

No. 24-43

IN THE
Supreme Court of the United States

STATE OF WEST VIRGINIA, *ET AL.*, *PETITIONERS*,

v.

B.P.J., BY HER NEXT FRIEND AND MOTHER,
HEATHER JACKSON, *RESPONDENT*.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

**BRIEF OF *AMICUS CURIAE*
NATIONAL FAIR HOUSING ALLIANCE
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

National Fair Housing Alliance (“NFHA”) is a national 501(c)(3) non-profit organization dedicated to ending discrimination and ensuring equal opportunity in housing for all people, including the LGBTQ community. Founded in 1988, NFHA is a consortium of 200 private, non-profit fair housing organizations and state and local civil rights agencies from throughout the United States. NFHA strives to eliminate housing discrimination and ensure equal housing opportunities for all people through initiatives focused on education and outreach, member services, public policy, advocacy, housing and community development, consulting and compliance, responsible AI, and enforcement. Relying on the federal, state, and local fair housing laws, including the federal Fair Housing Act, NFHA undertakes important enforcement initiatives in cities and states across the country and participates as *amicus curiae* in other cases to further its goal of achieving equal housing opportunities for all. Preserving the Fair Housing Act’s protections based on sexual orientation and gender identity is critical to NFHA’s mission.

¹ Pursuant to Rule 37.6, *Amicus* affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus*, its members, and its counsel has made a monetary contribution to support the brief’s preparation or submission.

SUMMARY OF ARGUMENT

This case is not about housing discrimination. But one of the questions presented concerns how to understand a prohibition—one against sex discrimination—found in dozens of federal civil rights statutes, including statutes that address housing. Among these are the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (“FHA”), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* (“ECOA”).

The most obvious and sensible way to construe what sex discrimination means across civil rights statutes is to do so consistently. Any departure from a consistent understanding should be limited to particular statutes and contexts where Congress clearly called for a different approach. That means the starting point for determining the meaning of sex discrimination under any civil rights statute must be *Bostock v. Clayton County*, 590 U.S. 644 (2020), which held that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex,” *id.* at 669, and “has always been prohibited by Title VII’s plain terms,” *id.* at 662. As for today’s case, Congress did not clearly indicate a different meaning for Title IX. Text is the primary source of a statute’s meaning, *see, e.g., Carter v. United States*, 530 U.S. 255, 271 (2000) (“[i]n analyzing a statute, we begin by examining the text”), and the textual distinction identified by Petitioner (“because of” sex in Title VII versus “on the basis of” sex in Title IX) is not meaningful, *see Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. 327, 335–36 (2020) (describing both “on the basis of” and “because of” as

strongly suggestive of the same but-for causation standard).

Petitioners nonetheless assert that a series of qualities specific to Title IX counsel against applying *Bostock* here. While these arguments provide no sound reason to unmoor Title IX from Title VII with respect to the meaning of sex discrimination, their logic in any event extends no further than Title IX. For the FHA and ECOA, it cuts the other way. These statutes should not be swept up in any limitation the Court may place on the reach of *Bostock* in resolving the instant question about the scope of Title IX.

Starting with the textual difference Petitioners point to between Title VII and Title IX, the FHA’s “because of” language mirrors that of Title VII. 42 U.S.C. §§ 3604(a), (b), (d), 3605(a). Like Title VII, the FHA contains no analog to Title IX’s exceptions permitting sex separation in certain settings. The FHA’s legislative history does not suggest Congress understood differences between the sexes as any more relevant to housing than to employment. The FHA’s implementing regulations do not allow for sex distinctions in housing. And like Title VII, the FHA is a broad remedial statute, not a limitation placed only on recipients of federal funds. Petitioners claim that these are all important distinctions between Title VII and Title IX; if so, they are equally important distinctions between the FHA and Title IX. This leaves no doubt that for Title VII and the FHA sex discrimination means the same thing. The same is true for ECOA—there is no indication Congress meant a person’s sex to be relevant to creditworthiness in any circumstance.

The scale of housing discrimination against transgender and other LGBTQ people makes it especially important not to call into question their protections under the FHA and ECOA. Just last year, Zillow found that 79% of LGBTQ people reported experiencing housing discrimination based on their identity. Studies show that they face prejudice when trying to rent a home, are more likely to be denied when applying for a mortgage to buy a home, and are charged more when approved for a mortgage. The harm of this discrimination is heightened because the LGBTQ population is at high risk for housing instability—LGBTQ people are likelier to live in poverty and experience homelessness, and less likely to own their home. Americans overwhelmingly support laws protecting LGBTQ people from housing discrimination.

The Court should apply *Bostock* and find that discrimination based on gender identity constitutes sex discrimination in violation of Title IX. And, in any event, it should leave questions about *Bostock*'s application under other civil rights statutes like the FHA and ECOA for cases arising under those statutes.

ARGUMENT

I. *Bostock*'s Understanding of Sex Discrimination Applies to Title IX.

Petitioners assert that the Fourth Circuit erred by applying “[r]easoning from *Bostock*” in the Title IX context. Pet’rs’ Br. 17. *Bostock* held that discrimination because a person is transgender is necessarily discrimination “because of” sex under Title VII. The Court reasoned that sex is always a

“but-for” cause of a decision premised on a person’s transgender status, and Title VII liability is based on the “traditional but-for causation standard.” 590 U.S. at 657, 660.

