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ARTICLES

BOOSTED BY *BOSTOCK*: LGBTQ[1] TITLE IX PROTECTIONS

REGINA LAMBERT HILLMAN[*]

"It takes no compromise to give people their rights . . .
it takes no money to respect the individual.
It takes no political deal to give people freedom.
It takes no survey to remove repression."
Harvey Milk[**]

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[*] Regina Lambert Hillman is an Assistant Professor of Law at the University of Memphis Cecil C. Humphreys School of Law. In 2013, Professor Hillman was an organizing member of the Tennessee Marriage Equality Legal Team that challenged Tennessee's constitutional and statutory bans on recognition of valid out-of-state same-sex marriages. In 2015, the case, *Tanco v. Haslam/Obergefell v. Hodges,* was successfully decided by the United States Supreme Court, culminating in nationwide marriage equality on June 26, 2015. Professor Hillman received her J.D. *summa cum laude* from the University of Tennessee College of Law and her B.A. *summa cum laude* from the University of Memphis. Thanks to my outstanding research assistant, Tiffany Odom-Rodriquez, for her excellent research and editing. I am grateful to the University of Memphis Cecil C. Humphreys School of Law for its generous support for this article. Many thanks to the members of the *Indiana Law Review* for their excellent assistance during the editing process. This article is dedicated to the memory of my longtime mentor and dear friend, Max Shelton, and my wife, Natalie Hillman.

[**] *Harvey Milk—Inductee*, THE LEGACY PROJECT, https://legacyprojectchicago.org/person/harvey-milk [https://perma.cc/KG6N-D7YT] (last visited Mar. 15, 2025).

1. "LGBTQ" is an acronym for Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning. It represents the evolving understanding of sexual orientation, identity, gender, and expression. Although "LGBTQ+" and "LGBTQIA+" are often used to fully recognize the diversity of the LGBTQ community (including those who identify as asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way), this article utilizes "LGBTQ" to comport with the majority of legal cases, articles, and agencies.

INTRODUCTION

Most rights currently available to LGBTQ Americans have been granted by the Supreme Court, piece by piece, over the past three decades following countless years of abuse and discrimination:[2]

> On May 20, 1996, the Supreme Court decided that a state could no longer prohibit cities, counties, and municipalities from providing discrimination protections to LGBTQ citizens, striking down a state constitutional amendment as unconstitutional;[3]
>
> On June 26, 2003, the Supreme Court decided that states could no longer criminalize consensual same-sex adult intimacy, striking down *Bowers v. Hardwick*[4] as unconstitutional;[5]
>
> On June 26, 2013, the Supreme Court decided that the federal government could no longer deny federal recognition of valid same-sex marriages, striking down Section III of the federal Defense of Marriage Act as unconstitutional;[6]
>
> On June 26, 2015, the Supreme Court decided that states could no longer deny same-sex couples the right to marry or fail to recognize valid out-of-state marriages, striking down state constitutional and statutory bans as unconstitutional;[7]
>
> On June 15, 2020, the Supreme Court decided that employers could no longer legally discriminate against LGBTQ American employees based on their sexual orientation or gender identity because such actions were

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2. *See, e.g.*, Judith Adkins, *These People are Frightened to Death*, PROLOGUE, Summer 2016, at 6 (addressing congressional investigations of gays and lesbians during the mid-twentieth century that led to President Eisenhower's 1953 Executive Order 10450). One committee report warned, "One homosexual can pollute a Government office." *Id.* at 17. Eisenhower's Order "effectively banned gay men and lesbians from all jobs in the U.S. government—the country's largest employer." *Id.* at 18. Following the Order, "thousands of gay employees were fired or forced to resign from the federal workforce because of their sexuality." *Id.* at 7. Called the Lavender Scare, gay men and lesbians were referred to as "perverts" with "'weak' moral fiber" and compared to communists. *Id.* at 17. "Historians estimate that somewhere between 5,000 and tens of thousands of gay workers lost their jobs, . . . faced continued unemployment or underemployment, [were excluded] from their professions, [and faced] financial strain or even ruin, [as well as] considerable emotional distress." *Id.* at 18. Further, "[s]uicide was not uncommon." *Id.*

3. Romer v. Evans, 517 U.S. 620, 635–36 (1996).

4. Bowers v. Hardwick, 478 U.S. 186 (1986).

5. Lawrence v. Texas, 539 U.S. 528, 578 (2003).

6. United States v. Windsor, 570 U.S. 744, 775 (2013).

7. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

"exactly what Title VII forbids."[8]

Despite the Court's four holdings recognizing the unconstitutional discrimination aimed at LGBTQ Americans and an additional holding recognizing that Title VII does not permit intentional workplace sex discrimination against LGBTQ employees, the piece-by-piece battle for LGBTQ rights continues. Almost five years after the most recent victory, LGBTQ Americans again need the Supreme Court to intervene and clarify that sex discrimination protections under Title IX, like Title VII, prohibit discrimination based on sexual orientation and gender identity. One more step toward full citizenship for LGBTQ citizens. One more piece.

In *Bostock v. Clayton County, Georgia*, the Supreme Court granted certiorari, consolidating three cases that each asserted a Title VII violation after an employer fired an employee due to their gay or transgender status.[9] The Court focused on the statute's text and "but for" causation standard to reach its historic conclusion, announcing on June 15, 2020, that LGBTQ employees are entitled to the same Title VII protections as their workplace peers.[10] The 6–3 decision was a game-changer in employment law, providing millions of LGBTQ employees with first-ever federal workplace protections.[11]

The 2020 *Bostock* decision was announced just shy of five years after the Court held in *Obergefell v. Hodges* that same-sex couples have the constitutional right to marry.[12] During that five-year interval, LGBTQ employees could legally be fired for exercising their constitutional right to marry.[13] Today, queer people can marry and enjoy legal rights and protections

8. Bostock v. Clayton County, 590 U.S. 644, 651–52 (2020). Justice Gorsuch announced for the majority that Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on sexual orientation and gender identity. *Id.* at 662. Under Title VII, it is an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) [hereinafter Title VII]. Title VII applies to employers with fifteen or more employees and protects job applicants and current, temporary, and former employees in employment settings. *Id.* at § 2000e(b).

9. *Bostock*, 590 U.S. at 653–54.

10. *Id.* at 656–61.

11. *See* Kerith J. Conron & Shoshana K. Goldberg, *LGBTQ People in the US Not Protected by State Nondiscrimination Statutes*, WILLIAMS INST. (Apr. 2020), https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/ [https://perma.cc/UT29-JQ75] (noting that, of the "estimated 8.1 million LGBTQ U.S. workers 16 and older," almost half had no workplace protections).

12. *Obergefell* was decided on June 26, 2015. 576 U.S. 644. *Bostock* was decided on June 15, 2020. 590 U.S. 644.

13. *See* Conron & Goldberg, *supra* note 11 (citing statistics from April 2020, two months before the *Bostock* opinion was released and workplace protections became available to LGBTQ employees under Title VII). *See also* Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. WOMEN & L. 31 (2015) (published shortly after the *Obergefell* decision and five years before the *Bostock* decision).

in the workplace yet still face discrimination in several other important areas.[14] Rather than acquiring deserved equal citizenship in one fell swoop, LGBTQ victories have been sporadic and hard-fought. That fight continues.

While the *Bostock* opinion addressed federal sex discrimination protections in the employment realm under Title VII of the Civil Rights Act of 1964 (Title VII), the decision immediately triggered questions regarding its impact on other federal sex-based discrimination statutes.[15] In particular, due to several similarities between Title VII and Title IX and a history of their comparison by federal courts, the *Bostock* decision immediately impacted the interpretation of Title IX of the Education Amendments of 1972 (Title IX).[16] The *Bostock* decision boosted pre-*Bostock* decisions holding that Title IX's sex discrimination protections extended to LGBTQ students and provided additional support in favor of Title IX discrimination protections to LGBTQ students post-*Bostock*.

A decade before the *Bostock* decision, the U.S. Department of Education (DOE) interpreted Title IX's protective reach to include sex discrimination protections based on gender identity.[17] However, changing presidential administrations led to withdrawn guidance and confusing and conflicting agency interpretations of Title IX's application to LGBTQ students.[18] During Obama's presidency, the DOE engaged in several important efforts to extend Title IX's sex discrimination protections to LGBTQ students, including releasing federal agency guidance to federal fund recipients subject to Title IX.[19] However, Trump's subsequent presidency and the shift in political party in control of the White House negatively impacted the progress of LGBTQ rights, including Trump's withdrawal of Obama-era DOE Title IX guidance and the denial of Title IX sex discrimination protections to LGBTQ students.[20]

The release of the *Bostock* decision during the last months of Trump's presidency did not immediately impact his DOE's interpretation of Title IX; instead, his administration worked to limit *Bostock*'s broad holding.[21] In contrast, seven months after the *Bostock* decision, Biden was sworn in as

14. Among other areas, LGBTQ Americans still face discrimination in health care and lack federal protection for public accommodations.

15. Justice Alito accurately noted in his *Bostock* dissent that there are "[o]ver 100 federal statutes [that] prohibit discrimination because of sex" that could be affected by the majority's ruling. *Bostock*, 590 U.S. at 724. (Alito, J., dissenting).

16. 20 U.S.C. § 1681 *et. seq*. [Title IX]. Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

17. *See infra* Section I.B.

18. *See infra* Sections I.B, I.C., II.B., II.C.

19. *See infra* Section I.B.

20. *See infra* Section I.C.

21. *See infra* notes 83–85 and accompanying text.

president[22] and immediately issued an executive order directing his federal agencies to review applicable statutory nondiscrimination protections and apply *Bostock*'s holding broadly.[23] In response to the order and boosted by *Bostock*, the DOE, the federal administrative agency tasked with Title IX's enforcement,[24] returned to its earlier position that Title IX's protective ambit includes prohibiting sex discrimination based on sexual orientation and gender identity.[25] The DOE's responsive efforts to implement the broad *Bostock* holding to again include LGBTQ students under Title IX's protective purview have resulted in mass litigation and confusion, leaving LGBTQ+ students in limbo and vulnerable to the political culture war.

The *Bostock* decision also made an immediate impact on the federal judiciary.[26] Prior to *Bostock*, a handful of federal appellate courts favorably addressed Title IX's sex-based discrimination prohibition in preliminary decisions involving LGBTQ students, relying on Supreme Court sex-stereotyping precedent as well as the Obama DOE's stated Title IX position.[27] Several of those cases were impacted when Trump took office, withdrew the Obama-era guidance, and shifted the DOE's Title IX administrative position, causing the Supreme Court's withdrawal of a certiorari grant to determine whether Title IX prohibited the denial of a transgender student's access to the bathroom of his gender identity.[28] Still, within six weeks of the *Bostock* opinion's release, two federal appellate courts weighed in, holding that the Court's Title VII reasoning applied equally to Title IX.[29] While the federal appellate courts, boosted by *Bostock*, were initially unanimous in holding that

22. Peter Baker, *Biden Inaugurated as the 46th President Amid a Cascade of Crises*, N.Y. TIMES, Jan. 20, 2021, https://www.nytimes.com/2021/01/20/us/politics/biden-president.html [https://perma.cc/GG7W-RMTR].

23. *See infra* Section II.C. While this article was in the editorial process, Donald Trump was again elected as president and was sworn in on January 20, 2025. Trump wasted no time attacking the LGBTQ community. On his first day in office, he issued executive orders that directly harm queer Americans and rescinded executive orders in place under President Biden that provided protections to LGBTQ people. Brandon Wolf, *Background on Trump Day One Orders Impacting the LGBTQ+ Community*, HUMAN RIGHTS CAMPAIGN (Jan. 22, 2025), https://www.hrc.org/press-releases/background-on-trump-day-one-executive-orders-impacting-the-lgbtq-community [https://perma.cc/YZ7J-CR76]. There is no doubt that Trump's presidency will cause harm to the LGBTQ community, but it is too early in his second term to predict how much. *See id*. (explaining that Trump's "executive actions do NOT have the authority to override the United States Constitution, federal statutes, or established legal precedents" and that "many of [Trump's] directives do just that or are regarding matters over which the president does not have control"). Further, because "much is unknown about whether or how the administration or other actors will comply with these directives," this article does not attempt to predict the harms that Trump's presidency will inflict on the LGBTQ community. *Id.*

24. *See infra* Section III.B.

25. *See infra* Section II.C.

26. This article focuses on the treatment of Title IX by federal appellate courts. For an analysis of Title IX treatment by federal district courts, see Suzanne Eckes, *A Conflict in the Courts: An Update on School Restroom Policies*, 11 CHILD & FAM. L.J. 1 (2023).

27. *See infra* Section IV.A.

28. *See infra* Section I.C.

29. *See infra* Sections IV.B.1., IV.B.2(a).

Title IX's sex discrimination protection prohibited discrimination based on sexual orientation and gender identity, the circuits are currently split, with only one circuit, in a divided en banc decision, holding otherwise.[30] The Supreme Court denied certiorari to the most recent circuit decision in January 2024, refusing to provide a needed resolution.[31]

This article first addresses the DOE's pre-*Bostock* recognition under President Obama that LGBTQ students were included under Title IX's broad sex discrimination protections, its subsequent reversal under Trump, and its post-*Bostock* response to President Biden's executive orders to implement the Court's holding broadly. An analysis of the DOE's Title IX Final Rule, released in April 2024, and the subsequent mass litigation is included. Second, the article examines how federal appellate courts applied Title IX to LGBTQ students before the *Bostock* decision and analyzes the circuit split created post-*Bostock*, including why the majority of the circuits are correct in holding that *Bostock*'s Title VII reasoning extends into the statutorily similar Title IX education realm to protect vulnerable LGBTQ students.[32] Third, the article highlights why the Supreme Court should grant certiorari and provide resolution in this growing area of judicial conflict, including a widening circuit split and current congressional gridlock.[33] Further, Court intervention is needed to comply with Congress's purpose in enacting the statute: ending sex discrimination in education.[34] Finally, the article examines the likely battles ahead should the Supreme Court fail to intervene, including the growing confusion and conflict over whether *Bostock*'s reasoning that "discrimination based on [gay] or transgender status necessarily entails discrimination based on sex"[35] applies

30. *See infra* Section IV.A.

31. *See infra* note 563 and accompanying text.

32. This article does not address Title IX concerning school athletics. Under President Biden, the DOE was engaged in a separate rulemaking process on Title IX athletics and has since withdrawn the athletic issue from the rulemaking process. However, courts have held that *Bostock*'s Title VII reasoning applies equally to Title IX school athletics and have issued injunctions allowing transgender athletes to participate on teams matching their sexual identity. *See*, *e.g.*, B.P.J. *ex rel.* Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 562 (4th Cir. 2024) (finding West Virginia's Save Women's Sports Act violated Title IX as applied to a transgender female student, allowing her to compete in school track and field competitions); Hecox v. Little, 104 F.4th 1061 (9th Cir. 2024) (affirming trial court's grant of preliminary injunctive relief to transgender female college student wishing to try out for women's track and field team), *as amended* (June 14, 2024), *petition for cert. filed*, (U.S. July 15, 2024) (No. 24-38). For an analysis of Title IX's application to school athletics, see Kimberly Jade Norwood & Jaimie Hileman, *The Tragic Cost of "Protecting" Trans Youth*, 73 WASH. U. J. L. & POL'Y 203, 215–24 (2024), and Samantha Gill, *You Can't Play with Us: Fifty-Year Anniversary of Title IX Marred by Trend of Anti Transgender Inclusion Acts*, 30 JEFFREY S. MOORAD SPORTS L.J. 365 (2023).

33. For a thorough analysis of bipartisanship-fueled congressional gridlock, see Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1099 (2013), and Eric McDaniel, *Congress Passed So Few Laws This Year That We Explained Them All in 1,000 Words*, NPR (Dec. 22, 2023), https://www.npr. org/2023/12/22/1220111009/congress-passed-so-few-laws-this-year-that-we-explained-them-all-in-1-000-words [https://perma.cc/A9CV-YQD9].

34. 20 U.S.C. § 1681; *see infra* notes 38–39, 209–10 and accompanying text.

35. *Bostock*, 590 U.S. at 669.

equally to Title IX's sex discrimination provisions. The pre-*Bostock* circuit court decisions finding that Title IX's sex discrimination protections reach LGBTQ students, the DOE's prior and current position finding the same, and all of the federal circuit courts addressing the issue post-*Bostock*, with one exception, support an affirmative response.

I. PRE-*BOSTOCK* ADMINISTRATIVE WRANGLING OVER TITLE IX LGBTQ PROTECTIONS[36]

In the decade leading up to *Bostock*, the federal government, through several of its administrative agencies, provided first-ever federal statutory protections to members of the LGBTQ community.[37] Title IX of the Education Amendments of 1972 was "designed to eliminate discrimination on the basis of sex in any education program or activity receiving Federal financial assistance."[38] Title IX provides in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[39] When enacting Title IX, Congress charged the DOE with its implementation and enforcement.[40] The Department of Justice's (DOJ) Civil Rights Division (CRD) coordinates and implements Title IX's enforcement.[41]

In its Sexual Harassment Guidance issued in 1997, the DOE's Office of Civil Rights (OCR) first stated that sexual harassment directed toward LGBTQ students may be a Title IX violation if it creates a sexually hostile environment.[42] During the following decade, the DOE continued to advance Title IX LGBTQ protections, ultimately providing definitive protections for LGBTQ students under Title IX that remained in effect until they were withdrawn following Trump's election and a party change in the White House. The DOE returned to

36. For a detailed analysis of how the LGBTQ community is impacted by a change in presidential political parties, including conflicting guidance and executive orders, see Regina L. Hillman, *The Battle Over Bostock: Dueling Presidential Administrations & the Need For Consistent & Reliable LGBTQ Rights*, 32 AM. U. J. GENDER, SOC. POL'Y & L. (2023). *See also* Allison Fetter-Harrott et al., *Sex Discrimination in Schools: Has Change in Administration Meant Change in Protections for Transgender Students and Educators?,* 44 U. DAYTON L. REV. 455, 472 (2019).

37. *See* Letter from James A. Ferg-Cadima, Acting Deputy Assistant for Pol'y, U.S. Dep't of Educ. Off. for C.R., to Emily Prince, n.3 (Jan. 7, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/20150107-title-ix-prince-letter.pdf [https://perma.cc/RD9W-JR2M] [hereinafter Jan. 2015 Ferg–Cardima Letter] (addressing guidance documents from other federal agencies regarding prohibited sex discrimination, including based on sexual orientation and gender identity).

38. 34 C.F.R. § 106.1.

39. 20 U.S.C. § 1681(a).

40. 20 U.S.C. § 1681.

41. Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 4, 1980); *see infra* Section III.A.

42. Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997).

its earlier stance four years later after President Biden beat Trump in the 2020 presidential election, leading to another White House presidential party change.

A. The Implementation of Title IX

In *Cannon v. University of Chicago*, the Supreme Court identified two objectives that Title IX "sought to accomplish."[43] First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.[44] Title IX and its implementing regulations require federal fund recipients to meet several obligations to qualify for federal funding.[45] Under Title IX, federal agencies with the authority to provide financial assistance are authorized to promulgate rules, regulations, and orders to enforce Title IX's objectives, relying on "any . . . means authorized by law," including "the termination of funds."[46] One qualification, in line with Title IX's objective, is the agreement that fund recipients will not permit sex discrimination in their institutions.[47]

Similar to Title VII's workplace prohibition of discrimination "because of . . . sex,"[48] Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[49] To state a valid claim under Title IX, an individual must prove (1) they were excluded from participating in an education program based on sex, (2) the education institution they attend was a federal financial recipient at the time the alleged wrongdoing took place, and (3) the individual suffered harm due to the wrongful discrimination.[50] The statute does permit, but not require, sex-based separation, including separate living accommodations, and implementing regulations allow fund recipients to

43. 441 U.S. 677, 704 (1979).

44. *Id.*

45. 20 U.S.C. § 1681.

46. 20 U.S.C. § 1682.

47. *Id.* Title IX exempts certain entities from its sex discrimination ban in particular situations. *Id.*

48. Title VII, *supra* note 8.

49. 20 U.S.C. § 1681(a).

50. *Id.* Discrimination "refers to distinctions or differences in treatment that injure protected individuals." Burlington N. Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006). Federal fund recipients must not treat students differently based on sex in determining who qualifies for "any aid, benefit, or service," including how that assistance is provided, if the same assistance is provided, and how the rules are administered. 34 C.F.R. § 106.31(b)(2), (3). The DOE's regulations that implement Title IX permit bathrooms, locker rooms, and shower facilities to be separated "on the basis of sex," but note that "such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C..R. § 106.33. Title IX provides a private right of action for its enforcement. *Cannon v. Univ. of Chicago,* 441 U.S. 677, 714–17 (1979).

maintain sex-segregated bathrooms if they are comparable.[51] Omitted from the statute, and the subject of ongoing litigation, is the definition of "sex."

B. Title IX Protections Under Obama

Under President Obama, the DOE took several unprecedented actions to shield transgender and gender-nonconforming students from sex discrimination and harm, including determining that Title IX's protective umbrella included sex discrimination protections for LGBTQ students. On October 26, 2010, the OCR issued a "Dear Colleague Letter" addressing anti-bullying efforts.[52] The letter highlighted DOE's interpretation of Title IX's protections, explaining that Title IX "prohibits gender-based harassment," including "acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping."[53] The letter explained that Title IX prohibits sex-based harassment "regardless of the actual or perceived sexual orientation or gender identity of the harasser or target," as well as "failing to conform to stereotypical notions of masculinity and femininity."[54] Further, the letter clarified that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students from sex discrimination" and that harassment based on LGBTQ status may be "prohibited [sex discrimination] under Title IX."[55]

Taking further steps to protect LGBTQ students, the following April 4, 2011, the OCR issued a second "Dear Colleague Letter" that it identified as a "significant guidance document" addressing sexual harassment of students and steps to prevent such harassment.[56] The letter supplemented its earlier 2010 guidance and clarified that LGBTQ students are included under Title IX's protections, stating that harassment based on gender includes "acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature" and that "Title IX obligations . . . also apply to gender-based harassment."[57] Backing

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51. 34 C.F.R. § 106.33.

52. October 26, 2010, *Dear Colleague Letter* from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. [2010 Ali Dear Colleague Letter] (Oct. 26, 2010), https://www.mass.gov/doc/commission-to-review-statutes-relative-to-implementation-of-the-school-bullying-law-testimony-6/download [https://perma.cc/9C7H-EKJD].

53. *Id.*

54. *Id.*

55. *Id.*("Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment.").

56. April 4, 2011, *Dear Colleague Letter* from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. n.1 [2011 Ali Dear Colleague Letter] (Apr. 4, 2011), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/7FMV-VK6L].

57. *Id.*

up its guidance, in 2013 and 2014, OCR, joined by the DOJ, brought enforcement actions against school districts that denied transgender students access to the bathroom of their gender identity, reaching settlements that allowed the previously denied bathroom access.[58]

OCR again issued a "significant guidance document" on April 29, 2014, titled, *Questions and Answers on Title IX and Sexual Violence*, noting that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation."[59] In December 2014, OCR issued further guidance, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, to clarify that:

> [a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.[60]

OCR reiterated its position on January 7, 2015, clarifying that "a school generally must treat transgender students consistent with their gender identity."[61] Continuing to provide direction, the following April, OCR issued a *Title IX Resource Guide* that directed schools to "help ensure that transgender students are treated consistent with their gender identity in the context of single-sex classes."[62] The next year, in May 2016, the DOE published *Examples of Policies & Emerging Practices for Supporting Transgender Students*, a 25-page guide providing examples of how schools across the U.S. support transgender students.[63] The guide also offered policy links and access to additional resources to assist educators while developing school policies and procedures.[64]

On May 13, 2016, President Obama's DOJ and DOE jointly issued yet

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58. *See, e.g.*, DOJ Case No. DJ 169-12C-70, OCR Case No. 09-12-1020, June 24, 2013, Letter from DOJ and DOE re Voluntary Resolution Agreement with Arcadia Unified School District, https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf [https://perma.cc/7PWX-DKVN].

59. OFF. OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5–6 (2014) [hereinafter TITLE IX Q & A SEXUAL VIOLENCE].

60. OFF. OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (2014) [hereinafter TITLE IX Q & A CLASSES & ACTIVITIES].

61. Jan. 2015 Ferg–Cardima Letter, *supra* note 37 (stating that OCR enforces Title IX's nondiscrimination protection based on sex to include discrimination based on gender identity and sexual stereotypes).

62. OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE (Apr. 2015).

63. OFF. OF ELEMENTARY & SECONDARY EDUC., U.S. DEP'T OF EDUC., EXAMPLES OF POLICIES & EMERGING PRACTICES FOR SUPPORTING TRANSGENDER STUDENTS (May 2016).

64. *Id.*

another "significant guidance document" titled, *Dear Colleague Letter on Transgender Students*, responding to requests from educators and parents for information regarding Title IX protections available to transgender students.[65] To ensure that "transgender students enjoy a supportive and nondiscriminatory school environment," the document clarified that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity."[66] Additionally, the guidance directed that schools update trans students' names on school records and that school personnel address trans students by their gender-identified pronouns.[67] By the summer of 2016, OCR had engaged in yearslong efforts to protect LGBTQ students and guide educators in line with Title IX's purpose to eradicate sex discrimination in education.

In response to OCR's May 2016 guidance, on July 6, 2016, various states, agencies, and school districts sued the DOE and DOJ, challenging their interpretation of Title IX and requesting an injunction.[68] Specifically, the plaintiffs argued that OCR's guidance violated the Administrative Procedure Act (APA) because it failed to have a notice-and-comment period and focused on Title IX's carve-out permitting separate sex-based facilities, including bathrooms and showers.[69] The DOE argued that the guidance did not require formal rulemaking, but the district court disagreed and issued a nationwide injunction on August 21, 2016, banning the guidelines from taking effect pending congressional action or the successful completion of the required APA procedures.[70]

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65. "Dear Colleague" Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., and Vanita Gupta, Principal Deputy Assistant Att'y Gen. for C.R., U.S. Dep't of Just. (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/UU5J-2G3W] [hereinafter 2016 DOJ/DOE Joint Guidance Document].

66. *Id.*

67. *Id.* Until a Texas district court judge nationally enjoined it, DOE federal fund recipients and courts relied on the *Dear Colleague* guidance.

68. Texas v. United States, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016). The plaintiffs represented 13 states and agencies and sued the DOE, DOJ, Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), and other agency officials. *Id.*

69. *Id.* at 816, 825–26, 831–32.

70. *Id*. at 832–33. The district court enjoined the defendants from "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, education-based institutions." *Id.* It further ordered that "while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex." *Id.* at 836. The court also enjoined the defendants from "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of [the] Order" and directed that "[a]ll parties . . . must maintain the status quo as of the date of issuance of [the] Order and [the] preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals." *Id.* In a subsequent motion requesting clarification of the court's nationwide injunction, the court

During Obama's presidency, the DOE made clear that Title IX's sex discrimination protections extended to LGBTQ students, and it remained constant until Obama left office in January 2017.[71] All told, Obama's administration made substantial efforts to recognize the needs of LGBTQ students and provide Title IX sex discrimination protections to ALL students.

C. The Undoing of Protections Under Trump

Just one month into his presidency, Trump rescinded Obama's administrative guidance interpreting Title IX's sex prohibition to include discrimination based on sexual orientation and gender identity.[72] On February 22, 2017, the new administration's DOJ and DOE issued a new "Dear Colleague" letter informing of the rescinded guidance.[73] In an attempt to justify the revocation, the letter claimed the guidance issued under Obama gave "rise to significant litigation regarding school restroom and locker rooms," but the revocation caused confusion among federal fund recipients regarding Title IX's nondiscrimination requirements and had a major impact on ongoing Title IX litigation.[74] Three federal appellate courts, the Fourth,[75] Sixth,[76] and Seventh[77] Circuits, had granted preliminary injunctions under Title IX preventing schools

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held that "[t]he injunction [was] limited to the issue of access to intimate facilities" and that the injunction prevented the Defendants "from relying on the Guidelines, but [clarified that Defendants] may offer textual analyses of Title IX and Title VII in cases where the Government and its agencies are defendants or where the United States Supreme Court or any Circuit Court request that Defendants file amicus curiae briefing on [the] issue." Texas v. United States, 7:16-CV-00054-O, 2016 WL 7852331, at *4 (N.D. Tex. Oct. 18, 2016).

71. TITLE IX Q & A CLASSES & ACTIVITIES, *supra* note 60.

72. Letter from Sandra Battle, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ. and T.E. Wheeler, II, Acting Assistant Att'y Gen. for C.R., U.S. Dep't of Just. (Feb. 22, 2017) [hereinafter 2017 Battle Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/M3TQ-ER4R]. *See also* Letter from Edwin S. Kneedler, Deputy Solic. Gen., U.S. Dep't of Just., to Scott S. Harris, Clerk, U.S. Sup. Ct. (Feb. 22, 2017), https://www.scotusblog.com/wp-content/uploads/2017/02/16-273-2.22.17-DOJ-Cover-Letter-Guidance.pdf [https://perma.cc/8C23-CSNZ].

73. 2017 Battle Dear Colleague Letter, *supra* note 72. The letter explicitly did not "add requirements" to Title IX, but only withdrew the guidance that discrimination "because of sex" included discrimination based on gender identity. *Id.*

74. *Id.*

75. G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 580 U.S. 1168 (2017).

76. Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (per curiam) (finding that the school district seeking to exclude a transgender female student from using the girls' bathroom at school was not likely to succeed because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity).

77. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049–50 (7th Cir. 2017) (affirming the trial court's grant of a preliminary injunction enjoining the school district from enforcing its policy preventing a transgender student from using the bathroom corresponding to their gender identity due to the likelihood of success of a sex stereotyping violation under Title IX), *cert. dismissed*, 583 U.S. 1165 (2018), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020).

from denying bathroom access to transgender students, but none of the cases had yet reached a final determination on the merits before Trump took office.[78]

Trump's reversal of the prior administration's pro-LGBTQ position and his withdrawal of the DOE and DOJ Title IX guidance documents supporting transgender student bathroom access foiled an upcoming March 2017 Supreme Court oral argument in the Fourth Circuit *Grimm* case.[79] As a result of Trump's policy reversal, the Court vacated its certiorari grant, vacated the Fourth Circuit's decision, and remanded the case to the district court, preventing lower courts from obtaining clarity regarding Title IX's sex discrimination provision.[80] The Sixth Circuit's Title IX case was not addressed on the merits when the parties dismissed the case in light of the Obama guidance withdrawal,[81] and a certiorari petition pending before the Supreme Court in the Seventh Circuit Title IX case was dismissed by written agreement of the parties when the school district agreed to settle the case, preventing the Court from ruling on the merits.[82]

Following years of consistent direction and guidance from the DOE and DOJ that Title IX's nondiscrimination protections required schools to permit transgender students to use the bathroom consistent with their gender identity, the change in political party upended years of LGBTQ progress. It also resulted in a license to discriminate, highlighting the instability resulting from a change in presidential administration. Nonetheless, three and a half years into Trump's first-term, the 2020 *Bostock* decision provided further support for courts

78. The Third Circuit affirmed the district court's denial of a preliminary injunction requested by cisgender high school students alleging a Title IX violation based on a school district's policy allowing transgender students to use bathrooms and locker rooms consistent with their gender identity, finding the cisgender students would not be irreparably harmed by the transgender student's bathroom access. Doe *by & through* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 521 (3d Cir. 2018).

