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A Conflict in the Courts: An Update on School Restroom Policies

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A Conflict in the Courts: An Update on School Restroom Policies

Suzanne Eckes^{*}

ABSTRACT

Over the past ten years, courts have been asked to weigh in on whether students' rights are violated when school policies prohibit them from using restrooms that align with their gender identities. In the vast majority of legal cases, courts have rendered decisions favorable for the student. In December 2022, however, the Eleventh Circuit Court of Appeals ruled that a school district's policy prohibiting transgender students from using a restroom that matched their gender identity did not violate Title IX of the Education Amendments of 1972 nor the Equal Protection Clause of the Fourteenth Amendment. The Eleventh Circuit's *en banc* decision contradicts other federal circuit courts that have examined this issue. It has created a circuit split, potentially inviting U.S. Supreme Court review, if the student-plaintiff appeals.

This article first identifies and briefly examines several of the court decisions that have addressed this issue. The article then discusses how a 2020 U.S. Supreme Court's decision aligns with the topic, and how the U.S. Department of Education has interpreted Title IX as it relates to this issue. This article concludes with an analysis of the Eleventh Circuit's recent decision, and discusses the decision's implications for students in K-12 public schools. The findings should be helpful to policy makers, lawyers, school officials, students, families, and scholars as this is the first article to highlight the evolution of most of the litigation in this area.

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INTRODUCTION

Over the past ten years, courts have been asked to weigh in on whether students' rights are violated when school policies prohibit them from using restrooms that match their gender identities. In these lawsuits, transgender¹ students typically allege violations under the U.S. Constitution, federal law, and/or state law.² In the vast majority of cases, courts have rendered decisions favorable for the student.³ In December 2022, however, the Eleventh Circuit Court of Appeals ruled, in *Adams v. School Board of St. John's County*, that a school district's policy prohibiting transgender students from using a restroom that aligned with their gender identity did not violate Title IX of the Education Amendments of 1972 nor the Equal Protection Clause of the Fourteenth Amendment.⁴ The Eleventh Circuit's *en banc* decision contradicts other federal circuit courts that have examined this issue.⁵ It has created a circuit split, potentially inviting U.S. Supreme Court review, if the student-plaintiff appeals. The decision comes at a time of harmful and nonsensical attacks against transgender students via state legislatures across the country.⁶

¹ See GLAAD Media Reference Guide, Glossary of Terms LGBTQ, <https://www.glaad.org/reference/terms> (last visited Apr. 22, 2023) (Defines transgender as an adjective to describe people whose gender identity differs from the sex they were assigned at birth).

² See GLAAD Media Reference Guide, Glossary of Terms LGBTQ, <https://www.glaad.org/reference/terms> (last visited Jan. 3, 2023) (Please see GLAAD's website for a definition of terms when referring to LGBTQ+ persons. These terms include: sex, transgender, gender identity, gender expression, sexual orientation, transsexual, trans, and cis- and cisgender. Although these definitions were relied upon, it is important to note that when discussing the legal cases, the language used by courts is used within this discussion).

³ Many of these proceedings involved pretrial motions.

⁴ *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F4 791, 796 (11th Cir. 2022).

⁵ See Suzanne Eckes, *Transgender Students and Sex Segregated Facilities: Why School Leaders Might Rethink Litigation*, 4 J. ACAD. PERSP. 1, 2 (2019).

⁶ See Allison Gash, *Anti-Transgender Bills are Latest Version of Conservatives' Longtime Strategy to Rally their Base*, CONVERSATION (May 6, 2021), <https://theconversation.com/anti-transgender-bills-are-latest-version-of-conservatives-longtime-strategy-to-rally-their-base-158296>; see also Wyatt Ronan, *2021 Becomes Record Year for Anti-Transgender Legislation*, HUM. RTS. CAMPAIGN (March 13, 2021), <https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation>; Elliot A. Tebbe et al., *A Dangerous Visibility: Moderating Effects of Antitrans Legislative Efforts on Trans and Gender-Diverse Mental Health*, PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY, 259 (2022), <https://www.apa.org/pubs/journals/releases/sgd-sgd0000481.pdf>; see also Landon D. Hughes et al., "These Laws Will Be Devastating": Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender

Although it is unclear why lawmakers would choose to target a group of students that has been historically marginalized in schools, some have argued that these attacks are often politically motivated.⁷ Whatever the case may be, these legislators' policy goals run contrary to what studies suggest when creating a more inclusive school environment that is free from discrimination.⁸ Prior to the Eleventh Circuit's decision, courts were generally ruling in favor of transgender students' rights in schools. Specifically, before the recent decision, judges in several parts of the country began questioning discriminatory practices and policies targeting transgender students in schools.⁹

This article first identifies and briefly examines several of the court decisions that have addressed this issue and provides a framework for the legal arguments in these challenges. The article then discusses how the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County* relates to the topic, and how the U.S. Department of Education has interpreted Title IX as it relates to sexual orientation and gender identity. This article concludes with an analysis of the Eleventh Circuit's recent decision, and discusses the decision's implications for students in K-12 public schools. The findings should be helpful to policy makers, lawyers,

Adolescents, J. ADOLESCENT HEALTH, 976 (2021), [https://www.jahonline.org/article/S1054-139X\(21\)00435-3/fulltext](https://www.jahonline.org/article/S1054-139X(21)00435-3/fulltext).

⁷ See Allison Gash, *Anti-Transgender Bills are Latest Version of Conservatives' Longtime Strategy to Rally their Base*, CONVERSATION (May 6, 2021), <https://theconversation.com/anti-transgender-bills-are-latest-version-of-conservatives-longtime-strategy-to-rally-their-base-158296>.

