McKINNEY SCHOOL OF LAW
INDIANA LAW REVIEW

VOLUME 58 2024 – 2025

EXECUTIVE BOARD

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Print-on-demand. The *Indiana Law Review* is an online-only publication. However, for those wishing to receive print-on-demand copies, current rates for an academic year are $30.00 (domestic mailing) and $35.00 (foreign mailing for Canada only) for four issues. ***Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.***

Back Issues. Claims for nonreceipt of current year's issues must be made within six months of the mailing date. Back issues may be ordered from: William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068, (800) 828-7571, (716) 883-8100 fax, mail@wshein.com (e-mail for orders). Back issues are also available in an image-based format through HeinOnline, www.heinonline.org and Ebsco Publishing, www.ebscohost.com.

Manuscripts. The *Indiana Law Review* invites submission of unsolicited manuscripts. All citations should conform to *The Bluebook A Uniform System of Citation* (20th ed. 2015). Manuscripts should be double-spaced with standard one-inch margins. The *Indiana Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University Robert H. McKinney School of Law, which assumes complete editorial responsibility thereof. Current subscription rates for an academic year are: one year domestic $30.00; foreign $35.00. Send all correspondence to Editorial Specialist, *Indiana Law Review*, Indiana University Robert H. McKinney School of Law, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.

The entire text of this Law Review is printed on recycled paper.

Indiana University Robert H. McKinney School of Law

2024-2025 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

PAMELA WHITTEN, *Indiana University President*. B.S., Tulane University; M.A., University of Kentucky; Ph.D., University of Kansas.

LATHA RAMCHAND, *IU Executive Vice President and IU Indianapolis Chancellor*. B.A., M.A., University of Bombay; Ph.D., Northwestern University.

KAREN BRAVO, *Dean and Gerald L. Bepko Professor of Law*. B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.

MAX HUFFMAN, *Vice Dean, Professor of Law, and Director of Online Learning*. B.A., Cornell University; J.D., University of Cincinnati College of Law.

ALLISON MARTIN, *Vice Dean, Clinical Professor of Law*. B.S., J.D., University of Illinois.

MICHAEL J. PITTS, *Associate Dean for Research and Cleon H. Foust Professor of Law*. B.S.J., Northwestern University; J.D., Georgetown University Law Center.

LLOYD T. WILSON, JR., *Associate Dean of Graduate and International Programs*; *Professor of Law*; *Director, Joint Center for Asian Law Studies; Director, Chinese Law Summer Program.* B.A., Wabash College; M.A., Duke University; J.D., Indiana University Maurer School of Law; M.T.S., Christian Theological Seminary.

MIRIAM MURPHY, *Director and Senior Lecturer in Law, Ruth Lilly Law Library*. B.A., Purdue University; J.D., M.L.S., Indiana University.

ELIZABETH ALLINGTON, *Assistant Dean for External Affairs*. B.A., Indiana University; M.A., M. Phil., New York University.

OLIVIA COOLEY, *Interim Assistant Dean for Professional Development*. B.A., Xavier University; M.S., Indiana University.

PATRICIA K. KINNEY, *Assistant Dean of Diversity and Inclusion*. B.S., Purdue University; J.D., Indiana University Robert H. McKinney School of Law.

JAYME LITTLE, *Assistant Dean of Alumni Relations*. B.F.A., University of Cincinnati; M.S. Ed, Indiana University.

TIM LUCZAK, *Assistant Dean of Enrollment Maagement*. B.S., University of Southern Indiana; M.Ed., Florida Atlantic University.

VIRGINIA MARSCHAND, *Assistant Dean of Finance and Administration*. B.S., M.P.A., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

SONJA RICE, *Assistant Dean of Student Affairs*. B.A., Purdue University; J.D., Indiana University Robert H. McKinney School of Law.

BECK SPEARS, *Assistant Dean of Development*. A.A., Tallahassee Community College; B.S., Purdue University; M.S., Purdue University; M.B.A., Indiana University.

STEVEN THOMPSON, *Assistant Dean of Technology Services*. B.S., Indiana University; M.S. Purdue University.

WILL CLANSKY, *Director of Development, Major Gifts*. B.A., Boston College.

JULIE DAVIS *Director of Programming for Student Affairs.* B.S., Indiana University; M.S.M., Indiana Wesleyan University.

ERIN ENGELS, *Director of Academic and Bar Success and Lecturer*. B.A University of Illinois; J.D. Indiana University Robert H. McKinney School of Law.

MARY MORRIS, *Director of Externships and Academic Advisor*. B.A., University of North Carolina; J.D., Indiana University Maurer School of Law.

LISA SCHRAGE, *Director of Development, Stewardship*. B.S., Marian University.

REBECCA TRIMPE, *Director of Communications and Content*. B.A., Indiana University.

ANNE MCGEE, *Associate Director of Graduate & Professional Programs*. B.A. Bellarmine University.

AMBER MORGAN WALKER, *Associate Director of Institutional Reporting and Scholarship Administration*. B.S., University of Southern Indiana.

SUSAN BUSHUE-RUSSELL, *Assistant Director of Administration and Finance*. A.A.S., Lakeland College; B.S., Eastern Illinois University.

MICHAEL FINNELL, *Assistant Director of Student Financial Services*. B.A., M.A., Indiana University.

CHARLES MILLER, *Assistant Director of Student Recruitment*. B.A., Bethel University, Minnesota.

REILLY WILSON, *Assistant Director of Development*. B.S., DePauw University.

ANNA HUFFMAN, *Law School Registrar*. B.S. Georgetown University; M.F.A. Memphis College of Art.

Faculty

CYNTHIA M. ADAMS, *Clinical Professor of Law*. B.A., Kentucky Wesleyan College; J.D., Indiana University Robert H. McKinney School of Law.

CYNTHIA A. BAKER, *Clinical Professor of Law and Director, Program on Law and State Government*. B.A., J.D., Valparaiso University.

CARTER G. BISHOP, *Visiting Professor of Law*. B.S., Ball State University; M.B.A., J.D., Drake University; LL.M., New York University.

LEA BISHOP, *Professor of Law and Dean's Fellow*. B.A., M.A., University of Chicago; J.D., Yale Law School.

JAMES D. DIMITRI, *Clinical Professor of Law*. B.S., Indiana University; J.D., Valparaiso University School of Law.

YVONNE M. DUTTON, *Professor of Law and Dean's Fellow, John S. Grimes Fellow*. B.A., Columbia University; M.A., Ph.D., University of Colorado at Boulder; J.D., Columbia Law School.

FRANK EMMERT, *John S. Grimes Professor of Law; Executive Director, Center for International and Comparative Law*. Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.

M. ALEX EVANS, *Associate Professor of Law*. B.A., J.D., North Carolina Central University; Ph.D. University of Illinois, Urbana-Champaign.

NICHOLAS GEORGAKOPOULOS, *Harold R. Woodard Professor of Law*. Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.

JULIE GILGOFF, *Associate Professor of Law*. B.A., Columbia University; M.A., City University of New York; J.D., City University of New York School of Law.

CARRIE HAGAN, *Clinical Associate Professor of Law; Director, Civil Practice Clinic*. B.A., University of Kansas; J.D., University of Cincinnati College of Law.

JOHN LAWRENCE HILL, *R. Bruce Townsend Professor of Law; Adjunct Professor of Philosophy*. B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.

STEPHANIE R. HOFFER, *LAWRENCE A. JEGEN III CHAIR IN TAX LAW*. B.S., The Ohio State University; J.D., Case Western Reserve University School of Law; LL.M., New York University.

AILA HOSS, *Associate Professor of Law*. B.A., Emory University; J.D., University of Oregon.

SAM KALEN, *Robert H. McKinney Family Chair in Environmental Law*. B.A., Clark University; J.D., Washington University School of Law.

ROBERT A. KATZ, *Professor of Law and John S. Grimes Fellow; Affiliate Faculty, Indiana University Center for Bioethics; Affiliate Faculty, Indiana University Lilly Family School of Philanthropy*. A.B., Harvard College; J.D., University of Chicago Law School.

LINDA KELLY, *M. Dale Palmer Professor of Law*. B.A., J.D., University of Virginia.

RENÉE M. LANDERS, *Visiting McKinney Family Chair in Health Law*. A.B., Radcliffe College. J.D., Boston College.

GERARD N. MAGLIOCCA, *Indiana University Distinguished Professor; Samuel R. Rosen Professor of Law*. B.A., Stanford University; J.D., Yale Law School.

JAMES P. NEHF, *Thomas F. Sheehan Professor of Law; John S. Grimes Fellow*. B.A., Knox College; J.D., University of North Carolina Law School.

SARAH PARKS, *Visiting Clinical Assistant Professor of Law*. B.A. Wichita State University; J.D. Indiana University Maurer School of Law.

FRAN QUIGLEY, *Clinical Professor of Law; Director, Health and Human Rights Clinic*. B.A., Hanover College; M.A., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law*. B.A., University of Connecticut; LL.B., Harvard Law School.

JAMI SAYEED, *Visiting Assistant Professor of Law*. B.A., University of Indianapolis; J.D., Indiana University Robert H. McKinney School of Law.

JESSICA WILLIAMS SCHNELKER, *Visiting Assistant Professor of Law*. B.A., Purdue University; J.D. Notre Dame Law School.

JOEL M. SCHUMM, *Carl M. Gray Professor of Law; Clinical Professor of Law*. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University Robert H. McKinney School of Law.

LAHNY R. SILVA, *Chancellor's Professor; Professor of Law; Dean's Fellow*. B.A., M.A., Boston University; J.D., University of Connecticut School of Law; LL.M., University of Wisconsin Law School.

FRANK SULLIVAN, JR., *Indiana University Bicentennial Professor; Professor of Practice*. A.B., Dartmouth College; J.D., Indiana University Maurer School of Law; LL.M., University of Virginia School of Law.

ERIC SWANK, *Visiting Assistant Clinical Professor of Law*. B.A., St. Olaf College; J.D., University of Michigan Law School.

MARGARET C. TARKINGTON, *Professor of Law and Dean's Fellow; Director*. B.A., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University.

PRISCILLA D. THOMAS-KEITH, *Visiting Hall Render Professor and Interim Associate Director of the Hall Center for Law and Health.* B.S., Spelman College; M.S., Atlanta University; J.D., Indiana University Robert H. McKinney School of Law.

KATHERINE TWOMEY, *Visiting Assistant Clinical Professor*. A.B., University of Georgia; J.D., Mercer University School of Law.

APRYL ELIZABETH UNDERWOOD, *Visiting Assistant Professor*. B.A., Saint Mary's College, Notre Dame; M.S., Indiana University School of Medicine; M.P.Aff., Indiana University School of Environmental Public Affairs; J.D., University of Wisconsin Law School.

R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law*. A.B., University of Virginia; J.D., Indiana University Robert H. McKinney School of Law, Ph.D., Indiana University.

Emeriti Faculty

THOMAS B. ALLINGTON, *Professor of Law Emeritus*. B.S., J.D., University of Nebraska; LL.M., New York University School of Law.

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library Emerita*. B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

EDWARD P. ARCHER, *Professor of Law Emeritus*. B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.

JAMES F. BAILEY, III, *Professor of Law and Director, Ruth Lilly Law Library Emeritus.* A.B., J.D., M.A.L.S., The University of Michigan.

ROBERT BROOKINS, *Professor of Law Emeritus*. B.S., University of South Florida; J.D., Ph.D., Cornell University.

JEFFREY O. COOPER, *Associate Professor of Law Emeritus*. A.B., Harvard University; J.D., University of Pennsylvania Law School.

CLYDE HARRISON CROCKETT, *Professor of Law Emeritus*. A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).

JENNIFER A. DROBAC, *Professor of Law Emerita*. B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.

GEORGE EDWARDS, *Professor of Law Emeritus; Former Director, Program in International Human Rights Law*. B.A., North Carolina State University; J.D., Harvard University.

DEBRA A. FALENDER, *Professor of Law Emerita*. A.B., Mount Holyoke College; J.D., Indiana University Robert H. McKinney School of Law.

DAVID A. FUNK, *Professor of Law Emeritus*. A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.

PAUL J. GALANTI, *Professor of Law Emeritus*. A.B., Bowdoin College; J.D., University of Chicago Law School.

HELEN P. GARFIELD, *Professor of Law Emerita*. B.S.J., Northwestern University; J.D., University of Colorado School of Law.

JEFFREY W. GROVE, *Professor of Law Emeritus*. A.B., Juniata College; J.D., George Washington University Law School.

W. WILLIAM HODES, *Professor of Law Emeritus*, A.B., Harvard College; J.D., Rutgers University School of Law—Newark.

WILLIAM ANDREW KERR, *Professor of Law Emeritus*. A.B., J.D., West Virginia University; B.D., Duke University; LL.M., Harvard Law School.

ANDREW R. KLEIN, *Former Interim Chancellor, IUPUI; Professor of Law Emeritus.* B.A., University of Wisconsin. J.D., Emory University School of Law.

WILLIAM E. MARSH, *Professor of Law Emeritus*. B.S., J.D., University of Nebraska.

DEBORAH B. MCGREGOR, *Clinical Professor of Law Emerita; Founding Director, Master of Jurisprudence Program.* B.A., University of Evansville; J.D., Georgetown University Law Center.

NOVELLA NEDEFF, *Clinical Associate Professor of Law Emerita*. B.A., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

JOANNE ORR, *Clinical Professor of Law Emerita*. B.S., Indiana State University; J.D., California Western School of Law.

H. KATHLEEN PATCHEL, *Associate Professor Law Emerita*. A.B., Huntingdon College; J.D., University of North Carolina; LL.M., Yale Law School.

RONALD W. POLSTON, *Professor of Law Emeritus*. B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.

GARY R. ROBERTS, *Dean and Professor of Law Emeritus*. B.A., Bradley University; J.D., Stanford University.

NICOLAS TERRY, *Hall Render Professor of Law Emeritus*. B.A., Kingston University; LL.M., Corpus Christi College, University of Cambridge.

JAMES W. TORKE, *Professor of Law Emeritus*. B.S., J.D., University of Wisconsin.

FRANCES LEE WATSON, *Clinical Professor of Law Emerita*. B.S., Ball State University; J.D., Indiana University Robert H. McKinney School of Law.

JAMES PATRICK WHITE, *Professor of Law Emeritus*. A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LAWRENCE P. WILKINS, *Professor of Law Emeritus*. B.A., The Ohio State University; J.D., Capitol University Law School; LL.M., University of Texas School of Law.

MARY THERESE WOLF, *Clinical Professor of Law Emerita*. B.A., Saint Xavier College; J.D., University of Iowa College of Law.

Ruth Lilly Law Library Faculty

BENJAMIN J. KEELE, *Associate Director & Lecturer in Law, Ruth Lilly Law Library*. B.A., University of Nebraska—Lincoln; J.D., Indiana University Maurer School of Law; M.L.S., Indiana University.

LEE LITTLE, *Research and Instruction Librarian & Adjunct Lecturer in Law, Ruth Lilly Law Library*. B.A., XAVIER UNIVERSITY; M.L.S., INDIANA UNIVERSITY; J.D., INDIANA UNIVERSITY ROBERT H. MCKINNEY SCHOOL OF LAW.

RYAN OVERDORF, *Research and Instructional Services Librarian & Adjunct Lecturer in Law*, *Ruth Lilly Law Library*. B.S., Indiana Wesleyan University, M.L.S., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

TAMARA ROGERS, *Research and Instruction Librarian and Lecturer in Law*, Ruth Lilly Law Library. B.A., M.S.W, Southern Illinois University-Carbondale; J.D., DePaul University College of Law.

LARISSA SULLIVANT, *Head of Collection Services & Adjunct Lecturer in Law, Ruth Lilly Law Library.* B.A., Moscow State Linguistic University; M.A., Moscow State Institute for Foreign Tourism; M.L.I.S., Wayne State University.

Indiana Law Review

Volume 58 **2025** **Number 3**

TABLE OF CONTENTS

ARTICLES

NOTES

Indiana Law Review

Volume 58 **2025** **Number 3**

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[**]

TABLE OF CONTENTS

---

[*] 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

---

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

---

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

---

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]

---

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

---

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

---

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

---

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

---

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

---

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

---

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,

---

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

---

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

---

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

---

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.

---

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]

---

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.).

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

---

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]

---

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

---

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

---

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

---

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.

---

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

---

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

---

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.

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.

---

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.

---

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.").

ON THE JUSTIFICATION OF ACADEMIC FREEDOM AND OF FREE SPEECH ON THE UNIVERSITY CAMPUS

R. GEORGE WRIGHT*

I. AN INFORMAL OVERVIEW

Questions of academic freedom, and of free speech on university campuses, have arisen in a variety of specific contexts, all of which this Essay ignores. Instead, this Essay offers a partial explanation of the current status of both academic freedom and of free speech on university campuses in general. We do not herein affirm or deny that academic freedom, on the one hand, and free speech on campus, on the other, may be very different and partly conflicting phenomena. For present purposes, though, all such concerns may be referred to herein, merely for simplicity, as matters of academic freedom.

One sensible approach to questions of academic freedom assumes that the answers to such questions should, ultimately, depend on what are taken to be the most fundamental purposes of the university. This approach seeks to encompass public as well as private universities, including distinctly religious universities. As well, this approach seeks to encompass academic freedom at the level of the university as an institution and at the level of any individual or group speaker within the university. Finally, this approach aims to encompass university purposes as judged by the university, by relevant government actors, and by the broader public.

As it turns out, our universities invariably pursue, whether expressly or not, a range of typically shifting and often conflicting purposes. Rarely do universities articulate any genuinely meaningful, as opposed to a largely rhetorical, sense of the tradeoffs among such institutional purposes.

Among the most commonly cited, such basic university purposes have been the pursuit, testing, inculcation, or dissemination of significant knowledge and meaningful truth at one level of the university community or another. Merely for convenience, this purpose will be referred to herein as the pursuit of knowledge and truth. For present purposes, we need take no position on whether the university goal of pursuing knowledge and truth, in any context, is ultimately well-advised or not.

Crucial for our purposes, though, is the general academic and cultural shift in attitudes toward the very meaning and value of the ideas of knowledge and truth themselves. Broadly put, over the last century especially, a number of partly conflicting academic and cultural schools of thought have had a jointly significant effect on how universities, and some elements of the public, think of the very ideas of knowledge and truth.

To oversimplify, the long-standing prominence of various sorts of objectivity-oriented and metaphysically realist understandings of moral and other forms of knowledge and truth has, over time, been eroded. The specific metaphor of erosion itself is dispensable. Alternative metaphors, such as

* Professor of Law, Indiana University Robert H. McKinney School of Law. The author's thanks are hereby extended to Shelby L. Mohr.

disenchantment, dilution, hollowing and evacuation, deflation, flattening, disillusion, and debunking, if not abandonment, might also serve.

As a result of this erosion of the status of the pursuit of objective or metaphysically realist understandings of knowledge and truth, the status of academic freedom has correspondingly changed. Classically metaethically realist justifications of academic freedom, broadly understood, have gradually lost some of their credibility among academics in particular.

Universities are thus increasingly left with metaethically less ambitious understandings of academic freedom, and indeed of the freedom of the person more broadly, in various senses. To the degree that the moral status of academic freedom has thus been eroded, academic freedom has predictably been deprioritized, whether consciously or not, relative to competing university values that do not depend so substantially on any ambitious metaphysical status and grounding. Almost inevitably, competing university values with less ambitious, and thus less vulnerable, metaphysical commitments will tend to fare relatively better than formerly.

Some other competing campus and broader social values, such as the equality of persons in particular, have often partly relied as well on now controversial metaphysical commitments. But there is no guarantee that a non-metaphysically based understanding of academic freedom, and a non-metaphysically based understanding of the equality of persons on the university campus, will leave the relative statuses of academic freedom and of the equality of persons unchanged. There may well be stronger, metaethically unambitious, merely pragmatic, grounds distinctively underlying the value of equality. Equality may well thus fare better, relatively, in a metaphysically arid environment.

How an eroded underlying justification of academic freedom, given a shallower sense of knowledge and truth themselves, will play out in the future is, of course, difficult to say. The difficulty of any such prediction remains even if we implausibly assume that university-level education will continue to resemble its current institutional and technological form over even the near-term future.

Whether desirable or not, any sort of revival of metaphysically deeper justifications for the pursuit of knowledge and truth can hardly be counted on. Either way, university communities would be well advised to emphasize values, including basic virtues, that are relatively uncontroversial, broadly cross-cultural, and that, whatever their metaphysical status, tend to promote the survival of the cultures that embody them most fully.

Precise formulations and understandings of such basic virtues and their survival value may vary. But basic, largely culture-neutral virtues, including practical wisdom and prudential judgment; fortitude in the face of adversity; temperance as reasonable self-restraint; and justice in the sense of affording everyone what is fitting, can be cultivated over time. Such cultivated virtues would help university communities arrive, in particular, at academic speech

policies that tend to stand the test of time.

II. THE ARGUMENT DOCUMENTED

Historically, American universities have typically conceived of their mission at least partly in terms of the pursuit, if not the exposition, of truth and knowledge. Famously, the official motto of Harvard University has long been "Veritas."[1] The Yale University motto is similarly focused. Yale President Peter Salovey recently declared to entering students that "Yale's motto is Light and Truth—*Lux et Veritas* . . . and you will see it etched ubiquitously on crests around campus."[2] Referring to his incipient University of Virginia, Thomas Jefferson asserted that "here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it."[3] Even more fundamentally, John Henry Newman held that "the philosophy of Education is founded on truths in the natural order."[4]

The importance of knowledge and truth to the functioning of the university has been argued for much more recently as well. Consider, merely for example, the declaration by Michigan State University President Lou Anna K. Simon that "[t]he basic purposes of the University are the advancement, dissemination, and application of knowledge."[5] The classic 1940 Statement of Principles on Academic Freedom and Tenure by the American Association of University Professors (AAUP) similarly apotheosized the search for, and the advancement of, truth.[6] The AAUP 1940 Statement echoed the sentiments of figures such as

1. As of 1843, as indicated by *Harvard shields*, HARVARD UNIV., https://www.harvard.edu/about/history/shields/ [https://perma.cc/5CQQ-U7MV] (last visited Jan. 1, 2025).

2. Peter Salovey, President, Yale University, Opening Assembly Address, Yale College Class of 2026: Pursuing Truth at Yale (Aug. 22, 2022). *See also* ROBERT PAUL WOLFF, THE IDEAL OF THE UNIVERSITY 128 ("The university is a community devoted to the preservation and advancement of knowledge, to the pursuit of truth.").

3. Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820) (available at https://founders.archives.gov/documents/Jefferson/03-16-02-0404 [https://perma.cc/KX69-NAN9]). *See also* DONALD ALEXANDER DOWNS, FREE SPEECH AND LIBERAL EDUCATION 29 (2020) ("the modern university's distinctive purpose [among other purposes] is the pursuit and teaching of truth and knowledge.").

4. JOHN HENRY NEWMAN, THE IDEA OF A UNIVERSITY Part I, Introductory, sec. 2 (2001 ed.) (1852).

5. Lou Anna K. Simon, President's Statement on Free Speech Rights and Responsibilities 1, available at http://president.msu.edu/communications/statements/free-speech.html (last visited Jan. 1, 2025).

6. *1940 Statement of Principles on Academic Freedom and Tenure* 2, AAUP https://www.aaup.org/file/1940%20Statement.pdf. Consider, though, more recent conflicts over the legitimacy of academic boycotts for political reasons, as discussed in, *e.g.*, Ronald Krebs & Cary Nelson, *Boycotts: The Threat to Academic Freedom*, SAPIR J. Vol. 15 (Nov. 18, 2024); Greg Lukianoff, *The Fall of the AAUP* (Nov. 20, 2024) https://eternallyradicalidea.com/p/the-fall-of-the-aaup [https://perma.cc/TF5Z-Q9UM]. For background critique of broad academic freedom defenses, see MICHAEL BÉRUBÉ & JENNIFER ROTH, RACE, DEMOCRACY, AND THE FUTURE OF ACADEMIC FREEDOM (2022). *See also* Joan W. Scott, *What Is Behind FIRE's Attack on AAUP?*

University of Chicago President Robert Maynard Hutchins in emphasizing "the pursuit of truth for its own sake"[7] as an "aim of the university."[8] And more recently, Professor Stanley Fish has forthrightly declared that "[t]he values of advancing knowledge and discovering truth are not extrinsic to academic activity; they constitute it."[9]

However metaphysically freighted, or else evacuated, we take the ideas of knowledge and truth to be, serious conflicts between knowledge and truth on the one hand, and an evolving mix of other possible university purposes are inevitable. President Hutchins himself thus recognized "a conflict between one aim of the university, the pursuit of truth for its own sake, and another which it professes too, the preparation of men and women for their life work."[10]

Much more broadly, consider not only the compatibilities, but the conflicts between the values of knowledge and truth on the one hand and any number of other candidates for the status of an important university purpose. Such values might include, for example, prioritizing a range of religious commitments; combatting discrimination, inequality, exclusion, and injustice; expanding educational opportunities and socio-economic mobility; promoting community; promoting economic and technological growth; providing social criticism; encouraging the moral cultivation and development of the students; training students to fit into a variety of professional roles; and perhaps even variously reinforcing established societal hierarchies.[11]

Crucially, though, the ideas of knowledge and truth have evolved in their nature, meaning, and significance, particularly on university campuses, and particularly over the past century or so. This evolution has consisted, in large measure, in what we have called a tendency toward conceptional erosion, disenchantment, dilution, hollowing and evacuation, deflation, and debunking.

This process of erosion has been from a position of the historical prominence of what we may call metaphysical realism and, in the realm of morality, of metaethical realism. Metaethical realism has taken a wide range of forms across the centuries. But we may simply say that according to metaethical

---

(Nov. 18, 2024), https://www.insidehighered.com/opinion/views/2024/11/18/what-behind-fires-attacks-aaup-opinion [https://perma.cc/8GNL-6G8P].

7. ROBERT MAYNARD HUTCHINS, THE HIGHER LEARNING IN AMERICA 33 (2009 ed.) (1936).

8. *Id.*

9. STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION 132 (2014).

10. HUTCHINS, *supra* note 7, at 33. Consider, merely for example, the role of the university in preparing a student for a practically successful career in contemporary politics.

11. For elaboration, see R. George Wright, *Campus Speech and the Functions of the University*, 43 J. COLL. & UNIV. L. 1 (2017). Each of these values may, in turn, conflict internally, or with one another, as well as, in at least some instances, with either knowledge or truth in some significant respect. We here set aside the possibility that prioritizing either academic freedom, or freedom of speech on campus, however variously understood, actually might not optimally contribute toward a university's values of knowledge and truth. *Contrast* JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed. 1975) (1859) with JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (reprint ed. 1992) (1873).

realism in general, some moral propositions and moral beliefs can be better than others in some robust sense, and thus deeply truer, and can at least in principle often be knowable, as that latter term is most familiarly used.[12]

Moral realism may be partly contrasted with at least some forms of moral non-cognitivism. A number of such forms are popular with contemporary academics, with the basic idea being that moral, or politically normative, judgments do not express beliefs. One observer begins a brief census of such as follows:

> A.J. Ayer's emotivism . . . according to which moral judgements express emotions, or sentiments of approval or disapproval;[13] Simon Blackburn's quasi-realism . . . according to which moral judgements express our dispositions to form sentiments of approval or disapproval;[14] and Allan Gibbard's[15] norm-expressivism . . . according to which our moral judgements express our acceptance of norms.[16]

---

12. For examples of secular moral realist approaches of substantial repute in contemporary academia, see, for example, JOHN BENGSON, TERENCE CUNEO & RUSS SHAFER-LANDAU, THE MORAL UNIVERSE (2024); DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989); TERENCE CUNEO, THE NORMATIVE WEB: AN ARGUMENT FOR MORAL REALISM (2010); DAVID ENOCH, TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM (2013); RUSS SHAFTER-LANDAU, MORAL REALISM: A DEFENSE (2005). For a useful collection of some influential articles, see ESSAYS ON MORAL REALISM (Geoffrey Sayre-McCord ed., 1988). For a defense of moral realism whose provenance may or may not ultimately be entirely secular, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011). It has been said that realism is "a way of things that is independent of human opinion" and binding on appropriate parties. PAUL BOGHOSSIAN, FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM 130 (2006).

13. *See*, classically, A.J. AYER, LANGUAGE, TRUTH AND LOGIC (1936). *See also* CHARLES L. STEVENSON, ETHICS AND LANGUAGE (1944).

