workers; and second, that the PDA specifically rejected *Gilbert*'s logic that excluding pregnancy-related benefits is permissible simply because only women can become pregnant.[35]

The *Newport News* majority turned next to the text of Title VII, specifically Section 703(a), which prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex." [36]At the outset, the Court affirmed that employer-sponsored health insurance and other fringe benefits fall squarely within the scope of "compensation, terms, conditions, or privileges of employment" under the statute, and that the Act affords protection to both male and female employees.[37] In support, the majority cited *Los Angeles Department of Water & Power v. Manhart*, which articulated a but-for causation standard: discrimination under Title VII occurs when "but for that person's sex the treatment would have been different."[38] Applying this framework, the Court concluded that male employees were disadvantaged in comparison to similarly situated female employees who receive more comprehensive pregnancy-related benefits.[39] But for the male employee's sex, he would receive more comprehensive pregnancy benefits, which establishes discrimination under Title VII.[40] Additionally, the majority relied on the Pregnancy Discrimination Act to emphasize that discrimination against male employees' *spouses* in the context of fringe benefits necessarily operates as discrimination against male employees, further reinforcing the statute's broad remedial purpose.[41]

The Supreme Court resurrected this issue in *Young v. United Parcel Service, Inc.*[42] Notably, the plaintiff in this case sued under The Pregnancy Discrimination Act, which contains distinct language from Title VII forbidding sex discrimination

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[34] 462 U.S. at 678. *See* Pub. L. 95-555, 92 Stat. 2076.
[35] 462 U.S. at 680-81. (Author's Note: Contrary to the Supreme Court's language, not only women can get pregnant. Individuals who were classified female at birth and contain female reproductive organs can also get pregnant which includes, but is not limited to, women. For example, some non-binary and trans men can get pregnant.).
[36] *Id.* at 682.
[37] *Id.*
[38] *Id.* at 683. *See* 435 U.S. 702, 711 (1978).
[39] 462 U.S. at 683-84.
[40] *Id.*
[41] *Id.* at 684 ("The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.").
[42] 575 U.S. 206 (2015).

"because of or on the basis of pregnancy, childbirth, or related medical conditions" and requiring employers to treat "women affecting by pregnancy…the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work."[43] In this case, the plaintiff objected to her employer's failure to accommodate her during her pregnancy, during which she was unable to meet her employer's general requirement for drivers to lift up to 70 pounds.[44] Young alleged that this policy discriminated against pregnant workers, because the employer had light-duty-for-injury policies that applied to other workers, but not pregnant ones.[45] Writing for the majority, Justice Breyer applied the PDA to the traditional *McDonnell-Douglas* framework to conclude that an employer could prevail by showing that its refusal to accommodate the plaintiff relied on "legitimate, non-discriminatory reasons."[46] A plaintiff could then prevail by showing that the employer's proffered non-discriminatory reasons were pretextual.[47] For pregnant workers, however, the employer could not justify its exclusion by arguing that it would be "more expensive or less convenient to add pregnant women."[48] In short, *Young* reinforced the principle that Title VII allows for employer discretion in their disability plans, provided that those reasons are not discriminatory.

II. Lange v. Houston County

In 2017, after more than a decade of service with the Houston County Sheriff's Office, Sergeant Anne Lange received a life-changing diagnosis.[49] Her physician confirmed that Lange was experiencing gender dysphoria and prescribed her a treatment plan that included hormone therapy and gender-affirming surgery.[50] As part of her medical care, Lange was advised to begin "coming out" at work; her employer reluctantly allowed Lange to wear a female uniform, and Lange began asserting her identity through she/her pronouns.[51] But when her doctors determined that vaginoplasty was medically necessary to treat her condition, Lange encountered a roadblock familiar to many transgender Americans: her employer-sponsored health plan denied her coverage.[52] Since 1998, the state-funded health insurance utilized by

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[43] *Id.* at 210.
[44] *Id.* at 211.
[45] *Id.*
[46] *Id.* at 229. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (The McDonnell Douglas framework governs how a Court analyzes disparate treatment cases under Title VII and similar statutes. First, the plaintiff must meet its prima facie burden by establishing that it belongs to a protected class under the respective Act, were qualified for the job, experienced an adverse employment action, and that there are circumstances that give rise to an inference of discrimination. Once the plaintiff has met its prima facie burden, the burden shifts to the defendant who must proffer a legitimate, non-discriminatory reason for the adverse action. Lastly, the plaintiff must then establish that the employer's legitimate, non-discriminatory reason is pretext for discrimination based on the protected trait.).
[47] 575 U.S. at 229.
[48] *Id.*
[49] Lange v. Houston County, 608 F. Supp. 3d 1340, 1346 (M.D. Ga. 2022).
[50] *Id.*
[51] *Id.* at 1347.
[52] *Id.*

the Sheriff's Office has excluded any coverage for "services and supplies for a sex change."[53] The plan covers vaginoplasties for cisgender women.[54]