⁸ See e.g. Mollie McQuillan et al. *A Solution in Search of a Problem: Justice Demands More for Trans Student-Athletes to Fulfill the Promise of Title IX*, 33 MARQ. SPORTS L. REV. 195 (2022) (explaining how state legislators' actions are politically motivated); see e.g. Kayla Acklin, "Hurdling" Gender Identity Discrimination: The Implications of State Participation Policies on Transgender Youth Athletes' Ability to Thrive, 37 B.C. J. L. & SOC. JUST., 107 (2017) (explaining how these laws and policies are often politically motivated and contrary to research); see Selena Simmons-Duffin, *Rachel Levine Calls State Anti-LGBT Bills Disturbing and Dangerous for Trans Youth*, NPR (Apr. 29, 2022), <https://www.npr.org/sections/health-shots/2022/04/29/1095227346/rachel-levine-calls-state-anti-lgbtq-bills-disturbing-and-dangerous-to-trans-you> (explaining that the political attacks against trans youth are harming the overall well-being of students); see Jeremy W. Peters, *Why Transgender Girls Are Suddenly the G.O.P.'s Culture-War Focus*, N.Y. TIMES (March 29, 2021) (explaining harmful political rhetoric against transgender persons); see Christina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS (2016), <http://pediatrics.aappublications.org/content/137/3/e20153223> (discussing the importance of inclusive policies to promote mental health).

⁹ See *Eckes*, *supra* note 5.

school officials, students, families, and scholars as this is the first article to highlight the evolution of all of the litigation in this area.¹⁰

AN OVERVIEW OF EARLIER COURT RULINGS

Before the Eleventh Circuit's recent ruling, there were at least 14 court cases initiated on behalf of transgender students who alleged violations under the Equal Protection Clause of the Fourteenth Amendment, Title IX of the Education Amendments of 1972, or violations under state law. All of these cases, except for one, have ended in a favorable result for transgender students. Moreover, there have been at least five court cases initiated on behalf of cisgender students who have claimed that their right to privacy is violated when they are required to share a restroom with a transgender student at school. In all these decisions, courts have found no right to privacy. Tables A and B provide a snapshot of these cases.¹¹ Table A presents those cases in which the plaintiff is a transgender student who was denied access to a restroom that matched the student's gender identity. Table B focuses on those claims initiated by cisgender students who argue that their privacy rights were violated when school policy allowed transgender students to use restrooms that aligned with their gender identities.¹²

¹⁰ *Id.*

¹¹ These cases were located on the Lexis-Nexis database using broad search terms (e.g., transgender, student, Title IX or Equal Protection Clause). The cases were then Shepardized to find out if they were cited in other similar cases. Cases that were not reported on the database or those that did include those broad search terms may have been missed.

¹² *LGBTQ+ Inclusion: Glossary*, UW MED., <https://www.uwmedicine.org/practitioner-resource/lgbtq/lgbtq-inclusion-glossary> (last visited Apr. 28, 2023).

A. Table A: Transgender Access Claims¹³

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>A.C. v. Metro. Sch. Dist. of Martinsville, 2022</i>	Federal district court in Indiana	Title IX and Equal Protection	Plaintiff's motion for preliminary injunction granted to allow student use of boys' restrooms at school, following precedent that preventing him from doing so violates Title IX.
<i>B.E. v. Vigo Cnty. Sch. Corp., 2022</i>	Federal district court in Indiana	Title IX and Equal Protection	Plaintiffs' motion for preliminary injunction granted to allow student use of boys' restrooms at school, following precedent that preventing him from doing so violates Title IX.

¹³ See Suzanne Eckes, *Transgender Students and Sex Segregated Facilities: Why School Leaders Might Rethink Litigation*, 4 J. ACAD. PERSP. 1, 4 (2019) (see earlier versions of Tables A & B).

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>Adams v. Sch. Bd.</i> , 2021	Eleventh Circuit Court of Appeals (AL, FL, GA)	Title IX and Equal Protection	Affirming grant of summary judgment and compensatory damages for transgender student on Equal Protection clause claim. ¹⁴
<i>N.H. v. Anoka-Hennepin Sch. Dist. No. 11</i> , 2020	Court of Appeals of Minnesota	Minnesota Human Rights Act, Equal Protection provisions of Minnesota Constitution	Affirming denial of school district's motion to dismiss transgender student's claim of sexual orientation discrimination and Equal Protection violation.
<i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , 2020	Fourth Circuit Court of Appeals (MD, SC, NC, VA, WV)	Title IX and Equal Protection	Affirming grant of summary judgment to student on Title IX and Equal Protection Clause claims. Denied school district's petition for rehearing en banc.

¹⁴ *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299 (11th Cir. 2021), *on reh'g granted en banc*, *Adams by & through Kasper v. Sch. Bd.*, 57 F.4th 791 (11th Cir. 2022).

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>R.M.A. v. Blue Springs R-IV Sch. Dist.</i> , 2019	Supreme Court of Missouri	Missouri Human Rights Act	Circuit court decision to dismiss student's claims was vacated, reasoning that he had a valid claim of sex discrimination under the state law.
<i>J.A.W. v. Evansville Vanderburgh Sch. Corp.</i> , 2019	Federal District Court in Indiana	Title IX and Equal Protection	District court denied school district's motion to dismiss the transgender student's complaints and granted student's partial summary judgment.
<i>A.H. ex rel. Handling v. Minersville Area Sch. Dist.</i> , 2019	Federal District Court in Pennsylvania	Title IX and Equal Protection	The school district's motion for summary judgment was denied for both the Title IX and Equal Protection claims (restroom on field trips).

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>M.A.B. v. Bd. of Educ.</i> , 2018	Federal District Court in Maryland	Title IX and Equal Protection	District court denied the school district's motion to dismiss the student's claims; student sufficiently plead a Title IX and equal protection claim; Student's motion for preliminary injunction denied without prejudice.
<i>Whitaker v. Kenosha Unified School Dist.</i> , 2017	Seventh Circuit Court of Appeals (Ill, IN, WI)	Title IX and Equal Protection	Affirming grant of transgender student's motion for a preliminary injunction.
<i>Evancho v. Pine-Richland Sch. Dist.</i> , 2017	Federal District Court in Pennsylvania	Title IX and Equal Protection	District court granted 2 transgender students' motion for a preliminary injunction on their equal protection claim. Did not decide Title IX issue. School district's motion to dismiss denied.

