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From *Bostock* to *Adams*: Following the Expansion of Rights for Transgender Students in Public School Settings

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I. INTRODUCTION

Since before the turn of the twenty-first century, it is undeniable that classrooms across the country have undergone a multitude of changes. In 2020, schooling continued through a global pandemic—forcing teachers and students alike to improvise, adapt, and overcome challenges both in the classroom and in their own homes. Now that teachers and students are attempting to return to "normal," federal courts across the country have passed down a number of decisions that will impact students' return to the classroom. Specifically, the Supreme Court of the United States' landmark decision in *Bostock v. Clayton County, Georgia*,[1] (*Bostock*) has paved the way for recognition and expansion of civil rights among the LGBTQI+ community.

In light of *Bostock*, the United States Court of Appeals for the Eleventh Circuit decided *Adams by and through Kasper v. School Board of St. Johns County* (*Adams I*).[2] In *Adams I*, a transgender student, Drew Adams, challenged the St. Johns County School District's bathroom policy that forbid him from using the boys' restroom and

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1. 140 S. Ct. 1731 (2020).

2. 968 F.3d 1286 (11th Cir. 2020).

instead Adams was provided the opportunity to use the multi-stall girls' restroom or a single-stall gender-neutral bathroom.[3] The Eleventh Circuit initially ruled in Adams's favor, on August 7, 2020, concluding that the bathroom policy violated Title IX.[4] The initial opinion was later vacated by a subsequent opinion, *Adams II*, issued on July 14, 2021, "[i]n an effort to get broader support among our colleagues[.]"[5]

To further complicate the matter, *Adams II* was vacated on August 23, 2021, so that the matter could be heard by the Eleventh Circuit *en banc*.[6] Consequently, schools are now left with some uncertainty as to how the Eleventh Circuit will ultimately address this issue. This Article will discuss *Bostock*, *Adams*, and their progeny and will provide guidance on broaching these issues and other issues that may arise within a school setting.

II. BOSTOCK

Bostock was consolidated from three different cases where employers allegedly fired employees because they were homosexual or transgender.[7] Each employee then sued their respective employer for sex discrimination under Title VII of the Civil Rights Act of 1964.[8] The Eleventh Circuit previously held that Title VII did not prohibit employers from firing employees for being gay,[9] whereas the United States Court of Appeals for the Second and Sixth Circuits both held that Title VII would bar employers from firing employees because of their sexual orientation or transgender status.[10] In rectifying this split, right out the gate, Justice Gorsuch plainly stated the Supreme Court's interpretation of "sex" under Title VII:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have

3. *Id.* at 1291–92.

4. *Id.* at 1310.

5. Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1304 (11th Cir. 2021) (hereinafter *Adams II*).

6. Adams v. Sch. Bd. of St. Johns Cnty., 9 F.4th 1369, 1372 (11th Cir. 2021) (hereinafter *Adams III*).

7. *Bostock*, 140 S. Ct. at 1734.

8. *Id.*; *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1991).

9. Bostock v. Clayton Cnty. Bd. of Comm'r, 723 F. App'x. 964 (11th Cir. 2018).

10. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

> questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.[11]

In reaching this decision, the Supreme Court was tasked with determining whether members of the LGBTQI+ community were encapsulated by Congress's use of the word "sex" under the Civil Rights Act of 1964.[12] In 1964, "sex" referred to "status as either male or female [as] determined by reproductive biology."[13] But the Court did not just examine the word "sex"; instead, the Court considered the full context of Title VII which forbids discrimination "because of such individual's . . . sex[.]"[14] Title VII's use of "because of" creates a traditional but-for causation standard. This means that as "long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."[15] Discrimination, for the most part, took on the same meaning in 1964 that it does today: an employer who intentionally makes an employment decision because of the employee's sex violates Title VII and practices discrimination.[16] Lastly, the use of the word "individual," as it pertains to discrimination within the statute, "works to protect individuals of both sexes from discrimination, and does so equally."[17]

Consequently, based on the foregoing, Justice Gorsuch provided a straightforward rule:

> An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.[18]

As momentous of an occasion that this opinion was—with the Supreme Court explicitly stating that an individual's homosexuality or transgender status is not relevant to employment decisions—it still left

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11. *Bostock*, 140 S. Ct. at 1737.
12. *Id.* at 1738–39.
13. *Id.* at 1739 (internal quotations omitted).
14. 42 U.S.C. § 2000e-2(a)(1) (1991).
15. *Bostock*, 140 S. Ct. at 1739.
16. *Id.* at 1740.
17. *Id.* at 1741.
18. *Id.*

some room for doubt as to whether the same would apply to students within the LGBTQI+ community under Title IX.[19]