To avoid the same conclusion under Title IX, Petitioners argue that Title IX incorporates a more exacting sole causation standard. Pet’rs’ Br. 19–20, 29. In support, they point to the text of Title IX’s antidiscrimination mandate, which prohibits discrimination “on the basis of sex.” 20 U.S.C. § 1681(a). They argue that, while Title VII’s prohibition on discrimination “because of” sex “requires mere but-for causation,” Title IX’s use of the definite article “the” before “on the basis of” signals a stricter causation standard, requiring that “sex must be the sole reason for invidious discrimination.” Pet’rs’ Br. 19–20, 29. They cite no precedent interpreting “on the basis of” in this manner, nor could they. Their interpretation flies in the face of this Court’s instructions regarding the causation standards of antidiscrimination statutes, its own usage of the phrase “on the basis of,” and robust precedent in the courts of appeals interpreting this exact language.

This Court has instructed that but-for causation “supplies the ‘default’ or ‘background’ rule against which Congress is normally presumed to have legislated when creating its own new causes of action.” *Comcast Corp.*, 589 U.S. at 332 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013)). Congress is “presumed to have incorporated” these rules, “absent an indication to the contrary in the statute itself.” *Nassar*, 570 U.S. at 347. And nothing in “on the basis of” indicates any

departure from the but-for standard. In fact, the Court has expressly described the phrase “on the basis of”—the very Title IX language at issue here—as “language (again) strongly suggestive of a but-for causation standard.” *Comcast Corp.*, 589 U.S. at 335. The Court has arrived at similar conclusions regarding other variants in statutory causation language. See, e.g., *Burrage v. United States*, 571 U.S. 204, 213 (2014) (“Our insistence on but-for causality has not been restricted to statutes using the term ‘because of.’ We have, for instance, observed that in common talk, the phrase ‘based on’ indicates a but-for causal relationship.” (cleaned up)); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 265–66 (1992) (equating “by reason of” with “‘but for’ cause”); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63, 64 n. 14 (2007) (noting that “because of” means “based on” and that “‘based on’ indicates a but-for causal relationship”).

The functional equivalence of “on the basis of” and “because of” is reinforced by this Court’s own usage of the phrases as interchangeable. In numerous opinions, this Court has described claims brought under Title VII (and its “because of” language) as being claims about discrimination “on the basis of” a prohibited characteristic. It described plaintiffs in *Bostock*, for example, as having “brought suit under Title VII alleging unlawful discrimination *on the basis of sex*.” *Bostock*, 590 U.S. at 654 (emphasis added); see also *id.* at 709 (Alito, J., dissenting) (observing that “the concept of discrimination ‘because of,’ ‘on account of,’ or ‘on the basis of’ sex was well understood” at the time of Title VII’s passage). In *Griggs v. Duke Power Co.*, the Court proclaimed that Title VII required “the

removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate *on the basis of* racial or other impermissible classification.” 401 U.S. 424, 431 (1971) (emphasis added). In *Nassar*, the Court noted that “Title VII defines the term ‘unlawful employment practice’ as discrimination *on the basis of* any of seven prohibited criteria[.]” 570 U.S. at 359–60 (emphasis added).

Finally, in contending that “on the basis of” signals a sole causation requirement, Petitioners fail to account for the many decisions from the courts of appeals interpreting the causation standard required by antidiscrimination statutes employing this language. Numerous courts of appeals have addressed the question, largely in the context of Titles I and III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–65, 12181–89, which prohibit discrimination “on the basis of” disability in employment and public accommodations respectively. None require that a plaintiff prove sole causation.² Indeed, several courts of appeals have

² Most have concluded that “on the basis of” signals a but-for standard. See *Doe v. R.I. Interscholastic League*, 137 F.4th 34, 41 (1st Cir. 2025); *Natofsky v. City of New York*, 921 F.3d 337, 349–50 (2d Cir. 2019); *Haberle v. Troxell*, 885 F.3d 170, 179 (3d Cir. 2018); *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235–36 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 314–21 (6th Cir. 2012); *Murray v. Mayo Clinic*, 934 F.3d 1101, 1107 (9th Cir. 2019); *Crane v. Utah Dep’t of Corr.*, 15 F.4th 1296, 1313 (10th Cir. 2021); *Akridge v. Alfa Ins. Cos.*, 93 F.4th 1181, 1192 (11th Cir. 2024). A few have reserved the question or applied a looser motivating factors standard. See *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 702–03

considered whether a 2008 amendment changing the causation language in Title I of the ADA from “because of” to “on the basis of” required any departure from the but-for causation standard each had been applying; they uniformly concluded that there was no meaningful difference between the two phrases. *See Natofsky v. City of New York*, 921 F.3d 337, 349 (2d Cir. 2019) (“We find no reason to hold that there is any meaningful difference between ‘on the basis of,’ ‘because of,’ or ‘based on,’ which would require courts to use a causation standard other than ‘but-for’”); *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235–36 (4th Cir. 2016) (“We see no ‘meaningful textual difference’ between [‘on the basis of’] and the terms ‘because of,’ ‘by reason of,’ or ‘based on.’”); *Murray v. Mayo Clinic*, 934 F.3d 1101, 1106 n.6 (9th Cir. 2019) (“We find no meaningful textual difference in the two phrases with respect to causation.”); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315 (6th Cir. 2012) (*en banc*) (“Later amendments to the ADA [to replace ‘because of’ with ‘on the basis of’] do not change things.”); *Akridge v. Alfa Ins. Cos.*, 93 F.4th 1181, 1192 (11th Cir. 2024) (“[T]he switch from ‘because of’ to ‘on the basis of’ . . . did not change or affect [Title I’s] but-for causation standard.”).