14. *See, e.g.*, SIMON BLACKBURN, ESSAYS IN QUASI-REALISM (1993); SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING (2001). For criticism, see, for example, TERENCE CUNEO, *Quasi-Realism*, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS 626, 628 (Tristram Colin McPherson & David Plunkett eds., 2018) ("no irreducible or essential appeal to the existence of moral 'properties' or 'facts'"). A contemporary critic of the immensely influential David Hume declared that according to Hume's metaethics, "Moral Approbation and Disapprobation are not [j]udgments, which must be true or false, but barely agreeable and uneasy [f]eelings or [s]ensations." THOMAS REID, INQUIRY AND ESSAYS 361 (Ronald E. Beanblossom & Keith Lehrer eds., 1983) (1788). The contemporary evolutionary psychologist Steven Pinker argues that "[p]eople have got feelings that give them empathetic moral convictions, and they struggle to rationalize the convictions after the fact." STEVEN PINKER, THE BLANK SLATE 271 (2002).

15. *See* ALLAN GIBBARD, THINKING HOW TO LIVE (2003); ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990). For whatever difference it might make, Professor Gibbard is often thought of as, like Professor Blackburn, an ethical quasi-realist or subjectivist. *See* CUNEO, *Quasi-Realism*, *supra* note 14, at 625. In general, non-realists have incentives both to highlight and, in other contexts, to minimize their differences with moral realists. This phenomenon is exemplified in Bart Streumer, *Superspreading the Word*, 58 NOÛS 927 (2024).

16. ALEXANDER MILLER, CONTEMPORARY METAETHICS 6 (2d ed. 2013). For a further very brief characterization of non-cognitivism, see MATTHEW S. BEDKE, COGNITIVISM AND NON-COGNITIVISM, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS, *supra* note 14, at 292, 293.

There are, however, moral cognitivists who also think that our moral beliefs are systematically false. Moral error theorists argue that "moral thought and discourse involve systematically false beliefs and that, as a consequence, all moral judgments, or some significant subset thereof, are false."[17] On such views, our moral and political claims do aspire to more than just expressions of sentiments, of intentions, or of generalized approval. But our claims that some set of moral or political principles is meaningfully better than another, in some higher sense, are inevitably mistaken. Moral and political truth may be contrived or invented, but not discovered or found.[18]

Taking the idea of moral and normative political principles as the result of sheer invention naturally suggests what is called moral constructivism.[19] On such constructivist views, there are assumed to be no preexisting truths, or any facts of the matter, about moral and political policies.[20] We then proceed, actually or hypothetically, to select and then apply some procedure, perhaps involving debate followed by a possible agreement,[21] with the resulting substantive moral and political policies then being deemed legitimately adopted.[22]

One way of carrying out such a constructivist procedure, with an element of commitment entering at some point, we may call pragmatism. Pragmatism involves disdain not only for pre-existing moral truths,[23] but for any elaborate

17. JONAS OLSON, *Error Theory in Metaethics*, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS, *supra* note 14, at 58. The classic error theory exposition is that of J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977). *See also* A WORLD WITHOUT VALUES: ESSAYS ON JOHN MACKIE'S MORAL ERROR THEORY (Richard Joyce & Simon Kirchin eds., 2010). For a critique, see Russ Shafer-Landau, *Error Theory and the Possibility of Normative Ethics*, 15 PHIL. ISSUES 107 (2009). For more recent versions of moral error theory, see RICHARD GARNER, BEYOND MORALITY (2014); THE END OF MORALITY: TAKING MORAL ABOLITIONISM SERIOUSLY (Richard Joyce & Richard Garner eds., 2019).

18. *See generally*, MACKIE, *supra* note 17.

19. *See, e.g.*, Sharon Street, *What is Constructivism in Ethics and Metaethics?*, 5 PHIL. COMPASS 363 (2010); MELISSA BARRY, *Constructivism*, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS, *supra* note 14, at 385; T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998); John Rawls, *Kantian Constructivism in Ethics*, 71 J. PHIL. 515 (1980); Onora O'Neill, *Constructivisms in Ethics*, 89 PROC. OF THE ARISTOTELIAN SOC. 1 (1989). For perspective, see Christina M. Korsgaard, *Realism and Constructivism in Twentieth-Century Moral Philosophy*, 28 J. MORAL PHIL. 99 (2003). For a hybrid of constructivism and anti-realist emotivism, expressivism, subjectivism, and relativism, see JESSE PRINZ, THE EMOTIONAL CONSTRUCTIVISM OF MORALS (2007). For several reasons, hybrid or compound metaethical theories have proliferated.

20. *See* the authorities cited, *supra* note 19.

21. *See* the authorities cited, *supra* note 19.

22. *See* the authorities cited, *supra* note 19.

23. *See* ANDRE SEPIELLI, *Pragmatism and Metaethics*, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS, *supra* note 14, at 582. The leading such pragmatist is Richard Rorty. For a very brief exposition, from among his many works, see Richard Rorty, *Main Statement*, *in* RICHARD RORTY & PASCAL ENGEL, WHAT'S THE USE OF TRUTH? 36–37 (2007). In the legal jurisprudential realm specifically, see RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2005). For brief commentary on Rorty-style pragmatism, see SIMON BLACKBURN, TRUTH: A GUIDE 156 (2007); CHRISTOPHER NORRIS, TRUTH MATTERS: REALISM, ANTI-REALISM AND RESPONSE-DEPENDENCE 115 (2002); R. George Wright, *Pragmatism and Freedom of Speech*, 80 NEB. L. REV. 103 (2004).

metaethical inquiry. While pragmatists differ among themselves, the idea, roughly, is to somehow bypass metaethics in favor of a concern for degrees of consensus on policies that are somehow deemed to be practically useful, helpful, or promotive of social utility and well-being, any and all metaethical foundations aside.

A further group of scholars has developed diverse, and partly conflicting, forms of what is known as moral fictionalism.[24] Collectively, moral fictionalist theories partake variously of general non-cognitivism, moral error theory, and pragmatism.[25] More specifically, some moral fictionalists embrace moral error theory, but recommend, in some presumably metaethically legitimate fashion, that we continue our moral discourse, but without any pretense to any dubious metaethical claim.[26] Other moral fictionalists do not subscribe to moral error theory, or any other moral realist theory, and suggest that despite appearances, we are, collectively, actually not committed to any metaethically ambitious form of moral discourse.[27]

Beyond these schools, there is a legion of moral skeptics[28] of various stripes, including some postmodernist philosophers.[29] Some moral skeptics suggest, in particular, that as a matter of evolutionary survival and reproductive fitness, our moral beliefs tend to track our environmental adaptation and survival as distinct from any independent moral truths.[30]

Then there are moral nihilists who may "believe neither in a meaning of life imposed by God nor in one supposedly made by humans."[31] It is then said that "[m]oral nihilism denies the sense of moral obligation, the objectivity of moral

---

24. For a brief but authoritative overview, see RICHARD JOYCE, *Fictionalism in Metaethics*, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS, *supra* note 14, at 72.

25. *See id*. at 73.

26. *See id*.

27. *See id*. The leading contemporary moral fictionalists of these two schools are, respectively, Richard Joyce and Mark Eli Kalderon. *See* RICHARD JOYCE, THE MYTH OF MORALITY 206–31 (2001); MARK ELI KALDERON, MORAL FICTIONALISM (2005); Richard Joyce, *Review of Kalderon, M.E., Moral Fictionalism*, 85 PHIL. & PHENOMENOLOGICAL RES. 61 (2012).

28. *See, e.g.*, WALTER SINNOTT-ARMSTRONG, MORAL SKEPTICISMS (2006); MATT LUTZ & JACOB ROSS, *Moral Skepticism*, *in* THE ROUTLEDGE HANDBOOK OF METAETHICS, *supra* note 14, at 484.

29. *See, e.g.*, the postmodernist distrust of metanarratives embodied in the view that "[w]here reality itself has become a manufactured image, it will be said, it can no longer make sense to measure our beliefs against how matters really stand." FRANK B. FARRELL, SUBJECTIVITY, REALISM AND POSTMODERNISM: THE RECOVERY OF THE WORLD IN RECENT PHILOSOPHY 245 (1996).

30. *See, e.g.*, SINNOTT-ARMSTRONG, *supra* note 28, at ch. 6. The leading work in this area of recent vintage is by the constructivist Sharon Street, *A Darwinian Dilemma for Realist Theories of Value*, 127 PHIL. STUD. 109 (2006). For critical assessments from among a now vast literature, see, for example, Guy Kahane, *Evolutionary Debunking Arguments*, 45 NOÚS 103 (2010); Erik J. Wielenberg, *On the Evolutionary Debunking of Morality*, 120 ETHICS 441 (2010). More broadly, *see* RICHARD JOYCE, THE EVOLUTION OF MORALITY (2006).

31. JAMES TARTAGLIA & TRACY LLANERA, A DEFENCE OF NIHILISM 10 (2021).

principles, or the moral viewpoint."[32] Professor Alex Rosenberg has thus asked: "What is the difference between right and wrong, good and bad? There is no moral difference between them."[33] Even the most unambitious forms of moral constructivism would thus seem logically inappropriate.

Finally, consider the position that morality, whether tolerant of outsiders or not, is essentially group-based.[34] Campus moral relativism may well be conspicuous without being adhered to with any rigorous consistency. Moral relativists as to knowledge and truth may actually vary in interesting ways as to their metaethics. Some might believe that moral relativism is indeed inscribed into the very nature of the universe. Others might wind up with some form of normative-level moral relativism as a result of their disenchantment with, or skepticism of, all ambitious metaethical claims.[35]

Of course, like most others, few campus moral relativists have anything like a fully developed approach to metaethics. For some, moral relativism may be thought, rightly or wrongly, to gesture at some occasions for tolerance, or at a desire simply to avoid some moral controversies.

More broadly, few persons on campus, whether relativistically inclined or not, will hold anything akin to any developed metaethical view. Our argument herein need not contend otherwise. All that is needed for our purposes is something like a broad, perhaps diversely constituted current of thought, however rudimentary and inchoate, with a meaningful presence on university campuses.

Consider, in this context, the observation of John Maynard Keynes that whether recognized or not, the thinking of a few "academic scribblers" may, whether indirectly, deludedly, and oversimplifiedly or not, meaningfully influence university policies over time.[36]

---

32. NOLEN GERTZ, NIHILISM 74 (2019). *See also* DAVID BENTLEY HART, ALL THINGS ARE FULL OF GODS 471 (2024) ("[w]hatever else modernity is, good or bad, alike, it's most definitely also the project of a fully recognized nihilism, in the most neutral philosophical sense of that terms.").

33. ALEX ROSENBERG, THE ATHEIST'S GUIDE TO REALITY 3 (2011). For a recent response to various such approaches, see SHELLY KAGAN, ANSWERING MORAL SKEPTICISM (2023).

34. *See* ISIDORA STOJANOVIC, *Metaethical Relativism, in* THE ROUTLEDGE HANDBOOK OF METAETHICS, *supra* note 14, at 119. For some leading contemporary discussions of moral relativism, see GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND MORAL OBJECTIVITY (1996); GILBERT HARMAN, THE NATURE OF MORALITY (1977); STEVEN LUKES, MORAL RELATIVISM (2008); MORAL RELATIVISM: A READER (Paul K. Moser & Thomas L. Carson eds., 2000); RELATIVISM: COGNITIVE AND MORAL (Michael Krausz & Jack W. Meiland eds., 1982); DAVID B. WONG NATURAL MORALITIES: A DEFENSE OF PLURALISTIC RELATIVISM (2006); Torbjörn Tännsjö, *Moral Relativism*, 135 PHIL. STUD. 123 (2007).

35. *See, e.g.*, STOJANOVIC, *supra* note 34.

36. *See* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 383 (1936), where Keynes famously wrote that: "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist [or "political philosopher"]. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back." *Id.* And in turn,

As well, we need not claim that the schools of thought that have eroded the stature of classic, John Stuart Mill-type quests for objectively valid moral knowledge and truth have actually eclipsed, and now dominate, such classically ambitious metaethical aspirations.

Instead, we need claim only that the combined effects of the rise of the less metaethically ambitious approaches to moral knowledge and truth have significantly reduced the dominance of the metaethically more ambitious such approaches. Likely, metaethically realist approaches to moral knowledge and truth are still preeminent, at least among philosophers.[37] Our claim is instead that the rise of the various non-realist and broadly post-modernist schools have legitimized, if not facilitated, less metaethically ambitious and now more influential approaches to moral knowledge and truth on campus.[38]

This phenomenon is obscured by the fact that many persons on university campuses might choose to tick the box of moral realism, but whose version of moral realism deflates classic understandings of knowledge and truth.

Consider specifically those on campus who would tick the moral realist box, but who also believe that moral knowledge and truth cannot escape, or rise higher than, one's group memberships. As a member of some specific group, some moral proposition may be claimed to be true. But members of other, perhaps hostile, groups doubtless believe the converse of such proposition to be

---

academics across the departments tend to imbibe the spirit of the age emanating from the broader cultural world, as well as from other academic departments. *See generally* ONORA O'NEILL, *The Eclipse of Virtue in the University and Wider Society*, *in* CULTIVATING VIRTUE IN THE UNIVERSITY (Jonathan Brand et al. ed., 2021)

37. For some survey numbers, whatever their limitations, see David Bourget & David J. Chalmers, *Philosophers on Philosophy: The 2020 PhilPapers Survey*, 23 PHILOSOPHERS' IMPRINT 1, 7 (2023). A clear majority of the philosophers surveyed in 2020 endorsed some form of moral realism, which may well include, though, a substantial number of moral relativists and error theorists.

38. *See*, merely anecdotally, ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987); Chris Meyers, *A Disturbing Trend of Relativism Among College Students*, MEDIUM (Apr. 14, 2022), https://medium.com/illumination/a-disturbing-trend-of-relativism-among-college-students-ff4ec293c6f1 [https://perma.cc/XB89-5US8]; Richard Cocks, *Students Are Moral Relativists: Problem and Solution*, THE JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL (Aug. 12. 2016), https://www.jamesgmartin.center/2016/08/students-moral-relativists-problem-solution/ [https://perma.cc/LD6Z-X8HA]; Molly Olshatz, *College Without Truth*, FIRST THINGS (May 2016), www.firstthings.com/article/2016/05/college-without-truth [https://perma.cc/TMQ7-PHD6]; Brooke Conrad, *Dominic Legge Speaks on Moral Relativism*, THE COLLEGIAN (Apr. 12, 2018), www.hillsdalecollegian.com/2018/04/dominic-legge-speaks-moral-relativism [https://perma.cc/DC4N-JRTD]; Philip Carl Salzman, *How cultural relativism on campus has chilled freedom of expression,* MACDONALD-LAURIER INST. (Nov. 14, 2016) Paul Boghossian, *The Maze of Moral Relativism*, N.Y. TIMES (July 24, 2011), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2011/07/24/the-maze-of-moral-relativism/ [https://perma.cc/SC6F-EWYU]. Note that there need not be any association between moral relativism, or any other metaethically unambitious approaches, and any empathy or tolerance toward one's perceived political antagonists. One's own group's relative morality may call for the destruction of other groups, who may adhere to their own antagonistic group-based moral views. *See, e.g.*, John J. Tilley, *Cultural Relativism and Tolerance*, 6 LYCEUM 1 (1994).

knowably true. In a logical, but unimportant sense, there is no contradiction between the beliefs of these two groups. The obvious pragmatic conflict between the two relativist groups, however, remains.

The more important point for our purposes is that these two 'realist' campus relativist groups are not engaged in any joint, common pursuit of morally realist knowledge and truth, as we classically imagine the university community to be engaged in.[39] One group has their perhaps morally 'realist' ways of knowing, and another group has some other ways of knowing, with no likelihood of the twain ever meeting. One group has their own lived experience as their guide to 'realist' moral truth. Another group has some other set of lived experiences as their corresponding guide. Neither group need assign any weight, let alone any potentially decisive weight, to the unshared experiences of others.[40]

Outside groups may then seek to bring their own normative beliefs, and their own perhaps realist metaethics, to the two mutually insulated relativist groups in question. But neither of the latter two relativist groups need have their slightest reason to revise their own normative beliefs in light of any third-party critique.

Here, and much more broadly, then, the classic idea of a genuine academic community,[41] composed of sub-communities, but jointly seeking knowledge and truth in community, tends to evaporate.

Consider the dramatic conclusion reached by Professor Paul Boghossian:

> Especially within the academy, but also and inevitably to some extent outside of it, the idea that there are 'many equally valid ways of knowing the world' . . . has taken deep root. In vast stretches of the humanities and social sciences, this sort of postmodern relativism about knowledge has achieved the status of orthodoxy.[42]

We need not make any argument this narrowly focused, or this ambitiously strong. Our less dramatic claims above will instead suffice for our purposes.

But even our less dramatic claims have important implications. It is

---

39. *See supra* notes 1–9 and accompanying text.

40. For background, see sources cited *supra* note 34.

41. For the idea of the university as an overarching community, see, merely for example, JACQUES BARZUN, THE AMERICAN UNIVERSITY: HOW IT RUNS, WHERE IT IS GOING 244 (2d ed. 1993) (1968); JOHN DEWEY, DEMOCRACY AND EDUCATION 4 (Dover ed. 2004) (1916); CHARLES HOMER HASKINS, THE RISE OF THE UNIVERSITIES 24 (1965 ed.) (1923); CLARK KERR, THE USES OF THE UNIVERSITY 1 (1963); JAROSLAV PELIKAN, THE IDEA OF THE UNIVERSITY: A RE-EXAMINATION 65 (1992); R.S. PETERS, ETHICS AND EDUCATION 58 (1966). Consider, at an etymological level, that 'college' may refer not merely to an association of persons, but to a genuine community. *See* ROBERT S. RAIT, LIFE IN THE MEDIEVAL UNIVERSITY 5 (Forgotten Books ed., 2015) (Cambridge Univ. reprint ed. 1918). *See also* WOLFF, *supra* note 2, at 127 ("a university ought to be a community of persons united by collective understandings, by common and communal goals") (emphasis in the original).

42. PAUL BOGHOSSIAN, FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM 2 (2006).

reasonable to believe that when universities are "dedicated to truth-seeking and the advancement and dissemination of human knowledge, then robust protections for academic freedom . . . are essential to effectuating that mission."[43] What, then, if the traditional understandings of knowledge and truth are, to some degree, eroded, attenuated, debunked, set aside, or evacuated on one theory or another?

Understandably, "[a]cademic freedom is much less useful, or even counterproductive, if universities prioritize[ ] some other mission over [meaningful] truth-seeking."[44] Truth that is, say, thought to be written into the very fabric of the universe may well seem worth pursuing at some substantial cost. But what if 'truth' is today increasingly, if not primarily, thought of on campus as variously less intrinsically worth of sacrificial pursuit? What if, in John Stuart Mill's phrase, the very existence of genuinely "all-important truth"[45] in the moral and political realm has gradually diminished?

Prioritizing academic freedom, or free speech on campus,[46] may seem worthwhile if we, like Mill, aspire to "knowing the whole of a subject."[47] But any substantial cost of such prioritization may seem not worth paying if knowing and truth have themselves been diluted.

Consider the question of academic freedom, or of freedom of speech, when upheld at the expense, in particular, of the equality of persons.[48] Values such as personal equality and non-discrimination may, initially, seem no less dependent upon some ultimate metaphysical grounding than freedom of speech. Certainly, equality and non-discrimination have often been defended, historically, in ambitious metaphysical terms.[49] As with the value of free speech, though, attempts to justify non-discrimination and the equality of persons on ambitious metaphysical grounds have come to seem increasingly dubious.[50]

---

43. Keith E. Whittington, *Academic Freedom and the Mission of the University*, 59 HOUS. L. REV. 821, 821 (2022).

44. *Id.*

45. JOHN STUART MILL, ON LIBERTY 99 (Gertrude Himmelfarb ed., 1974) (1859).

46. We need take no position on current debates over the relation between academic freedom, narrowly conceived, and the general freedom of speech of all campus actors. *See* Mary-Rose Papandrea, *Law Schools*, *Professionalism, and the First Amendment*, 76 STAN. L. REV. 1609 (2024); Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 211 (2012); Frederick Schauer*, The Permutations of Academic Freedom*, 65 ARK. L. REV. 193, 200–01 (2012).

47. MILL, *supra* note 45, at 80.

48. As pursued in R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006).

49. *See, e.g.*, JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL (1999); JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT (2002); NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS (2010); Michael J. Perry, *Moral Equality?*, 23 J. CONTEMP. LEGAL ISSUES 383 (2022).

50. For recent discussions, see, for example, JEREMY WALDRON, ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY (2017); Ian Carter, *Respect and the Basis of Equality*, 121 Ethics 538, 539 & 539 n.4 (2011) (collecting, at this historic late date, earnest contemporary attempts to meaningfully ground the universal equality of persons). More bluntly, there is Peter Singer's

But equality of persons, as opposed to any broad principles of free speech, seems much better adapted to a metaethically arid or unambitious campus climate. In an arid metaethical climate, free speech seems worthy only up to the bounds of its perceived usefulness in generating somehow valued outcomes. Free speech must pay off in terms of sheer utility in a culture that has downgraded the status of the pursuit of knowledge and truth. And this brute utility calculus may well call for substantial restrictions on speech for the sake of better pursuing other university goals.[51]

A de facto, pragmatic, or modus vivendi-type of equality and non-discrimination among persons is hardier and more self-sustaining if we take unambitious metaethical assumptions for granted. Apart from unchallenged institutional hierarchies, equality among persons on campus and elsewhere is the only realistic presumption. There is clearly no stable alternative baseline for genuinely meaningful discussions, arguments, and negotiations on campus. Consider the elemental, self-sustaining, unambitiousness of this observation of Oliver Wendell Holmes, Jr.:

> You cannot argue with your neighbor, except on the admission for the moment that he is as wise as you . . . you cannot deal with him . . . except on the footing of equal treatment, and the same rules for both.[52]

In this context, Holmes echoes the classic insights of Thomas Hobbes on the realistic conditions for stable social interaction. Hobbes observes that despite obviously real inequalities among persons, "[n]ature hath made men so equall in the faculties of body and mind, . . . [that] the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe

declaration that "[t]he plain fact is that humans differ, and the differences apply to so many characteristics that the search for a factual basis on which to erect the principle of equality seems hopeless." PETER SINGER, PRACTICAL ETHICS 295 (1979). *See also* Anne Phillips, UNCONDITIONAL EQUALS 15–16, 44–45 (2021) (equality as a commitment one might make, rather than involving an assertion with any ground or foundations); Geoffrey Cupit, *The Basis of Equality*, 75 PHIL.105, 108 (2000) (the claim that persons are relevantly equal "is very far from being self-evident. Indeed, on the face of it, the claim seems highly implausible"); Giacomo Floris, *On the Basis of Moral Equality: A Rejection of the Relation-First Approach*, 22 ETHICAL THEORY & MORAL PRAC. 237 (2019); *Suzy Killmister, Constructing Moral Equality*, 8 J. AM. PHIL. ASS'N 1 (2022) (moral constructivism); Kasper Lippert-Rasmussen, *What Is It For Us To Be Moral Equals? And Does It Much Matter If We're Not?,* 23 J. CONTEMP. LEGAL ISSUES 307 (2022). There seems to be an unstable, whistling past the graveyard quality to all such attenuated and would-be deflationist views that nevertheless retain a determined normative commitment to universal equality.

51. As when the value of freedom of campus speech bumps up against any other purpose or precondition of university campus life, including equality, non-discrimination, students' psychological health, career-preparedness, redistribution of career opportunities, training in civility, promotion of particular religious tenets, and other conflicting such university purposes.

52. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41–42 (Harv. Univ. Press ed., 2009) (1881).

any benefit, to which another may not pretend, as well as he."[53] By comparison, a robust regime of broad but unambitiously grounded campus freedom of speech, unlike equality, amounts to a delicate, distinctly vulnerable hothouse plant, continually subject to understandable objections reflecting less metaphysically dependent countervailing interests.

Overall, then our account above has sought to describe some elements of the current state of play on contemporary university campuses, including the status of the quest for moral and other truths. Whether there is any realistic path forward to a sufficiently well-grounded justification for prioritizing the pursuit of knowledge and truth by the campus community is doubtful. Too many mutually reinforcing academic and broader cultural trends,[54] accruing over a century, seem to militate against any such development. Even if our collective political antagonisms were to subside, there would remain the diminished collective sense that free speech distinctly contributes to the meaningful pursuit of any objective, robust, broadly valid truths.

In the absence of any revitalization of the values of truth and knowledge, though, some relevant forms of progress may still be possible. Consider the nature and status of what many cultures across history have thought of as important virtues and vices. Importantly, such virtues and vices can have important effects on whether anyone 'believes' in them or not and whether those who 'believe' in such virtues accord them any metaphysical status or not.

Fortitude and resilience, for example, can have meaningful effects even if they lack any metaphysical depth, and whether anyone thinks of them as virtues or not.[55] Similarly for the virtue of prudence, or for practical wisdom, and for the virtue of reasonable, as distinct from either excessive or insufficient, self-restraint.[56] In general, such virtues tend, over time, to pay off, for many, in elemental, realistically undeniable ways, such as sheer group survival.

Doubtless, classic vices such as chronic self-indulgence, rashness, unreflective impulsivity, or sheer cravenness may, for a time, under limited cultural circumstances, have a net payoff for some persons who exhibit such traits. But such classic vices do not seem likely to generally pay off for their

53. THOMAS HOBBES, LEVIATHAN CH. XIII (1651), (available at www.gutenberg.org/files/3207/3207-h/3207-h).

54. Among such trends would be the confluence of institutional self-indulgence, dogmatism, complacent and irrevocable commitments to largely empirical claims, postmodern insouciance regarding truth, and a half-century of intense political polarization. *See, e.g.*, EZRA KLEIN, WHY WE'RE POLARIZED (2021). Given today's remarkably intense and pervasive polarization, especially in its emotional dimensions, we should be reluctant to predict a general favoring of rigorous campus speech protections for one's designated, and perhaps delegitimized, political opponents in particular.

55. For useful overviews, see MICHAEL PAKALUK, ARISTOTLE'S NICOMACHEAN ETHICS: AN INTRODUCTION (2005); SARAH BROADIE, ETHICS WITH ARISTOTLE (1991); NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE (1991).

56. *See* the sources cited, *supra* note 55. All persons and groups can, of course, seek to redefine widely recognized virtues and vices in an attempt to bring credit to themselves or their allies. The actual payoffs from such moves may, however, often be limited.

exhibitor or for the exhibitor's group, over the long haul, or when circumstances have become distinctly challenging.[57]

In contrast, practical wisdom and fortitude, especially, tend to pay off over time and across circumstances, particularly for their exhibitors and their affiliated groups. This is true, at least to a significant extent, even on contemporary university campuses. Being caught blind-sided by developments on our office campus, and then reacting out of impulse, irrationally or not, tends not to promote group success, even on campus. There arise, eventually, cultural selection pressures against persons and groups regularly exhibiting such reactions.

And this is again true whether one thinks that there are such things as classic virtues and vices or not,[58] and whether one sees such virtues and vices as reflective of human nature, the world, or an objective moral order or not. Persons on university campuses today thus have some affirmative practical interest in cultivating, and appropriately displaying, some largely uncontroversial set of elemental, cross-culturally recognized basic virtues.

Thus, the philosopher Linda Zagzebski argues that "[m]any virtues ought to be common ground for persons of all political viewpoints."[59] Some basic moral and epistemic virtues seem to be vital for a healthy functioning society over time.[60] Here, Professor Zagzebski lists "[c]ompassion, generosity, tolerance, trustworthiness, honesty, [and] sympathy."[61] Within limits, such lists can be adjusted and reformulated.

Persons on campus can indeed choose to reject, deconstruct, redefine, or seek to commandeer and monopolize any of the virtues on Professor Zagzebski's list. Perhaps anyone on campus can, as an individual or a small group, free ride on the trustworthiness and honesty of others, at least within

57. Especially, one would imagine, in the face of any relevant budgetary resource shortages, let alone any funding emergencies.