III. ADAMS I

One transgender student in a school district in St. Johns County, Florida, Drew Adams, sought to challenge this issue before the Eleventh Circuit when his school tried to dictate which bathroom he was able to use.[20] Drew Adams, while being born female, knew "'with every fiber of [his] being' that he is a boy."[21] Unfortunately, Adams's school forbid him from using the boys' restroom and, instead, provided the option of using the multi-stall girls' restroom or a single-stall gender-neutral bathroom. Adams found these options to be insulting, isolating, depressing, humiliating, and burdensome. After attempting to negotiate with the St. Johns County School District, Adams, by and through his mother, Erica Adams Kasper, brought suit against the St. Johns County School Board. Adams alleged that his rights under Title IX and the Fourteenth Amendment to the United States Constitution had been violated.[22]

Upon his entrance into high school in the ninth grade, Adams had already transitioned and presented as a boy.[23] In fact, for his first six weeks as a ninth-grader, Adams used the boys' restroom without incident. However, after two unidentified female students complained, the school informed Adams that he could no longer use the boys' restroom—despite the fact that there were no complaints from male students. This decision was based on the school district's "unwritten bathroom policy":

> For "as long as anybody can remember," the School District has maintained a policy that, for restroom use, "boys go to boys' rooms, [and] girls go to girls' rooms." The School District defines "boy" and "girl" based on "biological sex," separating "biological boys" from "biological girls." It administers this policy based on the sex indicated on a student's enrollment documents. Because Mr. Adams enrolled in St. Johns County schools in the fourth grade as "female," the School District's policy considered him a "biological girl" who could not use the boys' restroom, regardless of Mr. Adams's updated legal documents or verified course of medical treatment. Students who fail

19. *Id.*
20. *Adams I*, 968 F.3d at 1291–92.
21. *Adams I*, 968 F.3d at 1291 (alterations in original).
22. *Id.*
23. *Id.* at 1293.

> to abide by the School District's bathroom policy can be disciplined for violating the student code of conduct.[24]

While this particular school district trained its employees to use LGBTQI+ students' preferred names and pronouns and to allow LGBTQI+ students to wear clothing that was in accordance with their gender identity, the bathroom seemed to be a sticking point.[25] The school district felt that offering a single-stall restroom appropriately accommodated Adams. According to the school district, its bathroom policy was "because it feared any student might be able to gain access to any bathroom facility by identifying or pretending to identify as 'gender fluid[,]'" despite that the school district has never encountered or even heard of any students pretending to be another gender to seek access to a bathroom facility.[26]

Conversely, Adams felt "alienated and humiliated" when he was forced to use the gender-neutral bathroom and felt that it was sending a message that he was different, leading to Adams's lawsuit and a bench trial in December 2017.[27] The United States District Court for the Middle District of Florida granted Adams relief on both his Title IX and Equal Protection claims.[28] The Eleventh Circuit reviewed the district court's decision *de novo*.[29]

A. Adams's Fourteenth Amendment Claims

Both Adams and the school district agreed that the school's bathroom policy required a heightened standard of review as "[a] gender classification fails unless it is substantially related to a sufficiently important governmental interest."[30] While the school district argued that its policy broadly discriminates on the basis of sex (biological females using the girls' restroom and biological males using the boys' restroom), Adams characterized his argument as discrimination specifically against him because he was transgender and defied gender norms. By forcing him to choose between an isolated single-stall restroom and a restroom that does not match his gender identity, he argued that the school was effectively excluding him from all communal

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24. *Id.* at 1293–94 (alterations in original).

25. *Id.* at 1294.

26. *Id.* at 1294–95.

27. *Id.* at 1295.

28. *Id.*

29. *Id.*

30. *Id.* at 1295–96 (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985)).

restrooms.[31] The Eleventh Circuit agreed with Adams, concluding that the school district's policy "places a special burden on transgender students because their gender identity does not match their sex assigned at birth."[32]

However, the inquiry did not end there. The Eleventh Circuit next had to decide whether there was a sufficient important governmental interest behind the school district's bathroom policy.[33] While the court recognized that the school district intended to protect the bodily privacy of young students, it also held that the school district "demonstrated no substantial relationship between excluding Mr. Adams from the communal boys' restrooms and protecting student privacy."[34] In support of this finding, the Eleventh Circuit noted that the school district's policy was administered arbitrarily;[35] the school board's concerns about Adams's use of the boys' bathroom were "hypothesized";[36] and the bathroom policy "subjects Mr. Adams to unfavorable treatment simply because he defies gender stereotypes as a transgender person."[37] Based

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31. *Adams I*, 968 F.3d at 1296.