These facts give rise to *Lange v. Houston County, Georgia*, a case with profound legal and practical consequences, both for the scope of Title VII's prohibition against sex-based workplace discrimination and for the broader accessibility of gender-affirming care. The litigation raises two critical questions. First, it asks whether Anne Lange is protected under Title VII by reason of her gender identity, revisiting whether the statute's ban on discrimination "because of sex" extends to transgender individuals. Second, it considers whether an employer-sponsored health plan that categorically excludes coverage for "sex change surgery" violates Title VII. As increasing numbers of transgender employees seek medically necessary, gender-affirming treatment through employer-provided insurance, *Lange* defines the legal contours of access to such care.[55]

A. Parties' Arguments

Sergeant Lange (plaintiff-appellee) contends that her employer's health plan's exclusion of "sex change" procedures constitutes a "simple sex discrimination case based on Title VII's simple test."[56] Plaintiff articulates that test as: "an employer that withholds an employment benefit based on sex has discriminated based on sex."[57] Citing *Bostock v. Clayton County*, Plaintiff emphasizes that it is "settled law that discrimination based on transgender status is unlawful sex discrimination."[58] In applying this principle, Plaintiff urged the Court to conclude that the plan's exclusion, which applies only to transgender individuals and withholds healthcare otherwise covered, is facial discrimination in violation of Title VII.[59] Plaintiff argued that "but for Sgt. Lange's assigned sex and transgender status, the Health Plan would have covered her medically necessary vaginoplasty."[60]

The County (defendants-appellants) argues that *Bostock v. Clayton County* does not control the outcome of this case for two reasons.[61] First, Defendants argue that *Bostock* is inapplicable to healthcare benefits because *Bostock* involved disparate treatment between sexes, whereas Lange "had the same coverage as all other plan

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[53] *Id.* at 1346-47.
[54] 608 F. Supp. 3d at 1346-47.
[55] S.M. Bond, T. Fouche, J.R. Smith & R.M. Garza, "Review of Health Insurance Policy Inclusivity of Gender Nonconforming and Nonbinary Individuals Seeking Gender-Affirming Healthcare, *7 Transgend. Health* 484 (2022).
[56] Anna LANGE, Plaintiff-Appellee, v. HOUSTON COUNTY, GEORGIA and Houston Cnty. Sheriff Cullen Talton, Defendants-Appellants., 2024 WL 4679334 at *15 (hereinafter "En Banc Brief of Plaintiff-Appellee").
[57] *Id.*
[58] *Id.* at 16.
[59] *Id.*
[60] *Id.*
[61] HOUSTON COUNTY, GEORGIA, and Houston Cnty. Sheriff Cullen Talton, in His Official Capacity, Defendants-Appellants, v. Anna LANGE, Plaintiff-Appellee., 2024 WL 5136648 at *9 (hereinafter "En Banc Reply Brief of Defendants-Appellants").

participants."[62] Defendants argue that, because neither men nor women can access surgeries for "sex change" purposes, there is no disparate treatment.[63] Plaintiff disposes of this claim by citing *Newport News v. EEOC*, emphasizing "that health coverage is subject to Title VII has been settled law for at least half a century" and that the plan's exclusion applies only to transgender individuals.[64] Second, Defendants argue that, even if *Bostock* did apply, the case adopts a "but for" causation standard that Lange fails to meet.[65] Conversely, Defendants argue that *Bostock* only compels a finding of facial discrimination if, "changing one thing at a time," the exclusion would not have occurred but for the individual's transgender status.[66] Defendants posit that "changing the sex of the person requesting transition surgery would make no difference – whether a natal male, natal female, cisgender male, cisgender female, transgender male, or transgender female…the Exclusion would apply equally to all to deny it."[67]

