

RECENT CASES

TITLE VII — EQUAL PROTECTION CLAUSE — EN BANC
ELEVENTH CIRCUIT UPHOLDS EXCLUSION OF GENDER-
AFFIRMING CARE FROM EMPLOYER-SPONSORED HEALTH PLAN
FOLLOWING *SKRMETTI* AND *BOSTOCK*. — *Lange v. Houston County*,
152 F.4th 1245 (11th Cir. 2025) (en banc).

When an employer-sponsored health plan covers mastectomies for cancer but excludes them for gender dysphoria, is that sex discrimination under Title VII?¹ The Eleventh Circuit split 8–5 in *Lange v. Houston County*,² holding that such a plan is not discriminatory.³ Both sides purported to apply the same legal test from *Bostock v. Clayton County*,⁴ which interpreted Title VII’s prohibition on employment discrimination “because of . . . sex”⁵ to adopt a counterfactual test: “[C]hange one thing at a time” — the employee’s sex — “and see [whether] the outcome changes.”⁶ Yet they reached opposite results. This disagreement turned on what “sex” includes for purposes of Title VII analysis. The majority treated “medical use”⁷ as an analytically independent intermediary between sex and outcome, finding no discrimination because the exclusion classified individuals by the medical indication of gender dysphoria rather than sex.⁸ The dissenters treated that same medical indication as inseparable from “sex” itself.⁹ Both applied *Bostock*’s test only after embedding a different definition of sex into the counterfactual.

That choice is outcome-determinative — and Title VII precedents have long rejected the majority’s approach. Through the Pregnancy Discrimination Act¹⁰ (PDA) and decisions like *Bostock*, *Price Waterhouse v. Hopkins*,¹¹ and *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,¹² statutory doctrine has defined sex broadly, collapsing traits correlated with sex (like pregnancy) and traits derived from sex (like sexual orientation) into “sex” itself.¹³ Equal Protection Clause (EPC) doctrine by

¹ 42 U.S.C. §§ 2000e to 2000e-17.

² (*Lange II*), 152 F.4th 1245 (11th Cir. 2025) (en banc).

³ *Id.* at 1249.

⁴ 140 S. Ct. 1731 (2020).

⁵ 42 U.S.C. § 2000e-2(a)(1).

⁶ *Bostock*, 140 S. Ct. at 1739; see *Lange II*, 152 F.4th at 1269 (quoting *United States v. Skrmetti*, 145 S. Ct. 1816, 1834 (2025)); *id.* at 1290 (Wilson, J., dissenting) (quoting *Bostock*, 140 S. Ct. at 1739).

⁷ *Lange II*, 152 F.4th at 1253 (quoting *Skrmetti*, 145 S. Ct. at 1833).

⁸ See *id.* at 1253.

⁹ See, e.g., *id.* at 1277–78 (J. Pryor, J., dissenting).

¹⁰ Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

¹¹ 490 U.S. 228 (1989).

¹² 462 U.S. 669 (1983).

¹³ For a more detailed analysis of intermediaries and how they interact with protected classes, see Cindy X. Guo, *Intermediary Choice and the Structural Logic of Title VII’s But-For Test*, HARV. L. REV. BLOG (forthcoming Apr. 2026).

contrast, from *Geduldig v. Aiello*¹⁴ through *United States v. Skrametti*,¹⁵ has defined sex narrowly: Biological and medical traits are treated as independent conditions even when they correlate with or depend on sex.¹⁶ *Lange* departs from the Title VII framework by importing the EPC's condition-based logic into statutory analysis.

Anna Lange, a transgender woman serving as a deputy with the Houston County Sheriff's Office, sought coverage under the County's health plan for gender-affirming surgery.¹⁷ But the plan excluded from coverage "[d]rugs for sex change surgery" and "[s]ervices and supplies for a sex change and/or the reversal of a sex change"¹⁸ (together, the Exclusion). After her insurer denied coverage for gender-affirming surgery and the County refused to change its policy,¹⁹ Lange filed suit in federal district court,²⁰ challenging the Exclusion as a violation of both Title VII and the EPC.²¹