In light of this history, any decision here holding that “on the basis of” in Title IX requires

(5th Cir. 2014) (allowing for a “motivating factor” causation standard); *Monroe v. Ind. Dep’t of Transp.*, 871 F.3d 495, 504 (7th Cir. 2017) (reserving the question but applying a “but-for” causation standard); *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 757 n.6 (8th Cir. 2016) (reserving the question).

something stricter than but-for causation would disrupt a significant settled body of law and could have a far-reaching effect not just on Title IX but on the other antidiscrimination statutes employing the same language, of which there are many.³ Instead, the phrase “on the basis of” in Title IX should be interpreted congruently with the interpretation of the same phrase in other statutes: as encompassing a causation standard no stricter than but-for causation. Because Title IX should be understood to prohibit any action for which sex was a but-for cause, the reasoning of *Bostock* applies here.

The United States resists this conclusion in a different way, by arguing that it is unnecessary to consider whether *Bostock*’s understanding of sex discrimination applies to Title IX because there has been no sex discrimination against Respondent, only equal treatment of her. Not so. Respondent’s school excluded her from the girls’ team “on the basis of” her (male) sex assigned at birth; this dispute would not have arisen had she been assigned the female sex

³ See, e.g., 15 U.S.C. § 1691(a)(1) (ECOA); 42 U.S.C. §§ 12111–65, 12181–89 (Titles I and III of the Americans with Disabilities Act); 42 U.S.C. § 6102 (Age Discrimination Act of 1975); 29 U.S.C. § 623(b) (Age Discrimination in Employment Act, Employment Agency Practices); 5 U.S.C. § 2302 (Merit System Principles, Prohibited Personnel Practices); 42 U.S.C. § 2000e-16a (Government Employee Rights Act of 1991); 20 U.S.C. § 1071(a)(2) (The Federal Family Education Loan Program); 42 U.S.C. § 290ff-1(e)(2) (Title V of the Public Health Service Act (as amended in 1992)); 22 U.S.C. § 2314(g)(1) (Foreign Assistance Act (as amended in 1976)); 47 U.S.C. § 1726 (Digital Equity Act of 2021); 49 U.S.C. § 40127 (Air Commerce and Safety; Prohibitions on Discrimination).

at birth. That is, on its face, differential treatment based on sex, regardless of whether one accepts the premise that the exclusive meaning of “sex” in Title IX is biological sex assigned at birth.

II. Petitioners’ Arguments for Why *Bostock* Should Not Apply Under Title IX Are Inapplicable to the Fair Housing Act and ECOA.

If the Court nonetheless agrees with Petitioners’ distinction between Title VII and Title IX, it should not attempt to answer a broader question about the proper interpretation of prohibitions on sex discrimination in other civil rights statutes. This Court has recognized the importance of “restrict[ing] its analysis to the statute before it and withhold[ing] judgment on the proper resolution of a case” under a different statute. *Nassar*, 570 U.S. at 351. Rather, “[w]hen conducting statutory interpretation, [the Court] must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (internal quotation marks omitted). In *Bostock* itself, the Court responded to the concern that “our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination” this way: “But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.” 590 U.S. at 681. The same is true here. Thus, any decision by the Court about the applicability of *Bostock* to Title IX should only apply to Title IX,

which is the only anti-sex discrimination statute before the court.

There is particularly good reason for this with respect to the FHA and ECOA. To the extent this Court agrees that there are meaningful distinctions between Title VII's and Title IX's sex-discrimination bars, as explained below, the FHA and ECOA are more like Title VII than Title IX.

A. The Fair Housing Act Is Like Title VII.

1. The Fair Housing Act is Properly Interpreted in Keeping with Title VII.

The Court has held that discrimination because of “sex” under Title VII necessarily includes discrimination because a person is transgender (or gay or lesbian); thus, Petitioners’ argument necessarily focuses on distinguishing Title IX from Title VII. While the distinctions they point to do not create a meaningful difference even between Title VII and Title IX, they are non-existent with regard to Title VII and the Fair Housing Act.

This Court, as well as the courts of appeals, have long looked to Title VII for guidance in interpreting the Fair Housing Act. Decisions under Title VII have been significant sources of guidance for this Court in answering questions about the scope of standing, the viability of disparate impact theories of liability, and other issues under the FHA. *See, e.g., Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (standing); *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 530–33 (2015) (citing *Griggs*, 401 U.S. 424) (disparate impact). As this Court recognized in *Inclusive*

Communities, cases interpreting Title VII often “provide essential background and instruction” in deciding Fair Housing Act issues. 576 U.S. at 533. Indeed, every circuit court has relied on Title VII precedent when interpreting the Fair Housing Act. *See, e.g., Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 602 n.3 (1st Cir. 1990); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *aff’d* 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Hall v. Greystar Mgmt. Servs., L.P.*, 637 F. App’x 93, 98 (4th Cir. 2016); *Equal Emp. Opportunity Comm’n v. Miss. Coll.*, 626 F.2d 477, 482 (5th Cir. 1980); *Hollis v. Chestnut Bend Homeowners Ass’n*, 760 F.3d 531, 537 (6th Cir. 2014); *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000); *Badami v. Flood*, 214 F.3d 994, 997 (8th Cir. 2000); *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 n.3 (9th Cir. 2007); *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989); *Fox v. Gaines*, 4 F.4th 1293, 1296 (11th Cir. 2021); *2922 Sherman Ave. Tenants’ Ass’n v. D.C.*, 444 F.3d 673, 679 (D.C. Cir. 2006).