Plaintiff argues that Defendants misinterpret *Bostock*'s causation standard. Instead, she argues that *Bostock* affirmed the test for facial discrimination articulated in *City of Los Angeles, Dept. of Water and Power v. Manhart*, namely that "to determine whether an employer facially discriminates base of sex in violation of Title VII…one need only apply the 'simple test' of 'whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.'"[68] This would foreclose a reading of sole "but-for" causation and instead allow for multiple "but for" causes. It also would focus on discrimination against the *individual*, rather than the group. Plaintiff clarifies that this was the intention of *Bostock*, as it cited *Manhart* and acknowledged that "events have multiple but-for causes" and that a "defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."[69] In response, Defendants argue that *Manhart*, and other cases, are not determinative because that case involved disparate treatment between women and men, specifically by charging 14.84% more to female pension plan participants.[70] Unlike *Manhart,* Defendants' policy afforded Lange the same coverage at the same cost as all other plan participants; allegedly, no disparate treatment occurred.[71]

Plaintiff disputes Defendants' contention that the exclusion applies equally to all plan participants, arguing instead that the exclusion cannot be applied without

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[62] *Id.*
[63] *Id.*
[64] En Banc Brief of Plaintiff-Appellee at *16, *supra* note 56.
[65] En Banc Reply Brief of Defendants-Appellants at *8, *supra* note 61.
[66] *Id.*
[67] *Id.*
[68] En Banc Brief of Plaintiff-Appellee at *21, *supra* note 56.
[69] *Id.* (emphasis added).
[70] En Banc Reply Brief of Defendants-Appellants at *9, *supra* note 61.
[71] *Id.*

considering the employee's sex.[72] First, Plaintiff points out that the Plan permits coverage for medically necessary vaginoplasty when sought by individuals who were identified as female at birth.[73] In contrast, because Lange was assigned male at birth, identifies as transgender, and seeks vaginoplasty as part of her gender transition, the Plan denied her coverage.[74] Second, Plaintiff contends the exclusion constitutes differential treatment based on sex stereotypes, prohibited under *Price Waterhouse v. Hopkins.*[75] Lange argues that the exclusion "on its face" draws a line between individuals who seek the vaginoplasty to "chang[e] a person's sex characteristics in a way that does not adhere to stereotypes associated with their birth-assigned sex and those seeking care to align their sex characteristics with their birth-assigned sex."[76] Third, Plaintiff argues that the Exclusion simply penalizes a person for transitioning.[77]

Defendants refute that vaginoplasties sought for "sex change" purposes are similar to the operation performed for cisgender women, which they characterize as "organ repair surgery."[78] They argue that the "creation or construction of a vagina" is materially different from the "repair or construction of an existing vagina."[79] Because of this, Defendants argue first, that the plaintiff lacks a requisite comparator and, second, that the Plan distinguishes based on treatment and not based on sex, and therefore provides a non-discriminatory reason for exclusion permitted under Title VII.[80] In response, Plaintiff argues that this distinction is immaterial "because it does not change the fact that the Exclusion removes healthcare coverage from Sgt. Lange because of sex, not surgical technique" and because "the differences…are, themselves, based on sex."[81]

B. Lower Court Decisions

In 2019, Sergeant Lange filed a charge against the U.S. Equal Employment Opportunity Commission (EEOC), a prerequisite to litigation.[82] She was subsequently issued a right to sue letter. Sergeant Lange requested that the County once again either remove their health insurance's exclusion or grant her an exception to coverage, which the County refused. For the first time, however, the County requested – and received – information from the insurer about the cost of Sergeant

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[72] En Banc Brief of Plaintiff-Appellee at *24, *supra* note 56.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 24-25. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("[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.").
[76] En Banc Brief of Plaintiff-Appellee at *24-25, *supra* note 56.
[77] *Id.* at *26.
[78] En Banc Reply Brief of Defendants-Appellants at *15, *supra* note 61.
[79] *Id.*
[80] *Id.*
[81] En Banc Brief of Plaintiff-Appellee at *39, *supra* note 56.
[82] Lange v. Houston County, 608 F. Supp. 3d 1340, 1348 (M.D. Ga. 2022).

