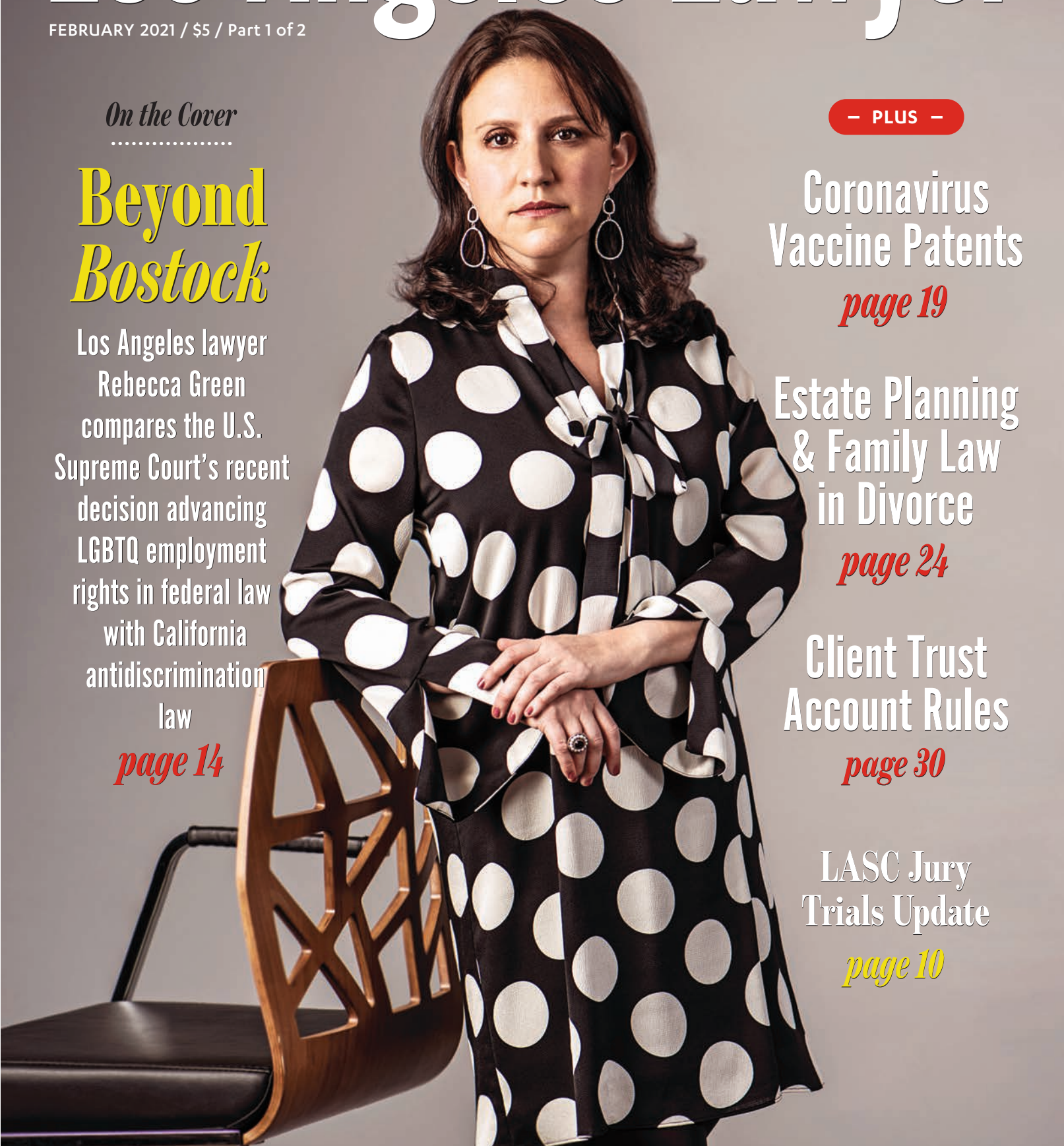
THE MAGAZINE OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Los Angeles Lawyer