32. *Id.* (citing first Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011); and quoting *Bostock*, 140 S. Ct. at 1741).

33. *Id.* at 1297.

34. *Id.*

35. In order to be sufficient under the Fourteenth Amendment, a governmental gender classification must be "reasonable, not arbitrary." Reed v. Reed, 404 U.S. 71, 76 (1971). In *Adams I*, the school district's bathroom policy violated the Fourteenth Amendment because it did not treat all transgender students alike. *Adams I*, 968 F.3d at 1298. By conditioning gender on the documents presented at the time of a student's enrollment and ignoring any updated forms of identification such as a birth certificate or a driver's license submitted after enrollment, the school district ignored any student who began his, her, or their transition after enrollment. *Id.* at 1298.

36. "While a rational basis standard of review 'permits a court to hypothesize interests that might support [governmental gender] distinctions . . . heightened scrutiny limits the realm of justification to demonstrable reality.'" *Adams I*, 968 F.3d at 1299 (quoting Tuan Anh Nguyen v. INS, 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting)) (alterations in original). In *Adams I*, the school district did not present any evidence that Adams's presence in the boys' restroom would "jeopardize the privacy of his peers." *Id.*; *see Brumby*, 663 F.3d at 1321 (holding that there was not sufficient evidence that the employee's firing was "actually motivated" by restroom-related concerns). The Eleventh Circuit also shot down the school district's argument based on the "different physiological characteristics between the two sexes" because Adams's anatomical differences from his other male peers were irrelevant to his use of the boys' restroom. *Adams I*, 968 F.3d at 1300. Moreover, this argument wholly ignores the ways in which Adams physically changed the manifestation of his gender. *Id.* at 1301.

37. *Adams I*, 968 F.3d at 1298. "To survive heightened scrutiny, a sex classification 'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'" *Id.* at 1301–02 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)). Here, the school district's bathroom policy labels Adams as a "girl"

on the foregoing, Adams was entitled to relief under the Fourteenth Amendment.[38]

B. Adams's Title IX Claims

Adams also argued that the school district's bathroom policy unfairly discriminated against him on the basis of sex under Title IX.[39] Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance."[40] The Eleventh Circuit deferred to the Supreme Court's ruling in *Bostock*, reasoning that both Title VII and Title IX employ a "but-for causation standard," and also pointed to prior cases wherein the Supreme Court utilized Title VII decisions to illuminate rulings under Title IX.[41]

The school district argued that Title IX was only intended to address discrimination against biological women and that the Title VII jurisprudence should be ignored because "schools are a wildly different environment than the workplace[.]"[42] Conversely, Adams argued that the school district's bathroom policy excluded him from the boys' restroom because he is transgender.[43] The Eleventh Circuit agreed with Adams:

> The Board's treatment of Mr. Adams is like that deemed discriminatory in *Bostock*. If Mr. Adams were a non-transgender boy, the School Board would permit him to use the boys' restroom. The School Board allowed all non-transgender boys to use the boys' restroom. It allowed all non-transgender students with male driver's licenses and birth certificates to use the boys' restroom. But because Mr. Adams is a transgender boy, the School Board singled him out for different treatment. By the very terms of the bathroom policy, the Board refused to allow Adams, "a transgender student[,] access to the restroom corresponding to [his] consistently asserted transgender identity."[44]

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solely based on the gender that was assigned to him at birth; as such, wrongly stereotypes that every person born female would act and identify as a girl. *Id.* at 1302.

38. *Id.* at 1304.

39. *Id.* at 1291.

40. 20 U.S.C. § 1681(a) (1976).

41. *Adams I*, 968 F.3d at 1305 (citing Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting)).

42. *Id.*

43. *Id.*

44. *Id.* at 1306 (alterations in original).