Lange's surgery, which was an estimated $25,600.[83] On October 2, 2019, Sergeant Lange formally filed suit in the District Court for the Middle District of Georgia.[84] In June 2022, the district court ruled against the County's motion for summary judgment, allowing Lange to proceed with her Title VII claim.[85]

Notably, the trial court refuted the Defendants' argument that their health insurance plan was merely denying high-cost, non-necessary treatments.[86] Using *Young*, Defendants had argued that they had a legitimate non-discriminatory reason because "even if the cost of expanding its insurance coverage to include transition-related health care was low on average, it could amount to much more in some years" and "spur demands to pay for other, currently excluded benefits."[87] Plaintiff's experts countered by establishing, first, the medical necessity of Lange's gender-affirming care, and, second, that including gender-affirming care was a negligible amount; it comprised .1% of all claims and costed approximately $10,000 per year on average.[88] In fact, when North Carolina briefly covered gender-affirming care in 2014, it cost them $400,000 – a mere .1% of their health plan's $3.3 billion annual budget.[89] Plaintiff also established that Defendants had spent more than $1 million defending its plan in its litigation against Lange.[90]

In May 2024, the United States Court of Appeals for the Eleventh Circuit affirmed.[91] The case was presented to a panel of Circuit judges, with Circuit Judge Wilson writing the majority, Circuit Judge Pryor signing onto the majority, and Circuit Judge Brasher dissenting. Judge Wilson applied *Bostock*'s prohibition against "discrimination based on…transgender status" to conclude that the County's exclusion is a "blanket denial of coverage for gender-affirming surgery."[92] Judge Wilson agreed with Lange's contention that the Exclusion applied only to "sex change" surgeries and that, "because transgender persons are the only plan participants who qualify for gender-affirming surgery, the plan denies health care coverage based on transgender status."[93] Additionally, Circuit Judge Wilson refuted defendants-appellants' argument that *Bostock* did not apply to health benefits, citing *Newport News v. EEOC* for the proposition that healthcare coverage is a benefit or

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Aliyya Swaby & Lucas Waldron, *This Georgia County Spent $1 Million to Avoid Paying for One Employee's Gender-Affirming Care*, ProPublica (Mar. 19, 2023), https://www.propublica.org/article/georgia-county-spent-one-million-fighting-coverage-gender-affirming-care.
[88] Expert Report of Joan Barrett, Ex. 2 to Pl.'s Mot. for Summ. J., Lange v. Houston County, No. 5:19-cv-00392 (M.D. Ga. Nov. 3, 2021), ECF No. 133-3.
[89] Swaby & Waldron, *supra* note 86.
[90] *Id.*
[91] Lange v. Houston County, 101 F.4th 793 (11th Cir. 2024).
[92] *Id.* at 799.
[93] *Id.*

privilege of her employment and is protected under Title VII.[94] The Court also rejected the dissent's argument that Lange was not subjected to discrimination because the County permitted other transition-related care, writing that "an employer is not shielded from liability when it engages in discriminatory practices concerning some treatments and not others."[95] Circuit Judge Wilson additionally rejected defendants-appellants' attempt to distinguish vaginoplasties sought for "sex change" purposes from those sought by cisgender women, concluding that "this kind of line drawing is precisely what makes the plan discriminatory."[96] Circuit Judge Wilson explained that this comparator proves that the Plan is intentionally denying care based on transgender status and that sex is inextricably tied to such denial of coverage.[97]

In his dissent, Circuit Judge Brasher agreed with the proposition that an employer-sponsored health insurance plan cannot deny coverage "to a transgender employee because the employee is transgender," but refuted its application to this case.[98] Judge Brasher would have held that the plan does not discriminate on the basis of the employee's transgender status, and instead distinguishes on the basis of treatment, namely "sex change" surgeries.[99] This, Judge Brasher argued, "is consistent with the pattern in the rest of the insurance plan: it covers medically necessary treatment but excludes particularly expensive, top-of-the-line procedures," like bariatric surgery to treat obesity.[100] Brasher contended that this exclusion therefore "doesn't fit *Bostock*'s rubric" because it applies equally to all individuals and "because nothing about the exclusion turns on Lange's sex."[101] As evidence of this, Judge Brasher cited the fact that the Plan covers hormone therapy and psychotherapy sessions for her condition and concludes that "all that matters is whether Lange is asking the insurer to pay for the constellation of medical procedures known as a "sex change."[102] As part and parcel of this, Circuit Judge Brasher rejected Judge Wilson's contention that vaginoplasties are similar for transgender and cisgender women, enumerating the different techniques utilized in both.[103] For the same reasons, Judge Brasher also rejected Plaintiff's argument that the exclusion constitutes unlawful sex stereotyping.[104]

Additionally, Circuit Judge Brasher condemned Plaintiff for "conflating this policy – an insurance policy that denies coverage for a single treatment for gender