79. Grimm v. Gloucester Cnty. Sch. Bd., 869 F.3d 286, 289 (4th Cir. 2017) (noting that after the Court's *certiorari* grant and scheduled oral argument, "the new Administration issued a guidance document on February 22, 2017, that withdrew the prior Administration's guidance . . . and the Court then vacated our April 2016 decision and remanded the case to us 'for further consideration in light of the [new] guidance document'" Trump's DOE and DOJ issued).

80. *Id.*

81. *Dodds*, 845 F.3d at 217. In contrast, the Ninth Circuit weighed in on Title IX's protective ambit in the months before the *Bostock* decision. In February 2020, the court addressed an appeal from current and former high school students, their parents, and others who filed for injunctive relief against multiple defendants, including their school district, alleging that the high school's policy of allowing transgender students to use bathrooms, locker rooms, and showers that matched their gender identity violated the Due Process Clause and Title IX, among others. Parents for Privacy v. Barr, 949 F.3d 1210, 1218 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020). The Ninth Circuit affirmed the school district's policy allowing transgender students to use the bathroom corresponding with their gender identity, holding there was not a Title IX violation or sexual harassment under Title IX. *Id.* at 1239–40. By denying certiorari, the Supreme Court left final the Ninth Circuit ruling that a policy allowing transgender students access to bathrooms, locker rooms, and showers that coordinate with their gender identity instead of biological sex assignment at birth does not violate constitutional privacy rights or create an actionable Title IX claim. *Id.*

82. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker *ex rel.* Whitaker, 583 U.S. 1165 (2018).

analyzing the reach of Title IX's sex-based discrimination prohibition due to the Court's Title VII reasoning, which also supported Title IX protections to transgender students.

Before the decision was announced by the *Bostock* Court on June 26, 2020, the Trump administration wrongly anticipated that the Court would reach an opposite outcome and explicitly acknowledged the historical reliance on Title VII when determining Title IX's reach. Just days before the *Bostock* opinion was released, Trump's Health & Human Services (HHS) released its Final Section 1557 Rule, which is the nondiscrimination provision related to healthcare that incorporates Title IX's "based on sex" discrimination prohibition.[83] The Preamble to the final rule stated:

> The Department continues to expect that ***a holding by the U.S. Supreme Court on the meaning of "on the basis of sex" under Title VII will likely have ramifications for the definition of "on the basis of sex" under Title IX***. Title VII case law has often informed Title IX case law with respect to the meaning of discrimination "on the basis of sex" and the reasons why "on the basis of sex" (or "because of sex," as used in Title VII) **does not encompass sexual orientation or gender identity under Title VII have similar force for the interpretation of Title IX.**[84]

Just days later, following the *Bostock* Court's determination that Title VII's sex discrimination prohibition *did* include protections based on sexual orientation and gender identity, Trump and his administration walked back the Preamble acknowledgment and took the opposite stance.[85]

83. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020).

84. 85 Fed. Reg. at 37160 (emphasis added). Because the Trump administration made no efforts to amend the final rule after the release of the *Bostock* decision, two federal district courts, relying in part on *Bostock*, issued nationwide preliminary injunctions preventing the administration from implementing provisions of the final rule. Walker v. Azar, 480 F. Supp 3d 417, 429–30 (E.D.N.Y. 2015) (finding the rule promulgation was arbitrary and capricious in light of the *Bostock* decision by excluding sex stereotyping from the definition of sex discrimination); Whitman-Walker Clinic v. U.S. Dep't of Health & Human Servs., 485 F. Supp. 3d 1, 10, 16 (D.D.C. 2015) (finding the rule promulgation was arbitrary and capricious in excluding sex stereotyping from the definition of sex discrimination and by incorporating a blanket religious exemption from sex discrimination claims).

85. *See infra* Section II.B.

II. ENTER *BOSTOCK*[86]

On June 15, 2020, the Supreme Court *Bostock* case announced, 6–3, that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[87] The Court focused on Title VII's "starkly broad terms," which "virtually guaranteed that unexpected applications would emerge over time," and found that "an employer who fires an individual for being [gay] or transgender fires that person for traits or actions it would not have questioned in members of a different sex."[88] The Court noted that "[s]ex plays a necessary and undisguisable role . . . [which is] exactly what Title VII forbids."[89] In holding that Title VII's sex discrimination workplace protections extended to sexual orientation and gender identity, the Court provided first-time crucial protections to vulnerable LGBTQ workers.[90]

Justice Gorsuch, writing for the majority, engaged in a textualist analysis of the statute, acknowledging its expansive, sweeping, remedial nature.[91] Determining that Title VII required a "simple" and "traditional" "but-for" causation analysis based on the ordinary textual meaning of "because of . . . sex" at the time the statute was adopted in 1964,[92] the majority concluded that if "sex" is merely one "but-for" cause of a negative employment action, Title VII is triggered.[93] The majority determined that "discriminate" in 1964 meant "treating [an] individual worse than others who are similarly situated"[94] and noted that the "difference in treatment based on sex must be intentional."[95] After citing three of its prior cases (*Phillips v. Martin Marietta Corp.*,[96] *Los Angeles*

86. The *Bostock* case consolidated three Title VII circuit court cases that each addressed an employee who was fired based on their sexual orientation or gender identity. *Bostock*, 590 U.S. at 653–54. For details and a full analysis of the *Bostock* case, see Susan Bisom-Rapp, *The Landmark Bostock Decision: Sexual Orientation and Gender Identity Bias in Employment Constitute Sex Discrimination Under Federal Law*, 43 T. JEFFERSON L. REV. 1 (2021).

87. *Bostock*, 590 U.S. at 683. Justice Gorsuch was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan to make up the 6–3 majority.

88. *Id.* at 651–52, 682.

89. *Id.* at 652.

90. *Id.*

91. *Id.* at 656–57.

92. *Id.* at 656 (citing Univ. of Texas Sw. Med Ctr. v. Nassar, 570 U.S. 338, 346, 360 (2013) (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)) (employing a traditional "but for" analysis).

93. *Bostock*, 590 U.S. at 656. The Court noted that "[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.*

94. *Id.* at 657.

95. *Id.* at 658 (citing Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988) ("In so-called 'disparate treatment' cases like today's, this Court has also held that the difference in treatment based on sex must be intentional.").

96. 400 U.S. 542 (1971) (holding that under Title VII an employer may not refuse to hire women with pre-school children while hiring men with pre-school children unless it qualified as a valid business necessity).

Department of Water and Power v. Manhart,[97] and *Oncale v. Sundowner Offshore Services, Inc.*),[98] the Court recognized that (1) it is irrelevant how an employer labels a discriminatory action, (2) sex is not required to be the main cause of an employer's adverse action if it is "a" cause, and (3) it is irrelevant how an employer treats "groups" of employees because Title VII's focus is on the individual.[99] Thus, the Court determined that "Title VII's message is 'simple but momentous,'" announcing that to avoid violating the statute, the sex of an employee cannot be "relevant to the [individual employee's] selection, evaluation, or compensation."[100]

The Court's analysis resulted in a "straightforward rule": "A Title VII statutory violation takes place when an employer intentionally considers, even in part, an employee's sex when deciding to take an adverse employment action, such as firing the employee."[101] Noting that Congress used broad, unambiguous, and sweeping language in Title VII's sex-based prohibition, the majority found an individual's sexual orientation and gender identity are "inextricably tied" to a person's sex.[102] Thus, the Court announced that "the statute's message for our cases is equally simple and momentous: An individual's [gay] or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being [gay] or transgender without

97. 435 U.S. 702 (1978) (holding that Title VII prohibits employers from charging women more for pension benefits than men regardless of group statistics that women live longer than men).

98. 523 U.S. 75 (1998) (holding that Title VII's sex discrimination protection applied to employment harassment by members of the same sex).

99. *Bostock*, 590 U.S. at 665.

100. *Id.* at 660 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989)). As such, the Court determined that if an employer makes an adverse employment action based—even in part—on "traits or actions it would not have questioned in members of a different sex," Title VII is violated." *Id.* at 652.

101. *Id.* at 659.

102. *Id.* at 660. Addressing the broad language Congress used in Title VII, the majority announced the "necessary consequence of that legislative choice": "An employer who fires an individual merely for being gay or transgender defies the law." *Id.* at 683. The Court acknowledged that it was unlikely that the 1964 Congress anticipated that Title VII would lead to LGBTQ workplace protections, but noted that what a 1964 Congress may have anticipated was not a sufficient reason to deny protections that the statute's plain language required. *Id.* at 766–67. Justice Gorsuch addressed the broad language used in Title VII, noting:

> Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices – to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time.

Id. at 680. The Court concluded that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. 'Sexual harassment' is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. Same with 'motherhood discrimination.'" *Id.* at 669 (internal citations omitted).

discriminating against that individual based on sex."[103]

A. The Title VII & Title IX Connection

Both Title VII and Title IX are broad, remedial, and comprehensive statutes that protect individuals from sex-based discrimination. The Supreme Court has described the sweeping nature of Title VII by noting, "[W]hen Congress chooses not to include any exceptions to a broad rule, the Court applies the broad rule."[104] Similarly, in *North Haven Board of Education v. Bell*, the Court addressed the sweeping nature of Title IX, noting, "[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language."[105] Title IX provides nondiscrimination protections in education;[106] it is part of the same statutory scheme as Title VII, which provides nondiscrimination protections in employment.[107] The two federal statutes also employ nearly identical language: Title VII's sex discrimination prohibition forbids discrimination "because of . . . sex"[108] while Title IX's sex discrimination prohibition forbids discrimination "based on sex."[109] Further, both statutes protect individuals and neither provides an exception permitting sex discrimination based on sexual orientation or gender identity.[110] The near-identical language employed in the two statutes has led courts to determine that the same causation standard applies to both.

In *Bostock*, the Court confirmed that "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation" that is "established whenever a particular outcome would not have happened 'but for' the purported cause."[111] Further, but-for causation does not require an employer's challenged action to be the sole cause of an employment decision. Title VII is triggered if sex was merely one of several but-for causes of the

103. *Id.* at 660. The *Bostock* majority noted the concerns raised by the dissenting justices and employers regarding the reach of its Title VII decision was "nothing new." *Id.* at 665–673, 681 ("Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII" were "questions for future cases, not these."). The majority also addressed the stated fear that the decision would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," *id.* at 681, commenting that "judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Id.* at 683. Unlike the majority's approach to the possibility *Bostock*'s holding would impact other federal nondiscrimination statutes, Justice Alito's dissent predicted *Bostock*'s holding would reach beyond Title VII to federal sex-based nondiscrimination statutes including Title IX, the Fair Housing Act, and the Affordable Care Act. *Id.* at 724–25 (Alito, J., dissenting).

104. *Id.* at 646–47.

105. 456 U.S. 512, 521 (1982).

106. *See supra* note 16.

107. *See supra* note 8.

108. *See supra* note 8.

109. *See supra* note 16.

110. *See supra* Section II.A.

111. *Bostock*, 590 U.S. at 656.

action.[112] Similarly, "Title IX prohibits all discrimination where sex is a but-for cause, even if there is another motivating factor."[113] Notably, in its *Bostock* opinion, the Supreme Court used "because of" and "based on" interchangeably.[114]

Due to the similarities between the two federal nondiscrimination statutes, multiple circuit courts,[115] as well as the Supreme Court,[116] have consulted Title VII and its principles for guidance when construing Title IX. The Supreme Court explicitly relied on Title VII principles to explain that sexual harassment constitutes intentional discrimination under Title IX.[117] In *Franklin v. Gwinnett County Public Schools*, the Court tackled whether a high school student sexually abused by a teacher could bring a private cause of action under Title IX.[118] In analyzing whether the remedies under Title IX were limited to injunctive relief or if the "normal presumption in favor of all appropriate remedies" applied, the Court stated:

> Unquestionably, Title IX placed on the [school] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.[119]

Notably, the Court utilized its earlier Title VII hostile environment sexual harassment decision in *Meritor Savings Bank, FSB v. Vinson* to determine whether a teacher's sexual harassment of a student was actionable under Title

112. *Id.*

113. Tennessee v. U.S. Dep't of Agric., 665 F. Supp. 3d 880, 912 (E.D. Tenn. 2023) ("[J]ust as in Title VII cases, federal circuit courts of appeals have uniformly held that an individual's sex need only be a 'motivating factor' of the discrimination in order to constitute discrimination 'on the basis of sex' under Title IX.") (internal citations omitted).

114. *See, e.g.*, *Bostock*, 590 U.S. at 659 ("An employer violates Title VII when it intentionally fires an individual employee **based in part on** sex.") (emphasis added); *id.* at 658 ("[T]his Court has also held that the difference in treatment **based on** sex must be intentional.") (emphasis added); *id.* at 660 ("[I]t is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual **based on** sex.") (emphasis added). *See also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("[W]hen a supervisor sexually harasses a subordinate **because of** the subordinate's sex, that supervisor 'discriminate[s]' **on the basis of sex**.") (emphasis added).

115. *See infra* notes 122–31 and accompanying text. *See also Title IX*, C.R. DIV., U.S. DEP'T OF JUST. https://www.justice.gov/crt/title-ix [https://perma.cc/FJ2S-Q4X3] (last visited Mar. 8, 2025) ("Though Title VII and Title IX are two distinct statutes, their statutory prohibitions against sex discrimination are similar, such that Title VII jurisprudence is frequently used as a guide to inform Title IX.").

116. Franklin v. Gwinnett Co. Public Schools, 503 U.S. 60, 75 (1992) (quoting *Meritor,* 477 U.S. at 64).

117. *Id.* at 75.

118. *Id.*

119. *Id.* at 74–75 (quoting *Meritor,* 477 U.S. at 64).

IX.[120] Recognizing that sexual harassment under Title VII should have the same application under Title IX, the Court held that the student could bring a Title IX private cause of action, adopting Title VII principles to reach its conclusion.[121]

Following *Franklin,* several appellate courts applied Title VII principles to Title IX claims for guidance in resolving a case. For example, two years after the *Franklin* decision, the Fourth Circuit determined that Title VII provided "a persuasive body of standards" to consult when "shaping the contours of a private right of action under Title IX."[122] The following year, the Second Circuit noted the *Franklin* Court had relied on "Title VII authority and principles," so it also relied on Title VII to determine there was no notice provided to the defendant in a sexual harassment claim.[123] The Eighth Circuit similarly looked to Title VII law when addressing a Title IX same-sex sexual harassment case, finding "no reason to apply a different standard under Title IX" when the same type of harassment was actionable under Title VII.[124] While the Seventh Circuit noted that it had not done so "as often as some of our sister circuits," it recognized that

120. *Id.* at 73–76.

121. *Id.* at 76 (quoting *Meritor,* 477 U.S. at 64). Before the Court's *Franklin* decision, the First Circuit found that Title IX's legislative history "strongly suggested" that Congress intended for Title VII's substantive standards to be applied under Title IX. Lipsett v. Univ. of P.R., 864 F.2d 881, 896–98 (1st Cir. 1988). Similarly, before the *Franklin* decision, the Tenth Circuit acknowledged in a footnote that "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX . . . we regard it as the most appropriate analogue when defining Title IX's substantive standards." Mabry v. State Bd. of Cmty. Colls, and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987), *cert. denied,* 484 U.S. 849 (1987).

122. Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994) ("We agree that Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."). *See also* Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 65 (1st Cir. 2002) ("We have not previously considered a Title IX claim of sexual harassment involving a plaintiff and defendant of the same gender. For guidance, we turn to Title VII of the Civil Rights Act of 1964.").

123. Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 248–49 (2d Cir. 1995) (noting that "[t]he Court's citation of *Meritor Savings Bank, FSB v. Vinson,* a Title VII case, in support of *Franklin*'s central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII"), *abrogated on other grounds by* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); *see also* Torres v. Pisano, 116 F.3d 625, 630 n.3 (2d Cir. 1997) ("We have held that Title VII principles apply in interpreting Title IX.") (citing *Murray*, 57 F.3d at 248 ("In reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII.")).

124. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (Acknowledging that under Title VII same-sex sexual harassment is actionable, the court said, "We see no reason to apply a different standard under Title IX."). *See also id.* at 469 (citing *Franklin*, 503 U.S. at 74–75) (some internal citations omitted) ("A number of courts that have addressed the appropriate standard for . . . liability under Title IX have looked to Title VII for guidance." Moreover, the Supreme Court relied upon Title VII principles and authority in its holding that Title IX authorizes an award of compensatory damages.").).

it also "has looked to Title VII when construing Title IX."[125]

Further, when addressing whether discriminatory intent was required for a Title IX violation, the Tenth Circuit noted that "Title VII . . . is 'the most appropriate analogue when defining Title IX's substantive standards."[126] In addressing whether Title IX's sex discrimination provision included a hostile environment sex harassment claim, the Sixth Circuit contrasted Title IX's brief history with Title VII's "well litigated" history.[127] Citing the *Franklin* decision and noting that "courts have and do resort to Title VII standards to resolve sexual harassment claims brought under Title IX" the court adopted Title VII's elements and found a cause of action under Title IX.[128] The First[129] and Ninth[130] Circuits also weighed in post-*Franklin* to find that Title VII standards also apply to Title IX claims. Circuits have also looked to Title VII when addressing Title IX retaliation claims.[131]

Despite multiple courts finding that *Franklin* provided direction and guidance to apply Title VII standards to Title IX, the Supreme Court has cited Title VII to distinguish it from Title IX as well as to gain guidance.[132] For example, in *Gebser v. Lago Vista Independent School District*, the Court addressed its *Meritor* decision and rationale to note that the conclusion that "agency principles guide the liability inquiry under Title VII" is due to its express definition of employer to include "any agent," which has no comparable reference in Title IX.[133] Further, the Court noted that Title VII "contains an express cause of action and specifically provides for relief in the form of monetary damages," while Title IX's "private right of action is judicially

125. Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034, 1047 (7th Cir. 2017) ("Although not as often as some of our sister circuits, this court has looked to Title VII when construing Title IX."), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020). *See also* Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997) ("[I]t is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.").

126. Mabry v. State Bd. of Cmty. Colls, and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987), *cert. denied,* 484 U.S. 849 (1987).

127. Doe v. Claiborne, 103 F.3d 495, 514–15 (6th Cir.1996).

128. *Id.* at 514 ("By citing *Meritor Savings Bank,* a Title VII hostile environment case, the Court indicated that it views with approval the application of Title VII principles to resolve similar Title IX cases.") (internal citations omitted).

129. Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 ("[T]here is no principled basis for construing Title IX more grudgingly [than Title VII]. We therefore hold that a hostile environment claim based upon same-sex harassment is cognizable under Title IX.").

130. Oona R.-S. *ex rel.* Kate S. v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998) ("Title VII standards apply to hostile environment claims under Title IX.").

131. *See e.g.*, Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 564 (3d Cir. 2017) ("Title VII's familiar retaliation framework 'generally governs' Title IX retaliation claims.").

132. Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643–44 (1999) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998)) (noting the Court "expressly rejected the use of agency principles in the Title IX context" due to the "textual differences between Title IX and Title VII").

133. *Gebser*, 524 U.S. at 283.

implied," with no "legislative expression on the scope of available remedies."[134]

Circuits have also criticized reading *Franklin* to support using Title VII to guide Title IX interpretations,[135] including the Eleventh Circuit in its en banc majority *Adams* opinion.[136] Courts have noted that while there are several similarities between Title VII and Title IX, there are also many differences, including textual and historical.[137] For example, Title VII's discrimination prohibition applies to employers with fifteen or more employees, both public and private, while Title IX is limited to federal fund recipients.[138] As such, Title VII prohibits employment discrimination outright,[139] as compared to the contractual nature of Title IX's application solely to federal fund recipients.[140] And, while Title VII is focused on discriminatory workplace actions that have already taken place, Title IX's focus is on preventing discrimination in an educational environment. Nonetheless, in light of the many similarities and historical references, divided appellate panels from the Eleventh[141] and Fourth Circuits[142] determined, within weeks after the Court's decision, that *Bostock*'s reasoning applied beyond Title VII and held that Title IX's sex discrimination protections also prohibited discrimination based on sexual orientation and gender identity.

B. Trump's Response

Despite the Trump administration's earlier recognition that the *Bostock* Title VII decision would impact Title IX, once the opinion was announced with an unexpected outcome, the Trump administration made no effort to amend the revised rule.[143] Instead, it changed course and engaged in multiple efforts to prevent *Bostock*'s potential broad reach under Title VII and its impact on Title IX during the last months of Trump's presidency.[144] In fact, in the last days of

134. *Id.* at 283–84.

135. *See, e.g.*, Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655 (5th Cir. 1997) (noting "*Franklin* did not establish any sweeping parallel between Title IX and Title VII").

136. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams III*), 57 F.4th 791, 808 (11th Cir. 2022) (*en banc*) (differentiating Title VII from Title IX by noting that "the instant appeal is about schools and children—and the school is not the workplace").

137. *Gebser*, 524 U.S. at 283.

138. *See supra* note 8.

139. *See supra* note 8.

140. *See supra* note 16.

141. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams I*), 968 F.3d 1286, 1310 (11th Cir. 2020), *opinion vacated and superseded sub nom.* Adams v. Sch. Bd. of St. Johns Cnty., Florida (*Adams II*), 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted, opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *on reh'g en banc sub nom.* Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams III*), 57 F.4th 791 (11th Cir. 2022).

142. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619 (4th Cir. 2020).

143. *See supra* notes 83–85 and accompanying text.

144. See *infra* notes 145–46 and accompanying text. The Trump administration also disregarded the Court's interchangeable use of Title VII's "because of sex" language with Title

Trump's presidency, his Acting Assistant Secretary of the DOE's OCR issued a 12-page memorandum misconstruing the Supreme Court's holding in *Bostock* to limit its reach and contradicting the administration's earlier Preamble statement, now noting that *Bostock* **does not** construe Title IX because "Title IX text is very different from Title VII text in many important respects."[145] Just days later, his successor immediately reached out to his administrative agencies on the day of his inauguration, directing a broad application of *Bostock*'s reasoning.[146]

C. Bostock *& Biden*

On January 20, 2021, President Biden's first day in office, he signed Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*.[147] The executive order, described as "the most substantive, wide-ranging executive order concerning sexual orientation and gender identity ever issued by a United States president,"[148] reflected the Biden administration's policy "to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation."[149] The *Bostock* case provided the legal foundation for President Biden's inauguration day executive order.[150] In it, he directed his federal administrative agencies to apply *Bostock* broadly to their applicable nondiscrimination statutes.[151] The administrative response to Biden's order saw Justice Alito's prediction come true as federal nondiscrimination protections were made available for the first time to LGBTQ Americans in multiple areas beyond Title VII's ambit.[152]

Biden's Order advanced *Bostock* beyond Title VII, directing that other similar federal laws prohibiting sex discrimination also prohibit discrimination

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IX's "based on sex" language throughout the majority opinion. Justice Gorsuch used Title VII's "because of sex" language 33 times in the majority opinion and used Title IX's "based on sex" language 16 times. *Bostock*, 590 U.S. at 649–88.

145. Memorandum from Reed Rubinstein, Principal Deputy Gen. Counsel, U.S. Dep't of Educ., to Kimberly M. Richey, Acting Assistant Sec'y of the Off. for C.R., U.S. Dep't of Educ., on Bostock v. Clayton Cnty. (Jan. 8, 2021).

146. Hillman, *supra* note 36, at 64–65.

147. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021). The Order references the *Bostock* holding and states that *Bostock*'s reasoning applies with equal force to other laws that prohibit sex discrimination "so long as the laws do not contain sufficient indications to the contrary." *Id.*

148. Jo Yurcaba, *Biden Issues Executive Order Expanding LGBTQ Nondiscrimination Protections*, NBC NEWS (Jan. 21, 2021, 1:52 PM), https://www.nbcnews.com/feature/nbc-out/biden-issues-executive-order-expanding-LGBTQ-nondiscrimination-protections-n1255165 [https://perma.cc/3NG7-QTC6].

149. Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7025 (Jan. 20, 2021).

150. *Id.* at 7023.

151. *Id.* at 7023–24.

152. *See supra* note 103 and accompanying text.

based on sexual orientation and gender identity.[153] Referencing the *Bostock* decision, the Order recounted the Court's holding that discrimination "'because of . . . sex' covers discrimination on the basis of gender identity and sexual orientation."[154] Further, the Order directed that *Bostock*'s reasoning applied to all federal laws and regulations that prohibit sex discrimination, which, according to Justice Alito's dissent, numbered over one hundred.[155] The Order directed each agency head to "consider whether to revise, suspend, or rescind . . . agency actions, or promulgate new agency actions" to "fully implement statutes that prohibit sex discrimination" to include protections based on sexual orientation and gender identity.[156] Finally, the Order required each agency to develop an appropriate action plan to implement its applicable sex discrimination statutes "[w]ithin 100 days of the date" of the Order.[157]

On March 8, 2021, President Biden issued Executive Order 14021, titled "*Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*," addressing Title IX in light of the *Bostock* decision.[158] The Order acknowledged the Biden administration's policy regarding Title IX's education protections:

> It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity. For students attending schools and other educational institutions that receive Federal financial assistance, this guarantee is codified, in part, in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in education programs or activities receiving Federal financial assistance.[159]

Executive Order 14021 directed the Secretary of Education, in consultation with the Attorney General, to review "all existing regulations, orders, guidance documents, policies, and any other similar agency actions" along with all agency actions related to the Trump administration's May 19, 2020, rule titled, *Nondiscrimination on the Basis of Sex in Education Programs or Activities*

153. *See infra* notes 154–57 and accompanying text.

154. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021). The Order addressed specific nondiscrimination statutes, "including Title IX of the Education Amendments of 1972, as amended, the Fair Housing Act, as amended, and section 412 of the Immigration and Nationality Act, as amended" and declared that they also, "along with their respective implementing regulations," provide discrimination protections based on sexual orientation and gender identity, "so long as the laws do not contain sufficient indications to the contrary." *Id.*

155. *Bostock*, 590 U.S. at 724 (Alito, J., dissenting).

156. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

157. *Id.*

158. Exec. Order No. 14,021, 86 Fed. Reg. 13083 (Mar. 11, 2021).

159. *Id.*

Receiving Federal Financial Assistance,[160] to assure consistency with the Biden administration's policy, Title IX, and governing law.[161] The Order also directed the Secretary of Education to issue new guidance as needed to remedy inconsistent agency actions within one hundred days of the Order.[162]

Fewer than two months after being sworn in, President Biden solidly established that his administration was committed to undoing the damage inflicted on the LGBTQ community under his predecessor,[163] furthering the rights and protections available to LGBTQ Americans, and broadly applying the Supreme Court's *Bostock* holding. From the first day of his presidency, President Biden and his administration made historic and significant measures to value, support, and enhance the lives of LGBTQ Americans, including LGBTQ students.

III. THE TITLE IX ADMINISTRATIVE RESPONSE

After President Biden issued his executive order directing federal administrative agencies to apply *Bostock*'s holding to their nondiscrimination provisions, those agencies responded accordingly. The DOJ issued a March 2021 memorandum addressing *Bostock*'s impact on Title IX, and OCR issued a Notice of Interpretation (NOI) to clarify its enforcement authority regarding discrimination based on sexual orientation and gender identity under Title IX in light of the Court's *Bostock* decision.[164] Those administrative actions resulted in legal challenges, temporary and permanent injunctions, and efforts to prevent LGBTQ students from acquiring federal sex discrimination protections.[165]

A. Department of Justice—Civil Rights Division

The DOJ was established in 1870 and is led by an Attorney General.[166] The

160. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30026 (May 19, 2020).

161. Exec. Order No. 14,021, 86 Fed. Reg. 13083 (Mar. 11, 2021).

162. *Id.*

163. Five days after his inauguration, President Biden signed Executive Order No. 14,004 on January 25, 2021, which enabled all qualified Americans to serve in the military: "[I]t shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet all appropriate standards shall be able to do so openly and freely of discrimination." Exec. Order No. 14,004, 86 Fed. Reg. 7471, (Jan. 25, 2021) (noting that "gender identity should not be a bar to military service," the Order recognized that "an inclusive military strengthens our national security").

164. *See infra* Sections III.A.–B1.

165. *See infra* Section III.B.1.

166. *About the Office of the Attorney General*, U.S. DEP'T OF JUST., https://www.justice.gov/ag [https://perma.cc/Z6MX-W828] (last visited Mar. 10, 2025) ("Since the 1870 Act that established the Department of Justice as an executive department of the government of the United States, the Attorney General has guided the world's largest law office and the central agency for enforcement of federal laws.").

DOJ's Civil Rights Division (CRD)[167] was created in 1957 to uphold American citizens' civil and constitutional rights[168] and has multiple enforcement responsibilities.[169] The CRD coordinates and implements Title IX enforcement by administrative agencies.[170] On March 26, 2021, in response to President Biden's Executive Order 13988, the CRD issued a memorandum from the Principal Deputy Assistant Attorney General for Civil Rights to all federal agency civil rights directors and general counsels addressing *Bostock*'s application to Title IX.[171]

The memorandum announced that CRD had conducted a careful review of Title IX's statutory language and legislative history, Supreme Court precedent, and Supreme Court guidance to broadly interpret the statute.[172] Addressing specific rationale used in determining *Bostock*'s impact on Title IX, the CRD pointed out that both statutes apply to discrimination against individuals, both are broad, sweeping statutes, and both statutes use interchangeable language that establish the same causation standard.[173] The CRD also relied on the two post-*Bostock* circuit court decisions finding the same outcome as well as two pre-*Bostock* circuit court decisions with identical results.[174]

After considering those multiple sources, including the dissenting opinions in the cases, the CRD "found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly." Therefore, CRD determined that "the best reading of Title IX's prohibition on discrimination 'on the basis of sex'" established that Title IX, like Title VII, prohibits discrimination based on sexual orientation and gender identity by

167. *About the Civil Rights Division*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/about-division-0 [https://perma.cc/8JSS-U3NZ] (last visited Mar. 10, 2025). The Civil Rights Act of 1957 was enacted on September 9, 1957, and the DOJ's CRD was created on December 9, 1957. *Id.*

168. *Id.* ("Congress created the Civil Rights Division in 1957 to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society.").

169. *Id.* ("The Division enforces federal statutes prohibiting discrimination on the basis of race, color, sex disability, religion, familial status, military status, and national origin."). The CRD enforces, among others, Title IX; the CRD's Educational Opportunities Section represents the Department of Education in lawsuits and "may intervene in private suits alleging violations of education-related anti-discrimination statutes and the Fourteenth Amendment to the Constitution." *Educational Opportunities Section Overview*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/educational-opportunities-section-overview [https://perma.cc/BJ5P-7FQ5] (last updated Aug. 31, 2023).

