

---

2022

## May I Use The Restroom? The Supreme Court’s Likely Opportunity to Define “Sex” in Title IX and End the Transgender Bathroom Debate

Kaleb Degler  
*Southern Methodist University, Dedman School of Law*

---

### Recommended Citation

Kaleb Degler, Comment, *May I Use The Restroom? The Supreme Court’s Likely Opportunity to Define “Sex” in Title IX and End the Transgender Bathroom Debate*, 75 SMU L. REV. 917 (2022)  
<https://scholar.smu.edu/smulr/vol75/iss4/7>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# MAY I USE THE RESTROOM? THE SUPREME COURT’S LIKELY OPPORTUNITY TO DEFINE “SEX” IN TITLE IX AND END THE TRANSGENDER BATHROOM DEBATE

*Kaleb Degler\**

## ABSTRACT

*The Supreme Court’s landmark decision in Bostock, which established that “sex” under Title VII includes gender identity and sexual orientation, now protects LGBTQ+ persons from discrimination in the workplace. However, this interpretation of “sex” was not subsequently applied wholesale to “sex” under Title IX, leaving many LGBTQ+ students—particularly transgender students—subject to the fate of where they were born and the shifting tides of the federal executive. Beginning with the Obama Administration, a history of conflicting guidance and opinion letters has dominated the discussion on whether transgender students are allowed to use the restroom that corresponds with their gender identity.*

*In 2020, the Fourth Circuit in Grimm interpreted “sex” under Title IX as including gender identity and sexual orientation, thereby establishing the right of transgender students to use the restroom that corresponds with their gender identity. The same year, the Eleventh Circuit reached an identical conclusion. However, the Eleventh Circuit subsequently vacated this opinion and granted a rehearing, suggesting that it will likely reach the opposite conclusion on rehearing. The Supreme Court could soon find itself in a position to settle a circuit split between the Fourth and Eleventh Circuits and should grant certiorari to uphold the rights of transgender students, regardless of what circuit jurisdiction they may live in or who the president may be.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	919
II. OVERVIEW OF TRANSGENDER BATHROOM RIGHTS IN SCHOOLS .....	919
A. RELEVANT STATUTES .....	919

---

<https://doi.org/10.25172/smblr.75.4.7>.

\* J.D. Candidate 2023, SMU Dedman School of Law; B.S. 2020, Texas A&M University.

1. <i>Title IX</i> .....	919
2. <i>Title VII</i> .....	920
B. TEXAS STUDENT ANECDOTE .....	920
C. HOW DID TRANSGENDER BATHROOM USE COME TO THE FOREFRONT OF AMERICAN POLITICS AND JURISPRUDENCE? .....	921
D. RECENT ATTACKS ON LGBTQ+ STUDENTS .....	924
E. THE EXECUTIVE BRANCH PLAYED TIT-FOR-TAT WITH TRANSGENDER RIGHTS .....	926
1. <i>2015 Department of Education Opinion Letter</i> .....	926
2. <i>2016 Dear Colleague Letter on Transgender         Students</i> .....	926
3. <i>Trump 2017 Dear Colleague Letter Rescinding the         2016 Letter</i> .....	929
4. <i>President Biden's 2021 Executive Order</i> .....	930
5. <i>DOJ and DOE Enforcement of Title IX</i> .....	930
III. TRANSGENDER RIGHTS: SUPREME COURT PRECEDENT AND CIRCUIT SPLITS .....	931
A. THE SUPREME COURT HAS INTERPRETED "SEX" UNDER TITLE VII TO INCLUDE TRANSGENDER PERSONS .....	931
B. TRANSGENDER RIGHTS UNDER TITLE IX: A LOOMING CIRCUIT SPLIT .....	934
1. <i>The Fourth Circuit "Resoundingly" Affirms             Transgender Bathroom Rights in Schools</i> .....	934
2. <i>The Eleventh Circuit Continuously Denies "Sex"             Includes Transgender Persons</i> .....	936
a. The Eleventh Circuit's Interpretation of "Sex" Under Title VII .....	936
b. The Eleventh Circuit's Unsurprising and Problematic Interpretation of "Sex" Under Title IX .....	937
IV. THE REALITY OF <i>ADAMS</i> AND THE MEANING OF "SEX" .....	938
A. IN LIGHT OF <i>EVANS</i> 'S ABROGATION BY <i>BOSTOCK</i> , WHY IS THE ELEVENTH CIRCUIT LIKELY TO REVERSE ITS OWN PANEL DECISION IN <i>ADAMS</i> ? .....	938
B. THE CANON OF PRESUMPTION OF CONSISTENT USAGE DICTATES THAT "SEX" IN TITLE IX HAS THE SAME MEANING AS "SEX" IN TITLE VII .....	939
C. A LIKELY HYPOTHETICAL: THE <i>ADAMS</i> DECISION CREATES A CIRCUIT SPLIT .....	939
V. CONCLUSION .....	941

## I. INTRODUCTION

THE existence of LGBTQ+ people is not a twenty-first-century phenomenon in the United States, but the legal acknowledgment that these living, breathing people should have the same rights as their cisgender, heterosexual counterparts is. Only eighteen states have issued “[c]omprehensive . . . guidance on transgender, nonbinary, and gender[ ]nonconforming students.”<sup>1</sup> Additionally, only twenty-one states “have passed legislation that specifically prohibits bullying and harassment of students . . . in K–12 schools based on actual or perceived sexual orientation and gender identity.”<sup>2</sup> Transgender students are entitled to the same protection as their cisgender, heterosexual peers, and given the opportunity, the Supreme Court should affirm this right in the context of transgender students using the restroom that corresponds with their gender identity.

Part II of this Comment discusses current anti-LGBTQ+ proposed legislation and directives, provides a student anecdote, explains the purpose of Title IX and Title VII, and summarizes the drastic policy changes that have occurred alongside changes in presidential administrations. Part III reviews the Supreme Court’s current interpretation of “sex” under Title VII and considers the possibility of a circuit split centered on the definition of “sex” in Title IX. Part IV advocates that the Supreme Court should adopt its interpretation of “sex” in Title VII and apply it to “sex” in Title IX, thereby settling the issue in favor of transgender students’ rights.

## II. OVERVIEW OF TRANSGENDER BATHROOM RIGHTS IN SCHOOLS

### A. RELEVANT STATUTES

#### 1. Title IX

Title IX of the Education Amendments of 1972 applies to all educational institutions in the United States that receive federal financial assistance.<sup>3</sup> 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 subject to discrimination under any education program or activity receiving Federal financial assistance.”<sup>4</sup> Thus, Title IX makes it illegal for “any entity that receives ‘federal financial assistance’ from discriminating against individuals on the basis of sex in education programs or activi-

---

1. *Student Nondiscrimination Policies*, GLSEN (May 2021), <https://maps.glsen.org/student-nondiscrimination-policies> [https://perma.cc/3ZGN-45XX].

2. *Enumerated Anti-Bullying and Harassment Policies*, GLSEN (May 2021), <https://maps.glsen.org/enumerated-anti-bullying-and-harassment-policies> [https://perma.cc/A7C9-2KXA].

3. *See* 20 U.S.C. § 1681(a) (2020).

4. *Id.*

ties.”<sup>5</sup> “Sex” is not defined anywhere in the text of Title IX, and the Supreme Court has not taken up an opportunity to provide a definitive interpretation. Additionally, federal financial assistance often comes in the form of an award or grant of money, but it also includes “the use or rent of federal land or property at below market value, federal training, a loan of federal personnel, [and] subsidies.”<sup>6</sup>

## 2. Title VII

Title VII of the Civil Rights Act of 1964 is relevant in a discussion of transgender and LGBTQ+ rights because it shares similar language with Title IX.<sup>7</sup> Title VII makes it unlawful for any employer in the United States “to fail or refuse to hire or to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment[] because of such individual’s race, color, religion, sex, or national origin.”<sup>8</sup> The language “because of . . . sex” in Title VII is similar to Title IX’s “on the basis of sex.”<sup>9</sup> Both statutes contemplate action premised on a person’s sex. As in Title IX, “sex” is not defined in the text of Title VII. The difference, however, is that, in the context of Title VII, the Supreme Court has interpreted discrimination “because of . . . sex” to include discrimination because of sexual orientation or gender identity.<sup>10</sup>

### B. TEXAS STUDENT ANECDOTE

Kendall Tinoco, a transgender student at Temple High School in Temple, Texas, used the women’s restroom at school without incident from the time she was in seventh grade.<sup>11</sup> However, in an Instagram post from September 22, 2021, Kendall claimed a teacher refused to allow her access to the female locker room “because there were ‘actual girls’ in there.”<sup>12</sup> In a subsequent encounter, the same teacher explicitly told Kendall she could not use the female locker room because she is transgender.<sup>13</sup> Kendall hoped her Instagram post would garner the support of “a few students,” but she never expected her peers to plan a transgender rights protest and walkout in support.<sup>14</sup> What was initially intended to be

5. U.S. DEP’T OF JUST., TITLE IX LEGAL MANUAL 25 (2001), <https://www.justice.gov/file/1423496/download> [<https://perma.cc/V2F2-MP7T>].