If the distinctions Petitioners draw create a meaningful line between Title VII and Title IX, the Fair Housing Act falls squarely on the Title VII side.

2. *The Fair Housing Act is Like Title VII in All the Ways Petitioners Claim Title IX is Not.*

Petitioners say Titles VII and IX are fundamentally different because Title VII neither allows, nor has reason to allow, sex distinctions in employment, while sex distinctions are both permitted by Title IX and necessary to achieving its

underlying aims. They state repeatedly that Title IX prohibits discrimination but permits “sex distinctions,” Pet’rs’ Br. 3–4, 17–18, 22–26, and observe that the statute allows sex separation in living facilities, certain public colleges, and other specified contexts, *see, e.g., id.* at 5, 22 (citing 20 U.S.C §§ 1691(a)(5)–(8), 1686). Title IX permits these “sex distinctions,” Petitioners say, because of “inherent differences between men and women,” and because such distinctions are sometimes “needed to ensure equal opportunities.” *Id.* at 4, 22. In particular, Petitioners emphasize that differences in sex assigned at birth are “generally irrelevant” to employment but “critical to athletic fairness.” *Id.* at 17; *see also, e.g., id.* at 21 (citing *Bostock* for general irrelevance of biological sex to employment); *id.* at 30 (“Title VII *prohibits* considering sex in hiring and firing because those traits are generally irrelevant there[.]” (emphasis in original)). These differences, they argue, mean that *Bostock*’s understanding of sex discrimination is inapplicable to Title IX.

Petitioners point to six factors as indicia of these purportedly core distinctions: the text of Title IX’s antidiscrimination mandate, the statutory context, the legislative history, “common sense,” the history of regulatory interpretation of the statute, and Title IX’s status as an exercise of Congress’s powers under the Spending Clause. Each of these factors, they argue, illustrates the difference between Title VII and Title IX, such that the Court’s understanding of sex discrimination under the former in *Bostock* should not apply to the latter. These arguments are unconvincing with respect to Title IX. In the context of the Fair Housing Act,

moreover, each of these factors illustrates that the FHA falls on the Title VII side of Petitioners' line.

First, Petitioners point to the text of Title IX's antidiscrimination mandate, which prohibits discrimination "on the basis of sex." Compared to Title VII's prohibition on discrimination "because of sex," Petitioners say, Title IX's "on the basis of" language signals a stricter causation standard. Pet'rs' Br. 19–20, 29. As dubious as the merits of this argument are for Title IX, as discussed above, it cuts the other way with respect to the Fair Housing Act, which uses the same "because of" language as Title VII. Courts of appeals have understood the phrase in the FHA as requiring either a but-for causation standard or a more lenient motivating-factor causation standard. *See, e.g., 431 E. Palisade Ave. Real Est., LLC v. City of Englewood*, 977 F.3d 277, 284 (3d Cir. 2020); *Gilead Cmty. Servs., Inc. v. Town of Cromwell*, 112 F.4th 93, 101 (2d Cir. 2024). The statutory texts, then, provide no basis for distinguishing Title VII and the FHA.

Second, Petitioners point to surrounding provisions in Title IX that approve of sex separation in living facilities, in single-sex colleges, and in certain activities such as scouting, father-son or mother-daughter activities, and conferences like Boys State and Girls State, so long as comparable activities are provided to both boys and girls. Pet'rs' Br. 22. They argue that these provisions confirm that the statute as a whole does not prohibit and in fact "may embrace sex distinctions when they matter." *Id.* Petitioners state, for example, that the living facilities provision, 20 U.S.C. § 1686, is framed as an *interpretation* of the scope of Title IX's broad

antidiscrimination mandate, rather than an exception to it. *Id.* As Respondent explains, this “gets it backwards”: these statutory exceptions were added in the years after Title IX was enacted precisely because Congress recognized that the original text of Title IX would have otherwise prohibited these activities. Resp’t’s Br. 27. But either way, this provides no basis for distinguishing between Title VII and the FHA, which does not include any statutory language authorizing sex distinctions in housing.⁴ Where the FHA’s application is limited, it is on grounds that have nothing to do with sex. *See, e.g.*, 42 U.S.C. § 3607(b)(4) (an applicant’s history of drug convictions); *id.* § 3607(b)(1) (reasonable state

⁴ Title IX and the Fair Housing Act generally regulate separate spheres: education and housing. They only overlap in limited circumstances like college dormitories. Both statutes are implicated, for instance, when a student is harassed in her dormitory because of her sexual orientation. When this overlap occurs, the FHA and Title IX usually work in tandem, with the more specific rule controlling. For example, the FHA says nothing about sex segregation in student housing (or any other housing), while Title IX expressly permits educational institutions to maintain sex-segregated living facilities. *See* 20 U.S.C. § 1686. In such cases, enforcement agencies have looked to the education-specific rules in Title IX, not to the FHA’s general prohibition on sex discrimination in housing. The Department of Housing and Urban Development “has never filed such a charge against a college for sex discrimination based on a housing policy that is specifically exempted from the prohibition on sex discrimination in education under Title IX of the Civil Rights Act.” *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 998 (8th Cir. 2022). This approach is consistent with the general notion that “a specific provision controls one of a more general application[.]” *Gozlon-Peretz v. United States*, 498 U.S. 395, 396 (1991).

and local maximum occupancy restrictions). And most statutory exemptions in the FHA address the scope of the statute's coverage (that is, which housing is covered by the statute and which is not) rather than what counts as discrimination where it does apply. *See, e.g.*, 42 U.S.C. § 3603(b)(2) (exempting owner-occupied one-to-four-unit properties from most of the FHA's provisions). Everywhere the FHA applies, sex distinctions are prohibited.