The district court granted summary judgment for Lange on her Title VII claim,²² concluding that the exclusion was facially discriminatory.²³ The plan denied coverage for procedures like mastectomies or hormone therapy to treat gender dysphoria, while covering the same procedures when prescribed for other conditions, like breast cancer.²⁴ Applying *Bostock*, the court reasoned that denying coverage "because of transgender status" is necessarily sex discrimination²⁵ and that employer intent was immaterial where the policy was facially discriminatory.²⁶

However, the district court rejected Lange's EPC challenge by relying on *Geduldig*,²⁷ which held that pregnancy-based classifications do not constitute sex-based classifications for EPC purposes.²⁸ Hence, the court reasoned that the Exclusion classified by medical condition, not sex or transgender status.²⁹ Though the Exclusion did not facially discriminate,³⁰ the court found genuine factual disputes on discriminatory

¹⁴ 417 U.S. 484 (1974).

¹⁵ 145 S. Ct. 1816 (2025).

¹⁶ See, e.g., Kate Redburn, *The Supreme Court, 2024 Term — Comment: Skrametti Beyond Scrutiny*, 139 HARV. L. REV. 167, 178–81 (2025).

¹⁷ *Lange v. Houston County*, 608 F. Supp. 3d 1340, 1345 (M.D. Ga. 2022).

¹⁸ *Id.* at 1346–47 (alterations in original).

¹⁹ *Id.* at 1348.

²⁰ See *id.* at 1349.

²¹ *Id.*

²² *Id.* at 1360.

²³ *Id.* at 1357.

²⁴ *Id.* at 1357–58.

²⁵ *Id.* at 1356–60.

²⁶ *Id.* at 1357.

²⁷ *Id.* at 1354.

²⁸ *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

²⁹ *Lange*, 608 F. Supp. 3d at 1354.

³⁰ *Id.*

intent and denied summary judgment to both parties on Lange's EPC claim.³¹

A three-judge panel affirmed the district court's Title VII holding.³² Judge Wilson,³³ writing for the majority, concluded that the Exclusion was facially discriminatory because the only affected employees were transgender individuals seeking gender-affirming care.³⁴ Denying treatment to transgender employees constituted sex discrimination per *Bostock*.³⁵ Judge Brasher dissented, emphasizing that the Exclusion applied to a medical condition and not to transgender persons as such.³⁶ He argued the insurance plan was "just a cheap plan," not a discriminatory one.³⁷

After *Skrmetti* held that a Tennessee state law banning gender-affirming care for transgender youths was not a facial violation of the EPC because the law did not classify based on sex,³⁸ the Eleventh Circuit vacated the *Lange* panel opinion and reheard the case en banc to address one question: whether the Exclusion facially violates Title VII.³⁹ Now writing for the majority, Judge Brasher concluded that the Exclusion was not facially discriminatory, relying heavily on "*Skrmetti*'s holding about the meaning of *Bostock*."⁴⁰ He rejected each of Lange's four arguments. First, he explained that the health plan did not discriminate on the basis of sex because the Exclusion applied to "anyone regardless of their biological sex."⁴¹ Second, it similarly did not discriminate on the basis of transgender status because "changing [the party's] sex or transgender status does not alter the application" of the plan.⁴² Instead, it merely classified based on "medical use."⁴³ Third, the health plan did not facially discriminate based on sex stereotypes because it also excluded "procedures to *align* a participant's physical characteristics with those of his or her biological sex."⁴⁴ Lastly, the Exclusion did not penalize a person for transitioning because its declination of benefits applied to everyone.⁴⁵

³¹ *Id.* at 1356.

³² *Lange v. Houston County (Lange I)*, 101 F.4th 793, 801 (11th Cir. 2024), *rev'd en banc*, 152 F.4th 1245 (11th Cir. 2025).

³³ Judge Wilson was joined by Judge Jill Pryor.

³⁴ *Lange I*, 101 F.4th. at 798–99.

³⁵ *Id.*

³⁶ *Id.* at 803 (Brasher, J., dissenting).

³⁷ *Id.* at 805.

³⁸ *United States v. Skrmetti*, 145 S. Ct. 1816, 1829 (2025).

³⁹ *Lange II*, 152 F.4th at 1250.

⁴⁰ *Id.* at 1254.