6. *Id.*

7. Compare 42 U.S.C. § 2000e-2(a)(1) (1991), with 20 U.S.C. § 1681.

8. 42 U.S.C. § 2000e-2(a)(1).

9. Compare 42 U.S.C. § 2000e-2(a)(1), with 20 U.S.C. § 1681.

10. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

11. Kaitlyn McNab, *Texas Students Protest in Support of Trans Student Allegedly Denied Locker Room Access*, TEEN VOGUE (Oct. 4, 2021), <https://www.teenvogue.com/story/texas-students-protest-support-trans-student-allegedly-denied-locker-room-access> [<https://perma.cc/F3FB-UEU5>].

12. *Id.*

13. Pathikrit Sanyal, *Kendall Tinoco: Trans Student Barred from Girls’ Locker Room, Kids Gather in Protest*, MEAWW (Oct. 5, 2021), <https://meaww.com/kendall-tinoco-students-protest-texas-trans-junior-who-was-denied-access-to-girls-locker-room> [<https://perma.cc/W8Y3-QQD5>].

14. McNab, *supra* note 11.

a silent protest became a “spirited rally” 300–400 students strong.<sup>15</sup> Kendall said the “support was overwhelming—in a good way.”<sup>16</sup>

Unfortunately, the love and support Kendall received are not representative of the majority of transgender students’ experiences. Indeed, 53.2% of LGBTQ+ students report hearing negative remarks about gender expression and 43.7% of LGBTQ+ students report hearing negative remarks specifically about transgender people “often” or “frequently” while at school.<sup>17</sup> The latter statistic dramatically increases to 70.6% when including the responses of LGBTQ+ students who say they “sometimes” hear negative remarks about transgender people in school.<sup>18</sup>

### C. HOW DID TRANSGENDER BATHROOM USE COME TO THE FOREFRONT OF AMERICAN POLITICS AND JURISPRUDENCE?

It would be prudent to establish at the outset a baseline understanding of the words that frequently appear in discussions of transgender rights and the LGBTQ+ community. Although the term “is often confused with gender,”<sup>19</sup> “sex” is a narrow term used “to describe a child at birth based on their external anatomy,” usually male or female.<sup>20</sup> However, “there are many more sexes than just the binary male and female.”<sup>21</sup> A person’s sex is “a combination of bodily characteristics including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.”<sup>22</sup> Gender identity is a person’s “innermost concept of self as male, female, a blend of both or neither” and is “how individuals perceive themselves and what they call themselves.”<sup>23</sup> A person’s “gender identity can be the same or different from their sex assigned at birth.”<sup>24</sup> Gender expression is the “external manifestation[ ]”<sup>25</sup> of a person’s “gender identity, usually expressed through behavior, clothing, body characteristics[,] or voice.”<sup>26</sup> While gender identity and gender expression are distinct but related concepts, this discussion uses the term gender identity as a blanket term for both. Sexual orientation is “an inherent or immutable enduring emotional, romantic[,] or sexual attraction to other people”<sup>27</sup> and is “based on their gender expression, gender iden-

15. *Id.*

16. *Id.*

17. JOSEPH G. KOSCIW, CAITLIN M. CLARK, NHAN L. TRUONG & ADRIAN D. ZONGRONE, GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY 22–25 (2020).

18. *Id.* at 22.

19. *LGBTQ+ Glossary*, IT GETS BETTER PROJECT, <https://itgetsbetter.org/glossary> [<https://perma.cc/3SSZ-46QX>].

20. *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> [<https://perma.cc/3SQB-BAAQ>].

21. *LGBTQ+ Glossary*, *supra* note 19.

22. *Id.*

23. *Glossary of Terms*, *supra* note 20.

24. *Id.*

25. *LGBTQ+ Glossary*, *supra* note 19.

26. *Glossary of Terms*, *supra* note 20.

27. *Id.*

tity, and/or sex.”<sup>28</sup> Transgender is “[a]n umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.”<sup>29</sup>

Early in the transgender bathroom debate, there was a wave of nondiscrimination laws and efforts to protect transgender students’ rights to use the bathroom that matches their gender identity. For example, “[i]n 2013, the Colorado Civil Rights Division was the first governmental body to declare that a student must be permitted to use the school bathroom that correlates with the student’s self-declared gender identity.”<sup>30</sup> The Division ruled in favor of a six-year-old transgender girl whose school barred her from using the girls’ restroom.<sup>31</sup> Then, in 2014, California passed Assembly Bill No. 1266, enabling transgender students to participate in sex-segregated sports and use the locker room corresponding to their gender identity.<sup>32</sup>

Unfortunately, this support for transgender students—and transgender people in general—was neither widespread nor long-lasting. In 2015, there was a “political and legal backlash” against transgender people when voters in Houston, Texas, repealed a local anti-discrimination ordinance that prohibited gender identity discrimination.<sup>33</sup> North Carolina then adopted the North Carolina Public Facilities Privacy and Security Act (HB2) in 2016,<sup>34</sup> which required individuals to use the restroom that matches “the biological sex on their birth certificates.”<sup>35</sup>

The nationwide backlash to North Carolina’s “bathroom bill” was staggering. Adidas, PayPal, Deutsche Bank, and other corporations shuttered expansion plans in North Carolina; TV and movie studios reconsidered filming in the state; over a dozen states announced travel bans to North Carolina; celebrity musicians announced boycotts and “donated a portion of local ticket sales to LGBTQ+ organizations”; the NBA moved the 2017 All-Star game from North Carolina to Louisiana; and the “NCAA relocated March Madness basketball championship rounds outside the state.”<sup>36</sup> In a 2017 report, the Associated Press estimated that North Carolina would lose over \$3.76 billion and almost 3,000 jobs over the next twelve years “as a direct result of HB2.”<sup>37</sup>

---

28. *LGBTQ+ Glossary*, *supra* note 19.

29. *Glossary of Terms*, *supra* note 20.

30. Josselyn Sheer, *A Legal Analysis: The Transgender Bathroom Debate*, 47 J. SOCIO. & SOC. WELFARE 53, 58 (2020).

31. *Id.*

32. *Id.*; CAL. EDUC. CODE § 221.5 (2015).

33. Sheer, *supra* note 30, at 58 (quoting Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL’Y 1, 5 (2016)).

34. H.B. 2, Gen. Assemb., 2d Spec. Sess. (N.C. 2016).

35. Sheer, *supra* note 30, at 58.

36. Dan Avery, *LGBTQ Rights Fight Reignited 4 Years After N.C.’s ‘Bathroom Bill’ Controversy*, NBC NEWS (Dec. 8, 2020, 1:31 PM), <https://www.nbcnews.com/feature/nbc-out/lgbtq-rights-fight-reignited-4-years-after-n-c-s-n1250390> [https://perma.cc/E2RS-2PZA].

37. *Id.*

North Carolina Republican Governor Pat McCrory lost his 2016 reelection bid to Democrat Roy Cooper, likely in part due to the backlash from HB2.<sup>38</sup> Governor Cooper, along with state Democrats and Republicans, was eager to find a solution to HB2.<sup>39</sup> That solution was House Bill 142,<sup>40</sup> which passed in March of 2017, almost a year after the passage of HB2.<sup>41</sup> House Bill 142 was not a complete repeal of HB2, and “[Governor] Cooper admitted . . . that it was ‘not a perfect deal’ and ‘not [his] preferred solution.’”<sup>42</sup> House Bill 142 “prohibited state agencies from regulating access to multiple-occupancy restrooms without the General Assembly’s consent”; however, “it also barred local governments from passing any new anti-discrimination regulations for [three and a half] years.”<sup>43</sup>

In 2017, the Texas House of Representatives approved legislation similar to North Carolina’s HB2, containing a provision that would have required transgender students in public schools “to use bathrooms that correspond to their ‘biological sex,’” or their sex assigned at birth.<sup>44</sup> This provision was “attached as an amendment to an unrelated school hazard preparedness bill.”<sup>45</sup> Texas Republican Governor Greg Abbott hoped the bathroom legislation would “protect[ ] the privacy of students in locker rooms and restrooms.”<sup>46</sup> Similarly, Texas Republican Representative and author of the Bill, Chris Paddie, defended the legislation and stated, “I think it’s absolutely about school safety.”<sup>47</sup> The Bill would have required “schools to provide alternate, single-occupancy accommodations for students uncomfortable with using bathrooms that don’t align with their biological sex.”<sup>48</sup>

In response to the legislation and the concerns of Governor Abbott, Representative Paddie, and others, Texas Democrat Representative Senfronia Thompson likened the restrictions on bathroom usage to Jim Crow-era segregation.<sup>49</sup> Representative Thompson also rejected the idea that transgender students should use single-occupant restrooms, harkening back to the not-so-distant past when restrooms were racially segregated and it became an American staple that “separate but equal is not equal at all.”<sup>50</sup>

---

38. *Id.*

39. *See id.*

40. 2017 N.C. Sess. Laws S.L. 2017-4 (H.B. 142) (codified as amended N.C. GEN. STAT. § 143-761 (2017)).