The Eleventh Circuit further concluded that Adams suffered harm from this differential treatment, including distress, anxiety, depression, and alienation.[45] Thus, the Eleventh Circuit joined the Sixth and Seventh Circuits in holding that transgender students are entitled to access restrooms for their identified gender rather than their biological gender at birth.[46]

C. Chief Judge William Pryor's Dissent

To have a full grasp of the arguments embedded within *Adams*, especially considering that the entirety of the Eleventh Circuit will soon be revisiting this case *en banc*, it is important to note the arguments raised in dissent by Chief Judge William Pryor.[47] Regarding Adams's Fourteenth Amendment arguments, the dissent believed that the school district's bathroom policy would not violate the Equal Protection Clause because it survives intermediate scrutiny—meaning that even though the bathroom policy differentiates on the basis of sex, it serves an "important governmental objective" by "protecting the interests of children in using the bathroom away from the opposite sex and in shielding their bodies from exposure to the opposite sex."[48]

The dissent also seemed to take issue with the district court's finding that gender identity, as opposed to biology, determines a person's sex.[49] The dissent argued that out of the 40,000 children attending school within the school district, there were only sixteen students who were transgender, meaning that if the school district would have assigned these sixteen students to the bathroom that aligned with their gender identity, "the policy would still be 99.96 percent accurate in separating bathrooms by sex" which the dissent called a "near-perfect result[.]"[50] Despite there being no evidence in the record that there were safety or privacy concerns about Adams using the boys' restroom, the dissent still implored that separating bathrooms by sex eliminates the risk of bodily exposure.[51]

Said more plainly, the dissent fundamentally disagreed with the majority's conclusion:

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45. *Id.* at 1295, 1307.

46. *Id.* at 1307–08 (citing first Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017); and citing Dodds v. U.S. Dept. of Educ., 845 F.3d 217, 221 (6th Cir. 2016)).

47. *Adams I*, 968 F.3d at 1311 (Pryor, J., dissenting).

48. *Id.* at 1311–12 (Pryor, J., dissenting).

49. *Id.* at 1313 (Pryor, J., dissenting).

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

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

> The majority opinion elides this entire analysis by misunderstanding both the classification and privacy interests at issue. It contends that the policy triggers heightened scrutiny not because it separates bathrooms by sex but because it purportedly imposes "differential treatment" on transgender students. In doing so, the majority misstates the school policy, conflates sex-based classifications with transgender-based classifications, and contravenes Supreme Court precedent. Compounding its errors, the majority then ignores fundamental understandings of why bathrooms are separated on the basis of sex by rejecting long-standing privacy rationales for sex-separated bathrooms. This conclusion leads it to fault the objective underlying the school policy as both hypothetical and based on impermissible stereotypes. After misconstruing both the classification and the privacy interests at issue—the only two ingredients of intermediate scrutiny—the majority opinion then concludes that the schools' classification does not substantially advance a valid objective.[52]

With respect to the gender classification itself, the dissent did not view transgender students as a separate group, but instead lumped all students into two classifications: students who can use the boys' bathroom and students who can use the girls' bathroom.[53] Thus, the dissent argued that the bathroom policy only had a disparate impact on transgender students, "which is not enough to create a sex-based classification."[54] With respect to the privacy interests at play, the dissent believed that the majority focused too closely on bodily exposure and instead should have considered the students' "distinct privacy interest in using the bathroom away from the opposite sex."[55] Ultimately, the dissent believed the bathroom policy was not unconstitutional because of the school district's longstanding interests in fostering privacy within its bathrooms.[56]

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52. *Id.* at 1314–15 (Pryor, J., dissenting).

53. *Id.* at 1315 (Pryor, J., dissenting).

54. *Id.* (Pryor, J., dissenting) ("Facially neutral policies trigger immediate scrutiny only if 'invidious gender-based discrimination' motivated them."). According to the dissent, because the bathroom policy was written to protect privacy interests, Adams would not have been able to show that the policy had a discriminatory purpose. *Id.* at 1315–16 (Pryor, J., dissenting).

55. *Id.* at 1317 (Pryor, J., dissenting). It is important to note that in support of these arguments, the dissent cited a number of cases from the Supreme Court wherein sex and gender were discussed. However, these cases predate society's recent and continued learning and growth regarding transgendered people. *See, e.g., Tuan Anh Nguyen*, 533 U.S. at 73; *Virginia*, 518 U.S. at 532–33; Gedulig v. Aiello, 417 U.S. 484, 495–96 (1974); Frontiero v. Richardson, 411 U.S. 677, 685–86 (1973).

56. *Adams I*, 968 F.3d at 1319 (Pryor, J., dissenting).