58. For the classic Aristotelian cardinal, or fundamental, virtues, see the authorities cited, *supra* note 55. For broader discussion of both moral and epistemic virtues and beyond, see ROBERT M. ADAMS, A THEORY OF VIRTUE (2006); JASON BAEHR, THE INQUIRING MIND: ON INTELLECTUAL VIRTUES AND VIRTUE EPISTEMOLOGY (2012); CHRISTOPHER M. BELLITTO, HUMILITY: THE SECRET HISTORY OF A LOST VIRTUE (2023); THE CAMBRIDGE COMPANION TO VIRTUE ETHICS (Daniel C. Russell ed., 2013); ANDRE COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES (2002); DALE DORSEY, A THEORY OF PRUDENCE (2021); JOSEPH PIEPER, THE FOUR CARDINAL VIRTUES (Richard & Clara Winston trans., 1966); ROBERT C. ROBERTS & W. JAY WOOD, INTELLECTUAL VIRTUES: AN ESSAY IN REGULATIVE EPISTEMOLOGY (2007); VIRTUE AND VICE: MORAL AND EPISTEMIC (Heather Battaly ed., 2010); VIRTUES AND THEIR VICES (Kevin Timpe & Craig A. Boyd eds., 2015); LINDA TRINKAUS ZAGZEBSKI, VIRTUES OF THE MIND: AN INQUIRY INTO THE NATURE OF VIRTUE AND THE ETHICAL FOUNDATIONS OF KNOWLEDGE (1996); PRACTICAL WISDOM: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES (Mario de Caro & Maria Silvia Vacarreza eds., 2021); Paul Bloomfield, *Epistemic Temperance*, 56 AM. PHIL. Q. 109 (2019).

59. Linda Zagzebski, *Virtue Ethics*, 22 THINK 15, 20 (2022).

60. *See id*.

61. *Id.*

limits.[62] But there are inevitable limits to the payoffs of repeated such behavior.

Let us then briefly take a narrower focus. Especially in the university campus context, there is a distinct place for the virtue of epistemic or intellectual humility in particular.[63] The virtue of epistemic humility is herein not a matter of modesty or self-depreciation. Instead, it is a matter of sheer cold-eyed realism concerning one's abilities, and the limits thereof. Humility, in this sense, lies in a mean between intellectual self-effacement and sheer intellectual pretense.[64] On that standard, a reality-based intellectual humility on campus may be in shorter supply, within or beyond one's favored grouping, than is widely recognized.[65]

As well, lack of practical wisdom may, for a time, be rational for those committed to any given campus cause. But the disinclination to pursue practical wisdom is, in the long run, likely to undermine one's efforts to obtain one's political aims. If, by analogy, one is playing chess against someone with greater practical wisdom as to chess strategy, one is, all else equal, likely to lose over the long term.

An under-appreciated point, though, is that one campus group's practical wisdom may benefit not merely the campus in general, but that campus group's political opponents in particular. On the global scale, one group's practical wisdom may, in the context of a nuclear missile crisis, prevent the destruction not only of their own civilization, but of their opponent's civilization as well.[66]

---

62. For background, see Russel Hardin & Garrett Cullity, *The Free Rider Problem*, STAN. ENCYC. PHIL. (rev. ed. Oct. 13, 2020, https://plato.stanford.edu/entries/free-rider [https://perma.cc/22H3-DNTE].

63. For background, see BELLITTO, *supra* note 58; THE ROUTLEDGE HANDBOOK OF PHILOSOPHY OF HUMILITY (Mark Alfaro, Michael P. Lynch & Alessandra Tanesini eds., 2021); Elizabeth J. Krumrei-Mancuso, et al., *Toward an Understanding of Collective Intellectual Humility* (Oct. 2, 2024), https://www.sciencedirect.com/science/article/pii/S1364661324002286; Nancy Nyquist Porter, The Virtue of Epistemic Humility, 29 PHIL., PSYCHIATRY, & PSYCH.121 (2022); Duncan Pritchard, *Intellectual Humility and the Epistemology of Disagreement*, 198 Synthese S1711 (2021 Peter Salovey, President, Yale University, Baccalaureate Address, Yale College Class of 2022: On Intellectual Humilty (May 22, 2022); G. Scott Waterman, *Epistemic Humility: Accruing Wisdom or Forsaking Standards?*, 29 PHIL., PSYCHIATRY, & PSYCH. 101 (2022); Dennis Whitcomb, et al., *Intellectual Humility: Owning Our Limitations*, 94 PHIL. & PHENOMENOLOGICAL RES. 509 (2017).

64. *See* the sources cited, *supra* note 63.

65. *See* John P.A. Ioannidis, *Why Most Published Research Findings Are False*, PLOS MED 2(8): E124 (Aug. 30, 2005)); RICHARD ARUM & JOSIPA ROKSA, ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES (2011); Rose Horowitch, *The Elite College Students Who Can't Read Books,* THE ATLANTIC (Oct. 1, 2024), https://www.theatlantic.com/magazine/archive/2024/11/the-elite-college-students-who-cant-read-books/679945/ [https://perma.cc/2RZA-HN75]; Jean M. Twenge, *The Homework Bubble Has Popped*, (Dec. 12, 2024) https://www.generationtechblog.com/p/the-homework-bubble-has-popped [https://perma.cc/QL63-J47M] (homework and grades as trending in opposite directions). More broadly, *see* ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE 17 (2d ed. 2016) ("[t]he sheer depth of most individual voters' ignorance may be shocking to [those] not familiar with the research"); NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS (2020).

66. For background, see THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1981).

More broadly, a recognition by one's practically wiser opponents that both parties are indeed locked in a prisoner's dilemma[67] may benefit both parties equally. Otherwise put, one campus group's cultivating their own practical wisdom, grace under pressure, fortitude under stress, and other virtues may have important positive externalities for even their campus opponents.[68] Cultivating widely recognized elemental moral and epistemic virtues may have recognizable value for many contending campus groups, and for the university campus more generally.

III. CONCLUSION

We may well be unable to fully regenerate any consensus that freedom of speech on campus, or academic freedom, promotes the search for knowledge and truth understood in terms of classic, robust moral objectivity. But some useful compensatory work can nevertheless be done. In particular, campus citizenry can be led to better appreciate that cultivating and allowing others to cultivate, at least within limits, widely acknowledged basic virtues can promote the health of the campus community and the flourishing of many contending campus groups.

67. See, for background, Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYC. PHIL., (rev. ed. April 2, 2019), https://plato.stanford.edu/entries/prisoner-dilemma/ [https://perma.cc/5GNF-XY8X].

68. Contending campus groups might also come to realize that practical wisdom in their opponents may allow the latter to first recognize, and then to devise optimal strategies to combat, serious external threats to the broader university community. Such threats may be a matter of rapidly evolving and inexpensive educational technologies that are at home well beyond the brick-and-mortar university. Or the looming possibility of reductions, by state or national government actors, of their contributions to university budgets.

Indiana Law Review

Volume 58 **2025** **Number 3**

NOTES

TIME OUT OF MIND: EMERGENCY DETENTIONS UNDER INDIANA LAW, DUE PROCESS IMPLICATIONS, AND PROPOSED REFORMS

JERRICK T. ADAMS*

INTRODUCTION

In the late winter of 2018, Eskenazi Health sought the involuntary commitment of C.N., an adult male.[1] Eskenazi filed an application for emergency detention,[2] alleging that C.N., by reason of untreated bipolar disorder, posed a danger to himself.[3] The Marion County Superior Court authorized detention and set a commitment hearing.[4]

At the hearing, a doctor testified that C.N., now diagnosed with schizoaffective disorder, was gravely disabled.[5] C.N. entertained delusions of grandeur: he believed he was a police officer and claimed to have worked with both the Federal Bureau of Investigation (F.B.I.) and the Drug Enforcement Agency.[6] A detective with the Indianapolis Metropolitan Police Department said that C.N. had "shown signs of mental illness," including disorganized and delusional thinking.[7] A "plastic hybrid BB gun," body armor, a gas mask, and a "footlocker type of thing" had been found in C.N.'s home.[8]

For his part, C.N. flatly contested the need for commitment.[9] He was gainfully employed, earning between $10 and $15 per hour working for a home

* J.D. Candidate, 2025, Indiana University Robert H. McKinney School of Law – Indianapolis, Indiana; B.A. 2011, Indiana University – Bloomington, Indiana.

1. *In re* Commitment of C.N., 116 N.E.3d 544, 545 (Ind. Ct. App. 2019).

2. As explained in greater detail below, an emergency detention is a form of civil commitment. *See infra* notes 33–35 and accompanying text. In an emergency detention, an individual alleged to be mentally ill and either dangerous or gravely disabled can be confined to a facility on a short-term basis. *Id.* At the time of C.N.'s commitment, an emergency detainee could be held without a hearing for no more than six days. *See infra* notes 39–49 and accompanying text. Under current Indiana law, the detainee can be held without a hearing for as many as fourteen days. *See infra* notes 51–60 and accompanying text.

3. *C.N.*, 116 N.E.3d at 545–46.

4. *Id.* at 546.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

improvement company.[10] He was living with his girlfriend in a house she had inherited from her grandmother, and he was helping "get that house back in shape and fixed up."[11] In his time at Eskenazi, he had seen to his dietary and hygiene needs.[12] He denied having claimed to be an "official member" of either the F.B.I. or the police department.[13]

The hearing concluded.[14] C.N. was, in the trial court's assessment, "gravely disabled because he was demonstrating a substantial impairment in his judgment and reasoning that resulted in his inability to function independently."[15] Notably, the trial court did *not* find that C.N. posed a danger to himself or others.[16] Nevertheless, the trial court ruled for Eskenazi and ordered the involuntary commitment of C.N. "for a period of time expected to exceed ninety days."[17]

C.N. appealed, arguing that the evidence against him was insufficient to justify involuntary commitment.[18] The Indiana Court of Appeals agreed and vacated the trial court's commitment order: the evidence "simply [did] not support the trial court's conclusion that C.N. was gravely disabled."[19]

This case vividly illustrates just what is at stake in a commitment proceeding. The Indiana Supreme Court has stressed that "[i]nvoluntary civil commitment, no less than imprisonment, is a tremendous intrusion on personal liberty and autonomy."[20] Subjects "may be confined against their will, restrained, forcibly medicated, and even kept in seclusion."[21] Moreover, "serious stigma and adverse social consequences" attach to the subjects of commitment proceedings.[22]

It is well established that commitment proceedings must comply with the dictates of due process.[23] Because commitment proceedings implicate such weighty interests, it is essential that the procedural apparatus be both finely calibrated and fitted with robust safeguards. Yet legislation enacted in 2023 actually *weakened* the safeguards surrounding emergency detentions in Indiana, creating an elevated risk of prolonged wrongful confinements.[24]

This Note argues that the statutes governing emergency detentions in Indiana deprive detainees of liberty without due process of law. Part I concerns essential context: how emergency detentions fit into the broader framework for

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 546–47.
15. *Id.*
16. *Id.* at 547.
17. *Id.*
18. *Id.*
19. *Id.* at 548.
20. A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606, 608 (Ind. 2018).
21. *Id.*
22. Civ. Commitment of T.K. v. Dep't of Veterans Aff., 27 N.E.3d 271, 273 (Ind. 2015).
23. *Id.*
24. 2023 IND. ACTS 3148.

civil commitments, how the old statutory regime differs from the new, and what process is due in commitment proceedings. Part II addresses the timeliness of hearings: first, it contends that the statutes unconstitutionally extend the period of detainment prior to a hearing; second, it proposes reforms to reduce this delay. Part III examines the statutory rights afforded to the subjects of commitment actions: first, it argues that these rights, as presently formulated, do not extend to emergency detainees; second, it proposes amendments to remedy this defect. Finally, Part IV argues, by analogy to bedrock principles of criminal procedure, that any heightened fiscal and administrative burdens occasioned by the proposed reforms are outweighed by the detainee's liberty interest.

I. BACKGROUND

A. Civil Commitment Generally

The mechanisms of civil commitment are functions of a state's police and *parens patriae* powers.[25] The police power has long been applied to matters affecting "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."[26] Pursuant to its police power, a state may "protect the community from the dangerous tendencies of some who are mentally ill."[27] The *parens patriae* power has its ancient roots in English constitutional law, which made the monarch the "guardian of persons under legal disabilities to act for themselves."[28] The state, as *parens patriae* (literally, "father of the nation"), "has a legitimate interest" in "providing care to its citizens who are unable because of [mental] disorders to care for themselves."[29]

However, these powers are not without their limits. The Supreme Court of the United States has held that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement" because there is "no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[30] And yet, in the five decades since this somewhat vague pronouncement on substantive limits, the Court has offered the states scant instruction as to the procedural limits of the commitment power.[31] In the absence

25. BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 42 (2005).

26. Berman v. Parker, 348 U.S. 26, 32 (1954).

27. Addington v. Texas, 441 U.S. 418, 426 (1979).

28. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972).

29. *Addington*, 441 U.S. at 426.

30. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

31. *See, e.g.*, Margaret J. Lederer, *Not So Civil Commitment: A Proposal for Statutory Reform Grounded in Procedural Justice*, 72 DUKE L.J. 903, 914 (2023) (noting that "the Court has offered little guidance" as to the procedural limits of the commitment power).

of any such instruction, the states have developed highly divergent civil commitment systems.[32]

Title 12, Article 26, of the Indiana Code governs this state's civil commitment system.[33] An emergency detention is but one of the commitment mechanisms available to the state under Article 26. For instance, an individual "alleged to be mentally ill and either dangerous or gravely disabled" may be temporarily committed for up to ninety days.[34] If a court later concludes that this same individual is, in fact, mentally ill and either dangerous or gravely disabled, the court may order a "regular commitment," the duration of which is generally indefinite.[35] Because emergency detentions are the focus of this Note, little else will be said about temporary and regular commitments. It is, however, noteworthy that an emergency detention is sometimes the first step on a path that leads to temporary or regular commitment (indeed, that was the case for C.N., as discussed above).[36] For that reason, the interplay among the emergency detention statutes and those governing temporary and regular commitments can be a matter of great consequence. The reader should bear that in mind as this Note proceeds in its analysis.

B. Emergency Detentions in Indiana

On May 4, 2023, Governor Eric Holcomb signed House Bill 1006 into law.[37] This omnibus mental health bill worked fundamental changes to the statutes governing emergency detentions.[38] The two subsections below describe in detail both the old statutory regime and the new. Each subsection proceeds chronologically, starting with the initiation of a detention, continuing through the facility's application and reporting processes, and concluding with the court's part in finding probable cause, conducting hearings, and ordering either release or continued confinement.

1. The Old Statutory Regime.—The controlling statutes authorized detention on the filing of a written application with a facility (as defined in Ind. Code Section 12-7-2-82).[39] The application consisted of (1) a "statement of the applicant's belief" that the individual to be detained was both "mentally ill and either dangerous or gravely disabled" and "in need of immediate restraint" and (2) a statement by a single physician, based either on the physician's own

32. *See, e.g.*, Donald Stone, *There Are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 789 (2016) (cataloging critical differences in the states' civil commitment systems).

33. IND. CODE § 12-26-1-1 (2024).

34. I.C. § 12-26-6-1 (2024).

35. I.C. § 12-26-7-5 (2024).

36. *See, e.g.*, *In re* Commitment of C.N., 116 N.E.3d 544, 545–47 (Ind. Ct. App. 2019).

37. *House Bill 1006: Bill Details*, INDIANA GENERAL ASSEMBLY – 2023 SESSION, https://iga.in.gov/legislative/2023/bills/house/1006/details [https://perma.cc/CP3J-ME6W].

38. 2023 IND. ACTS 3148.

39. I.C. § 12-26-5-1 (2022).

examination or information provided to the physician, that the individual to be detained "may be mentally ill and either dangerous or gravely disabled."[40]

The duration of an emergency detention was limited to seventy-two hours.[41] Within that period, the detaining facility filed a written report with a court of competent jurisdiction stating (1) that the individual had been examined and (2) whether there was probable cause to believe that the individual was "mentally ill and either dangerous or gravely disabled" and in need of "continuing care and treatment."[42]

The court, in turn, would act on the facility's report within twenty-four hours of receipt.[43] If the court found no probable cause to detain the individual, the court would order the detainee's release.[44] If, on the other hand, the court did find probable cause for detainment, the court could order that the individual remain in detention pending a preliminary or final hearing.[45]

The purpose of a preliminary hearing was to establish probable cause justifying detention.[46] If ordered by the court, a preliminary hearing took place within two days of the court's order.[47] The purpose of a final hearing was to determine whether the detainee was, in fact, "in need of temporary or regular commitment."[48] A final hearing took place within either ten days of the preliminary hearing or, if no preliminary hearing was held, within two days of the court's order.[49]

2. The New Statutory Regime.—The old statutory regime remained in force from 1994 until 2023, when the new statutory regime took effect.[50] Now, pursuant to this new regime, a facility may detain an individual for up to forty-eight hours without involving the court.[51] Detainment can continue for up to seventy-two hours if the facility files a detention application with the court within the first forty-eight hours of confinement.[52] That application must contain an attestation, signed by a physician, stating that the detainee has been examined by a physician, an advanced practice registered nurse, or a physician assistant.[53] The attestation must also state that, on the basis of an examination or other information provided to the examiner, "there is probable cause to believe" that (1) "the individual is mentally ill and either dangerous or gravely disabled" and

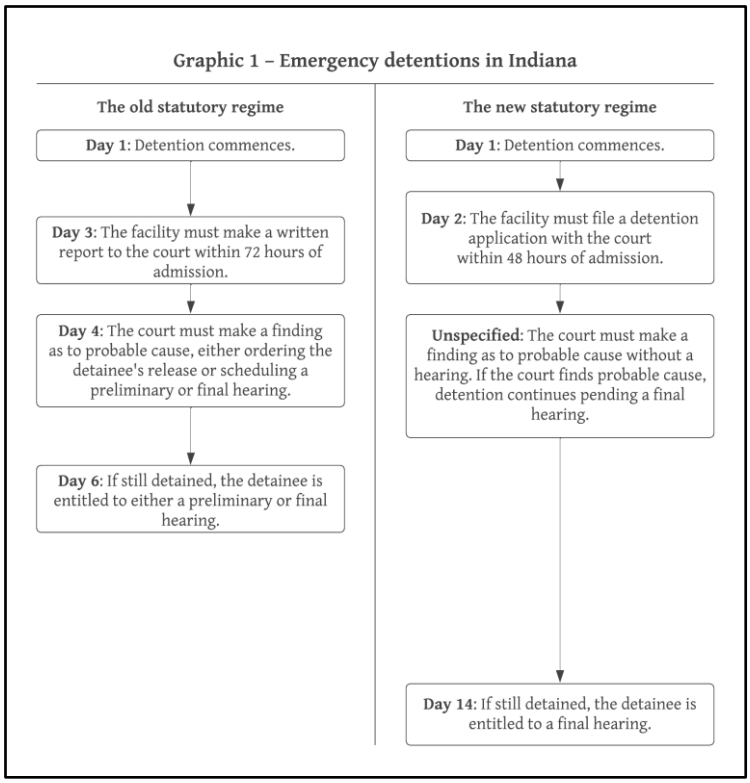
40. *Id.*
41. *Id.*
42. I.C. § 12-26-5-5 (2022).
43. I.C. § 12-26-5-8 (2022).
44. I.C. § 12-26-5-9 (2022).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*; I.C. § 12-26-5-11 (2022).
50. I.C. § 12-26-5-1 (2022) (originally adopted in 1992 and amended in 1993 and 1994).
51. I.C. § 12-26-5-1 (2024).
52. *Id.*
53. *Id.*

(2) "the individual requires continuing involuntary detention to receive care and treatment."[54]

On receiving an application, the court must determine, without conducting a hearing, whether there is probable cause for detention.[55] If the court finds no probable cause, it must order the detainee's release.[56] However, if the court *does* find probable cause, the facility may hold the detainee pending a final hearing.[57] The controlling statute does not specify a deadline by which the court must make its determination as to probable cause.[58]

The new statutory regime dispenses with preliminary hearings altogether. The purpose of a final hearing is "to determine by clear and convincing evidence whether the individual is: (1) mentally ill and either dangerous or gravely disabled; and (2) in need of temporary or regular commitment."[59] A final hearing can take place as late as fourteen days after the date of initial confinement.[60]

The following is a graphic representation of the differences between the old statutory regime and the new.



54. *Id.*
55. I.C. § 12-26-5-9 (2024).
56. *Id.*
57. *Id.*
58. *See id.*
59. I.C. § 12-26-5-11 (2024).
60. *Id.*

C. Due Process

Our respect for the rule of law has as its predicate an abiding faith in its promise that procedural fairness gives rise to substantive justice.[61] This is implicit in the United States Constitution, which twice enjoins governmental actors from deprivations of "life, liberty, or property, without due process of law."[62] The Indiana Constitution, in its guarantee that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law," likewise emphasizes process as the essential mechanism of substantive justice.[63]

The Supreme Court of the United States "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[64] The Court has aptly explained why this is so:

> The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual[.]" . . . Also, "[a]mong the historic liberties" protected by the Due Process Clause is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[65]

Setting aside axiomatic statements about its importance and application, "due process of law" defies easy definition. Justice Felix Frankfurter perhaps put it best:

> '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place[,] and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and

---

61. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2 (1964) ("[A state] is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, *unless* in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.") (emphasis added).

62. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

63. IND. CONST. art. 1, § 12.

64. Addington v. Texas, 441 U.S. 418, 425 (1979).

65. Vitek v. Jones, 445 U.S. 480, 492 (1980) (quoting Addington v. Texas, 441 U.S. 418, 426 (1979); Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

> more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.[66]

There being no easy formula, determining the constitutional sufficiency of process requires careful analysis of both the private and governmental interests involved in a given factual setting.[67] The balancing test articulated in *Mathews v. Eldridge* is instructive. The *Mathews* test turns on three factors:[68]

- The private interest involved;[69]
- The risk that existing process will result in an unwarranted deprivation of that interest, as well as the probable value of additional or alternative process;[70] and
- The government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[71]

Fifty years hence, the *Mathews* test has proved durable; federal courts continue to apply it in a variety of contexts,[72] as do Indiana courts.[73] This Note will therefore make occasional reference to the *Mathews* test as it proceeds in its analysis.

II. TIMELY HEARINGS

A. The Problem: Fourteen Days Without a Hearing

As noted above, the statutes governing emergency detentions now dispense altogether with preliminary hearings.[74] The court must determine, without conducting a hearing, whether there is probable cause justifying detention.[75] If

66. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring).

67. Mathews v. Eldridge, 424 U.S. 319, 334 (1976); *see also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (stressing that due process "calls for such procedural protections as the particular situation demands").

68. *Mathews*, 424 U.S. at 335.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 224–25 (2005) (applying the *Mathews* test in a case concerning a state's policy governing placement in a "supermax" prison); Clancy v. Off. of Foreign Assets Control of U.S. Dep't of the Treasury, 559 F.3d 595, 600 (7th Cir. 2009) ("We apply the *Mathews* test when determining what procedures *are* necessary to ensure that a citizen is not deprived of property without due process of law.").

73. *See, e.g.*, *In re* C.G., 954 N.E.2d 910, 917–19 (Ind. 2011) (applying the *Mathews* test in a case concerning the termination of parental rights); Ruge v. Kovach, 467 N.E.2d 673, 678–81 (Ind. 1984) (applying the *Mathews* test in a case concerning the constitutionality of a statute providing for summary suspension of driver's licenses).

74. 2023 IND. ACTS 3148.

75. IND. CODE § 12-26-5-9 (2024).

the court finds probable cause, the detainee can be held pending a final hearing.[76] That final hearing can take place as late as fourteen days after the date of initial confinement. [77] This change, which is shocking on its face, is all the more startling in light of caselaw, which demonstrates that fourteen days without a hearing is far too long.

First and foremost, in *Matter of Tedesco*, the Indiana Court of Appeals concluded that detainment for fourteen days without a hearing to establish probable cause was unreasonable and, therefore, violative of the right to due process.[78] In this case, Tedesco's father filed a petition for Tedesco's involuntary commitment.[79] The trial court ordered that the sheriff take Tedesco into custody and transport him to a state hospital pending a hearing, which was set for fourteen days later.[80] At that hearing, the trial court ordered Tedesco's commitment.[81] Tedesco appealed, arguing that his pre-hearing detention violated his right to due process.[82] The Court of Appeals agreed.[83] In its analysis of "what process is due and whether [the] procedures provided to Tedesco were adequate," the court applied the *Mathews* balancing test.[84]

The court reasoned that Tedesco's private interest was "twofold."[85] First, he had "a vital interest in being protected from unjustified and significant deprivations of his personal liberty."[86] Second, in view of the "adverse social consequences" that can follow from detainment in a mental hospital, he had "an interest in being protected from any [resulting] stigma."[87]

The court next considered both the risk of erroneous deprivation and the probable value of other procedural safeguards.[88] The court determined that the risk of erroneous deprivation was "relatively high" because the petition prompting the commitment proceedings reflected the opinion of a single physician, "without opportunity for anyone, including the alleged mentally ill individual, to question that opinion."[89] Moreover, "certain procedures, such as a hearing with the alleged mentally ill individual present with counsel, would reduce the risk of an erroneous conclusion" because "[s]uch a procedure would allow the individual or counsel to question the opinion of the physician to [e]nsure that the detention was necessary."[90]

---

76. *Id.*
77. I.C. § 12-26-5-11 (2024).
78. *In re* Tedesco, 421 N.E.2d 726, 730 (Ind. Ct. App. 1981).
79. *Id.* at 727.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 728.
84. *Id.* at 729.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

The court conceded that "the state may sometimes have a compelling interest in emergency detention of persons who threaten violence to themselves or others for the purpose of protecting society and the individual."[91] That interest notwithstanding, the court concluded that Tedesco's right to due process had been violated:[92]

> [I]n light of the significant risk of an erroneous conclusion and the individual's compelling interest in liberty, [an] emergency detention can be justified only for a reasonable length of time in order to arrange for a hearing to determine whether probable cause for the detention exists. In the present case, Tedesco was detained for fourteen days without being afforded such a hearing. We find this period of detainment without a probable cause hearing to be unreasonable. Therefore, we hold that the prehearing detainment of Tedesco violated his due process rights.[93]

The court held that "a probable cause hearing must be afforded the individual within a reasonable time."[94] If a trial court finds probable cause justifying detention, then a full hearing on the merits "must be held as soon after detention as possible, for probable cause does not justify a prolonged period of confinement without a full hearing."[95]

Tedesco remains good law. Our courts have cited it as recently as 2017,[96] and its central holdings have gone uncontested.[97] And *Tedesco* precludes on constitutional grounds precisely what is now purportedly sanctioned by statute: confinement for up to fourteen days without a hearing of any sort.

In reaching these conclusions, the *Tedesco* court relied heavily on the reasoning of *Lessard v. Schmidt*, an influential decision that struck down much of Wisconsin's commitment system. The *Lessard* court held, in pertinent part, that the subject of a commitment action is entitled to a preliminary hearing within forty-eight hours of initial confinement:[98]

> [W]e believe that the maximum period which a person may be detained without a preliminary hearing is 48 hours. It must be remembered that

---

91. *Id.* at 730 (quoting Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972)).

92. *Id.*

93. *Id.* (citation omitted).

94. *Id.*

95. *Id.*

96. K.J. v. State, No. 18A02-1607-MH-1610, 2017 WL 192876, at *6 (Ind. Ct. App. Jan. 18, 2017) (unpublished mem. decision) (noting that *Tedesco*, which "considered only the time limitations for conducting an initial hearing when committing an individual," was inapplicable to the instant case, which concerned "the statutorily-mandated annual review of [K.J.'s] case").

97. *See, e.g.*, M.E. v. V.A. Med. Ctr., 957 N.E.2d 637, 639 (Ind. Ct. App. 2011); Commitment of C.A. v. Ctr. for Mental Health, 776 N.E.2d 1216, 1217 (Ind. Ct. App. 2002).

98. Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972) (vacated and remanded on procedural grounds).

> at this time the necessity for commitment of an individual has not yet been established. Those who argue that notice and a hearing at this time may be harmful to the patient ignore the fact that there has been no finding that the person is in need of hospitalization. The argument also ignores the fact that even a short detention in a mental facility may have long lasting effects on the individual's ability to function in the outside world due to the stigma attached to mental illness.[99]

In the years following *Lessard*, courts across the country issued decisions concerning the timeliness of commitment hearings, and many of those decisions bear *Lessard*'s unmistakable imprint.[100] More recent decisions, although less reliant on *Lessard*, also recognize that the timeliness of hearings is a central due process concern.[101]

It is true that a consensus as to the exact interval between initial confinement and a hearing has yet to emerge. However, one ought not misconstrue this divergence of opinion as evidence that the states retain unfettered discretion. After all, the decisions clearly suggest a range of constitutionally permissible intervals, from forty-eight hours on the low end to seven days on the high end.[102] State statutes reflect this same range.[103] Fourteen days, falling far outside it, is simply too long to pass constitutional muster.

B. The Solution: A Hearing Within Seven Days

Regrettably, the *Tedesco* court stopped short of "specify[ing] the precise length of time an individual may be [confined] before a probable cause hearing must be held."[104] The Supreme Court of the United States has likewise failed to prescribe clear requirements as to the timing of commitment hearings.[105]

---

99. *Id.* (footnote omitted).