⁴¹ *Id.* at 1252.

⁴² *Id.* at 1253 (quoting *Skrmetti*, 145 S. Ct. at 1834).

⁴³ *Id.* (quoting *Skrmetti*, 145 S. Ct. at 1833).

⁴⁴ *Id.* at 1254.

⁴⁵ *Id.*

Judge Newsom concurred, writing separately to highlight the distinct analytical frameworks of Title VII and the EPC.⁴⁶ In particular, the EPC “prohibits only intentional discrimination,” while Title VII “aims to eliminate all forms of employment discrimination, unintentional as well as deliberate.”⁴⁷

Judge Rosenbaum concurred in the judgment. She viewed *Skrmetti* as binding because the facts of *Lange* were indistinguishable.⁴⁸ However, she did not join the majority’s reasoning because she disagreed with *Skrmetti*’s importation of *Geduldig*’s framework into Title VII and its incorrect construction of *Bostock*.⁴⁹

Judge Jill Pryor dissented.⁵⁰ She rejected the majority’s choice to import EPC logic into Title VII, and argued that *Skrmetti*’s discussion of *Bostock* did not bind the court because there was “[n]o Title VII claim . . . before the Supreme Court” in *Skrmetti*.⁵¹ Instead, relying on Title VII precedents like *Bostock* and *Newport News*, she concluded that line-drawing based on a medical condition that impacts employees differently based on sex is impermissible.⁵²

Judge Abudu also dissented. She argued that the majority’s decision erodes both the text and spirit of federal civil rights protections.⁵³ Beyond doctrine, she emphasized the real-world consequences of denying gender-affirming care.⁵⁴

Judge Wilson likewise dissented,⁵⁵ applying *Bostock*’s reasoning to *Lange*’s facts.⁵⁶ He criticized the majority for reframing the case as one about medical treatment rather than individuals,⁵⁷ warning that their manipulation of *Bostock* merely “obfuscate[s] the discrimination apparent on the face of the plan.”⁵⁸

Lange was wrongly decided because its treatment of medical use as a neutral intermediary cannot be reconciled with Title VII’s history or precedent. Courts decide what counts as sex before applying *Bostock*’s counterfactual, and *Skrmetti*’s discussion of *Bostock* rests on EPC-based definitions of sex that do not govern Title VII. *Lange* erred by importing that constitutional framing into a statutory analysis.

Both the majority and dissent can claim fidelity to *Bostock* because they made different antecedent choices about which traits count as part

⁴⁶ *Id.* at 1255–56 (Newsom, J., concurring).

⁴⁷ *Id.* at 1256 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting)).

⁴⁸ *Id.* at 1257 (Rosenbaum, J., concurring in the judgment).

⁴⁹ *See id.* at 1270.

⁵⁰ Judge Jill Pryor was joined by Judges Jordan, Abudu, Kidd, and Wilson.

⁵¹ *Lange II*, 152 F.4th at 1276–79 (J. Pryor, J., dissenting).

⁵² *Id.* at 1278.

⁵³ *Id.* at 1279 (Abudu, J., dissenting).

⁵⁴ *See id.* at 1279–83.

⁵⁵ Judge Wilson was joined by Judges Abudu and Kidd.

⁵⁶ *Lange II*, 152 F.4th at 1292 (Wilson, J., dissenting).

⁵⁷ *Id.* at 1295–96.

⁵⁸ *Id.* at 1297.

of sex and which may be treated as analytically independent. Some traits cannot be held constant across a change in sex because they are defined with reference to sex. In *Bostock*, for example, sexual orientation and transgender identity were not treated as independent traits. The Court reasoned that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex” because “the first cannot happen without the second.”⁵⁹ These traits are not analytically separate from sex; they are defined through sex.⁶⁰ When such traits are folded into sex, changing sex changes the outcome, and sex is the but-for cause.

Other traits, however, may be treated as independent of sex for purposes of the counterfactual. If a court treats a trait as analytically independent and holds it constant while changing sex, and the outcome does not change, then sex will not appear to affect the outcome. The question, therefore, is not whether a particular intermediary can change the outcome, but whether Title VII permits that intermediary to be treated as independent of sex in the first place.