170. Exec. Order No. 12,250, §§ 1–2, 45 Fed. Reg. 72995 (Nov. 4, 1980).

171. Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen. for C.R., U.S. Dep't of Just., on application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021) (on file with author) [hereinafter Karlan Memo] ("The Executive Order directs agencies to review other laws that prohibit sex discrimination, including Title IX, to determine whether they prohibit discrimination on the basis of gender identity and sexual orientation. We conclude that Title IX does.").

172. *Id.* at 2–3.

173. *Id.* at 2.

174. *Id.*

education programs that receive federal funds.[175] As such, CRD advised agency leaders that Title IX should be interpreted accordingly.[176] The memo concluded by reiterating the administration's commitment that "every person should be treated with respect and dignity" and invited questions as the agencies "implement Title IX's protections against sexual orientation and gender identity discrimination."[177]

B. Department of Education—Office of Civil Rights

When enacting Title IX, Congress charged the DOE with its implementation and enforcement.[178] As such, the DOE has the authority to issue nonbinding guidance interpreting and clarifying Title IX's meaning and enforcement absent the power of law as well as the power to create binding regulations that do have the power of law.[179] To create binding regulations, the DOE must follow specific rulemaking steps required by the Administrative Procedure Act (APA), including a public notice and comment period.[180] However, when issuing interpretive guidance, the DOE is not required to undergo the APA's official rulemaking procedures.[181] The OCR is responsible for enforcing federal civil rights laws prohibiting discrimination by DOE federal fund recipients, including sex-based discrimination under Title IX.[182]

1. DOE's Title IX Notice of Interpretation.—President Biden followed up his initial January 20, 2021, executive order on March 8, 2021, with Executive

175. *Id.*

176. *Id.* The memorandum acknowledged that "[w]hether allegations of sex discrimination, including allegations of sexual orientation or gender identity discrimination, constitute a violation of Title IX in any given case will necessarily turn on the specific facts" and clarified that CRD's memorandum did not "prescribe any particular outcome with regard to enforcement" but was a "starting point" for agencies "to ensure the consistent and robust enforcement of Title IX, in furtherance of the commitment that every person should be treated with respect and dignity." *Id.* at 3. CRD noted that Title VII and Title IX had similar statutory prohibitions against sex discrimination and that "the Supreme Court and other federal courts consistently look to interpretations of Title VII to inform Title IX." *Id.* at 1 (citing Franklin v. Gwinnett Co. Public Schools, 503 U.S. 60, 75 (1992); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007); Gossett v. Oklahoma *ex rel.* Bd. of Regents for Langston Univ., 245 F.3d 1172, 1176 (10th Cir. 2001)). Finally, the memorandum announced that "*Bostock*'s discussion of the text of Title VII informs the Division's analysis of the text of Title IX." *Id.*

177. Karlan Memo, *supra* note 171, at 3.

178. 20 U.S.C. §§ 1681.

179. *Id.*

180. Federal agency rules that are binding or have the force of law must be promulgated through the required procedures in the APA, including publishing a notice of the proposed regulation, providing the public with an opportunity to provide comments and concerns, considering and responding to feedback, and including a "concise general statement of" the basis and purpose of the regulation in the final rule. 5 U.S.C. § 553(c).

181. *Id.* § 553(b)(A) (Section 553 exempts from notice-and-comment requirements "interpretative rules, general statements of policy, or rules or agency organization, procedure or practice.").

182. *About OCR*, U.S DEP'T OF EDUC., https://www.ed.gov/about/ed-offices/ocr/about-ocr [https://perma.cc/TM78-W85E] (last updated Jan. 15, 2025).

Order 14021, *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, directing the Secretary of Education to review all agency actions for inconsistencies with the new administration's policies within 100 days.[183] In response to both orders, on June 22, 2021, the OCR published a Notice of Interpretation (NOI), effective the same day, addressing *Bostock*'s impact on Title IX's sex discrimination protections.[184] The NOI announced that, in light of the Court's Title VII *Bostock* analysis and like the DOJ's determination, it interpreted Title IX's prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity.[185] The NOI highlighted OCR's historical recognition that Title IX's sex discrimination protections extended to LGBTQ students, with Trump's policy changes as the only exception,[186] and clarified that the DOE's current stance would guide future complaint investigations.[187] The next day, DOE followed up with a "Dear Educator" letter[188] and Fact Sheet[189] sent to federal fund recipients reiterating that Title IX's sex discrimination prohibition included protections based on sexual orientation and gender identity and that it would be fully and immediately enforced.

In response, on July 7, 2021, twenty Republican state attorneys general (AGs)[190] sent a letter to Biden disputing the guidance and alleging the NOI went beyond clarification and changed the statute's meaning, which required formal rulemaking under the APA.[191] On July 15, 2021, the AGs filed suit against the DOE, DOJ, and the EEOC challenging the NOI and requesting a temporary injunctive to prevent its enforcement (Tennessee Litigation).[192] A Tennessee federal district court judge issued an injunction on July 15, 2022, preventing the

183. Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021).

184. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637, 32637 (June 22, 2021).

185. *Id.* (citing *Bostock,* 140 S. Ct. at 1743, 1748–50).

186. *Id.*

187. *Id.* The NOI clarified it did "not itself determine the outcome in any particular case or set of facts." *Id.*

188. Letter from Suzanne B. Goldberg, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., on Title IX's 49th anniversary (June 23, 2021) (on file with author).

189. *Confronting Anti-LGBTQI+ Harassment in Schools*, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC. (June 23, 2021), https://www.ed.gov/media/document/ocr-factsheet-tix-202106pdf [https://perma.cc/8RQB-YM9T].

190. Letter from Herbert H. Slatery, III, Att'y Gen. of Tenn., to Joseph R. Biden, Jr., President of U.S., on administrative action related to *Bostock v. Clayton County* (July 7, 2021) (on file with author). The letter was signed by attorneys general from Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia.

191. *Id.* at 3.

192. Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807, 842 (E.D. Tenn. 2022).

DOE from applying the NOI to the twenty plaintiff states.[193] The State of Texas filed a similar lawsuit against the DOE and DOJ on June 14, 2023 (Texas Litigation).[194] The United States appealed the *Tennessee Litigation* decision to the Sixth Circuit Court of Appeals on September 13, 2022.[195] In the meantime, identifying the need to "restore vital protections for students" that had been "eroded by controversial regulations implemented during the previous

193. *Id.* ("[I]t is hereby ordered that Federal Defendants and all their respective officers, agents, employees, attorneys, and persons acting in concert or participation with them are **ENJOINED** and **RESTRAINED** from implementing the Interpretation, Dear Educator Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs.") .

194. Texas v. Cardona, 743 F. Supp. 3d 824, 899–900 (N.D. Tex. 2024) *correcting and superseding* Texas v. Cardona, 743 F. Supp. 3d 824 (N.D. Tex. 2024). On June 11, 2024, following the release of the Title IX Final Rule, the Texas judge issued an opinion addressing the challenged guidance documents, *Cardona*, 743 F. Supp. at 824, which were no longer at issue as the DOE by that time had complied with the APA rulemaking process and issued a Final Rule on April 29, 2024. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474, 33474–33896 (Apr. 29, 2024). The June 11, 2024, holding vacated the guidance documents, declared them unlawful, and enjoined their implementation or enforcement in Texas. *Cardona*, 743 F. Supp. 3d at 899–900. The opinion also enjoined any similar ***future*** agency guidance defining "'sex' to include gender identity or sexual orientation in Title IX's prohibition against discrimination on the basis of sex." *Id.* On August 5, 2024, several months after the Title IX Final Rule was released, the Texas judge corrected his June 11, 2024, ruling and superseded it almost two months later. *Cardona*, 743 F. Supp. 3d at 824 899–900. In the August 2024 opinion, the judge restated his ruling on the 2021 NOI complaint that vacated the challenged guidance documents, declared them unlawful, and enjoined their implementation or enforcement in Texas, but changed the earlier order's injunction on "any future agency *guidance documents*" to "any future *agency action*" that asserts "the unlawful interpretation of Title IX in the Guidance Documents" or asserts "the same interpretation . . . carries any weight in future litigation" in Texas *Id.* Thus, the Texas district judge, in a case challenging DOE guidance documents as violating the formal APA process, enjoined not only the guidance documents at issue but also the Final Title IX Rule that **did comply** with the formal APA process:

> Defendants and their agents are also **ENJOINED** from implementing or enforcing Title IX based on an interpretation that "sex" includes gender identity or sexual orientation in Title IX's prohibition against discrimination on the basis of sex against Plaintiff and its respective schools, school boards, and other public, educationally based institutions. Further, Defendants and their agents are **ENJOINED** from initiating, continuing, or concluding any investigation based on Defendants' interpretation that defines "sex" to include gender identity or sexual orientation in Title IX's prohibition against discrimination on the basis of sex against Plaintiff and its respective schools, school boards, and other public, educationally based institutions. Additionally, Defendants and their agents are **ENJOINED** from using the Guidance Documents or asserting that the unlawful interpretation of Title IX in the Guidance Documents—as well as asserting the same interpretation in any *future* agency action—carries any weight in future litigation initiated in Texas or against Plaintiff and its respective schools, school boards, and other public, educationally based institutions following the date of this Order.

Id. at 52.

195. Brief for Appellants, Tennessee v. U.S. Dep't of Educ., 104 F.4th 577 (6th Cir. 2024) (No. 22-5807), 2022 WL 17901086. On June 14, 2024, a divided Sixth Circuit panel affirmed the district court's injunction almost two months after the 2024 Final Rule was released. Tennessee v. U.S. Dep't of Educ., 104 F.4th 577, 584 (6th Cir. 2024).

Administration," the DOE initiated the formal APA rulemaking process.[196]

2. The Rulemaking Process.—On July 12, 2022, the DOE engaged in the formal APA process when it officially published its proposed changes in the Federal Register and invited public comment.[197] The proposed changes advanced the Biden administration's mission to strengthen protections for LGBTQI+ students by "clarifying that Title IX's prohibition on sex discrimination encompasses discrimination based on . . . sexual orientation and gender identity,"[198] and its "commitment to ensuring equal and nondiscriminatory access to education for students at all educational levels."[199] The changes implemented the *Bostock* Court's reasoning "that it is 'impossible to discriminate against a person' on the basis of sexual orientation or gender identity without 'discriminating against that individual based on sex,'"[200] acknowledging the Court made its determination by assuming – for argument's sake – "that sex refers only to certain 'biological distinctions.'"[201] Finally, the proposed rule advanced Title IX's goal of ensuring that "no person experiences sex discrimination in education"[202] and the Biden administration's goal to "ensure all our nation's students – no matter where they live, who they are, or

196. *FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations*, U.S. DEP'T OF EDUC., www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf [https://perma.cc/7B56-LUPU] (last visited Mar. 10, 2025).

197. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg 41390, 41390–41579 (proposed July 12, 2022). In the 2022 Notice, the DOE explained the proposed changes resulted from a detailed review of its Title IX implementing regulations and information obtained through hearings and listening sessions and were needed because "the current regulations do not best fulfill" Title IX's requirement to eliminate sex discrimination in education programs and activities that receive federal funds. *Id.* at 41390. As such, the proposed changes "provide greater clarity regarding the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* The DOE announced that it would address Title IX's application to athletics in "separate rulemaking," *Id.* at 41537, and published a second notice of proposed rulemaking in April 2023 addressing athletic team participation. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860, 22860–22891 (proposed Apr. 13, 2023).

198. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg at 41564.

199. *Id.* at 41395.

200. *Id.* at 41532 (citing *Bostock*, 590 U.S. at 660).

201. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41532 ("The [*Bostock*] Court explained that, even if one assumes 'for argument's sake' the employers' narrower definition of sex as referring 'only to biological distinctions between male and female,' discrimination 'because of sex' occurs whenever an employer discriminates against a person for being gay or transgender: In such a circumstance, the Court explained, the employer 'intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex.' And, the Court explained, this is so whether or not 'other factors besides the plaintiff's sex contributed to the decision' and regardless of whether 'the employer treated women as a group the same when compared to men as a group.'") (internal quotation and citations omitted).

202. *Id.* at 41396.

whom they love – can learn, grow, and thrive in school."[203]

Based on the large number of comments submitted and the time-consuming process involved in addressing each comment, it was more than three years into Biden's presidency before the DOE released its Final Title IX Rule.[204] The new regulations clarify, among other things, that Title IX's sex discrimination provisions, like those of Title VII, prohibit discrimination based on sexual orientation and gender identity.[205] Although the long-awaited Title IX Regulations went into effect on August 1, 2024, conservative Republican Attorneys General representing 26 states filed a flurry of lawsuits to block LGBTQ student sex discrimination protections, resulting in the Final Rule being enjoined in roughly half of the states.[206]

3. The DOE's Revised Title IX Regulations (Title IX Final Rule).[207]—After considering almost a quarter million comments, on April 19, 2024, the DOE released its Title IX Final Rule in response to Biden's directive.[208] The Title IX Final Rule intended to "fully effectuate Title IX by clarifying" its coverage and the responsibilities of federal fund recipients "not to discriminate based on sex"[209] while fulfilling its promise that "no person experiences sex

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203. Brett Samuels, *Biden Administration Proposes Extending Title IX Protections to Transgender Students*, THE HILL, (June 23, 2022, 12:04 PM), https://thehill.com/homenews/administration/3534328-biden-administration-proposes-extending-title-ix-protections-to-transgender-students/ [https://perma.cc/TV8W-SK47]. The public comment period closed on September 12, 2022, which, in line with APA requirements, was followed by a mandatory review of the public comments before the DOE issued its final regulations. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41390.

204. *FACT SHEET: U.S. Department of Education's 2024 Title IX Final Rule Overview*, U.S. DEP'T OF EDUC. [hereinafter 2024 Title IX Fact Sheet] https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf [https://perma.cc/76UP-XTFN] (last visited Mar. 10, 2025).

205. *Id.* at 1.

206. Rulemaking and Regulations by the Office for Civil Rights, U.S. Dep't of Educ. ("As of August 28, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at https://www2.ed. gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf. Per Court order, this list of schools may be supplemented in the future. The Final Rule and these resources do not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools."), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/pointers-for-implementation-2024-title-ix-regulations.pdf

207. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33474–896 (Apr. 29, 2024). On January 9, 2025, a federal district court judge vacated the Biden administration's 2024 Title IX Regulation creating further confusion for federal fund recipients. Tennessee v. Cardona, No. CV 2:24-072-DCR, 2025 WL 63795, at *7 (E.D. Ky. Jan. 9, 2025), *as amended* (Jan. 10, 2025).

208. *Id.*

209. *Id.* at 33878.

discrimination in education *programs or activities that receive Federal financial assistance*."[210] The DOE's Title IX Final Rule brings Title IX in line with *Bostock* and the purpose behind Title IX's enactment: to put an end to sex-based discrimination in educational programs or activities at all institutions that are federal fund recipients.[211] Called "the most comprehensive coverage under Title IX since the regulations were first promulgated in 1975," the long-awaited overhaul of Title IX went into effect on August 1, 2024.[212] The updated regulations broaden the scope and definitions of sex discrimination, reverse policies from the Trump administration,[213] implement a lower standard for a finding of sexual misconduct, apply to off-campus conduct, and require a quick response by school administrators to "all types of sex-based discrimination," replacing the former requirement that was limited to sexual harassment.[214]

With the important goal of "provid[ing] an educational environment free from discrimination on the basis of sex,"[215] the Final Rule defines sex-based discrimination to include discrimination "based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[216] Among other things,[217] the new regulations, which apply to any school that is a federal fund recipient, expand existing protections for LGBTQ students.[218] Recognizing that "many LGBTQI+ students face bullying and

210. *Id.* at 33480.

211. 20 U.S.C. § 1681; *see also supra* notes 43–47 and accompanying text.

212. The Final Rule defines "sex-based harassment" as "sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10." 34 C.F.R. § 106.2 (2024). *See also* Nadra Nittle, *New Title IX Rules offer 'C*omprehensive *Coverage' for LGBTQ+ Students and Sexual Violence Survivors*, THE 19TH, (Apr. 19, 2024), https://19thnews.org/2024/04/biden-administration-new-title-ix-regulations/ [https://perma.cc/ZDF8-7E9P] (quoting Catherine Lhamon, Assistant Secretary for the Office of Civil Rights at the Department of Education).

213. Michael Martin, *What Do Changes to Title IX Mean for LGBTQ Students?*, NPR, (Apr. 23, 2024, 5:13 AM), https://www.npr.org/2024/04/23/1246546231/what-do-changes-to-title-ix-mean-for-lgbtq-students [https://perma.cc/XB5B-8EXF].

214. Zachary Schermele, *Biden Finalizes Title IX Rules to Boost Rights of Assault Victims, LGBTQ Students*, USA TODAY, (Apr. 19, 2024, 10:15 AM), https://www.usatoday.com/story/news/education/2024/04/19/title-ix-biden-trump/73369449007 [https://perma.cc/T7RN-9TZS].

215. 2024 Title IX Fact Sheet, *supra* note 204, at 1.

216. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33476.

217. *Id.* (addressing other issues updated by the new regulations, including investigation procedures, the adjudication of allegations of sexual misconduct, and pregnancy discrimination). The new regulations do not apply to sports teams or living facilities, which will be covered when the DOE releases a later rule addressing those issues. *Id.*

218. *U.S. Department of Education Releases Final Title IX Regulations, Providing Vital Protections Against Sex Discrimination*, *Department Advances Educational Equity and Opportunity, U.S. DEP'T OF EDUC. (Apr. 19, 2024), https://www.ed.gov/news/press-releases/us-department-education-releases-final-title-ix-regulations-providing-vital-protections-against-sex-discrimination [https://perma.cc/WP5Q-MQDF].*

harassment just because of who they are,"[219] the updated regulations confirm that Title IX, like Title VII, protects students from sex discrimination based on sexual orientation and gender identity.[220] Secretary of Education, Miguel A. Cardona, clarified that the "regulations make it crystal clear that everyone can access schools that are safe, welcoming and that respect their rights."[221]

In support of the Title IX Final Rule, the DOE highlighted that "courts often rely on interpretations of Title VII to inform interpretations of Title IX"[222] and noted that " the Supreme Court has held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity."[223] Further, recognizing that "[s]ome courts have declined to extend the Supreme Court's [Title VII] reasoning in *Bostock* to Title IX by concluding that prohibitions on discrimination 'because of sex' and discrimination 'on the basis' of sex do not mean the same thing," the DOE explained that both "simply refer to discrimination motivated in some way by sex."[224] The DOE further pointed out that "the Supreme Court has used the terms 'because of' and 'on the basis of' interchangeably, including in *Bostock* itself,"[225] and noted that both statutes employ the same "but-for" causation.[226]

The Final Rule also amends the earlier requirement that sex-based conduct must be "severe AND pervasive" to the expanded requirement that sex-based conduct must be "severe OR pervasive" and expands the prior requirement that the conduct must "deny" participation to the updated "limit or den[y].[227] The standard under the new rules requires the questionable conduct to be: (1) unwelcome; (2) based on sex; (3) offensive subjectively and objectively and; (4) so severe or pervasive that; (5) it limits or denies a person's ability to participate in or benefit from an educational program or activity.[228] While the updated regulations implement critical measures to ensure full protection from sex-based

219. 2024 Title IX Fact Sheet, *supra* note 204. *See also* Lisa Marshall, *How New Title IX Rules Could Boost Mental Health for LGBTQ+ Students*, CU BOULDER TODAY, (July 8, 2024) https://www.colorado.edu/today/2024/07/08/how-new-title-ix-rules-could-boost-mental-health-lgbtq-students [https://perma.cc/M3NQ-WUJX]. (noting that "[t]here's a ton of research out there showing that when individuals from minoritized groups feel like they belong, they have lower suicide rates, lower depression rates and better school retention rates").

220. Zach Montague & Erica L. Green, *Biden Administration Releases Revised Title IX Rules*, N.Y. TIMES, (Apr. 19, 2024), https://www.nytimes.com/2024/04/19/us/politics/biden-title-ix-rules.html [https://perma.cc/UX2F-Y8QK] (noting that the newly released rules "cement[] protections for L.G.B.T.Q. students under federal law and update[] the procedure schools must follow when investigating and adjudicating cases of alleged sexual misconduct on campus").

221. *Id.*

222. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33509 n.13.

223. Id. at 33542.

224. *Id.* at 33806.

225. *Id.* (citing *Bostock*, 590 U.S. at 650).

226. *Id.* at 33807.

227. *Id.* at 33516. The regulations also now include off-campus behavior, requiring schools to address actions that create or "contribut[e] to a hostile environment," including in study abroad programs. *Id.* at 33532.

228. *Id.* at 33500

harassment in public education, including the fair and equitable treatment of complainants and respondents, eliminating bias or conflict involved in an informal resolution process, and provide updated grievance procedures, they specifically "[p]rohibit discrimination against LGBTQI+ students, employees, and others."[229] By applying the reasoning from *Bostock*, the Title IX Final Rule is clear that "discrimination and harassment based on sexual orientation, gender identity, and sex characteristics" are prohibited Title IX violations.[230]

To protect from unequal treatment based on sex and remain in compliance with Title IX, the new regulations make clear that federal fund recipients must not engage in sex-based differential treatment that causes a student to suffer "more than *de minimis* harm."[231] The new rules instruct that "in the limited circumstances" where Title IX permits treating students differently or separately "on the basis of sex, "a recipient must not carry out such different treatment or separation" in a way that subjects a student "to more than *de minimis* harm."[232] The Title IX Final Rule then clarifies that any policy or practice that prevents a student from participating in an educational program or activity consistent with the student's gender identity, the new regulations clarify, impart more than *de minimis harm,* and violate Title IX.[233] Further, "stigmatic injuries" caused by unequal treatment constitute more than *de minimis harm*, as do medical questions or document requirements to permit students to participate in activities that correspond with their gender identity.[234] As such, the updated Title IX rules permit students to use the bathroom that corresponds with their gender identity "without any fear of discipline, harassment, or violence" and allow students to freely express themselves.[235]

Schools are also prohibited under the Title IX Final Rule from retaliation by providing protections to those who report discrimination, including responsibility for protecting students from peer retaliation.[236] It also supports parental and guardian rights, requires schools to communicate the updated Title IX protections clearly and effectively, makes it easier for students to report harmful and discriminatory experiences, and prevents sharing personal student information obtained through Title IX compliance.[237] Notably, the mid-April

229. 2024 Title IX Fact Sheet, *supra* note 204, at 4.

230. *Id.*

231. *Id.* (noting "limited circumstances permitted by Title IX").

232. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33876 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (noting "except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations at §§ 106.12[–]106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b).").

233. *Id. See also id.* at 33815 ("Such harm . . . must generally be something more than innocuous, or de minimis, to be actionable discrimination.").

234. *Id.* at 33815, 33819.

235. Martin, *supra* note 213.

236. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33825–33827.

237. 2024 Title IX Fact Sheet, *supra* note 204, at 5 (noting limiting exceptions including consent or disclosing information to a minor's parent).

rule release and the August 1st effective date required school administrators to act quickly, providing only 100 days to get their school policies into compliance.[238] To assist in those preparations, the DOE released a "summary of the major provisions," a "resource for drafting" related Title IX documents and policies, and committed to assisting schools with technical assistance and additional resources "to support implementation and compliance."[239] The Title IX Updated Rule makes clear that "discrimination and harassment based on sexual orientation, gender identity, and sex characteristics in federally funded education programs" is prohibited.[240]

The revamped regulations returned the DOE to the pre-Trump position that Title IX includes protections based on sexual orientation and gender identity, but this time with teeth.[241] Unsurprisingly, multiple lawsuits challenging the updated regulations were filed shortly after its release.

4. Conservative Attacks.[242]—While many cheered the new rule and multiple states embraced the much-needed overhaul,[243] several conservative state leaders made coordinated efforts to block the implementation and enforcement of the Final Title IX Rule, creating challenges for those tasked with implementing the new regulations[244] and pausing needed protections for vulnerable LGBTQ

238. The new rules address the designation of the Title IX coordinator, the requirement to adopt and publish nondiscrimination policies and grievance procedures, and requirements for employee training on reporting requirements and confidentiality. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33477.

239. 2024 Title IX Fact Sheet. *supra* note 204, at 5.

240. *Id.* at 4.

241. As the Obama-era guidance was informal and did not go through the APA procedure, it did not have the force of law or qualify for *Chevron* deference. Under Trump, the 2020 Title IX regulations did go through the APA procedure, becoming effective three years into his first term. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (noting that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference"). *See also infra* Section V.B. (addressing the demise of *Chevron*).

242. *See infra* Section V.C. *See als*o Adam Naqourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 17, 2023), https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html [https://perma.cc/GU72-JKFR] ("Today, the effort to restrict transgender rights has supplanted same-sex marriage as an animating issue for social conservatives at a pace that has stunned political leaders across the spectrum. It has reinvigorated a network of conservative groups, increased fund-raising and set the agenda in school boards and state legislatures.").

243. Marshall, *supra* note 219 (noting that "[t]here's a ton of research . . . showing that when individuals from minoritized groups feel like they belong, they have lower suicide rates, lower depression rates and better school retention rates").

244. *See e.g.*, Amy Harmon, *As States Resist Federal Gender Rules, Schools Are Caught in the Middle*, N.Y. TIMES (May 4, 2024), https://www.nytimes.com/2024/05/04/us/title-nine-schools-transgender.html [https://perma.cc/5LMA-3CWU] (noting that "clashing state and federal directives have put school officials in a difficult spot").

students in several states.[245] Before the release of the updated Title IX rules, multiple Republican conservative legislatures passed anti-LGBTQ laws, including broadly prohibiting transgender students from accessing the bathroom of their gender identity, banning transgender athletes from playing on sports teams of their identified gender, and banning the use of transgender student pronouns.[246]

Those same right-leaning state leaders, through their Attorney General, filed lawsuits challenging the updated rules shortly after their release, with some directing educational institutions that are federal fund recipients to disregard the new Title IX regulations.[247] Generally, the Republican attorneys general argue that the DOE "acted 'arbitrarily and capriciously' when it adopted the final rule."[248] Several state challenges seeking to block what they refer to as "gender ideology," have found initial success through district court rulings temporarily

245. Schermele, *supra* note 214 (noting that Title IX has become a "political football" and that those in charge of Title IX's enforcement are in "a state of whiplash"). *See also*, Grace Abels, *This Supreme Court Case is Reshaping LGBTQ+ Rights. You Probably Haven't Heard About It*, POLITIFACT (May 20, 2024) https://www.politifact.com/article/2024/may/20/this-supreme-court-case-is-reshaping-lgbtq-rights/ [https://perma.cc/859S-EJE3] (noting that "the inclusion of LGBTQ+ identities under the nation's leading gender-equity law prompted backlash").

246. *See e.g.*, Matt Lavietes, *Transgender Bathroom Bills Are Back. Does the Nation Care?*, NBC NEWS (Feb. 3, 2024, 7:00 A.M.), https://www.nbcnews.com/nbc-out/out-politics-and-policy/transgender-bathroom-bills-are-back-nation-care-rcna137014 [https://perma.cc/HTR5-K9WW]; Matt Lavietes, *Mississippi Enacts Transgender Bathroom Ban in Public Schools*, NBC NEWS (May 10, 2024, 6:12 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/mississippi-reeves-transgender-bathroom-ban-public-schools-rcna152036 [https://perma.cc/7M3Q-8XZB]. *See also* John Kruzel, *US Supreme Court sidesteps fight over transgender student bathroom access*, AOL (Jan. 16, 2024, 10:48 AM), https://www.aol.com/us-supreme-court-snubs-fight-143754156.html [https://perma.cc/HP3A-R7DT] ("Republicans in various states have pursued a wave of laws affecting transgender people including restricting bathroom access, limiting transgender participation in sports and access to gender-affirming medical care, and the teaching of subjects related to gender identity.").

247. Attorneys general from twenty-six states challenged the regulations. The states are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. *See* Shauneen Miranda, *More Than Half of States Sue to Block Biden Title IX Rule Protecting LGBTQ+ Students*, TENN. LOOKOUT (May 20, 2024, 5:01 AM), https://tennesseelookout.com/2024/05/20/more-than-half-of-states-sue-to-block-biden-title-ix-rule-protecting-lgbtq-students/ [https://perma.cc/4EXY-BNAN] ("All of the attorneys general in the 26 states suing over the final rule are part of the Republicans Attorneys General Association."); *see also* Katherine Knott, *Title IX Legal Challenges Target LGBTQ+ Protections*, INSIDE HIGHER ED (June 26, 2024), https://www.insidehighered.com/news/government/2024/06/26/title-ix-legal-challenges-target-lgbtq-protections [https://perma.cc/AV99-Q6CK] ("Over all [sic], 26 state attorneys general, all Republicans, are challenging the regulations."). The Title IX Final Rule notes that "these regulations simply reiterate that longstanding principle, which in the Title IX context means that a recipient may not adopt a policy or practice that contravenes Title IX or this part even if such a policy or practice is required by a conflicting State law." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33541 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106).

248. Knott, *supra* note 247.

enjoining the updated regulations from going into effect.[249]

At the time of this writing, Republican Attorneys General from twenty-six states have filed nine lawsuits,[250] and the Title IX Final Rule is temporarily enjoined in those states.[251] The lawsuits focus primarily on the Final Rule's confirmation that sexual orientation and gender identity are included under Title IX's sex discrimination prohibition,[252] but the injunctions to date are not limited

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249. *See, e.g., Attorney General Ken Paxton Sues Biden Administration for Unlawfully Using Title IX to Mandate Radical Gender Ideology, Violating Constitution and Putting Women at Risk*, ATT'Y GEN. OF TEX. (Apr. 29, 2024), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-biden-administration-unlawfully-using-title-ix-mandate-radical#:~:text=The%20Department%20of%20Education's%20new,program%20that%20receives%20federal%20money [https://perma.cc/6JXB-SVRQ]. *See also* Brooke Migdon, *Judge Blocks Biden's Transgender Student Protections in 6 More States*, THE HILL (June 17, 2024 3:13 PM), https://thehill.com/regulation/court-battles/4726114-judge-blocks-bidens-transgender-student-protections-in-6-more-states/ [https://perma.cc/NZT9-MNC6] ("Disapproval resolutions filed this month by House and Senate Republicans aim to strike down the rule before its enforcement date.") [hereinafter Migdon I]; *see also* Brooke Migdon, *Republicans Look to Reverse New Transgender Student Protections*, THE HILL (June 6, 2024, 2:56 PM), https://thehill.com/homenews/house/4708351-republicans-transgender-student-protections/ [https://perma.cc/CC2A-AUC7] ("More than 60 House Republicans are mounting a challenge to a Biden administration rule expanding federal nondiscrimination protections for transgender students.") [hereinafter Migdon II].

250. *See infra* Section V.C.

251. The states where the Final Rule has been enjoined from taking effect are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Naaz Moden, *11th Circuit Deals Another Blow to Education Department's Title IX Rule*, K-12 DIVE (Aug. 26, 2024), https://www.k12dive.com/news/11th-circuit-title-ix-education-department-injunction-pending-appeal/725241/ [https://perma.cc/T36B-UY2L] ("So far, the rule has been temporarily paused in at least 26 states until the courts can ultimately decide on those claims.").