Third, Petitioners argue that the legislative history of Title IX indicates Congress intended to “allow[] sex distinctions to respect biological differences.” Pet’rs’ Br. 23. But Respondent correctly shows that the particular exceptions to the general rule that sex should be irrelevant under both Title VII and Title IX do not “undermine the general rule that sex is otherwise irrelevant”; instead, they “confirm[] it.” Resp’t’s Br. 30. And even if Petitioners were correct with regard to Title IX, the legislative history of the Fair Housing Act, in contrast, does not provide any such approval of “sex distinctions,” biology-based or otherwise. The original Fair Housing Act as passed in 1968 did not cover sex discrimination, and the Act was amended to add “sex” to the list of protected characteristics in 1974. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 728–29 (August 22, 1974). No other changes to the FHA were made in the 1974 bill. What little legislative history exists for this amendment indicates that the aim was to end rampant discrimination against women in mortgage credit and rental housing, and that the bill’s sponsors believed that sex was irrelevant to such transactions. *See* 120 Cong. Rec. 6124 (Mar. 11,

1974) (statement of Senator Brock); 119 Cong. Rec. 30922–23 (Sept. 21, 1973) (statement of Senator Tower); 119 Cong. Rec. 20263–64 (June 19, 1973) (statement of Senator Tower). The statute prohibits sex-discrimination without exception; unlike in Title IX, Congress did not carve out particular circumstances in which sex distinctions are permissible. The absence of qualifications is particularly notable because the 1974 FHA amendment came just two years *after* Congress enacted Title IX. *See* Education Amendments of 1972, Pub. L. 92-318, title IX, 86 Stat. 236, 373–75 (June 23, 1972). Thus, after spending months debating permissible sex distinctions in education, Congress chose to reject such distinctions in housing.

Fourth, Petitioners argue that “common sense” demonstrates Title IX allows for sex distinctions in sports, because “sex is the most obvious and well-established characteristic to determine whether individuals are similarly situated.” Pet’rs’ Br. 23–24 (quoting *Biden v. Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J., concurring)). Therefore, *Bostock*’s logic cannot apply to Title IX, they argue, because while sex (including transgender status) is not relevant to employment, it is relevant to sports. This is an atextual attempt to replace the actual test established by the statutorily-authorized athletics regulations—the provision of “equal athletic opportunity”—with Petitioners’ own value judgments and furthermore misunderstands the “similarly situated” concept under antidiscrimination law. *See* Resp’t’s Br. 35–37, 39–40. But whatever “common sense” relevance sex might have to sports, it has none to the questions with which the Fair Housing Act is concerned, like

the ability to repay a mortgage loan or comply with the terms of a lease. *See, e.g.*, 119 Cong. Rec. 30923 (Sept. 21, 1973) (quoting a letter of support for the proposed addition of sex to the Fair Housing Act from the Federal National Mortgage Association (Fannie Mae), which supported the change because it considered sex an “immaterial consideration”).

Fifth, Petitioners argue that Title IX’s implementing regulations—authorizing sex separation in several settings including sports teams—support their argument because they were adopted just three years after Title IX’s enactment. Pet’rs’ Br. 24–25. These regulations, Petitioners argue, are a contemporaneous construction of the statute and thus “authoritative expressions concerning [Title IX’s] scope and purpose,” and were subsequently “blessed” by Congress. *Id.* (quoting *N. Haven Bd. Of Educ. v. Bell*, 456 U.S. 512, 535 (1982)). As Respondent explains, these regulations do not support excluding girls like B.P.J. Resp’t’s Br. 36–38. Even if Petitioners were right as to Title IX, however, the regulatory history of the Fair Housing Act is different and provides no basis for such an argument. The Department of Housing and Urban Development’s (HUD’s) contemporaneous regulations implementing the 1974 addition of sex to the statute merely edited the list of protected characteristics each time it appeared; the regulations did not purport to authorize any sex distinctions. In fact, HUD considered notice and comment unnecessary because the regulatory amendments were “merely editorial modifications to reflect the [new] congressional mandate.” Equal Housing Opportunity Miscellaneous Amendments, 40 Fed. Reg. 20053, 20079 (May 8, 1975).