Geduldig illustrates how the constitutional context answers that question differently. California’s disability insurance scheme excluded pregnancy-related disabilities, and the Court held that such exclusions did not constitute sex discrimination under the EPC.⁶¹ The Court explained that because people of both sexes could be non-pregnant, classifications based on pregnancy were not sex-based.⁶² Pregnancy became an intermediary analytically independent of sex,⁶³ even though it is a condition experienced exclusively by one sex.

Title VII’s history reveals the opposite approach: a pattern of broadening the definition of sex to include intermediaries. Traits that are defined by sex or that correlate exclusively with sex are folded into sex itself and may not be used to insulate employers from liability. In *General Electric Co. v. Gilbert*,⁶⁴ the Court imported *Geduldig*’s logic into Title VII, treating pregnancy as a neutral intermediary and holding that an employer-sponsored disability plan’s exclusion of pregnancy did not constitute sex discrimination under Title VII.⁶⁵ The dissents rejected that importation of EPC reasoning,⁶⁶ with Justice Stevens insisting that pregnancy was a *sex-exclusive* medical risk and thus part of “sex” itself when analyzing employment discrimination.⁶⁷

⁵⁹ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020).

⁶⁰ See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 211 (1994).

⁶¹ *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

⁶² *Id.* at 496 n.20.

⁶³ See Jessica A. Clarke, *Scrutinizing Sex*, 92 U. CHI. L. REV. 1, 32 & n.200 (2025).

⁶⁴ 429 U.S. 125 (1976).

⁶⁵ *Id.* at 133.

⁶⁶ *Id.* at 152 (Brennan, J., dissenting); *id.* at 160–61 (Stevens, J., dissenting).

⁶⁷ *Id.* at 161–62 (Stevens, J., dissenting).

Congress agreed with the *Gilbert* dissents. It passed the PDA to amend Title VII, defining discrimination “because of sex” to include “pregnancy, childbirth, or related medical conditions.”⁶⁸ Congress rejected the premise that pregnancy could be treated as analytically separate from sex.⁶⁹ The legislative history is unequivocal: Both House and Senate reports endorsed the reasoning of the *Gilbert* dissents regarding the *principle* and *meaning* of Title VII, expressly repudiating the majority’s neutral medical carve-out.⁷⁰ *Newport News* then applied this amendment to invalidate an asymmetrical-benefits plan, rejecting *Gilbert*’s premise that an “otherwise inclusive plan” could carve out pregnancy.⁷¹ The PDA thus represents a deliberate statutory choice to fold sex-exclusive traits into sex itself — a choice with no parallel in EPC doctrine, where *Geduldig* remains good law.⁷²

Modern Title VII sex-discrimination doctrine developed in the same direction.⁷³ In *Price Waterhouse*, a plurality of the Court concluded that Title VII prohibits discrimination based on sex stereotypes⁷⁴ because “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁷⁵ The plurality rejected the view that sex stereotypes were analytically independent of sex itself,⁷⁶ and instead treated “discrimination against women who are not sufficiently feminine”⁷⁷ as discrimination because of sex. Although changing an employee’s sex does not invariably change the presence of a stereotype, such stereotypes derive their meaning from societal understandings of sex and cannot be applied without reference to them.⁷⁸ Title VII therefore treats discrimination based on gender-role stereotypes as discrimination because of sex.⁷⁹

⁶⁸ See 42 U.S.C. § 2000e(k).

⁶⁹ See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1366–67, 1366 n.342, 1367 nn.342–45 (2012) (quoting, inter alia, H.R. REP. NO. 95-948, at 3 (1978)).

⁷⁰ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (quoting, inter alia, H.R. REP. NO. 95-948, at 2 (1978); S. REP. NO. 95-331, at 2 (1977)).

⁷¹ *Id.* at 684.

⁷² *Lange II*, 152 F.4th at 1265–66 (Rosenbaum, J., concurring in the judgment).

⁷³ See *id.* (discussing how subsequent Title VII cases contradicted the narrow logic of *Geduldig*); cf. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743–44 (2020) (discussing Title VII cases that show employers cannot avoid liability by pointing “to some other, nonprotected trait[s]” or by treating “males and females comparably as groups,” *id.* at 1744).