252. *See, e.g.,* Louisiana v. U.S. Dep't of Educ. (*LA Lawsuit*), 737 F. Supp. 3d 377 (W.D. La. 2024) (joined by Mississippi, and Montana); Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ., 741 F. Supp. 3d 515 (N.D. Tex. 2024); Texas v. Cardona (*TX Lawsuit*), No. 4:23-CV-00604-O, 2024 WL 2947022, at *52 (N.D. Tex. June 11, 2024) (ruling on lawsuit challenging Notice of Interpretation ("NOI") guidance documents, but issuing injunction beyond the NOI to include the Final Title IX Rule and applying broadly, beyond plaintiffs in the litigation by stating that

> The Court **ENJOINS** Defendants and their agents from implementing or enforcing the Guidance Documents against Plaintiff and its respective schools, school boards, **and other public, educationally based institutions . . . . ENJOINED** from enforcing the Guidance Documents . . . . **ENJOINED** from **initiating, continuing, or concluding any investigation based on Defendants' interpretation in the Guidance Documents—as well as in any future agency guidance** documents—that define "sex" to includes gender identity or sexual orientation in Title IX's prohibition against discrimination on the basis of sex against Plaintiff and its respective schools, school boards, and o**ther public, educationally based institutions** . . . . **ENJOINED** from **using the Guidance Documents or asserting the Guidance Documents carry any weight—as well as any future agency guidance documents—in any litigation in Texas or against Plaintiff and its respective schools, school boards, and other public, educationally based institutions** that is initiated following the date of this Order.

and block the Final Rule in full.[253] Conservative politicians and legislators have framed the Final Rule's protection of transgender students as cutting directly against Title IX's intent to protect women and provide equal opportunities in sports.[254] Engaging in a fear campaign, conservative state Attorneys General have also advanced false arguments, including that the Final Rule puts cisgender women and girls in danger by allowing transgender students to access bathrooms consistent with their gender identity.[255]

(emphasis added)); Alabama v. Cardona, (*AL Lawsuit*), No. 7:24-CV-00533, 2024 WL 3607492 (N.D. Ala. July 30, 2024) (joined by Florida, Georgia, and South Carolina); Tennessee v. Cardona (*TN Lawsuit*), 737 F. Supp. 3d 510 (E.D. Ky. 2024) (joined by Ohio, Kentucky, Idaho, Virginia, and West Virginia); Oklahoma v. U.S. Dep't of Educ., 743 F. Supp. 3d 1314 (W.D. Okla. 2024); Arkansas v. U.S. Dep't of Educ. (*AR Lawsuit*), 742 F. Supp. 3d 919 (E.D. Mo. 2024); Kansas v. U.S. Dep't of Educ. (*KS Lawsuit*), 739 F. Supp. 3d 902 (D. Kan. 2024) (joined by Alaska, Utah, and Wyoming). The Kansas district court judge failed to limit his injunction of the Final Title IX Rule to Kansas federal fund recipients and took the drastic measure of enjoining "any school attended by a member of Young America's Foundation or Female Athletes United, as well as any school attended by a minor child of a member of Moms for Liberty," who are plaintiffs in the case. *KS Lawsuit*, 739 F. Supp. 3d at 936. As a result, the injunction applies to schools in states that have not challenged the rule, leading to "instability and confusion." Naaz Modan, *Activist Organizations Seek to Block Title IX Rule in Over 600 Colleges Nationwide*, HIGHER ED DIVE (July 18, 2024), https://www.highereddive.com/news/organizations-block-title-ix-600-colleges-kansas/721700/ [https://perma.cc/9MZQ-UY5M].

253. *See, e.g.*, *TN Lawsuit*, 737 F. Supp. 3d at 572 (While the State and Intervenor Plaintiffs sought injunctive relief related to three provisions of the 2024 Final Rule that they allege constitute a "gender-identity mandate," the district court preliminarily enjoined the entire rule.). In Kansas, the injunction issued by the federal district court went beyond the state's boundaries. *KS Lawsuit*, 739 F. Supp. 3d at 936–37. On July 2, 2024, a Kansas district court judge failed to limit his injunction of the Final Rule to federal fund recipients of the states involved in the lawsuit (Kansas, Alaska, Utah, and Wyoming) and took the drastic measure of enjoining "any school attended by a member of Young America's Foundation or Female Athletes United, as well as any school attended by a minor child of a member of Moms for Liberty," all plaintiff organizations in the case. *Id.* As a result, the injunction applies to hundreds of schools and includes states that have not challenged the rule, causing "instability and confusion." Modan, *supra* note 252. To determine the schools that were enjoined by the judge, the plaintiff organizations are required to "file a notice in the record identifying the schools which their members or their members' children . . . attend." *KS Lawsuit*, 739 F. Supp. 3d at 936–37. Along with the definition of sex that includes sexual orientation and gender identity, the Final Title IX Rule also addresses protections for students who are pregnant and parenting and the procedures regarding a school's response to sexual misconduct reports and investigative procedures. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33736, 33765 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106).

254. Migdon I and II, *supra* note 249 and accompanying text.

255. Amina Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL'Y 70, 70–71 (2019) (determining that laws allowing bathroom access based on gender identity are "not related to the number or frequency of criminal incidents in these spaces" and finding "evidence that fears of increased safety and privacy violations as a result of nondiscrimination laws are not empirically grounded). *See also* Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, NBC NEWS (Sept. 19, 2018, 12:33 PM), https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106 [https://perma.cc/5XGT-427T].

Depicting transgender female students as presenting a "danger" to cisgender female students using the same bathroom paints a false picture, obscuring the DOE's goal in updating Title IX: to be fair and inclusive to all students.[256] Additional complaint allegations include that the DOE lacks statutory authority to decide major questions; that the Final Rule is contrary to Title IX's text and structure; violates First Amendment Free Speech because it compels educators to use a student's preferred pronouns and prevents them from expressing sincerely held religious beliefs on the immutability of sex; violates the Spending Clause; and put students, families, and schools at risk of harm.[257] Most of the states that have filed suit against the DOE have anti-transgender laws in place prohibiting bathroom access, pronoun use, and access to sports teams congruent with a transgender individual's gender identity, leading to allegations that the Final Rule interferes with state sovereignty.[258]

While several conservative Republican states have opposed the Title IX Final Rule, multiple states have welcomed its broad benefits, filing amicus briefs in its support and opposing the preliminary judgment motions.[259] A coalition of sixteen attorneys general argue in their amicus brief that the Final Rule is consistent with Title IX's plain text and the Constitution, that the rule will not compromise privacy or safety, and will not impose significant compliance costs.[260] And, despite the wave of lawsuits and political attacks, the Biden administration stands firmly behind the Final Rule.[261] A DOE

256. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33480.

257. The DOE addressed several of these arguments in the text of the Updated Title IX Rule, including citing 20 U.S.C. § 1682; 20 U.S.C. § 1221e-3, 20 U.S.C. § 3474, and the Education Amendments of 1974 § 844 to show its "authority to issue regulations governing equal opportunity to participate in an education program or activity is 'well established.'" Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33804.

258. *See Bans on Transgender People Using Public Bathrooms and Facilities According to Their Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, https://www.mapresearch.org/equality-maps/nondiscrimination/bathroom_bans [https://perma.cc/U6Z4-SUQM] (last visited Aug. 19, 2024); *see also Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, www.mapresearch.org/equality-maps/youth/sports_participation_bans [https://perma.cc/A6J5-MYCU] (last visited Aug. 19, 2024); *Equality Maps: Safe Schools Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/safe_school_laws [https://perma.cc/2EZF-B76J] (last accessed Aug. 9, 2024).

259. Tennessee v. Cardona (*TN Lawsuit*), 737 F. Supp. 3d 510, 571 (E.D. Ky. 2024) ("clearly there are states that do not want this relief as evidenced by the proposed amicus curiae filing in this case"). *See also* Louisiana v. U.S. Dep't of Educ. (*LA Lawsuit*), 737 F. Supp. 3d 377, 388 (W.D. La. 2024) (noting that an amicus brief was filed in the case opposing the motions for a preliminary injunction by sixteen states).

260. *See* Brief for California et al. as Amici Curiae Supporting Defendants, Arkansas v. U.S. Dep't of Educ. (*AR Lawsuit*), 742 F. Supp. 3d 919 (E.D. Mo. 2024) (No. 24 CV 636), https://www.nj.gov/oag/newsreleases24/2024-0625_Arkansas-v-USDOE-Amicus-Brief.pdf.

261. Following the states' lead, congressional Republicans engaged in efforts to impact and undo the 2024 Final Title IX Rule and defeat efforts to provide discrimination protections to LGBTQ students. Invoking the Congressional Review Act (CRA), which allows Congress to

representative clarified that "[t]he Department crafted the final Title IX regulations following a rigorous process" to give complete effect to "the Title IX statutory guarantee" "that no person experience sex discrimination in" federally-funded education."[262] He further noted, "The Department stands by the final Title IX regulations released in April 2024, and we will continue to fight for every student."[263]

Louisiana was the first state to file suit against the DOE requesting a preliminary injunction to "cure the unlawfulness of the Final Rule."[264] The federal district court judge found that "sex" applied only to biological males and females, the Final Rule violated both the Constitution and APA, accused the DOE of abusing its power, and issued temporary injunctions blocking the Rule from its August 1, 2024, effective date.[265] In the Tennessee case, a Kentucky

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overturn certain federal agency actions, on July 11, 2024, the House, voting along party lines, passed a joint resolution to repeal the 2024 Final Title IX Rule. Naaz Modan, *House Passes Resolution Seeking to Overturn Title IX Rule*, HIGHER ED DIVE (July 11, 2024), https://www.highereddive.com/news/house-passes-congressional-review-act-resolution-overturn-title-ix-rule/721178/ [https://perma.cc/H677-PK3F]. At the time, Biden said he would veto the resolution if necessary. *Id. See also NWLC Condemns House Vote to Block Title IX Regulations*, NAT'L WOMEN'S L. CTR. (July 11, 2024), https://nwlc.org/press-release/nwlc-condemns-house-vote-to-block-title-ix-regulations/ ("We are outraged that right-wing extremist House members voted to undo the protections established in the revised Title IX rule. Despite the disinformation spewed by these extremists, the Biden administration's updates to Title IX regulations safeguard *all* women and girls. This includes protections for student survivors of sexual harassment, pregnant and parenting students, and LGBTQI+ students — especially transgender, nonbinary, and intersex students — against discrimination in school.") (emphasis added).

262. Knott, *supra* note 247.

263. *Id. See also* Migdon I, *supra* note 249 ("Disapproval resolutions filed this month by House and Senate Republicans aim to strike down the rule before its enforcement date."); Migdon II, *supra* note 249 ("More than 60 House Republicans are mounting a challenge to a Biden administration rule expanding federal nondiscrimination protections for transgender students.").

264. *LA Lawsuit*, 737 F. Supp. 3d at 396 (asserting that the Final Rule "ignores the text, structure, and context of Title IX to advance Defendants' political and ideological agenda," that the "Defendants have no authority [ ] to rewrite Title IX and decide major questions," that the Final Rule "violates the Spending Clause, is an unconstitutional exercise of legislative power, and fails arbitrary-and-capricious review several times over"). The Plaintiffs also allege that the rule causes "immediate irreparable harm and will cause additional irreparable harm, including unrecoverable compliance costs." *Id.* Along with the states, additional plaintiffs include the School Board of Webster Parish; School Board of Red River Parish; School Board of Bossier Parish; School Board Sabine Parish; School Board of Grant Parish; School Board of West Carroll Parish; School Board of Caddo Parish; School Board of Natchitoches Parish; School Board of Caldwell Parish; School Board of Allen Parish; School Board LaSalle Parish; School Board Jefferson Davis Parish; School Board of Ouachita Parish; School Board of Franklin Parish; School Board of Acadia Parish; School Board of Desoto Parish; and School Board of St. Tammany Parish. *Id.* at n.13.

265. *Id.* at 388 (finding that the "Final Rule is (1) contrary to law under the Administrative Procedures Act ("APA"), (2) violates the Free Speech Clause of the First Amendment, (3) violates the Free Exercise Clause of the First Amendment, (4) violates the Spending Clause, and (5) is arbitrary and capricious in accordance with Title 5 U.S.C. § 706 (2)(A) of the APA").

district court judge, addressing several state challenges,[266] opened his June 17, 2024, opinion with the words, "There are two sexes: male and female"[267] and accused the DOE of "seek[ing] to derail deeply rooted law."[268] The judge also disregarded the *Bostock* Court majority opinion that assumed for the sake of argument that there were two sexes and reached an opposite outcome, instead referencing Justice Thomas's "compelling dissent."[269] That court, finding that "the new rule contravenes the plain text of Title IX by redefining 'sex' to include gender identity" and that it resulted from "arbitrary and capricious rulemaking," granted preliminary injunctions to the six plaintiff states.[270]

On June 24, 2024, the Biden administration filed Notices of Appeal in cases under the jurisdiction of the Fifth[271] and Sixth Circuit Courts of Appeal.[272] On July 17, 2024, both circuits released opinions responding to the DOE's appeals. In a unanimous opinion, the Fifth Circuit denied the DOE's motion for a partial stay of the district court's preliminary injunction,[273] and the Sixth Circuit, in a 2-1 split, did the same but announced it would expedite the appeal.[274] On July 22, 2024, the DOJ asked the Supreme Court for emergency action to restore parts of the Final Rule in states that were enjoined from enforcing the rule on the August 1, 2024, effective date.[275] The DOJ requested the Court limit the injunctions solely to gender identity discrimination protections, noting that other portions of the Final Rule, such as updated procedures for assault and sexual harassment claims and enhanced pregnancy protections, should not be impacted.[276]

On August 16, 2024, the Supreme Court, 5-4, declined the Biden administration's emergency request, finding that there was not a "sufficient basis to disturb" the lower court's determination and that the provisions were

266. Tennessee v. Cardona (*TN Lawsuit*), 737 F. Supp. 3d 510, 527 (E.D. Ky. 2024) ("Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia filed a complaint with this Court on April 30, 2024, seeking to enjoin and invalidate the Final Rule and its accompanying regulations."). The court noted that "[t]he States are validly before the Court based on a modern form of the '*parens patriae*' authority allowing them to sue the federal government." *Id.* at 552.

267. *Id.* at 521.

268. *Id.* at 571.

269. *Id.* at 532.

270. *Id.* at 521. The Kentucky judge contributed to the conservative misinformation campaign regarding transgender bathroom risk when he criticized the DOE for failing to "meaningfully respond to commentors' [sic] concerns regarding risks posed to student and faculty safety." *Id.* at 572. *See* Hasenbush et al., *supra* note 255 and accompanying text. On January 9, 2025, the Kentucky district court judge vacated the Biden administration's 2024 Title IX Regulation creating further confusion for federal fund recipients. Tennessee v. Cardona, No. CV 2:24-072-DCR, 2025 WL 63795, at *7 (E.D. Ky. Jan. 9, 2025), *as amended* (Jan. 10, 2025).

271. Louisiana v. U.S. Dep't of Educ. (*LA Lawsuit*), 737 F. Supp. 3d 377 (W.D. La. 2024)

272. *TN Lawsuit*, No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024).

273. Louisiana v. U.S. Dep't of Educ., No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024).

274. Tennessee v. Cardona, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024).

275. *See* Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024).

276. *Id.*

intertwined.[277] At that time, litigation was ongoing in twenty-six states, and a national patchwork required federal fund recipients to determine whether the Final Rule was enjoined in their state as well as whether it was included on a nationwide list resulting from the Kansas litigation.[278] On January 9, 2025, a federal district court judge vacated the Biden administration's 2024 Title IX Regulation creating further confusion for federal fund recipients, further evidencing the need for direction from the Supreme Court to settle the scope of Title IX's protections.[279]

IV. APPELLATE COURT TREATMENT OF TITLE IX PRE-*BOSTOCK* & THE POST-*BOSTOCK* SPLIT IN THE CIRCUITS[280]

Federal courts addressing whether Title IX's sex discrimination provision included protections for LGBTQ students prior to the *Bostock* decision responded in the affirmative. At the circuit court level, each court addressing Title IX's reach concerning LGBTQ students ruled in favor of the student, whether on a preliminary matter or final decision on the merits, based on sex stereotyping following the Court's 1989 decision in *Price Waterhouse v. Hopkins*.[281] In *Price Waterhouse*, a plurality of the Court held that if an employee suffers an adverse employment action motivated in part by the employer's sex-based stereotype, Title VII is violated.[282] Based on the Court's holding that sex stereotyping was a form of sex discrimination, several circuit

277. *Id.* at 868.

278. *See supra* notes 251–64 and accompanying text.

279. The Supreme Court did grant certiorari to the United States as intervenor in a Tennessee case to address a related matter: the state's ban on gender-affirming care for transgender youth. United States v. Skrmetti, 144 S. Ct. 2679 (2024). Of the three federal appellate courts that have addressed the issue, the Sixth Circuit and the Eighth Circuit issued directly opposing opinions related to whether the bans are sex-related and the correct standard of review merited. L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *cert. granted in part sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); *see also* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022). The Court, which agreed to address only the Equal Protection claim, heard oral arguments on December 4, 2025, and will likely issue its opinion at the end of June 2025. *Skrmetti*, 144 S. Ct. at 2679.

280. Most lawsuits that assert a Title IX violation also allege an Equal Protection violation or other claims. This article focuses on the Title IX issue. For an analysis of the Equal Protection clause in relation to transgender bathroom use, see Jackson B. Hurst-Sanders, *Equality Can Stick with* Bostock*: A Call to Expand the Equal Protection Clause to Include Discrimination Against Transgender People's Bathroom Usage*, 111 KY. L.J. 345, 347 (2023).

281. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion). For a history of Title VII up to the Supreme Court's grant of certiorari in *Bostock*, see Regina Lambert Hillman, *Title VII Discrimination Protections & LGBT Employees: The Need for Consistency, Certainty & Equality Post*-Obergefell, 6 BELMONT L. REV. 1 (2019). For a detailed analysis of LGBTQ employment discrimination, see Kavisha Patel & Elaina Rahrig, *Employment Discrimination Against LGBTQ Persons*, 24 GEO. J. GENDER & L. 527 (2023).

282. *Price Waterhouse*, 490 U.S. at 246. Congress passed the Civil Rights Act of 1991, superseding *Price Waterhouse* and amending Title VII to clarify that if a protected category is a "motivating factor" behind an adverse employment action, a Title VII violation occurs, even if other lawful factors were considered. 42 U.S.C. § 2000e-2(m).

courts held that Title VII protected transgender and gay employees from adverse employment decisions if sex stereotyping was a motivating factor for the employer's decision.[283] Other courts applied *Price Waterhouse*'s sex stereotype theory to equal protection claims and non-Title VII federal statutes that prohibit sex-based discrimination, including Title IX, to find protections available for transgender individuals, including students.[284] In *Bostock*, however, the Court majority moved away from the earlier sex stereotyping theory, relying instead on Title VII's plain language and the broad sweeping nature of the statute combined with its "but-for" causation standard.[285]

Following the *Bostock* decision, Justice Alito's prediction that the *Bostock* holding was "virtually certain to have far-reaching consequences" became reality.[286] While the *Bostock* opinion addressed workplace discrimination, less than two months following the Court's decision, the Eleventh and Fourth Circuits both held that *Bostock*'s Title VII reasoning regarding employment protections from sex discrimination applied equally to Title IX. [287] In doing so, the two circuits found that the *Bostock* Court's reasoning that Title VII's workplace sex discrimination prohibitions included discrimination based on sexual orientation and gender identity applied equally to Title IX's sex discrimination prohibitions in education.

*A. Title IX in the Circuit Courts Pre-*Bostock

Pre-*Bostock*, five federal circuit courts addressed Title IX's sex-based prohibition in cases involving transgender students. The Third and Ninth Circuit Courts of Appeal denied injunctive relief requested by cis-gender students and their parents challenging school policies allowing bathroom access aligned with gender identity, with the circuit decisions becoming final when the Supreme

283. *See, e.g.*, Smith v. City of Salem, Ohio, 378 F.3d 566, 573–75 (6th Cir. 2004) (*Price Waterhouse*'s reasoning supported transgender employee's Title VII claim); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290 (3d Cir. 2009) (same as *Smith*); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 351–52 (7th Cir. 2017) (*en banc*) (overruling precedent to hold employment discrimination based on sexual orientation violates Title VII); Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 201 (2d Cir. 2017) (per curiam) (holding gay plaintiff's Title VII sex-stereotype claim was cognizable based on *Price Waterhouse*); Zarda v. Altitude Express, Inc., 883 F.3d 100, 107–08, 123 (2d Cir. 2018) (*en banc*) (overruling precedent and holding Title VII prohibits discrimination based on sexual orientation).

284. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (relying on *Price Waterhouse* to hold an employee fired based on transgender status violated Equal Protection); Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (relying on *Price Waterhouse* to hold transgender person's sex discrimination claim was cognizable under Equal Credit Opportunity Act); Schwenk v. Hartford, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (relying on *Price Waterhouse* to hold transgender person could state claim under the Gender Motivated Violence Act).

285. *See supra* Section II.A.

286. *Bostock*, 590 U.S. at 724 (Alito, J., dissenting).

287. *See infra* Sections IV.B.1.–IV.B.2.(a).

Court denied certiorari in each case.[288] The Fourth, Sixth, and Seventh Circuits all made rulings favorable to a transgender student plaintiff, affirming district court grants of preliminary injunctions to allow transgender students to access bathrooms aligned with their gender identity.[289] However, while the rulings were favorable to the transgender student plaintiffs, only one of those circuit decisions ultimately resulted in a final determination on the merits after President Trump took office on January 20, 2017, and withdrew the Obama administration's Title IX position, impacting ongoing litigation. [290]

1. The Fourth Circuit – G.G. v. Gloucester County School Board.—In *G.G. v. Gloucester County School Board*, a transgender male student brought suit on June 11, 2015, challenging his school board's bathroom policy as violating Title IX and the Equal Protection Clause and requesting a preliminary injunction to allow him to use the male bathroom while the case proceeded.[291] In an opinion letter dated January 7, 2015, OCR clarified how Title IX should apply to transgender students, noting that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."[292] The Obama administration intervened in the lawsuit, filing a Statement of Interest in the student's support confirming that "[u]nder Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's

288. *See* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 535 (3d Cir. 2018) (affirming district court's denial of a preliminary injunction, finding cisgender students would not suffer irreparable harm from transgender student use of bathroom), *cert. denied*, 139 S. Ct. 2636 (2019); *see also* Parents for Privacy v. Barr, 949 F.3d 1210, 1217, 1240 (9th Cir. 2020) (affirming district court's grant of a motion to dismiss school district with supportive transgender policy and denial of a preliminary injunction to cis students' parents,' finding that "a policy that treats all students equally does not discriminate based on sex in violation of Title IX"), *cert. denied*, 141 S. Ct. 894 (2020).

289. *See* G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd.*,* 822 F.3d 709 (4th Cir. 2016) (noting that multiple circuits "conclude[] that discrimination against transgender individuals constitutes discrimination 'on the basis of sex' in the context of analogous statutes) (citing *Glenn v. Brumby,* 663 F.3d 1312, 1316–19 (11th Cir. 2011); *Smith v. City of Salem,* 378 F.3d 566, 573–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.,* 214 F.3d 213, 215–16 (1st Cir.2000); *Schwenk v. Hartford,* 204 F.3d 1187, 1201–02 (9th Cir.2000)), *vacated and remanded*, Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 580 U.S. 1168 (2017); *see also* Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (per curiam) (finding school district was unlikely to succeed in attempts to exclude transgender girl from girls' bathroom because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ., 858 F.3d 1034, 1049–50 (7th Cir. 2017) (affirming trial court's grant of preliminary injunction to prevent enforcement of policy preventing transgender student from using bathroom of identified gender due to likelihood of success on sex stereotyping Title IX claim), *cert. dismissed*, 583 U.S. 1165 (2018), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020).

290. *See supra* notes 72–78 and accompanying text.

291. G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd., 132 F. Supp. 3d 736, 741 (E.D. Va. 2015).

292. G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded*, Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 580 U.S. 1168 (2017).

nonconformity to sex stereotypes constitutes discrimination based on sex."[293] Nonetheless, the district court found the statute was unambiguous, denied *Auer* deference,[294] applied Title IX narrowly, and found that because Title IX's implementing regulations provide express permission for schools to separate bathrooms based on sex, a policy requiring the transgender male to use the girls' bathroom was not a Title IX violation.[295] Thus, the district court denied the student's motion for a preliminary injunction and granted the School Board's motion to dismiss the Title IX claim.[296]

On appeal, the U.S. filed an *amicus* brief to support the transgender plaintiff and defend its Title IX interpretation.[297] The Fourth Circuit evaluated Title IX to determine whether the language was ambiguous, determined that it was, and found that the trial court erred when it failed to give proper deference to DOE's Title IX Guidance directing schools to treat transgender students consistent with their gender identity.[298] The court also determined that the district court applied the incorrect standard when denying the preliminary injunction.[299] Therefore, the Fourth Circuit reversed the trial court's dismissal of the claim, vacated its denial, and remanded the case.[300]

On remand, the district court granted the transgender student's preliminary injunction and refused the school board's request for a stay.[301] The Fourth Circuit also denied the school board's request for a stay pending the filing of a certiorari petition.[302] The Supreme Court subsequently granted the school board's application to recall and stay the Fourth Circuit's mandate and granted a stay of the preliminary injunction pending a certiorari petition by the School Board.[303] On October 28, 2016, less than three months before Trump's inauguration, the Supreme Court granted certiorari to determine whether Title

293. Statement of Interest of the United States, G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., No. 15cv54 (E.D. Va. June 29, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/gloucestersoi.pdf.

294. *Auer* deference is warranted when an agency interprets one of its own regulations. The Supreme Court has identified when *Auer* deference is appropriate, noting, "The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise." Kisor v. Wilkie, 588 U.S. 558, 591 (2019) (Roberts, C.J. concurring in part).

295. *G.G.*, 132 F. Supp. 3d at 745–46.

296. *Id.* at 753.

297. *G.G.*, 822 F.3d at 717.

298. *Id.* at 715 ("Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim.").

299. *Id.*

300. *Id.*

301. G.G. v. Gloucester Cnty. Sch. Bd., No. 4:15-CV-54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016).

302. G.G. v. Gloucester Cnty. Sch. Bd., 654 Fed. Appx. 606, 607 (4th Cir. 2016) (Davis, J., concurring) (finding "no reason to disturb the district court's exercise of discretion in denying the motion to stay its preliminary injunction.").

303. Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 579 U.S. 961 (2016).

IX or the Fourteenth Amendment requires schools to allow a transgender student access to bathrooms of his gender identity.[304]

After Trump took office in January 2017, he reversed the DOE's Title IX guidance, so the Supreme Court vacated the certiorari grant, vacated the Fourth Circuit's ruling, and remanded the case back to the trial court for action in line with the Trump administration's policy change.[305] The Fourth Circuit subsequently granted an unopposed motion to vacate the preliminary injunction on April 17, 2017.[306] While the student's original allegations asserted that the school district's policy requiring students to use bathrooms based on their birth-assigned sex violated Title IX and the Equal Protection clause, on remand to the district court the now-graduated student's action was amended to include an additional allegation based on the district's refusal to amend his school records to reflect his gender identity.[307] The district court granted summary judgment in the student's favor on August 9, 2019, and the school district again appealed to the Fourth Circuit.[308]

2. The Sixth Circuit – Board of Education of the Highland Local School District. v. U.S. Department of Education ex rel. Dodds v. U.S. Department of Education.—The Sixth Circuit case, *Board of Education of the Highland Local School District v. U.S. Department of Education ex rel. Dodds v. U.S. Department of Education* was filed on June 10, 2016, by an Ohio school district challenging the federal government's determination that its policy limiting a young transgender female student's bathroom access based on biological sex violated Title IX's sex-based prohibition.[309] Before filing suit, the OCR received a complaint regarding the student's bathroom denial by her school district, conducted an investigation, notified the school district that its policy violated Title IX, and attempted to enter into a resolution agreement with the district agreeing it would allow the student bathroom access in line with her gender identity.[310] The school district refused to agree, and after being informed that OCR would issue a letter finding it in violation of Title IX, the district brought an action against the DOE challenging its finding and requesting a preliminary injunction.[311] The transgender student filed a motion to intervene and, upon approval,[312] filed an intervenor third-party complaint, *Doe by & through Doe v.*

304. Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 580 U.S. 951 (2016) (granting certiorari).

305. Gloucester Cnty. Sch. Bd. v. G. G. *ex rel.* Grimm, 580 U.S. 1168 (2017).

306. G. G. v. Gloucester Cnty. Sch. Bd., 853 F.3d 729 (4th Cir. 2017).

307. Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444 (E.D. Va. 2019), *aff'd*, 972 F.3d 586 (4th Cir. 2020). The court denied a motion to dismiss filed by the school board. Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730, 752 (E.D. Va. 2018).

308. *Grimm,* 400 F. Supp. 3d at 465.

309. Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ. (*Highland*), 208 F. Supp. 3d 850, 859 (S.D. Ohio 2016).

310. *Id.* at 858–59.

311. *Id.* at 859.

312. Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., No. 2:16-CV-524, 2016 WL 4269080, at *1 (S.D. Ohio Aug. 15, 2016).

Board of Education of Highland Local School District,[313] alleging Title IX and constitutional violations followed by a motion for a preliminary injunction against the school district.[314]

In evaluating the student's motion, the court recognized that Title IX did not define the term "sex" and that its use in the implementing regulations permitting sex-separated bathrooms was ambiguous.[315] As such, the court gave *Auer* deference to the DOE's Title IX interpretation as evidenced in guidance documents issued under the Obama administration[316] and found the DOE's interpretation of "sex" was plausible.[317] On September 26, 2016, the district court granted the student's motion for a preliminary injunction, finding she was likely to succeed on the merits and ordering the school district to treat her "as the girl she is, including referring to her by female pronouns and her female name and allowing her to use the girls' restroom."[318] The district court denied a request to stay the injunction,[319] and the school district appealed to the Sixth Circuit requesting a stay pending appeal.[320]

On appeal, the Sixth Circuit identified the "crux of [the] case" as "whether transgender students are entitled to access restrooms for their identified gender rather than their biological gender at birth."[321] The court acknowledged settled circuit law that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination" that applies to transgender status.[322] The court recognized that the Supreme Court had stayed the injunction in the Fourth Circuit *Grimm* case pending its upcoming review, but the *Dodds* court majority found that the school district was unable to satisfy the requirements for a stay, distinguishing *Grimm*'s facts, including that the *Dodds* student had been using the girl's bathroom for over six weeks and would suffer further irreparable harm if the injunction was stayed.[323] Finally, the court found that public interest weighed "strongly against a stay," and denied the district's motion on December 15, 2016, holding the injunction should remain in effect.[324]

After Trump took office in January 2017 and his administration revoked the Obama-era Title IX Guidance Documents, the parties agreed to dismiss the

313. Doe v. Bd. of Educ. of Highland Local Sch. District, No. 16-CV-524, 2017 WL 3588727 (S.D. Ohio Aug. 21, 2017).

314. *Id.* at 1.