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[94] *Id.*
[95] *Id.*
[96] 101 F.4th at 799.
[97] *Id.*
[98] 101 F.4th at 801.
[99] *Id.* at 802.
[100] *Id.*
[101] *Id.* at 803.
[102] *Id.* at 804.
[103] 101 F.4th at 806.
[104] *Id.* at 804.

dysphoria – with a policy that facially discriminates against transgender people because of sex."[105] Circuit Judge Brasher emphasized that Title VII does not mandate that an employer cover every treatment for a given disorder, analogizing to obesity-related treatments.[106] Circuit Judge Brasher additionally argued that the Supreme Court rejected similar reasoning in *Young v. United Parcel Services*, where the Court probed a company's policy that provided accommodations to some disabled employees but not pregnant women and ultimately concluded that the policy was not facially invalid if the employer had a legitimate, non-discriminatory reason for the policy.[107]

Shortly after its decision, however, the 11th Circuit vacated the panel's opinion, granting the County's petition that the 11th Circuit rehear the case "by the Court sitting en banc."[108] This has yet to occur. Of note, the Supreme Court is currently considering the *constitutionality* of gender-affirming care, which raises similar requisite questions about the meaning of "because of sex."[109]

III. INDEPENDENT ANALYSIS

As a preliminary matter, Lange must establish that she is a protected class under Title VII, specifically, that the statute's ban on discrimination "because of sex" extends to discrimination based on transgender status. The parties do not dispute the meaning of "sex" in their briefs. The next question is whether an employer-sponsored health plan that denies coverage for vaginoplasties when performed for gender-affirming purposes constitutes unlawful discrimination *because of* sex, as opposed to a lawful classification based on procedure type or another non-discriminatory rationale.

In this Section, I assess the parties' arguments and conclude that the County's denial of coverage for "sex change" surgery violates Title VII. First, I argue that Title VII's causation standard incorporates multiple but-for causes such that an employer who distinguishes based on sex cannot escape liability by pointing to additional non-discriminatory reasons. Second, I argue that the County's exclusion facially discriminates "because of sex" by conditioning coverage on sex-based anatomy at birth, directly violating *Newport News* and broad principles from the Pregnancy Discrimination Act (PDA). Lastly, I argue that, even if comparators were necessary to establish discrimination, Lange has sufficiently demonstrated that transgender and cisgender women seeking vaginoplasties are similarly situated in relevant respects, consistent with Title VII precedent. Together, these points establish that Houston

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[105] *Id.*
[106] *Id.* at 805.
[107] *Id.* at 805-06.
[108] Lange v. Houston County, 110 F.4th 1254 (11th Cir. 2024).
[109] L.W. by and through Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) cert. granted, 144 S.Ct. 2679 (2024). The constitutionality of gender-affirming care relies on the Fourteenth Amendment, whereas *Lange v. Houston County* raises a statutory question under Title VII.

County's health insurance plan discriminates against Lange because of her sex-based transgender status, and that the Eleventh Circuit panel was correct in finding a Title VII violation in this case.

A. *Bostock* Incorporates *Manhart*'s Standard of Multiple "But For" Causation

The parties dispute the causation standard articulated by the *Bostock* court. Plaintiff argues *Bostock* incorporated *Manhart*'s definition of causation that incorporates multiple "but for" causes, while Defendants argue that there must be a sole "but for" cause. In other words, Defendants argue that its exclusion does not discriminate against Plaintiff because sex is not the sole cause of its denial; they argue that the exclusion is based on the nature of the procedure – that vaginoplasties for sex change purposes constitute "expensive, top-of-the-line procedures" and that the plan excluded Lange's surgery on that ground. However, Title VII's "because of sex" causation standard permits multiple but-for causes, and an employer cannot avoid liability by asserting that other, non-discriminatory factors contributed to the adverse employment decision.

Defendants' strongest argument against multiple but-for causation is that Title VII's plain language requires traditional but-for causation. Section 2000(e)-2(a) prohibits discrimination "because of such individual's…sex."[110] They would likely reason that this simple language indicates Congress' intention to indoctrinate a "but for" standard; permitting "multiple" causes no longer makes it a "but for" cause; according to the Restatement (Second) of Torts, "an act or omission is not regarded as a cause of an event if the particular event would have occurred without it."[111] In short, the defendants would argue that, if sex was not necessary to the outcome because another factor would have compelled the adverse employment decision anyways, there is no liability. They would contend that allowing multiple causes would dilute the standard clearly codified by Congress by permitting liability even when sex was not a necessary condition for the action.