FEBRUARY 2021 / $5 / Part 1 of 2



On the Cover

Beyond *Bostock*

Los Angeles lawyer Rebecca Green compares the U.S. Supreme Court's recent decision advancing LGBTQ employment rights in federal law with California antidiscrimination law

page 14

– PLUS –

Coronavirus Vaccine Patents

page 19

Estate Planning & Family Law in Divorce

page 24

Client Trust Account Rules

page 30

LASC Jury Trials Update

page 10

By REBECCA GREEN

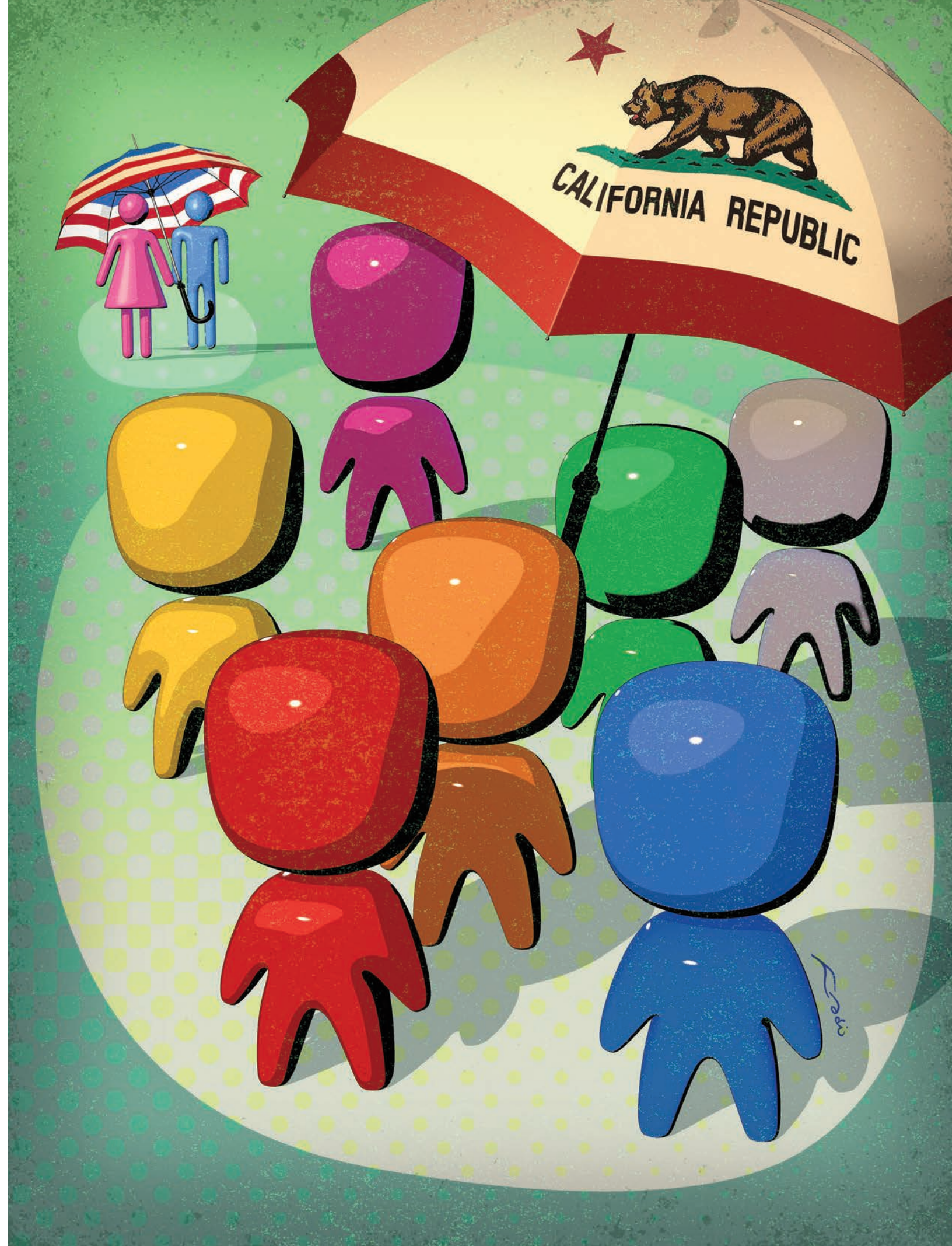
Beyond *Bostock*

Unlike federal law, California antidiscrimination law recognizes and protects sex and gender characteristics independent of a binary male-female structure