315. *Highland*, 208 F. Supp. 3d at 867.

316. *See supra* Section I.B.

317. *Highland*, 208 F. Supp. at 869–70 (citing 20 U.S.C. § 1686, 34 C.F.R. § 106.32, and 34 C.F.R. § 106.33).

318. *Id.* at 879.

319. Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., No. 16-CV-524, 2016 WL 6125403, at *1 (S.D. Ohio Oct. 20, 2016).

320. Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 222 (6th Cir. 2016). Highland's superintendent, "Dodds," became identified in the case citations from the Sixth Circuit rather than the trial court's "Highland."

321. *Id.* at 221.

322. *Id.* (quoting Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004)).

323. *Dodds*, 845 F.3d at 221–22.

324. *Id.* at 222.

case.[325] As a result, while the initial rulings from the district court and Sixth Circuit supported the transgender student, the case was not ultimately decided on its merits.

3. The Seventh Circuit – Whittaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education.—The Seventh Circuit case, *Whittaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, originated on July 16, 2016, when a transgender male student sued his school district alleging Title IX and constitutional violations after he was denied access to the boys' bathroom.[326] Although the school district did not have a written policy, it denied the student's request absent medical documentation of a surgical transition.[327] Shortly after filing suit, the student moved for a preliminary injunction and the school board moved to dismiss, alleging failure to state a claim.[328] The school board's motion to dismiss was denied, and following oral arguments on September 20, 2016, on the preliminary injunction, the district court orally enjoined the school district from denying the student access to the boys' bathrooms on school premises or at school-sponsored events, monitoring his bathroom use, or disciplining him for such use.[329] The court also denied a request by the school district to stay the injunction.[330]

Two days later, the court issued its written opinion finding that all factors weighed in favor of granting the injunction.[331] The school district appealed to the Seventh Circuit, challenging the injunction and moving the court to assert pendent appellate jurisdiction over the court's denial of the district's motion to dismiss.[332] The district court denied a second motion to stay the injunction pending appeal to the Seventh Circuit.[333] After the district court's decision and before the Seventh Circuit decided the appeal, President Trump was inaugurated on January 20, 2017, and withdrew the prior administration's Title IX guidance.[334] Nonetheless, four months later on May 30, 2017, the Seventh Circuit unanimously held for the first time that transgender students could state

325. Doe v. Bd. of Educ. of Highland Local Sch. Dist., No. 2:16-CV-524, 2017 WL 3588727, at *1 (S.D. Ohio Aug. 21, 2017) ("Following a change in political administration and the new administration's revocation of DOE/DOJ guidance documents relating to transgender students, the parties agreed to dismiss the appeal. Highland then dismissed the DOE and DOJ from the case before this Court. Doe's case against Highland remains.") (internal citations omitted).

326. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1042 (7th Cir. 2017), *cert. dismissed*, 583 U.S. 1165 (2018), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020).

327. *Id.* at 1041.

328. *Id.* at 1039.

329. *Id.* at 1042.

330. *Id.*

331. *Whitake*r, 858 F.3d at 1042–43.

332. *Id.*

333. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-cv-943, 2016 WL 8846573, at *3 (E.D. Wis. October 3, 2016).

334. Andrew Glass, *Trump Becomes Nation's 45th President*, POLITICO (Jan. 20, 2017 7:04 AM), https://www.politico.com/story/2019/01/20/this-day-in-politics-january-20-1106045 [https://perma.cc/XF8L-W3CS].

a Title IX sex discrimination claim under a sex-stereotyping theory and affirmed the district court's grant of the preliminary injunction.[335]

To reach its conclusion, the court focused on the progression of protections under Title VII in *Hopkins v. Price Waterhouse* and *Oncale v. Sundowner Offshore Services, Inc.* to observe that the nondiscrimination law was expansive and included sex stereotyping among its prohibited actions.[336] The court noted that it "has looked to Title VII when construing Title IX" because "it is helpful . . . to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX."[337] Observing that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth,"[338] the court found the student was likely to prevail under a sex stereotype theory because "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[339]

Further, the court found that the policy treated transgender students differently than non-transgender students, which is also a Title IX violation.[340] Therefore, the court affirmed the district court's grant of the preliminary injunction and denied the school district's motion for the court to assert pendent jurisdiction.[341] The school district filed a certiorari petition with the Supreme Court on August 14, 2017,[342] which was later dismissed by agreement of the parties on March 5, 2018, following settlement of the case.[343] As a result, the Seventh Circuit's decision became final before the *Bostock* case was decided.

4. The Third Circuit – Doe by & through Doe v. Boyertown Area School

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335. *Whitaker*, 858 F.3d at 1039. The court also held that the student was likely to succeed on the Title IX issue, that the equal protection claim was subject to heightened review, and that the student was also likely to succeed on the constitutional claim. *Id.* Therefore, the court affirmed the district court's grant of the student's preliminary injunction requiring access to the boys' bathroom and denied the school district's motion for the court to assert pendent jurisdiction. *Id.* at 1055.

336. *Id.* at 1048 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) and Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

337. *Id.* at 1047 (citing Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997)).

338. *Id.* at 1048.

339. *Id.* at 1049.

340. *Id.* at 1049–50. The Seventh Circuit also found that "[p]roviding a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act." *Id.* at 1050.

341. *Id.* at 1055.

342. *Id.*

343. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker *ex rel.* Whitaker, 583 U.S. 1165 (2018). The school district settled the federal lawsuit in January 2018, agreeing to pay the transgender student and his attorneys $800,000 and to withdraw its certiorari petition, which left the Seventh Circuit's decision final and precedent for that jurisdiction. Jacey Fortin, *Transgender Student's Discrimination Suit Is Settled for $800,000*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/us/transgender-wisconsin-school-lawsuit.html?unlocked_article_code=1.xE4.TtUq.fLtaDT861lNF&smid=url-share [https://perma.cc/JKE5-TFTZ].

District.—On March 21, 2017, in *Doe by & through Doe v. Boyertown Area School District*, four cisgender high school students and their parents sued a school district and its principal and superintendent alleging the school district's transgender positive policy that allowed students to use the bathrooms and locker rooms of their gender identity violated Title IX and the Fourteenth Amendment, seeking a preliminary injunction to halt the policy.[344] The district court denied the injunction finding that the cisgender students failed to show a likelihood of success on the merits or that they would suffer irreparable harm absent an injunction, and the students appealed.[345]

On July 26, 2018, the Third Circuit affirmed the district court's denial holding that "the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs' rights under Title IX."[346] On May 28, 2019, the Supreme Court denied certiorari, making the decision final in the Third Circuit jurisdiction.[347]

5. The Ninth Circuit – Parents for Privacy v. Dallas School District No. 2.—In a case similar to the Seventh Circuit *Boyertown* case, on Nov. 13, 2017, a group of students and their parents filed a lawsuit, *Parents for Privacy v. Dallas School District No. 2*, alleging the school district's Student Safety Plan allowing transgender students to access bathrooms, locker rooms, and showers matching their gender identity violated Title IX, the Constitution, and state law.[348] The students and parents sought an injunction to prevent the school district from enforcing the plan and ordering it to require bathroom access based on biological sex.[349] They also sought to enjoin the DOE and DOJ from acting on the DOE's "alleged rule redefining the word 'sex' as used in Title IX to include gender identity."[350] The district and federal parties filed a motion to dismiss.[351] Following an extensive analysis of similar cases, the court noted:

> No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to

344. Doe *by & through* Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324 (E.D. Pa. 2017). The original complaint had one plaintiff, but on April 18, 2017, the plaintiff filed an amended complaint in which three new plaintiffs were added to the litigation. *Id.* at 331.

345. *Id.* at 330.

346. Doe *by & through* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 521 (3d Cir. 2018).

347. Doe v. Boyertown Area Sch. Dist., 139 S. Ct. 2636 (2019).

348. Parents for Privacy v. Dallas Sch. Dist. No. 2, 326 F. Supp. 3d 1075, 1081 (D. Or. 2018).

349. *Id.*

350. *Id.*

351. *Id.* The court also granted a motion to intervene by an Oregon nonprofit, Basic Rights Oregon, and it filed a motion to dismiss. *Id.*

> protect themselves from such contact, embarrassment or discomfort.[352]

Therefore, the court determined that "high school students do not have a fundamental privacy right to not share school restrooms, lockers, and showers with transgender students whose biological sex is different than theirs," and, because this "does not give rise to a constitutional violation," dismissed the constitutional privacy claim.[353]

Addressing the Title IX hostile environment claim, the court found that the District Plan did not violate Title IX because it treated all students identically and did not target the plaintiffs.[354] The court also determined that the plaintiffs' requested relief was not permitted under Title IX.[355] On appeal to the Ninth Circuit, the court affirmed the district court's holding just months before the *Bostock* decision was released, noting that:

> "[J]ust because Title IX authorizes sex-segregated facilities does not mean that they are required, let alone that they must be segregated based only on biological sex and cannot accommodate gender identity. Nowhere does the statute explicitly state, or even suggest, that schools may not allow transgender students to use the facilities that are most consistent with their gender identity. That is, Title IX does not specifically make actionable a school's decision not to provide facilities segregated by 'biological sex;' contrary to Plaintiffs' suggestion, the statute does not create distinct 'bodily privacy rights' that may be vindicated through suit. Instead, Title IX provides recourse for discriminatory treatment 'on the basis of sex.'"[356]

The Ninth Circuit observed that the plaintiffs were not actually harassed by anyone, but "allegedly [felt] harassed by the mere presence of transgender students in locker and bathroom facilities" which "cannot be enough."[357] In affirming the trial court, the Ninth Circuit panel stated that "[t]he use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender."[358] Thus, when the Court decided the *Bostock* case in June 2020, precedent from all circuits addressing the issue was unanimous that Title IX supported sex discrimination protections for LGBTQ students. On December 7, 2020, six months after *Bostock* was decided, the Supreme Court denied the school district's petition for certiorari,

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352. *Id.* at 1093 (quoting Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2016 WL 6134121, at *24 (N.D. Ill. Oct. 18, 2016)).

353. *Parents for Privacy*, 326 F. Supp. 3d at 1099.

354. *Id.* at 1104.

355. *Id.* at 1106.

356. Parents for Privacy v. Barr, 949 F.3d 1210, 1227 (9th Cir. 2020) (quoting 20 U.S.C. § 1681(a)).

357. *Id.* at 1228–29.

358. *Id.* at 1229.

making the Ninth Circuit's decision final.[359]

B. Title IX & the Circuit Split Post-Bostock

Following the *Bostock* decision, two federal appellate courts quickly held that Title IX, like Title VII, prohibits discrimination based on sexual orientation and gender identity under its sex nondiscrimination provision, with one circuit noting, "*Bostock* confirmed that workplace discrimination against transgender people is contrary to law. Neither should this discrimination be tolerated in schools."[360] Since then, federal appellate courts have continued evaluating *Bostock*'s impact on Title IX's sex discrimination prohibition. To date, three federal appellate courts addressing the issue have determined that the *Bostock* Court's reasoning equally applies to Title IX. Two of the decisions were on the merits, and the Supreme Court denied certiorari in both of those cases, allowing the law to become final for the states governed by the Fourth and Seventh Circuit Courts of Appeal. The third decision was not on the merits, but the Ninth Circuit made clear that Title IX, like Title VII, provides sex discrimination protections based on sexual orientation and gender identity.

The sole remaining federal circuit that has addressed the issue, which, ironically, was the first to determine post-*Bostock* that Title IX did prohibit discrimination based on sexual orientation and gender identity, has since, in a 7-4 divided en banc decision and after obvious discord within the circuit, held that Title IX provides no such protections. That determination split the circuits and has contributed to the confusion, inconsistency, and unreliability facing LGBTQ students and recipients of federal funds under Title IX.

1. The Fourth Circuit – Grimm v. Gloucester County School Board.—The *Grimm* case was filed five years before the *Bostock* decision and wound its way back to the Fourth Circuit in 2020.[361] In the interim, the transgender student graduated and filed an amended complaint seeking declaratory relief and nominal damages.[362] The amended complaint adjusted the former student's claim to account for the remainder of the time he spent at the defendant school before graduating.[363] The trial court denied the school board's motion to dismiss, finding the plaintiff stated a valid claim because "'claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping

359. Parents for Privacy v. Barr, 141 S. Ct. 894 (2020).

360. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* I), 968 F.3d 1286, 1310 (11th Cir. 2020), *opinion vacated and superseded sub nom.* Adams v. Sch. Bd. of St. Johns Cnty., Florida (*Adams* II), 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *and on reh'g en banc sub nom.* Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791 (11th Cir. 2022).

361. *See supra* Section IV.A.1.

362. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 602 (4th Cir. 2020), *as amended* (Aug. 28, 2020).

363. *Id.* (The amended complaint provided additional facts, including the former student's top surgery, legal sex change affirmed by the Gloucester County Circuit Clerk per Virginia law, and a reissued birth certificate identifying him as male, issued by the Department of Health.).

theory'" and that the student suffered harm from the discrimination.[364] A second amended complaint was subsequently filed alleging constitutional and Title IX violations based on the school board's refusal to update the student's records to reflect his male gender.[365] The trial court granted the former student's summary judgment motion, rejected the School Board's argument that there was no harm suffered, and issued an injunction ordering the School Board to correct the relevant records; in response, the School Board again appealed to the Fourth Circuit.[366]

The *Grimm* decision was released in August 2020, shortly after the *Bostock* decision.[367] The Fourth Circuit found 2-1 that Title IX, like Title VII, included sexual orientation and gender identity in its sex discrimination provisions, announcing, "[a]fter the Supreme Court's recent decision in *Bostock v. Clayton County*, we have little difficulty holding that a bathroom policy precluding [the transgender student] from using the boys [sic] restrooms discriminated against him 'on the basis of sex.'"[368] In a detailed and thorough opinion, the Fourth Circuit first conducted an Equal Protection analysis, determining the school board's policy was sex-based discrimination unable to withstand heightened scrutiny.[369] It made the same finding regarding the refusal by the school board to amend the student's records.[370]

Moving on to the Title IX claim and referencing the *Bostock* Court's finding that "'it is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex,'" the court found that when a policy uses a person's sex to determine whether their sex and gender align, "sex" is a but-for cause of the discrimination.[371] The court also found that the statute's regulations permitting sex-separated bathrooms did not allow the board to do so based on "its own discriminatory notions of what 'sex' means," but instead meant that separate bathrooms, on their own, were not discriminatory.[372] Therefore, the court held the school board's policy was sex-based discrimination, that the former student suffered resulting harm, and that the policy violated Title IX.[373]

The dissenting judge argued the school board's policy did not violate Title IX after determining that the statute's undefined term "sex" refers to biological sex.[374] Asserting that the sex separation permitted in Title IX's implementing regulation was due to "physical differences between males and females" the

364. *Id.*
365. *Id.* at 603.
366. *Id.* The district court also granted summary judgment on the equal protection claim. *Id.* at 613–14.
367. *Id.* at 586.
368. *Id.* at 616.
369. *Id.* at 613–14.
370. *Id.* at 615.
371. *Id.* at 616 (citing *Bostock*, 590 U.S. at 660).
372. *Id.* at 616.
373. *Id.* at 616–17.
374. *Id.* at 632 (Niemeyer, J., dissenting).

dissent found that the school board's policy was "explicitly" permitted by Title IX's exceptions.[375] According to the dissent, the school board was within the acceptable bounds of Title IX when it denied the plaintiff access to use the boys' bathroom based on biological differences between the sexes.[376] Therefore the dissent found that the school board properly "relied on the commonly accepted definition of the word 'sex,'" which meant the "anatomical and physiological differences between males and females" and did not violate Title IX.[377]

The court denied an en banc hearing,[378] and the school board filed a certiorari petition with the Supreme Court. On June 28, 2021, almost a year after the Fourth Circuit's August 2020 *Grimm* holding that *Bostock*'s Title VII sex discrimination analysis equally applied to Title IX, the Supreme Court denied the certiorari petition, signifying that there was no reason to correct or disturb the court's holding and rendering the decision final in the Fourth Circuit.[379]

2. The Eleventh Circuit's Confusing Back-And-Forth.—The Eleventh Circuit was the first circuit to weigh in less than two months after the *Bostock* decision in *Adams v. School Bd. of St. John's County, Florida* [*Adams I*].[380] In that case, a transgender male high school student filed suit against the school board after being denied access to the bathroom of his sexual identity, alleging Title IX and Equal Protection violations.[381] On July 16, 2016, the district court found in favor of the student, holding the denial violated both Title IX and the Equal Protection Clause as applied.[382] The Eleventh Circuit had not yet released an opinion addressing the school board's appeal when *Bostock* was decided on June 15, 2020.[383] Six weeks later, on August 7, 2020, the Eleventh Circuit held 2-1 that the *Bostock* Court's recent holding that discrimination based on sexual orientation and gender identity violated Title VII's sex discrimination prohibition equally applied to Title IX's sex discrimination prohibition, determined the bathroom denial violated the Equal Protection Clause as applied

375. *Id.* at 633–34 (Niemeyer, J., dissenting).

376. *Id.* at 634–35(Niemeyer, J., dissenting) .

377. *Id.* (Niemeyer, J., dissenting)

378. Grimm v. Gloucester Cnty. Sch. Bd., 976 F.3d 399 (4th Cir. 2020) (denying *en banc* review).

379. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (June 28, 2021) (denying certiorari). On April 16, 2024, the Fourth Circuit issued its opinion in *B.P.J. by Jackson v. West Virginia State Board of Education*, holding that a state law preventing a transgender female plaintiff from playing on a girls' athletic team violated Title IX as applied. 98 F.4th 542, 565 (4th Cir. 2024). In its opinion, the Fourth Circuit affirmed its earlier decision in *Grimm*, noting it had already determined that Title IX sex discrimination protections include gender identity discrimination. *Id.* at 563.

380. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* I), 968 F.3d 1286 (11th Cir. 2020), *opinion vacated and superseded sub nom.* Adams v. Sch. Bd. of St. Johns Cnty., Florida (*Adams* II), 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *and on reh'g en banc sub nom.* Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791 (11th Cir. 2022).

381. *Adams* I, 968 F.3d at 1295.

382. *Id.*

383. *Bostock*, 590 U.S. at 644.

and affirmed the district court's decision.[384]

However, in an unusual turn of events and evidencing discord within the circuit, the Eleventh Circuit panel altered its decision almost a year later "[i]n an effort to get broader support among our colleagues."[385] On July 14, 2021, the "updated" opinion held that the bathroom denial was an Equal Protection violation, but omitted any analysis of the earlier Title IX violation.[386] A little over a month later, on August 23, 2021, that decision was vacated and the Eleventh Circuit granted an en banc review.[387] In February 2022 the en banc Eleventh Circuit heard oral arguments, and on December 30, 2022, issued a divided opinion overruling the district court 7-4 and creating a split in the circuits, which has remained the sole decision on one side of a deepening circuit split.[388]

a. Adams I – Adams v. School Board of St. John's County.—On June 28, 2017, a transgender student filed suit against his school district alleging that its refusal to permit him to use the bathroom in line with his gender identity violated Title IX and the Fourteenth Amendment.[389] Before filing suit, the student made several failed attempts to gain access to the male bathrooms through school channels.[390] In his lawsuit, the student requested a temporary injunction preventing the school district from enforcing its bathroom policy while the lawsuit proceeded through the courts.[391] The trial court denied the injunction but expedited its schedule, holding a three-day trial the following December, and hearing closing arguments in February 2018.[392] On July 26, 2018, the trial court issued its opinion in favor of the transgender student, finding the school board's restrictive bathroom policy violated Title IX and the Constitution and enjoined the school district from enforcing the policy as it applied to the student.[393] The school district appealed to the Eleventh Circuit.

On August 7, 2020, less than two months after *Bostock*'s release, the Eleventh Circuit was the first circuit court post-*Bostock* to determine that the Court's Title VII reasoning equally applied to Title IX, thus prohibiting the denial of bathroom facilities based on gender identity.[394] Announcing that "*Bostock* has great import for [the plaintiff's] Title IX claim," the court noted that as both Title VII and Title IX protect individuals from sex discrimination and utilize the same "but-for" causation standard, "it comes as no surprise that the Supreme Court has 'looked to its Title VII interpretations of discrimination

384. *Adams* I, 968 F.3d at 1310–11.
385. *Adams* II, 3 F.4th at 1304.
386. *Id.* at 1320.
387. *Id*. at 1369.
388. *Adams* III, 57 F.4th 791 (11th Cir. 2022) (*en banc*).
389. *Adams* I, 968 F.3d at 1295.
390. *Id.*
391. *Id.*
392. *Id.*
393. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty., Florida, 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018).
394. *Adams* I, 968 F.3d at 1292.

in illuminating Title IX' and its antidiscrimination provisions."[395] Finding that *Bostock*'s "reasoning applies with the same force to Title IX's equally broad prohibition on sex discrimination," the court held that the transgender student's Title IX rights were violated:

> Congress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces. And, as we have explained, the Supreme Court's interpretation of discrimination based on sex applies in both settings. With *Bostock*'s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex.[396]

Further, the court confirmed that a public school may not "harm transgender students by establishing arbitrary, separate rules for their restroom use"[397] and held that "the school board's bathroom policy, as applied [to the transgender student] singled him out for different treatment because of his transgender status," "caused him psychological and dignitary harm," and "violated Title IX."[398] Additionally, the majority recognized that "[e]very court of appeals to consider bathroom policies like the School District's agrees that such policies

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395. *Id.* (citing Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting)). Addressing the recent Supreme Court decision, the majority noted, "*Bostock* explained that if an employer fires a transgender female employee but retains a non-transgender female employee, this differential treatment is discrimination because of sex. In the same way, Mr. Adams can show discrimination by comparing the School Board's treatment of him, as a transgender boy, to its treatment of non-transgender boys." *Adams* I, 968 F.3d at 1306. The panel rejected attempts by the school board and dissenting judge to diminish *Bostock*'s impact by asserting that Title IX was distinguishable from Title VII due to its specific exception for separate facilities that "forecloses" the transgender student's claims by explaining that rather than challenging separate facilities, the student's discrimination claim sought access to the boys' bathroom based on his gender identity and that Title IX "does not mandate how to determine a transgender student's "sex." *Id.* at 1308 (addressing 34 C.F.R. § 106.33, which states that "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex"). The panel observed that the statute did not define sex or use the term "biological," which made it "fair to say that § 106.33 tells us that restrooms may be divided by male and female. *Adams* I, 968 F.3d at 1308. But the plain language of the regulation sheds no light on whether [the plaintiff's] 'sex' is female as assigned at his birth or whether his 'sex' is male as it reads on his driver's license and his birth certificate." *Id.* Further, addressing the school board's argument that Title IX only addressed "discrimination plaguing women," the Eleventh Circuit clarified that "*Bostock* teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the 'starkly broad terms' of the statute require nothing less." *Id.* at 1305.

396. *Id.* at 1308 ("It seems fair to say that § 106.33 tells us that restrooms may be divided by male and female. But the plain language of the regulation sheds no light on whether Mr. Adams's 'sex' is female as assigned at his birth or whether his 'sex' is male as it reads on his driver's license and his birth certificate.").

397. *Id.* at 1310.

398. *Id.*

violate Title IX."[399]

Notably, the panel rejected arguments by the school board and dissenting judge that Title IX was distinguishable from Title VII due to its specific exception for separate facilities, which, they argued, "foreclose[d]" the transgender student's claims.[400] The majority countered that the transgender student did not challenge the school board's ability to separate bathroom facilities, but instead sought access to the boys' bathroom based on his gender identity, pointing out that Title IX "does not mandate how to determine a transgender student's 'sex.'"[401] Highlighting that Title IX did not define "sex" or use the term "biological," the majority found it was "fair to say that §106.33 tells us that [while] restrooms may be divided by male and female . . . [,] the plain language of the regulation sheds no light on whether [the plaintiff's] 'sex' is female as assigned at his birth or whether his 'sex' is male as it reads on his driver's license and his birth certificate."[402] Finally, tackling the school board's assertion that Title IX only addressed "discrimination plaguing women," the Eleventh Circuit invoked *Bostock* to note that it "teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the 'starkly broad terms' of the statute require nothing less."[403]

The dissenting judge noted that the *Bostock* Court expressly declined to address bathroom access and did not define "sex,"[404] arguing that because Title IX and its implementing regulations permitted sex-separated bathrooms, the school board's policy was permissible.[405] In reaching his flawed conclusion, the dissenting judge stated that the Title IX issue "turns on the answer to one question: what does 'sex' mean under Title IX."[406] Finding that "[r]egardless of whether separating bathrooms by sex would otherwise constitute discrimination 'on the basis of sex,' the bathroom policy does not violate Title IX if it falls within the safe harbor for 'separate toilet . . . facilities on the basis of sex.'"[407] Applying this faulty reasoning, the dissent found that "if the school policy is

399. *Id.* at 1307–08 ("The Seventh Circuit has held that '[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender nonconformance, which in turn violates Title IX.'") (citing *Whitaker*, 858 F.3d at 1049)). The court noted that in affirming a preliminary injunction order, the Sixth Circuit stated that "transgender students are entitled to access restrooms for their identified gender rather than their biological gender at birth." *Adams* I, 968 F.3d at 1307–08 (citing *Dodds*, 845 F.3d at 221).

400. *Adams* I, 968 F.3d at 1307–08.

401. *Id.* at 1308. *See* 20 U.S.C. § 1686 (permitting "separate living facilities for the different sexes"); 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

402. *Adams* I, 968 F.3d at 1308.

403. *Id.* at 1305.

404. *Id.* at 1311 (Pryor, C.J., dissenting).

405. *Id.* at 1319–20 (Pryor, C.J., dissenting).

406. *Id.* at 1320 (Pryor, C.J., dissenting).

407. *Id.* (Pryor, C.J., dissenting).

valid under Title IX, then Title IX also permits the schools to require all students, including [the transgender student], to follow that policy."[408]

Concluding that "[a]s used in Title IX and its implementing regulations, 'sex' unambiguously is a classification on the basis of reproductive function," the dissent focused on the Title IX carve-out to determine that separating bathrooms based on biology was not a violation of Title IX's sex discrimination prohibition.[409] Notably, the dissenting judge did not adequately consider the *Bostock* Court's holding that discrimination based on sexual orientation and gender identity *was* sex discrimination or that the Court's finding that Title VII was violated occurred despite assuming—only for argument's sake—that "sex" was based on biology.[410] The dissent incorrectly used the Court's assumption as a rationale and then used the carve-out to justify its flawed holding.[411]

b. Adams II – *The Eleventh Circuit Swaps Its Original Opinion & Eliminates its Title IX Ruling*.—Almost a year after issuing its August 2020 decision in *Adams I* and as a result of disagreement within the Eleventh Circuit regarding *Bostock*'s reach, on July 14, 2021, the panel vacated its original opinion *sua sponte* and issued a replacement, *Adams II*.[412] The replaced opinion, with the same 2-1 panel split, explained that "[o]n the day the original panel decision issued . . . an active member of this Court withheld issuance of the mandate" and that the replaced opinion was undertaken "[i]n an effort to get broader support among our colleagues."[413] The replaced opinion notably omitted any conclusion regarding the student's Title IX claim because, as the court explained, the school board's "unwritten," exclusionary bathroom policy was an unconstitutional equal protection violation.[414] Because the student prevailed on the constitutional claim, the court "decline[d] to reach his Title IX

408. *Id.* (Pryor, C.J., dissenting).

409. *Id.* (Pryor, C.J., dissenting).

410. *Id.* (Pryor, C.J., dissenting) ("Contrary to the majority's and Adams's arguments otherwise, the Supreme Court did not resolve this question in *Bostock*. Far from it. Not only did the Court 'proceed on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female,' it disclaimed deciding whether Title VII allows for sex-separated bathrooms. And any guidance *Bostock* might otherwise provide about whether Title VII allows for sex-separated bathrooms does not extend to Title IX, which permits schools to act on the basis of sex through sex-separated bathrooms.") (citing *Bostock*, 590 U.S. at 655, 681).

411. *Adams* II, 3 F.4th at 1304.

412. *Id.*

413. *Id.* at 1303–04. The "revised" opinion was released on July 14, 2021. *Id.* at 1304. The court also acknowledged in *Adams* II that the revised opinion "reaches only one ground under the Equal Protection Clause instead of the three Equal Protection rulings [it] made in the [*Grimm*] August 7 opinion." *Id.* at 1304. In the Eleventh Circuit, an active court member may withhold the mandate of a case. 11th Cir. R. 35 I.O.P. 5. ("Any active Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a petition for rehearing en banc has been filed by a party. This is ordinarily done by a letter from the requesting judge to the chief judge with copies to the other active and senior judges of the court and any other panel member. At the same time the judge shall notify the clerk to withhold the mandate, and the clerk will enter an order withholding the mandate. The identity of the judge will not be disclosed in the order.").

414. *Adams* II, 3 F.4th at 1303.

claim."[415]

While the majority did not address the Title IX claim, the dissenting judge did. The dissent, which mirrors the same judge's dissent in the 2020 vacated opinion, again reframed the issue as a challenge against separating bathrooms based on sex rather than whether the policy denying male bathroom access to a transgender male student violated the Constitution and Title IX.[416] The dissent's analysis again revolved around sex-segregated bathrooms and the Title IX carve-out, refusing to acknowledge the gender identity claim.[417] Further evidencing disagreement within the Eleventh Circuit, the majority opinion addressed the dissent's focus on the Title IX carve-outs, remarking that "[c]ontrary to the dissent's assertion, this case is not about challenging sex-segregated bathrooms," clarifying that the transgender male student "does not challenge or even question the ubiquitous societal practice of separate bathrooms for men and women."[418]

c. Adams III – *The Outlier: The Eleventh Circuit Grants En Banc Review, Vacates* Adams II*, Issues a Flawed Opinion & Splits the Circuits*.—Fewer than six weeks after releasing the *Adams II* opinion, the Eleventh Circuit granted the school board's petition for an en banc review, vacating the *Adams II* opinion on August 23, 2021.[419] The en banc court heard oral arguments in February 2022, and on December 30, 2022, released a closely divided 7-4 decision with four dissenting opinions, reversing the trial court and creating a split in the circuits.[420] Almost two years later, the Eleventh Circuit remains the sole circuit on one side of a growing split.

Unlike the first two panel decisions, the *Adams III* majority held that the school district's bathroom policy "comports with Title IX" and "passes constitutional muster."[421] Replicating the dissent in the earlier panel decisions, the now-majority again reframed the issue and declared that the "case involves

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415. *Id.* ("This revised opinion does not reach the Title IX question and reaches only one ground under the Equal Protection Clause instead of the three Equal Protection rulings we made in the August 7 opinion.").

416. *Id.* at 1335 (Pryor, C.J., dissenting). The dissent noted that "an important qualification tempers this mandate: 'nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.'" *Id.* Thus, "[t]he implementing regulations clarify that institutions 'may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.'" (citing 34 C.F.R. § 106.33).

417. *Id.* at 1335.

418. *Id.* at 1308 ("Indeed, [the transgender student] did not challenge the School Board's ability to separate boys and girls into different bathrooms on the basis of sex, and the District Court did not hold that such separation was impermissible.").