Finally, Petitioners argue that, because Title IX, unlike Title VII, was enacted under Congress's Spending Clause authority, a clearer textual directive is required before a *Bostock*-like rule may be applied. Pet'rs' Br. 31–32. They note that, while Title VII applies broadly to employers regardless of receipt of federal funds and aims to “eradicate discrimination throughout the economy,” Title IX is focused on preventing “discriminatory practices carried out by recipients of federal funds.” *Id.* at 31 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286–87 (1998)). As Respondent explains, Petitioners are wrong about the effect of the Spending Clause here (and in any event have waived that argument). Resp't's Br. 30–31 n.12. But here too, even if Petitioners were correct about this distinction with regard to Title IX, their argument only highlights the similarities between the Fair Housing Act and Title VII. Like Title VII, the FHA was enacted with a broad societal mandate: “to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601; *see also Inclusive Cmty. Project, Inc.*, 576 U.S. at 539 (“The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy.” (citing 42 U.S.C. § 3601; H.R. Rep. No. 100-711, p. 15 (1988))). And far from the narrow construction Petitioners assert is required for Title IX, the Court has been clear that the FHA was adopted with a “broad and inclusive’ compass” that entitles it to a “generous construction.” *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (quoting *Trafficante*, 409 U.S. at 731)).

B. The Equal Credit Opportunity Act is Like Title VII.

ECOA bars sex and other types of discrimination in mortgage and other credit transactions. *See* 15 U.S.C. § 1691(a). While both Title IX and ECOA use the phrase “on the basis of” in prohibiting sex discrimination, *id.*; 20 U.S.C. § 1681(a), for the reasons discussed above, this is immaterial. And with respect to the other differences Petitioners say set apart Titles VII and IX, like the FHA, ECOA is squarely on the Title VII side of this argument.

Any ruling by the Court in Petitioners’ favor based on Title VII’s and Title IX’s differences should, accordingly, not prejudge the meaning and application of “sex” in ECOA, whether directly or by implication. *See Bostock*, 590 U.S. at 681 (“But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”).

As discussed above, Petitioners say Titles VII and IX are fundamentally different because Title IX prohibits discrimination but permits “sex distinctions,” Pet’rs’ Br. 3–4, 17–18, 22–26, which they say are necessary because of “inherent differences between men and women,” *id.* at 4. They argue that differences in sex as assigned at birth are “generally irrelevant” to employment but “critical to athletic fairness.” *Id.* at 17.

As with the Fair Housing Act, ECOA is like Title VII—not Title IX—in these respects. The concept of permitting “sex distinctions” in credit

because of “inherent differences between men and women” is directly contrary to the very purpose of ECOA. “Congress stated that the legislation’s purpose was to ensure ‘that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status.’” *Consumer Fin. Prot. Bd. v. Townstone Fin., Inc.*, 107 F.4th 768, 773 (7th Cir. 2024) (quoting initial version of the statute). Perhaps men on average swim faster or spike a volleyball harder than women, and so sex distinctions may be material to sports, but that has no bearing on their likelihood of repaying a loan, where sex distinctions—including distinctions based on sexual orientation or gender identity—have no place.

III. Housing Discrimination Against LGBTQ People is a Significant Problem.

The importance of *Bostock*’s application to the FHA and ECOA is not an abstract matter. Housing discrimination against LGBTQ people is a material and pressing concern for millions of Americans. Lower courts have correctly applied *Bostock* to claims of LGBTQ discrimination under the Fair Housing Act and they should be permitted to continue doing so.

America has grown increasingly welcoming towards its many LGBTQ people. This trend is not universal, however, and serious housing discrimination against the LGBTQ community persists. In one recent survey, more than three-quarters of LGBTQ individuals reported experiencing housing discrimination based on their identity. See Zillow Grp., Survey: Most LGBTQ+

Individuals Experience Discrimination in Housing (June 11, 2024), <https://www.zillowgroup.com/news/most-lgbtq-experience-discrimination-in-housing/> [<https://perma.cc/EJU3-CJJ5>].

These reports of discrimination are corroborated by robust empirical evidence. In a 2013 study, researchers sent thousands of emails to landlords inquiring about units the landlords had advertised online. Samantha Friedman et al., *An Estimate of Housing Discrimination Against Same-Sex Couples*, Dep't Hous. & Urb. Dev't (2013), [<http://perma.cc/5KXM-T6YZ>]. Approximately one of every six landlords sent less favorable responses to emails that purported to be from a same-sex couple than to emails that purported to be from a heterosexual couple. *Id.* at vi–vii. Another pair-testing study found that landlords told gay men and transgender people about fewer available rental units. See Diane K. Levy et al., *A Paired-Testing Pilot Study of Housing Discrimination Against Same-Sex Couples and Transgender Individuals*, Urb. Inst. (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf [<https://perma.cc/Y6B3-D8HF>].

LGBTQ Americans also face prejudice when they wish to buy a home. When same-sex couples apply for a mortgage, their applications are less likely than those of heterosexual couples to be approved. See J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. Chi. L. Rev. 1, 4–5 (2019), https://lawreview.uchicago.edu/sites/default/files/01_Dillbary_ART_Post-SA_%28KT%29.pdf [<https://>

perma.cc/9A86-2XN8]. And when their applications are approved, same-sex couples pay higher financing costs, resulting in millions in additional interest and fees each year. See Lei Gao & Hua Sun, *Lending Practices to Same-Sex Borrowers*, 116 Proceedings Nat'l Acad. Scis. 9293, 9293 (2019), <https://doi.org/10.1073/pnas.1903592116>. Both studies accounted for financial risk factors and loan characteristics. See Dillbary & Edwards, *supra*, at 35–39, 43–44, 47 n.200; Gao & Sun, *supra*, at 9294.