⁷⁴ See 490 U.S. 228, 235, 258 (1989) (plurality opinion).

⁷⁵ *Id.* at 250.

⁷⁶ See *id.*

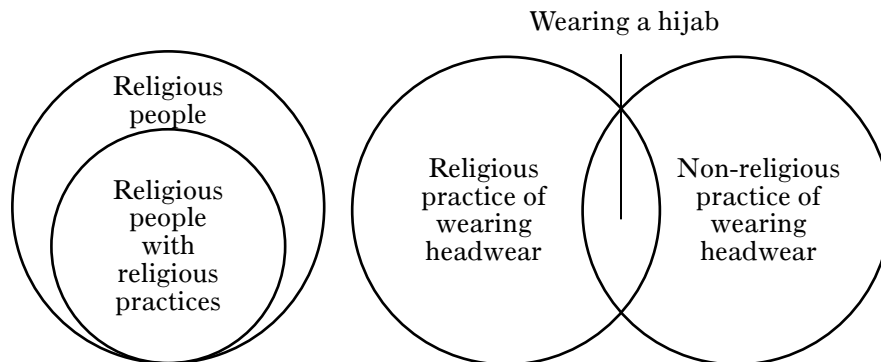
⁷⁷ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 95 (1995).

⁷⁸ Cf. *id.* at 39–40 (discussing how gender stereotypes contribute to “the construction of sexual difference,” *id.* at 39).

⁷⁹ See Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1666 (2021).

The same logic governs other protected characteristics under Title VII, including religion.⁸⁰ Consider an employer who refuses to hire a Muslim woman because she wears a hijab, citing a facially neutral “no-headwear” policy. A *Geduldig*-style analysis might treat religious practice or headwear as neutral intermediaries and characterize the policy as religion-neutral. Religious practices can be used as an intermediary independent from religion because the group of people without religious practices includes both religious and non-religious people, just as the group of non-pregnant people includes both women and men in *Geduldig*. And even if the definition of religion were expanded to include religious practices, headwear could be another distinct intermediary because the group of people who do not wear headwear includes both people with religious practices that do not include headwear and people without religious practices. On this view, the hiring policy is neutral because it classifies based on headwear, not religion or religious practices.

FIGURE 1: COMPETING TRAIT FRAMINGS UNDER TITLE VII:
HIJAB AS INTERMEDIARY VS. PART OF RELIGION



But Title VII rejects this framing. *EEOC v. Abercrombie & Fitch Stores, Inc.*⁸¹ explicitly held that an employer who refuses to accommodate the wearing of a hijab under a dress-code policy violates Title VII.⁸² The Court emphasized that “Title VII does not demand mere neutrality with regard to religious practices — that they be treated no worse than other practices. Rather, it gives them favored treatment”⁸³ Title VII’s text supports this: It explicitly defines “religion” to “include[] all aspects of religious observance and practice.”⁸⁴ This statutory language

⁸⁰ See *id.*; 42 U.S.C. § 2000e-2(a).

⁸¹ 575 U.S. 768 (2015).

⁸² See *id.* at 772–73.

⁸³ *Id.* at 775.

⁸⁴ 42 U.S.C. § 2000e(j).

rejects treating religious practices as an independent intermediary: Religion-exclusive traits like religious practices are included within the definition of religion, a parallel to how the PDA broadened sex to include pregnancy.⁸⁵ *Abercrombie* then judicially rejected the headwear intermediary by treating discrimination against someone for wearing a hijab as religious discrimination, not neutral headwear discrimination, even if some religious practices do not include headwear. Notably, Justice Thomas was alone in his partial dissent when he argued *Abercrombie*'s dress code was a "religion-neutral policy" because it applied uniformly to all potential applicants.⁸⁶

Skrametti's reasoning under the EPC contrasts sharply with this statutory framework. The majority rejected the argument that the Tennessee statute at issue drew sex-based classifications because it did not bar minors of one sex from receiving medical treatments that minors of the other sex could receive.⁸⁷ Instead, the Court characterized the law as drawing medical-based distinctions: Minors born male or female could not receive certain treatments for gender dysphoria but could receive them for other diagnoses.⁸⁸ That analysis follows *Geduldig*, treating medical use as an analytically independent category and thereby severing the causal connection between sex and the challenged restriction.⁸⁹ This is the reasoning *Lange* imports into Title VII.