The U.S. Supreme Court's June 2020 decision in *Bostock v. Clayton County, Georgia*[1] has been touted as a definitive victory for employees facing discrimination on the basis of their lesbian, gay, bisexual, transgender, or queer (LGBTQ) status. Although *Bostock* constitutes a significant advancement in federal law protection of sexual orientation and transgender rights, it stops well short of dismantling the traditional notion that the term "sex" refers solely to the biological category assigned based on chromosomal differences. Under the *Bostock* ruling, employees are entitled to legal protection under Title VII of the Civil Rights Act of 1964[2] if they are treated adversely by an employer or prospective employer based on their homosexual or transgender status. But that protection is not afforded to employees because they are homosexual or transgender; instead, it is granted "because of sex,"[3] a phrase that means discrimination based on a person's status as biological male or biological female. Because it fails to move beyond the rigid male-female binary structure that has long defined the American conception of "sex," federal law is still a long way

Rebecca Green is an attorney at Richards, Watson & Gershon in Los Angeles, and chair of the firm's Labor and Employment Department. She advises, litigates, and negotiates on behalf of public agencies.

HADI FARAHANI


CALIFORNIA REPUBLIC

behind California antidiscrimination law, which recognizes—and protects—sex and gender characteristics independent of that structure.

The *Bostock* Decision

The Supreme Court in *Bostock* sought to resolve a federal circuit split over whether Title VII's prohibition on employment discrimination "because of sex" bans discrimination based on homosexual or transgender status. Gerald Bostock worked for Clayton County, Georgia as a child welfare advocate and was fired when he began participating in a gay recreational softball league. Donald Zarda, a skydiving instructor for a private company in New York, was fired after mentioning that he was gay. Aimee Stephens, a funeral home worker in Michigan, was hired when she presented as a male—her biological sex. After six years with the company, Ms. Stephens decided to transition and "live and work full-time as a woman."[4] The funeral home fired her immediately.

In all three cases, the employees brought suit under Title VII, alleging unlawful discrimination on the basis of sex. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and dismissed Mr. Bostock's suit. The Second Circuit ruled that sexual orientation discrimination is encompassed within sex discrimination, and therefore Mr. Zarda's case could proceed. The Sixth Circuit also allowed Ms. Stephens's case to proceed, concluding that Title VII prohibits terminations based on transgender status.

The parties in *Bostock* agreed that the employers' sole reason for firing the employees was their homosexual or transgender status. The employers contended that the plain meaning of "sex" as used in Title VII referred to "status as either male or female [as] determined by reproductive biology."[5] The employees contended that "sex" encompassed a broader meaning than biological categories, and that even in 1964, the term's scope "captur[ed] more than anatomy and reach[ed] at least some norms concerning gender identity and sexual orientation."[6] The Court dismissed the employees' argument at the outset, declining to consider whether sex signified anything more than "the biological distinctions between male and female."[7] What mattered for Title VII purposes, the Court reasoned, was not what "sex" meant, but what "because of" meant. Instead of broadening the definition of sex, the Court expanded the conception of causation, ultimately holding that discrimination "because of" sexual orientation or transgender status was—despite the employers' intent—discrimination "because of" biological sex. *Bostock* did not expand the meaning of sex under federal law; if anything, it prescribed a narrow definition. Yet, within that restrictive scheme, the Court established federal protection for gay and transgender employees.

To illustrate the "but-for" causation analysis used to determine liability under Title VII,[8] the Court presented the following hypothetical scenario: An employer has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the employee is a man, the answer is no; if the employee is a woman, the answer is yes. Thus, even if the employer's goal is to discriminate based on homosexuality (a characteristic not protected by Title VII), the only way to achieve that purpose is to disfavor the woman who brought her wife to the party.[9] A man would not have been fired for the same action, and, but for the employee's sex, she would not have been fired. Therefore, the employee's rights were violated under Title VII when the employer decided to fire her "because of" sex.

In the following scenario, the same reasoning applies to transgender employees: An employer has a policy of firing employees known to be transgender. An employee comes to work wearing traditionally feminine clothing, requests that coworkers use the pronoun "she," and introduces herself as "Caroline." Will that employee be fired? If the employee is a biological female, the answer is no; if the employee is a biological male, the answer is yes. While the employer's intent was to discriminate based on transgender status (another characteristic not protected by Title VII), the only way to achieve that goal is to disfavor the biological male employee who identifies as a woman. A biological female would not have been fired for identifying as a woman. But for the employee's sex, the transgender employee would not have been fired. Therefore, again, the employee's rights were violated under Title VII when the employer took adverse action "because of" sex.[10]

Justice Neil Gorsuch, writing for the majority, stated that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex.... An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[11] The protection extended to homosexual and transgender employees under *Bostock* thus arises from an entirely different basis than what caused the employees in the case to seek protection: sexual orientation and gender identity. Had those employees faced the same discriminatory actions in California, they could have brought suit under state law and prevailed because of their sexual orientation and gender identity. The very scheme rejected by the Court in *Bostock* forms the foundation of California antidiscrimination law, as articulated by the courts and codified under the Fair Employment and Housing Act (FEHA).