419. Adams v. Sch. Bd. of St. Johns Cnty., Florida, 9 F.4th 1369 (11th Cir. 2021), *granting reh'g en banc and vacating Adams II opinion.*

420. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791, 796 (11th Cir. 2022) (*en banc*) (holding that *Bostock* does not apply to Title IX, creating a split in the circuits). The decision also held that the school's bathroom policy did not violate the Equal Protection Clause. *Id.*

421. *Id.*

the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex."[422] Noting that the school board's bathroom policy separated students based on biological sex proven by legal documents at the time of enrollment, the majority, like the two earlier dissents, focused on the Title IX carve-out allowing separate facilities based on sex, and determined it meant separating bathrooms on the "basis of biological sex" despite the lack of a statutory definition[423] Through this flawed approach, the court limited its analysis, misstated the issue, and disregarded evidence and expert testimony from the three-day district court trial.[424] Summarizing the issue on appeal as "whether separating the use of male and female bathrooms in the public schools based on a student's biological sex violates" the Constitution or Title IX, the majority disregarded the issue raised by the transgender student and held that it does not.[425]

By identifying Title IX's carve-out permitting federal fund recipients to provide "separate toilet, locker room, and shower facilities on the basis of sex," the court avoided the student's actual Title IX argument.[426] However, the transgender student's claim did not challenge the separation of sexes carve-out; it relied on it. The student's lawsuit alleged that the school's unwritten policy violated Title IX because it refused to allow him to use the bathroom of his gender identity and sought an injunction allowing him to do so.[427] While the carve-outs allow sex-segregated facilities, the student argued that they do not allow excluding an individual from using sex-segregated facilities that correspond with their gender identity.[428] The majority disregarded the fact that even the school board recognized that the student did not challenge the board's authority to separate bathrooms based on sex, understanding instead that he challenged the board's refusal to treat him as a boy for bathroom access.[429] Nonetheless, the majority focused on "a long tradition in this country of separating sexes" to justify its determination that biological sex is limited to a binary sex assigned at birth.[430]

Focused solely on Title IX's carve-out provision, the majority found that the *Bostock* Court's Title VII reasoning did not impact Title IX's

422. *Id.*

423. *Id.*

424. *Id.* at 798.

425. *Id.* at 801.

426. 20 U.S.C. § 1686 ("[N]othing contained [in Chapter 38] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."); *see also* 34 C.F.R. § 106.33 (part of Title IX's implementing regulations that specifically permit "separate toilet[s], locker room[s], and shower facilities on the basis of sex").

427. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty., Florida, 318 F. Supp. 3d 1293, 1296 (M.D. Fla. 2018) ("Everyone agrees that boys should use the boys' restroom at Nease and that girls should use the girls' restroom. The parties disagree over whether Drew Adams is a boy.").

428. *Adams* III, 57 F.4th at 801.

429. *Id.*

430. *Id.*

nondiscrimination provision.[431] In determining that *Bostock* did not apply in the context of school bathroom access for transgender students,[432] the majority referred to the *Bostock* opinion's caveat that it did not address bathrooms and noted that Title IX's application to children and schools was not similar to Title VII's application to adults in the workplace.[433] The Eleventh Circuit majority also discounted the district court's determination that "sex," as an undefined term in Title IX, was "'ambiguous as applied to transgender students.'"[434] Although the trial court cited the Fourth Circuit *Grimm* decision to note that other courts "'did not find the meaning [of "sex"] to be so universally clear'" under Title IX drafting-era dictionary definitions,[435] the Eleventh Circuit en banc majority discounted the trial judge's finding because he cited only one dictionary definition of "sex" in support.[436] Further, the majority disregarded the *Grimm* majority's analysis altogether, which at the time was the only other court that had addressed the issue post-*Bostock*, finding *Bostock*'s reasoning did equally apply to Title IX.[437] In fact, the majority opinion only cited *Grimm* a total of three times, with two citations to the *Grimm* dissenting opinion.[438]

Rather than seriously considering the *Grimm* opinion before creating a circuit split, the majority instead refused to include gender identity when defining "sex" under Title IX and, citing *Geduldig v. Aiello*, declared that "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status."[439] In *Geduldig*, the Supreme Court addressed the constitutionality of a state disability insurance program that

431. *Id.* at 808–09 (citing *Bostock*, 590 U.S. at 669) ("*Bostock* does not resolve the issue before us. While *Bostock* held that 'discrimination based on [gay] or transgender status necessarily entails discrimination based on sex,' that statement is not in question in this appeal. This appeal centers on the converse of that statement—whether discrimination based on biological sex necessarily entails discrimination based on transgender status. It does not—a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status.").

432. *Adams* III, 57 F.4th at 811.

433. *Id.* at 808–09 (citing *Bostock*, 590 U.S. at 681).

434. Adams v. Sch. Bd. of St. Johns Cnty., Florida (*Adams* II), 3 F.4th 1299, 1303–04 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *and on reh'g en banc sub nom.* Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791 (11th Cir. 2022).

435. *Adams* III, 57 F.4th at 808–09. Despite finding the definition of "sex" unambiguous, the majority nonetheless raised the issue that Congress enacted Title IX under its Spending Clause, requiring proper notice to federal fund recipients before taking any action per the Clear Rule Statement. *Id.* at 815–16. However, as the dissent pointed out, "[t]he Spending Clause cannon of construction only comes into play if we find ourselves dealing with an ambiguous statute." *Adams* III, 57 F.4th at 856 (Pryor, J., dissenting).

436. *Id.* at 812.

437. *Id.* at 813–14.

438. *Id.* at 804–05, 812.

439. *Adams II*, 3 F.4th at 1303–04 (citing Geduldig v. Aiello, 417 U.S. 484 (1974)).

refused benefits related to normal pregnancy and delivery.[440] The Court held that the program was not unconstitutional because "[t]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.'"[441] In a footnote, the *Geduldig* Court noted "[t]he lack of identity between the excluded disability and gender," explaining "[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons," the second group included "members of both sexes."[442]

Basing its reasoning on *Geduldig*, the majority found a "lack of identity" between the school's bathroom policy and the status of being transgender as both groups created by the policy, male and female, include transgender students.[443] As such, the court found that the options were "'equivalent to th[ose] provided [to] all' students of the same biological sex."[444] The Ninth Circuit recently addressed the *Geduldig* case as it relates to transgender individuals. In *Hecox v. Little*, the court recognized the *Geduldig* Court's finding that "a classification based on pregnancy is not per se a classification based on sex, even though 'it is true that only women can become pregnant.'"[445] However, the *Hecox* court addressed what the Eleventh Circuit majority failed to recognize: In *Geduldig*, "the Court held that 'distinctions involving pregnancy' that are 'mere pretexts designed to effect an invidious discrimination' are subject to heightened scrutiny."[446] As a result, the Ninth Circuit determined in *Hecox* that the term "biological sex" was "designed precisely as a pretext to exclude transgender women . . . a classification that *Geduldig* prohibits."[447]

Nonetheless, by limiting its focus to Title IX's express statutory and regulatory carve-outs permitting sex-segregated facilities and the *Bostock* Court's express statement declining to address bathrooms because the issue was not before the Court, the majority determined that *Bostock*'s Title VII reasoning

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440. *Geduldig*, 417 U.S. at 492. The Court determined that "particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." *Id.* at 495 (citing Dandridge v. Williams, 397 U.S. 471, 486–87 (1970)).

441. *Geduldig*, 417 U.S. at 497.

442. *Id*.

443. *Adams* III, 57 F.4th at 809 (citing *Geduldig*, 417 U.S. at 496–97, 496 n.20 (1974) and Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271 (1993) (reaffirming *Geduldig*)).

444. *Adams* III, 57 F.4th at 809.

445. Hecox v. Little, 104 F.4th 1061, 1078–79 (9th Cir. 2024), *as amended* (June 14, 2024) ("Appellants likewise misrely on a footnote in *Geduldig v. Aiello*, for the proposition that a legislative classification based on biological sex is not a classification based on transgender status. In *Geduldig*, the Supreme Court stated that a classification based on pregnancy is not per se a classification based on sex, even though 'it is true that only women can become pregnant.' However, the Court held that 'distinctions involving pregnancy' that are 'mere pretexts designed to effect an invidious discrimination' are subject to heightened scrutiny. Here, it appears that the definition of 'biological sex' was designed precisely as a pretext to exclude transgender women from women's athletics—a classification that *Geduldig* prohibits." *Id.* (citing *Geduldig*, 417 U.S. at 484) (internal citations omitted)).

446. *Hecox*, 104 F.4th at 1078–79.

447. *Id.*

did not apply to Title IX.[448] The majority found that "*Bostock* does not resolve the issue" because the Court's holding that "discrimination based on [gay] or transgender status necessarily entails discrimination based on sex[]" was not at issue.[449] Instead, the *Adams* court determined the issue on appeal was the "converse" of *Bostock*, defining it as "whether discrimination based on biological sex necessarily entails discrimination based on transgender status."[450] By focusing its analysis solely on its definition of "sex" as biological sex and Title IX's carve-out, the court held *Bostock*'s reasoning that discrimination based on transgender status was prohibited discrimination based on sex did not apply.[451]

As a result, the majority determined that the school board's policy, which separated students based on biological sex proven by legal documents at the time of enrollment, did not "facially discriminate on the basis of transgender status" as it merely "divides students into two groups" that each includes transgender students.[452] Thus, the majority irrationally held that the policy complied with Title IX because it applied to all students based on their biological sex and separated students on that basis, allowing some transgender students to use the restroom of their gender identity and denying others the same use.[453] The majority opinion concluded that "if the School Board's policy fits within the carve-out, then Title IX permits the School Board to mandate that all students follow the policy. . . ."[454]

The majority also addressed a fear-based concern used by anti-transgender conservative Republican legislators when enacting harmful laws. Determining that "affirming the district court's order would have broad implications for sex-separated sports teams at institutions subject to Title IX," the court concluded that "equating 'sex' to 'gender identity' or 'transgender status' would also call into question the validity of sex-separated sports teams."[455] Beyond questioning the validity of sex-separated sports teams, the majority found that the decision by the district court would also "provide[] ample support for subsequent litigants to transform schools' living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities," fears one dissent referred to as "unfounded."[456] By reaching its likely pre-determined conclusion that the policy did not present a constitutional or Title IX violation, the Eleventh Circuit created a split in the circuits and remains the solitary circuit on one side of the split.

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448. *Adams* III, 57 F.4th at 808–09.

449. *Id.* at 808.

450. *Id.* at 809.

451. *Id.* at 811.

452. *Id.* at 809.

453. *Id.* (noting that "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status") (citations omitted).

454. *Id.* at 811–12.

455. *Id.* at 816–17 (noting that "reading in ambiguity to the term 'sex' ignores the overall statutory scheme and purpose of Title IX, along with the vast majority of dictionaries defining 'sex' based on biology and reproductive function").

456. *Id.* at 859 (Pryor, J., dissenting).

The court majority missed the mark by limiting its analysis to its reframed issue, the differences between males and females, citing cases to support basic biological differences, and circumventing any analysis of the issue raised by the transgender student and addressed at trial and by the three-judge panel in both of its earlier vacated opinions.[457] To the en banc majority, the statutory and regulatory carve-outs prevented a successful Title IX claim.

As an indication of the internal turmoil regarding this issue, one concurrence and four dissents were filed with the en banc decision. The first two dissents focus primarily on the constitutional challenge, criticizing the majority's reframing of the issue to "biological sex," with Judge Wilson observing that the majority "misconstrued [] [the] argument the whole way."[458] Addressing the school board's flawed policy of assigning sex at matriculation, the Wilson dissent noted that the underlying policy presumes that "biological sex is accurately determinable at birth and that it is a static or permanent biological determination."[459] The resulting policy prohibits later amendments because it assumes that "a student's sex does not change," which the Wilson dissent labels as "both medically and scientifically flawed."[460]

The third dissent by Judge Rosenbaum also addressed the constitutional challenge and refuted the majority's slippery slope parade of horribles based on the fact-specific analysis required in an Equal Protection challenge.[461] Rosenbaum criticized the majority's concerns that a favorable outcome for the transgender student would lead to "challenges to other policies involving sex-separated facilities," stating that such concerns "should not even subconsciously figure into the correct analysis here."[462]

In the final and main dissent, Judge Jill Pryor,[463] acknowledging the two earlier panel opinions of which she was in the majority, first addressed the en banc majority's conclusion that the case was about "biological sex."[464] Judge Pryor wrote that it was egregious that the majority found gender identity inapplicable to the issue, sarcastically commenting that the majority determined that "gender identity has no bearing on this case *about equal protection for a transgender boy*."[465] Through its reframing, the dissent pointed out, the majority addressed the wrong issue–whether sex-segregated bathrooms were legally permissible–rather than the proper issue presented to the court: "whether [the

457. *Id.* (Pryor, J., dissenting).

458. *Id.* at 823 (Wilson, J., dissenting).

459. *Id.* at 821 (Wilson, J., dissenting).

460. *Id.* at 821–22 (Wilson, J., dissenting) (noting that "there are thousands of infants born every year whose biological sex is *not* easily or readily categorizable at birth").

461. *Id.* at 832–32 (Rosenbaum, J., dissenting).

462. *Id.* at 831–32 (Rosenbaum, J., dissenting).

463. Judge Jill Pryor's dissent began by noting that a member of the circuit withheld the mandate from the *Adams I* decision and that a revised opinion (*Adams II*) was issued with the hope of gaining consensus. *Id.* at 841 (Pryor, J., dissenting).

464. *Id.* at 832 (Pryor, J., dissenting).

465. *Id.* (Pryor, J., dissenting) ("The majority opinion does so in disregard of the record evidence—evidence the majority does not contest—which demonstrates that gender identity is an immutable, biological component of a person's sex.").

transgender student's] exclusion from the boys' restroom[] . . . violated the Equal Protection Clause of the Fourteenth Amendment and Title IX."[466] Following a detailed analysis concluding that the school's policy violated the Equal Protection Clause because it could not survive intermediate scrutiny, Judge Pryor's dissent addressed the Title IX claim.[467]

Judge Pryor pointed out that, although Title IX does not define the term "sex," the *Adams III* majority decided, after consulting various dictionaries, that it meant "biological sex" and conducted its analysis with that sole consideration.[468] However, she noted, that definition does not comport with medical science and oversimplifies the complex nature of what makes up a person's "sex."[469] Her dissent noted that "undisputed record evidence" in *Adams III* showed that "among other biological components, 'biological sex' *includes gender identity*."[470] Medical testimony at the trial confirmed that "'physical aspects of maleness and femaleness' may not be in alignment (for example, 'a person with XY chromosomes [may] have female-appearing genitalia')."[471] Further, the dissent clarified that "the markers of a person's biological sex may diverge" such that "a person can be male if some biological components of sex, including gender identity, align with maleness, even if other biological components (for example, chromosomal structure) align with femaleness."[472]

Therefore, Judge Pryor pointed out, when determining if a student is discriminated against "on the basis of sex," Title IX requires a but-for analysis of whether the alleged act would not have happened absent the biological factors making up a person's "sex."[473] The dissent again explained that "*Bostock*'s reasoning, separate from any Title VII-specific language, demonstrates that 'sex' was a but-for cause of the discrimination" based on "the individual's 'sex' and 'something else,'" which applies equally to Title IX.[474] Thus, a transgender person barred from using a bathroom consistent with their gender identity experiences sex discrimination because they lack "one specific biological marker traditionally associated with" their gender identity.[475] The *Adams III* majority failed to understand the complexity of the many factors making up a person's "sex," which led to a simplistic and inaccurate analysis.

As additional support that a strictly biological definition of "sex" is untenable, Judge Wilson's *Adams III* dissent assumed arguendo that "sex" was

466. *Id.* at 844 (Pryor, J., dissenting).
467. *Id.* at 855–56 (Pryor, J., dissenting).
468. *Id.* at 809–10.
469. *Id*. at 836–37 (Pryor, J., dissenting).
470. *Id*. at 857–58 (Pryor, J., dissenting) (noting that "it would defy the record and reality to suggest that all the markers of a person's biological sex must be present and consistent with either maleness or femaleness to determine an individual's 'biological sex'").
471. *Id.* (Pryor, J., dissenting) (internal citations omitted).
472. *Id.* (Pryor, J., dissenting).
473. *Id*. at 857–58 (Pryor, J., dissenting).
474. *Id.* (Pryor, J., dissenting).
475. *Id.* (Pryor, J., dissenting).

"based on chromosomal structure and anatomy at birth."[476] In applying this binary concept, "thousands of infants born every year whose biological sex is *not* easily or readily categorizable at birth," referred to as intersex, are born with bodies that do not cleanly fit into a male or female "slot."[477] Judge Pryor included the following medical expert testimony to highlight the complex nature of a person's "sex":

> [M]edical understanding recognizes that a person's sex is comprised of a number of components including: chromosomal sex, gonadal sex, fetal hormonal sex (prenatal hormones produced by the gonads), internal morphologic sex (internal genitalia, i.e., ovaries, uterus, testes), external morphological sex (external genitalia, i.e., penis, clitoris, vulva), hypothalamic sex (i.e., sexual differentiations in brain development and structure), pubertal hormonal sex, neurological sex, and gender identity and role . . . As with components like chromosomal sex or external morphological sex . . . gender identity is "immutable" and "has a biological basis."[478]

In conclusion, the expert explained regarding sex determination, "'When there is a divergence between these factors, neurological sex and related gender identity are the most important and determinative factors' for determining sex."[479] Thus, the dissent pointed out that the majority opinion's use of biological sex alone disregards scientific medical evidence.[480]

As to the majority's reliance on Title IX's carve-outs, Judge Pryor's dissent pointed out that they do not resolve the Title IX issue, which is "the School District's categorical assignment of transgender students to sex-separated restrooms at school based on the School District's discriminatory notions of what 'sex' means."[481] The carve-outs merely allow the act of creating bathrooms based on sex, but the dissent explained that they do not resolve the issue of whether a federal fund recipient can prevent a transgender male student from

476. *Id.* at 822 (Wilson, J., dissenting).

477. *Id.* (Wilson, J., dissenting) (noting that "there are rare individuals who are delineated 'intersex' because they have physical, anatomical sex characteristics that are a mixture of those typically associated with male and female designations (e.g. congenital adrenal hyperplasia)" as well as other conditions causing "delayed genital development," and that "cause the existence of ovaries to remain hidden until puberty and ovulation" which "occur frequently enough that doctors use a scale called the Prader Scale to describe the genitalia on a spectrum from male to female").

478. *Id.* at 836 (Pryor, J., dissenting) (citing testimony from the medical expert in the trial court).

479. *Id.* (Pryor, J., dissenting) (citing testimony from the medical expert in the trial court).

480. *Id.* at 836–37 (Pryor, J., dissenting). A medical expert in the *Adams* trial "testified that '[b]y the beginning of the twentieth century scientific research had established that external genitalia alone—the typical criterion for assigning sex at birth—[was] not an accurate proxy for a person's sex." *Id.* at 836 (Pryor, J., dissenting) (internal citation omitted).

481. *Id.* at 832–33.

accessing the male student bathrooms.[482] Further, the dissent observed that the carve-outs do not permit a recipient to assign students to sex-segregated bathrooms in a discriminatory manner.[483]

Quoting Title IX, the dissent clarified that to raise a successful Title IX claim, a transgender individual must show they are in a federally funded education program or activity, that they were subjected to discrimination on the basis of "sex," and suffered harm.[484] The dissent acknowledged the lack of dispute that school bathroom use qualifies as an "educational program or activity" and that the school was a federal fund recipient.[485] The remaining inquiry was whether the transgender student suffered harm due to sex-based discrimination.[486] Relying on undisputed expert evidence in the record, Judge Pryor determined that "among other biological components, 'biological sex' *includes gender identity*."[487] According to Judge Pryor's dissenting opinion, banning transgender students from the bathroom that correlates with their gender identity "no doubt . . . constitutes discrimination" under Title IX because "only cisgender students receiv[e] the benefit of being permitted to use the restroom matching their gender identity and transgender students [are] denied that benefit."[488]

Addressing Title IX's "but-for" causation, Judge Pryor invoked *Bostock*'s reasoning that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[489] Quoting *Bostock*, the dissent noted that "[t]he but-for causation standard means that 'a particular outcome would not have happened "but for" the purported cause.'"[490] Adhering to the Court's explanation that "discrimination based on transgender status was 'inextricably bound up with sex,'"[491] Judge Pryor found that "Adams' [gender-based] exclusion from the boys' restrooms" was "a sex-based classification" because it was "inextricably bound up with sex."[492] Noting that "[t]he same reasoning [from *Bostock*] applies," Pryor explained that the transgender student was denied bathroom access because of a "specific biological marker" he lacked that was "traditionally associated with males."[493]

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482. *Id.* at 858–59 (Pryor, J., dissenting) (citing Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618 (4th Cir. 2020), *as amended* (Aug. 28, 2020)).

483. *Adams* III, 57 F.4th at 858–59 (Pryor, J., dissenting).

484. *Id.* at 856 (Pryor, J., dissenting).

485. *Id.* (Pryor, J., dissenting)

486. *Id.* (Pryor, J., dissenting)

487. *Id.* at 867 (Pryor, J., dissenting) ("[I]t would defy the record and reality to suggest that all the markers of a person's biological sex must be present and consistent with either maleness or femaleness to determine an individual's 'biological sex.'").

488. *Id.* at 856 (Pryor, J., dissenting).

489. *Id.* at 847 (Pryor, J., dissenting) (quoting *Bostock*, 590 U.S. at 660).

490. *Adams* III, 57 F.4th at 857 (Pryor, J., dissenting) (quoting *Bostock*, 590 U.S. at 656).

491. *Adams* III, 57 F.4th at 847 (Pryor, J., dissenting) (noting that when a transgender employee is fired, "two causal factors [are] in play—*both* the individual's sex *and* something else (the sex . . . with which the individual identifies")) (quoting *Bostock*, 590 U.S. at 656).

492. *Adams* III, 57 F.4th at 847 (Pryor, J., dissenting) (quoting *Bostock*, 590 U.S. at 660–61).

493. *Adams* III, 57 F.4th at 857–58 (Pryor, J., dissenting) (citing *Bostock*, 590 U.S. at 656).

Even under the majority's view that Title IX's use of "sex" means biological sex, "the biological marker" of the transgender student's sex was "a but-for cause of [his] discriminatory exclusion from the boys' restrooms."[494]

Thus, Judge Pryor concluded that the "but-for cause of [the transgender student's] discriminatory exclusion from the boys' restroom was 'sex' within the meaning of Title IX."[495] Finally, Pryor's dissent stated that "the School District forced [the student] to wear what courts have called a 'badge of inferiority,'" that the Constitution and United States law's promise will not take place "because of an immutable characteristic,"[496] declaring that the majority in the *Adams III* opinion, "breaks that promise."[497]

3. The Ninth Circuit "Unofficially" Weighs In.—While the Ninth Circuit's "unofficial" weigh-in did not address transgender student access to bathrooms in line with their gender identity, it did address *Bostock*'s impact on Title IX and found that the Court's reasoning equally applied in the Title IX realm. On March 10, 2022, the Ninth Circuit made its initial "unofficial" weigh-in regarding *Bostock*'s impact on Title IX.[498] In *Doe v. Snyder*, the court addressed the denial of injunctive relief related to gender-affirming surgery in a challenge to Section 1557 of the ACA and the Equal Protection Clause of the Fourteenth Amendment.[499] While the Ninth Circuit affirmed the trial court's denial of injunctive relief, it disagreed with the trial court's determination that the *Bostock* decision was expressly limited to Title VII and "unpersuasive" when addressing Section 1557 of the ACA, its sex nondiscrimination protection that incorporates Title IX's nondiscrimination provisions.[500] The Ninth Circuit noted that "[a] faithful application of *Bostock* causes us to conclude that the district court's understanding of *Bostock* was too narrow."[501] The court proceeded to address *Bostock*'s holding that "it is impossible to discriminate against a person for being [gay] or transgender without discriminating against the individual based on sex," analyzing *Bostock*'s impact on Title IX.[502]

Noting the similarity in the nondiscrimination language of Title VII and Title IX, along with the fact that "the Supreme Court has often looked to its Title VII interpretations of discrimination in illuminating Title IX,"[503] the Ninth Circuit stated, "We construe Title IX's protections consistently with those of

494. *Adams* III, 57 F.4th at 852–53 (Pryor, J., dissenting) (noting the transgender student "was excluded from the boys' bathroom under the policy either because he had one specific biological marker traditionally associated with females, genital anatomy (or, put differently, because he lacked that one specific biological marker traditionally associated with males)").

495. *Id.* at 858 (Pryor, J., dissenting).

496. *Id.* at 858–59 (Pryor, J., dissenting).

497. *Id.* (Pryor, J., dissenting).

498. Doe v. Snyder, 28 F.4th 103 (9th Cir. 2022).

499. *Id.* at 106–07.

500. *Id.* at 110.

501. *Id.* at 113–14.

502. *Id.* at 114 (quoting *Bostock*, 590 U.S. at 660).

503. *Snyder*, 28 F.4th at 114 (quoting Emeldi v. Univ. of Or., 698 F.3d 715, 725 (9th Cir. 2012)).

Title VII."[504] The court also noted Justice Alito's comment that the *Bostock* decision was "virtually certain to have far-reaching consequences" and that the Justice specifically mentioned Title IX when stating that there were "[o]ver 100 federal statutes [that] prohibit discrimination because of sex."[505] Finally, the Ninth Circuit recognized that Title VII's phrase "because of sex" and Title IX's phrase "on the basis of sex" are used "interchangeably throughout the [*Bostock*] majority decision."[506] Thus, on remand, the Ninth Circuit instructed the district court that its reading of *Bostock* was incorrect.[507]

The following summer of 2023, the Ninth Circuit again "unofficially" weighed in on Title IX's reach in a case addressing whether Title IX's sex discrimination protections extended to sexual orientation in a non-transgender bathroom case.[508] In *Grabowski v. Arizona Board of Regents*, a student-athlete sued his state university, its Board of Regents, and his coaches alleging Title IX violations based on deliberate indifference to his claims of harassment by teammates and retaliation by the university.[509] The student alleged the harassment was based on his teammates' perception of his sexual orientation and the retaliation occurred after he reported the harassment, both Title IX violations.[510] The district court granted a motion to dismiss his complaint, and the student appealed to the Ninth Circuit.[511]

In a case of first impression, the Ninth Circuit first addressed whether Title IX's sex-based discrimination prohibition included discrimination based on sexual orientation.[512] The court relied on the Supreme Court's *Bostock* decision and its own precedent in *Doe v. Snyder*.[513] The court found the *Bostock* Court's interchangeable use of Title VII's "because of sex" and Title IX's "based on sex" language "suggest[ed] interpretive consistency across the statutes."[514] The

504. *Snyder*, 28 F.4th at 114 (citing Emeldi v. Univ. of Or., 673 F.3d 1218, 1224 (9th Cir. 2012), *as amended*, 698 F.3d 715 (9th Cir. 2012)).

505. *Id.* at 114 (citing *Bostock*, 590 U.S. at 724 (Alito, J., dissenting)).

506. *Snyder*, 28 F.4th at 114 (citing *Bostock*, 590 U.S. at 649–55, 662–66, 680–81).

507. *Snyder*, 28 F.4th at 114.

508. Grabowski v. Arizona Bd. of Regents, 69 F.4th 1110, 1116 (9th Cir. 2023) (internal citations omitted) ("In *Bostock v. Clayton County* the Supreme Court brought sexual-orientation discrimination within Title VII's embrace. The Court held that discrimination 'because of' sexual orientation is a form of sex discrimination under Title VII. We conclude that the same result applies to Title IX.").

509. *Id.* at 1114–15.The student also alleged a due process violation, but the court affirmed the trial court's dismissal of the claim based on qualified immunity under Section 1983. *Id.* at 1124. The *Grabowski* plaintiff initially filed a complaint on September 16, 2019, but the complaint was amended three times before the district court ruled. *Id.* at 1114–15. On June 13, 2023, the district court granted the defendants' motion to dismiss as to the plaintiff's Title IX sex harassment claim, leaving only the plaintiff's Title IX retaliation claim viable. *Id.* at 1115.

510. *Id.* at 1113–14.

511. *Id.* at 1113.

512. *Id.* at 1116.

513. *Id.* (quoting *Snyder*, 28 F.4th at 114).

514. *Grabowski*, 69 F.4th at 1116 (citing *Snyder*, 28 F.4th at 114) (noting that in *Bostock* the "Supreme Court brought sexual-orientation discrimination within Title VII's embrace" by holding that sex discrimination under Title VII includes discrimination because of sexual orientation.).

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court also found it significant that the Supreme Court "often looked to its Title VII interpretations of discrimination in illuminating Title IX."[515] Further, the court determined that Title IX's legislative history "strongly suggests" that Congress intended "similar substantive standards" to apply to both Title VII and Title IX.[516]

Noting that the student-athlete alleged harassment due to the perception that he was gay but not that he was gay, the court continued its analysis to determine whether discrimination based on perceived sexual orientation violated Title IX.[517] Having determined that the sex discrimination prohibitions in Title VII and Title IX are construed consistently in *Snyder*, the court relied on "two related branches of Title VII precedent" to make its decision: the *Bostock* Court's "but-for" causal analysis that led to its determination that "Title VII prohibits discriminating against someone because of sexual orientation [because] such discrimination occurs 'in part because of sex'"[518] and *Price Waterhouse*'s holding that sex stereotyping is a Title VII violation.[519] Finding the same logic from the Title VII *Bostock* and *Price Waterhouse* cases applied to Title IX, the Ninth Circuit announced that "[h]armonizing the Court's holding in *Bostock* with our holding in *Snyder*, we hold today that discrimination on the basis of sexual orientation and perceived sexual orientation is a form of sex-based discrimination under Title IX."[520]

Ultimately, the court found that while the alleged harassment by teammates was not actionable under Title IX, the student-athlete's complaint made sufficient allegations of harassment, that he requested intervention from the university defendants, and that they retaliated by failing to conduct an adequate investigation.[521] However, the complaint failed to allege that the harassment caused "a deprivation of an educational opportunity, a required element" for a prima facie harassment claim.[522] Thus, a Title IX retaliation claim against university officials was plausible, but the student-athlete did not satisfy all the required elements.[523] Therefore, the Ninth Circuit affirmed the dismissal of the

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515. *Grabowski*, 69 F.4th at 1116 (quoting Emeldi v. Univ. of Or., 673 F.3d 1218, 1224 (9th Cir. 2017)) ("The Supreme Court has often "looked to its Title VII interpretations of discrimination in illuminating Title IX.").

516. *Grabowski*, 69 F.4th at 1116 (internal citations omitted).

517. *Id.*

518. *Id.* at 1116–17 (citing *Bostock*, 590 U.S. at 662).