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>Bd. of Educ. v. U.S. Dep't of Educ.</i> , 2016	Federal District Court in Ohio	Title IX and Equal Protection	Federal District court granted a transgender student's motion for a preliminary injunction. School district's subsequent motion for a stay was denied by the Sixth Circuit Court of Appeals (<i>Dodds v. U.S. Dep't of Educ.</i> , 2016).
<i>D.H. Williamson Cnty. Bd. of Educ.</i> , 2022	Federal District Court in Tennessee	Equal Protection Clause and Title IX	Student's motion for a preliminary injunction denied. State and school policy did not violate the Equal Protection Clause or Title IX.

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>Doe v. Reg'l Sch. Unit 26, 2014</i>	Maine Supreme Court	Maine's Human Rights Act	State Supreme Court found that Maine's Human Rights Act was violated when a transgender student was not permitted to use the female restroom.

B. Table B: Cisgender Privacy Claims

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>Doe v. Boyertown Area Sch. Dist.</i> , 2019	Third Circuit Court of Appeals (Delaware, New Jersey, Pennsylvania)	Constitutional right to privacy	District court did not find the policy violated cisgender students' privacy rights. Third Circuit Court of Appeals upheld this decision and U.S. Supreme Court denied <i>cert.</i>
<i>Students & Parents for Privacy v. United States Dep't of Educ.</i> , 2017	Federal District Court in Illinois	Constitutional right to privacy	District court did not find that cisgender students' right to privacy violated.
<i>Parents for Privacy v. Dallas Sch. Dist.</i> , 2020	Federal District Court in Oregon	Constitutional right to privacy	Affirmed District court's decision that cisgender students' right to privacy was not violated.
<i>Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist.</i> , 2019	Federal District Court in Illinois	Constitutional right to privacy	District court did not find that cisgender students' right to privacy violated.

Case Name	Court/Jurisdiction	Legal Claim	Outcome
<i>Parents for Privacy v. Barr</i> , 2020	Ninth Circuit Court of Appeals (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington)	Constitutional right to privacy and Title IX	Right to privacy did not extend to high school students who wished to avoid all risks of intimate exposure to or by a transgender person. Mere presence of a transgender student in locker and bathroom facilities is not severe, pervasive, and objectively offensive harassment to deprive alleged victims of access to educational opportunities or benefits provided by the school under Title IX.

These tables provide a broad overview of various courts' rulings throughout the country by jurisdiction. As the tables suggest, there have been a series of disputes related to students being able to use restrooms that align with their gender identities in different regions of the U.S. The earlier emerging outcomes in these court rulings indicated a possible trend that students are protected under Title IX, the Equal Protection Clause, and/or state law from discriminatory practices in controversies involving K-12 restroom access. These previous decisions also aligned with best school practices according to numerous studies.¹⁵ The cases in Table A and B are briefly examined below to explain the evolution of the litigation involving restroom access by jurisdiction.¹⁶

LAWSUITS INITIATED ON BEHALF OF TRANSGENDER STUDENTS: TITLE IX AND EPC CLAIMS

As noted, most of the litigation in this area includes Title IX and Equal Protection Clause claims. Sometimes, state law claims are involved as well. Title IX of the Education Amendments of 1972 requires, in part, “[n]o 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. . . .”¹⁷ In Equal Protection Clause jurisprudence, gender classifications are analyzed under intermediate scrutiny.¹⁸ Thus, for a school district’s

¹⁵ Joseph G. Kosciw, et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN (2020), <https://www.glsen.org/research>; THE NAT’L ACAD. PRESS, *Understanding the Well-Being of LGBTQI+ Populations* (2020), <https://nap.nationalacademies.org/read/25877/chapter/1>; NAT’L ACAD. PRESS, *The Health of Lesbian, Gay, Bisexual, and Transgender People Building a Foundation for Better Understanding*, (2011), <https://nap.nationalacademies.org/read/13128/chapter/1>; Mollie T. McQuillan, *Scaling Gender and Sexual Diversity Policies in K-12 Schools*, EDUC. POL’Y (2021); Wayne Martino, et al., *Supporting Transgender Students in Schools: Beyond an Individualist Approach to Trans Inclusion in the Education System*, 74 EDUC. REV. 753, 761 (2020); Maria M. Lewis & Suzanne E. Eckes, *Storytelling, Leadership, and the Law: Using Amicus Briefs to Understand the Impact of School District Policies and Practices Related to Transgender Student Inclusion*, 56 EDUC. ADMIN. Q. 46 (2020).

¹⁶ From athletics to bullying, there are indeed several other legal challenges in K-12 schools involving transgender students’ rights to be free from discriminatory practices. These topics are beyond the scope of this article. As will be noted, the findings from the restroom cases may have important implications for these other important civil rights issues.

¹⁷ Title IX of the Education Amendments, 20 U.S.C. § 1681(a) (1972).

¹⁸ See *Adams v. Sch. Bd. of St. Johns Cnty.*, 2021 U.S. App. 3 F.4th 1299, 1306 (11th Cir. 2021) (discussing how intermediate scrutiny applies with governmental sex-based classifications).

restroom policy to not violate the Equal Protection Clause, the policy must promote an important governmental interest, and the classification employed must be substantially related to the achievement of that objective.¹⁹ No federal circuit court, until the recent Eleventh Circuit opinion, had found such a justification in the K-12 education context.

A. Federal Circuit Court Decisions

1. The Fourth Circuit.

A student diagnosed with gender dysphoria, a condition that is related to stress stemming from the conflict between one's gender identity and their physical sex at birth, wanted to use the restroom that aligned with his gender identity.²⁰ Based on his doctor's advice, school officials permitted him to use the male restroom for several weeks; however, after some complaints from adult community members, the board changed its policy.²¹ The student challenged the school's decision.²² After several different proceedings, in May 2018 on remand, the district court denied the school district's motion to dismiss the student's claims.²³ In August 2019, the court found that the school district's policy violated the plaintiff's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.²⁴ The school district appealed this decision. In August 2020, after five years of litigation, the Fourth Circuit upheld the district court's decision, finding both a violation of the Equal Protection Clause and Title IX.²⁵ Also, in 2021, the U.S. Supreme Court, without comment, let the Fourth Circuit's opinion stand.²⁶

2. The Seventh Circuit.

A student's motion for injunctive relief was granted after he challenged his high school's policy. The student, who had been

¹⁹ *Id.*

²⁰ Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730, 736 (E.D. Va. 2018).