100. *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) ("In no event may [an emergency detention] in the absence of a probable cause hearing exceed seven (7) days from the date of the initial detention."); Doe v. Gallinot, 486 F. Supp. 983, 994 (C.D. Cal. 1979) (holding that "due process requires a probable cause hearing after the 72-hour emergency detention period for persons alleged to be gravely disabled"); State *ex rel.* Doe v. Madonna, 295 N.W.2d 356, 365 (Minn. 1980) (holding that "a preliminary probable cause hearing must be held within 72 hours after confinement").

101. *See, e.g.*, N.M. Dep't of Health v. Compton, 34 P.3d 593, 600 (N.M. 2001) (holding that a statutory seven-day hearing requirement in proceedings for thirty-day commitments was "constitutional on its face").

102. *See Madonna*, 295 N.W.2d at 365 ("There is no consensus in the courts as to the maximum time limits between initial confinement and a probable cause hearing that will not violate due process. The tendency, however, has been to shorten the delay before a preliminary hearing, and, for example, certain courts have suggested that the maximum delay is 96–120 hours or even as limited a period as 48 hours.") (citations omitted).

103. *See, e.g.*, Lederer, *supra* note 31, at 919 (noting that at least eight states require hearings within seventy-two hours while at least five states require hearings within five to seven days).

104. *In re* Tedesco, 421 N.E.2d 726, 730 (Ind. Ct. App. 1981).

105. *See, e.g.*, Lederer, *supra* note 31, at 914 (observing that "the Court has offered little guidance" as to the procedural limits of the commitment power).

In the absence of clear and controlling precedents, the law of surrounding states can be illuminating. The table below summarizes the law governing the timeliness of hearings in Indiana and four neighboring states: Illinois, Kentucky, Michigan, and Ohio.[106]

Table 1 — Provision of hearings in emergency detentions: selected comparisons

	Initial detention	Preliminary (probable cause) hearing	Final (merits) hearing	Total possible time without a hearing
Indiana	The facility can detain the individual up to 2 days without the court's permission.[107] The facility can detain the individual up to 3 days if it files a detention application with the court.[108]	None; the court makes a finding as to probable cause without a hearing.[109]	A hearing to determine whether an individual should be committed on a temporary or regular basis must be held within 14 days of initial confinement.[110]	14 days.[111]
Illinois	The facility can detain the individual up to 1 day without the court's permission.[112]	None.	A hearing to determine whether the individual should be involuntarily committed must be held within 5 days of the court's receipt of a petition for involuntary commitment.[113]	6 days.[114]

106. Note that these comparisons are necessarily somewhat imperfect because no two states impose identical requirements for emergency detentions. Conceptual frameworks vary, as does even the language used to describe commitment actions. In collecting and presenting the below information, the author has taken pains to account for these differences in order to facilitate fitting comparisons.

107. IND. CODE § 12-26-5-1 (2024).

108. *Id.*

109. I.C. § 12-26-5-9 (2024).

110. I.C. § 12-26-5-11 (2024).

111. *Id.*

112. 405 ILL. COMP. STAT. 5/3-611 (2024).

113. *Id.*; *In re* Lanter, 576 N.E.2d 1219, 1220 (Ill. App. Ct. 1991).

114. This is inferred by reading 405 ILL. COMP. STAT. 5/3-611 and 405 ILL. COMP. STAT. 5/3-611 in conjunction.

Kentucky	The facility can detain the individual up to 3 days without the court's permission.[115]	A hearing to establish probable cause for continued confinement must be held within 6 days of initial confinement.[116]	A final hearing to determine whether the individual should be committed must be held within 21 days of initial confinement.[117]	6 days.[118]
Michigan	The facility can detain the individual up to 1 day without the court's permission.[119]	None; if the examining physician or psychologist executes a clinical certificate, confinement can continue pending a final hearing.[120]	A final hearing to determine whether the individual is in need of treatment must be held within 7 days of the court's receipt of a petition and clinical certificate(s).[121]	8 days.[122]
Ohio	The facility can detain an individual up to 3 days if it files an affidavit alleging that the individual is "a person with a mental illness subject to court order."[123]	None as a matter of right; a court may make a finding as to probable cause without a hearing.[124]	A hearing to determine whether the individual is "a person with a mental illness subject to court order" must be held within 5 days of initial confinement or the filing of the affidavit, whichever occurs first.[125]	5 days.[126]

In Ohio, the detainee is entitled to a hearing on the merits within five days of either initial confinement or the filing of the affidavit alleging the detainee to

115. KY. REV. STAT. § 202A.031 (2024).
116. KY. REV. STAT. § 202A.071 (2024).
117. *Id.*
118. *Id.*
119. MICH. COMP. LAWS § 330.1429 (2024).
120. *Id.*
121. MICH. COMP. LAWS § 330.1452 (2024).
122. This is inferred by reading MICH. COMP. LAWS § 330.1429 and MICH. COMP. LAWS § 330.1452 in conjunction.
123. OHIO REV. CODE §§ 5122.10–.11 (2024).
124. *Id.* § 5122.11.
125. OHIO REV. CODE § 5122.141 (2024).
126. *Id.*

be "a person with a mental illness subject to court order," whichever occurs first.[127] In both Illinois and Kentucky, the detainee is entitled to a hearing of some sort within six days of initial confinement.[128] In Michigan, a hearing on the merits must be set within eight days of the detainee's initial confinement.[129] Indiana lags far behind, affording the detainee a hearing within fourteen days of his or her initial confinement.[130] This disparity is deeply troubling. Fortunately, it is also easily remedied.

First, a hearing should occur no more than seven days out from the date of initial confinement. From a clinical perspective, a seven-day interval constitutes a major extension as compared to the three-day interval imposed by the old statutory regime, and that extension may benefit some detainees. Although "many patients with psychiatric needs can be evaluated, stabilized, and discharged within 72 hours," there is some evidence that "72-hour and other short-term holds may foster neglect of patients and ineffective churn in mental health settings."[131] A seven-day detention, by contrast, affords clinicians more time "to better observe their [patients'] clinical needs and to provide necessary care."[132] From a legal perspective, there is considerable support for the proposition that a seven-day interval meets the requirements of due process.[133] Moreover, as demonstrated above, a seven-day interval more closely aligns with the law of surrounding states.[134]

Second, a detainee ought to be able to obtain an earlier hearing upon request, and that hearing should be held within forty-eight hours of the court's receipt of the request. Such provisions are not uncommon, especially in states that conduct relatively late hearings.[135] This guarantees that any detainee eager to contest the grounds of detention is granted a prompt opportunity to do so.[136]

---

127. *Id.*

128. 405 ILL. COMP. STAT. 5/3-611 (2024); *In re* Lanter, 576 N.E.2d 1219, 1220 (Ill. App. Ct. 1991); KY. REV. STAT. § 202A.071 (2024).

129. MICH. COMP. LAWS §§ 330.1452, .1429 (2024).

130. IND. CODE § 12-26-5-11 (2024).

131. Nathaniel P. Morris, *Reasonable or Random: 72-Hour Limits to Psychiatric Holds*, 72 PSYCHIATRIC SERVICES 210, 211 (2021).

132. *Id.*

133. *See, e.g.*, N.M. Dep't of Health v. Compton, 34 P.3d 593, 600 (N.M. 2001) (holding that "the seven-day hearing requirement [in proceedings for thirty-day commitments] is constitutional on its face"); Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) ("In no event may [an emergency detention] in the absence of a probable cause hearing exceed seven (7) days from the date of the initial detention."); Lederer, *supra* note 31, at 919 (noting that at least thirteen states require hearings within seven days).

134. *See supra* notes 127–130 and accompanying text.

135. *See, e.g.*, N.Y. MENTAL HYGIENE LAW § 9.39 (McKinney2024) (providing that the subject of an emergency admission can petition the court for what is, in essence, a probable cause hearing, and that such hearing must be held no more than five days out from the court's receipt of the request).

136. *See, e.g.*, Project Release v. Prevost, 722 F.2d 960, 975 (2d Cir. 1983) (holding that "the New York State Mental Hygiene Law's elaborate notice and hearing provisions, including notice to relatives and others designated by the patient, *and the availability of a judicial hearing within five days of demand*" satisfy the dictates of due process) (emphasis added).

Finally, a preliminary hearing ought to be available as a matter of right. Although some of Indiana's sister states (including Illinois, Michigan, and Ohio) forgo preliminary hearings in favor of accelerated final hearings, preliminary hearings constitute a critical procedural safeguard for detainees because they afford the detainee a unique opportunity both to hear the evidence offered in support of detention and to rebut that evidence.[137] Accordingly, courts across the country have suggested that a preliminary hearing is an essential element of due process in commitment proceedings.[138] Although preliminary hearings need not be as formal as final hearings on the merits of commitment, they are subject to some foundational requirements:[139]

> At the very least . . . due process does require that the hearing be preceded by adequate notice informing the person (or his counsel) of the factual grounds upon which the proposed commitment is predicated and the reasons for the necessity of confinement; that the person be represented by counsel, appointed if necessary; and that the person proposed to be committed be present at the hearing unless his presence is waived by counsel and approved by the court after an adversary hearing at the conclusion of which the court judicially finds and determines that the detainee is so mentally or physically ill as to be incapable of attending the probable cause hearing.[140]

III. THE DETAINED PERSON'S RIGHTS

A. The Problem: No Express Delineation of the Detainee's Rights

A hearing by itself, no matter how timely, does precious little for the detainee who—unaided by counsel and ill-apprised of his right to appear, to testify in his own behalf, and to confront the witnesses against him—is disempowered to participate meaningfully.[141] The importance of these

137. *See, e.g.*, *In re* Tedesco, 421 N.E.2d 726, 729 (Ind. Ct. App. 1981) (noting that a preliminary hearing for the purpose of establishing probable cause "allow[s] the individual or counsel to question the opinion of the physician [alleging mental illness justifying detention] to [e]nsure that the detention was necessary").

138. *See, e.g.*, *Lynch*, 386 F. Supp. at 388 ("Emergency detention without a hearing on its appropriateness and necessity can be justified only for the length of time required to arrange a probable cause hearing before the probate judge or other judicial officer empowered by law to commit persons to [state] mental institutions."); *In re* Barnard, 455 F.2d 1370, 1374 (D.C. Cir. 1971) ("[W]e believe that where a person, said to be mentally ill and dangerous, is involuntarily detained, he must be given a hearing within a reasonable time to test whether the confinement is based upon probable cause.").

139. *Lynch*, 386 F. Supp. at 388.

140. *Id.*

141. *See, e.g.*, A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606, 618 (Ind. 2018) ("This [case] highlights the importance of a respondent's right to appear at an involuntary-commitment proceeding. If present, A.A. could have voiced concerns on issues like adverse side

participatory rights is reflected in the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[142]

The Indiana Constitution makes similar assurances:

> In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.[143]

Although these constitutional provisions apply directly only in criminal prosecutions,[144] the protections therein are as essential to the subject of a commitment action as to the criminal defendant because the interests implicated in commitment actions and criminal proceedings are much the same. Both commitment and imprisonment constitute a "tremendous intrusion on personal liberty and autonomy," as both involve forcible confinement, restraint, and isolation.[145] In implicit recognition of this fact, lawmakers in every state have enacted procedural protections for committed persons that are often closely akin to those guaranteed to criminal defendants.[146]

Indiana is no exception. The statutory rights afforded to subjects of involuntary mental health treatment are consonant with the constitutional rights afforded to criminal defendants.[147] Ind. Code Section 12-26-2-2 furnishes the subject with the right to receive notice of hearings and copies of petitions and orders, to be present at hearings, and to be represented by counsel.[148] Ind. Code Section 12-26-2-3 confers the right to testify and to present and cross-examine

---

effects of forced medications; assisted his counsel in cross-examining witnesses, such as family members; and offered mitigating evidence."); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950) ("[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

142. U.S. CONST. amend. VI.

143. IND. CONST. art. 1, § 13.

144. *See, e.g.*, *In re* V.H., 996 N.W.2d 530, 538–39 (Iowa 2023) (holding that the Sixth Amendment does not apply in civil commitment proceedings and noting a dearth of federal cases to the contrary).

145. *A.A.*, 97 N.E.3d at 608.

146. WINICK, *supra* note 25, at 162–64 (listing citations to statutory procedures for commitment hearings in the 50 states and the District of Columbia).

147. IND. CODE §§ 12-26-2-1–9 (2024).

148. I.C. § 12-26-2-2 (2024).

witnesses.[149] The rights delineated in these two statutes are expressly applicable in actions and proceedings arising under Ind. Code Sections 12-26-6 (temporary commitments), 12-26-7 (regular commitments), 12-26-12 (discharges), and 12-26-15 (reviews); however, neither Ind. Code Section 12-26-2-2 nor Section 12-26-2-3 make any reference whatsoever to Ind. Code Section 12-26-5, which governs emergency detentions.[150] These omissions imply that the two statutes do not apply in emergency detentions.

In *A.A. v. Eskenazi Health/Midtown CMHC*, the Indiana Supreme Court had occasion to consider the effect of these omissions. This case concerned an adult male whose mother, troubled by his erratic behavior, sought to have him committed.[151] In an application for emergency detention, the mother stated that her son suffered from a psychiatric disorder.[152] She said he "wasn't sleeping, was going outside and making disruptive noises, and wanted to fight family members."[153] Two days later, a trial court ordered the son's emergency detention.[154] In a subsequent report to the court, a physician recommended regular involuntary commitment.[155]

The commitment hearing proceeded in the son's absence.[156] The son, according to his attorney, was not brought to the hearing because he was "agitated."[157] The attorney waived the son's right of appearance.[158] A physician testified as to the son's "menacing" and "aggressive" conduct, reporting that hospital staff had at times found it necessary to apply restraints and administer sedatives.[159] The mother said her son's behavior sometimes caused her to fear for her safety.[160] The son's attorney presented no evidence.[161] The trial court concluded that the son was "gravely disabled" by reason of mental illness and ordered his regular involuntary commitment.[162]

The Indiana Supreme Court vacated the commitment order, holding that, although the respondent in a commitment proceeding "can personally waive the right to appear if the waiver is knowing, intelligent, and voluntary," the respondent's attorney "cannot waive the right by proxy."[163] In a footnote, the court acknowledged that Ind. Code Section 12-26-2-2, which provides for the right of appearance, "does not directly refer to the emergency detention

149. I.C. § 12-26-2-3 (2024).
150. I.C. §§ 12-26-2-2(a)–12-26-2-3(a) (2024).
151. A.A. v. Eskenazi Health/Midtown C.M.H.C., 97 N.E.3d 606, 609 (Ind. 2018).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 618.

statutes."[164] However, the court concluded that the "commitment statutes as a whole . . . make clear that the rights listed in that section do apply to preliminary and final hearings for respondents in emergency detentions."[165] The court noted that, "once the detaining facility files [the report required by the emergency detention statutes], the trial court must quickly either order the individual released or set a preliminary or final hearing."[166] Because both preliminary and final hearings "involve determining whether temporary or regular commitment is appropriate," the court reasoned that one is entitled to the rights delineated in Ind. Code Section 12-26-2-2 as soon as either a preliminary or final hearing has been set.[167]

However, the ultimate effect of the court's pronouncement here is unclear for two reasons. First, it may be nothing more than mere *obiter dictum*, appearing as it does in a footnote to the court's opinion.[168] The Indiana Court of Appeals has made the point, plainly and categorically: "As always, it should be remembered that we do not decide issues in footnotes."[169] The Indiana Supreme Court has made the same point plainly, if somewhat less categorically.[170]

Second, even assuming *arguendo* that the *A.A.* footnote is binding, its sweep is unclear. The footnote is unambiguous insofar as Ind. Code Section 12-26-2-2 is concerned: "[O]nce a preliminary or final hearing has been set for an individual in emergency detention, that individual is afforded the statutory rights in Indiana Code Section 12-26-2-2, including the right to be present."[171] But what about Ind. Code Section 12-26-2-3? Narrowly construed, the footnote does not reach Ind. Code Section 12-26-2-3 (i.e., the footnote makes no explicit statement that an emergency detainee must be afforded the rights in Ind. Code Section 12-26-2-3). However, the rights established in Ind. Code Section 12-26-2-2 have little meaning if isolated from the rights established in Ind. Code Section 12-26-2-3. The right to appear is rendered utterly hollow if the detainee cannot testify in his own behalf, call witnesses, and cross-examine the witnesses against him.

---

164. *Id.* at 612 n.2.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *obiter dictum* as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

169. Sw. Allen Cnty. Fire Prot. Dist. v. City of Fort Wayne, 142 N.E.3d 946, 956 (Ind. Ct. App. 2020); *see also* Hillebrand v. Supervised Est. of Large, 914 N.E.2d 846, 850 (Ind. Ct. App. 2009) (noting that "a footnote's legal value is merely dicta at best").

170. *See, e.g.*, Montgomery v. Bd. of Tr. of Purdue Univ., 849 N.E.2d 1120, 1130 (Ind. 2006) (noting that a footnote from an earlier opinion was *dictum* and, as such, "not binding on this Court"); Hyundai Motor America, Inc. v. Goodin, 822 N.E.2d 947, 953–54 (Ind. 2005) (dismissing as *dictum* an oft-cited footnote from an earlier opinion).

171. *A.A.*, 97 N.E.3d at 612 n.2.

B. The Solution: Express Delineation of the Detainee's Rights

In light of these ambiguities, the statutes are in desperate need of amendment. Surrounding states offer useful models for reform. The table below summarizes the statutes delineating an emergency detainee's rights in Indiana and four neighboring states: Illinois, Kentucky, Michigan, and Ohio.

Table 2 — Delineation of the detainee's rights: selected comparisons

	Express advisement of rights	**Right to counsel**	**Right to notice**	**Right to appear, to testify, and to cross-examine witnesses**
Indiana	None.[172]	Unspecified.[173]	Unspecified.[174]	Unspecified.[175]
Illinois	Within 12 hours of admission, the detainee is entitled to a written statement of rights.[176]	Right to counsel, either retained or appointed (if the detainee is indigent).[177]	The detainee is entitled to a copy of the petition seeking admission and notice of hearings.[178]	Right to appear;[179] right to testify and to cross-examine witnesses, although unspecified, is arguably implicit.
Kentucky	None.[180]	Unspecified.[181]	Unspecified.[182]	Right to appear;[183] right to testify and to cross-examine witnesses.[184]
Michigan	Within 4 days of the court's receipt of a	Right to counsel, either retained or appointed.[186]	Within 4 days of the court's receipt of a	Right to appear;[188] right to testify and to

172. *See, e.g.*, IND. CODE § 12-26-2-2 (2024).
173. *Id.*
174. *Id.*
175. I.C. § 12-26-2-3 (2024).
176. 405 ILL. COMP. STAT. 5/3-205 (2024).
177. 405 ILL. COMP. STAT. 5/3-805 (2024).
178. 405 ILL. COMP. STAT. 5/3-611 (2024).
179. 405 ILL. COMP. STAT. 5/3-806 (2024).
180. KY. REV. STAT. § 202A.191 (2024) (delineating certain *non-legal* rights without making provision for an express advisement of even those rights).
181. KY. REV. STAT. § 202A.121 (2024) (providing explicitly for the right to counsel in proceedings for 60-day commitments, 360-day commitments, and commitments prompted by warrantless arrests).
182. *See* KY. REV. STAT. § 202A.071 (2024) (providing for the timing of preliminary and final hearings, without reference to notice requirements).
183. KY. REV. STAT. § 202A.131 (2024).
184. KY. REV. STAT. § 202A.076 (2024).
186. MICH. COMP. LAWS § 330.1454 (2024).
188. MICH. COMP. LAWS § 330.1455 (2024).

	petition seeking admission, the detainee is entitled to notice of rights.[185]		petition seeking admission, the detainee is entitled to a copy of the petition and notice of hearings.[187]	cross-examine witnesses, although unspecified, is arguably implicit.
Ohio	None.[189]	Right to counsel, either retained or appointed (if the detainee is not indigent, the detainee may be taxed the costs of appointed counsel).[190]	The detainee is entitled to a copy of the affidavit alleging that the detainee is "a person with a mental illness subject to court order" and notice of hearings.[191]	Right to appear; right to testify and to cross-examine witnesses.[192]

At a minimum, the scope of both Ind. Code Sections 12-26-2-2 and 12-26-2-3 should be enlarged to encompass emergency detentions. These easy amendments would clear any confusion as to the detainee's rights. Properly enlarged, Ind. Code Sections 12-26-2-2 and 12-26-2-3 would affirm that the emergency detainee is shielded by the same rights afforded in proceedings for temporary and regular commitments: (1) the right to representation, (2) the right to receive notice of hearings and copies of petitions and court orders, (3) the right to be present, and (4) the right to testify, to call witnesses, and to cross-examine opposing witnesses.

Moreover, Ind. Code Section 12-26-2-2 ought to provide for the appointment of counsel, at least in cases involving indigent detainees. This would be in keeping with most of our sister states. In Illinois, the court is obligated to appoint counsel if "the respondent [in a commitment proceeding] is indigent or an appearance has not been entered on his behalf at the time the matter is set for hearing."[193] In Michigan, the court must appoint counsel within twenty-four hours of an individual's hospitalization unless an attorney has already entered an appearance on that individual's behalf.[194] In Ohio, the court

185. MICH. COMP. LAWS § 330.1453 (2024).

187. MICH. COMP. LAWS § 330.1453 (2024).

189. OHIO REV. CODE § 5122.29 (2024) (delineating certain *non-legal* rights without making provision for an express advisement of even those rights).

190. OHIO REV. CODE § 5122.141 (2024) (establishing that the detainee is entitled to counsel as provided in OHIO REV. CODE § 5122.15).

191. OHIO REV. CODE § 5122.12 (2024).

192. OHIO REV. CODE § 5122.141 (2024) (providing that a hearing "to determine whether or not the [detainee] is a person with a mental illness subject to court order" is to be conducted in accordance with OHIO REV. CODE § 5122.15, which delineates the detainee's right to appear, to testify, and to cross-examine witnesses).

193. 405 ILL. COMP. STAT. 5/3-805 (2024).

194. MICH. COMP. LAWS § 330.1454 (2024).

is obligated to appoint counsel if the subject of a commitment proceeding "is not represented by counsel, is absent from the hearing, and has not validly waived the right to counsel."[195] The failure of Ind. Code Section 12-26-2-2 to make adequate provision for the detainee's right to counsel is indefensible in light of Ind. Code Section 12-26-2-5, which provides, in some detail, for the *petitioner's* right to counsel.[196] Indeed, Ind. Code Section 12-26-2-5 goes so far as to authorize the appointment of counsel on a showing of the petitioner's indigency.[197] If the party seeking the detainee's commitment is sometimes entitled to appointment of counsel, then surely the party whose liberty is at stake is owed the same.

One last simple prophylactic measure is in order: an express advisement of the detainee's rights, to be given to the detainee in writing within twenty-four hours of initial confinement. There is ample precedent for such advisements, both among our neighboring states and farther afield.[198] The advisement need not be cumbersome, even assuming incorporation of the aforementioned reforms. The following language would suffice:

> If you feel you have been wrongfully detained, you can contest the grounds of your detention at a court hearing. This hearing will take place within seven days by default. If you would like an earlier hearing, you or your attorney can make a written request to the court, which must then schedule a hearing within forty-eight hours.
>
> You have the right to an attorney. If you cannot afford an attorney, the court will provide one to represent you. You have the right to receive notice of hearings and copies of any papers related to your case. You have the right to be present at your hearing. You have the right to testify at your hearing. You have the right to present your own witnesses, and you have the right to ask questions of opposing witnesses.

195. OHIO REV. CODE § 5122.141 (2024) (establishing that a detainee is entitled to counsel as provided in OHIO REV. CODE § 5122.15); *Id.* § 5122.15 (2024).

196. IND. CODE § 12-26-2-5 (2024).

197. *Id.*

198. *See, e.g.*, 405 ILL. COMP. STAT. 5/3-205 (2024) (mandating that the director of a mental health facility must furnish the subject of an involuntary commitment with "a clear and concise written statement explaining the person's legal status and his right to counsel and a court hearing"); MICH. COMP. LAWS § 330.1453 (2024) (requiring that the court furnish the subject of an involuntary commitment with "notice of the right to a full court hearing, notice of the right to be present at the hearing, notice of the right to be represented by legal counsel, notice of the right to demand a jury trial, and notice of the right to an independent clinical evaluation"); VT. STAT. TIT. 18, § 7613 (2024) (providing that, when an application for involuntary commitment is filed, the court must transmit to the "proposed patient" notice of the hearing, which "shall contain a list of the proposed patient's rights at the hearing").

IV. Fiscal and Administrative Burdens to the State

One may argue that the reforms proposed in this Note (namely, the provision of more timely hearings, the delineation of the detainee's rights, and advisement of those rights) might unduly burden the state. It is true that, pursuant to *Mathews*, courts confronted with due process challenges must consider both the private interest at stake and the governmental interest, which includes "the fiscal and administrative burdens that [any] additional or substitute procedural requirement would entail."[199] However, as explained below, any heightened fiscal and administrative burdens occasioned by the proposed reforms are outweighed by the detainee's liberty interest.

Requiring a hearing within seven days as opposed to fourteen may force the state to shoulder heightened fiscal and administrative burdens. However, these burdens pale in comparison to the detainee's liberty interest. Criminal procedure makes for a fitting analogy because, as noted elsewhere in this Note, the interests implicated in commitment actions and criminal proceedings are much the same (both represent a "tremendous intrusion on personal liberty and autonomy," involving forcible confinement, restraint, and isolation).[200] As a general matter, a state must furnish a criminal defendant with "a fair and reliable determination of probable cause as a condition for any significant [pre-trial] restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."[201] Of course, multiplying pre-trial proceedings and otherwise "introducing further procedural complexity into an already intricate system" burdens the state.[202] Nevertheless, confinement constitutes a profound "restraint of liberty," which may "imperil the [arrestee's] job, interrupt his source of income, and impair his family relationships."[203] The balance of interests, therefore, tips in favor of the defendant. Accordingly, if a state fails to facilitate a determination as to probable cause within forty-eight hours of arrest, then it must "demonstrate the existence of a *bona fide* emergency or other extraordinary circumstance."[204] In a commitment proceeding, the balance of interests likewise tips in favor of the detainee.

As for the delineation of the detainee's rights, the minimum amendments outlined above amount to mere *clarification*, affirming that the detainee is shielded by the same rights as the subject of a temporary or regular commitment. These are likely to impose negligible fiscal and administrative burdens on the state.[205] This Note also proposes that indigent detainees be provided with

199. Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

200. A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606, 608 (Ind. 2018).

201. Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

202. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991).

203. *Gerstein*, 420 U.S. at 114.

204. *McLaughlin*, 500 U.S. at 57.

205. *See, e.g.*, Edward W. v. Lamkins, 122 Cal. Rptr. 2d 1, 23 (Cal. Ct. App. 2002) (holding that "a routine practice of seeking notice waivers in temporary conservatorships violates the proposed conservatees' right to due process," noting "the relatively small costs associated with providing notice in most cases").

appointed counsel, and, admittedly, such provision will burden the state.[206] However, in light of the weight of the detainee's liberty interest, this burden is warranted. Again, criminal procedure provides an apt point of comparison. A criminal defendant's right to counsel is "fundamental and essential" to a fair trial.[207] The "noble ideal" of equality before the law "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[208] An indigent defendant is, therefore, constitutionally entitled to appointment of counsel, notwithstanding the burden such appointment imposes on the state.[209] The same should go for the subject of a commitment proceeding, whose liberty interest is imperiled in much the same manner as that of the criminal defendant.

Lastly, it is difficult, if not impossible, to quantify the extent to which an advisement of the detainee's rights is likely to burden the state.[210] However, assuming *arguendo* that an advisement constitutes a significant burden for the state, the weight of the detainee's liberty interest is sufficient to counter it. Consider the *Miranda* warning, which is closely akin to the advisement envisioned in this Note. A criminal defendant subjected to custodial interrogation "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[211] This necessarily adds somewhat to "the burdens which law enforcement officials must bear, often under trying circumstances."[212] Still, it does not constitute "an undue interference with a proper system of law enforcement."[213] Because the privilege against self-incrimination "is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple," a universal warning requirement is altogether appropriate.[214] Similarly, the detainee's liberty interest is so "fundamental," and an express advisement of rights "so simple," as to warrant whatever burden such an advisement imposes on the state.

---

206. *See, e.g.*, Tonya L. Brito et al., *What We Know and Need to Know About Civil* Gideon, 67 S.C. L. REV. 223, 239 ("In debates about how best to address the civil justice gap, it is often taken for granted that the cost of providing counsel to economically needy pro se litigants will be prohibitive. This assumption may be in part due to the sheer magnitude of the civil justice gap and the projected costs of providing counsel to needy litigants. . . . However, existing studies suggest that the provision of representation in civil cases can in fact provide both direct and indirect economic benefits that offset costs.").

207. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

208. *Id.*

209. *Id.* at 345.

210. *See, e.g.,* Fred E. Inbau & James P. Manak, Miranda v. Arizona*—Is it Worth the Cost? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 24 CALIF. W. L. REV. 185, 190 (1987) ("As is true with regard to the trial court expenditure of time and effort, there is no way by which the overall *monetary costs* produced by *Miranda* could be assessed.").

211. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

212. *Id.* at 481.

213. *Id.*

214. *Id.* at 468.

CONCLUSION

The Supreme Court of the United States, in holding that the standard of proof in civil commitment proceedings must be "greater than the preponderance of the evidence standard applicable to other categories of civil cases,"[215] made a powerful point that bears repeating in full:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior.
> . . .
>
> *The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state*.[216]

This Note has argued, in essence, that the statutes governing emergency detentions in Indiana disregard this admonishment and force the individual to shoulder a disproportionate share of the risk of wrongful confinement. This is so for at least two reasons: first, the statutes fail to provide for prompt hearings, denying the detainee a meaningful opportunity to contest the grounds of detention in a timely manner; second, the statutes fail both to delineate the detainee's procedural rights and to ensure that the detainee is advised of those rights. This Note has proposed simple statutory reforms to remedy these defects.

These reforms would empower the detainee, and that is a desirable end in itself. However, the benefits of these reforms would accrue not only to the detainee, but to society at large. Ours is an adversarial system, and rights are akin to armor. When well-armed opponents confront one another in court on equal footing, a just and equitable outcome is made more likely. The moral force of the law itself, in effecting such outcomes, is strengthened, and our faith in the law is reinforced. And we all reap the rewards of that reinforced faith.

215. Addington v. Texas, 441 U.S. 418, 433 (1979).
216. *Id.* at 426–27 (emphasis added).

"UNWAIVERING" JUSTICE: HOW INDIANA SHOULD BALANCE FAIRNESS AND FINALITY BY LIMITING WAIVERS OF SENTENCE APPEALS

SARAH FAULKNER*

INTRODUCTION

In 2022, the Indiana criminal justice system disposed of cases through guilty plea or admission in more than 110,000 cases—twenty-eight times for every one jury or bench trial.[1] Or, as Justice Anthony Kennedy said, "[C]riminal justice today is for the most part a system of pleas, not a system of trials."[2]

This system of pleas applied to the case of Joseph Hook.[3] Hook took a plea agreement in 2022, pleading guilty to two Level 4 felonies.[4] The plea agreement did not contain a sentencing recommendation, but it did state that Hook would serve his individual sentences concurrently.[5] At Hook's guilty plea hearing—but prior to acceptance of Hook's guilty plea—the trial court addressed Hook.[6] The judge informed Hook of the rights he waived by pleading guilty and stated, "[Y]ou give up your right to appeal the convictions. *You are not agreeing to your sentences, so you don't give up your right to appeal your sentences*, but you are pleading guilty to two charges, and you give up your right to appeal those convictions . . . ."[7]

The trial court's admonishment contradicted a term in Hook's written plea agreement, which stated:

> By entering into this agreement, you are expressly waiving your right to such appeal under Appellate Rule 7, and are expressly waiving your right to appeal your sentence on the basis that it is erroneous or otherwise challenge the appropriateness of your sentence, or on the basis that the court abused its discretion so long as the Judge sentences you within the terms of this plea agreement.[8]

Despite the trial judge's statement to Hook contradicting Hook's written plea agreement with the State, the Indiana Court of Appeals decision made no

---

* J.D. Candidate, 2026, Indiana University Robert H. McKinney School of Law; B.A., 2019, Purdue University, with gratitude to Isra Haider and Professor Joel Schumm.

1. *Indiana Trial Court Statistics by County*, IND. JUD. BRANCH, https://publicaccess.courts.in.gov/ICOR [https://perma.cc/8JPJ-K3V6] (last visited Oct. 21, 2023) (showing 110,805 cases in 2022 disposed of via guilty plea/admission compared to 911 cases disposed of via jury trial and 2,973 disposed of via bench trial, not including juvenile delinquency cases).

2. Lafler v. Cooper, 566 U.S. 156, 168 (2012).

3. *See generally* Hook v. State, No. 23A-CR-820, 2023 WL 8946141 (Ind. Ct. App. Dec. 28, 2023).

4. *Id.* at *2.

5. *Id.*

6. *Id.* at *1.

7. *Id.*

8. *Id.*

mention of any objection by the State to this erroneous admonishment at the guilty plea hearing.[9] State objection to this judicial admonishment was not noted until six months later, when the trial court made a similar statement that Hook had a right to appeal his sentence at Hook's sentencing hearing.[10] After the State's objection, the trial court for the third time advised Hook that he had a right to appeal his sentence and, three days later, appointed Hook appellate counsel at Hook's request.[11]

Hook argued on appeal that his guilty plea was not entered into knowingly and voluntarily when the trial court specifically misadvised him.[12] The State first filed a motion to dismiss the appeal.[13] The Indiana Court of Appeals motions panel denied that motion.[14] The State then cross-appealed, arguing that Hook waived his right to directly appeal his sentence.[15] In December of 2023, more than five years after the State initially charged Hook and fifteen months after the trial court accepted his plea agreement, the Indiana Court of Appeals dismissed Hook's appeal.[16] The court held that Hook's only remedy for challenging the sentence—a sentence which the trial court explicitly told him three times he could appeal—was for Hook to seek post-conviction relief.[17] Such relief, if granted, would set aside Hook's plea agreement entirely and allow the State to go to trial on the two Level 1 felonies, Class A felony, and Level 4 felony, on which they originally charged him.[18]

This Note highlights the serious inefficiencies in cases such as Hook's, where appellate counsel for the defendant, the Indiana Attorney General's office, and two different panels from the Indiana Court of Appeals spent nearly six months litigating an appeal that could only go nowhere under current Indiana law.[19] This process did not just waste resources. It delayed the finality of Hook's case and left Hook with no way to remedy an improper admonishment on his sentencing other than setting aside his entire conviction.

This Note examines these issues and recommends changes to Indiana's criminal rules to better protect every defendant's right under the Indiana Constitution to "in all cases an absolute right to one appeal" and to promote fairness within the justice system.[20]

This Note argues that because of serious public policy concerns with the current enforcement of waivers of the right to appeal a sentence in Indiana, the

---

9. *See generally id.*
10. *Id.* at *1.
11. *Id.*
12. *Id.* at *2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *3.
17. *Id.* at *3.
18. *See* IND. POST-CONVICTION RULE 1(10); *see also* Hook v. State, No. 23A-CR-820, 2023 WL 8946141, at *1 (Ind. Ct. App. Dec. 28, 2023).
19. *See generally Hook*, 2023 WL 8946141.
20. IND. CONST. art. VII, § 6.

Indiana Supreme Court should adopt a criminal rule that prohibits trial courts from accepting plea agreements that include a waiver of the right to appeal sentencing in some circumstances. Specifically, the proposed rule would bar acceptance of plea agreements that both (1) preserve some judicial discretion in sentencing, and (2) include waivers of the right to appeal sentencing that has not yet occurred. Part I of this Note defines key terms and provides an overview of the waivers of sentence appeals in Indiana. Part II provides an overview of sentence appeals in other United States jurisdictions, including the federal system and Indiana's neighboring states. Part III then discusses the serious public policy concerns with Indiana's current practice and the available remedies. Part IV argues for possible reform, including narrowing the application of certain case law going forward, creating a new criminal rule, and applying contract law to find improper waivers unenforceable.

I. OVERVIEW OF WAIVERS OF SENTENCE APPEAL IN INDIANA

A. Defining "Partially Negotiated Pleas"

The term "partially negotiated plea" is a key phrase in this Note. In the landmark Indiana case *Collins v. State*, the Court stated that "[a] plea agreement where the issue of sentencing is left to the trial court's discretion is often referred to as an 'open plea.'"[21] However, there are narrower definitions. In a 2016 case, the plea agreement defined an open plea as one that "leaves the sentence entirely to the Judge's discretion, without any limitations or the dismissal of any charges."[22] Even more specifically, an open plea can refer to a plea where the defendant pleads guilty without coming to any agreement with the prosecution.[23] This Note differentiates between (1) such as a fully-open guilty plea with no State-defendant agreement and (2) pleas that are "partially negotiated." The term "partially negotiated plea"—like the "open plea" in *Collins v. State*—refers to plea agreements that set some parameters on convictions or sentencing but preserve some level of discretion for the judge.[24] For example, in Indiana, the sentence for a Level 6 Felony is between six months and two and one-half years.[25] If a defendant pleading guilty to a Level 6 felony

21. Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004).

22. T.A.D.W. v. State, 51 N.E.3d 1205, 1209 (Ind. Ct. App. 2016).

23. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 233 (2005) ("One defender's explanation was typical of many of those interviewed: 'Our position is we're only going to sign [a plea agreement containing an appeal waiver] if we get a significant concession. . . . If not, we plead open, [because there's] not much advantage to entering into an agreement.'"); *see also* Tracey B. Carter, *Drunk Drivers Are A Moving Time Bomb: Should States Impose Liability on Both Social Hosts and Commercial Establishments Whose Intoxicated Guests and Patrons Subsequently Cause Injuries or Death to Innocent Third Parties?*, 49 CAP. U. L. REV. 385, 404 (2021) ("It was an open plea, meaning he hadn't negotiated a deal with prosecutors.")

24. *See Collins*, 817 N.E.2d at 231.

25. *See* IND. CODE § 35-50-2-7(b) (2019).

signed a plea agreement to a sentence of up to one year, this Note would categorize that plea as partially negotiated. This is because a judge could sentence the defendant anywhere between six and twelve months. However, if the plea set the maximum sentence at six months, the plea would be fully negotiated. If the judge accepted the plea agreement, she would retain no discretion since the statutory minimum of the offense and the plea-agreement maximum sentence are both six months.

B. Waiver of the Right to Appeal Sentence

A plea agreement is essentially a contract between a criminal defendant and the State.[26] Via the agreement, a defendant receives certain benefits in exchange for pleading guilty to some offense and waiving certain rights, such as the right to a trial or—at issue in this Note—the right to appeal one's case.[27] As one scholar noted, "[T]hough its victory merits no fanfare, plea bargaining has triumphed."[28] Parties and non-parties alike benefit from a plea agreement; by avoiding the time and resources of going to trial, prosecutors and law enforcement officers have more energy to solve, prevent, and prosecute other crimes.[29] Victims get immediate closure when a plea is accepted and the defendant admits guilt, as opposed to being subjected to a trial where the defendant maintains her innocence while the victim grapples with the uncertainty of a possible acquittal.[30] Defendants also have a clear incentive to plea bargain. "Their incentive lay in the difference between the severe sentence that loomed should the jury convict at trial and the more lenient sentence promised by the prosecutor or judge in exchange for a plea."[31] And as far back as 1971, the highest Court of the land stated that the country would need many more courtrooms and judges if the United States stopped using plea agreements.[32] As Justice Burger wrote, "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."[33]

As recognized in the Indiana Criminal Rules adopted January 1, 2024, a defendant who pleads guilty waives many rights.[34] These include "the rights to

---

26. U.S. DEP'T OF JUST., CRIM. RESOURCE MANUAL § 626 https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law.

27. *Id.*

28. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000).

29. Michael Conklin, *In Defense of Plea Bargaining: Answering Critics' Objections*, 47 W. ST. L. REV. 1, 3 (2020).

30. *Id.* at 4.

31. Fisher, *supra* note 28, at 965.

32. *See* Santobello v. New York, 404 U.S. 257, 260 (1971).

33. *Id.*

34. Order Amending the Rules of Criminal Procedure, No. 23S-MS-10, 11 (Ind. June 23, 2023) https://www.in.gov/courts/files/order-rules-2023-0623-crim-proc.pdf [https://perma.cc/FCQ7-XV3F].

public and speedy trial by jury, to confront and cross-examine witnesses, to have compulsory process, to have proof by the state of guilt beyond a reasonable doubt, not to be compelled to testify against himself/herself, and to appeal the conviction . . . ."[35]

However, Indiana's appellate courts have recognized a distinction between defendants with plea agreements appealing their conviction versus appealing the sentence of a court that has exercised a degree of sentencing discretion.[36] In *Collins v. State*, Indiana's Supreme Court stated that "[a] person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal."[37] But, the defendant may appeal "a trial court's sentencing decision where the trial court has exercised sentencing discretion."[38]

In 2008, the Indiana Supreme Court held for the first time that a defendant can—as part of her plea agreement—waive her right to appeal a discretionary sentencing decision when that waiver is knowing and voluntary.[39]

C. Appeal of One's Sentence Despite Waiver

Despite Indiana's 2008 allowance of defendants waiving their right to appeal a discretionary sentencing decision, many appellate waivers regarding sentencing have historically gone unenforced in Indiana.[40] This section of this Note details a number of instances where Indiana appellate courts allowed an appeal despite a plea agreement's waiver of the right to appeal.

First, the Indiana Supreme Court has held that when the trial court sentences a defendant to the specifics of a plea agreement containing an illegal sentence, the sentence is not in error.[41] In *Collins v. State*, the defendant's plea agreement gave him credit for time served and suspended his remaining time.[42] Despite the fact that this suspension of time was illegal, the trial court sentenced the defendant in accordance with his plea.[43] This benefited the defendant, as he served less time than he ought to.[44] Because the defendant benefited from the illegal sentence, the court held that the sentence could not be challenged.[45]

---

35. *Id.*

36. Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004).

37. *Id.*

38. *Id.*

39. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008).

40. *See generally* Brief for Indiana Public Defender Council as Amicus Curiae in Support of Rehearing at 15, Davis v. State, 217 N.E.3d 1229 (Ind. 2023) (No. 22S-CR-253) [hereinafter Indiana Public Defender Council Amicus Curiae Brief].

41. Collins v. State, 509 N.E.2d 827, 833 (Ind. 1987).

42. *Id.*

43. *Id.*

44. The defendant later challenged the underlying conviction and asked for his plea to be set aside. The court stated that "a defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence." *Id.*

45. *Id.*

However, when the plea agreement did not explicitly allow for the illegal sentence, the defendant was "entitled to presume that the trial court would sentence him in accordance with the law."[46] In *Crider v. State*, a trial court ordered that a defendant's habitual offender enhancement would run consecutive to a habitual offender enhancement imposed by another county.[47] This was contrary to Indiana law and not explicitly agreed to in the plea agreement.[48] The Court of Appeals held the remedy was to allow an appeal of the illegal sentence, thus invalidating the waiver of appeal.[49] Similarly, in *Lacey v. State*, the Indiana Court of Appeals upheld a defendant's right to appeal his sentence despite a waiver of that right when the defendant argued that the trial court erred in adding a thirteen-year habitual offender enhancement to his sentence.[50]

Likewise, in *Ricci v. State*, where the trial court clearly stated at the plea hearing that the defendant retained the right to appeal his sentence and the State did not object to that advisement, the Indiana Court of Appeals nullified the waiver of appeal, and the defendant retained the right to appeal his sentence.[51] And, when the trial court in *Bonilla v. State* told a defendant who was not a native English speaker at the plea hearing that he "may" have waived his right to appeal, it created enough contradictory and confusing information that the Court of Appeals held that the right to appeal the sentence was not waived.[52]

Additionally, where the waiver of the right to appeal appeared alongside a waiver of post-conviction relief, the Indiana Supreme Court held the plea agreement insufficient to establish the defendant's knowing and voluntary waiver of the right to appeal the sentence.[53] In *Johnson v. State*, a plea agreement stated, "DEFENDANT WAIVES RIGHT TO APPEAL AND POST CONVICTION RELIEF"—despite the fact that waivers of post-conviction relief have been held "patently void and unenforceable . . . for almost thirty years."[54] The Court held the waiver was not sufficiently explicit so as to establish an enforceable waiver of the right to appeal the sentence.[55] Because of the appeal waiver's location in the same sentence as the unenforceable post-conviction waiver provision, the Indiana Supreme Court held that the waiver did not establish that the defendant knowingly and voluntarily waived the right to appeal his sentence.[56]

46. Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013).
47. *Id.* at 621.
48. *Id.* at 621–22.
49. *Id.* at 625.
50. Lacey v. State, 124 N.E.3d 1253, 1255–56 (Ind. Ct. App. 2019).
51. Ricci v. State, 894 N.E.2d 1089, 1093–94 (Ind. Ct. App. 2008).
52. Bonilla v. State, 907 N.E.2d 586, 589–90 (Ind. Ct. App. 2009).
53. *See generally* Johnson v. State, 145 N.E.3d 785 (Ind. 2020).
54. *Id.* at 786–87.
55. *Id.*
56. *Id.*

The examples of appeals allowed despite a waiver of the right to appeal the sentences continue. In one case, the court allowed the defendant to appeal the amount of restitution ordered because the plea agreement left the restitution amount blank and did not specify how restitution would be determined.[57] Finally, in at least one modern case, the Indiana Court of Appeals held that a defendant retained the right to appeal a sentence as illegal, despite a waiver of the right to appeal the sentence, because the defendant alleged the trial court improperly applied an aggravator that was also an element of the offense.[58] However, the Indiana Supreme Court's recent decision in *Davis v. State* distinguishes the above case law and calls into question when—if ever—a defendant can successfully seek direct appeal of a sentence once they have signed a waiver of the right to appeal the sentence.[59]

D. Post-conviction Relief as the Remedy

In 2023, the Indiana Supreme Court held that a defendant who signed an appeal waiver based on a misunderstanding of the rights being waived could only seek redress via post-conviction relief.[60] If a defendant is successful on post-conviction relief, their entire plea agreement is invalidated, and all parties are returned to the state they were in before the agreement.[61] In its recent decision in *Davis v. State*, the Indiana Supreme Court held in a 3-2 decision that when the trial court's misstatement misleads a defendant about his ability to appeal his sentence, Indiana's courthouse doors are closed to a direct appeal.[62] The Court focused on the written instrument of the plea agreement, which stated:

> The Defendant hereby waives the right to appeal any sentence imposed by the Court, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of this plea agreement.[63]

In exchange for Davis's agreement to plead guilty and waive his rights, the State agreed that Davis's executed sentence would be no greater than four years, with a maximum of two served in the Department of Correction.[64] After Davis signed this agreement but before the trial court accepted it, the trial judge made

57. Archer v. State, 81 N.E.3d 212, 215 (Ind. 2017).

58. Haddock v. State, 112 N.E.3d 763, 766 (Ind. Ct. App. 2018).

59. *See generally* Davis v. State, 207 N.E.3d 1183 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023).

60. *Id.* at 1234–35.

61. *Id.*

62. *Id.* at 1233.

63. *Id.* at 1231.

64. *Id.*

two statements to Davis regarding his right to appeal his sentence.[65] The court said that while Davis was waiving his "right to appeal any decision made by the court," there was an exception.[66] "The one exception is because you have a plea agreement that provides the court some discretion about where your sentence is, in a certain range, you would have the ability to appeal my use of discretion in that sentencing."[67] A month later, after formally accepting Davis's plea and sentencing him, the judge again told Davis he could appeal. "[Y]ou're a person who's been sentenced after [a] contested sentencing hearing where there was some discretion that was left to the court under the plea agreement. Because of that you do have the ability to appeal the sentence that was imposed today."[68] Neither Davis's defense counsel nor the State objected to either of these mis-advisements by the trial court.[69]

When Davis appealed his sentence, the Indiana Supreme Court enforced the appellate waiver of the plea deal.[70] The Court reasoned that Davis did not argue the written instrument of the plea deal was ambiguous, only that the trial court gave Davis contrary advisements.[71] As such, the Court held that Davis's only means of remedy was via post-conviction relief.[72] If successful, post-conviction relief would vacate the defendant's conviction and render the plea agreement unenforceable.[73] The Court added, "[T]he defendant cannot retain the benefits of the bargain (a more lenient sentence) while escaping its burdens (the promise not to appeal for an even more lenient sentence)."[74] This Note argues that the post-conviction remedy is insufficient for several reasons discussed in Part III.

II. Overview of Waivers of Sentence Appeal in United States Jurisdictions

A. Federal System

Nationally, waivers of the right to appeal sentences emerged in federal courts as early as 1989.[75] "In 1999, amendments to the Federal Rules of Criminal Procedure took effect which formally legitimized appeal waivers by requiring judges to discuss them with defendants prior to accepting the plea agreement."[76]

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1231–32.
69. *Id.* at 1232.
70. *Id.* at 1236.
71. *Id.* at 1233.
72. *Id.* at 1234.
73. *Id.*
74. *Id.*
75. United States v. Wiggins, 905 F.2d 51, 52 (4th Cir. 1990).
76. Andrew Dean, *Challenging Appeal Waivers*, 61 Buff. L. Rev. 1191, 1196–97 (2013).

The D.C. Circuit was a holdout on affirming the use of sentencing appeal waivers in plea agreements, but did so in 2009.[77]

However, waivers of the right to appeal one's sentence are not always enforced at the federal level.[78] In 2001, the First Circuit announced that "if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver."[79] Subsequently, the Third, Eighth, and Tenth Circuits adopted this approach.[80] Additionally, at the federal level, appeals of ineffective assistance of counsel may result in the voiding of a waiver.[81]

B. Processes in Neighboring States

Illinois has explicit rules governing when a defendant who signed a plea agreement can appeal their sentence. Specifically, an Illinois Supreme Court Rule limits a defendant's ability to appeal the sentence in a "negotiated plea" of guilty, where "the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending."[82] In cases involving a negotiated plea, a defendant seeking to challenge a sentence as excessive must first file a motion with the trial court to "withdraw the plea of guilty and vacate the judgment."[83] The trial court can grant the motion and "modify the sentence or vacate the judgment and permit the defendant to withdraw the plea of guilty and plead anew."[84] If the trial court denies the motion, the defendant can appeal the judgment and the sentence, arguing that the trial court errored in denying his motion to withdraw the plea.[85] The Illinois system allows a defendant to seek remedy for perceived injustice by keeping the courthouse doors open to him, but it simultaneously incentivizes a defendant to abide by the terms he negotiated, since his challenge to a "negotiated plea" could result in his entire judgment being set aside.

---

77. *See id.* at 1197 (stating that appeal waivers were not used in the D.C. Circuit); *see also* United States v. Guillen, 561 F.3d 527, 529 (D.C. Cir. 2009) ("We now agree with our sister circuits that such waivers generally may be enforced.").

78. *See* Dean, *supra* note 76, at 1123–24.

79. United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001).

80. Dean, *supra* note 76, at 1123–24 ("The First, Third, Eighth, and Tenth Circuits refuse to enforce an appeal waiver if doing so would result in a miscarriage of justice.").

81. If a defendant makes a colorable claim of ineffective assistance of counsel in signing the plea's waiver, the waiver may be voided. *See* United States v. Elliott, 264 F.3d 1171, 1173 (10th Cir. 2001). Additionally, the Department of Justice updated its Justice Manual to state, "When negotiating a plea agreement, the attorney for the government should also not seek to have a defendant waive claims of ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal." U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-27.420 (2023).

82. ILL. SUP. CT. R. 604(d).

83. *Id.*

84. *Id.*

85. *Id.*; *see* People v. Robinson, 197 N.E.3d 683, 691 (Ill. App. Ct. 2021).

The Commonwealth of Kentucky has recognized that one's right to appeal sentencing issues can remain even when a defendant pleads guilty and waives the right to appeal the finding of guilt.[86] In Kentucky, a defendant may appeal a sentencing issue when he has "a claim that a sentencing decision is contrary to statute, such as when an imposed sentence is longer than allowed by statute for the crime, or a claim that the decision was made without fully considering the statutorily-allowed sentencing options."[87] This has similarities to Indiana—Indiana likewise allows a defendant to directly appeal an illegal sentence.[88] But it is distinct in that the Kentucky rule allows challenges to sentences that are lawful but where the sentence "was made without fully considering what sentencing options were allowed by statute."[89]

Plea agreements in Michigan take the names of keystone cases that set their precedent. A defendant in Michigan might take a *Cobbs* agreement. A *Cobbs* agreement "involves the trial court participating in sentencing discussions at the request of a party, by stating 'on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.'"[90] A defendant who pleads guilty with a *Cobbs* agreement "must be expected to be denied appellate relief on the ground that the plea demonstrates the defendant's agreement that the sentence is proportionate."[91] On the other hand, a Michigan defendant may enter into a *Killebrew* agreement, where the defendant and the prosecution agree to a sentence within a specified range.[92] Under Michigan law, entering a *Killebrew* agreement means a defendant waives "challenges to the proportionality and reasonableness of sentences within that range."[93]

Finally, Ohio also has explicit rules about when a sentence after a guilty plea can be challenged on appeal. Per Ohio state statute, "A sentence imposed upon a defendant is not subject to review under [the appeals as a matter of right section] if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."[94] Thus, the Ohio Supreme Court did not allow an appeal of three eight-year consecutive sentences jointly agreed upon by the defendant and the State, even when the trial court failed to make the findings required by state law before imposing consecutive sentences.[95] More recently, Ohio has held that a defendant

86. The Kentucky Supreme Court allowed appeal despite the defendant's plea agreement form containing an express waiver of the right to direct appeal. Windsor v. Com., 250 S.W.3d 306, 307 (Ky. 2008)

87. Hayes v. Commonwealth, 627 S.W.3d 857, 862 (Ky. 2021).

88. *See generally* Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013).

89. Grigsby v. Com., 302 S.W.3d 52, 54 (Ky. 2010).

90. People v. Guichelaar, No. 363588, 2023 WL 8852963, at *3 (Mich. Ct. App. Dec. 21, 2023) (quoting People v. Cobbs, 505 N.W.2d 208, 283 (1993)).

91. *Id.* at *4.

92. *Id.* at *3.

93. *Id.* at *7.

94. OHIO REV. CODE § 2953.08(D)(1).

95. State v. Sergent, 148 Ohio St. 3d 94, 2016-Ohio-2696, 69 N.E.3d 627, at ¶ 43.

may not have a right to appeal a sentence within an agreed-upon range, which has broader applicability than a waiver of the right to appeal a specific sentence fixed by the plea agreement.[96]

In the surrounding states, defendants have more clarity regarding their appellate rights after when they have taken a plea agreement. Case law such as Michigan's and court rules such as those in Illinois provide information to judges, defendants, and defendants' counsel about when a sentence can be appealed.[97] This is preferable to Indiana's current situation, where great uncertainty and public policy concerns exist regarding when a defendant who waived her right to appeal may appeal her sentence. These concerns are discussed in Part III of this Note.

III. PUBLIC POLICY CONCERNS WITH INDIANA'S CURRENT PRACTICE

A. Efficiency

One major reason individuals support plea agreements overall is under the rationale that they are an efficient use of justice-system resources.[98] The United States Supreme Court has pointed out that plea agreements can benefit all involved.[99] "The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial . . . . Judges and prosecutors conserve vital and scarce resources."[100] The Seventh Circuit likewise stated specific to waivers of the right to appeal; "An appeal requires the prosecutor's office to spend time researching the record, writing a brief, and attending oral argument. All of this time could be devoted to other prosecutions; and a promise that frees up time may induce a prosecutor to offer concessions."[101] The Indiana Supreme Court repeated this quotation in *Creech v. State* regarding the benefits of appeal waivers.[102]

However, in Indiana, appeals are not prosecuted by the local prosecutor who tried the case originally, but by the Attorney General.[103] In Indiana, resources for the Attorney General's office are appropriated directly out of the State General Fund, not from the limited county funding that supports county

96. State v. Brown, 129 N.E.3d 524, at ¶ 18 (Ohio Ct. App. 2019).

97. *See supra* text accompanying notes 82–85, 90–93.

98. Jeffrey Bellin, et al., *Plea Bargains: Efficient or Unjust?*, 107 JUDICATURE 50 (2023) (Jeffrey Bellin said, "The truth is that judges like plea bargains, just like everybody else in the system, because plea deals are efficient, and judges care about efficiency.").

99. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

100. *Id.*

101. United States v. Hare, 269 F.3d 859, 861 (7th Cir. 2001).

102. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008).

103. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 15.

prosecutors.[104] There is an argument to be made that allowing for direct appeals of sentencing issues is more efficient. If a defendant with a partially negotiated plea can directly appeal concerns with their sentence but leave their conviction and guilty plea intact, the possible impact on judicial resources is lower. The sentence could be litigated on appeal and reversed or affirmed without implicating the underlying conviction. However, under the post-*Davis* scheme, a defendant must challenge their plea as a whole. While this post-conviction relief is handled by the State Public Defender,[105] if the action is successful and the plea is vacated, the whole matter is turned back to the local prosecutor, county public defender, and trial court to take another crack at both the conviction and the sentencing.