519. *Grabowski*, 69 F.4th at 1117 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989)). The court also cited its 2001 case, *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001), where the Ninth Circuit held that "verbal abuse [] closely linked to gender" violates Title VII's sex discrimination prohibition. *Id.*

520. *Grabowski*, 69 F.4th at 1116. The court referenced and agreed with the Fourth Circuit's finding in Roberts v. Glenn Industrial Group, Inc., 998 F.3d 111 (4th Cir. 2021), that "Title VII affords protection for a claim of discrimination because of perceived sexual orientation" because the Court's reasoning in *Bostock* 'applie[s] . . . broadly to employees who fail to conform to traditional sex stereotypes.'" *Id.* at 1118.

521. *Grabowski*, 69 F.4th at 1113–14.

522. *Id.* at 1114.

523. *Id.* at 1121.

claim, but vacated the denial to amend the complaint and remanded for consideration if the student requested permission to amend the complaint to plead deprivation of an educational opportunity.[524]

On January 12, 2024, the district court granted the student's motion for leave to amend his complaint, requiring the amended complaint to be filed by January 25, 2024.[525] An August 2024 search indicates that the student failed to file an amended complaint by that date, but the *Grabowski* case remains of great significance due to the Ninth Circuit holding that discrimination based on sexual orientation and perceived sexual orientation is a form of sex-based discrimination under Title IX.[526] Further, while the court did not address transgender rights under Title IX, its reasoning indicates that the Ninth Circuit will hold that Title IX protects transgender students from sex discrimination as well.

*4. The Seventh Circuit Re-Affirms Its Pre-*Bostock *Decision, Joins the Fourth Circuit & Creates a Majority*.—Pre-*Bostock*, the Seventh Circuit held in its 2017 *Whitaker* decision that a school district's unwritten policy that prevented a transgender male student from accessing the male bathroom was a Title IX violation.[527] Six years later, with a post-*Bostock* Title IX split in the circuits, the Seventh Circuit addressed a similar case and reached the same result.[528] In *A.C. by M.C. v. Metropolitan School District of Martinsville*, the Seventh Circuit acknowledged the post-*Bostock* Title IX circuit split, reaffirmed its pre-*Bostock* decision finding *Bostock* "strengthened" it, and criticized the Eleventh Circuit's en banc *Adams* opinion when it unanimously agreed that Title IX prohibited banning transgender students from the bathroom of their gender identity.[529] Therefore, it upheld two district court rulings granting preliminary injunctions that enjoined two school districts from prohibiting transgender students' use of the bathrooms and locker rooms that matched their gender identity. [530]

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524. *Id.* at 1114 ("[T]he operative complaint fails to allege a deprivation of educational opportunity, a required element of the harassment claim. As to the harassment claim, we affirm the dismissal and remand for the district court to consider Plaintiff's request to amend the complaint again, should he renew that request before the district court.").

525. Grabowski v. Arizona Bd. of Regents, CV-19-00460-TUC-SHR, 2024 WL 149756, at *4 (D. Ariz. Jan. 12, 2024).

526. *Grabowski*, 69 F.4th at 1113–14.

527. *See supra* Section IV.A.3. In *Whitaker*, the Seventh Circuit affirmed a trial court's temporary injunction permitting a transgender male student to use the male bathroom. 858 F.3d 1034, 1039 (7th Cir. 2017), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020). The court noted that "[n]either the statute nor the regulations define the term 'sex'" and it does not mention the term "biological" and held that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Whitaker*, 858 F.3d at 1047, 1049.

528. A.C. *by* M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 770–71 (7th Cir. 2023), *cert. denied sub nom.* Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024).

529. *A.C.*, 75 F.4th at 764.

530. *Id.* at 769. The students alleged violations of both Title IX and the Equal Protection Clause. *Id.* at 764.

Like its pre-*Bostock Whitaker* case, the plaintiffs in *A.C.*, three transgender students, were denied access to bathrooms corresponding to their gender identity.[531] Noting the similarities between the facts of its earlier *Whitaker* decision and the cases at issue, the court recalled its earlier holding: "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[532] Finding the *Whitaker* holding addressed most issues in the post-*Bostock* consolidated cases on appeal, the court turned to the defendants' challenge of its authority.[533] The defendants raised three issues to support their position that *Whitaker* should be reevaluated: the *Bostock* Court's express omission of sex-separated bathrooms in its decision, an updated standard to evaluate the likelihood a party will succeed on the merits,[534] and that *Whitaker* "did not adequately grapple with" the separate facilities exception permitted through Title IX's implementing regulation.[535]

The court gave each issue short shrift. The defendant school districts argued that the *Bostock* Court's failure to address sex-segregated bathrooms meant it "saw a fundamental difference between bathroom policies and employment decisions" such that its "definition of sex discrimination does not apply in the bathroom context."[536] The majority found the school district's flawed conclusion read too much into the *Bostock* Court's statement, which merely reflected the common court practice to focus only on the question at issue, noting the *Bostock* case "did not involve gender-affirming bathroom access."[537] As to the stricter requirement to show a likelihood of success, the court found *Whitaker* could easily withstand heightened evaluation.[538] Finally, the Seventh Circuit *Whitaker* opinion did cite the relevant Title IX implementing regulation, 34 C.F.R. § 106.33, which permits federal fund recipients to "provide separate toilet, locker room, and shower facilities" based on sex if the facilities are similar.[539] The *Whitaker* court concluded that the omission of a "sex" definition

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531. *Id.*

532. *Id.* at 768 (quoting *Whitaker*, 858 F.3d at 1049).

533. *A.C.*, 75 F.4th at 767.

534. *Id.* (noting the earlier standard that a party must show "a 'better than negligible' chance of success on the merits" versus the current showing that "must be a strong one, though the applicant 'need not show that [he] definitely will win the case'") (internal citations omitted).

535. *Id.* at 769–70. 20 U.S.C.A. § 1686 states: "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." *Id.*

536. *A.C.*, 75 F.4th at 769.

537. *Id.* (citing *Bostock*, 690 U.S. at 681) ("The school districts reason that the Court exercised this restraint because it saw a fundamental difference between bathroom policies and employment decisions. From that, they conclude that *Bostock*'s definition of sex discrimination does not apply in the bathroom context. That is reading quite a bit into a statement that says, in essence, 'we aren't reaching this point.'").

538. *A.C.*, 75 F.4th at 768 ("Perhaps there are some cases that have been affected by the need to make a more compelling showing of likelihood of success, but *Whitaker* is not one of them.").

539. *Id.* at 770 (quoting 34 C.F.R. § 106.33).

in Title IX and its implementing regulations and a lack of authority suggesting that the word "sex" was limited to biological sex meant "that bathroom-access policies that engaged in sex-stereotyping could violate Title IX, notwithstanding [the bathroom exception]."[540]

Importantly, the Seventh Circuit correctly explained that the implementing regulation raised by the defendants, "is of little relevance" to the issue on appeal because, while it permits "sex-segregated facilities . . . . neither the plaintiff in *Whitaker* nor the plaintiffs in these cases have any quarrel with that rule."[541] Addressing the *Whitaker* decision, the unanimous Seventh Circuit panel stated, "Notably, we did not criticize the defendant school district's decision to maintain sex-segregated bathrooms. Our focus was on the district's policy for 'decid[ing] which bathroom a student may use.'"[542] In this way, the opinion recognized the difference between maintaining separate facilities and providing access to the bathroom facility that comports with a student's gender identity.

The court addressed the flawed "separate facilities" argument raised by the defendants and utilized in similar litigation (it was relied on by the Eleventh Circuit en banc majority).[543] The court clarified that "[t]he question is different: who counts as a 'boy' for the boys' rooms, and who counts as a 'girl' for the girls' rooms—essentially, how do we sort by gender? The statute says nothing on this topic, and so nothing we say here risks rendering section 1686 a nullity."[544] Noting that sex is not defined in Title IX, the implementing regulations provide insufficient guidance, and dictionary definitions at the time Title IX was implemented are inconclusive, the court stated:

> There is insufficient evidence to support the assumption that sex can mean only biological sex. And there is less certainty than meets the eye in such a definition: what, for instance, should we do about someone who is intersex? There are several conditions that create discrepancies between external and internal sex markers, which can produce XX males or XY females, or other chromosomal combinations such as XXY or XXX that affect overall sexual development. People with this genetic makeup are entitled to Title IX's protections, and an educational institution's policy for facility access would fail to account for them if biological sex were the only permissible sorting mechanism. Narrow definitions of sex do not account for the complexity of the necessary inquiry.[545]

As such, the court confirmed that each district court below had assessed the applicable school's access policy, not the schools' "decisions to maintain sex-

540. *Id.* at 770 (citing 34 C.F.R. § 106.33).
541. *A.C.*, 75 F.4th at 770.
542. *Id.* at 767.
543. *Id.* at 770.
544. *Id.*
545. *Id.*

segregated facilities."[546] Following its determination that *Whitaker* was controlling, the court evaluated the factors considered by the trial courts when determining that preliminary injunctions were warranted: "likelihood of success on the merits, irreparable harm, and the balance of equities, including the public interest."[547] The court observed that each trial court properly evaluated the relevant school's access policy and found the transgender male students were persistently treated worse than other male students based on their sex status. Additionally, both trial courts found the transgender students established consistent irreparable harm based on facts in the record.[548] Following its analysis, the court determined that the students were likely to succeed on the merits.[549]

Finally, the panel examined each trial court's findings that the balance of equities and public interest supported issuing the injunctions to protect the students' civil and constitutional rights.[550] The claims of injury by the school district did not gain ground as they were "speculative."[551] The appellate court agreed that the school district's policy "appear[ed] entirely conjectural," noting it was "fighting a phantom,"[552] strongly stating that "[g]ender-affirming facility access does not implicate the interest in preventing bodily exposure, because there is no such exposure."[553] The court also referenced an *amicus* brief filed by school administrators from sixteen states and the District of Columbia who had implemented gender-affirming facility access policies.[554] The brief assured that the policies "neither thwart[ed] rule enforcement nor increase[d] the risk of misbehavior in bathrooms and locker rooms."[555] In fact, the court noted, "such a scenario has *never* materialized."[556] Applying the reasoning from *Bostock* to Title IX, the Seventh Circuit determined that discrimination based on gender identity violated Title IX's sex discrimination prohibition and affirmed both trial courts' issuance of preliminary injunctions.[557] Finding that *Bostock* "strengthened" its earlier *Whitaker* decision, the panel noted that since 2017

546. *Id.* at 771.

547. *Id.* at 771–72.

548. *Id.* at 774.

549. *Id.* at 775.

550. *Id.* at 774–75.

551. *Id.* at 774.

552. *Id.* at 772–73.

553. *Id.* at 773. ("Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall." (citing Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017), *cert. dismissed*, 583 U.S. 1165 (2018), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020)).

554. *A.C.*, 75 F.4th at 773–74.

555. *Id.* at 774.

556. *Id.* As to the Equal Protection argument, the court evaluated one of the district court's findings, which was that there was a likelihood of success that the school's access policy fails constitutional muster under heightened scrutiny, and found no error. *Id.* at 772.

557. *Id.* at 769.

when the case became controlling law, "school districts [within its jurisdiction] have not identified any substantial injuries it has caused."[558]

Importantly, the Seventh Circuit acknowledged the circuit split between the Fourth and Eleventh Circuits, commenting that it was unable to resolve or add to the argument.[559] In a subtle nudge to the Supreme Court, the Seventh Circuit stated, "Much of what is needed to resolve this conflict is present in the majority opinion and four dissents offered by the Eleventh Circuit in *Adams*."[560] In a somewhat less subtle nudge, the concurring option stated, "The Supreme Court or Congress could produce a nationally uniform approach; we cannot."[561] The Seventh Circuit also recognized the prevalence of nationwide litigation regarding transgender rights and "assume[d] that at some point the Supreme Court will step in with more guidance than it has furnished so far."[562] Nonetheless, on January 16, 2024, the Supreme Court denied *certiorari* in the case, refusing to provide the requested guidance or nationwide rule.[563]

*C. The Decisions by All Circuits Pre- & Post-*Bostock *Are Correct Other Than the Sole Flawed Holding by the Eleventh Circuit*

Unlike every other circuit that thoroughly analyzed Title IX's applicability to LGBTQ students both before and after the *Bostock* decision to conclude that Title IX, like Title VII, prohibits discrimination based on sexual orientation and gender identity,[564] the Eleventh Circuit came up short.[565] Its faulty decision resulted from reading too much into the *Bostock* Court's statement that its opinion did not address bathrooms and reading too little into its reasoning. Like the dissenting opinions in the first two now-vacated Eleventh Circuit panel opinions, the majority in the en banc review disregarded *Bostock*'s significant holding based on its reframing of the issue before it.[566]

As the Seventh Circuit unanimous panel accurately pointed out regarding the Court's bathroom statement, the Supreme Court "was simply focusing on '[t]he only question before [it],' which did not involve gender-affirming bathroom access."[567] The Court made this clear when addressing the employer's

558. *Id.* at 771.

559. *Id.* at 770–71.

560. *Id.* at 771.

561. *Id.* at 775 (Easterbrook J., concurring).

562. *Id.* at 764 ("Until then, we will stay the course and follow *Whitaker*.").

563. Metro. Sch. Dist. of Martinsville v. A.C., 144 S. Ct. 683 (2024).

564. *See supra* Section IV.

565. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791, 796 (11th Cir. 2022) (*en banc*).

566. Compare Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* I), 968 F.3d 1286 (11th Cir. 2020), *opinion vacated and superseded sub nom.* Adams v. Sch. Bd. of St. Johns Cnty., Florida (*Adams* II), 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *and on reh'g en banc sub nom.* Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791 (11th Cir. 2022) and *Adams II*, 3 F.4th at 1321 (Pryor, William, C.J., dissenting) *with Adams III*, 57 F.4th at 796.

567. *See supra* notes 537–38 and accompanying text.

concern that the *Bostock* holding would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" and that "under Title VII itself . . . sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable," by stating that "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."[568] To further clarify, the majority explained, "The only question before us is whether an employer who fires someone simply for being [gay] or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"[569] The Court held that "[f]iring employees because of a statutorily protected trait surely counts," stating that "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."[570]

The Seventh Circuit noted the flawed argument advanced by the school districts in *A.C. by M.C.*[571] The school district defendants argued that the *Bostock* Court's "decision to refrain from addressing how 'sex-segregated bathrooms, locker rooms, and dress codes' were affected by its ruling" was because "it saw a fundamental difference between bathroom policies and employment decisions."[572] That determination led the school districts to "conclude that *Bostock*'s definition of sex discrimination does not apply in the bathroom context."[573] The Seventh Circuit accurately observed that the school districts "read[] quite a bit into [the *Bostock* Court's] statement that says, in essence, 'we aren't reaching this point'" because it "was simply focusing on '[t]he only question before [it],' which did not involve gender-affirming bathroom access."[574]

In addition, the Eleventh Circuit's en banc majority, reframed the issue before it to address "whether separating the use of male and female bathrooms in the public schools based on a student's biological sex violates" Title IX and the Constitution rather than the issue raised by the plaintiff, which was whether excluding transgender boys access to the boys' bathroom violated Title IX or the Constitution.[575] As the Fourth and Seventh Circuits recognized in their post-*Bostock* majority opinions, along with Judge Pryor's dissent in the Eleventh Circuit, the transgender student plaintiffs did not challenge whether bathrooms

568. *Bostock*, 590 U.S. at 681.
569. *Id.*
570. *Id.*
571. *A.C.*, 75 F.4th at 769.
572. *Id.*
573. *Id.*
574. *Id.* (quoting *Bostock*, 590 U.S. at 681)
575. *Adams III*, 57 F.4th at 796 ("This case involves the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex. This appeal requires us to determine whether separating the use of male and female bathrooms in the public schools based on a student's biological sex violates (1) the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, and (2) Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq*.").

could be separated by sex under Title IX, but whether a transgender individual could be denied access to the bathroom that coordinated with their gender identity. The Fourth Circuit stated that the issue before it was "whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender."[576] The Seventh Circuit framed the issue before it in *A.C. by M.C.* as "how [] one interpret[s] Title IX's prohibition against discrimination 'on the basis of sex' as applied to transgender people?"[577] And Judge Pryor, pointed out the majority's flaw in the *Adams III* dissent stating:

> [T]he majority opinion next focuses on the wrong question: the legality of separating bathrooms by sex. Adams has consistently agreed throughout the pendency of this case—in the district court, on appeal, and during these en banc proceedings—that sex-separated bathrooms are lawful. He has never challenged the School District's policy of having one set of bathrooms for girls and another set of bathrooms for boys. In fact, Adams's case logically depends upon the existence of sex-separated bathrooms. He—a transgender boy—wanted to use *the boys' restrooms* at Nease High School and sought an injunction that would allow him to use *the boys' restrooms*.[578]

By reframing the issue, the *Adams III* en banc majority failed to address the actual issue raised in the case. Additionally, the en banc majority distanced itself from *Bostock*'s reasoning, incorrectly announcing that "*Bostock* does not resolve the issue" because the Court's holding that "discrimination based on [gay] or transgender status necessarily entails discrimination based on sex" was not at issue.[579] However, the majority's determination that "the bathroom policy facially classifies based on biological sex—not transgender status or gender identity"[580] failed to apply *Bostock*'s reasoning that discrimination based on sexual orientation or gender identity *is* discrimination based on sex.[581] The *Adams III* majority's statement that by separating based on biology, the bathroom policy "include[s] transgender students" on both sides of the classification,[582] misapplies *Bostock*'s instruction that such a scenario *doubles* rather than eliminates the discrimination.[583] By discriminating against both transgender female students and transgender male students, the defendant

576. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020), *as amended* (Aug. 28, 2020).

577. *A.C.*, 75 F.4th at 769.

578. *Adams* III, 57 F.4th at 832 (Pryor, J., dissenting).

579. *Id.* at 808–09.

580. *Id.* at 808.

581. *Bostock*, 590 U.S. at 669 (noting that "discrimination based on [gay] or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second").

582. *Adams* III, 57 F.4th at 808.

583. *Bostock*, 590 U.S. at 662.

"doubles rather than eliminates" the liability.[584]

In *Bostock* the Court assumed—for the sake of argument only—that sex was based solely on biology and nonetheless held that Title VII does not permit an employer to fire an employee because they are gay or transgender.[585] The Court reasoned that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex" because when "an employer fires an employee" because of their transgender status, "two causal factors [are] in play–*both* the individual's sex and something else (the sex . . . with which the individual identifies)."[586] The Court found that transgender discrimination was "inextricably bound up with sex," which is prohibited under Title VII.[587] The *Adams III* majority disregarded *Bostock*'s reasoning and lesson, instead focusing on the carve-out to the exclusion of the Court's clear command.

In fact, the *Bostock* majority found Title VII's sex discrimination prohibition was violated if an employer took the employee's sexual orientation or gender identity into consideration – even in part – when making a harmful employment decision based on the broad sweeping language of the statute and the but-for causation standard.[588] Title IX employs near-identical language and the same but-for causation.[589] The Eleventh Circuit en banc majority opinion made short shrift of *Bostock*'s lesson. By defining "sex" as purely biological, focusing almost entirely on Title IX's carve-out for sex-separated bathrooms, and getting distracted by the *Bostock* Court's failure to address bathrooms, the en banc majority missed the mark.

In *Adams I*, the first post-*Bostock* circuit court decision that addressed the case's impact on Title IX, the Eleventh Circuit three-judge panel got it right.[590] The 2-1 majority issued a thorough and well-reasoned opinion applying

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584. *Id.* The *Bostock* Court stated:

> An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are [gay] or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

Id.

585. *Id.* at 655.

586. *Id.* at 660–61.

587. *Id.*

588. *Id.* at 683 ("Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.").

589. *See supra* Section II.A.

590. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* I), 968 F.3d 1286 (11th Cir. 2020), *opinion vacated and superseded sub nom.* Adams v. Sch. Bd. of St. Johns Cnty., Florida (*Adams* II), 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *and on reh'g en banc sub nom.* Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791 (11th Cir. 2022).

Supreme Court precedent to hold that *Bostock*'s Title VII reasoning applied equally to Title IX and that Title IX's sex-discrimination provision included discrimination based on gender identity and sexual orientation.[591] The Fourth Circuit issued a similarly decided opinion shortly thereafter, resulting in two circuit court decisions that squared with the DOE and all pre-*Bostock* circuit decisions.[592] When the Fourth Circuit decision was appealed to the Supreme Court, the Court refused to grant certiorari and allowed the Fourth Circuit's decision to become final.[593] Nevertheless, rather than issuing the mandate of the correctly decided panel decision, the Eleventh Circuit, due to inner conflict within the circuit on the issue, held its decision.[594] Rather than granting an en banc review in 2020 or allowing the opinion to issue, the circuit engaged in confusing actions resulting in two vacated opinions and a closely divided third opinion almost two and a half years later that split the circuits.[595]

The en banc opinion flipped the two prior dissents into the new majority opinion and the two earlier majority opinions into the new dissents.[596] The application of the law remained the same. The arguments remained the same. The now-majority opinion continued to disregard the plaintiff's actual argument just as the former dissents had.[597] The en banc majority even disregarded

591. *Id.* at 1310–11.

592. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020), *as amended* (Aug. 28, 2020)..

593. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (denying *certiorari*).

594. *Adams II*, 3 F.4th at 1304.

595. *Adams III*, 57 F.4th at 798–99.

596. *Compare Adams* III, 57 F.4th at 796 ("This case involves the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex. . . . separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX") *with Adams* I, 968 F.3d at 1311 (Pryor, W., C.J., dissenting) ("Not long ago, a suit challenging the lawfulness of separating bathrooms on the basis of sex would have been unthinkable. This practice has long been the common-sense example of an acceptable classification on the basis of sex."). *Compare also Adams* III, 57 F.4th at 832–33 (Pryor, J., dissenting) ("Even accepting the majority opinion's premise—that 'sex' in Title IX refers to what it calls a 'biological' understanding of sex—the biological markers of Adams's sex were but-for causes of his discriminatory exclusion from the boys' restrooms at Nease High School. Title IX's statutory and regulatory carveouts do not speak to the issue we face here: the School District's categorical assignment of transgender students to sex-separated restrooms at school based on the School District's discriminatory notions of what 'sex' means.") *with Adams* I, 968 F.3d at 1308 ("Title IX says nothing about Mr. Adams's 'sex.' To start, Title IX and its accompanying regulations contain no definition of the term 'sex.' Also absent from the statute is the term 'biological.' It seems fair to say that [the implementing regulation] tells us that restrooms may be divided by male and female. But the plain language of the regulation sheds no light on whether Mr. Adams's 'sex' is female as assigned at his birth or whether his 'sex' is male as it reads on his driver's license and his birth certificate.") (citing Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017), *cert. dismissed*, 583 U.S. 1165 (2018), *abrogated on other grounds by* Ill. Republican Party v. Pritzker, 973 F.3d 760, 762–63 (7th Cir. 2020)).

597. *Compare Adams III*, 57 F.4th at 832 (Pryor, J., dissenting) ("With the role of gender identity in determining biological sex thus obscured, the majority opinion next focuses on the wrong question: the legality of separating bathrooms by sex.") *with Adams I*, 968 F.3d at 1306 ("[The plaintiff] argues the School District excluded him from the boys' restroom because he is

unchallenged expert testimony from a three-day trial that established that "sex," undefined in Title IX, encompasses more than binary biology.[598] The four separate dissents clearly explained why the binary definition ran contrary to Title IX's purpose and that the carve-out permitting separate facilities did not address transgender students' access to bathrooms.[599] Regardless, the en banc majority ignored the scientific reality and clung to a carve-out that simply allowed separate facilities but did not address transgender students' access to bathrooms to reach its decision.[600] The en banc majority even disregarded the Fourth Circuit's thorough analysis and decision— at the time the only other circuit to have weighed in on the matter—that was rendered final by the Court's certiorari denial.[601] Instead, the majority cited twice to the dissent in the Fourth Circuit case.[602] In sum, the slim majority addressed the wrong argument and came to a faulty conclusion.

Further, the Eleventh Circuit disregarded the *Bostock* Court's declaration that "it is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex" is not Title VII specific, but based on the same "but-for" causation analysis required under Title IX.[603] As accurately pointed out in Judge Jill Pryor's *Adams III* dissent, "it is *Bostock*'s logic—apart from any Title VII-specific language—that requires us to find there has been a sex-based classification here."[604] The Title IX carve-out does not impact the analysis of whether a bathroom policy that denies a transgender student access based on the gender assigned to the student

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transgender. He says this policy constitutes discrimination on the basis of sex in violation of Title IX. Although one would never know it from reading the dissenting opinion, Mr. Adams does not argue that providing separate restrooms for boys and girls violates Title IX.").

598. *Adams III*, 57 F.4th at 833 (Pryor, J., dissenting) ("In sum, the majority opinion reverses the district court without addressing the question presented, without concluding that a single factual finding is clearly erroneous, without discussing any of the unrebutted expert testimony, and without putting the School District to its evidentiary burden.")

599. *See, e.g.*, *Adams III*, 57 F.4th at 821–22 (Wilson, J., dissenting) ("Underlying this sex-assigned-at-matriculation bathroom policy, however, is the presumption that biological sex is accurately determinable at birth and that it is a static or permanent biological determination. In other words, the policy presumes it does not need to accept amended documentation because a student's sex does not change. This presumption is both medically and scientifically flawed.").

600. *Id.* at 817 ("In sum, commensurate with the plain and ordinary meaning of 'sex' in 1972, Title IX allows schools to provide separate bathrooms on the basis of biological sex. That is exactly what the School Board has done in this case; it has provided separate bathrooms for each of the biological sexes.").

601. *Id.* at 812 (The sole mention of the *Grimm* case, other than two citations to the dissenting opinion, was when the majority stated that "in deciding that 'sex' was an ambiguous term, [the district court] noted that other courts, including the majority in *Grimm v. Gloucester County School Board*, 'did not find the meaning [of 'sex'] to be so universally clear' under Title IX drafting-era dictionary definitions," but never addressed anything further about the *Grimm* majority opinion.).

602. *Id.* at 804, 805 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 634, 636 (4th Cir. 2020) (Niemeyer, J., dissenting)).

603. *Bostock*, 590 U.S. at 660.

604. *Adams* III, 57 F.4th at 847 (Pryor, J., dissenting) (agreeing with the plaintiff's reading of *Bostock*).

at birth discriminates on the basis of sex.[605] Like the *Bostock* plaintiffs who were discriminated against based on sex when a negative employment action was taken based on their sexual orientation or gender identity, so too are bathroom restrictions in schools based on a student's gender identity sex-based discrimination under Title IX. A violation of Title VII due to sex discrimination of a transgender employee is also a violation of Title IX due to sex discrimination of a transgender student. By failing to consider the transgender student's valid arguments, the Eleventh Circuit issued a decision out of line with Title IX's language and purpose, contrary to Supreme Court precedent, and lacking legal support.

Today, every appellate court that has addressed the issue, except the Eleventh Circuit, has held that *Bostock*'s Title VII reasoning equally applies to Title IX discrimination cases based on sexual orientation and gender identity. Further, every circuit court that addressed the issue before *Bostock* ruled in favor of the transgender student under Title IX. And - the Eleventh Circuit, the sole outlier, vacated two earlier panel decisions agreeing with the rest of the circuits before a closely divided en banc review held otherwise.[606] As a result, LGBTQ students living in states under the jurisdiction of the Fourth and Seventh Circuits are protected from sex discrimination under Title IX while LGBTQ students living in states under the jurisdiction of the Eleventh Circuit are not.[607] The Supreme Court should resolve the circuit split and remedy this inequity so that all LGBTQ students receive the same valuable protections regardless of where they attend school.

V. ONLY THE SUPREME COURT CAN RESOLVE THIS ISSUE OF NATIONAL IMPORTANCE

Multiple factors support a Supreme Court certiorari grant to resolve whether Title IX's sex discrimination protection, like Title VII, prohibits discrimination based on sexual orientation and gender identity, including the need to resolve an issue of national importance, the hopelessly widening federal circuit split over *Bostock*'s applicability to Title IX, the strong unlikelihood that the current deadlocked Congress can provide resolution, and the need for consistency in administrative and court determinations. Additionally, by granting certiorari to a proper Title IX case, the Court will provide much-needed direction and provide equal discrimination protections to vulnerable LGBTQ students.

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605. *Id.* at 832 (Pryor, J., dissenting) ("[The plaintiff] has consistently agreed throughout the pendency of this case—in the district court, on appeal, and during these en banc proceedings—that sex-separated bathrooms are lawful. He has never challenged the School District's policy of having one set of bathrooms for girls and another set of bathrooms for boys. In fact, Adams's case logically depends upon the existence of sex-separated bathrooms. He—a transgender boy—wanted to use *the boys' restrooms* at Nease High School and sought an injunction that would allow him to use *the boys' restrooms*.").

606. *See supra* Section IV.B.

607. *See supra* Section IV.B.2.

A. The Circuits Are Hopelessly Split with Only One Outlier & Congress Is Deadlocked

Any time there is a split in the federal circuits it undermines the desired uniformity of federal law.[608] A circuit split is concerning because it indicates that federal law is applied differently in different areas of the country.[609] Therefore, similarly situated citizens are not receiving the same treatment across jurisdictions.[610] Circuit splits also create costly issues that increase the need for resolution.[611] When the Court has the sole ability to provide a resolution, the need for intervention becomes urgent.

Absent Supreme Court review, the Title IX issue will persist. The courts involved in the circuit split have reached definitive rulings that impact only their jurisdiction, creating a patchwork of states where students are afforded Title IX protections in some states but not others.[612] In addition, confusion remains regarding the impact of the Biden administration's Title IX Final Rule, which was implemented on its effective date of August 1, 2024, in roughly half of the states.[613] Thus, the nation's LGBTQ students are not equally protected. And a deadlocked Congress is unable to provide guidance or resolution.[614]

The circuit courts that addressed Title IX's reach before the *Bostock* decision found that its broad nondiscrimination protections extended to LGBTQ students.[615] Post-*Bostock*, every circuit court that has addressed the issue – excepting only the Eleventh Circuit – has held that *Bostock*'s Title VII sex

608. *See, e.g.*, Thomas B. Bennett, *There is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1757 (2023) ("And uniformity is linked to the animating purpose of federal law. Judge Friendly called uniformity 'the most basic principle of jurisprudence.' The weight of commentary supports the existence of a fundamental link between federal law and the need for uniformity. Federal law's connection to uniformity is bound up with the institution of the Supreme Court and its systemic role. Indeed, the uniformity value in federal law runs so deep that to violate it challenges fundamental fairness.").

609. *See, e.g.*, MICHAEL JOHN GARCIA ET AL., CONG. RSCH. SERV., R47899, THE UNITED STATES COURTS OF APPEALS: BACKGROUND AND CIRCUIT SPLITS FROM 2023 7 (2024) ("This difference results in the non-uniform treatment of similarly situated litigants, depending on the circuit that hears their case, and also may lead to greater uncertainty for litigants in the circuits that have not yet addressed the issue.") (internal citations omitted).

610. *Id.* at 8 ("A court of appeals will often expressly indicate in its opinion that its decision differs from that of another court or 'deepens' a preexisting split among the circuits by joining one side in that conflicting interpretation of a point of law. The Supreme Court's rules make it clear, however, that the existence of a circuit split is not on its own sufficient to warrant Supreme Court review; the split must concern an 'important matter.'") (internal citations omitted).