²¹ *Id.* at 737.

²² *Id.*

²³ *Id.* at 752.

²⁴ Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444, 461 (E.D. Va. 2019).

²⁵ Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 615, 619 (4th Cir. 2020); Grimm v. Gloucester Cnty. Sch. Bd., 976 F.3d 399 (4th Cir. 2020) (*en banc* hearing denied).

²⁶ Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (*cert.* denied).

diagnosed with gender dysphoria, had used the male restroom for six months without incident before the school changed course. He alleged that denying him access to the male restroom caused him depression and medical concerns and stated that he contemplated suicide due to the stress he experienced. When affirming the grant of the preliminary injunction, the Seventh Circuit found that it would cause irreparable harm to deny him access to the male restroom because the use of the boys' restroom was necessary for both his transition and his emotional well-being.²⁷ The circuit wrote:

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. . . . Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.²⁸

3. The Eleventh Circuit.

A federal district court granted a student's motion for preliminary injunction allowing him to use the male restroom.²⁹ The school district did not demonstrate an important justification for this policy that prohibited his access, nor did school officials show how the policy allowing him to use the male restroom caused harm to other students. The court also found that this policy discriminated against the student on the basis of sex.³⁰ The circuit court affirmed the federal district court's opinion, finding the school's policy prohibiting a transgender male student from using the boys' restroom as a violation of the Fourteenth Amendment and Title IX.³¹ The court found the policy based on privacy to be administered in an arbitrary way, such that it lacked any factual support.³² This case was later vacated and a substituted opinion was issued. In this opinion the court still found that the transgender student's equal protection rights were violated.³³ As noted, the case was heard *en banc* in 2022 and the decision will be discussed later in the article.

²⁷ Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1045 (7th Cir. 2017).

²⁸ *Id.* at 1049-50.

²⁹ Adams v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293, 1327 (M.D. Fla. 2018).

³⁰ *Id.* at 1323-25.

³¹ *Id.* at 1320, 1325.

³² Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1297 (11th Cir. 2020).

³³ *Adams*, 3 F.4th at 1320.

B. Federal District Court Decisions

1. Indiana.

Despite the Seventh Circuit case discussed above, there have been three subsequent challenges involving transgender students who have been denied the use of a restroom that matches their gender identities. In all three cases, the result was favorable for the transgender students.³⁴ This was not surprising as the Seventh Circuit in the *Whitaker* decision made clear that such school policies were problematic. A federal district court in Indiana also granted a transgender student's motion for a preliminary injunction, allowing him to use the restroom that aligns with his gender identity.³⁵ In the same case, the federal district court later denied the school district's motion to dismiss the transgender student's complaints and granted the student partial summary judgment.³⁶ In another Indiana case, a federal district court judge granted a preliminary injunction in favor of a student who wanted to use the restroom that aligned with his gender identity. The 13-year-old student, who had been diagnosed with gender dysphoria, has been presenting as a male since the age of nine. After his parents' requests for him to use the male restroom were denied, the school district offered for him to attend remote schooling.³⁷ Reasoning that the majority of federal courts, including the Seventh Circuit, have found that denying transgender students access to restrooms aligned with their gender identity violates Title IX and that the student was likely to suffer irreparable harm if denied, the judge in this case ordered the school district to permit the student to use the male restrooms in his middle school.³⁸ In a third Indiana case since the Seventh Circuit's *Whitaker* decision, the court granted the plaintiffs' motion for preliminary injunction, which would allow the students to use the boys' restrooms at school because they would likely succeed with their Title IX claim.³⁹

³⁴ See generally *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 843 (S.D. Ind. 2019); *A.C. v. Metro Sch. Dist. of Martinsville*, 601 F. Supp. 3d 345, 356 (S.D. Ind. 2022); *B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 736 (S.D. Ind. 2022).

³⁵ *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1042 (S.D. Ind. 2018).

³⁶ *J.A.W.*, 396 F. Supp. 3d at 843.

³⁷ *A.C.*, 601 F. Supp. 3d at 348-49.

³⁸ *Id.* at 351, 355-56.

³⁹ *B.E.*, 608 F. Supp. 3d at 727.

2. Maryland.

Maryland is in the Fourth Circuit, but this case was decided before the 2020 *Grimm* decision. A federal district court within this same circuit examined a similar controversy and denied the school district's motion to dismiss the students' Title IX and equal protection claim.⁴⁰ It should also be noted, that this case focused more on the locker room issue because school officials eventually allowed the student to use the restroom that matched his gender identity in light of the Fourth Circuit's *Grimm* decision in 2016.⁴¹

3. Ohio.

An Ohio federal district court granted a student's motion for a preliminary injunction.⁴² The court found the student demonstrated irreparable injury and observed that she felt stigmatized when she was forced to use a separate restroom. The school district's subsequent motion for a stay was denied by the Sixth Circuit Court of Appeals.⁴³

4. Pennsylvania.

A federal district court granted two students' motion for a preliminary injunction on their equal protection claim in a case involving school restrooms. In granting the motion for the students, the court observed that they were treated differently from other students who were similarly situated because they are transgender.⁴⁴ Another federal district court within this same circuit reviewed a case involving an eight-year-old transgender student who challenged a district's policy requiring her to use the restroom that aligned with her sex at birth. The school district's motion to dismiss was denied for both the Title IX and equal protection claims.⁴⁵

⁴⁰ *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 726-27 (D. Md. 2018).

⁴¹ *Id.* at 712 n.5.

⁴² *Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 854 (S.D. Ohio 2016). *See also* *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016).

⁴³ *Id.* at 220-22.