41. Avery, *supra* note 36.

42. *Id.*

43. *Id.*

44. Moriah Balingit, *Texas House Passes ‘Bathroom Bill’ Restricting Transgender Student Access*, WASH. POST (May 22, 2017), [https://www.washingtonpost.com/local/education/texas-house-passes-bathroom-bill-targeting-transgender-schoolchildren/2017/05/22/b828efce-3f15-11e7-8c25-44d09ff5a4a8\\_story.html](https://www.washingtonpost.com/local/education/texas-house-passes-bathroom-bill-targeting-transgender-schoolchildren/2017/05/22/b828efce-3f15-11e7-8c25-44d09ff5a4a8_story.html) [https://perma.cc/7CDH-DCY3].

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*



Due to the substantial outcry from the transgender community, the potential for economic backlash, and opposition from dozens of Fortune 500 companies, Texas House Speaker Joe Straus refused to refer the Bill to a committee for consideration, and the discriminatory legislation quickly died.<sup>51</sup> If the Bill had become law, Texas would have been “the only state with a statute restricting bathrooms for transgender schoolchildren.”<sup>52</sup>

The crusades against transgender bathroom rights in North Carolina and Texas raise multiple questions about the reality and future of rights for transgender people. Was the passage of North Carolina’s House Bill 142 merely a response to economic consequences? Was the failure of Texas’s Bathroom Bill similarly a response to potential economic difficulties rather than a concern for the rights of transgender people? Are state governments out of touch with the true opinions of their constituencies?

#### D. RECENT ATTACKS ON LGBTQ+ STUDENTS

The rights of LGBTQ+ students are woefully unprotected, as evidenced by legislation recently proposed in Florida and Texas’s anti-transgender directive. In February of 2022, the Florida House of Representatives and Florida Senate Appropriations Committee passed the Parental Rights in Education Bill,<sup>53</sup> which was quickly dubbed the “Don’t Say Gay” Bill.<sup>54</sup> The Bill “limit[s] classroom discussions on sexual orientation and gender identity and encourage[s] parents to sue schools or teachers that engage in these topics.”<sup>55</sup> An amendment to the Bill, withdrawn after only four days, “would require school officials to disclose a student’s sexual or gender identity to their parents within six weeks of finding out about the student’s identity.”<sup>56</sup> Essentially, this amendment would have legally required any school faculty with knowledge of a student’s identity to out the child to their parents. State Representative Joe Harding, the sponsor of the legislation, stated that the amendment was intended to ensure that “kids knew what to expect.”<sup>57</sup> The White House staunchly denounced the Bill, stating that it is “designed to target and attack . . . LGBTQI+ students, who are already vulnerable to bullying and violence for just being themselves.”<sup>58</sup>

---

51. Alexa Ura, *After Months of Controversy, Texas Bathroom Bill Dies Quietly*, TEX. TRIB. (Aug. 16, 2017, 12:00 PM), <https://www.texastribune.org/2017/08/16/after-months-controversy-texas-bathroom-bill-dies-quiet-death> [<https://perma.cc/YU4Q-QWGE>].

52. Balingit, *supra* note 44.

53. 2022 Fla. Sess. Law. Serv. Ch. 2022-22 (H.B. 1557) (codified as amended at FLA. STAT. § 1001.42 (2022)).

54. Brooke Migdon, *Florida ‘Don’t Say Gay’ Bill Passes Final Senate Committee*, HILL (Feb. 28, 2022), <https://thehill.com/changing-america/respect/equality/596178-florida-dont-say-gay-bill-passes-final-senate-committee> [<https://perma.cc/XK8P-4J4L>].

55. Kiara Alfonseca, *DeSantis-backed ‘Dont Say Gay’ Bill Sparks Outrage*, ABC NEWS (Feb. 22, 2022, 5:54 PM), <https://abcnews.go.com/US/dont-gay-bill-moves-forward-florida/story?id=82481565> [<https://perma.cc/6SLW-RGBH>].

56. *Id.*

57. *Id.*

58. *Id.*

Also in February 2022, Texas Governor Greg Abbott issued a letter to the state Department of Family and Protective Services directing it to “conduct a prompt and thorough investigation” into gender-affirming care for transgender children because such treatments are considered child abuse.<sup>59</sup> Abbott’s letter is based on an opinion by Texas Attorney General Ken Paxton announcing that gender-affirming treatments like puberty-blocking medications and gender reassignment surgery “can legally constitute child abuse under several provisions” of Texas law.<sup>60</sup> Abbott agreed, writing that “Texas law imposes reporting requirements upon all licensed professionals who have direct contact with children . . . including doctors, nurses, and teachers,” meaning they must report on any children who may be receiving gender-affirming treatment or they will face criminal penalties.<sup>61</sup> Additionally, “[t]here are similar reporting requirements and criminal penalties for members of the general public.”<sup>62</sup> This would essentially be a double whammy: parents who provide access to gender-affirming care will be charged with child abuse, and *anyone* who does not report such treatments will be criminally charged. The Department of Family and Protective Services stated that it “will follow Texas law as explained” in Paxton’s opinion.<sup>63</sup> However, Paxton’s opinion is nonbinding,<sup>64</sup> and the district attorneys of Texas’s five biggest counties (Dallas, Travis, Bexar, Nueces, and Fort Bend) do not intend to enforce these directives, calling them “cruel” and “politically motivated attacks.”<sup>65</sup>

Texas and Florida highlight the urgent need for nationwide protection of transgender and LGBTQ+ students from sex discrimination under Title IX. It is not enough that transgender students have the right to use the restroom that corresponds with their gender identity in only certain jurisdictions; *all* transgender students are entitled to this right and more, and the Supreme Court could soon have the opportunity to quash the trans-

---

59. Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Tex. Dep’t of Fam. & Protective Servs. Comm’r (Feb. 22, 2022), available at <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://perma.cc/DM37-NCFH>]; see also Julian Mark, *Texas Governor Directs State Agencies to Investigate Gender-affirming Care for Trans Youths as ‘Child Abuse,’* WASH. POST (Feb. 23, 2022, 7:49 AM), <https://www.washingtonpost.com/nation/2022/02/23/greg-abbott-gender-affirming-care-child-abuse-directive/> [<https://perma.cc/X7D3-VGTA>].

60. Tex. Att’y Gen. Op. No. KP-0401 (2022); see also Mark, *supra* note 59.

61. Letter from Greg Abbott, *supra* note 59; see also J. David Goodman & Amanda Morris, *Texas Investigates Parents over Care for Transgender Youth, Suit Says*, N.Y. TIMES (March 1, 2022), <https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html> [<https://perma.cc/GJ48-P8RR>].

62. Letter from Greg Abbott, *supra* note 59.

63. Lauren McGaughy, *Texas Gov. Abbott: Agencies Must Investigate Gender-Affirming Care for Trans Kids as ‘Child Abuse,’* DALL. MORNING NEWS (Feb. 22, 2022), <https://www.dallasnews.com/news/politics/2022/02/22/texas-gov-abbott-agencies-must-investigate-gender-affirming-care-for-trans-kids-as-child-abuse/> [<https://perma.cc/X3L3-D7VP>].

64. Goodman & Morris, *supra* note 61.

65. Dallas County DA (@Dallas\_DA), TWITTER (Feb. 24, 2022, 11:13 AM), [https://twitter.com/Dallas\\_DA/status/1496896055828434948](https://twitter.com/Dallas_DA/status/1496896055828434948) [<https://perma.cc/YXZ9-F3WS>].

gender bathroom debate and legally acknowledge a right that should have always existed.