Although *Skrametti* involved no Title VII challenge,⁹⁰ the Court nonetheless walked through an analysis under *Bostock*'s counterfactual.⁹¹ In doing so, it treated gender identity as inseparable from sex but continued treating medical indication as independent of it. Like *Geduldig*, neutrality was achieved by noting that members of both gender identities fall on either side of the medical line — just as there exist women who are not pregnant, there exist transgender people who do not have gender dysphoria.⁹² Because changing sex (inclusive of transgender identity) as the "one thing" in running a *Bostock* counterfactual does not change the outcome, the discrimination must be because of medical use, not sex.

⁸⁵ See *id.* § 2000e(k).

⁸⁶ *Abercrombie*, 575 U.S. at 781, 782, 789 (Thomas, J., concurring in part and dissenting in part).

⁸⁷ *United States v. Skrametti*, 145 S. Ct. 1816, 1829 (2025).

⁸⁸ *Id.*

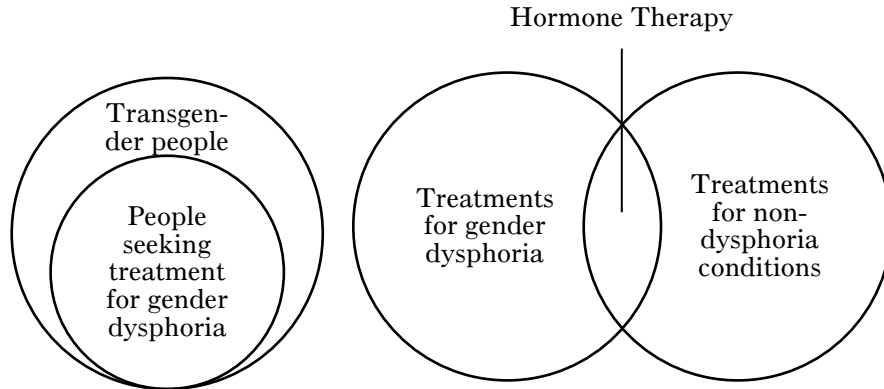
⁸⁹ See Redburn, *supra* note 16, at 181.

⁹⁰ See *Skrametti*, 145 S. Ct. at 1834.

⁹¹ *Id.* at 1834.

⁹² *Id.* at 1833.

FIGURE 2: COMPETING TRAIT FRAMINGS UNDER TITLE VII:
HORMONE THERAPY AS INTERMEDIARY VS. PART OF SEX



That logic is incompatible with Title VII. Gender dysphoria is closely related to sex in two distinct ways: It is sex-exclusive, affecting only transgender individuals,⁹³ and sex-derived, because the diagnosis depends on a mismatch between sex assigned at birth and gender identity.⁹⁴ Without the concept of sex, the diagnosis cannot exist. Unlike conditions such as cancer, the medical indication at issue in *Lange* is defined through and correlated with sex.⁹⁵ Treating it as analytically independent therefore obscures sex-based discrimination.

By importing *Skrametti*'s logic, the *Lange* majority rendered discrimination invisible.⁹⁶ But this is precisely what the PDA, *Bostock*, *Abercrombie*, *Newport News*, and *Price Waterhouse* rejected. The dissents in *Lange* correctly disagreed with that move: Judge Jill Pryor relied on Title VII precedents to reject condition-based neutral intermediaries;⁹⁷ Judge Wilson emphasized that the text of Title VII means the Exclusion turned on sex;⁹⁸ Judge Abudu noted that the medical-use reasoning undermines Title VII's purpose.⁹⁹ Employers may not evade Title VII by recharacterizing sex discrimination as discrimination based on an intermediary either defined by or correlated exclusively with sex — especially when, as here, the intermediary in *Lange* is both.

That statutory conclusion does not depend on rejecting *Skrametti* as a matter of constitutional law. The EPC and Title VII are different:

⁹³ See *id.*

⁹⁴ *Id.* at 1824.