⁴⁴ *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 273-74, 285 (W.D. Pa. 2017).

⁴⁵ *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 321 (M.D. Pa. 2017).

5. Tennessee.

An eight-year-old girl challenged a state law that forbids her from using the restroom that matched her gender identity.⁴⁶ The lawsuit, filed on behalf of the student, alleged Equal Protection Clause and Title IX violations. The plaintiff sought a preliminary injunction preventing the defendant school and others from enforcing this state law.⁴⁷ The court denied the student's motion for a preliminary injunction.⁴⁸ Under the equal protection claim, the court found that the long history of allowing separate bathroom facilities based on sex does not violate the constitution.⁴⁹ Also, the court did not believe that the student was likely to prevail on the merits of her Title IX claim due to the plain language of the law and its implementing regulations.⁵⁰ This was the only case identified that did not end in a favorable result for the student, prior to the Eleventh Circuit's decision.

C. *State Court Decisions*

Like the federal cases discussed above, state courts have also generally ended in a favorable result for the student. A few illustrative cases are briefly discussed.⁵¹

1. Missouri.

The Missouri Supreme Court vacated a lower court decision to dismiss a transgender student's claims. The Missouri Supreme Court reasoned that the student had a valid claim of sex discrimination under Missouri law. The student had sufficiently alleged that school officials denied him access to the boys' restrooms and locker rooms at his school because of his gender identity.⁵²

2. Maine.

The Maine Supreme Court found that Maine's Human Rights Act was violated when a student was not permitted to use the restroom that

⁴⁶ D.H. v. Williamson Cnty. Bd. of Educ., 2022 U.S. Dist. (M.D. Tenn. 2022).

⁴⁷ *Id.*

⁴⁸ *Id.* at *33.

⁴⁹ *Id.* at *25-26.

⁵⁰ *Id.* at *27-29.

⁵¹ Unlike federal court decisions, state cases are often more difficult to locate using legal databases. Thus, those cases that were found are discussed as illustrative examples.

⁵² R.M.A. v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 423-24 (Mo. 2019).

aligned with her gender identity. The court observed that “where ... it has been clearly established that a student’s psychological well-being and educational success depend upon being permitted to use the communal restroom consistent with her gender identity, denying access to the appropriate restroom constitutes sexual orientation discrimination.”⁵³

3. Minnesota.

A school district’s motion to dismiss was denied because the student had stated a valid sexual orientation discrimination claim and equal protection claim under state law when he was denied the use of the locker rooms and restrooms that aligned with his gender identity.⁵⁴ This case was more focused on the locker room issue.

LAWSUITS INITIATED ON BEHALF OF CISGENDER STUDENTS: PRIVACY CLAIMS

The cornerstone of constitutional privacy protection is whether the information at issue is within an individual’s reasonable expectations of privacy.⁵⁵ The U.S. Supreme Court has recognized a privacy interest rooted in the Fourteenth Amendment’s Substantive Due Process Clause.⁵⁶ The constitutional right to privacy is not absolute, however. For example, it must be weighed against important competing governmental interests. Cisgender plaintiffs have generally claimed that their fundamental right to privacy has been violated. No court, before the Eleventh Circuit’s decision, had agreed.⁵⁷

A. Federal Circuit Court Decisions

The Third Circuit Court of Appeals affirmed the district court’s decision to deny the cisgender plaintiffs’ motion for a preliminary

⁵³ Doe v. Reg’l Sch. Unit 26, 86 A.3d 600, 607 (Me. 2014).

⁵⁴ N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 553 (Minn. Ct. App. 2020).

⁵⁵ Although the cases discussed in this section may include multiple legal claims, the privacy argument is the focus in this discussion.

⁵⁶ Jon & Jane Parents 1 v. Montgomery Cnty Bd. Of Educ., 2022 U.S. WL 3544256 1, 3, 6 (D. Md. 2022).

⁵⁷ It will be interesting to observe whether the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2243 (2022) weakens a plaintiff’s privacy argument in future cases. Specifically, the *Dobbs*’s Court observed that the liberty interest argument was “exceptionally weak.” Also, similar to the abortion issue in *Dobbs*, a parental right is not an enumerated right in the U.S. Constitution and was likely not contemplated by the founders.

injunction. The court did not find that the presence of a transgender student in the school district's locker⁵⁸ or restrooms was any more offensive to the constitutional privacy interests than the presence of the other students who are not transgender.⁵⁹ According to its decision, even if one of the plaintiffs had been viewed by a transgender student in the restroom, it would not have resulted in a violation of the plaintiff's constitutional right to privacy. It observed: “[W]e decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no Court has ever done so.”⁶⁰

The circuit court also agreed with the district court that even if the plaintiffs had a constitutional right to privacy, the state had a compelling interest not to discriminate against transgender students and that the school district's policy was narrowly tailored to achieve that interest.⁶¹ In addressing the social, psychological, and medical harm that transgender students confront, the court found that school officials had a compelling state interest in protecting them from these harms.⁶² For example, it was noted that when transgender students are mistreated, not only can it lead to negative educational outcomes for them, but can also precipitate self-injurious behavior.⁶³

There was a similar case involving cisgender student claims in the Ninth Circuit.⁶⁴ In this decision, the court found that the right to privacy did not extend to high school students who wished to avoid all risk of intimate exposure to or by a transgender person.⁶⁵ The mere presence of a transgender student in locker rooms and bathroom facilities did not constitute “severe, pervasive, and objectively offensive harassment that could be said to deprive alleged victims of access to educational opportunities or benefits provided by the school under Title IX.”⁶⁶ A federal district court in Oregon also found no right to privacy.⁶⁷

⁵⁸ *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3rd Cir. 2018).

⁵⁹ *Id.*

⁶⁰ *Id.* at 531.

⁶¹ *Id.* at 525.

⁶² *Id.* at 528.

⁶³ *Id.* at 523.

⁶⁴ *Parents for Priv. v. Barr*, 949 F.3d 1210,1217 (9th Cir. 2020).