E. THE EXECUTIVE BRANCH PLAYED TIT-FOR-TAT WITH  
TRANSGENDER RIGHTS

1. 2015 Department of Education Opinion Letter

The Department of Education (DOE) issued an opinion letter in January 2015, declaring that schools with sex-segregated facilities, such as bathrooms and locker rooms, should allow students to have access to these facilities based on their gender identity.<sup>66</sup> Following this opinion, in November of the same year, the DOE sent a letter to a high school in Illinois, concluding the school violated Title IX because it did not allow a transgender girl to use the girls' locker room.<sup>67</sup> The opinion letter from January was the basis for the United States Court of Appeals for the Fourth Circuit's original opinion in *G.G. ex rel. Grimm v. Gloucester County School Board*.<sup>68</sup>

2. 2016 Dear Colleague Letter on Transgender Students

Under the Obama Administration in 2016, the Department of Justice (DOJ) and DOE issued joint guidance titled "Dear Colleague Letter on Transgender Students" (2016 Dear Colleague Letter), stating that schools must treat transgender students with respect for their gender identity in order to be in compliance with Title IX.<sup>69</sup> Specifically, the joint 2016 Dear Colleague Letter asserts that a school's receipt of federal funds is conditioned on the premise that "a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational program or activities unless expressly authorized to do so under Title IX or its implementing regulations."<sup>70</sup> The 2016 Dear Colleague Letter also reinforces that both the DOJ and DOE "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."<sup>71</sup>

Twenty states filed two separate federal lawsuits challenging the 2016

---

66. Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, Off. for C.R., to Emily T. Prince (Jan. 7, 2015), [https://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](https://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf) [<https://perma.cc/B4F5-WGKZ>].

67. Archibald, *supra* note 33, at 4 (citing Resolution Letter from Adele Rapport, Reg'l Dir., Dep't of Educ. Off. for C.R. to Daniel E. Cates, Superintendent of Twp. High Sch. Dist. 211 (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf> [<https://perma.cc/2M6N-Y23E>]).

68. 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017); *see* discussion *infra* Section III.B.

69. Catherine E. Lhamon, Assistant Sec'y for C.R., Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for C.R., Dep't of Just., *Dear Colleague Letter on Transgender Students*, DEP'T OF JUST. & DEP'T OF EDUC. (May 13, 2016) [hereinafter *Dear Colleague Letter*] (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/YB9D-3MN2>].

70. *Id.*

71. *Id.*

Dear Colleague Letter.<sup>72</sup> The first lawsuit, filed by Texas in the Northern District of Texas in May 2016,<sup>73</sup> challenged the DOJ and DOE's interpretation of Title IX in the letter.<sup>74</sup> While ten states joined Texas's challenge, the District of Columbia and twelve other states opposed Texas's position in an amicus brief supporting the United States.<sup>75</sup> The second lawsuit, similar to Texas's suit, was filed against the United States by Nebraska and eight other states in the United States District Court for the District of Nebraska.<sup>76</sup> Texas and Nebraska's challenges against the 2016 Dear Colleague Letter argued that it was invalid because (1) "it was not issued through a notice-and-comment procedure"; (2) "it [was] not an allowable interpretation of Title IX and its regulations"; and (3) "it violat[e] the Spending Clause of the United States Constitution."<sup>77</sup>

Texas and Nebraska argued that the 2016 Dear Colleague Letter violated the Administrative Procedures Act (APA) because it did not pass through the notice-and-comment procedure.<sup>78</sup> However, agencies can promulgate two different types of rules under the APA: legislative rules and interpretive rules.<sup>79</sup> Texas and Nebraska alleged that the DOJ and DOE issued a legislative rule that had the "force and effect of law" and must be promulgated "through a three-part procedure known as 'notice-and-comment' rulemaking" established by the APA in 5 U.S.C. § 553.<sup>80</sup> Notice-and-comment rulemaking requires that an agency "first provide the public with notice of the proposed rule," then "members of the public must have the opportunity to comment on the proposed rule, and the agency must consider and respond to 'significant' comments."<sup>81</sup> The last step requires the agency to "include a statement of the rule's 'basis and purpose'" when the legislative rule is published.<sup>82</sup> Alternately, interpretive rules are designed to be guides "to help the public and regulated entities understand how the agency is interpreting the statutes and rules it administers."<sup>83</sup> Interpretive rules are not required to undergo the notice-

---

72. Archibald, *supra* note 33, at 6.

73. Complaint, Texas v. United States, 7:16-cv-00054-O (N.D. Tex. May 25, 2016), <https://storage.courtlistener.com/recap/gov.uscourts.txnd.273901.1.0.pdf> [<https://perma.cc/KF6X-DDYJ>].

74. Archibald, *supra* note 33, at 6.

75. Brief for Robert W. Ferguson, Att'y Gen. of Wash. et al. as Amici Curiae in Opposition to Plaintiffs' Application for Preliminary Injunction, Texas v. United States, 7:16-cv-00054-O (N.D. Tex. May 25, 2016); *see also* Archibald, *supra* note 33, at 6.

76. Complaint, Nebraska v. United States, No. 4:16-cv-03117 (D. Neb. July, 8, 2016), <https://storage.courtlistener.com/recap/gov.uscourts.ned.73257.1.0.pdf> [<https://perma.cc/74BF-M4RR>].

77. Archibald, *supra* note 33, at 6–7.

78. *Id.* at 7 (first citing First Amended Complaint ¶¶ 60–64, Texas v. United States, 7:16-cv-00054-O (N.D. Tex. June 15, 2016), <https://storage.courtlistener.com/recap/gov.uscourts.txnd.273901.6.0.pdf> [<https://perma.cc/Y9Y5-NRFV>]; then citing Complaint ¶¶ 62–72, Nebraska, No. 4:16-cv-03117).

79. *See id.* (first citing Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979); then citing 5 U.S.C. §§ 551(4), 553(b)(A) (2012)).

80. *Id.*

81. *Id.* (citing 5 U.S.C. § 533(b)–(c)).

82. *Id.* (citing 5 U.S.C. § 533(c)).

83. *Id.* (citing Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

and-comment procedure.<sup>84</sup> However, this leads to a potential issue—interpretive rules are generally not considered to carry the same weight as legislative rules.<sup>85</sup>

The 2016 Dear Colleague Letter was an interpretive rule rather than a legislative rule because it served as advisement as to how the federal government intended to enforce Title IX and interpret the terms gender identity and sex.<sup>86</sup> Texas and Nebraska's assertions that the 2016 Dear Colleague Letter was invalid because it did not undergo the notice-and-comment procedure are thus misplaced. Although the letter was an interpretive rule and consequently could have been deemed to lack the force of law, Texas and Nebraska were nevertheless put on notice of the federal government's intent to enforce Title IX against adverse policies regarding transgender students' use of restrooms and locker rooms.

Texas and Nebraska's next central argument posited that the 2016 Dear Colleague Letter was not an allowable interpretation of Title IX and its regulations because the terms "sex" and "sex discrimination" are unambiguous and do not warrant interpretation.<sup>87</sup> Agencies are imbued with the authority to interpret ambiguous statutes and regulations.<sup>88</sup> In *Grimm*, the Fourth Circuit found the terms "sex" and "sex discrimination" in Title IX "ambiguous as applied to transgender individuals."<sup>89</sup> However, courts have also found these terms unambiguous, referring strictly to biological sex and discrimination based on biological sex rather than gender identity and discrimination based on gender identity.<sup>90</sup> The court in *Grimm* went so far as to expressly state that Title IX could be read to permit either an interpretation that "sex" refers "exclusively to genitalia," as the school argued, or an interpretation that "sex" refers "to gender identity," as the federal government argued.<sup>91</sup> Thus, the 2016 Dear Colleague Letter was valid as an interpretive rule because "sex" and "sex discrimination" are ambiguous terms.

---

84. See 5 U.S.C. § 533(b)(A).

85. See Archibald, *supra* note 33, at 7.

86. See *Dear Colleague Letter*, *supra* note 69.

87. First Amended Complaint ¶ 93, *Texas v. United States*, 7:16-cv-00054-O (N.D. Tex. June 15, 2016), <https://storage.courtlistener.com/recap/gov.uscourts.txnd.273901.6.0.pdf> [<https://perma.cc/Y9Y5-NRFV>] (referring to the phrase "on the basis of sex" as "a term long understood unambiguously to be a biological category"); Complaint ¶ 77, *Nebraska v. United States*, No. 4:16-cv-03117 (D. Neb. July, 8, 2016), <https://storage.courtlistener.com/recap/gov.uscourts.ned.73257.1.0.pdf> [<https://perma.cc/74BF-M4RR>] (arguing DOJ and DOE's acted "in excess of statutory jurisdiction . . . because they redefine the unambiguous term 'sex' in Title VII and Title IX").