When landlords and lenders discriminate against LGBTQ consumers, they target a community already at high risk of housing instability. LGBTQ Americans are more likely to live in poverty than their heterosexual and cisgender peers. See M.V. Lee Badgett et al., *LGBT Poverty in the United States: A Study of Differences Between Sexual Orientation and Gender Identity Groups*, U.C.L.A. L. Sch. Williams Inst., at 24–26 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf> [<https://perma.cc/3U65-2ZLB>]. They are, accordingly, less likely to own homes than others in their age cohort, and more likely to experience homelessness. See Visalli et al., *Why Are There Gaps in LGBTQ+ Homeownership*, Urb. Inst. Rsch. Report, at 7 (2023), https://www.urban.org/sites/default/files/2024-02/Why_Are_There_Gaps_in_LGBTQ%2B_Homeownership.pdf [<https://perma.cc/B73M-SRXU>]; Alex Montero et al., *LGBT Adults' Experiences with Discrimination and Health Care Disparities: Findings from the KFF Survey of Racism, Discrimination, and Health*, Kaiser Fam. Found. (2024), <https://www.kff.org/racial-equity-and-health-policy/lgbt-adults-experiences-with-discrimination-and-health-care-disparities-findings-from-the-kff->

[survey-of-racism-discrimination-and-health/ \[https://perma.cc/Y9RR-6KE4\]](https://perma.cc/Y9RR-6KE4).

LGBTQ youth are particularly vulnerable because they often face rejection from their families after coming out: studies have shown that a large share of homeless youth (ranging from 20% to 45%) identify as LGBTQ. Adam P. Romero et al., *LGBT People and Housing Affordability, Discrimination, and Homelessness*, U.C.L.A. L. Sch. Williams Inst., at 14–17, (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf> [<https://perma.cc/K4QL-HY44>]. When in shelters, moreover, many LGBTQ youth report being harassed because of their sexual orientation or gender identity. *Id.* at 18–19.

The effects of housing discrimination are far-reaching, because where we live shapes many facets of our lives. Our homes affect our job opportunities, our health and health care, the quality of schools our children attend, and our risk of being victims of violent crimes. Our homes are integrally connected to our financial well-being, too. Home ownership is a primary method by which Americans accumulate wealth. Meanwhile, the median renter spends 31% of their income on housing costs—an amount that has increased over the past two decades. *See* Press Release, U.S. Census Bureau, Nearly Half of Renter Households Are Cost-Burdened, Proportions Differ by Race (Sept. 12, 2024), <https://www.census.gov/newsroom/press-releases/2024/renter-households-cost-burdened-race.html> [<https://perma.cc/MA54-RVYA>]. Countering housing discrimination, including discrimination against LGBTQ individuals, is therefore an urgent priority.

Following *Bostock*, state and federal regulators have made substantial strides towards this goal. In 2021, HUD cited *Bostock* when announcing its position that the Fair Housing Act prohibits discrimination on the basis of gender identity or sexual orientation.⁵ News Release, Dep't Hous. & Urb. Dev't, No. 21-021, HUD to Enforce Fair Housing Act to Prohibit Discrimination on the Basis of Sexual Orientation and Gender Identity (Feb. 11, 2021), <https://archives.hud.gov/news/2021/pr21-021.cfm> [<https://perma.cc/Z5SX-BCWG>]. A majority of states have now either interpreted or amended their fair housing statutes to protect LGBTQ home-seekers.⁶ Polls show overwhelming support for such

⁵ HUD has since announced that it will not enforce the Fair Housing Act with respect to claims of gender-identity discrimination, based on its purported authority to prioritize some claims over others. *See* Memorandum from John Gibbs, Principal Deputy Assistant Sec'y for Fair Hous. & Equal Opportunity, Fair Housing Act Enforcement and Prioritization of Resources at 3 (Sept. 16, 2025), <https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/880/2025/09/HUD-memo-Fair-Housing-Act-Enforcement-and-Prioritization-of-Resources-9.16.2025.pdf> [<https://perma.cc/3FM7-HQNY>]. It has not, however, officially stated that the FHA does not bar such discrimination, let alone released legal analysis that would justify such a position.

⁶ After *Bostock*, regulators in seven states (Arizona, Florida, Kansas, Kentucky, Michigan, Nebraska, North Dakota, Ohio, and Pennsylvania) interpreted state fair housing statutes to prohibit discrimination based on sexual orientation or gender identity in at least some circumstances. *See* Press Release, Ariz. Att'y Gen., Attorney General Mayes Announces Fair Housing Act Settlement between LGBTQ Customers and Mortgage Company (Apr. 18, 2023), <https://www.azag.gov/press-release/attorney-general-mayes-announces-fair-housing-act-settlement>