⁶⁵ *Id.* at 1222-23.

⁶⁶ *Id.* at 1226-27.

⁶⁷ *Parents for Priv. v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1099 (D. Or. 2018).

B. Federal District Court Decision

A federal district court in Illinois denied the cisgender students' motion for a preliminary injunction because they could not demonstrate that they were likely to succeed on the merits of the case under their privacy and Title IX arguments, nor that they suffered any irreparable harm when transgender students used restrooms and locker rooms that aligned with their gender identities.⁶⁸ In their lawsuit, the plaintiff students sought to segregate restroom and locker room use by sex assigned at birth. The court highlighted that the plaintiffs had used restrooms with transgender students for three years without any incident.⁶⁹ In another case, the court dismissed the student's claims that they had a right to bodily privacy in the school district's restrooms and locker rooms. The court reasoned that it was not at liberty to expand the rights currently protected by the Substantive Due Process Clause.⁷⁰ However, it should be noted, that the court did not dismiss the plaintiffs' Title IX claim.

In addition to these lawsuits, there have been other legal challenges initiated by parties that are related to areas such as athletics⁷¹ and harassment.⁷² These topics are beyond the scope of this study. Likewise, there have been other lawsuits involving similar controversies that have been settled that were not included here.⁷³

THE POTENTIAL IMPACT OF THE *BOSTOCK* DECISION

The U.S. Supreme Court examined two arguments in 2020 involving similar but not identical issues focused on Title VII of the Civil Rights Act of 1964. Title VII is a federal law prohibiting employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.⁷⁴ The federal law covers private and public employers that have fifteen or more employees. One unresolved question

⁶⁸ *Students & Parents for Priv. v. United States Dep't of Educ.*, No. 16-CV-4945, 2017 WL 6629520, at *7 (N.D. Ill. Dec. 29, 2017).

⁶⁹ *Id.*

⁷⁰ *Students & Parents for Priv. v. Sch. Directors of Twp. High Sch. Dist.*, 211, 377 F. Supp. 3d 891, 902 (N.D. Ill. 2019).

⁷¹ *B. P. J. v. W. Virginia Bd. of Educ.*, 550 F. Supp. 3d 347, 347 (S.D.W. Va. 2021).

⁷² *C.C. v. Harrison Cnty. Bd. of Educ.*, 859 S.E.2d 762, 768 (W. Va. 2021).

⁷³ Dan Carden, *Settlement Reached in Lawsuit Accusing Valparaiso High School of Discriminating Against Trans Student*, NWI TIMES (May 2, 2022), https://www.nwitimes.com/news/education/settlement-reached-in-lawsuit-accusing-valparaiso-high-school-of-discriminating-against-trans-student/article_5c7c4d1c-11df-5460-8c9c-2311e54a1e72.html.

⁷⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

had been whether Title VII provides protections from discrimination based on sexual orientation or gender identity.⁷⁵ In particular, there had been uncertainty within the federal court system about whether the prohibition of discrimination “because of sex” included protections from discrimination based on sexual orientation and gender identity.⁷⁶

In a 6-3 decision, the Court ruled that an employer who fires someone for being gay or transgender violates Title VII. The Court reasoned that “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”⁷⁷ The Court observed that “[a]n employer who fires an individual merely for being gay or transgender defies the law.”⁷⁸

Although the *Bostock* opinion addresses an employment issue, courts examining Title IX issues often look to Title VII cases for guidance. As a result, when the Fourth Circuit ruled in favor of student defendant (Grimm) in 2020 on his equal protection and Title IX claims, the circuit observed that “[w]e first address the restroom policy. After the Supreme Court’s recent decision in *Bostock* . . . , we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex.’”⁷⁹ The court further observed that although “*Bostock* interprets Title VII of the Civil Rights Act of 1964 . . . , it guides our evaluation of claims under Title IX.”⁸⁰ To be certain, it is well understood that “Congress modeled Title IX after Title VII . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.”⁸¹

Thus, it is a reasonable assumption that Title IX also provides protections for discrimination based on gender identity and sexual orientation. The U.S. Department of Education under the Biden Administration has taken this approach. It is important to note, though, that the U.S. Supreme Court has not yet decided if Title IX covers these areas. Also, in *Bostock*, the Supreme Court wrote:

Under Title VII, . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for

⁷⁵ *Id.*

⁷⁶ *Id.* at 1738.

⁷⁷ *Id.* at 1737.

⁷⁸ *Id.* at 1754.

⁷⁹ Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020).

⁸⁰ *Id.*

⁸¹ *Id.*

being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.”⁸²

As will be discussed, the Eleventh Circuit’s recent *en banc* opinion rejected the plaintiff’s argument that, if Title VII prohibits discrimination based on sexual orientation and gender identity, then Title IX does too. In so doing, the Eleventh Circuit distinguished *Bostock*, an employment case, from a K-12 restroom-related case.

A. *The U.S. Department of Education*

During the Obama administration, guidance was released from the U.S. Department of Education highlighting that students should be permitted to use the restroom that aligns with their gender identity.⁸³ Title IX was specifically interpreted to provide protections for students who experienced discrimination based on their gender identity. The Trump Administration rescinded that guidance in 2017.⁸⁴ In August of 2020, the Office for Civil Rights (OCR) released a “revised letter of impending enforcement action” related to the topic.⁸⁵ The letter suggested that allowing transgender high school athletes in Connecticut to participate in girls’ sports violated the rights of female athletes under Title IX. Interestingly, the letter explicitly stated that this was not to be considered formal OCR policy. The validity of the letter was called into question after the *Bostock v. Clayton County* decision from the U.S. Supreme Court in 2020.⁸⁶ This decision clarified that under Title VII, discrimination because of sex included sexual orientation and gender identity. The Biden Administration withdrew this document and noted that they have reconsidered the matter.

⁸² *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753 (2020).