California Law

The California Constitution was amended in 1974 to provide that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex...."[12] It was not the prohibition on sex discrimination, however, that gave rise to the idea that sexual orientation discrimination should also be unlawful. Rather, sexual orientation discrimination was initially contemplated as a restriction on protected political activities—the right to engage in and defend homosexual activity.

In *Gay Law Students Association v. Pacific Telephone & Telegraph Company*, the California Supreme Court held that a public utility's "practice of excluding homosexuals from employment" violated state constitutional rights under California's equal protection clause.[13] The plaintiffs alleged that a public utility discriminated "against homosexuals in the hiring, firing, and promotion of employees."[14] The court established that "under California law, the state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him unfit for the job...."[15] Although the court noted that "the state may not exclude homosexuals as a class,"[16] cases that followed *Gay Law Students Association* focused instead on the court's prohibition against discrimination based on sexual orientation as a protected political activity.

The California Supreme Court in *Gay Law Students Association* also ruled that the public utility's discriminatory actions based on sexual orientation interfered with the plaintiffs' political

freedom. The plaintiffs alleged that the utility discriminated against "'manifest' homosexuals" and "persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations."[17] The court emphasized that "the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."[18] Applying Labor Code sections 1101[19] and 1102,[20] the court found that the public utility's exclusionary hiring policy based on sexual orientation "tend[ed] to control or direct the political activity or affiliations of employees" and attempted to "coerce or influence" individuals from "adopting [a] particular course or line of political…activity."[21] The court also addressed whether the California Fair Employment Practice Act (FEPA)[22] applied to prohibit discrimination "on the basis of sex."[23] The court found that the FEPA did not apply and rejected the plaintiffs' arguments that 1) "discrimination against homosexuals constitutes discrimination on the basis of 'sex' within the meaning of the FEPA" and 2) "discrimination against homosexuals is in effect discrimination based on the gender of the homosexual's partner."[24]

Had the Supreme Court in *Bostock* reached its decision by including gay and transgender status within the definition of "sex," thus effectively making it a protected class, the ruling would likely provide gay and transgender employees with a more unassailable protection against employment discrimination.

In 1991, the California Court of Appeal's decision in *Soroka v. Dayton Hudson Corporation* again prohibited discrimination based on sexual orientation as a form of political activity.[25] The plaintiffs alleged that Target's psychological screening test forced applicants for security officer positions to reveal their sexual orientation.[26] The court, applying Labor Code sections 1101 and 1102, found that the screening test interfered with political freedom because it "tend[ed] to discriminate against those who express a homosexual orientation" and also "constitute[d] an attempt to coerce an applicant to refrain from expressing a homosexual orientation."[27] Thus, the court concluded that the Labor Code also functioned to prohibit an employer from discriminating against an employee or applicant on the basis of sexual orientation.[28]

The following year, the California Legislature passed Assembly Bill 2601, codifying at Labor Code Section 1102.1 the holdings of *Gay Law Students Association* and *Soroka* to "prohibit discrimination or disparate treatment in any of the terms and conditions of employment based on actual or perceived sexual orientation."[29] Subsequent case law thus began to cite Section 1102.1 as the basis for prohibiting employment discrimination based on sexual orientation. For example, in *Delaney v. Superior Fast Freight,* an employee alleged "that he was harassed through lewd comments and conduct by his coworkers and supervisors based upon their perception of him as homosexual."[30] Applying Section 1102.1, the California Court of Appeal reasoned that "[s]ince one who identifies himself or herself as gay or who defends homosexuality is protected as engaging in political activity it follows that employer policies against those believed to be homosexual are outlawed as fostering an atmosphere in which gay workers would be compelled not just to forego seeking equal rights but also to hide their sexual orientation."[31]