tlement-between-lgbtq-customers [<https://perma.cc/MH53-VHEJ>]; Fla. Comm’n on Hum. Rels., Sexual Discrimination (Feb. 3, 2021), <https://fchr.myflorida.com/sexual-discrimination> [<https://perma.cc/6DZV-CSWH>]; Kan. Hum. Rts. Comm’n, Guidance from the Kansas Human Rights Commission on Sex Discrimination in Employment, Public Accommodations, and Housing (Sept. 18, 2020), <http://www.khrc.net/pdf/KHRC%20Guidance%20on%20Sex%20Discrimination%20in%20Employment%20Public%20Accommodations,%20and%20Housing%20on%20letterhead%20rev%20dwh.pdf> [<https://perma.cc/AP9F-AB6H>]; Ky. Hum. Rts. Comm’n, *Frequently Asked Questions: I believe I have been discriminated against based on my sexual orientation/gender identity. Can I file a claim with KCHR?* (accessed Nov. 5, 2025), <https://kchr.ky.gov/About/Pages/FAQs.aspx>; Neb. Equal Opportunity Comm’n, Outreach Initial Inquiry Questionnaire (accessed Nov. 5, 2025), https://neoc.nebraska.gov/sites/default/files/2024-08/NEOC_webinquiry2024_v1_fillable.pdf [<https://perma.cc/ZBG4-VLH7>]; Press Release, N.D. Dep’t Lab. & Hum. Rts., NDDOLHR Now Accepting and Investigating Charges of Discrimination Based on Sexual Orientation and Gender Identity (June 18, 2020), <https://web.archive.org/web/20250331211354/https://www.nd.gov/labor/news/nddolhr-now-accepting-and-investigating-charges-discrimination-based-sexual-orientation-and>; Ohio Civil Rts. Comm’n, *Discrimination based on Sexual Orientation and Gender Identity* (archived Dec. 17, 2021), <https://web.archive.org/web/20211217171914/https://www.crc.ohio.gov/FilingCharge/LGBTQ.aspx>; 53 Pa. Bull. 3188 (June 17, 2023).

State fair housing statutes expressly cover either sexual orientation or gender identity (or both) in 25 other states and territories: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin. *See* Cal. Gov. Code § 12955 (2025); Colo. Rev. Stat. § 24-34-502 (2025); Conn. Gen. Stat. § 46a-64c; Del. Code Ann.

policies. See Pub. Religion Rsch. Inst., *Views on LGBTQ Rights in All 50 States: Findings from PRRI's 2023 American Values Atlas* (Mar. 12, 2024), <https://prri.org/research/views-on-lgbtq-rights-in-all-50-states/> [<https://perma.cc/XMU5-MNNK>].

Since *Bostock* issued, meanwhile, the federal courts to consider whether the Fair Housing Act prohibits discrimination against LGBTQ individuals have universally concluded that it does. See Robert G. Schwemm, *Housing Discrimination Law & Litigation* § 11C:1 (2025) (collecting cases); *Larocque v. Spring Green Corp.*, No. 22-cv-00249, 2024 WL 4198607, at *4 (D.R.I. Sept. 16, 2024); *Johnson v. Conn. Coal. Against Domestic Violence*, No. 3:23-cv-1133, 2024 WL 1000730, at *6 (D. Conn. Mar. 8, 2024); *United States v. SSM Props., LLC*, 619 F. Supp. 3d 602, 606 (S.D. Miss. 2022); *Scutt v. Dorris*, No. 20-cv-00333, 2021 WL 206356, at *5 (D. Haw. Jan. 20, 2021); see also *Walsh v. Friendship Vill. of S. Cnty.*, No. 19-1395, 2020 WL 5361010, at *1 (8th Cir. July 2, 2020) (vacating district court's dismissal of

tit. 6, § 4603 (2025); D.C. Code § 2-1402.21; Haw. Rev. Stat. § 515-3; 775 Ill. Comp. Stat. 5/1-103(O-1), (Q), 5/3-102 (2025); Iowa Code § 216.8 (2025); Me. Stat. tit. 5, § 4581-A (2025); Md. Code Ann., State Gov't § 20-705 (West 2025); Mass. Gen. Laws ch. 151B, 4-3A, 3B, 6, 7 (2025); Mich. Comp. Laws § 37.2102 (2025); Minn. Stat. § 363A.09 (2025); Nev. Rev. Stat. § 118.100 (2025); N.H. Rev. Stat. Ann. §§ 354-A:10, 354-A:12.VI; N.J. Stat. Ann. § 10:5-4 (2025); N.M. Stat. Ann. § 28-1-7.G (West 2025); N.Y. Exec. Law § 296.2-a (McKinney 2025); Or. Rev. Stat. § 839-005-0205 (2025); 34 R.I. Gen. Laws § 34-37-2 (2025); Utah Code Ann. § 57-21-5 (2025); Vt. Stat. Ann. tit. 9, § 4503; Va. Code Ann. § 36.96.3 (2025); Wash. Rev. Code Ann. § 49.60.222 (2025); Wis Stat. § 106.50 (2025).

FHA sexual-orientation-discrimination claim and remanding for reconsideration in light of *Bostock*).

By focusing narrowly on the issue raised in this case—the correct reading of Title IX—this Court will allow lower courts to continue to consider and elaborate on the meaning of the Fair Housing Act.

CONCLUSION

Petitioners postulate differences between Title VII and Title IX that they contend preclude application of *Bostock*, a Title VII case, to this Title IX case. Amicus believes those arguments are incorrect. Petitioners’ assertion that Title IX’s “on the basis of” language requires a stricter causation standard than Title VII’s “because of,” thus preventing the application of *Bostock*, is contrary to this Court’s precedent and would disrupt established doctrine for many other antidiscrimination statutes. But if the Court concludes that Petitioners are right, then it must heed the fact that with respect to the differences Petitioners rely on, the FHA and ECOA are like Title VII, not Title IX. Discrimination based on sex under the FHA and ECOA includes discrimination based on gender identity and sexual orientation, and this Court should not say anything that calls that into question.

Respectfully submitted,

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