Additionally, as the Indiana Public Defender Council argued in their amicus brief for *Davis*, "[s]ince *Creech* was decided, more than one hundred appeals involving an appeal waiver were decided on the merits of issues raised."[106] This indicates that many appeals are still being brought, despite plea agreements specifically waiving the rights to those appeals. While *Davis* stated that the appropriate remedy for many is post-conviction relief and not direct appeal, that has not stemmed the tide, as clearly seen in *Hook*, which survived the state's initial motion to dismiss the appeal.[107]

Finally, any resources conserved through the reduced administrative costs since appeal waivers gained use in Indiana could possibly be offset by the expenses of incarcerating defendants improperly.[108] Andrew Chongseh Kim examined Utah's criminal justice system and found that the state experienced net savings on direct sentencing appeals.[109] In 2013, the law review note estimated that, on average, a direct appeal saved the state "around $14,700 in reduced incarceration and costs around $7,900 in total administrative costs."[110] Lesser incarceration costs when sentences are shortened as a result of an appeal produce these savings.[111] Applying Kim's methods to Indiana is beyond the scope of this Note. However, the Utah research suggests that enforcing waivers

---

104. *See* IND. P.L.201-2023 § 1 ("FOR THE ATTORNEY GENERAL Total Operating Expense 29,344,488"); Violet Comber-Wilen, *Indiana has 91 elected prosecutors. Experts say the state needs more deputy prosecutors*, WFYI (June 5, 2023), https://www.wfyi.org/news/articles/indiana-has-91-elected-prosecutors-experts-say-the-state-needs-more [https://perma.cc/4J24-AU56] (quoting Indiana Prosecuting Attorneys Council's assistant executive director Courtney Curtis, "county prosecutor's offices are funded by local counties. So when the state creates a new courtroom and staffs that courtroom and pays for that, they don't pay anything to have the prosecutor staff.").

105. *Frequently Asked Questions*, IND. JUD. BRANCH, https://www.in.gov/courts/defender/faq/ [https://perma.cc/B7J3-26EH] (last visited Mar. 10, 2024).

106. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 16.

107. Hook v. State, No. 23A-CR-820, 2023 WL 8946141, at *4 (Ind. Ct. App. Dec. 28, 2023).

108. Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561, 599 (2013).

109. *Id.*

110. *Id.*

111. *Id.*

of sentencing appeals actually results in inefficiency of overall system resources, with the state spending more on incarceration costs than what is saved by not litigating the appeal.[112]

B. Ethics & Professional Responsibility

Waivers of the right to appeal one's sentence raise important ethical and professional responsibility questions. As noted by Justice David, "Sentencing waivers are, by their nature, prospective: a defendant waives the right to appeal her sentence before the trial court accepts her guilty plea."[113] The trial court has to accept the plea and the waivers it contains prior to issuing the sentence.[114] Because of this, a defendant with a partially negotiated plea has to waive the right to appeal their sentence prior to learning what their sentence will be. As Justice David went on to say,

> [w]hile this Court has previously found a defendant's assent to the express waiver language in a written plea agreement indicates she knowingly and voluntarily waives her right to appeal the sentence, the prospective nature of the waiver calls into question the propriety of this conclusion.[115]

Further, waivers of sentence appeals serve to insulate trial court judges from appellate review of any number of errors.[116] One Colorado District Court judge raised this issue.[117] The judge refused to accept a plea containing a waiver of the right to appeal sentencing, stating, "[i]ndiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions."[118]

Beyond judicial concern for validity and reasonableness, Indiana's current process does not promote public confidence in the judiciary. Consider the 2023 case of *Hook v. State*, where the trial judge—three times and over the State's objection—told a defendant he would have the right to appeal his sentence, only

---

112. *Id.*

113. Wihebrink v. State, 192 N.E.3d 167, 168 (Ind. 2022) (David, J., dissenting from denial of transfer).

114. Order Amending the Rules of Criminal Procedure, No. 23S-MS-10, 14 (Ind. June 23, 2023), https://www.in.gov/courts/files/order-rules-2023-0623-crim-proc.pdf [https://perma.cc/FCQ7-XV3F] ("Upon entering a conviction, the court must sentence a defendant within thirty days of the plea or the finding or verdict of guilty, unless extended for good cause.").

115. *Wihebrink*, 192 N.E.3d at 168 (David, J., dissenting from denial of transfer).

116. *See id.* (David, J., dissenting from denial of transfer) ("These waiver provisions are worthy of criticism because they seemingly sanction any misstatement or abuse by the trial court and allow trial courts to deviate from the defendant's reasonable expectations.").

117. United States v. Vanderwerff, No. 12-CR-00069, 2012 WL 2514933, at *5 (D. Colo. June 28, 2012), *rev'd and remanded*, 788 F.3d 1266 (10th Cir. 2015).

118. *Id.*

for the defendant to have his appeal dismissed because of the waiver provision of his partially-negotiated plea.[119] Rule 1.2 of the Indiana Code of Judicial Conduct states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[120] Integrity is specifically defined as, "probity, fairness, honesty, uprightness, and soundness of character."[121] When a judge errors and mis-admonishes a defendant about that defendant's rights at a key junction of that defendant's case, there are ethical concerns that the judge, however unknowingly, undermines public confidence in the judiciary.[122] When a defendant, relying on the admonishment they received from a judicial officer, files an appeal to their sentence, it undermines public confidence in the judiciary to penalize the defendant for their actions by threatening to nullify the defendant's plea agreement.[123] Defendants ought to be able to rely on the statements judicial officers make to them in the course of criminal proceedings.

In addition to the judicial concerns, there are professional responsibility issues for both prosecutors and defense counsel. Regarding prosecutors, under Indiana's Rules of Professional Conduct, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[124] Appellate waivers encourage prosecutors to, as one writer for the Georgetown Journal of Legal Ethics described, "insulate review of their own past and future misconduct through waiver of direct and collateral review."[125] This Note argues that as ministers of justice, prosecutors should welcome opportunities to correct any errors in sentencing that occur and thus only argue for enforcing waivers of sentencing appeal when absolutely appropriate. After all, "the State can have no true interest in the imposition of an excessive or inappropriate sentence."[126]

---

119. Hook v. State, No. 23A-CR-820, 2023 WL 8946141, at *2 (Ind. Ct. App. Dec. 28, 2023).

120. IND. CODE OF JUD. CONDUCT RULE 1.2.

121. IND. CODE OF JUD. CONDUCT, TERMINOLOGY.

122. Krstafer Pinkerton, *Investigative Analysis: The Silent Threat of Judicial Incompetence and Corruption—Exposing the Failures that Erode Justice*, MEDIUM (Nov. 18, 2024) https://medium.com/@pinkerton_69080/justice-unbalanced-the-silent-threat-of-judicial-incompetence-33f2dfede58e [https://perma.cc/H3W9-WXKC] ("Every judicial error sends ripples through the justice system, eroding public trust.").

123. *See id.*

124. IND. PRO. CONDUCT RULE 3.8, cmt. 1.

125. Jackelyn Klatte, *Guilty As Pleaded: How Appellate Waivers in Plea Bargaining Implicate Prosecutorial Ethic Concerns*, 28 GEO. J. LEGAL ETHICS 643, 658 (2015).

126. Davis v. State, 207 N.E.3d 1183, 1191 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023) (Goff, J., dissenting). For example, a prosecutor read to the jury a United States Supreme Court concurrence that stated, "[if defense counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course" and contrasted that with the role of the prosecutor. "But while [the prosecutor] may strike hard blows he's not a [sic] liberty to strike foul ones. It is as much his duty

Further ethical concerns exist for the defendant's counsel, especially one court-appointed. In Indiana (unlike at the federal level), appellate defense counsel may not use *Anders* briefs to withdraw from direct appeals where the attorney sees no non-frivolous claims.[127] At the federal level, if "defendant-appellant's counsel determines that no non-frivolous issues exist on appeal after thorough review of the district court record," counsel may file a so-called "*Ander*'s brief."[128] If the court agrees after examination that the appeal is wholly frivolous, it may grant defense counsel's request to withdraw.[129] However, "*Ander*'s briefs" are disfavored in Indiana.[130] Instead, under the Indiana Supreme Court's opinion in *Mosley v. State*, counsel may be forced to "locate meritorious issues in a seemingly empty record."[131]

This framework paints defense counsel into a corner, as an appellate defense counsel jeopardizes their client's entire plea agreement if the only issues that could be raised on appeal are within the scope of the appeal waiver.[132] *Mosely* prohibits appellate defense counsel from withdrawing from cases even when she sees no meritorious issue on which to base an appeal.[133] The court in *Mosley* also states that, in line with Indiana's Rules of Professional Conduct, an attorney in a seemingly non-meritorious appeal may make a good faith argument to solicit a change in the law.[134] However, if appellate defense counsel files an appeal of her client's sentence that is subject to a waiver, she runs the risk of her client being found in breach of the terms of the plea agreement.[135] This could result in the setting aside of the defendant's entire plea agreement.[136]

However, to further complicate the situation, the United States Supreme Court held in *Garza v. Idaho* that, even in the face of a waiver of appeal, defense counsel violated a defendant's Sixth Amendment rights when counsel failed to file a notice of appeal.[137] Despite the defendant's plea agreement containing a waiver of appeal, the defendant was denied effective assistance of counsel when their attorney failed to file a notice of appeal "despite the defendant's express

---

to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." The Indiana Court of Appeals held the prosecutor's comments were clearly improper and granted a new trial. Bardonner v. State, 587 N.E.2d 1353, 1355–62 (Ind. Ct. App. 1992) (quoting United States v. Wade, 388, 257 U.S. 218 (1967), J. White, concurring in part)).

127. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 7.

128. 2D CIR. CT. OF APP., HOW TO FILE AN ANDERS BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1 (Aug. 8, 2022), https://ww3.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/pdf/Anders%20brief%20instructions%20and%20checklist%20combined%2010-11.pdf.

129. Anders v. California, 386 U.S. 738, 744 (1967).

130. Mosley v. State, 908 N.E.2d 599, 607 (Ind. 2009).

131. *Id.* at 608.

132. *See* Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 11–12.

133. *Mosley*, 908 N.E.2d at 608.

134. *Id.*; *see also* IND. PRO. CONDUCT RULE 3.1.

135. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 11–12.

136. *Id.*

137. Garza v. Idaho, 586 U.S. 232, 246–47 (2019).

instructions."[138] Between the federal and state case law, appellant defense counsel must choose to either endanger all the benefits of their client's plea agreement or provide ineffective assistance of counsel.[139] This Note argues each of the above ethical and professional concerns with the current practice in waivers of appeals is worthy of consideration. The ethical and professional quandaries necessitates change to Indiana's current treatment of waivers of sentencing appeals.

C. Post-Conviction Relief Insufficient to Safeguard Rights

In *Davis*, the court held that a defendant seeking to dispute his sentence set by a trial court after a plea agreement must seek remedy under post-conviction relief, even when the defendant alleged that his agreement to the waiver of the right to appeal was not knowing and voluntary.[140] Justice Goff critiqued this approach, saying, "Under the majority's approach, Davis must invalidate his entire plea bargain, exposing himself to the risk of additional or more serious charges, in order to assert his right to appeal. Mandating this procedure severely burdens his exercise of a right which he never properly waived."[141] This Note agrees with Justice Goff that requiring a defendant to abandon her entire plea agreement to vindicate her right to a just sentence burdens the defendant unnecessarily.

To provide a background, circumstances eligible for post-conviction relief are set by the Indiana Rules of Court Rules of Post-Conviction Remedies:[142]

> (a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:
> (1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
> (2) that the court was without jurisdiction to impose sentence;
> (3) that the sentence exceeds the maximum authorized by law, or is otherwise erroneous;
> (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

138. *Id.*

139. *Supra* text accompanying notes 127–38.

140. Davis v. State, 207 N.E.3d 1183 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229, 1231 (Ind. 2023).

141. *Id.* at 1239 (Goff, J., dissenting).

142. IND. POST-CONVICTION RULE 1(a).

> (5) that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;
> (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
> may institute at any time a proceeding under this Rule to secure relief.[143]

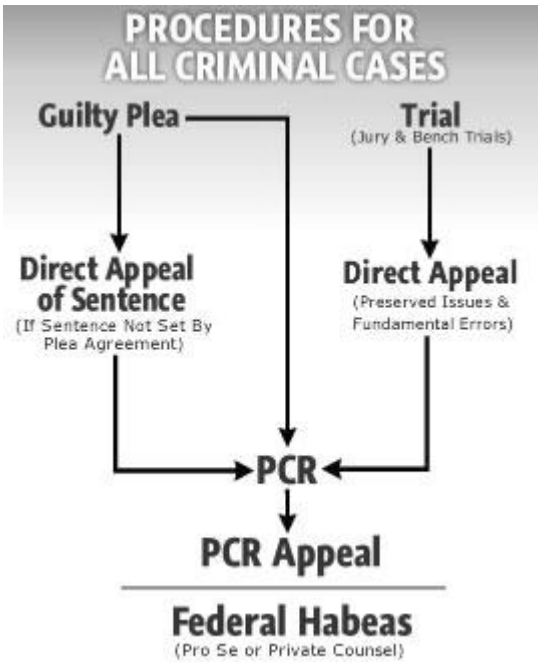


Figure 1. Public Defender of Indiana Post-Conviction Relief Process Map. IND. JUD. BRANCH, *Frequently Asked Questions*, *supra* note 105.

The Public Defender of Indiana represents indigent adults and juveniles in their post-conviction relief actions.[144] From July 1, 2020, to June 30, 2022, the Public Defender of Indiana reviewed 595 post-conviction trials and guilty pleas other than capital cases.[145] The Public Defender states that 99 of those cases received some form of relief.[146] However, the office defined that relief as "a change in sentence, a vacation of conviction or sentence, an appeal, a new sentencing hearing, or a new [post-conviction relief] hearing."[147] Compare that to the 25,385 adult offenders in the Indiana Department of Correction in July 2020, and one can see that only a very small percentage of criminal defendants are granted post-conviction relief.[148] In addition to the fact that only very few petitioners actually receive post-conviction, the process to seek post-conviction relief is lengthy for an indigent defendant. Per the Office of the Public Defender of Indiana,

143. *Id.*

144. IND. JUD. BRANCH, *Frequently Asked Questions*, *supra* note 105.

145. *About*, PUB. DEF. OF IND., https://www.in.gov/courts/defender/about/ [https://perma.cc/6BSY-BWCR] (last visited Mar. 10, 2024).

146. *Id.*

147. *Id.*

148. Robert Carter, *Offender Population Report*, IND. DEP'T OF CORR. at 6 (July 2020), https://www.in.gov/idoc/files/Indiana-Department-of-Correction-July-2020-Total-Population-Summary.pdf [https://perma.cc/NP5Y-UT2L].

"Demand for services is high and there is a significant backlog of cases awaiting review."[149] So there will be challenges for a defendant trying to collaterally attack their sentence via post-conviction relief.

Then, in the unlikely event that the defendant succeeds in showing their waiver of the right to appeal was not knowing and voluntary, *Davis* now requires the entire plea agreement, conviction and all, to be set aside.[150] This is not without issue. If a defendant secures post-conviction relief after some time, the State will have to decide whether to continue with the prosecution.[151] The case will likely face issues like those that led to the policy behind statutes of limitation: witness memories may fade, and key evidence may be lost.[152] Additionally, a delay in prosecution may implicate due process when a defendant is prejudiced in their ability to defend themself due to delay.[153] Finally, under the *Davis* rule, the State must do more than defend at the appellate court the reasonableness of the conviction (as previously required when the court held a waiver was invalid).[154] Instead, the state loses not just the sentence but the conviction, too.[155] Part IV of this Note argues that for public policy reasons, Indiana should adopt a remedy other than post-conviction relief for cases where a plea agreement provides the judge with some discretion in sentencing.

IV. ARGUING FOR REFORM

A. Apply Current Case Law Only When a Plea Explicitly Provides for a Sentence

To promote fairness while preserving finality, Indiana should only enforce blanket waivers of appeal to sentences that are explicitly provided for in the plea agreement. Although this would narrow the scope of *Creech*, it actually preserves its spirit that waivers of the right to appeal a sentence be "knowing and voluntary."[156] Only when a defendant knows the exact sentence that will be applied to her case can the waiver of her right to appeal that sentence be truly knowing and voluntary.[157]

---

149. IND. JUD. BRANCH, *Frequently Asked Questions*, *supra* note 105.

150. Davis v. State, 207 N.E.3d 1183, 1187 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023) ("It is all or nothing.").

151. *See id.*

152. *See generally* CONG. RSCH. SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW (Nov. 14, 2017).

153. *Id.* at 16–17.

154. *Davis*, 217 N.E.3d at 1233–34; *see* Ricci v. State, 894 N.E.2d 1089, 1093–94 (Ind. Ct. App. 2008) (reviewing a sentence for inappropriateness after holding the waiver of appeal null because the defendant's waiver was not knowing, voluntary, and intelligent).

155. *Davis*, 217 N.E.3d at 1233.

156. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008).

157. *See* Wihebrink v. State, 192 N.E.3d 167, 168 (Ind. 2022) (David, J., dissenting from denial of transfer).

Allowing waivers for fully negotiated pleas will allow certain illegal sentences. However, this is in line with Indiana precedent established in 1987 and upheld in 2004 and 2013.[158] "[W]hen a defendant explicitly agrees to a particular sentence . . . whether or not the sentence or method is authorized by the law, he cannot later appeal such sentence on the ground that it is illegal."[159] Thus, under the example provided at the outset of this Note, a defendant's plea agreement for a Level 6 Felony could set the sentence at five months or thirty-five months, clearly in violation of Indiana Sentencing Statute.[160] If that illegal time period is explicitly bargained for in the plea agreement and accepted by the trial court, it would be unappealable. As the Court held in *Davis*, a defendant's only remedy for a term explicitly captured in her plea agreement is through post-conviction relief and the setting aside of the entire plea agreement, including both its benefits and burdens.[161]

B. Prohibit Waivers of Appeal for Partially Negotiated Pleas

Indiana should limit *Creech* and *Davis* when it comes to sentencing appeal waivers where the judge maintains some discretion.[162] If the plea agreement places no constraints upon the judge's discretion in sentencing, the defendant's right to appeal the sentence should remain intact, because the defendant cannot *knowingly* waive the right to appeal a sentence when certain terms of the sentence are unknown to her.[163]

When a plea agreement leaves any room for judicial discretion, Indiana should adopt the rule articulated by the trial court in *Davis*.[164] Namely, in a plea agreement that provides the court some discretion in sentencing, the defendant should be able to appeal the sentence regardless of any waiver contained in the plea agreement. For example, if the plea agreement presents a sentencing range or simply states the defendant agrees to be sentenced subject to Indiana law and waives the right to appeal the sentence, Indiana should allow that defendant to appeal any sentence that the defendant can non-frivolously argue is contrary to Indiana law. This would include claims for abuse of discretion or sentences that are not appropriate pursuant to Rule 7 of the Indiana Rules of Appellant Procedure.[165] A defendant who accepts a plea agreement that preserves judicial discretion in sentencing relies on the belief that a judge will sentence her in

158. Collins v. State, 509 N.E.2d 827, 833 (Ind. 1987).; Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004); Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013).

159. *Crider*, 984 N.E.2d at 625.

160. *See* IND. CODE § 35-50-2-7(b) (2024); *supra* Part I, sect. A.

161. Davis v. State, 207 N.E.3d 1183 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229, 1234 (Ind. 2023).

162. *See generally* Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008); *Davis*, 217 N.E.3d 1229.

163. *See* Wihebrink v. State, 192 N.E.3d 167, 168 (Ind. 2022) (David, J., dissenting from denial of transfer).

164. *Davis*, 217 N.E.3d at 1231.

165. IND. R. APP. P. 7.

accordance with the law. That defendant ought not to be penalized for her trust in Indiana's justice system by insulating her sentence from appellate review.

In addition to protecting a defendant's right to a just sentence, allowing an appeal of sentencing terms for defendants who have signed a plea agreement would address many of the concerns raised in Part III of this Note. First, it would bolster public confidence in the criminal justice system. Indiana, in its most foundational legal document, the Constitution, sets out a policy that criminal defendants have a right to appeal their sentence.[166] The Constitution explicitly says the Indiana Court of Appeals shall "provide in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases."[167] This shows just how important third-party review of sentencing is.

Public faith in the judicial branch can be bolstered by allowing an appeal for all sentences where the judge exercised a degree of discretion. Appellate courts can review trial courts' use of discretion in sentencing and affirm (or, if the occasion warrants, reverse) a sentence. This creates opportunities for errors to be remedied, resulting in an overall fairer criminal law system. Even when no errors exist, appellate review of the trial court's actions strengthens the public's confidence in judges. The current Indiana caselaw does not accomplish this goal. Instead, it tells defendants that even when a judicial officer (1) misstates their legal rights and (2), by the defendant's argument, abuses their discretion in sentencing, the defendant cannot directly appeal the sentence. The proposal of this Note would avoid this outcome.

Likewise, when negotiating a plea, prosecutors could choose to either (1) offer a specific sentence in the agreement, which can be subject to a waiver of the right to an appeal, or (2) leave some discretion for the judge, knowing that means the State may expend additional resources defending the sentence on appeal in the case of an abuse of discretion. Under this rule, the prosecutor who chooses option one benefits from knowing exactly what sentence a defendant will receive and weighing as a minister of justice whether that is fair. And under option two, the prosecutor is safeguarded, too, because a sentence the defendant views as unjust would be subject to appellate review. As Justice Goff wrote in his dissent in *Davis*, "[T]he State can have no true interest in the imposition of an excessive or inappropriate sentence."[168] The proposal in this Note helps ensure that a defendant is sentenced either to a term mutually set by the defendant and prosecutor or to one that can be reviewed for its fairness.

Additionally, under the proposal of this Note, a judge will have more clarity on when to grant or deny a defendant's request for the appointment of appellate counsel. As seen in *Hook v. State*, judicial officers appoint appellate counsel for

166. IND. CONST. art. VII, § 6.

167. *Id.*

168. Davis v. State, 207 N.E.3d 1183, 1191 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023); *see also* Bardonner v. State, 587 N.E.2d 1353, 1355–62 (Ind. Ct. App. 1992).

a defendant, even in circumstances where a defendant seeking to appeal his sentence cannot do so via direct appeal.[169] But the proposed rule below would provide clarity. The trial court could appoint counsel if the court exercised a degree of discretion in sentencing, but if the terms of the plea agreement were fully negotiated and the right to appeal the sentence was waived, no attorney would be appointed for the defendant to directly appeal the sentence. Finally, with courts receiving more clarity on when to appoint or deny appellate counsel, appellate defense attorneys would not face the same dilemmas they do today, as described in Part III of this note.[170]

C. Accomplish via New Criminal Rule

Indiana should adopt a new criminal rule prohibiting trial courts from accepting plea agreements that include sweeping waivers on the defendant's rights to appeal. Instead, appellate waivers of sentencing issues should be narrowly tailored. The rules of Ohio and Illinois discussed in Part II of this note set when sentences in plea agreements may be appealed. Likewise, this rule would set clear expectations of what a defendant could and could not appeal when she enters into a partially negotiated plea agreement. This addition to the Indiana Rules of Criminal Procedure would dovetail with the expansion of the rules that went into effect in 2024.

The proposed rule would add a new rule, Rule 3.4, represented by **bold text**, to the existing rules (existing Rule 3.4 would be renumbered as 3.5). The proposed rule could read as follows:

> **Rule 3.4. Accepting a Waiver of the Right to Appeal the Sentence**
> **(A) When Waiver is Permitted.**
> **The court may accept a plea agreement containing a waiver of the defendant's right to appeal the sentence when the plea agreement sets the exact terms of the defendant's sentence.**
> **(B) When Waiver is Prohibited.**
> **Where the court retains any judicial discretion in sentencing, the court shall not accept a plea agreement containing any waiver of the defendant's right to appeal the sentence.**
> **(C) Advising the Defendant.**
> **(1) Advising of Waiver**
> **Before accepting a plea agreement that sets exact terms of the defendant's sentence and contains a waiver of the defendant's right to appeal the sentence, the court must advise the defendant that by pleading guilty the defendant waives the right to appeal the sentence.**
> **(2) Advising of Right to Appeal**

169. Hook v. State, No. 23A-CR-820, 2023 WL 8946141 at *2 (Ind. Ct. App. Dec. 28, 2023).
170. *Supra* text accompanying notes 127–38.

Before accepting a plea agreement where the court retains any judicial discretion in sentencing or where the defendant did not waive the right to appeal the sentence, the court must advise the defendant that the defendant retains the right to appeal the sentence.

D. Find Improper Waivers Unenforceable

Indiana should not adopt the reasoning of the Seventh Circuit requiring that "[w]aivers of appeal . . . stand or fall with the agreements of which they are a part."[171] This reasoning ignores a key provision of the Indiana Constitution that "the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to . . . review and revision of sentences for defendants in all criminal cases."[172] Additionally, it aligns with current practice for the court to hold the waiver of post-conviction relief as unenforceable while nevertheless enforcing a plea agreement that contains such a provision.[173] Likewise, in pending cases with pleas containing over-broad waivers or in future cases with pleas that do not conform to the proposed criminal rule, appellate courts should sever the waiver of appeal as to the sentence while leaving the conviction and remaining terms of the plea agreement in place, as advanced in *Lee v. State* and in line with current practice regarding pleas that contain a waiver of the right to seek post-conviction relief.[174]

CONCLUSION

Given the serious concerns with the current landscape of plea agreements containing waivers of the right to appeal one's sentence in Indiana—from efficacy to ethics, professional responsibility to insufficient remedy—reforms should be made. Rather than promoting the finality of a trial court's sentencing, the rule laid down in *Creech* has churned out appeal after appeal with the threshold question of whether appeals can be brought at all.[175] Indiana's appellate courts have struggled to form and stick to a consistent rule outlining when appeals can be brought despite a waiver. And the precedent puts defendants in the place of taking the mis-justice handed to them with no viable remedy.[176]

---

171. United States v. Wenger, 58 F.3d 280, 282 (7th Cir. 1995).

172. IND. CONST. art. VII, § 6.

173. *See* Majors v. State, 568 N.E.2d 1065, 1067–68 (Ind. Ct. App. 1991) (holding that plea agreement waivers of the right to seek post-conviction relief, "are void and unenforceable" while simultaneously declining to invalidate the defendant's guilty plea).

174. 816 N.E.2d 35, 40 (Ind. 2004); *Majors*, 568 N.E.2d at 1067–68.

175. *See supra* Part III, sect. A.

176. Philhower v. State, 192 N.E.3d 173 (Ind. 2022) (David, J., dissenting from denial of transfer) ("[A] defendant's front-end waiver of her appellate rights requires that she surrender the

These ills can be addressed by confining the use of appellate sentencing waivers. Waivers can be limited to scenarios where the defendant's plea agreement contained the specific sentence to which the defendant then seeks to appeal. Where those exact details are missing in the plea, the court should err on the side of the defendant and allow the appeal to proceed.

ability to appeal various errors potentially committed by the trial judge at the sentencing hearing, such as a misstatement of law, inflammatory or prejudicial commentary, or, . . . reliance on improper aggravators in reaching a sentencing decision . . . .").

INDIANA DRUG COURTS: ELIMINATING TEMPORARY-EVENT RELAPSE SANCTIONS

CLARE VAN PROOYEN*

INTRODUCTION

Michael Pawlowski was a working professional in New York City who struggled with substance abuse.[1] In 2010, Michael was convicted of a drunk driving offense and placed in a New York Drug Treatment Court in lieu of incarceration.[2] Michael recognized his struggle with substance abuse, sought help, and was proudly stable in recovery.[3] On July 4, 2012, at the age of 29, Michael relapsed and passed away in his apartment.[4] From the information in his apartment, Michael's mother deduced that Michael had been in a substance abuse crisis the night of his death and that he decided not to take himself to the emergency room.[5] The reason was obvious to Michael's mother: if Michael had gone to the emergency room, his relapse would have been discovered and subsequently punished by the drug court.[6] In New York, under the 911 Good Samaritan Law,[7] those on probation and in drug courts are not offered immunity in cases of overdoses, as anything in a drug court patient's medical record can be used against them in the program.[8] Because of this, Michael remained in his apartment, one block away from a hospital, and died.[9] After Michael's death, his mother described the drug court experience as a "horror" story.[10] She described how district attorneys would demean chronically ill or addicted participants, while the other participants would laugh as the judge reprimanded someone for failing to follow the program rules.[11] Michael's mother felt the judge was playing cat and mouse games to teach participants a lesson.[12] When Michael entered the program, he was constantly threatened with incarceration and was remanded to jail for relapses.[13] Because of his fear of being sanctioned

* J.D. Candidate, 2025, Indiana University Robert H. McKinney School of Law; B.A. 2022, Taylor University – Upland, Indiana.