⁹⁵ Cf. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1742 (2020) (describing transgender status as “inextricably bound up with sex”).

⁹⁶ See *Skrametti*, 145 S. Ct. at 1884 (Sotomayor, J., dissenting); *Lange II*, 152 F.4th at 1297 (Wilson, J., dissenting).

⁹⁷ *Lange II*, 152 F.4th at 1276–77 (J. Pryor, J., dissenting).

⁹⁸ *Id.* at 1290–92 (Wilson, J., dissenting).

⁹⁹ *Id.* at 1279 (Abudu, J., dissenting).

They ask different questions and assign definitional authority to different institutional actors.¹⁰⁰ The Constitution does not contain the “because of . . . sex” language that drives Title VII analysis;¹⁰¹ the EPC focuses on categorical classification and formal neutrality,¹⁰² leaving courts greater latitude to treat sex-linked traits as independent conditions. Title VII, by contrast, demands but-for causation,¹⁰³ operationalizing a legislative judgment that employment discrimination should be analyzed at the individual level.¹⁰⁴ Congress therefore retains authority to define sex broadly for statutory purposes,¹⁰⁵ including by folding certain intermediaries into sex itself.

Skrmetti’s “medical use” intermediary may fit constitutional classification, but it does not fit Title VII’s causation-based framework. In *Skrmetti*, Chief Justice Roberts relied on FDA regulations that require sex classifications in approving drugs due to biological variability between sexes.¹⁰⁶ This reasoning reflects an institutional logic proper to the Constitution’s domain of general governance, but not to Title VII’s narrow domain of employment discrimination — the holdings of cases like *Lange* will not affect the federal government’s ability to classify by sex when analyzing drug efficacy. The *Lange* majority erred by treating *Skrmetti*’s analysis of *Bostock* as controlling statutory interpretation, even though *Skrmetti* involved no Title VII claim.¹⁰⁷ The Court’s discussion of Title VII was dictum, and more importantly, it was dictum embedded within the EPC’s framework of viewing related intermediaries

¹⁰⁰ *Washington v. Davis*, 426 U.S. 229 (1976), partially answered how Title VII and the EPC interact by holding that race-based standards differ. *Id.* at 238–39; see also *Lange II*, 152 F.4th at 1256 (“Another difference, noted by the most (in a good way) ‘notorious’ sex-equality advocate of her generation: ‘The Equal Protection Clause . . . prohibits only intentional discrimination,’ while ‘Title VII . . . aims to eliminate all forms of employment discrimination, unintentional as well as deliberate.’”) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting)); *Skrmetti*, 145 S. Ct. at 1859 (Alito, J., concurring in part and concurring in the judgment) (“The Equal Protection Clause does not contain the same wording as Title VII [O]ur cases have adopted an entirely different methodology.”). Scholars have also explained how statutory protections can “exceed[] the constitutional standard,” especially with regard to sex. See, e.g., Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 105. On the facts in *Lange*, the district court had initially reached different results under Title VII and the EPC. *Lange v. Houston County*, 608 F. Supp. 3d 1340, 1356–60 (M.D. Ga. 2022).

¹⁰¹ *Bostock* grounded its Title VII analysis in textualist principles, interpreting the language of Title VII to require but-for causation. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020); see also, e.g., Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 281 (2020) (calling the *Bostock* majority’s approach “formalistic textualism”).

¹⁰² See Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 517 (2019).

¹⁰³ See Eyer, *supra* note 79, at 1642–44.

¹⁰⁴ See *Bostock*, 140 S. Ct. at 1740.

¹⁰⁵ See *Lange II*, 152 F.4th at 1260 n.7 (Rosenbaum, J., concurring in the judgment).

¹⁰⁶ See *United States v. Skrmetti*, 145 S. Ct. 1816, 1830 (2025).

¹⁰⁷ See *id.* at 1829–30; *Lange II*, 152 F.4th at 1276–79 (J. Pryor, J., dissenting).

as analytically independent — a framework repeatedly rejected under Title VII.

Courts may not redefine sex by carving out traits that exist only because of it. By adopting *Skrimetti*'s intermediary logic, *Lange* displaced Congress's statutory judgment with a constitutional framework Title VII does not share.