88. Archibald, *supra* note 33, at 11 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

89. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017); see discussion *infra* Section III.B.

90. See, e.g., *Holloway v. Arthur Andersen*, 566 F.2d 659, 661–64 (9th Cir. 1977); *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Kirkpatrick v. Seligman & Latz*, 636 F.2d 1047, 1050 (5th Cir. 1981).

91. *Grimm*, 822 F.3d at 721.

Finally, the 2016 Dear Colleague Letter did not violate the Spending Clause of the United States Constitution because it did not remove the states' choice "whether to accept or reject the conditions and the funding offered by the Federal Government," nor did it coerce the states into accepting or rejecting said funding.<sup>92</sup> Rather than a coercive new measure against the states, the 2016 Dear Colleague Letter was an interpretation of Title IX, an existing program.<sup>93</sup> Certainly, states may choose not to allow students to use bathrooms and locker rooms that align with their gender identity, but they would no longer be able to receive federal funds for their public schools. The Supreme Court has interpreted the Spending Clause to bar the federal government from "using financial inducements to exert 'a power akin to undue influence.'"<sup>94</sup> But simply asking states to allow all students to use the bathroom corresponding to their gender identity falls well below undue influence.<sup>95</sup>

### 3. *Trump 2017 Dear Colleague Letter Rescinding the 2016 Letter*

The lawsuits filed by Texas and Nebraska never resulted in final judgment because, on February 22, 2017, the Trump DOJ and DOE issued a new Dear Colleague Letter (2017 Dear Colleague Letter) that expressly rescinded the 2015 DOE Opinion Letter and the 2016 Dear Colleague Letter, both of which were issued under the Obama Administration.<sup>96</sup> The 2017 Dear Colleague Letter appeared to use the lawsuits filed by Texas and Nebraska to justify its rescission and claimed that the 2015 Opinion Letter and 2016 Dear Colleague Letter did not "contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did they undergo any formal public process."<sup>97</sup> The letter issued under the Trump Administration emphasizes the importance of recognizing the "primary role of the States and local school districts in establishing educational policy."<sup>98</sup> This stance is unduly problematic because LGBTQ+ rights—specifically the rights of transgender people in this context—are often violated when states and localities are left to their own devices. Additionally, transgender rights are human rights and are not limited to the effects of educational policy.

The 2017 Dear Colleague Letter attempted to claim that the "withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment" and tasked the individual schools with "ensur[ing] that all students, including LGBT stu-

---

92. Archibald, *supra* note 33, at 21; see U.S. CONST. art. I, § 8, cl. 1.

93. Archibald, *supra* note 33, at 21–22.

94. *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

95. See Archibald, *supra* note 33, at 21.

96. Sandra Battle, Acting Assistant Sec'y for C.R., Dep't of Educ. & T.E. Wheeler, II, Acting Assistant Att'y Gen. for C.R., Dep't of Just., *Dear Colleague Letter*, DEP'T OF JUST. & DEP'T OF EDUC. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/6GM9-U97Q>].

97. *Id.*

98. *Id.*

dents, are able to learn and thrive in a safe environment.”<sup>99</sup> The letter neglected, however, to specify what these protections are or how schools can ensure the success and safety of LGBTQ+ students.<sup>100</sup> The letter concludes that the “Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.”<sup>101</sup> Thus, under this letter, Title IX was no longer applicable to transgender rights, leaving transgender students woefully without protection.

#### 4. *President Biden’s 2021 Executive Order*

Executive Order 13988, issued by President Biden on January 20, 2021, established the Biden Administration’s policy regarding LGBTQ+ rights to “prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce . . . laws that prohibit discrimination on the basis of gender identity or sexual orientation.”<sup>102</sup> This Executive Order used the terms “sex discrimination” and “gender identity” throughout and contrasts starkly with the policies of the Trump Administration.<sup>103</sup> President Biden relied on the Supreme Court’s reasoning in *Bostock v. Clayton County* “that Title VII’s prohibition on discrimination ‘because of . . . sex’ covers discrimination on the basis of gender identity and sexual orientation.”<sup>104</sup> The Executive Order extended the interpretation of sex in Title VII to “prohibit discrimination on the basis of gender identity or sexual orientation” to “laws that prohibit sex discrimination—including Title IX.”<sup>105</sup>

#### 5. *DOJ and DOE Enforcement of Title IX*

Shortly after Executive Order 13988, the DOJ Civil Rights Division issued a memorandum detailing *Bostock*’s application to Title IX.<sup>106</sup> Under the Executive Order’s direction that agencies review laws prohibiting sex discrimination, the memorandum concluded that the language in Title IX, which prohibits sex discrimination, includes the prohibition of discrimination on the basis of gender identity and sexual orientation due to the Supreme Court’s ruling in *Bostock*.<sup>107</sup> The DOJ noted that “Title IX’s ‘on the basis of sex’ language is sufficiently similar to ‘because of’ sex under Title VII as to be considered interchangeable.”<sup>108</sup>

---

99. *Id.*

100. *See id.*

101. *Id.*

102. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

103. *Id.*

104. *Id.* See discussion *infra* Section III.A regarding *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

105. Exec. Order No. 13988, 86 Fed. Reg. at 7023.

106. Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen., C.R. Div., Dep’t of Just., to Fed. Agency C.R. Dirs. & Gen. Couns. 1 (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download> [<https://perma.cc/S9A5-HAL5>].

107. *Id.* at 2.

108. *Id.*

The Office for Civil Rights of the DOE also issued an interpretation in light of *Bostock*, stating that “sex” in Title IX affirmatively prohibits discrimination based on gender identity.<sup>109</sup> The purpose of the interpretation is to clarify the Office for Civil Rights’ inconsistent stance on Title IX’s coverage of discrimination and “recognize[ ] that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity.”<sup>110</sup> In this interpretation, the Office of Civil Rights asserts its “responsibility to enforce Title IX’s prohibition on sex discrimination,” which includes “[a]ddressing discrimination based on sexual orientation and gender identity.”<sup>111</sup>

### III. TRANSGENDER RIGHTS: SUPREME COURT PRECEDENT AND CIRCUIT SPLITS

The Supreme Court has already settled a circuit split over the meaning of “sex” in Title VII<sup>112</sup> and may soon find itself with another opportunity to define “sex”—this time in the context of Title IX.<sup>113</sup> Settling a circuit split on the issue of transgender rights should be paramount to the Court because “happenstance of geography should not justify different outcomes” in whether a person’s basic human rights are acknowledged.<sup>114</sup>

#### A. THE SUPREME COURT HAS INTERPRETED “SEX” UNDER TITLE VII TO INCLUDE TRANSGENDER PERSONS

Until 2020, it was legal under Title VII of the Civil Rights Act of 1964 to fire a person because of their gay or transgender status.<sup>115</sup> The Supreme Court’s decision in *Bostock v. Clayton County* finally gave LGBTQ+ employees the protection they deserve as citizens of the United States and as humans.<sup>116</sup> *Bostock* is a landmark decision for LGBTQ+ rights. Gay and transgender people no longer need to fear losing their jobs due to their sexual orientation or gender identity because “[a]n employer who fires an individual merely for being gay or transgender defies the law.”<sup>117</sup> *Bostock* consolidated three circuit court cases, resolving a circuit split.<sup>118</sup>

---

109. 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 (June 22, 2021) (to be codified at 34 C.F.R. ch. I).

110. *Id.*

111. *Id.*

112. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

113. *See discussion infra* Section IV.A.

114. Statement from Michael R. Dreeben to the Presidential Comm’n on the Supreme Court of the United States 10 (June 25, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dreeben-Statement-for-the-Presidential-Commission-on-the-Supreme-Court-6.25.2021.pdf> [<https://perma.cc/ZX2U-E6XL>].

115. *See Bostock*, 140 S. Ct. at 1737.

116. *See id.* at 1754.

117. *Id.*

118. *See id.* at 1737.