1. Elaine Pawlowski, *Reevaluating Drug Courts: No Mother Should Have to Go Through What I Did,* HUFFPOST.COM (Dec. 6, 2017), https://www.huffpost.com/entry/drug-courts-reform_b_3671505 [https://perma.cc/2AV2-G5QY].

2. *Id.*

3. *Id.*

4. *Id.*; Elaine Pawlowski, *Release the Shame of Addiction,* HUFFPOST.COM (Nov. 25, 2013), https://www.huffpost.com/entry/release-the-shame-of-addi_b_3975492 [https://perma.cc/8XWJ-JLPS].

5. Pawlowski, *supra* note 1.

6. *Id.*

7. The New York 911 Good Samaritan Law provides immunity for anyone experiencing a drug or alcohol overdose that requires medical attention. However, drug court participants' conversations with doctors are not confidential in the program. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

with jail time for his relapse, Michael died alone in his apartment even though his life might have been saved had he gone to the hospital.[14]

Substance abuse is common throughout the United States and can often culminate into a substance use disorder (SUD). SUD is "a treatable mental disorder that affects a person's brain and behavior, leading to their inability to control their use of substances like legal or illegal drugs, alcohol, or medications."[15] There is significant overlap between individuals with SUD and the criminal system. Many imprisoned individuals struggle with a substance use disorder (SUD), though it is difficult to measure an exact number.[16] However, a "substantial prison population in the United States is strongly connected to drug-offenses . . . some research shows that an estimated 65% of the United States prison population has an active SUD."[17] A 2019 report from the American Civil Liberties Union (ACLU) found that, in 2015, approximately one in four people in Indiana prisons were incarcerated for a drug-related offense.[18] This equates to roughly 6,875 people.[19] Additionally, drug offenses are the most common offense for individuals entering Indiana prisons.[20]

To combat rising rates of SUD, overwhelmed court dockets, and overpopulation in jails, courts across Indiana and the United States developed drug courts.[21] Drug courts allow certain drug users to participate in a treatment program in lieu of spending time in jail for a drug-related criminal offense.[22] There are approximately fifty-five courts in Indiana that operate alcohol and drug courts.[23] These courts are governed by the Indiana Code and administrative rules created by the Judicial Conference of Indiana.[24] The governing law gives large discretion to drug courts for the creation and implementation of their programs.[25] At the federal level, no law exists governing drug courts; instead,

14. *Id.*

15. *Substance Use and Co-Occurring Mental Disorders,* NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health [https://perma.cc/Q8RM-SB86] (last reviewed Mar. 2023).

16. *Criminal Justice DrugFacts,* NAT'L INST. ON DRUG ABUSE (June 2020), https://nida.nih.gov/publications/drugfacts/criminal-justice [https://perma.cc/X8SN-7JN7].

17. *Id.*

18. AM. C. L. UNION, BLUEPRINT FOR SMART JUSTICE INDIANA 8 (2019), https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-IN.pdf [https://perma.cc/V9X8-9DM4].

19. *Id.*

20. *Id.* at 9.

21. Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 FED. PROBATION J. 13 (June 2008).

22. *Treatment Courts*, U.S. DEP'T OF JUST.: OFF. OF JUST. PROGRAMS (Apr. 11, 2024), https://ojp.gov/feature/drug-courts/overview [https://perma.cc/F39M-647H].

23. *Court Alcohol & Drug Program*, IND. JUD. BRANCH: OFF. OF CT. SERVS., https://www.in.gov/courts/iocs/cadp/#:~:text=Approximately%20fifty%2Dfive%20circuit%2C%20superior,court%20alcohol%20and%20drug%20programs [https://perma.cc/TC27-ZYQA] (last visited Feb. 14, 2024).

24. IND. CODE § 33-23-16 (2023); I.C. § 12-23-14 (2023); JUDICIAL CONFERENCE OF IND., IND. OFF. OF CT. SERVS., *Rules for Court-Administered Alcohol & Drug Programs*, IND. OFF. OF CT. SERVS. (Aug. 31, 2021), https://www.in.gov/courts/iocs/files/cadp-rules.pdf.

25. *Id.*

the Federal Drug Courts Program Office has created nonbinding guidelines for state drug courts.[26]

As it stands, the law governing Indiana drug courts is silent regarding how a court should respond to a participant's relapse. Because of this, Indiana drug court teams, including the judges, are free to treat relapse however they wish. This Note argues that the Indiana Judicial Conference should amend the Rules for Court-Administered Alcohol & Drug Programs[27] to include a provision prohibiting courts from sanctioning temporary-event relapse, and instructing courts to instead provide therapeutic adjustments because temporary-event relapse is a normal part of recovery.[28] Part I of this Note defines SUD, discusses how SUD impacts the brain, explains why relapse is a normal part of recovery from SUD, and distinguishes temporary-event relapse from return-to-use relapse. Part II describes Indiana drug courts, state law governing Indiana drug courts, and federal guidelines for drug courts before analyzing the efficacy of drug courts. Part III analyzes why courts should respond to temporary-event relapse differently than return-to-use relapse and describes therapeutic adjustments as the best response for temporary-event relapses. Finally, Part V recommends that the Indiana Judicial Conference amend the Rules for Court-Administered Alcohol & Drug Programs to include provisions prohibiting the sanctioning of temporary-event relapses and requiring therapeutic adjustments for temporary-event relapses.

I. Substance Use Disorder and Relapse

The prevalence of SUD in drug court participants demands care and attention to drug court processes. Though the outside world often views drug use as a conscious choice made by the drug user, the reality is that drug use alters the normal brain network and processes. Because the brain is altered with drug use, relapse is a regular part of recovery. However, there are two types of relapses, and drug courts should consider which type of relapse a participant is experiencing when determining the appropriate response.

A. Diagnosing Substance Use Disorder

Roughly one in twelve Hoosiers have SUD, equating to nearly half a million people in Indiana.[29] Between 2018 and 2021, drug overdose deaths in Indiana

26. *See* Bureau of Just. Assistance, U.S. Dep't of Just., *Defining Drug Courts: The Key Components* (Oct. 2004), https://www.ojp.gov/pdffiles1/bja/205621.pdf.

27. Judicial Conference of Ind., Ind. Off. Of Ct. Servs., *Rules for Court-Administered Alcohol & Drug Programs* (Aug. 31, 2021), https://www.in.gov/courts/iocs/files/cadp-rules.pdf.

28. *See* discussion *infra* Part I, Sect. B.

29. *Addiction affects every aspect of Hoosier life,* Ind. Univ. (Mar. 2023), https://addictions.iu.edu/understanding-crisis/crisis-in-indiana.html [https://perma.cc/X4M5-6Z9Q].

related to opioids rose from 1,098 to 2,205, a nearly 200% increase.[30] The state drug-induced mortality rate quadrupled from 2000 to 2014, while deaths related to synthetic opioids increased by 600% between 2012 and 2016.[31] Indiana prisoners can be up to 129 times more likely to die of a drug overdose within two weeks after release from incarceration than the general population.[32] Many recently released former inmates in Indiana return to drug use because of a lack of treatment for their underlying SUD.[33]

SUD differs from substance misuse. Substance misuse is defined as the "use of alcohol, illegal drugs, and/or prescribed medications in ways that produce harms to ourselves and those around us."[34] SUD is a disorder associated with consumption of one or more of ten classes of drugs: "alcohol; caffeine; cannabis; hallucinogens . . . ; inhalants; opioids; sedatives, hypnotics, and anxiolytics; stimulants . . . ; tobacco; and other (or unknown) substances."[35] The key feature of SUD is a group of cognitive, behavioral, and physiological symptoms that show the consumer continuing substance use regardless of the negative side effects associated with it.[36] SUD can range from mild to severe, with addiction being the most severe type.[37] To qualify as a mild SUD, two or more of eleven criteria must be present.[38] With more present criteria, the SUD may be labeled moderate (four to five criteria) or severe (six or more).[39] These eleven criteria are:

(1) use of substance in large amounts or for longer periods of time than intended;
(2) failed attempts to stop use;
(3) excessive time using, obtaining, or recovering from the substance;
(4) craving the substance;
(5) failure to fulfill major obligations at work, school, or home;
(6) continuing substance use despite persistent or recurrent social/interpersonal problems caused by the substance;
(7) sacrificing important social, occupational, or recreational activities because of the substance use;
(8) physically hazardous use of the substance;

30. SYRA HEALTH, DRUG FACT SHEET: SUBSTANCE USE IN INDIANA 7, https://www.in.gov/fssa/dmha/files/Drug-Fact-Sheet_2023_ADA_final.pdf.

31. *Addiction affects every aspect of Hoosier life*, *supra* note 29.

32. *Id.*

33. *Id.*

34. A. Thomas McLellan, *Substance Misuse and Substance Use Disorders: Why Do They Matter in Healthcare?*, 128 TRANSACTIONS OF THE AM. CLINICAL AND CLIMATOLOGICAL ASS'N 112 (2017).

35. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 481 (5th ed. 2013) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-5].

36. *Id.* at 483.

37. NAT'L INST. OF MENTAL HEALTH, *Substance Use and Co-Occurring Mental Disorders, supra* note 15.

38. AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 35, at 484.

39. *Id.*

(9) continued use of substance despite awareness of physical or psychological problem caused by use;
(10) tolerance of the substance; and
(11) withdrawal after prolonged use.[40]

SUD can affect multiple areas of a person's life, including home life. In 2016, fifty percent of cases of children removed from their homes by the Indiana Department of Child Services were removed because of drug or alcohol use by a parent.[41] These children are four times more likely to misuse drugs or alcohol at some point in their lives.[42] Additionally, SUD affects physical and mental health.[43] Individuals struggling with SUD may "experience difficulty with sleeping, significant changes in their appetite, and even heart problems."[44] Long-term substance abuse can lead to cancer, lung disease, organ failure, and more.[45] These health problems can then take a toll on a person's mental health.[46]

B. The Science Behind Substance Use Disorder

SUD is categorized as a disorder because it involves "functional changes to brain circuits involved in reward, stress, and self-control" during and after drug use.[47] When an individual initially chooses to consume drugs, it is normally voluntary; however, with each subsequent use, self-control becomes more impaired.[48] In studies completed about individuals with addiction problems, brain imaging showed physical changes to areas of the brain that control "judgment, decision-making, learning and memory, and behavior control."[49] Risk factors,[50] biological factors,[51] protective factors,[52] environmental factors,[53]

---

40. *Id.* at 483–84.
41. *Addiction affects every aspect of Hoosier life, supra* note 29.
42. *Id.*
43. *4 Ways Addiction Affects Quality of Life,* FAIR PARK COUNSELING, https://www.fairparkcounseling.com/4-ways-addiction-affects-quality-of-life/#:~:text=Those%20battling%20substance%20abuse%20may,and%20problems%20with%20mental%20health [https://perma.cc/8EPZ-WB9G] (last visited Jan. 21, 2024).
44. *Id*
45. *Id.*
46. *Id.*
47. *Drug Misuse and Addiction,* NAT'L INST. ON DRUG ABUSE (July 6, 2020), https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction [https://perma.cc/3SCM-ZF9X].
48. *Id.*
49. *Id.*
50. Risk factors can include aggressive behavior in childhood, lack of parental supervision, low peer refusal skills, drug experimentation, availability of drugs at school, and community poverty. NAT'L INST. ON DRUG ABUSE, *Drug Misuse and Addiction, supra* note 47.
51. Biological factors can include genes, stage of development, gender, or ethnicity. *Id.*
52. Protective factors can include self-efficacy, parental monitoring and support, positive relationships, good grades, school anti-drug policies, and neighborhood resources. *Id.*
53. Environmental factors relate to family, school, and neighborhood. *Id.*

and other factors[54] can make someone more or less vulnerable to struggling with SUD.[55]

Drug use specifically alters the way neurotransmitters are released within the brain. The brain operates using billions of cells, called neurons, in circuits and networks to control the flow of information.[56] Neurons fire back and forth to send signals to one another.[57] The circuits work together as a team to perform functions between different parts of the brain, the spinal cord, and other parts of the body.[58] To send messages, neurons release neurotransmitters into the area between themselves and another cell.[59] The neurotransmitter crosses the gap to transfer information in a key-lock style.[60] Transporters, other molecules, help limit the signal of the neurotransmitter to its designation.[61] Drugs interfere with this process by interrupting all aspects described above.[62] Some drugs can activate neurons because their chemical buildup imitates the natural neurotransmitter.[63] Though this activation mimics the normal brain process, it is actually much different when activated by a drug like marijuana or heroin.[64] Instead of normal messages flowing through the network, drugs like marijuana and heroin cause abnormal messages to be sent out.[65] Drugs like cocaine can cause massive numbers of neurotransmitters to be released, creating large disruptions in the transport process, which in turn impacts behaviors.[66]

Several areas of the brain are impacted by drug use, including the basal ganglia, extended amygdala, and prefrontal cortex.[67] The basil ganglia supports positive motivation through normal daily activities like eating and socializing.[68] Drug use causes this area to overreact, resulting in the euphoric high associated with many drugs.[69] After repeated drug use, the basil ganglia adjusts to the drug, making it more difficult to feel motivation and reward like usual.[70] The extended

54. Other factors include early use of drugs and how the drug is taken. *Id.* The earlier the use of the drug, the more likely it may impact a developing brain. *Id.* Additionally, smoking or injecting a drug increases the addictive nature. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Drugs and the Brain,* NAT'L INST. ON DRUG ABUSE (July 6, 2020), https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drugs-brain [https://perma.cc/KH29-WA9T].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*; *see also* Joanna S. Fowler et al., *Imaging the Addicted Human Brain,* 3 SCI. & PRAC. PERSPS. 4, 5 (2007).

68. NAT'L INST. ON DRUG ABUSE, *Drugs and the Brain, supra* note 59.

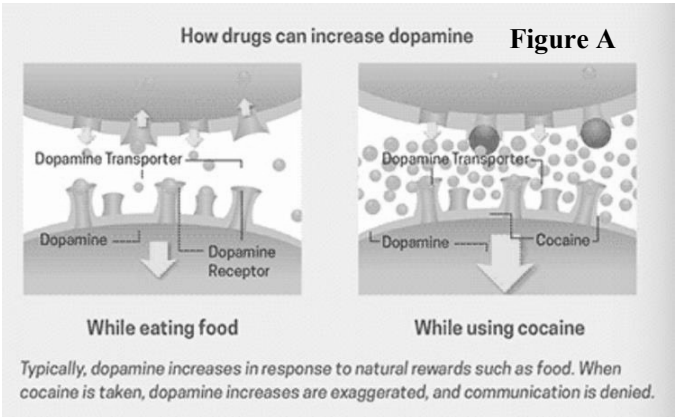
69. *Id.*

70. *Id.*

amygdala controls feelings like stress, anxiety, irritability, and unease.[71] With each subsequent drug use, the extended amygdala becomes more sensitive to discomfort and the feelings listed, resulting in the consumer wanting to use drugs for relief.[72] Finally, the prefrontal cortex enables thinking, planning, problem-solving, decision-making, and self-control.[73] Similarly to the other brain areas mentioned, the prefrontal cortex becomes susceptible to reduced impulse control after repeated drug use.[74] More severe drugs, like opioids, can impact the brain stem that controls heart rate, breathing, and more.[75]

Drugs increase pleasure by causing surges of neurotransmitters in areas like the basal ganglia (see Figure A), causing the consumer to return to use in the future.[76] Drug use produces surges of dopamine, a neurotransmitter activated by the reward circuit.[77] Dopamine is the "feel-good" hormone that allows a person to feel pleasure.[78] When dopamine is released, it signals to the brain that it should remember what caused the dopamine release.[79] Therefore, dopamine reinforces drug use by "reinforcing the connection between consumption of the drug, the resulting pleasure, and all the external cues linked to the experience."[80] Put in simpler terms, dopamine teaches the brain to want more with each subsequent drug use, creating a learned reflex.[81] This learned reflex is difficult to shake and can last decades.[82] Other brain imaging studies show that "drug use literally alters the connections between the ventral tegmental area (which is part of the reward center) and memory hubs in

Figure A



71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*; *see also* Fowler et al., *supra* note 67, at 5.
75. NAT'L INST. ON DRUG ABUSE, *Drugs and the Brain, supra* note 59.
76. *Id.*
77. *Id.*; *see also* Fowler et al., *supra* note 67, at 5.
78. *Dopamine*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/22581-dopamine [https://perma.cc/5FM6-JG9M] (last reviewed Mar. 23, 2022).
79. NAT'L INST. ON DRUG ABUSE, *Drugs and the Brain, supra* note 59.
80. *Id.*
81. *Id.*
82. *Id.*

the brain (such as the hippocampus).[83] Taken together, the impact of these alterations in normal brain function results in a drug user feeling depressed and unmotivated until returning to drug use again.[84] These changes can be long-term, leading to different neurological and cognitive complications.[85] Because of this, drug users struggle to stop using drugs and often return to drug use during their recovery process.

When talking about drug addiction and SUD, relapse "refers to the reinitiation of drug seeking and drug taking after abstinence."[86] Relapse is one part of the normal process during the treatment of SUD.[87] Relapse does not mean treatment is failing;[88] rather, "it indicates that the person needs to speak with their doctor to resume treatment, modify it, or try another treatment."[89] Roughly seventy to ninety percent of individuals attempting to overcome drug addiction experience some form of relapse.[90] For SUD specifically, forty to sixty percent experience relapse.[91] Relapse generally occurs when a person experiences a craving for drugs.[92] The craving for drugs "can be induced by re-exposure to cues previously associated with drug exposure, by acute exposure to stressors and by re-exposure to the drug itself."[93] These triggers are usually what cause an individual with SUD to relapse.[94] In a study completed of 2,002 individuals "who self-reported a resolved AOD [alcohol or drug] problem . . . ,"[95] researchers found that the mean number of recovery attempts before long-term recovery was 5.35 and the median number was 2.[96] Though relapse is a normal

83. David Sack, *Why Relapse Isn't a Sign of Failure,* PSYCH. TODAY (Oct. 19, 2012), https://www.psychologytoday.com/intl/blog/where-science-meets-the-steps/201210/why-relapse-isnt-sign-failure [https://perma.cc/XVE3-PQ27].

84. NAT'L INST. ON DRUG ABUSE, *Drugs and the Brain, supra* note 59.

85. Stacy Mosel, *Brain Damage from Alcohol and Drugs: Are the Effects Reversible?*, AM. ADDICTION CTRS. (Dec. 16, 2024), https://americanaddictioncenters.org/alcohol/risks-effects-dangers/brain [https://perma.cc/K8A7-6KBT].

86. Jane Stewart, *Psychological and Neural Mechanisms of Relapse,* 363 PHIL. TRANSACTIONS OF ROYAL SOC'Y B BIOLOGY SCIS. 3147 (July 18, 2008).

87. Sack, *supra* note 83; *Relapse,* ALCOHOL AND DRUG FOUND. (July 17, 2024), https://adf.org.au/reducing-risk/relapse/ [https://perma.cc/H344-WHDX]; Gilian Steckler et al., *Relapse and Lapse,* 1 PRINCIPLES OF ADDICTION 125 (Dec. 2013).

88. Sack*, supra* note 83.

89. *Treatment and Recovery,* NAT'L INST. ON DRUG ABUSE (July 6, 2020), https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery [https://perma.cc/4SUX-9NBT]; *see* Norda D. Volkow et al., *Loss of Dopamine Transporters in Methamphetamine Abusers Recovers with Protracted Abstinence,* 21 J. OF NEUROSCIENCE 9414 (Dec. 1, 2001).

90. Sack, *supra* note 83.

91. NAT'L INST. ON DRUG ABUSE, *Treatment and Recovery*, *supra* note 89.

92. Stewart, *supra* note 86 at 3147; Sack, *supra* note 83.

93. Stewart, *supra* note 86 at 3147.

94. Sack, *supra* note 83; AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 35, at 483.

95. John F. Kelly et al., *How Many Recovery Attempts Does It Take to Successfully Resolve an Alcohol or Drug Problem? Estimates and Correlates from a National Study of Recovering U.S. Adults*, 43 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RSCH. 1533, 1535 (2019).

96. *Id.* at 1536.

part of recovery, it can be difficult for drug courts to ascertain when a participant is taking their treatment plan seriously and genuinely struggling versus not taking treatment seriously. When a participant is not taking treatment seriously, the drug court program probably is not a good fit for them. For this reason, a distinction has been made between temporary-event relapse and return-to-use relapse, discussed in more detail below.

C. Differentiating Temporary-Event Relapse from Return-to-use Relapse

Temporary-event relapse, sometimes referred to as a lapse,[97] differs greatly from return-to-use relapse. Generally, relapse can be defined as an individual's return to drug use, either temporarily or permanently.[98] However, an occurrence of relapse does not necessarily mean that a person has returned to persistent use.[99] A temporary-event relapse "involves a few occasions of [substance] use."[100] Conversely, when an individual repeats drug use at a level similar to the pre-treatment level of use, this is deemed return-to-use relapse.[101] With psychological disorders and problem behaviors like drug use, most individuals experience multiple temporary-event relapses after beginning treatment.[102] It is difficult to define the exact moment that relapse happens; therefore, many define it as an iterative process.[103]

Distinguishing a temporary-event relapse from return-to-use relapse can affect how an individual responds to the relapse and how a treatment plan is made or adjusted. When a person relapses, "his or her perception that [it] is a temporary slip will make a significant difference in how optimistic the patient remains and how soon the patient returns to avoiding drug use."[104] Additionally, a person's treatment plan can change depending on what type of relapse they are experiencing.[105] To help ensure an individual is receiving the correct treatment, researchers created an empirical and standardized method for distinguishing temporary-event relapse from return-to-use relapse in drug court participants.[106] A statistical limit can be created by looking at the drug court program participant's history (or other similarly situated clients in the same program if a participant does not yet have history).[107] If the time in between a

97. Steckler et al., *supra* note 87.

98. Farrokh Alemi et al., *Statistical Definition of Relapse: Case of Family Drug Court,* 29 ADDICTIVE BEHAVS. 685 (2004).

99. *Addiction Relapse: Risk Factors, Coping & Treatment Options,* AM. ADDICTION CTRS. (Dec. 31, 2024), https://americanaddictioncenters.org/treat-drug-relapse [https://perma.cc/7CFL-2NX9].

100. Alemi et al., *supra* note 98, at 686.

101. Steckler et al., *supra* note 87.

102. *Id.*

103. *Id.*

104. Alemi et al., *supra* note 98, at 686.

105. *Id.*

106. *Id.*

107. *Id.* at 685.

relapse exceeds the limit, it is likely the participant has returned to persistent use.[108]

The researchers defined return to drug use as "a statistically significant deviation from a pattern of abstinence," finding that statistical charts could be used to determine what type of relapse a person is experiencing.[109] These charts, called relapse charts, can be used to display a pattern of use, especially with drug use (see Table 1 for the data that goes into the relapse chart).[110] Based on this data, an upper limit, called the Upper Control Limit (UCL), can be set to distinguish what type of relapse is occurring.[111] After compiling the case history of a participant into a table, the information on the length of relapses can be compiled into a histogram.[112] The researchers found that if a histogram shows a geometrically decaying shape, longer stretches of relapse are increasingly rare.[113] Once the histogram has been created, the UCL can be set at the point where the length of relapse "is so large that it cannot be expected by mere chance deviation from the underlying pattern of abstinence."[114] After this, 99% of the data points for a participant abstaining from drug use should fall below the limit.[115] The average length of relapse (ALR) can be calculated by dividing the number of weeks of relapse by the number of weeks of success.[116] For the participant table above, the UCL can be calculated using the following formula: $UCL = ALR + 3[ALR(ALR+1)]^{0.5}$.[117] So, the UCL for the participant would be 2.32.[118] This means that if the participant's drug use and abstinence were to be recorded for 100 weeks, the relapse rate should only be higher than 2.32 weeks one time.[119] Because the participant was only observed for 20 weeks, the

Table 1
Case history for a hypothetical patient

Week	Abstinent	Weeks abstinent	Length of relapse
1	Yes	1	0
2	Yes	2	0
3	Yes	3	0
4	Yes	4	0
5	Yes	5	0
6	No		1
7	Yes	6	0
8	Yes	7	0
9	Yes	8	0
10	No		1
11	Yes	9	0
12	Yes	10	0
13	Yes	11	0
14	Yes	12	0
15	No		1
16	No		2
17	No		3
18	Yes	13	0
19	Yes	14	0
20	Yes	15	0

108. *Id.*
109. *Id.* at 687–88.
110. *Id.* at 688.
111. *Id.*
112. *Id.*
113. *Id.* at 689.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

occurrence of a relapse lasting longer than 2.32 weeks could be a sign of a return to use.[120]

After determining a participant's UCL, this line can be placed on the relapse chart (see Fig. 2).[121] If points of relapse are below the UCL, they are temporary-event relapses that do not signify a change in the repetition of abstinence; however, points above the control limit represent a change in drug use.[122] As seen in figure 2,[123] the first two episodes of drug use are below the UCL; however, the third occasion is above the control limit and is, therefore, too long of a span of drug use to be considered a temporary-event relapse.[124] Therefore, the third occasion likely suggests a return-to-use relapse because points above the UCL have less than a 1% chance of occurring randomly.[125]

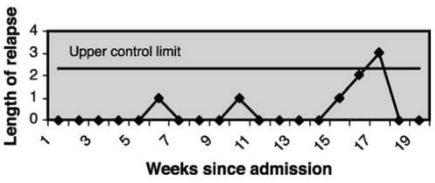


Fig. 2. Relapse chart.

After calculating the UCL and ALR, the probability of abstinence can be calculated using the following formula: probability of abstinence = 1/(1+ALR).[126] For the above participant, the probability of abstinence would be .75, or 75%. As time passes, a participant's probability of abstinence should increase; however, a 100% rate of abstinence is unlikely because, as explained before, SUD is a chronic disease.[127] By looking to this study as a guide, drug courts can distinguish between temporary-event relapse and return-to-use relapse to better aid participants in recovery. The probability of abstinence can be especially useful, as courts can determine whether a participant is heading toward or away from long-term recovery. Admittedly, this formula may be too rigid and complicated for drug courts to implement with every participant, especially when the drug court feels it has a good understanding of what the participant is experiencing. This Note argues that drug courts must consider this formula for determining when sanctions are appropriate (return-to-use relapse) and inappropriate (temporary-event relapse). If a drug court plans to sanction someone for a relapse, they must first determine, through the formula, which type of relapse is occurring.

II. DRUG COURTS

There are several state laws and nonbinding federal guidelines that drug

120. *Id.* at 689–90.
121. *Id.* at 690.
122. *Id.*
123. *Id.* at 690 fig. 2.
124. *Id.* at 690.
125. *Id.*
126. *Id.* at 691.
127. *Id.*

courts either must adhere to or can consider when implementing their respective programs. Because these guidelines are vague, implementation differs for each drug court. A lack of proper standardization can lead to different levels of efficacy in different drug courts, especially when it comes to the treatment of relapse.

A. Indiana's Drug Courts

Drug courts aim to be a therapeutic approach to jurisprudence in which the law can act as a rehabilitative agent rather than a punitive actor for individuals entering the system through a drug-defined or drug-related offense.[128] Individuals charged with a drug offense are sometimes given the opportunity to participate in a drug court program in lieu of incarceration.[129] When participants enter a drug court program, they are usually required to plead guilty to at least one of their charged offenses, which is often a felony.[130] Judgment and conviction are then withheld until the participant graduates from or fails out of the program.[131] Participants who successfully complete the program can have their criminal charge(s) dismissed, while those who fail the program must return to the normal justice system having forfeited their right to fight the charge.[132] In some instances of failure, a participant's post-program sentence can be even longer than their original sentence.[133]

There are over 4,000 drug treatment courts in the United States, including mental health courts, veterans treatment courts, tribal healing to wellness courts, and DUI/DWI courts.[134] Funding for drug treatment courts comes from local, state, tribal, and federal funding.[135] Drug courts are often managed by a multidisciplinary team comprised of different professionals like judges, prosecutors, defense attorneys, community corrections officers, social workers, and treatment service professionals.[136] Most drug courts operate using a multi-phase treatment approach that includes stabilization, treatment, and transition

128. Lurigio, *supra* note 21, at 14.

129. *Id.* at 15.