Defendants' argument is refuted by the 1991 Amendments to Title VII, through which Congress expressly rejected a narrow construction of causation.[112] In *Price Waterhouse v. Hopkins*, a plurality of the Court recognized "mixed motive" cases under Title VII, cases in which both a discriminatory (i.e. sex) and a non-discriminatory reason motivated the employment decision.[113] In the process, however, the plurality imposed a heightened causation requirement, requiring plaintiffs to demonstrate the illicit motive was a "substantial" or "motivating" factor to prevail under Title VII.[114]

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[110] 42 U.S.C. § 2000e-2(a).
[111] W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984)
[112] 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").
[113] 490 U.S. 228 (1989).
[114] *Id.* at 249.

In response, Congress amended Title VII to codify mixed motive liability while expressly lowering the causation threshold.[115] The amendment clarified that a plaintiff could establish a Title VII violation by showing that a protected characteristic was one of multiple factors in the employment decision, as long as they established it was a "motivating factor."[116] *Bostock v. Clayton County* illustrated this standard with a hypothetical involving an employer who fires any woman he discovers is a Yankees fan.[117] The Court explained that, under Congress' causation standard, firing a woman for being both a Yankees fan *and* a woman constitutes discrimination "because of sex" "if the employer would have tolerated the same allegiance in a male employee."[118]

Defendants' strongest, but ultimately unsuccessful, response would be to argue that Congress' declaration of multiple but-for causation in the amendments applies only to mixed motive cases and therefore preserves "sole but for" causation for other Title VII claims. This would only permit multiple but-for causation where a plaintiff explicitly invokes a mixed motive fact pattern from Section 2000e-2(m) and acknowledges the presence of both a lawful and unlawful motive for the adverse employment decision.[119] For example, in *Price Waterhouse v. Hopkins*, the Court evaluated the "mixed motive" case of a plaintiff who was allegedly not promoted due to both sex stereotyping (unlawful motive) and poor rapport among colleagues (lawful motive).[120]

This argument ultimately fails because it misreads the plain text of the 1991 Amendment and disregards its structure. Section 2000e-2(m) amended Title VII by speaking broadly to unlawful employment practices, writing that "*an unlawful employment practice* is established when the complaining party demonstrates that the race, color, religion, sex, or national origin was a motivating factor for *any employment practice*, even though other factors also motivated the practice."[121] Section 2000e-2(m)'s broad language, without any reference to mixed-motive cases or a specific type of employment decision, indicates that it applies to all of Title VII. This is further supported by the Section's placement within Section 2000e-2, which includes Title VII's broad prohibition against discrimination. Lastly, its broad applicability is reinforced by another subsection elsewhere in the 1991 Amendments, which clarifies that a finding of discrimination under a mixed motive pattern merely reduces the damages that can be sought.[122]

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[115] 42 U.S.C. § 2000e-2(m).
[116] *Id.*
[117] 590 U.S. 644 at 661 (2020).
[118] *Id.*
[119] 42 U.S.C. § 2000e-2(m).
[120] 490 U.S. at 257.
[121] *Id.* (emphasis added).
[122] 42 U.S.C. § 2000e-5(g)(2)(B).

It is significant that Congress only intervened after *Price Waterhouse*, where the Supreme Court, for the first time, narrowed its understanding of causation under Title VII by requiring a heightened showing of discriminatory intent.[123] This timing is telling; Congress had not intervened in response to earlier decisions that broadly interpreted "because of sex," suggesting congressional acquiescence to those more expansive readings. As such, pre-*Price Waterhouse* precedent remains instructive. For instance, in *Phillips v. Martin Marietta Corp.*, the Court rejected an employer's defense that its refusal to hire women with young children was not based "solely" on sex but also on parental status, holding that an adverse action motivated even partly by sex can constitute unlawful discrimination.[124] Similarly, in *Los Angeles Dept. of Water and Power v. Manhart*, the Court held that a pension plan violated Title VII by requiring women to contribute more than men, despite the employer's legitimate argument that the disparity was justified by statistical data that women live longer.[125] Most recently, the Court in *Bostock v. Clayton County* reaffirmed the principle of multiple but-for causation, citing *Manhart* with approval.[126] Justice Gorsuch clarified that the "simple" and "traditional" rule of but-for causation "can be a sweeping standard" and that "often, events have multiple but-for causes."[127] He rejected the notion that employers can escape liability by pointing to additional, non-prohibited factors influencing their decision, writing that "so long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."[128]