⁸³ U.S. Dep’t of Justice & U.S. Dep’t of Educ., *Dear Colleague Letter on Transgender Students* (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. (Although this “Dear Colleague Letter” is considered a significant guidance document, a DCL is not legally binding). See also Maria Lewis, Liliana Garces, & Erica Frankenberg, *A Comprehensive and Practical Approach to Policy Guidance: The Office for Civil Rights’ Role in Education During the Obama Administration*, 48 EDUC. RSCH. 51 (2019).

⁸⁴ U.S. Dep’t of Justice & U.S. Dep’t of Educ., *Dear Colleague* (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁸⁵ Kimberly M. Richey, *Revised Letter of Impending Enforcement Action*. OFFICE C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>.

⁸⁶ *Bostock*, 140 S. Ct. at 1731.

On March 26, 2021, the U.S. Department of Justice's Civil Rights Division issued a memo to all federal agencies extending protections to gay and transgender people.⁸⁷ The Civil Rights Division wrote that based on the *Bostock* decision, Title IX also should be read as protecting the status of gay and transgender students. In its memo, the Civil Rights Division stated that: "After considering the text of Title IX, Supreme Court case law, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."⁸⁸

On June 16, 2021, the OCR issued a Notice of Interpretation, which states that the Department of Education interprets Title IX's prohibition on discrimination to include discrimination on the basis of sexual orientation and gender identity and based that interpretation on the Supreme Court's decision in *Bostock*.⁸⁹ The OCR wrote that such interpretation is considered to align with Title IX.⁹⁰ It is necessary to go through the formal rulemaking process if a federal agency desires a more forceful document.⁹¹ The Biden Administration pursued this process because, unlike a Dear Colleague letter, the final interpretation of the rule would receive deference from a court.⁹² The Department of

⁸⁷ U.S. Department of Justice, Civil Rights Division, *Memorandum: Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (March 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>. (Memorandum from Principal Deputy Assistant Attorney General Pamela S. Karlan Civil Rights Division on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 to Federal Agency Civil Right Directors and General Counsels. (Mar. 26, 2021) (on file with U.S. Department of Justice, Civil Rights Division).

⁸⁸ *Id.*

⁸⁹ 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. 117, 32638, 34 CFR Ch. 1 (June 22, 2021), <https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendments-of-1972-with-respect-to-discrimination-based-on>.

⁹⁰ *Id.*

⁹¹ For a full discussion about the formal rulemaking process as it relates to this issue, see generally McQuillan, *supra* note 8.

⁹² On June 16, 2021, the OCR issued a Notice of Interpretation, which states that the Department of Education interprets Title IX's prohibition on discrimination to include discrimination on the basis of sexual orientation and gender identity and based that interpretation on the Supreme Court's decision in *Bostock*. The OCR concluded that such interpretation is considered to align with Title IX. See U.S. Department of Justice, Civil Rights Division, *Memorandum: Application of Bostock v. Clayton County to Title IX of the*

Education held public hearings in 2021 to obtain commentary related to this topic and in June 2022, the Department of Education released its proposed rule.⁹³ The rule specifically includes a prohibition on discriminating against someone based on sexual orientation and gender identity, which is expected to be formally written into the regulation.⁹⁴ The Department of Education may make changes after the public has the opportunity to comment; the rule will not take effect until the regulatory process is complete.⁹⁵ If enacted, the Department of Education's proposed rule will assist LGBTQ+ students who simply want to be included in school and school-related activities.⁹⁶ It is expected that the new rule will be finalized and as such, it would create conflict with those state statutes that prohibit transgender students from using the restroom that aligns with their gender identities, for example. Preempting the final rule, a group of 20 State Attorney Generals sued the Biden Administration because of the guidance, which has been temporarily blocked by a Federal judge in the Eastern Tennessee District Court.⁹⁷

THE ELEVENTH CIRCUIT'S *EN BANC* OPINION

The student plaintiff (Adams) in this case had been enrolled in the school district beginning in fourth grade and began to identify as a boy at the end of eighth grade. Since that time, the student had been diagnosed with gender dysphoria and had undergone a medial transition, which included hormone therapy. The student also changed his driver's license and birth certificate to reflect his gender identity. Students at the school recognized the plaintiff as a boy and there had been no incidents that arose when he was using the boys' restroom; however, two anonymous female students reportedly complained. As noted, a three-judge panel for

Education Amendments of 1972 (March 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

⁹³ U.S. Dep't of Educ., *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972* (June 2022), <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ Meena Venkataramanan, *Judge Temporarily Blocks Biden Administration's LGBTQ Protections at Work, Schools*, WASH. POST (July 7, 2022), <https://www.washingtonpost.com/politics/2022/07/17/biden-transgender-lgbtq-schools-work/>; Kimberly Kruesi, *Republican AGs Sue US Agency over LGBTQ School Guidance*, AP NEWS (July 26, 2022), <https://apnews.com/article/biden-education-lawsuits-discrimination-gender-identity-794c13d7a136614c8daea5add4db76aa>.

the Eleventh Circuit upheld the Federal District Court's decision in favor of the plaintiff in 2020.

In December 2022, in a 7-4 opinion, the Eleventh Circuit found that the school's policy of requiring trans students to use a gender-neutral, single-stall restroom or a restroom that aligns with their sex assigned at birth, did not violate the Equal Protection Clause or Title IX.⁹⁸ The court ruled that the school's policy "advances the important governmental objective of protecting students' privacy in school bathrooms."⁹⁹ The Court observed:

The school board's bathroom policy is clearly related to — indeed, is almost a mirror of — its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex and to shield their bodies from the opposite sex in the bathroom, which, like a locker room or shower facility, is one of the spaces in a school where such bodily exposure is most likely to occur,¹⁰⁰

The majority also wrote that the board's policy did not discriminate based on sex or transgender status because the policy was based on "biological sex."¹⁰¹ The majority distinguished *Bostock*, finding that the case at hand was not an employment matter and that in *Bostock* the Court never analyzed the restroom issue.¹⁰² In fact, the majority contended that the plaintiff's claim presented the opposite: "whether discrimination based on biological sex necessarily entails discrimination based on transgender status."¹⁰³ The majority answered that it does not. According to the Circuit Court, the school's policy divides students into two groups and both of these include transgender students. Likewise, in a concurring opinion, Judge Lagoa found no violation of Title IX because this federal law permits "carve-outs" for restrooms and locker rooms.¹⁰⁴ The Circuit Court explained that whether Title IX should equate to gender identity with sex should, ultimately be left to Congress.