130. *Monroe County Drug Treatment Court Program Participant Handbook and Program Information* (Feb. 2, 2024), https://www.co.monroe.in.us/egov/documents/1708717817_28317.pdf [https://perma.cc/K23T-G4V2].

131. *Id.*

132. U.S. DEP'T OF JUST.: OFF. OF JUST. PROGRAMS, *Treatment Courts*, *supra* note 22.

133. *See, e.g.*, Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 604 (2016); Brook W. Kearley, *Long Term Effects of Drug Court Participation: Evidence from a 15 Year Follow up of a Randomized Controlled Trial,* J. SUBSTANCE ABUSE TREATMENT (Oct. 2017).

134. U.S. DEP'T OF JUST.: OFF. OF JUST. PROGRAMS, *Treatment Courts*, *supra* note 22.

135. *Id.*; *Tribal Healing to Wellness Courts: Program Development Guide*, TRIBAL L. AND POL'Y INST. (2002), https://www.tribal-institute.org/download/Draft_Program_Development_Guide.pdf.

136. U.S. DEP'T OF JUST.: OFF. OF JUST. PROGRAMS, DRUG TREATMENT COURTS (May 2024), https://www.ojp.gov/pdffiles1/nij/238527.pdf.

phases.[137] During participation in the program, participants are rewarded for some behaviors and sanctioned for others.[138] Rewards in drug court can include praise from the drug court judge, tokens of accomplishment awarded in open court, candy, gift cards, and curfew extensions.[139] Sanctions can include more frequent drug screens, demotion to earlier program phases, fines, incarceration periods, and termination from the program.[140] This Note argues that temporary-event relapses should not be met with either of these options; instead, they should be met with therapeutic adjustments, as discussed later.

B. State Law Governing Indiana Drug Courts

There are two governing pieces of law for Indiana drug courts: the Indiana Code and the Rules for Court-Administered Alcohol & Drug Programs.[141] First, the Indiana Code includes two chapters covering drug courts: one chapter governs all courts deemed "problem solving courts",[142] and the other governs Alcohol and Drug Services programs.[143] The Indiana Code gives problem solving courts the power to hire employees, establish policies and procedures, and adopt local court rules.[144] The code discusses court jurisdiction, individual eligibility, deferred prosecution, and other similar topics,[145] but is not specific regarding other details like quantity of personnel. The code only describes a drug court as a problem-solving court that brings "rehabilitation professionals, local social programs, and intensive judicial monitoring [together with] . . . eligible defendants or juveniles to individually tailored programs or services."[146]

Second, the Judicial Conference of Indiana adopted the Rules for Court-Administered Alcohol & Drug Programs in 1997 to better guide drug courts.[147] The Indiana General Assembly delegated the Judicial Conference of Indiana the responsibility of certification, training, and support of drug programs.[148] These rules, however, are also vague, like the Indiana Code, and only address the technicalities of drug courts, like certification, procedures, and assessments.[149]

---

137. U.S. GOV'T ACCOUNTABILITY OFF, GAO-23-105272. ADULT DRUG COURT PROGRAMS: FACTORS RELATED TO ELIGIBILITY AND ACCEPTANCE OF OFFERS TO PARTICIPATE IN DOJ FUNDED ADULT DRUG COURTS 9 (Feb. 2023).

138. BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., *supra* note 26, at 13.

139. *Id.*

140. *Id.* at 14.

141. IND. CODE § 33-23-16 (2023); I.C. § 12-23-14 (2023); JUDICIAL CONFERENCE OF IND., IND. OFF. OF CT. SERVS., *supra* note 24.

142. I.C.§ 33-23-16 (2023).

143. I.C.§ 12-23-14 (2023).

144. I.C.§ 33-23-16-21 (2023).

145. I.C.§ 33-23-16-13 (2023); I.C.§ 12-23-5-2 (2023).

146. I.C.§ 33-23-16-5(a)(1)–(2) (2023).

147. *See* JUDICIAL CONFERENCE OF IND., IND. OFF. OF CT. SERVS., *supra* note 24.

148. *About*, IND. JUDICIAL BRANCH: OFF. OF CT. SERVS., https://www.in.gov/courts/iocs/cadp/about/ [https://perma.cc/39CA-YVF3] (last visited Mar. 1, 2024).

149. JUDICIAL CONFERENCE OF IND., IND. OFF. OF CT. SERVS, *supra* note 24 at §§ 7, 20, 22.

While the rules are specific on some topics, like creating forms with the rights of each program participant,[150] the rules do not address others, like how to approach a participant relapsing. None of the rules address sanctions.

C. Federal Guidelines for Drug Courts

There are a few federal guideline documents that state drug courts must abide by to receive specific federal funding.[151] The National Association of Drug Court Professionals developed ten key components of drug courts in the United States in an unsuccessful attempt to bring standardization to drug courts.[152] The key components are:

(1) integration of alcohol/drug treatment with the justice system;
(2) a nonadversarial approach that protects participants' due process rights;
(3) early identification of participants;
(4) access to treatment and rehabilitation services;
(5) abstinence monitoring;
(6) coordinated strategy for response to compliance;
(7) judicial interaction with participants;
(8) evaluation strategies to measure program goals and effectiveness;
(9) interdisciplinary education;
(10) creation of partnerships between drug courts and community-based organizations.[153]

These components are broad and do not necessarily require compliance because no federal agency or law says so.[154] A 2007 National Drug Court Survey found that, on average, respondent drug courts complied with six out of ten components.[155] Years after releasing these components, the National Association of Drug Court Professionals released the Adult Drug Court Best Practice Standards.[156] These standards offer advice regarding drug court programming, but some drug courts do not adhere to them. For example, the standards suggest that jail sanctions should only be given in extreme circumstances and should not last more than three to five days;[157] yet, in one drug court, when a participant relapsed, the participant was sanctioned to sixty

150. *Id.* at § 20.

151. *See* DEPT. OF HEALTH AND HUM. SERVS., SAMHSA TREATMENT DRUG COURTS 11–12 (2023).

152. BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., *supra* note 26.

153. *Id.*

154. *See* Brandy F. Henry, *Improving the Quality of Drug Court Clinical Screening: A Call for Performance Measurement Policy Reform*, 31 CRIM. JUST. STUD. 267, 268. (July 3, 2018).

155. *Id.*

156. NAT'L ASS'N OF DRUG CT. PROS., ADULT DRUG COURT BEST PRACTICE STANDARDS (2018), https://allrise.org/wp-content/uploads/2023/06/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018.pdf.

157. *Id.* at 28.

days in jail.[158] While the components and standards discussed here are admirable and promising when implemented, the reality is that drug courts operationalize standards differently, if implemented at all.[159]

D. Drug Court Efficacy and Issues

The National Institute of Justice (NIJ) evaluates drug courts around the country.[160] The NIJ's 2012 Multisite Adult Drug Court Evaluation found drug courts reduce drug use and criminal offending during and after program participation.[161] Specifically, when measuring a five-year timeline, the study found that participants reported less criminal activity, were rearrested less than comparable individuals, had less drug use, and tested positive less than comparable individuals.[162] In another study, the NIJ tracked 6,500 drug court participants across ten years to determine that rearrest rates were lower five years later than similar drug offenders in the same place.[163] Though these results seem promising, drug courts could be more effective. In a study of the efficacy of five Indiana drug courts, the graduation rate of drug court participants was found to be 50% to 56%, leaving roughly 44% to 50% of participants failing the drug court program and returning to the normal justice system.[164]

A survey of recidivism rates for an Indiana drug court completed in 2014 produced factors that indicated whether a participant was more likely to recidivate.[165] Recidivism was measured up to thirty-six months.[166] The study found that "[f]irst, drug court participants who were neither employed nor a student at the time of admission were more likely to recidivate (54%) than participants who were employed or a student at time of admission (36%) . . . [s]econd, drug court participants who had a violation within the first 30 days of the program were more likely to recidivate (65%) than participants who did not

158. Christine Mehta, *How Drug Courts Are Falling Short,* OPEN SOC'Y FOUNDS. (June 7, 2017), https://www.opensocietyfoundations.org/voices/how-drug-courts-are-falling-short [https://perma.cc/SV7Y-66ZD].

159. Shannon M. Carey et al., *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*, 8 DRUG CT. REV. 6 (2012).

160. *NIJ's Multisite Adult Drug Court Evaluation,* NAT'L INST. OF JUST. (Nov. 4, 2012), https://nij.ojp.gov/topics/articles/nijs-multisite-adult-drug-court-evaluation [https://perma.cc/Q255-JMW7].

161. *Id.*

162. Shelli B. Rossman et al., *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts,* 4 URB. INST. JUST. POL'Y CTR. 121 (Nov. 2011).

163. *Do Drug Courts Work? Findings From Drug Court Research,* NAT'L INST. OF JUST. (May 11, 2008), https://nij.ojp.gov/topics/articles/do-drug-courts-work-findings-drug-court-research [https://perma.cc/Q2LN-NEFC].

164. K.L. Wiest et al., NPC RSCH., INDIANA DRUG COURTS: A SUMMARY OF EVALUATION FINDINGS IN FIVE ADULT PROGRAMS 3 (Apr. 2007), https://www.in.gov/courts/iocs/files/pscourts-eval-summary.pdf.

165. John R. Gallagher et al., *The Impact of an Indiana (United States) Drug Court on Criminal Recidivism,* 15 ADVANCES IN SOC. WORK 507, 513 (2014).

166. *Id.* at 515.

have a violation with the first thirty days of the program (35%) . . . ."[167] The study also found that out of 197 participants, 108 (or 55%) participants graduated successfully while 89 (or 45%) were terminated unsuccessfully.[168] Most interestingly, the study found that "participants with no positive drug tests in drug court and those with multiple positive drug tests had equal odds of recidivating."[169]

However, these numbers are likely inflated and, therefore, an inaccurate representation of the success of drug court programs. Most drug courts "exclude people with more serious offenses or histories . . . .",[170] effectively selecting the participants who are less likely to be struggling with SUD and more likely to struggle with substance misuse. Yet, the individuals with more serious offenses are the ones who have the most need for a rehabilitative program such as a drug court. The studies also usually compare drug court participants with drug court failures, thereby leaving a net positive result no matter what.[171] Clearly, the drug court system is not perfect. This Note does not attempt to perfect the system; instead, this Note addresses relapse.

III. RELAPSE AND DRUG COURTS

This Note does not argue that sanctions should be prohibited for relapses in general. Instead, this Note argues that sanctions should not be imposed in cases of temporary-event relapses. Instead, judges should implement therapeutic adjustments for temporary-event relapses.

A. Why Courts Should Manage Temporary-Event Relapse Differently Than Return-to-Use Relapse

Indiana drug courts should manage temporary-event relapse differently than return-to-use relapse because temporary-event relapse is a normal part of recovery that often occurs when participants experience stress. It would be cruel to punish a participant for the effects of the program itself. Drug courts increase the levels of stress that often contribute to temporary-event relapse, and the consequences of treating the two comparably are severe.[172] The stress created by the way drug courts operate increases a participant's likelihood of relapsing. Though relapse is a normal part of recovery, there are external factors that can increase an individual's likelihood of relapsing. Specifically, stress "is a well-known risk factor in the development of addiction and in addiction relapse

167. *Id.* at 513.

168. *Id.* at 513–14.

169. *Id.* at 516.

170. DRUG POL'Y ALL., DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE.,15 (Mar. 2011), https://drugpolicy.org/wp-content/uploads/2023/09/Drug-Courts-Are-Not-the-Answer_Final2.pdf [https://perma.cc/TXM2-LK45].

171. *Id.*

172. Alemi et al., *supra* note 98, at 686.

vulnerability.[173] The structure of Indiana drug courts is stressful in several ways, including program fees and how status hearings are facilitated.[174]

Whatever the price may be for entering the drug court system, the financial burden placed on participants creates a lot of stress. The fees for drug screens can be disabling to some participants who are struggling to find or maintain a job, especially in jurisdictions like Kosciusko County, which charges a participant roughly $40 a week for a maximum of twenty-eight weeks.[175] This would equate to roughly $1,120 spent on drug screens. Additionally, drug courts need only identify testing locations and hours;[176] yet, the testing locations are not necessarily easily accessible to participants. A participant in a rural county who lives thirty miles from the testing location may have difficulty getting to the location during the specified hours, especially if they lack their own means of transportation. The stress of this can quickly take a toll.

Though the public aspect of the program is supposed to create accountability, it often leads to stress and humiliation.[177] Generally, all drug court participants with status hearings on a specific day are called into the courtroom at the same time and then appear individually before the judge.[178] Each participant appears before the judge to review their progress since the last status hearing.[179] In a study of drug courts through the eyes of participants, one participant said that they "fe[lt] like [they are] on a game show."[180] If a participant has relapsed, they can immediately be sent to jail.[181] The guilt and stress caused by relapse can lead "to self-blame and guilt that in turn mean the person is more likely to continue substance use as a coping mechanism."[182] By making drug court participants admit their normal temporary-event relapses in front of the rest of the participants,[183] Indiana drug courts increase stress levels in participants.

The consequences of punishing a temporary-event relapse can be severe. Drug court participants often stay in jail for more days than a traditional docket due to interim jail stays.[184] The penalty for relapsing can be a jail sanction where

173. Rajita Sinha, *Chronic Stress, Drug Use, and Vulnerability to Addiction*, 1141 ADDICTION REVS. 105 (Oct. 23, 2008).

174. Susan H. Witkin & Scott P. Hays, *Drug Court Through the Eyes of Participants,* 30 CRIM. JUST. POL'Y REV. 971, 976–77 (2017).

175. *Drug Court,* KOSCIUSKO CNTY., https://www.kcgov.com/department/division.php?structureid=240#:~:text=Fees%20included%20for%20participation%3A,Fee%3A%20%2420.00%20per%20drug%20screen [https://perma.cc/3AFH-HCNT] (last visited Mar. 10, 2024).

176. JUDICIAL CONFERENCE OF IND., IND. OFF. OF CT. SERVS., *supra* note 24, at § 33(b)(5).

177. Witkin & Hays, *supra* note 174, at 978.

178. *Id.* at 976–77.

179. *Id.* at 976.

180. *Id.* at 977.

181. *Id.* at 976–77.

182. ALCOHOL AND DRUG FOUND, *supra* note 87.

183. Witkin & Hays, *supra* note 174, at 976–77.

184. REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUST., DO DRUG COURTS SAVE JAIL AND PRISON BEDS*?* 6 (2000), https://www.vera.org/downloads/publications/IIB_Drug_courts.pdf.

participants have to spend a few days in jail.[185] Jail sanctions lead to isolation, which is a trigger for drug use.[186] Additionally, when a participant is sanctioned with jail time, it does not increase their likelihood of program retention or completion.[187] Sanctioning a drug court participant for temporary-event relapses can cause a participant to feel like they are failing. How a participant perceives their relapse can impact how soon the participant returns to sobriety.[188] In reality, "drug court jail stays are 'associated with a higher likelihood of re-arrest and a lower probability of program completion.'"[189] These jail stays can affect employment and child custody arrangements, further setting a participant back. A study of fifty-six Kentucky drug court participants discovered and analyzed employment needs and hardships that drug court participants face.[190] A theme derived from this study is that "participation in drug court treatment programs often conflicted with work schedules, thus making jobs difficult to obtain and maintain."[191]

Finally, relapses can be sanctioned with demotion to earlier program phases, resulting in stress and incorrect alterations to a participant's treatment plan.[192] While demotion to earlier treatment phases may be appropriate and productive for return-to-use relapse, it is not appropriate for temporary-event relapse. When a participant returns to an initial treatment phase after a temporary-event relapse, they usually "[report] experiencing further guilt, shame, and loss of self-esteem."[193] Additionally, returning to initial treatment services prevents the participant from receiving the adjustment to their current treatment plan that they need.[194]

Without this difference in treatment, misinterpretations of which type of relapse is occurring can have serious consequences.[195] For example, if a clinician mistakes a client's relapse for return-to-use instead of temporary-event, the participant's treatment plan may be drastically altered instead of adjusted accordingly, resulting in backward progress.[196] Additionally, when a judge feels a participant has returned to drug use, the judge usually takes more

185. *Id.* at 5.

186. Nora Volkow, *Addiction Should be Treated, Not Penalized,* NAT'L INST. ON DRUG ABUSE (May 7, 2021), https://nida.nih.gov/about-nida/noras-blog/2021/05/addiction-should-be-treated-not-penalized [https://perma.cc/W794-3PHJ].

187. John R. Hepburn & Angela N. Harvey, *Effect of the Threat of Legal Sanction on Program Retention and Completion: Is That Why They Stay in Drug Court?*, 53 CRIME & DELINQ. 255 (Apr. 2007).

188. Alemi et al., *supra* note 98 at 685.

189. Wayne A. Comstock, *Drug Courts: The Risk of an Increased Number of Drug-Related Arrests and Long Jail Sentences,* 13 U. MIAMI RACE & SOC. JUST. L. REV. 22 (2023).

190. Michele Staton et al., *Employment Issues Among Drug Court Participants,* 33 J. OFFENDER REHAB. 73 (2001).

191. *Id.*

192. BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST, *supra* note 26, at 14.

193. Alemi et al., *supra* note 98, at 695.

194. *Id.*

195. *Id.* at 685.

196. *Id.*

severe actions that are inappropriate for temporary-event relapses.[197] Ultimately, a participant's path to sobriety is a learning process where each temporary-event relapse should be used as a teaching moment for the participant's recovery process.[198]

B. Therapeutic Adjustments

Drug courts can operate differently than standard courts because of the treatment options, rewards, and punishments that they give participants in lieu of jail time. This unique feature is admirable and has the potential to thrive. However, the response to temporary-event relapses should differ from the traditional sanction and reward system. Instead, drug courts should use therapeutic adjustments when responding to temporary-event relapses. Therapeutic adjustments can include medication, counseling, and inpatient treatment.[199]

The National Institute on Drug Abuse considers drug addiction a "relapsing disorder."[200] The National Association of Drug Court Professionals points out that relapses should not be punished; instead, relapses should be met with "a therapeutic adjustment."[201] Participants should "not receive punitive sanctions if they are otherwise compliant with their treatment and supervision requirements but are not responding to the treatment interventions."[202] These decisions and adjustments to treatment should be made based on recommendations of trained treatment professionals.[203] When a court imposes "substantial sanctions for substance use early in treatment, the team is likely to run out of sanctions and reach a ceiling effect before treatment has had a chance to take effect."[204] This is where the distinction between temporary-event and return-to-use relapse is most important. Sanctions can be appropriate for return-to-use relapse, but they are not appropriate for temporary-event relapse.[205]

IV. ACCOMMODATING TEMPORARY-EVENT RELAPSE IN DRUG COURTS

The Indiana Judicial Conference should amend the Rules for Court-Administered Alcohol & Drug Programs to include a provision that prohibits sanctions and requires therapeutic adjustments for temporary-event relapse. This section discusses why standardization is needed to protect drug court participants experiencing a temporary-event relapse, and concludes by offering

197. *Id.* at 686.
198. BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., *supra* note 26, at 13.
199. NAT'L ASS'N OF DRUG CT. PROS., *supra* note 156, at 31.
200. *Drug Misuse and Addiction, supra* note 47.
201. NAT'L ASS'N OF DRUG CT. PROS., *supra* note 156, at 31.
202. *Id.* at 27.
203. *Id.*
204. *Id.* at 31.
205. *Id.*

a model administrative rule that Indiana should adopt.

A. Standardization Is Needed for Responses to Temporary-Event Relapse

Standardization is needed across the board for temporary event-relapses so that all drug court participants will receive the appropriate therapeutic adjustment if they experience temporary-event relapse, rather than sanctions. As the law stands now, drug court teams, which often do not include psychiatrists or sufficient interaction with mental health professionals, are left with the difficult, unguided responsibility of determining whether a drug court participant is refusing treatment and actively returning to drug use, or if a participant is experiencing a normal temporary-event relapse. Without standardization, Indiana drug courts can choose to treat relapse however they desire, just as they can implement other aspects of the program however they choose.[206]

An administrative response clarifying when sanctions are inappropriate is the best response because it will ensure that all Indiana drug courts are treating temporary-event relapse the same. In an analysis of eighteen Indiana problem-solving courts, a researcher found that treatment teams normally consisted of a judge, a prosecutor, a defense attorney, at least one counselor, and at least one case manager.[207] Thirteen of the courts had a police officer, twelve had a probation officer, and two had a physician.[208] In this study, "[e]very problem-solving court judge stated that treatment decisions are made through the court by the treatment team" and that the team is made up of treatment professionals (like mental health counselors and social workers) and non-treatment professionals (like attorneys).[209] Generally, the non-treatment professionals deferred treatment plans to the treatment professionals, even though the number of treatment professionals was limited.[210] As described, current non-treatment professionals in Indiana drug courts defer treatment to the limited number of

206. Currently, Indiana's drug courts can use a lot of discretion when implementing aspects of their programs because of the vague laws. Therefore, standardization is needed for temporary-event relapse. Under the Rules for Court-Administered Alcohol & Drug Programs, Indiana drug court participants are liable for the costs of drug screens required by the program. JUDICIAL CONFERENCE OF IND., IND. OFF. OF CT. SERVS., *supra* note 24, at § 33. Neither the Rules nor the Code specify how much a program can charge for each drug screen fee; therefore, different programs charge different fees. The Kosciusko County Drug Court charges a fee of $20 for each drug screen. *Drug Court, supra* note 175. The Grant County Drug court charges a fee of $5 for each drug screen. *Drug Court,* GRANT CNTY. CTS, https://www.in.gov/counties/grant/courts/courts/problem-solving-courts/drug-court/ [https://perma.cc/VQ55-3CYZ] (last visited Mar. 1, 2024).

207. Barbara Andraka-Christou, *What is "Treatment" for Opioid Addiction in Problem-Solving Courts? A Study of 20 Indiana Drug and Veterans Courts,* 13 STAN. J.C.R. & C.L. 189, 197 (June 1, 2017).

208. *Id.*

209. *Id.* at 200.

210. *Id.*

treatment professionals on drug court staff. This leaves the treatment of relapse in the hands of an individual who might not be qualified to respond to it (for example, a social worker without a medical background) or who may be overwhelmed with their caseload to give the time needed to evaluate and distinguish a temporary-event relapse from return-to-use relapse.[211] An administrative response would reduce this problem by guiding drug court teams through a statistical definition of the types of relapse. Therefore, the Indiana Judicial Conference should amend the Rules for Court-Administered Alcohol & Drug Programs to include a relapse provision that courts must follow to distinguish the treatment of temporary-event relapses versus return-to-use relapses and only sanction the latter.

B. Proposed Model Statute for Temporary-Event Relapse

Currently, neither the Indiana code, the Rules for Court-Administered Alcohol & Drug Programs, nor the federal guidelines define sanction, incentive, or therapeutic adjustment. So, the Rules for Court Administered Alcohol & Drug Programs must also distinguish incentives and therapeutic adjustments from sanctions and give examples of each. No state has specifically distinguished temporary-event relapse from return-to-use relapse, making this an innovative approach. Still taking guidance from other state statutes that can add to the current Indiana statutes and Rules for Court Administered Alcohol & Drug Programs, an example of provisions prohibiting sanctions for temporary-event relapses may read:

"Temporary-event relapse"

Sec. 1. As used in this chapter, "temporary-event relapse" means an occurrence of relapse that does not signify a return to persistent drug use by a participant. This statistical definition is calculated for each individual participant.

"Return-to-use relapse"

Sec. 2. As used in this chapter, "return-to-use relapse" means an occurrence of relapse that is "a statistically significant deviation from a pattern of abstinence."[212] This statistical definition is calculated for each individual

211. Though a reformation of drug court staff is needed to ensure qualified personnel are handling medical decisions, this Note does not address this topic here. The only qualification required of drug court personnel in Indiana is the Court Substance Abuse Management Specialist credential. JUDICIAL CONFERENCE OF IND., IND. OFF. OF CT. SERVS., *supra* note 24, at 23–25. To earn the credential, a program staff member must meet the following requirements: obtain a bachelor's degree; have at least nine months of employment experience relating to assessment, referral and case management of substance abuse; be employed at an Indiana Office of Court Services certified program; have 500 hours of direct supervision in the last five years of assessment, referral and case management of substance abuse clients with 100 of those being assessment; attend and complete an Indiana Office of Court Services staff orientation training, have a passing score of the CSAMS test, and complete a CSAMS application. *Id.* This does not ensure a person has the medical knowledge to make treatment decisions.

212. Alemi et al., *supra* note 98, at 687–88.

participant.

"Therapeutic adjustment"

Sec. 3. As used in this chapter, "therapeutic adjustment" "means alterations to a participant's treatment requirements that are intended to address unmet clinical or social service needs, and are not intended as an incentive or sanction."[213] Therapeutic adjustments "should be suggested by a licensed treatment provider."[214] Therapeutic adjustments may include counseling, inpatient treatment, group meetings, writing a letter to future self, changes in frequency of treatment, and medication adjustments.

"Incentive"

Sec. 4. "Incentives may include small, tangible rewards provided by the drug court team, a temporary decrease in drug court requirements, and an increase or advancement in phase."[215]

"Sanction"

Sec. 5. Sanctions are administered to discourage certain behaviors and equate to punishments. However, "[i]ncarceration [should be] imposed judiciously and sparingly. Unless a participant poses an immediate risk to public safety, jail sanctions are administered only after less consequences have been ineffective at deterring infractions."[216] When jail sanctions are used, they should not last beyond "three to five days."[217]

Relapse in general

Sec. 6. "The drug court judge shall recognize relapses and restarts in the program which are part of the rehabilitation and recovery process. The judge shall accomplish monitoring and offender accountability by . . . providing incentives"[218] and ordering therapeutic adjustments when a participant experiences a temporary-event relapse. The judge shall provide adjustments at the recommendation of a licensed treatment provider.

Distinguishing temporary-event relapse from return-to-use relapse

Sec. 7. A temporary-event relapse can be distinguished from a return-to-use relapse by plotting a participant's weeks of abstinence and length of relapse in a table. After this, a histogram can be completed to determine the length of relapse weeks against the frequency of relapse of specified length. An upper control limit (UCL), or the point at which the relapse length becomes long enough to suggest an alteration in a pattern of abstinence, can be calculated by using the following formula: UCL = average length of relapse (ALR) + 3[ALR(ALR + 1)]. The UCL is the relapse length limit where 99% of the data in the participant table should fall. Observing a relapse that is longer than the UCL is likely to represent return to use. Relapses that are shorter than the UCL

213. U.S. NAT'L SCI. FOUND., I.R.T.C. Rule 2(o) (2024).
214. KY AP PART XIII § 12 (2023).
215. *Id.*
216. *Id.* at § 12(3)(e) (2023).
217. *Id.*
218. OKLA. STAT. § 22-471.7 (2023).

can most likely be deemed temporary-event relapses.

Incentives, Sanctions, and Therapeutic Adjustments

Sec. 8. "Incentives, sanctions, and therapeutic adjustments shall be administered by the drug court judge"[219] to encourage behaviors, discourage behaviors, and help participants move forward with treatment.

Prohibition on sanctioning temporary-event relapse

Sec. 9. A drug treatment court may not sanction a participant for a temporary-event relapse.

(a) **"**Participants [will] not receive punitive sanctions if they are otherwise compliant with their treatment but are not responding to the current treatment interventions."[220] When a participant experiences a temporary-event relapse, "the treatment provider [must] reassess the individual and adjust the treatment plan accordingly."[221]
(b) Incarceration is never appropriate in response to a temporary-event relapse.
(c) If a court wishes to sanction a relapse, the court must first determine that the relapse is a return-to-use relapse as is calculated under these provisions.

Adjustment of treatment plan after temporary-event relapse

Sec. 10. When a participant experiences a temporary-event relapse, the drug court must make therapeutic adjustments to the participant's treatment plan.

Treatment of return-to-use relapse

Sec. 11. A drug treatment court may sanction a participant for return-to-use relapse and must adjust the participant's treatment plan. The adjustments to the participant's treatment plan must address the individual needs of the participant and consider any factors that lead to a return to use.

CONCLUSION

The sanctioning of temporary-event relapse is not medically sound and harms participants and their road to recovery. This Note argued that the current, vague statutory framework allows for the punishment of relapse even though the framework of Indiana drug courts is stressful to participants and can increase the likelihood of relapse. Because of this, Indiana drug courts must distinguish temporary-event relapses from return-to-use relapses. The proposed model administrative rule ensures protection for temporary-event relapses while also appropriately responding to return-to-use relapses. Because of the modern-day realization that relapse is a normal part of recovery, the Indiana Judicial Conference should adopt the proposed model rule.

219. KY AP PART XIII § 12 (2023).
220. *Id.* at § 12(4) (2023).
221. *Id.*