The causation standard is particularly critical in the context of gender-affirming care cases. *Young v. United Parcel Service, Inc.* recognized that employers retain considerable discretion to exclude health insurance coverage for legitimate, non-discriminatory reasons.[129] Therefore, multiple but-for causation permits plaintiffs to prevail even where an employer offers some legitimate justification, so long as sex discrimination was one of the several factors. As the ACLU's En Banc Brief clarifies:

> The relevant question is not where Defendants' exclusions 'draw a line' solely based on sex or transgender status, nor is it whether the exclusions are motivated by allegedly neutral reasons. The relevant question is whether sex or transgender status is a but-for cause of the policy's operation. If it is, and the policy cannot function without using sex or transgender status, then it is facially discriminatory under Title VII regardless of whether the policy turns *solely* on sex or transgender status and regardless of the employer's motivations for adopting it.
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> The insurance plan in *Lange* discriminates "because of sex" in violation of Title VII. Lange's sex and transgender status is at least one but-for cause of the exclusion of coverage for surgeries sought for "sex change" purposes. In assessing whether a

[123] 490 U.S. 228 (1989)
[124] 400 U.S. 542 (1971).
[125] 435 U.S. 702, 707-708 (1978).
[126] 590 U.S. 644, 656 (2020).
[127] *Id.*
[128] *Id.*
[129] 575 U.S. 206, 229 (2015).

vaginoplasty is covered, Lange's health insurance plan must consider whether the surgery is sought for "sex change" purposes. This inquiry itself is sex-determinative; it looks at the individual's sex at birth and whether the individual's sex at birth already has, or seeks to construct, the anatomical features created by the surgery. For example, when a transgender woman, like Lange, seeks a vaginoplasty, she is denied under the plan if her sex at birth (i.e. male) means she does not have a vagina, and therefore that the surgery would augment one for her. Conversely, if a cisgender woman seeks a vaginoplasty, she is accepted if her sex at birth (i.e. female) means she already has a vagina, and therefore that the surgery would be repairing the existing organ. As in *Bostock*, the health plan "intentionally treat[s] an employee worse based in part on that individual's sex." The discrimination is facial because the coverage turns expressly on sex-based anatomy at birth.

Defendants predominantly argue that the exclusion is justified on non-discriminatory grounds, claiming that "sex change" surgeries are "expensive, top-of-the-line procedures" that their plan generally excludes, like some treatments for obesity.[130] However, under *Young*, the plaintiffs could likely show that this non-discriminatory reason is pretextual, perhaps by demonstrating that the defendants tolerate higher-cost procedures or were aware that gender-affirming surgeries are often relatively low-cost as compared to covered procedures. It is also worth noting that these surgeries, like the vaginoplasties for non- "sex change" purposes permitted under the plan, are deemed "medically necessary" by physicians, unlike the other surgeries excluded under the County's health insurance plan. Regardless, Defendants fail on this argument because, even if they had another legitimate motive for the surgery, the characterization of exclusion for "sex change" purposes necessarily requires them to consider sex. This is why "multiple-but for causation" is crucial to *Lange* – Defendants cannot escape the role of "sex" in their decision by alluding to some other non-discriminatory reason.

B. With or Without a Comparator, Houston County's Exclusion of "Sex Change" Surgeries Violates Title VII

Defendants do not dispute that health insurance qualifies as a "privilege" under Title VII. Instead, they argue that their plan does not discriminate based on sex because Lange lacks a suitable comparator. Specifically, Defendants contend that vaginoplasties sought for "sex change" purposes differ from those sought by cisgender women, because the former involve "the additional — and unavoidable — steps of removing the penis and testicles," whereas the latter merely involve organ repair.[131] This argument misreads both the Pregnancy Discrimination Act and *Newport News*, which focus not merely on the formal structure of coverage, but on its

[130] Missouri and 19 Other States; Brief for Amici Curiae Supporting Defendants-Appellants at *14, *Lange v. Houston County, Georgia,* 2024 WL 5136646 (2025).
[131] En Banc Reply Brief of Defendants-Appellants at *15, *supra* note 61.

discriminatory impact. Title VII prohibits employers from offering less favorable health insurance coverage for sex-based conditions, even where no identical comparator exists.[132]