In a long dissent, Judge Jill Pryor wrote that the majority's opinion was both "stigmatizing and humiliating."¹⁰⁵ She further stated that the Circuit Court's majority "labels Adams as unfit for equal protection

⁹⁸ *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 796 (11th Cir. 2022).

⁹⁹ *Id.* at 803.

¹⁰⁰ *Id.* at 805.

¹⁰¹ *Id.* at 799.

¹⁰² *Id.* at 808.

¹⁰³ *Id.*

¹⁰⁴ *Adams*, 57 F.4th at 818.

¹⁰⁵ *Id.* at 832.

based on his transgender status.”¹⁰⁶ Judge Pryor also took issue with the majority opinion’s finding, that a student’s “biological sex” is comprised solely of chromosomal structure and sex that is assigned at birth—despite the evidence that “gender identity is an immutable, biological component” of a person’s sex.¹⁰⁷ Judge Wilson agreed in another dissenting opinion that science rebuts the presumption that “biological sex” is static. He wrote that “[t]his presumption is both medically and scientifically flawed,” and found that the school’s policy does not consider “intersex” individuals, or those whose sex at birth is not as easy to categorize.¹⁰⁸ According to Judge Wilson, “If the school board were truly concerned about male genitalia in the female bathroom, or vice versa, the policy would account for intersex students and would accept updated documentation.”¹⁰⁹

IMPLICATIONS AND CONCLUSIONS

Interestingly, 22 Democrat-leaning states and Washington, D.C., supported the student and 18 Republican-leaning states supported the school board in their legal briefs submitted for this case, which shows how the divided the country is on the topic at the state level. Although the country may be divided by red and blue-led state officials on this topic, the judicial system was *not* generally divided about transgender students’ rights within this context.¹¹⁰ In fact, it was the Eleventh Circuit’s misguided decision and one Federal District Court in Tennessee that created this new division. The Eleventh Circuit’s decision is a harmful setback that does not align with other federal courts’ reasoning on the matter. Lambda Legal, the organization that represented the student plaintiff in this lawsuit, issued the following statement after the Eleventh Circuit’s ruling:

This aberrant ruling contradicts the decisions of every other circuit to consider the question across the country. Transgender students deserve the same dignity and opportunity to thrive in school as all other students, and Lambda Legal’s work will not be done until that is a lived reality for every student.¹¹¹

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 842.

¹⁰⁸ *Id.* at 822.

¹⁰⁹ *Id.* at 824.

¹¹⁰ See Eckes, *supra* note 5, at 110.

¹¹¹ See Khorri Atkinson, *Transgender Bathroom Ruling Retains Uncertainty Over Path Forward*, BL (Jan. 6, 2023), <https://news.bloomberglaw.com/daily-labor-report/transgender-bathroom-ruling-retains-uncertainty-over-path-forward>.

This decision will impact other historically marginalized student groups as well. As argued by Judge Wilson in the dissent, when school restrooms are categorized by ‘biological sex’ they are harming intersex students.¹¹²

Lambda Legal did not discuss whether an appeal will be filed on behalf of the student. If Lambda Legal pursues this route, the current split among the circuit courts could invite Supreme Court review. Supreme Court review at this time is worrisome to several observers.¹¹³ On the one hand, based on the *Bostock* ruling, it is possible that the Supreme Court could also find that Title IX’s prohibition of discrimination on the basis of sex includes discrimination based on sexual orientation and gender identity. On the other hand, however, it is unclear how the Court might examine the restroom issue. The current majority on the Supreme Court has ruled against LGBTQ+ rights in other cases,¹¹⁴ which has raised concerns about an appeal at this time given the current makeup of the Court.¹¹⁵ One would hope that the Court would follow the thirteen earlier decisions that ended in a favorable result for the transgender student. To be certain, a Supreme Court decision on the matter would have ramifications for transgender students across the country and would likely impact other important issues beyond restrooms.

If the decision is not appealed, there is guidance from several different state and federal courts on the matter. For example, schools located in states within the Fourth Circuit would need to allow students to use the restroom that aligned with their gender identity whereas states in the Eleventh Circuit would not. As noted above, apart from the states located in the Eleventh Circuit and in the Middle District Court of Tennessee, courts have sided in favor of more equitable and inclusionary policies for transgender students. Indeed, this decision, which is an outlier, has created more confusion for school officials who are seeking

¹¹² See Maddie Moran, *Adams Decision Splits Circuit on Rights of Trans Students as Dissent Puts Intersex Traits Center Stage*, INTERACT (Jan 6, 2023), <https://interactadvocates.org/adams-decision-splits-circuit-courts-on-rights-of-trans-students/> (discussing the decision’s negative implications for intersex students).

¹¹³ Jared Gans, *Confidence in Supreme Court is at Lowest Level in 50-Year Recorded History*, HILL (June 23, 2022), <https://thehill.com/regulation/court-battles/3534955-confidence-in-supreme-court-is-at-lowest-level-in-50-year-recorded-history-gallup-poll-finds/>.

¹¹⁴ See *Masterpiece Cakeshop, Ltd v. Colo. Civil Rights Comm’n* 138 S Ct. 1720, 1720 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1871, 1871 (2021).

¹¹⁵ Khorri Atkinson, *Transgender Bathroom Ruling Returns Uncertainty Over Path Forward*, BL (Jan. 6. 2023), <https://news.bloomberglaw.com/daily-labor-report/transgender-bathroom-ruling-retains-uncertainty-over-path-forward>.

guidance from courts on this matter. It is also important to note that a growing number of states have non-discrimination laws allowing transgender students to use the restroom of their choice. However, even if a state has not had any litigation or has not adopted non-discrimination laws, this does not prevent a school district from adopting inclusive policies.