In the namesake decision, the Eleventh Circuit held that Title VII did not prohibit employers from firing employees because they are gay.<sup>119</sup> Gerald Bostock worked as a child welfare advocate for Clayton County, Georgia.<sup>120</sup> Soon after Bostock joined a local gay softball league, several members of the community made degrading comments about his sexual orientation and involvement in the league.<sup>121</sup> Shortly after these remarks surfaced, Bostock “was fired for conduct ‘unbecoming’ a county employee.”<sup>122</sup>

Conversely, the Second Circuit held that sexual orientation discrimination did violate Title VII.<sup>123</sup> Donald Zarda, a gay man, worked as a skydiving instructor in New York and frequently led tandem skydives, during which he was “strapped hip-to-hip and shoulder-to-shoulder with clients.”<sup>124</sup> Zarda sometimes disclosed his sexual orientation to female clients to alleviate concerns they might have about being in such intimate proximity with a man during the tandem skydive.<sup>125</sup> After a tandem skydive in which Zarda told a female client he was gay, “the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior.”<sup>126</sup> Although Zarda denied any inappropriate contact with the client, his boss fired him after the incident, and Zarda subsequently “insisted he was fired solely because of his reference to his sexual orientation.”<sup>127</sup>

In the final installment of the circuit split trilogy, the Sixth Circuit held that Title VII bars employers from firing employees because of their transgender status.<sup>128</sup> Aimee Stephens, a transgender woman, began her work at R.G. & G.R. Harris Funeral Homes as an apprentice and eventually earned the position of Funeral Director and Embalmer.<sup>129</sup> The funeral home had a dress code for both male and female public-facing employees.<sup>130</sup> After five years of working at the funeral home, Stephens provided a letter to her employer expressing that she had “struggled with ‘a gender identity disorder’ her ‘entire life’ and . . . ‘decided to become the person that [her] mind already [was].’”<sup>131</sup> The letter also conveyed that Stephens “intend[ed] to have sex reassignment surgery” but must first “live and work full-time as a woman for one year.”<sup>132</sup> Stephens

---

119. *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x 964, 964–65 (11th Cir. 2018) (per curiam), *rev’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

120. *Bostock*, 140 S. Ct. at 1737.

121. *Id.* at 1737–38.

122. *Id.* at 1738.

123. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 108–09.

128. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

129. *Id.* at 567.

130. *Id.* at 568.

131. *Id.*

132. *Id.*

planned to go on vacation and return as her “true self,” wearing “appropriate business attire.”<sup>133</sup> Stephens postponed her vacation for two weeks and continued working normally.<sup>134</sup> Just before she left for vacation, Stephens’ employer fired her, saying, “this is not going to work out,” and offered her severance if she “agreed not to say anything or do anything.”<sup>135</sup> Stephens’s employer testified that he fired her because “[Stephens] was no longer going to represent himself as a man.”<sup>136</sup> Stephens filed a sex discrimination charge with the Equal Employment Opportunity Commission, which then filed a complaint against the funeral home.<sup>137</sup>

In *Bostock*, the Supreme Court looked to the “ordinary public meaning of [Title VII’s] terms at the time of its enactment” and assumes “sex” refers “only to biological distinctions between male and female.”<sup>138</sup> The Court interpreted “the ordinary meaning of ‘because of’” in Title VII to mean “‘by reason of’ or ‘on account of.’”<sup>139</sup> The “because of” test accordingly incorporates the “standard of but-for causation.”<sup>140</sup> In this context, an employer discriminates against a person in violation of Title VII when the employer “intentionally treats a person worse because of sex.”<sup>141</sup> For a violation of Title VII to occur, an employer’s intentional firing of an employee need only be “based in part on sex,” since the Court recognized the possibility of “multiple but-for causes” in *Bostock*.<sup>142</sup>

The Court provided two clarifying examples in which an employer fires a gay or transgender employee because of the employee’s sex. First, the Court offered a scenario in which two employees—a man and a woman—are attracted to men.<sup>143</sup> If, all other things being equal, the employer fires the male employee because he is attracted to men, “the employer discriminates against him for traits or actions it tolerates in his female colleague.”<sup>144</sup> The male employee’s attraction to men is only objectionable to the employer because the employee is a man, so the employer discriminates against the male employee because of his sex.<sup>145</sup> The second example applies the same reasoning but involves a transgender person.<sup>146</sup> Consider two equal employees, one a transgender person “who was identified as a male at birth but who now identifies as a female,” and the

---

133. *Id.* at 569.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See id.*

138. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738–39 (2020).

139. *Id.* at 1739 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

140. *Id.*

141. *Id.* at 1740.

142. *Id.* at 1739, 1741.

143. *Id.* at 1741.

144. *Id.*

145. *See id.*

146. *Id.*

other a person who was identified as female at birth and still identifies as a female.<sup>147</sup> If the employer fires the transgender employee “for traits or actions that it tolerates in an employee identified as female at birth,” then “the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”<sup>148</sup>

An employer who intends to fire an employee based on the employee’s homosexual or transgender status “inescapably *intends* to rely on sex in its decision[-]making.”<sup>149</sup> The phrase “because of . . . sex” in Title VII thus protects LGBTQ+ employees because “[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.”<sup>150</sup> Although it may be logical to presume the Supreme Court’s interpretation of “sex” in Title VII would settle the debate over the meaning in other statutes, this has not been the case with respect to “sex” in Title IX.<sup>151</sup>

## B. TRANSGENDER RIGHTS UNDER TITLE IX: A LOOMING CIRCUIT SPLIT

### 1. *The Fourth Circuit “Resoundingly” Affirms Transgender Bathroom Rights in Schools*

High school student Gavin Grimm, a transgender man, alleged that his school’s restroom policy, which required him to use the female bathroom, discriminated against him in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment.<sup>152</sup> The procedural history of Grimm’s discrimination claim is tumultuous and reflects the Federal Executive’s tennis match of opinion and guidance letters. A federal district court in the Eastern District of Virginia denied Grimm’s motion for a preliminary injunction and dismissed his Title IX claim, refusing to defer to the DOE’s 2015 Opinion Letter.<sup>153</sup> On appeal, the Fourth Circuit—relying on the 2016 Dear Colleague Letter—reversed and held that the Opinion Letter was entitled to deference.<sup>154</sup> The School Board then petitioned the Supreme Court for a writ of certiorari, and the Court granted the petition and scheduled oral arguments.<sup>155</sup> However, the Supreme Court subsequently canceled oral arguments and vacated the appellate court’s decision, remanding the case back to the Fourth Circuit “in light of” the Trump Administration’s 2017 Dear Colleague Letter that re-

147. *Id.*

148. *Id.* at 1741–42.

149. *Id.* at 1742.

150. *Id.* at 1743; see 42 U.S.C. § 2000e-2(a)(1).

151. See 20 U.S.C. § 1681; 42 U.S.C. § 2000e-2(a)(1).

152. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015), *rev’d in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016), *vacated sub nom.* Gloucester Cnty. Sch. Bd. v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (mem.).

153. *Id.* at 745–47 (citing Letter from Ferg-Cadima, *supra* note 66).

154. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016).

155. *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016).

scinded the Obama Administration's 2016 Dear Colleague Letter.<sup>156</sup>

By the time Grimm's case returned to the Fourth Circuit on remand, he had graduated high school and filed an amended complaint in the district court seeking nominal damages and other equitable relief.<sup>157</sup> The district court handling Grimm's amended Title IX claim held that "claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory" and that Grimm had "sufficiently plead" harmful sex discrimination.<sup>158</sup> The district court thereafter granted Grimm's motion for summary judgment, holding "that the Board's refusal to update [his] official school transcript to conform to the 'male' designation on his birth certificate violated . . . his rights under the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972."<sup>159</sup>

The Fourth Circuit's final decision in the *Grimm* saga in 2020 addressed "Grimm's claim that the Board's restroom policy . . . violated Title IX."<sup>160</sup> Under Title IX, "[n]o 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."<sup>161</sup> Using *Bostock's* interpretation of "sex" under Title VII for guidance, the Fourth Circuit concluded "that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'"<sup>162</sup> The School Board's policy prohibiting transgender students from using the restroom that matches their gender identity references "biological gender," which the School Board "defined as the sex marker on [a] birth certificate."<sup>163</sup> Therefore, the "policy excluded Grimm from the boys restrooms 'on the basis of sex'" because it would not have otherwise excluded Grimm from using the restroom matching his gender identity but-for reference to his sex.<sup>164</sup>

In determining "whether the policy unlawfully discriminated against Grimm" under Title IX, the court defined discrimination as "treating that individual worse than others who are similarly situated."<sup>165</sup> Grimm identified as male but was prohibited from using the boys restroom; meanwhile, everyone else in the high school who identified as male was allowed to use the boys restroom as they pleased.<sup>166</sup> Grimm was treated worse than his similarly situated classmates because his only options were

---

156. Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (mem.).

157. Amended Complaint at 17, Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. 2018) (4:15-cv-54).

158. *Grimm*, 302 F. Supp. 3d at 747–48 (internal quotations omitted).

159. Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444, 464 (E.D. Va. 2019).

160. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 603 (4th Cir. 2020).

161. 20 U.S.C. § 1681(a).

162. *Grimm*, 972 F.3d at 616.

163. *Id.*

164. *Id.* at 616–17.

165. *Id.* at 618 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020)).