Defendants argue that *Newport News* prohibits only explicit coverage differences between the sexes, not the effects of exclusion. They claim that, in Lange's case, vaginoplasties available to cisgender women are available to all individuals, and that the surgery sought for "sex change purposes" are excluded for everyone, rendering the plan facially neutral. In contrast, in *Newport News*, the employer provided pregnancy-related hospitalization benefits to all female employees but denied such coverage to all male employees and their spouses.[133] Defendants' argument, however, ignores the significance of the PDA, which amended Title VII to clarify that discrimination "because of sex" includes, but is not limited to, discrimination based on "pregnancy, childbirth, or related medical conditions" – language that captures a broader category of sex-based conditions beyond pregnancy.[134] *Newport News* interpreted the PDA to reject *Gilbert*'s reasoning, holding that formal equality is insufficient when the real-world effect is to impose disparate treatment based on sex.[135]

The same flaw undermines Defendants' comparator argument. In *Gilbert*, the Court accepted the employer's defense that excluding pregnancy benefits was not discriminatory because the exclusion formally applied to both men and women.[136] However, *Newport News* rejected that reasoning, explaining that, because women face the risk of pregnancy and men do not, treating pregnancy-related conditions less favorably constitutes sex discrimination.[137] The same principle applies here: excluding gender-affirming surgeries facially discriminates against transgender individuals, even if no identical cisgender comparator exists. As the ACLU's En Banc Brief argues, "a plan that excludes a sex-related condition such as pregnancy care – or 'sex-change surgery' – is facially discriminatory under the PDA regardless of whether there is an exactly comparable procedure that is covered for others."[138]

In any event, Lange *does* have an appropriate comparator: vaginoplasties for non-sex change purposes. Title VII does not require identical comparators; it requires evidence that a protected characteristic triggered differential treatment based on sex. In *Furnco Construction Corp. v. Waters*, the Court emphasized that the critical issue under Title VII is whether the employer is treating "some people less favorably than

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[132] 462 U.S. 669; Pub. L. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k).
[133] Newport News Shipbuilding and Dry Dock Co. v. EEOC*,* 462 U.S. 669, 671-72 (1983).
[134] Pub. L. 95-55, 92 Stat. 2076, 42 U.S.C. §2000e(k).
[135] 462 U.S. at 678.
[136] General Electric Company v. Gilbert, 429 U.S. 125, 136 (1976) ("An exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.").
[137] 462 U.S. at 678. ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court.").
[138] AMERICAN CIVIL LIBERTIES UNION (ACLU); Brief for Amicus Curiae Supporting Plaintiff-Appellee at *17, *Lange v. Houston County, Georgia,* 2024 WL 5136646 (2025).

others because of their…sex."[139] Similarly, in *Young v. United Parcel Service, Inc.*, the Court rejected the notion that pregnant employees must find comparators with identical physical restrictions.[140] Both cases make clear that the focus is not on technical distinctions between conditions, but on whether the employer's exclusion hinges on a sex-based characteristic. Here, both types of vaginoplasty are medically necessary, seek to create functional vaginal anatomy, and address serious medical needs. The defendants' exclusion, which relies on birth-assigned sex, therefore constitutes unlawful sex discrimination under Title VII.

Conclusion

This Article has examined whether the denial of employer-sponsored health insurance coverage for medically necessary transition-related treatment constitutes unlawful discrimination under Title VII. Part I explored the meaning of "because of sex," both generally and in relation to sex-based medical conditions, drawing on relevant Supreme Court precedent. Part II analyzed *Lange v. Houston County*, a case in the Eleventh Circuit that addresses whether an employer's denial of coverage for surgeries related to "sex change" purposes violates Title VII. Part III applied statutory interpretation methods to conclude that the exclusion of gender-affirming care, even in the absence of an exact comparator, violates Title VII by treating transgender employees differently based on their sex. Ultimately, this Article concludes that providing transgender employees with the same healthcare benefits as their cisgender counterparts is not only a matter of equity but a legal obligation under Title VII. This obligation extends to gender-affirming surgeries that are otherwise available for different purposes.

[139] 438 U.S. 567, 577 (1978).

[140] 575 U.S. 206, 207 (2015) ("The second clause of the Act, when referring to nonpregnant persons with similar disabilities, uses the open-ended term 'other persons.' It does not say that the employer must treat pregnant employees the 'same' as '*any* other persons' who are similar in their ability or inability to work, nor does it specify the particular 'other persons' Congress had in mind as appropriate comparators for pregnant workers.").