Similarly, in *Kovatch v. California Casualty Management Company*, the California Court of Appeal applied Section 1102.1 in a wrongful termination case in which the employee alleged that he was constructively discharged "because of harassment based on his sexual orientation."[32] The court found that the employee could bring a claim for wrongful termination in violation of the public policy—the public policy of opposing harassment against gay people—because the alleged harassment was "based on actual or perceived sexual orientation."[33]

In 2000, Assembly Bill 1001 moved the provisions prohibiting employment discrimination on the basis of sexual orientation from the Labor Code to the Government Code, specifically to the FEHA. After the bill declared sexual orientation" a "civil right" under the FEHA, case law thereafter prohibited discrimination based on sexual orientation as a protected category under that statute. Sexual orientation, defined as "heterosexuality, homosexuality, and bisexuality"[34] remains a protected category in the FEHA.[35]

In *Murray v. Oceanside Unified School District*, the California Court of Appeal addressed the statutory change from the Labor Code to the FEHA. An employee alleged that she was harassed in the workplace because of her sexual orientation.[36] The court stated that "FEHA now clearly contains a prohibition of workplace harassment based on the protected category of sexual orientation."[37] The court further noted that the FEHA protections were "consistent with the political freedom of expression protections" that originated under the Labor Code to prohibit discrimination based on sexual orientation.[38]

Whereas California's prohibition on sexual orientation discrimination is rooted in the protection of political activity, the prohibition on discrimination based on gender, gender identity, and gender expression evolved out of the FEHA's definition of "sex." However, unlike the Supreme Court's ruling in *Bostock*, California law recognizes nonbinary genders and expressions of gender that are encompassed within the category of sex but that do not depend on the traditional male/female biological definition of sex.

In 2003, the legislature passed AB 196, expanding the definition of "sex" under the FEHA to include gender. AB 196 incorporated the definition of "gender" from the Penal Code section dealing with hate crimes.[39] In 2011, AB 887 again amended the FEHA to include its own definition of "sex," and added the terms "gender identity" and "gender expression." Under AB 887, "'Sex' also includes, but is not limited to, a person's gender. 'Gender' means sex and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[40] This is the definition currently in the FEHA.[41]

The Department of Fair Employment and Housing issued regulations in 2016 that clarified the FEHA's conception of

gender and solidified the notion of an individually protected class, one related to sex but also separate from it. That is, if the biological distinctions of male and female—the distinctions on which the *Bostock* ruling depended—were eliminated, gender, gender expression, and gender identity would continue to exist as independent characteristics upon which employment actions cannot be based. Under the current regulations, gender identity, its own protected characteristic, is defined as "each person's internal understanding of their gender, or the perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender."[42] The protection from discrimination, therefore, stems not from the "but-for" analysis of biological sex used in *Bostock* but on the very notion that biological sex does not matter. Thus, where *Bostock* reinforces the traditional male-female binary, California law dismantles it completely.

Practical Implications

Most employment discrimination cases in California are brought under the FEHA rather than Title VII. Most likely, that will not change. While federal law now protects homosexual and transgender employees, the protections are not rooted in the law's acknowledgment of the limitations of biological categorization. Those limitations matter. For example, does Title VII protect a bisexual employee from being fired "because of" sex? Under *Bostock*, probably not. Imagine that an employer adopts a policy of firing all bisexual employees. The employer requires its employees to check boxes identifying their sexual orientation: straight, homosexual, or bisexual. If a bisexual man is fired, it is because he is attracted to both males and females. A bisexual woman who checks the same box would be fired too. Because there is no disparate treatment of the biological sexes, the employee is not protected.

Additionally, federal law would not protect employees who identify as both male and female, neither male nor female, or something that cannot be described in male/female terms. Federal law would not protect employees who prefer the pronoun "they" rather than "he" or "she" to describe themselves, if "they" indicates something other than a biological male with traditionally feminine traits or a biological female with traditionally masculine traits.

