



**Women's Sports Policy
Working Group**

**FREQUENTLY ASKED QUESTIONS – ABOUT CURRENT LAW ON SEX
AND SPORT**

WomensSportsPolicy.org

Q32. How does the recent Supreme Court decision in *Bostock v. Clayton County* (2020) affect separate sex sport—does it prohibit all distinctions on the basis of sex, including in sport?

A32. In *Bostock*, the Supreme Court ruled that "sex" in Title VII means "biological sex." Contrary to what many proponents of the EA argue, *Bostock* did not define (or re-define) "sex" to include "gender identity." Rather, it held that Title VII's general prohibition of discrimination "on the basis of sex" precludes discrimination that takes into account a transgender employee's sex and gender identity. Firing a person because they are transgender – i.e., because their gender identity is nonconforming – requires taking their sex into account, and this is prohibited by Title VII. Because the case involved Title VII's general non-discrimination provision, not an existing exception that allows taking sex into account, the Court wrote that it was leaving the lawfulness of exceptions – including in bathrooms, locker rooms, and sport – for another day. On its face, *Bostock* did not rule on the lawfulness of the current scheme under Title IX and the other sport statutes.

Proponents of the EA nevertheless assert that *Bostock* applies to sport, completely ignoring the Court's express pronouncement to the contrary. Specifically, in cases pending in the lower courts, they argue that *Bostock* supports the redefinition of "sex" to include "gender identity", and that the decision requires the inclusion of trans girls/women in girls' and women's Title IX sport. Notably, however, they are inconsistent in their application of *Bostock* to the question whether administrators can lawfully distinguish biological females from transgender women and girls. For example, in pending federal cases in Connecticut and Idaho, advocates for transgender athletes argue that their inclusion in girls' high school sports must be full and unconditional, without regard to whether they are on gender affirming hormones. However, in the Idaho matter, in which college sports are also at issue, they support the NCAA rule which distinguishes female athletes from transgender athletes by requiring trans women to undergo a year of gender affirming hormone treatments before they can compete in women's sport. They support the position that in college, conditions on transgender inclusion are permissible. This distinction between high school and college may make good policy sense; but it is an acknowledgement of the continued lawfulness not only of the NCAA rule, but also more generally of what that rule represents, i.e., the lawfulness of distinctions on the basis of sex in sport. It is also a tacit acknowledgment of the fact that – as the Supreme Court itself announced – *Bostock* is not dispositive in this area.