611. Peter S. Menell & Ryan Vacca, *Breaking the Vicious Cycle Fragmenting National Law*, 2024 U. ILL. L. REV. 353, 355 (2024) ("Fragmentation of the law imposes significant costs on the public and private sectors as well as the judiciary. It generates confusion and inefficiencies in business planning, promotes forum shopping, undermines the rule of law by providing unequal treatment, harms competition, produces wasteful litigation, and burdens district and circuit court judges already grappling with increasing caseloads.").

612. *See supra* Section IV.B.

613. *Id. See supra* Section IV.B.

614. *See infra* note 623 and accompanying text.

615. *See supra* Section IV.A.

discrimination provision equally applies to Title IX's sex discrimination provision.[616] Less than three months after the Court's *Bostock* opinion, two federal appellate courts held that Title IX's nondiscrimination provisions, like Title VII's, prohibit discrimination based on sexual orientation and gender identity.[617] The Eleventh Circuit's divided en banc opinion reached a flawed conclusion that has caused – and will continue to cause – ongoing confusion.

Although the Supreme Court denied certiorari in the Fourth Circuit *Grimm* case in June 2021[618] and in the Seventh Circuit *A.C.* case in January 2024[619]—which left those decisions holding that Title IX's sex discrimination protections **do** include protections based on sexual orientation and gender identity final in those jurisdictions – several significant changes have occurred since the most recent denial. Significantly, the DOE released the 2024 Title IX Final Rule[620] in April 2024, mass litigation challenging the Final Rule resulted in its implementation in only half of the states while not in the other half, and the Court overruled *Chevron* and ended agency deference in June 2024.[621] These changes should influence the Court that a certiorari grant is merited. By granting certiorari and ruling on this issue, the Court will resolve the circuit split, provide much-needed direction and jurisdictional consistency, and provide equal sex discrimination protections for all students, including LGBTQ students.

Further, Congress, as the legislative branch with the ability to amend Title IX to make clear its protective reach regarding LGBTQ students, is unable to

616. *See supra* Section IV.B.

617. *See supra* Section IV.B.1.–2. The litigation includes individual actions as well as actions against federal administrative agencies.

618. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (*denying cert.*).

619. Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024).

620. *See supra* Section III.B.3.–4.

621. *See infra* Section V.B. On January 9, 2025, a Kentucky district court judge vacated the Biden administration's 2024 Title IX Regulation creating further confusion for federal fund recipients. Tennessee v. Cardona, No. CV 2:24-072-DCR, 2025 WL 63795, at *7 (E.D. Ky. Jan. 9, 2025), *as amended* (Jan. 10, 2025).

act in its current deadlocked state.[622] The 118th Congress was described as "on track to being one of the least functional sessions ever, with only 34 bills passed since January of [2023], the lowest number of bills passed in the first year of a congressional session since the Great Depression, according to congressional records."[623]

B. The Demise of Chevron Deference Will Invite Even More Circuit Inconsistency

Following the 2024 Supreme Court decision in *Loper Bright Enterprises v. Raimondo* and the demise of *Chevron* deference, changing executive administrations and their agencies' determinations of the meaning of statutory ambiguities will ultimately be decided in the courts.[624] As evidenced by the current and growing circuit split, ongoing litigation regarding Title IX's reach is inevitable.[625] Absent deference to the experts employed by the federal agencies tasked with enforcing federal statutes, a lack of uniformity in the federal courts addressing ambiguities in federal statutes is all but certain. When dealing with an issue as important as preventing sex discrimination by federal fund recipients, it becomes imperative that the Court provide guidance and

622. *See, e.g.*, Matthew Kendrick, *Hard Numbers: ICC Sanctions, Legislative deadlock, Fading free speech, Attacks on health workers, Mexico campaign tragedy*, GZERO (May 22, 2024), https://www.gzeromedia.com/news/hard-numbers/hard-numbers-icc-sanctions-legislative-deadlock-fading-free-speech-attacks-on-health-workers-mexico-campaign-tragedy [https://perma.cc/B7TK-DS3M] ("[J]ust 0.37% of all the bills introduced in the 118th Congress have become laws."). *See also*, Jonathan Nicholson, *Less Than 1% Of Bills Introduced This Congress Have Become Laws: Analysis*, HUFFPOST (May 22, 2024, 8:00 AM), https://www.huffpost.com/entry/congress-has-less-than-1-percent-success-in-making-laws-of-bills_n_664d4cf5e4b09c97de21c7db?d_id=7686073&ncid_tag=tweetlnkushpmg00000016&utm_medium=Social&utm_source=Twitter&utm_campaign=us_politics [https://perma.cc/AQ37-U2P8] ("The analysis by Quorum, which makes software for lobbying and advocacy groups, said the 46 laws enacted through the end of April, out of 12,354 bills introduced, was the lowest percentage of successful bills going back to at least the 101st Congress, which met in 1990 and 1991."). While the newly convened 119th Congress, which convened on January 3, 2025, maintained a slim majority in the House and gained a slim majority in the Senate, there is no indication to date that it will be more effective than its predecessor. Catie Edmondson, *Mike Johnson's Newest Headache: The Smallest House Majority in History*, N.Y. TIMES (Dec. 4, 2024), https://www.nytimes.com/2024/12/04/us/politics/mike-johnson-smallest-house-majority.html [https://perma.cc/GE43-3QVD] (noting that when three representatives leave to join the Trump administration, "Republicans will then be down to a 217-215 majority, on par with the narrowest controlling margin in House history. If all Democrats are present and united in opposition to a measure, [Republicans] won't be able to afford a single defection on the House floor until those vacancies are filled. . . . Even then, no more than three Republicans can break ranks without dooming a bill's passage.").

623. Joe LoCascio et al., *118th Congress on Track to Become One of the Least Productive in US History*, ABC NEWS (Jan. 20, 2024, 7:30 PM), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012 [https://perma.cc/FAG3-56RR].

624. 603 U.S. 369 (2024).

625. *See supra* Section III.B.4.

resolution to the courts addressing Title IX's reach. Addressing this issue of national importance and consequence will resolve the circuit split on this crucial issue and provide much-needed nationwide stability and consistency.

C. The Biden DOE's Final Title IX Rule Resulted in Nationwide Jurisdictional Inconsistencies & Confusion Remains

The Biden DOE's position on Title IX's protections for LGBTQ students was aligned with the Supreme Court's *Bostock* decision and all of the circuits pre- and post-*Bostock* that have addressed the issue except for the Eleventh Circuit. In its Title IX Legal Manual, the Biden administration's CRD explained, "Though Title VII and Title IX are two distinct statutes, their statutory prohibitions against sex discrimination are similar, such that Title VII jurisprudence is frequently used as a guide to inform Title IX."[626] As such, Biden's DOE concluded that the *Bostock* Court's determination that "because of . . . sex" encompasses discrimination based on sexual orientation and gender identity equally applied to discrimination "based on sex" under Title IX.[627] Therefore, the DOE promulgated its Final Rule clarifying that Title IX prohibits discrimination based on sexual orientation and gender identity.

Since the April 19, 2024, Final Rule's release and despite adherence to the APA's notice and comment requirement, there was a coordinated attack by conservative Republican-appointed Attorneys General to prevent the Final Rule's protections from taking effect. Rather than welcoming protections for a vulnerable segment of the population, transgender rights have been used as a tool in a political culture war where misinformation and fear prevent Title IX from reaching its express goal of preventing federal fund recipients from engaging in sex discrimination related to all students.[628] Conservative efforts to defeat the Final Rule and prevent needed protections led to a patchwork of just over half the states where courts enjoined the rule from taking effect on its August 1, 2024, effective date, and where the other nearly half of the states welcomed the Final Rule without challenge.[629] Confusion remains, and absent

626. U.S. DEP'T OF JUST., CIV. RTS. DIV., TITLE IX LEGAL MANUAL (2023).

627. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637, 32637 (June 22, 2021).

628. *See, e.g.*, James Pollard, *GOP Candidates Elevate Anti-Transgender Messaging as a Rallying Call to Christian Conservatives*, ASSOCIATED PRESS (Feb. 18, 2024, 12:35 PM), https://apnews.com/article/lgbtq-transgender-republicans-trump-christian-conservatives-election-83becc009d8123d96a75c2e4940ab339 [https://perma.cc/D2JH-7VUN] ("Transgender access to sports, bathrooms and health care became the new keystone issue for the religious right after the U.S. Supreme Court approved same-sex marriage.").

629. *See Title IX Regulation Compliance*, ASS'N OF TITLE IX ADM'RS (last visited Sept. 6, 2024), https://www.atixa.org/regs/#injunction [https://perma.cc/3P49-ZRZM] (identifying states where the Final Rule was enjoined, where the state government had issued a "do not implement" directive, states that supported the Final Rule and joined an amicus brief, states that did not taken a position, and a list of K–12 and higher education institutions where an injunction was in effect

Supreme Court intervention, student Title IX protections will continue to be applied inconsistently.

D. Title IX's Broad Reach to Eradicate All *Sex Discrimination by Federal Fund Recipients Includes Discrimination of LGBTQ Students*

Congress and the *Cannon* Court were clear that Title IX's dual purpose is to avoid using federal resources to support discriminatory practices and to provide individuals effective protection against those practices.[630] In line with Title IX's objective to avoid using federal funds to support discrimination, federal fund recipients agree to make sex discrimination in their institutions impermissible.[631] In line with Title IX's objective to provide effective protection from discrimination, Biden's DOE promulgated Final Rules to guide federal fund recipients in meeting the terms of their agreement not to allow discriminatory practices at their institutions.[632] Title IX's broad reach does not specifically exclude LGBTQ students, who are especially vulnerable to discrimination.[633] Title IX's stated purpose, to eradicate ALL sex discrimination by federal fund recipients, as well as its broad terms, would not reach its stated goals if individual LGBTQ students are denied equal protection from discrimination enjoyed by their non-LGBTQ classmates. Title IX's broad ambit guarantees LGBTQ students equal protection from sex discrimination.

It is not new information that transgender students can thrive in schools where they are seen, respected, and protected.[634] Scientific evidence proves that

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based on whether the school was attended by any member of Young America's Foundation or Female Athletes United, or attended by the minor child of a member of Moms for Liberty). On January 9, 2025, a Kentucky district court judge vacated the Biden administration's 2024 Title IX Regulation creating further confusion for federal fund recipients. Tennessee v. Cardona, No. CV 2:24-072-DCR, 2025 WL 63795, at *7 (E.D. Ky. Jan. 9, 2025), *as amended* (Jan. 10, 2025).

630. *Cannon v. Univ. of Chicago,* 441 U.S. 677, 704 (1979).

631. *Id.* Title IX exempts certain entities from its sex discrimination ban in particular situations. *Id.*

632. *Id.*

633. 20 U.S.C. §§ 1681–1689.

634. *See, e.g.*, Janie Kelley et al., *School Factors Strongly Impact Transgender and Non-Binary Youths' Well-Being*, NIH NAT'L LIBR. OF MED. (Oct. 4, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9599998/ [https://perma.cc/3M73-X8CU] ("Our study reveals that openness, validation, and support of gender diversity at school can positively affect TNB [transgender and non-binary] youths' well-being. Conversely, various forms of non-recognition of gender identity, victimization and bullying towards TNB youths impede their wellbeing and should not be tolerated at school. Schools should proactively ensure that they put in place measures that will facilitate the inclusion of gender diverse young people and adopt strategies that respect and affirm youth gender identities."). *See also* Stephen T. Russell et al., *Promoting School Safety for LGBTQ and All Students*, NIH NAT'L LIBR. OF MED. (Sept. 11, 2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8454913/ [https://perma.cc/R9Q3-SEKQ] ("Multiple studies at state, national, and international levels find that enumerated policies are associated with improved education environments for LGBTQ and all students. Specifically, in the presence of enumerated policies, LGBT students feel safer at school, hear less homophobic language, experience less identity-based victimization, report less absenteeism at school, and are less at risk for suicide and substance use.") (internal citations omitted).

transgender individuals suffer when denied the right to act, be treated, and have access to facilities that correlate with their gender identity.[635] This science-based evidence highlights the immediate need for clear rules, laws, and guidance not subject to partisan politics. Like the misinformation used as a political tool to create fear and justify express discrimination against gays and lesbians in the mid-twentieth Century[636] and continuing to a lesser degree today, transgender students are currently being used as political pawns in a culture war for political votes.[637] The Court can resolve this issue and allow Title IX to do what it was intended to do: protect kids, including LGBTQ kids, from discrimination in education.

Several persuasive factors evidence the desperate need for the Supreme Court to grant certiorari and provide national consistency by resolving the current split in the federal circuits. Additionally, Supreme Court intervention

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635. *See*, *e.g.*, AM. MED. ASS'N., ISSUE BRIEF: TRANSGENDER INDIVIDUAL'S ACCESS TO PUBLIC FACILITIES 3 (2019) ("Evidence confirms that policies excluding transgender individuals from facilities consistent with their gender identity have detrimental effects on the health, safety and well-being of those individuals. These exclusionary policies undermine well-established treatment protocols for gender dysphoria, expose these individuals to stigma and discrimination as well as potential harassment and abuse and impair their social and emotional development, leading to poorer health outcomes throughout life."). *See also*, Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions,* 147 SOC. SCI. MED. 222, 223 (2015) (noting that "[s]tructural, interpersonal, and individual forms of stigma are highly prevalent among transgender people and have been linked to adverse health outcomes including depression, anxiety, suicidality, substance abuse, and HIV"). *See also* Adams v. Sch. Bd. of St. Johns Cnty., Florida (*Adams II*), 3 F.4th 1299, 1319 (11th Cir. 2021), *reh'g en banc granted, opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *on reh'g en banc sub nom.* Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams III*), 57 F.4th 791 (11th Cir. 2022) (recognizing medical experts agree that symptoms of gender dysphoria suffered by transgender people can be "alleviated by using restrooms consistent with their gender identity" and that "forc[ing] transgender people to live in accordance with the sex assigned to them at birth both fail[s] to change transgender people from who they are and cause[s] significant harm").

636. *See, e.g.*, Dana Watters, *Pride v. Prejudice: The Threat of Misinformation to the LGBTQ+ Community*, NAT'L LEAGUE OF CITIES (June 26, 2023), https://www.nlc.org/article/2023/06/26/pride-v-prejudice-the-threat-of-misinformation-to-the-lgbtq-community/ [https://perma.cc/527R-8NGC] ("'Seventy years ago, as the Cold War set in, President Eisenhower signed an Executive Order banning LGBTQI+ Americans from serving in the Federal Government,' wrote President Joe Biden in an April 26 Proclamation marking the 70th anniversary of the event. 'It was a decades-long period when 5,000 to 10,000 LGBTQI+ federal employees were investigated, were interrogated, and lost their jobs simply because of who they were and whom they loved' . . . explicitly link[ing being gay] to the perceived threat of communism, claiming that gay men were more susceptible to communist recruitment due to inherent moral failings and psychological disturbances. Like communists, this false narrative suggested, [gays] were engaged in activities to recruit others to their secretive subculture. Such misinformation ultimately ruined the professional lives of thousands of public servants.").

637. *See, e.g.*, Jo Yurcaba, *Teachers Fear Transgender Students Are Becoming 'Political Pawns' for GOP Bills*, NBC NEWS (Apr. 8, 2021, 3:16 PM), https://www.nbcnews.com/feature/nbc-out/teachers-fear-transgender-students-are-becoming-political-pawns-gop-bills-n1263526 [https://perma.cc/S3BQ-PXKR] ("Hughes is one of 17,300 educators in the U.S. and Canada who signed an open letter to President Joe Biden Monday calling on him to do more to directly address the wave of state bills targeting transgender young people.").

could resolve inconsistencies in the application of Title IX among the states. The need takes on additional urgency due to the lack of an effective Congress to clarify Title IX's coverage for LGBTQ students, the demise of *Chevron* deference, and the recent change in presidential administrations. Perhaps most importantly, by implementing the *Bostock* Court's express declaration that "it is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex,"[638] vulnerable LGBTQ students will be equally protected from sex discrimination regardless of the appellate circuit where they reside.

VI. THE LIKELY BATTLES AHEAD ABSENT SUPREME COURT INTERVENTION

The former Biden administration's Final Rule, meant to provide much-needed protections and relief to LGBTQ students, is no longer a safeguard for LGBTQ students. Further, in recent years, administrative agency power has been chipped away in what has been called "a long-running goal of the conservative legal movement."[639] During Biden's presidency, right-wing conservatives and corporate interest proponents challenged agency authority and policy in what has been described as a "war on the administrative state,"[640] resulting in a loss of traditional agency deference and the expert interpretation and implementation of statutory goals.

During the Supreme Court's 2021–2022 Term, a Court majority invoked the Major Questions Doctrine (MQD) and landed an initial blow to a forty-year precedent established in 1984 in *Chevron v. Natural Resources Defense Council*.[641] In *Chevron*, the Court held that the judiciary must defer to administrative agency's reasonable interpretations of ambiguities in the statutes they are charged to enforce (*Chevron* deference).[642] Four decades after the *Chevron* case was decided and following over 18,000 citations to the case, in

638. *Bostock*, 590 U.S. at 660.

639. *See, e.g.*, Charlie Savage, *Supreme Court Takes Up Case That Could Curtail Agency Power to Regulate Business*, N.Y. TIMES (May 1, 2023), https://www.nytimes.com/2023/05/01/us/supreme-court-business-regulation-agencies.html [https://perma.cc/T9UZ-DLAK].

640. *See, e.g.*, Declan Harty et al., *The Campaign to Gut Washington's Power over Corporate America*, POLITICO (May 22, 2024, 5:00 AM), https://www.politico.com/news/2024/05/21/supreme-court-jarkesy-administrative-state-00158948 [https://perma.cc/84HF-XFPJ].

641. 467 U.S. 837, 843 (1984) (noting that if a court decides that "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). The *Chevron* case has been cited by federal courts more than 18,000 times since it was issued. Amy Howe, *Supreme Court to Hear Major Case on Power of Federal Agencies*, SCOTUSBLOG (Jan. 16, 2024, 3:30 PM), https://www.scotusblog.com/2024/01/supreme-court-to-hear-major-case-on-power-of-federal-agencies// [https://perma.cc/29TN-Y29N].

642. Under *Chevron,* the only question for a court to decide when a statute is ambiguous or silent on a particular issue is whether the action taken by the agency was based on a permissible construction of the statute and whether the agency was charged with administering the statute. 467 U.S. at 842–43.

West Virginia v. E.P.A., the Court evaluated whether the Environmental Protection Agency (EPA) had the congressional authority under the Clean Air Act to regulate emissions.[643]

Disregarding the traditional deference afforded to agency interpretations, the Court found that the EPA had exceeded its authority and, for the first time, it invoked the MQD to hold that a "decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[644] The Court reasoned that in such "extraordinary cases" that involve matters of "economic and political significance," agency deference does not apply.[645] Following *E.P.A.*, the Court continued to chip away at agency authority and their power to utilize their expertise when making difficult regulatory decisions.[646]

Then, in what has been called "the biggest judicial power grab since 1803,"[647] on June 28, 2024, the conservative Court landed its knock-out blow to agency deference when it overruled *Chevron*,[648] stripping federal executive agencies of power and reapportioning that power to the Court.[649] In its 6-3 *Loper Bright Enterprises v. Raimondo* decision, the Court determined that it was better

643. West Virginia v. E.P.A., 597 U.S. 697, 707 (2022).

644. *Id.* at 735. The Court stated, "Precedent teaches that there are 'extraordinary cases' in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* at 700 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–160 (2000)) (alterations in original) (omitting citations). Following *E.P.A.*, for an agency's action to remain in effect under the MQD, a challenged agency must prove that Congress provided clear, express authorization in the enabling statute for the agency to take the challenged action. *Id.* at 721–26.

645. *Id.* at 721.

646. The year after *E.P.A.* was decided, the Court again invoked the MQD to justify overriding President Biden and the Secretary of Education's student loan forgiveness program. Biden v. Nebraska, 600 U.S. 482, 504–07 (2023). As described in Justice Kagan's dissent, which was joined by Justices Sotomayor and Jackson, "the majority applies a rule specially crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also microspecifically. The question, the majority maintains, is 'who has the authority' to decide whether such a significant action should go forward. The right answer is the political branches: Congress in broadly authorizing loan relief, the Secretary and the President in using that authority to implement the forgiveness plan. *The majority instead says that it is theirs to decide." Id.* at 549–50 (Kagan, J. dissenting) (emphasis added) (internal citations omitted).

647. Elie Mystal, *We Just Witnessed the Biggest Supreme Court Power Grab Since 1803*, THE NATION (June 28, 2024), https://www.thenation.com/article/society/chevron-deference-supreme-court-power-grab/ [https://perma.cc/75LZ-V93G].

648. *See supra* notes 641–642 and accompanying text. Under *Chevron,* the only question for a court to decide when a statute is ambiguous or silent on a particular issue is whether the action taken by the agency was based on a permissible construction of the statute and whether the agency was charged with administering the statute. 468 U.S. at 842–43.

649. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). *Loper Bright*, a D.C. Circuit case, 45 F.4th 359 (D.C. Cir. 2022), was consolidated with *Relentless, Inc. v. U.S. Dep't of Commerce*, a First Circuit case that presented similar facts. 62 F.4th 621 (1st Cir. 2023). The *Loper Bright* Court held that the APA requires a court to exercise independent judgment to determine if an agency's action is within its statutory authority without deferring to an agency's interpretation when a statute is ambiguous. 603 U.S. at 412.

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suited to make detailed expert decisions enforcing rules created by Congress,[650] expanding its own power by stripping executive agencies of decades of deference and effectively seizing control of the administrative state.[651] In dissent, Justice Kagan, joined by Justices Sotomayor and Jackson, recognized that *Chevron* deference "has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades" and that "[i]t has been applied in thousands of judicial decisions."[652] The dissent also predicted the majority decision would "cause a massive shock to the legal system."[653]

Indeed, the *E.P.A.* and *Loper Bright* decisions elevate the need for the Supreme Court to grant certiorari to clarify that Title IX's sex discrimination prohibition includes discrimination based on sexual orientation and gender identity. Supreme Court intervention will provide desperately-needed clarity and protections for vulnerable LGBTQ students who would benefit from Title IX protections from discrimination in education. The MQD will only further complicate the battle of presidential administrative agencies in the back-and-forth changing guidance resulting from presidential party changes in the White House.[654] While the MQD presents serious challenges to agency power, the Court's recent decision put a nail in *Chevron*'s coffin and further complicates efforts to support and protect LGBTQ students under Title IX.

In addition to the diminution of agency power, changing presidential administrations can create havoc on discrimination protections afforded under an agency's regulations.[655] As evidence, Title IX has undergone drastic changes in the past three presidential administrations.[656] The recent change in political party leadership has resulted in the removal of much-needed protections in place under President Biden and the unraveling of the Final Title IX Rule. As a result, those tasked with implementing, enforcing, and abiding by Title IX's directives face professional challenges and constant confusion. At the same time, vulnerable LGBTQ student populations are unable to rely on sex discrimination protections consistently.

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650. *Id.* at 400 (noting that "agencies have no special competence in resolving statutory ambiguities. Courts do."). Roberts, who authored the opinion, disregarded that agencies utilize experts with technical and scientific knowledge when making interpretive decisions. *Id.* In dissent, Justice Kagan noted, "It is now 'the courts (rather than the agency)' that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris." *Id.* at 450 (Kagan, J. dissenting).

651. *Id.* at 412. Before *Loper Bright*, the Supreme Court had narrowed *Chevron*'s scope, including a determination that only agency interpretations reached through the APA's formal notice and comment procedures received the force of law and qualified for *Chevron* deference. *Christensen v. Harris Co.,* 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

652. *Loper Bright*, 603 U.S. at 449 (Kagan, J., dissenting).

653. *Id.* at 471 (Kagan, J., dissenting).

654. *See supra* Section III.B.4.

655. Hillman, *supra* note 36.

656. *Id.*

Rules change with new administrations. From Obama to Trump to Biden, Title IX has undergone dramatic changes, including diametrically opposing interpretations of Title IX's ability to protect LGBTQ students from sex discrimination at school and will do so again with Trump back in office. "Although Title IX is a federal law, each administration takes a different approach to enforcing its regulations about sex discrimination."[657] Following the Court's Title VII *Bostock* decision holding that discrimination based on sexual orientation and gender identity is included under the statute's broad employment protections, presidential administrations, federal administrative agencies,[658] federal jurists, and LGBTQ rights opponents, among others, have attempted to prevent *Bostock*'s application to other federal nondiscrimination provisions, including Title IX. Those efforts prove that the legal rights and protections available to LGBTQ students must be reliable, permanent, and independent of who is seated in the Oval Office.

The Trump administration's actions to undo LGBTQ guidance and protections in place under the Obama administration and the subsequent Biden administration's actions to re-right the damage inflicted on LGBTQ Americans from the Trump administration highlights the problem that exists when consistent, reliable LGBTQ+ protections are not in place.[659] And we are, once again, faced with damaging actions taking place in the Trump administration. While executive orders have provided much-needed protections to the LGBTQ community under President Biden, Trump immediately stripped them away and issued new executive orders devastating to LGBTQ Americans. Trump's recent actions emphasize the urgent need for a consistent and reliable resolution. And conflicting guidance and ongoing court battles evidence the need for consistency and certainty regarding LGBTQ student protection under Title IX.[660]

The Biden administration's finalized Title IX regulations strengthened LGBTQ student protections and reflected the *Bostock* Court's determination that it is "impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex."[661] While the Biden administration's Title IX Final Rule attempted to restart LGBTQ forward progress, Trump's administration has already engaged in the work to undo that progress. Trump has, once again, focused on undoing LGBTQ progress, underscoring how a change in the presidency drastically affects federal laws and agency enforcement of LGBTQ discrimination protections.

Absent Supreme Court intervention, the lack of consistency from shifting administrations will continue to create instability regarding Title IX's protective ambit. The legal rights and protections afforded a distinct group of American citizens who have faced historically invidious discrimination should not be

657. Nittle, *supra* note 212.
658. *See supra* Section III.
659. Hillman, *supra* note 36.
660. *See supra* Sections I, II, and III.B.4.
661. *Bostock*, 590 U.S. at 660.

contingent on the occupier of the White House or based on the power of a political party. Nor should it matter whether a Republican or Democrat president appointed the bodies filling the nine black robes of the Supreme Court. LGBTQ Americans fought for years to gain the constitutional right to marry[662] and, five years later, not to be fired for exercising that constitutional right.[663]

Despite these advances, LGBTQ rights remain a partisan issue, and the LGBTQ community continues to gain or lose fundamental rights depending on the party occupying the Oval Office. The confusing, inconsistent, and shifting administrative rules that occur following the transition of presidential power strongly evidence the need for a permanent solution. Until our drastically divided Congress intervenes or the Supreme Court grants certiorari to bring finality to this issue, there will no doubt continue to be contentious arguments on both sides of the issue, with LGBTQ students paying the price.[664]

VII. CONCLUSION

The LGBTQ community has achieved important advances over the past three decades on the road to full citizenship. Gaining privacy rights, marriage rights, and employment protections have been major milestones along that path, all achieved through Supreme Court intervention. The *Bostock* opinion alone impacted millions of LGBTQ individuals in the American workforce.[665] The same protections from sex discrimination are equally merited in the educational realm and a determination that Title IX's sex-based protections include sexual orientation and gender identity aligns with the statute's purpose of eliminating sex discrimination in federally funded educational environments.

With a deadlocked Congress that impedes current remedial legislation, the Supreme Court is the sole authority with the power to clarify Title IX's protective parameters, resolve the existing circuit split, and provide direction to the federal courts. Multiple courts have held, before and after the Court's *Bostock* decision, that Title IX's discrimination protections based on sex—like Title VII's sex discrimination protections – include sexual orientation and gender identity by relying on sex-stereotyping precedent, on Title VII's and

662. *See supra* note 7 and accompanying text.

663. *See supra* note 8 and accompanying text.

664. Even the American Bar Association has weighed in on the issue, recognizing the partisan nature of attacks on the LGBTQ community and the need for Supreme Court intervention. *See, e.g.*, Jon W. Davidson, *A Brief History of the Path to Securing LGBTQ Rights*, AM. BAR ASS'N. (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/a-brief-history-of-the-path-to-securing-lgbtq-rights/ [https://perma.cc/45G4-NBA2] ("The last few years have seen a swell of legislative attacks on transgender people, especially transgender minors. Restrictions on the ability of transgender individuals—particularly transgender youth—to access single-sex facilities matching their gender identity, obtain gender-affirming care, and participate in sports consistent with their gender identity have resulted in numerous lawsuits. While most of these suits have led to injunctions against these laws and policies, these issues will continue to be litigated until the Supreme Court weighs in.").

665. Conron & Goldberg, *supra* note 11.

Title IX's shared statutory scheme, near-identical language, similar but-for causation standards, and broad remedial language focused on ending sex discrimination. Those factors have historically supported courts in utilizing Title VII to provide guidance when interpreting and determining the reach and meaning of Title IX.

As the Court denied certiorari in the recent *Grimm* and *A.C.* cases, both rulings are binding law in the Fourth and Seventh Circuits. The Eleventh Circuit's changing and confusing handling of the *Adams* cases highlights the lack of consensus and stability within the only circuit on the minority side of the circuit split that created a lack of national uniformity. Importantly, the *Bostock* Court's determination that "it is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex"[666] is not Title VII specific, as accurately pointed out by the Seventh Circuit[667] and by a dissenting judge in the Eleventh Circuit.[668] The Supreme Court's *Bostock* reasoning supports the identical outcome under Title IX as it did under Title VII: discrimination based on sex includes discrimination based on sexual orientation and gender identity.

The *Bostock* Court's sex discrimination rationale, the majority of circuit court decisions pre- and post-*Bostock*, factors that have historically guided courts to reference Title VII when evaluating Title IX's application, and the express purpose of Title IX to protect *all* students from discrimination in education support a determination by the Court that Title IX's broad sex discrimination protection necessarily includes sexual orientation and gender identity. Such a holding is needed to provide nationwide uniformity and permanent, stable, and deserved sex discrimination protections to LGBTQ students – one more step in the ongoing quest for full LGBTQ citizenship. One more piece.

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666. *Bostock*, 590 U.S. at 660.

667. A.C. *by* M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 769 (7th Cir. 2023), *cert. denied sub nom.* Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024) ("It is also telling that, in the closely related area of Title VII law, the Supreme Court held in *Bostock* that discrimination based on transgender status is a form of sex discrimination. Both Title VII, at issue in *Bostock*, and Title IX, at issue here and in *Whitaker*, involve sex stereotypes and less favorable treatment because of the disfavored person's sex. *Bostock* thus provides useful guidance here, even though the particular application of sex discrimination it addressed was different.") (internal citations omitted).

668. Adams *by & through* Kasper v. Sch. Bd. of St. Johns Cnty. (*Adams* III), 57 F.4th 791, 847 (11th Cir. 2022) (*en banc*) (Pryor, J., dissenting) ("[I]t is *Bostock*'s logic—apart from any Title VII-specific language—that requires us to find there has been a sex-based classification here.").