The failure of federal law to consider LGBTQ status outside the rubric of biological sex also leaves the protections of *Bostock* vulnerable to erosion. On November 4, 2020, the Supreme Court heard oral arguments in *Fulton v. City of Philadelphia* and will decide whether the government may condition a religious agency's participation in the foster care system on the agency's willingness to take actions that contradict its religious beliefs.[43] At issue is Philadelphia's decision to stop referring foster parent applicants to Catholic Social Services based on the agency's refusal to certify same-sex couples as foster parents. During oral argument, the question arose whether a refusal to certify interracial couples would be treated with the same deference to an agency's religious belief as the refusal to certify same-sex couples. Justice Samuel Alito assured his fellow justices that a ruling in favor of Catholic Social Services would not lead to such an outcome, noting that *Obergefell v. Hodges* left open the possibility of "honorable reasons" to oppose same-sex marriage, whereas the Supreme Court has never said anything similar about interracial marriage. Simply put, discrimination based on LGBTQ status is still up for debate, whereas discrimination based on race is not. Had the Supreme Court in *Bostock* reached its decision by including gay and transgender status within the definition of "sex," thus effectively making it a protected class, the ruling would likely provide gay and transgender employees with a more unassailable protection against employment discrimination.

While *Bostock* does extend Title VII rights to individuals previously excluded from federal antidiscrimination law, it simultaneously reinforces the law's longstanding failure to truly recognize the groups of people it protects. To employees discriminated against based on their LGBTQ status, this failure should matter. If the purpose of antidiscrimination law is to confer protection on people based on intimate characteristics intrinsic to their identity, such as religion, and to their bodies, such as race and sex, then it should extend to other intimate characteristics that do not affect a person's ability to perform a job. Sexual orientation and gender identity are as intimate to a person's being, and as irrelevant to job performance, as biological sex. California law sees that. Federal law is a long way behind. ■

---

[1] Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
[2] 42 U.S.C. §2000e.
[3] 42 U.S.C. §2000e-2(a)(1).
[4] Bostock at 1738.
[5] *Id.* at 1739.
[6] *Id.*
[7] *Id.*
[8] University of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)).
[9] Bostock at 1742.
[10] *Id.* at 1741.
[11] *Id.*
[12] CAL. CONST., art. I, § 8.
[13] Gay Law Students Ass'n v. Pacific Tele. & Tele. Co., 24 Cal. 3d 458, 468-69 (1979).
[14] *Id.* at 464.
[15] *Id.* at 467; *see also* 66 Cal. Op. Att'y Gen. 486 (1983) (citing constitutional arguments in *Gay Law Students Association* to conclude that "[i]t is not lawful for a local public agency to discrimination in its employment practices on the basis of sexual orientation").
[16] Gay Law Students Ass'n, 24 Cal. 3d at 468.
[17] *Id.* at 488.
[18] *Id.*
[19] "'No employer shall make, adopt, or enforce any rule, regulation or policy: (a) Forbidding or preventing employees from engaging or participating in politics.... (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.'" *Id.* at 487 (quoting LAB. CODE §1101).
[20] "'No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.'" Gay Law Students Ass'n, 24 Cal. 3d at 487 (quoting LAB. CODE §1102).
[21] Gay Law Students Ass'n, 24 Cal. 3d at 488.
[22] Enacted in 1959 to prohibit employment discrimination based on color, national origin, ancestry, religion or race, the FEPA was later amended to include a prohibition on sex discrimination. In 1980, the FEPA was combined with fair housing laws and renamed the Fair Employment and Housing Act (FEHA).
[23] Gay Law Students Ass'n, 24 Cal. 3d at 490.
[24] *Id.* at 490-91.
[25] Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77 (1991).
[26] *Id.* at 80.
[27] *Id.* at 88.
[28] *Id.*
[29] In 1999, the legislature passed AB 1001, repealing Labor Code Section 1102.1 and reincorporating the prohibition on sexual orientation discrimination into the FEHA.
[30] Delaney v. Superior Fast Freight, 14 Cal. App. 4th 590, 596 (1993).
[31] *Id.* (citing Gay Law Students Ass'n).
[32] Kovatch v. California Cas. Mgmt. Co., 65 Cal. App. 4th 1256, 1261 (1998).
[33] *Id.* at 1266-67.
[34] GOV'T. CODE §12926(s).
[35] GOV'T. CODE §12940(a).
[36] Murray v. Oceanside Unified Sch. Dist., 79 Cal. App. 4th 1338, 1344 (2000).
[37] *Id.* at 1353.
[38] *Id.*
[39] In 2003, Penal Code Section 422.76 defined "gender." Currently, the definition is found in Section 422.56(c): "'Gender' means sex, and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."
[40] Currently codified at GOV'T. CODE §12926(r)(2).
[41] GOV'T. CODE §12926(r)(2).
[42] 2 CAL. CODE REGS. §11030(b).
[43] As of the date of this article's completion, the Supreme Court has not issued its decision.