166. *See id.* at 618.

“to use either the girls restroom or a single-stall” restroom.<sup>167</sup> In addition, Grimm eventually had his birth certificate changed to reflect his gender identity, yet even then, the School “Board *still* denied him access to the boys restrooms.”<sup>168</sup> The Fourth Circuit was left with no other conclusion than the School “Board’s application of its restroom policy against Grimm violated Title IX.”<sup>169</sup>

## 2. *The Eleventh Circuit Continuously Denies “Sex” Includes Transgender Persons*

### a. The Eleventh Circuit’s Interpretation of “Sex” Under Title VII

Before the Supreme Court ruled in *Bostock* that “sex” in Title VII includes gender identity, the Eleventh Circuit repeatedly denied that “sex” included sexual orientation.<sup>170</sup> In *Evans v. Georgia Regional Hospital*, Jameka Evans, a lesbian and former employee of Georgia Regional Hospital, stated that during her time working for the hospital, “she was denied equal pay or work, harassed, and physically assaulted or battered.”<sup>171</sup> Evans brought this action against her former employer under Title VII, alleging “gender non-conformity and sexual orientation discrimination.”<sup>172</sup> Evans’s claim of discrimination based on her sexual orientation was unsuccessful in the district court, which ruled that Title VII “was not intended to cover discrimination against homosexuals.”<sup>173</sup> The court also concluded that Evans’s claim of gender-nonconformity discrimination was “just another way to claim discrimination based on sexual orientation.”<sup>174</sup> Evans appealed to the Eleventh Circuit and argued “the district court erred in dismissing her claim that she was discriminated against for” defying gender stereotypes and that “her status as a lesbian supports her claim of sex discrimination” under Title VII.<sup>175</sup>

A three-judge panel of the Eleventh Circuit relied on the court’s “binding precedent” to categorically “foreclose” Title VII claims alleging sex discrimination based on sexual orientation such as Evans’s.<sup>176</sup> The Eleventh Circuit based this holding on the court’s 1979 decisions in *Blum v. Gulf Oil Corp.*, which held, “Discharge for homosexuality is not prohibited by Title VII.”<sup>177</sup> The Equal Employment Opportunity Commission, as amicus curiae for Evans, argued that the foregoing statement in *Blum*

167. *Id.*

168. *Id.* at 619.

169. *Id.*

170. See *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255–56 (11th Cir. 2017), *abrogated* by *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

171. *Id.* at 1251.

172. *Id.* at 1252.

173. *Evans v. Ga. Reg’l Hosp.*, No. CV415-103, 2015 WL 5316694, at \*2 (S.D. Ga. Sept. 10, 2015) (quoting *Arnold v. Heartland Dental, LLC*, 101 F. Supp. 3d 1220, 1226 (M.D. Fla. 2015), *R&R adopted*, No. CV415-103, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015)).

174. *Id.* at \*3.

175. *Evans*, 850 F.3d at 1253–54.

176. *Id.* at 1255.

177. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. June 1979); see *Evans*, 850 F.3d at 1255–57.

was dicta and thus not binding on the Eleventh Circuit.<sup>178</sup> However, this “statement in *Blum* concerning the viability of a sexual orientation claim was not dicta”<sup>179</sup> because the panel in *Blum* observed that it was “comment[ing] briefly on the other issues *raised on appeal*” before making the statement.<sup>180</sup> The Eleventh Circuit has thus historically refused to accept definitions of “sex” or “sex discrimination” that include sexual orientation.

A split in the circuits ensued over this issue when the Seventh Circuit held in April 2017 that Title VII applied to similar claims of discrimination.<sup>181</sup> Despite the newly minted circuit split, the Supreme Court denied Evans’s petition for writ of certiorari.<sup>182</sup> The Eleventh Circuit’s decision in *Evans* was particularly problematic considering *Blum* was decided in 1979 before the Fifth Circuit split into the Fifth and Eleventh Circuits that we have today.<sup>183</sup> Consequently, *Blum* was a binding precedent in both circuits until the Supreme Court decided *Bostock* in 2020 and abrogated *Evans*.<sup>184</sup>

#### b. The Eleventh Circuit’s Unsurprising and Problematic Interpretation of “Sex” Under Title IX

Consistent with the Eleventh Circuit’s denial of sex-discrimination protections to LGBTQ+ persons under Title VII, the court granted a rehearing en banc and vacated its own panel decision granting protections to transgender persons’ right to use the restrooms that align with their gender identity.<sup>185</sup> In August 2020, a three-judge panel of the Eleventh Circuit ruled in favor of Drew Adams, a transgender student, under the Equal Protection Clause of the Fourteenth Amendment and Title IX.<sup>186</sup> Adams was “forbidden to use the boys[ ] restroom” at his high school and, like Grimm, was only given the option of using either the multi-stall girls restroom or a single-occupant, gender-neutral bathroom.<sup>187</sup> The School Board refused to allow Adams to use the restroom that aligned with his gender identity, which caused him to feel “alienated and humili-

178. *Evans*, 850 F.3d at 1255.

179. *Id.*

180. *Id.* (quoting *Blum*, 597 F.2d at 938).

181. See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (“We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.”).

182. *Evans v. Ga. Reg’l Hosp.*, 138 S. Ct. 557 (2017).

183. *U.S. Court of Appeals for the Fifth Circuit—Brief History*, U.S. CT. OF APPEALS FOR THE 5TH CIR., <https://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history> [<https://perma.cc/T6DH-E426>].

184. See *Lewis v. Am. Tower*, 859 F. App’x 409, 411 (11th Cir. 2021) (recognizing abrogation of *Evans* by *Bostock*).

185. See *Adams v. Sch. Bd. of St. Johns Cnty.*, 9 F.4th 1369 (11th Cir. 2021), *granting reh’g en banc*, 3 F.4th 1299 (11th Cir. 2021).

186. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020), *vacated sub nom. Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299 (11th Cir.), *reh’g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

187. *Id.* at 1291.

ated” and caused him “anxiety and depression.”<sup>188</sup>

However, when the August 2020 decision was issued, “an active member of [the Eleventh Circuit] withheld issuance of the mandate.”<sup>189</sup> “In an effort to get broader support” from the full court for the panel opinion, the panel vacated its original decision and issued a revised decision in July 2021.<sup>190</sup> The revised decision did not address the Title IX question but decided the case on a single theory under the Equal Protection Clause instead of the three Equal Protection rulings made in the original panel decision.<sup>191</sup> In regard to Adams’s Equal Protection Clause claim, the revised decision held “that the School Board has not met its ‘demanding’ constitutional burden by showing a substantial relationship between its policy for excluding transgender students from certain restrooms and student privacy.”<sup>192</sup> The revised decision declined to reach Adams’s Title IX claim because the court already “concluded that Mr. Adams prevails on his equal protection claim, which fully entitles him to the relief granted by the District Court.”<sup>193</sup>

Despite the panel’s efforts to garner wider support, the full Eleventh Circuit Court voted to grant a rehearing en banc and vacate the panel’s revised opinion.<sup>194</sup> Because the Eleventh Circuit vacated the panel decision, Adams’s Title IX and Equal Protection discrimination claims have not been finally adjudicated, and the court will again decide on both claims. The fact that the Eleventh Circuit granted a rehearing en banc and vacated the revised opinion, despite how watered down the revised opinion was, hints that the full court may be inclined to affirm the district court’s adverse ruling against Adams. If the Eleventh Circuit does affirm the district court’s ruling, a circuit split will be created with the Fourth Circuit on the issue of whether sex discrimination under Title IX includes protection of gender identity.<sup>195</sup>

#### IV. THE REALITY OF *ADAMS* AND THE MEANING OF “SEX”

##### A. IN LIGHT OF *EVANS*’S ABROGATION BY *BOSTOCK*, WHY IS THE ELEVENTH CIRCUIT LIKELY TO REVERSE ITS OWN PANEL DECISION IN *ADAMS*?

Although the Eleventh Circuit’s conservative tilt and history of deny-

---

188. *Adams ex rel. Kaspar v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp.3d 1293, 1308 (M.D. Fla. 2018).

189. *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1303 (11th Cir. 2021), *reh’g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

190. *Id.* at 1304

191. *Id.*

192. *Id.* at 1320.

193. *Id.*

194. *Adams*, 9 F.4th at 1372.

195. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

ing discrimination protections to LGBTQ+ persons<sup>196</sup> suggests otherwise, the court may, in part, be purposely setting the stage for the Supreme Court to grant certiorari in *Adams*. On the one hand, there would be a final answer to the question of whether Title IX protects transgender persons' rights in schools to use the bathroom that corresponds with their gender identity. On the other hand, the Eleventh Circuit should be able to see the writing on the wall after *Bostock* and is merely pressing a minority point. Although it was in the context of Title VII rather than Title IX, the Supreme Court in *Bostock* has already held that "sex" includes sexual orientation and gender identity.<sup>197</sup>

B. THE CANON OF PRESUMPTION OF CONSISTENT USAGE DICTATES THAT "SEX" IN TITLE IX HAS THE SAME MEANING AS "SEX" IN TITLE VII

The presumption of consistent usage is a contextual canon that dictates that a "word or phrase is presumed to bear the same meaning throughout a text" and "material variation in terms suggests a variation in meaning."<sup>198</sup> Title VII of the Civil Rights Act of 1964 does not explicitly define "sex," but neither does it use any material variations—or any variations for that matter—of the term.<sup>199</sup> Title IX similarly does not define "sex," nor does it use any material variations.<sup>200</sup> In order to understand the meaning of the term "sex" using the presumption of consistent usage canon, the "language must be interpreted in light of how the term 'sex' has been construed by courts under Title IX, Title VII, and other laws."<sup>201</sup> This analysis need not go further due to the Supreme Court's ruling in *Bostock*, which explicitly held that "sex" and discrimination "on the basis of sex" include sexual orientation and gender identity.<sup>202</sup> Thus, under the canon of presumption of consistent usage, the term "sex" in Title IX is presumed to bear the same meaning as sex in Title VII.

C. A LIKELY HYPOTHETICAL: THE ADAMS DECISION CREATES A CIRCUIT SPLIT

Although the Eleventh Circuit's decision in *Evans* denying that sex discrimination under Title VII included discrimination based on gender identity<sup>203</sup> is abrogated by the Supreme Court's ruling in *Bostock*,<sup>204</sup> the Eleventh Circuit is likely to affirm the district court's ruling in *Adams*

196. See discussion *infra* Section IV.C.

197. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

198. Bryan A. Garner & Antonin Scalia, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE 80 (2015), <https://judicature.duke.edu/wp-content/uploads/2022/04/Lastly-scalia.pdf> [<https://perma.cc/XNF7-ZTMD>].

199. See 42 U.S.C. § 2000e-2.

200. See 20 U.S.C. § 1681.

201. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC'Y 301, 308 (2013).

202. See *Bostock*, 140 S. Ct. at 1754.

203. See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1256–57 (11th Cir. 2017).

204. See *Bostock*, 140 S. Ct. at 1754.



because of the court's ideological makeup and history of narrowly interpreting "sex" in Title VII.

The outcome of the Eleventh Circuit's rehearing of *Adams* balances precariously on a narrow ideological split. When President Trump took office, the Eleventh Circuit had an 8–3 majority of Democrat-appointed judges.<sup>205</sup> As judges retired, President Trump appointed six judges to the circuit, "all but guarantee[ing]" that the Eleventh Circuit will remain one of the most conservative courts in the United States.<sup>206</sup> University of Richmond School of Law Professor Carl Tobias claims that Trump replaced "conservative judges on the [Eleventh] Circuit with even more conservative judges."<sup>207</sup> As the circuit currently stands, there are seven judges who were appointed by Republican presidents and four judges who were appointed by Democrat presidents, with one vacancy left by Judge Beverly Martin, the author of the *Adams* panel decisions.<sup>208</sup> Judge Martin retired on September 30, 2021,<sup>209</sup> and President Biden made Nancy Gbana Abudu his first nominee to the Eleventh Circuit on January 10, 2022, to replace Judge Martin.<sup>210</sup> If Abudu is confirmed, the Eleventh Circuit will be comprised of seven judges appointed by Republican presidents and five judges appointed by Democratic presidents.

The Eleventh Circuit's history of deciding cases along ideological lines illustrates the court's conservative lean. In a September 2020 case, the Eleventh Circuit upheld a Florida law mandating that in order to "regain[ ] the right to vote, felons must complete *all* the terms of their criminal sentences, including imprisonment, probation, and payment of any fines, fees, costs, and restitution."<sup>211</sup> The Eleventh Circuit's decision in this case was divided 6–4, with five Trump appointees in the majority.<sup>212</sup> All four dissenters were Democratic appointees.<sup>213</sup>

---

205. Lawrence Hurley, *On Guns, Abortion and Voting Rights, Trump Leaves Lasting Mark on U.S. Judiciary*, REUTERS (Jan. 15, 2021, 5:52 AM), <https://www.reuters.com/article/us-usa-trump-judges/on-guns-abortion-and-voting-rights-trump-leaves-lasting-mark-on-u-s-judiciary-idUSKBN29K162> [<https://perma.cc/KXL5-ER87>].

206. Bill Rankin, *Trump Packs Influential Atlanta Court with Conservative Judges*, ATLANTA J.-CONST. (July 6, 2018), <https://www.ajc.com/news/local/trump-packs-influential-atlanta-court-with-conservative-judges/Yhbacu8m1stN9gwTEXcgwK> [<https://perma.cc/P7V7-ER4W>].

207. *Id.*

208. Bill Rankin, *Judge to Leave Atlanta Appeals Court, Giving President Biden a Vacancy to Fill*, ATLANTA J.-CONST. (May 18, 2021), <https://www.ajc.com/news/atlanta-news/judge-to-leave-atlanta-appeals-court-giving-president-biden-a-vacancy-to-fill/KO4YIGOPBBHH7FAR4JUVEMF4RM> [<https://perma.cc/J6FU-RCFJ>]; see also *Adams ex rel. Kasper v. Sch. Bd. of St. John's Cnty.*, 968 F.3d 1286, 1290 (11th Cir. 2020).

209. Rankin, *supra* note 208.

210. *President Biden Names Twelfth Round of Judicial Nominees*, WHITE HOUSE (Dec. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/president-biden-names-twelfth-round-of-judicial-nominees> [<https://perma.cc/BY5Z-2EWE>].

211. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1025, 1027 (11th Cir. 2020) (en banc) (noting that the district court and a previous panel on the Eleventh Circuit found the law unconstitutional in violation of the Equal Protection Clause); see also Hurley, *supra* note 205.

212. Hurley, *supra* note 205.

213. *Id.*

Additionally, as evidenced by *Evans*, the Eleventh Circuit is predisposed to deny that “sex” includes any interpretation other than the sex assigned at birth. This interpretation will likely be adopted in the context of Title IX. Assuming the Eleventh Circuit rules against Adams and a circuit split is created, the Supreme Court should grant certiorari and apply its interpretation of “sex” under Title VII in *Bostock* to Adams’s claim under Title IX. There will be a massive rift in American jurisprudence if the Supreme Court holds that sex does not include sexual orientation and gender identity under Title IX because this reasoning would directly conflict with the Court’s interpretation of sex in Title VII.

Although the meaning of sex should now be clear because of the Supreme Court’s holding in *Bostock*, a hypothetical circuit split on the issue of interpreting “sex” in Title IX would theoretically open the door for the Supreme Court to side with the Eleventh Circuit. To some, this opportunity would “enable the Court to minimize the damage from its serious error in failing to grant certiorari” in *Grimm*.<sup>214</sup> However, if the Supreme Court were to side with the Eleventh Circuit in an adverse ruling against Adams, the Court would have to reconcile its interpretation of sex under Title IX with sex under Title VII. The possibility of such a holding in *Adams* by the Supreme Court presents the harrowing, albeit small, risk that the Court takes *Adams* a step further and overrules *Bostock*’s interpretation of sex in Title VII. The Supreme Court’s holding in *Bostock* and the doctrine of stare decisis<sup>215</sup> should prevent the Supreme Court from deciding that discrimination “based on sex” in Title IX does not include discrimination based on sexual orientation or gender identity.

## V. CONCLUSION

Given a chance, the Supreme Court should decide *Adams* in favor of allowing transgender persons in schools to use the bathroom in accordance with their gender identity. This would finally quash the back-and-forth guidance letters from the federal executive and provide a solution to the overreach of authority argument, which asserts that it is not the place of the executive branch to interpret the law. Whether transgender persons deserve equal rights should not be up for debate, and the Supreme Court could soon find itself in a position to give the LGBTQ+ community the validation it never should have needed.

---

214. Ed Whelan, *Eleventh Circuit Grants En Banc Rehearing in Transgender Restroom Case*, NAT’L REV. (Aug. 23, 2021, 5:00 PM), <https://www.nationalreview.com/bench-memos/eleventh-circuit-grants-en-banc-rehearing-in-transgender-restroom-case> [https://perma.cc/P324-N9VP].

215. “The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” *Stare decisis*, BLACK’S L. DICTIONARY (11th ed. 2019).