The dissent also disagreed with the majority's conclusion that the school district's bathroom policy violated Adams's rights under Title IX.[57] This disagreement boiled down to one question: "what does 'sex' mean in Title IX?"[58] The dissent argued that the bathroom policy would not violate Title IX if it fell within the safe harbor rule for separate toilet facilities on the basis of sex found in the Code of Federal Regulations section 106.33.[59] Because the Supreme Court failed to decide whether Title VII allowed for sex-separated bathrooms in *Bostock*, the dissent did not feel there was enough of a basis for *Bostock*'s logic to be extended to Title IX.[60]

> [T]he majority erroneously concludes that the safe harbor for bathrooms does not apply because Title IX and its regulations do not "declare" whether "sex" as applied to Adams is the "sex identified at birth"—female—or the sex listed on Adams's amended birth certificate and driver's license—male. But the ordinary meaning of "sex" in the safe-harbor provision does not change when a plaintiff is transgender. And as explained above, the ordinary meaning of "sex" when Congress enacted Title IX turned on reproductive function. That Congress did not define "sex" does not change this conclusion. And under the unambiguous meaning of "sex" in the safe-harbor provision, the Board did not violate Title IX when it prohibited Adams from using the boys' bathroom.[61]

The dissent also pointed out that Title IX was enacted under Congress's Spending Clause power, meaning that any condition to be imposed on the grant of federal money by Congress must be unambiguous.[62] Consequently, the dissent believed that liability could only be imposed if the district court concluded that the meaning of "sex" in Title IX unambiguously did not turn on reproductive function and, instead, be based on gender identity.[63]

The dissent's arguments, especially with respect to the majority's opinion on Adams's Title IX claims, become even more important in light of the next procedural step taken in the case. The August 7, 2020

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

58. *Id.* at 1320 (Pryor, J., dissenting).

59. *Id.*; 34 C.F.R. § 106.33 (2020) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

60. *Adams I*, 968 F.3d at 1320 (Pryor, J., dissenting).

61. *Id.* at 1321 (Pryor, J., dissenting) (interal citations omitted).

62. *Id.* at 1321–22 (Pryor, J., dissenting).

63. *Id.* at 1322 (Pryor, J., dissenting).

opinion was later vacated, and an updated opinion was issued on July 14, 2021.

IV. ADAMS II

As stated previously, on July 14, 2021, the Eleventh Circuit vacated its prior opinion and issued an updated opinion "[i]n an effort to get broader support among [its] colleagues."[64] This was possible because "[o]n the day the original panel decision was issued in this appeal, an active member of this Court withheld issuance of the mandate."[65] In its updated opinion, the Eleventh Circuit no longer reached the question of whether Adams's claims succeeded under Title IX.[66] Moreover, the Eleventh Circuit only reached one conclusion regarding Adams's Equal Protection claims as opposed to the three Equal Protection rulings made in the prior opinion.[67]

In examining the updated opinion, the relevant facts and legal standard were unchanged. However, when the majority opinion broached into the analysis, it succinctly surmised that it must determine whether the school district's bathroom policy satisfied intermediate scrutiny in assigning students to bathrooms based solely on the documents received at the time of the student's enrollment.[68] The majority provided that the bathroom policy failed intermediate scrutiny on two accounts: (1) the policy relied on information provided in a student's enrollment documents, which could limit some transgender students but not others; and (2) the policy necessarily rejected the notion that a transgender student could receive updated government identification documents.[69] The majority pointed again to a scenario wherein a transgender student began to transition after enrolling in the school district. At that point, the school district's insistence on utilization of the documents provided upon the student's enrollment was arbitrary as it failed to treat all transgender students alike.[70] Thus,

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

65. *Id.* at 1303.

66. *Id.* at 1304.

67. *Id.*

68. *Id.* at 1308.

69. *Id.*

70. *Id.* at 1309–10.

> The School District gives no explanation for why a birth certificate provided at the time of enrollment takes priority over the same document provided at the time the bathroom policy is applied to the student. And we have come up with no explanation of our own. Mr. Adams has a birth certificate and a driver's license issued by the state of Florida stating that he is male. But the School District refuses to accept for the purposes of the bathroom policy Mr. Adams's

because of said arbitrariness, the majority concluded that the bathroom policy ran afoul to the Equal Protection Clause.[71]

The remainder of the majority opinion focused on responding to many of the arguments that were raised in Chief Judge Pryor's initial dissent, ensuring to frame the majority opinion as being applied to Adams's case and not as "floodgates for vast societal change[.]"[72] In fact, the majority opinion begins by taking aim at the redrafted dissent:

> The dissent also spills much ink over the former (now vacated) panel opinion. The majority of the pages in the dissent are directed at an opinion no longer in existence. Indeed much of the dissent continues to shadowbox with an opinion we never wrote. We view the dissent's recycling of outdated arguments as an apt metaphor for its analytical approach.[73]

Substantively, the majority opinion took time to address each of the three issues raised by the redrafted dissent: (1) that the opinion will have far-reaching consequences; (2) that the challenged policy "does not exist"; and (3) that the challenged policy is not arbitrary because it is largely "accurate."[74]

First, the majority opinion again clarified that the case was not an overt challenge to sex-segregated bathrooms because even Adams agreed that boys should use the boys' restroom and that girls should use the girls' restroom.[75] Said bluntly, Adams identified as a boy, and no one was suggesting that there be integration in the restrooms between sexes. Moreover, the majority opinion affirmed that this case was not intended to make sweeping conclusions about other notions of student privacy, including access to locker rooms for physical education classes.[76] Second, the majority opinion dispeled the dissent's newfound argument that no policy existed with respect to the utilization of the gender stated on documentation provided during enrollment, and even went as far as providing support that the policy existed from the first dissent that was drafted.[77]

> sex listed on those current government-issued documents. This kind of irrationality does not satisfy intermediate review.

Id. at 1310.

71. *Id.* at 1311.

72. *Id.*

73. *Id.*

74. *Id.* at 1312.

75. *Id.*

76. *Id.*

77. *Id.* at 1314. "The dissent ignores the record in an apparent attempt to save the School District from itself. . . . It is not right for the dissent to now make arguments the

Lastly, the majority opinion addressed the dissent's argument that the bathroom policy would be 99.96% accurate.[78] "The dissent suggests the constitutionality of a policy turns on the soundness of the statistical correlation supporting it, when the Supreme Court in *Craig*, following a long line of precedent, rejected that precise premise."[79] While these statistics may have had "surface appeal" it was "'unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique.'"[80] Disposing of this red herring, the majority opinion showed that the true statistic to be examined was whether there were any actual reported invasions of privacy in restrooms by transgender students—and there were not.[81] Thus, there was no corresponding correlation and, again, the bathroom policy was arbitrary solely as applied to Adams's case.[82] Consequently, the Eleventh Circuit held that Adams prevailed on his Equal Protection claim and was entitled to the relief awarded to him by the district court.[83]

V. BEGINNINGS OF *ADAMS III*

The updated *Adams* opinion was in effect for all of forty days before it was vacated by the Eleventh Circuit on August 23, 2021—a year and some change after *Adams I* was decided—and issued the following opinion:

> A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this case should be reheard *en banc*, and a majority of the judges of this Court in active service who are not disqualified having voted in favor of granting rehearing *en banc*, IT IS ORDERED that this case will be reheard *en banc*. The panel's opinion is VACATED.[84]

Therefore, for the time being, there is no resolution to the pending dispute between Adams and the school district. As of the time this Article was drafted, the school district's brief was due on or before

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School Board never made for itself by claiming the issues being decided today were not properly teed up. They were." *Id.* at 1315–17.

78. *Id.* at 1319.

79. *Id.* at 1317–18 (citing Craig v. Boren, 429 U.S. 190 (1976)).

80. *Id.* at 1318–19 (quoting *Craig*, 429 U.S. at 204).

81. *Id.* at 1319.

82. *Id.*

83. *Id.* at 1320.

84. *Adams III*, 9 F.4th at 1372.

October 26, 2021.[85] Adams's responsive brief is due on or before November 26, 2021, and the school district's reply brief is due on or before December 17, 2021.[86] Specifically, the Eleventh Circuit asked that the briefs address the following questions: (1) Does the School District's policy of assigning bathrooms based on sex violate the Equal Protection Clause of the Constitution; and (2) does the School District's policy of assigning bathrooms based on sex violate Title IX of the Education Amendments Act of 1972?[87] Oral argument is to be conducted the week of February 21, 2022.[88]

While we cannot predict how the Eleventh Circuit will rule, we know how at least two judges—Judge Jill Pryor and Chief Judge William Pryor—would rule on these issues. Judge Beverly Martin, who drafted both *Adams I* and *Adams II*, retired from the Eleventh Circuit on September 30, 2021.[89] Thus, President Biden has a vacancy to fill, and it is unknown as to whether that vacancy could be filled before oral argument would be conducted in February of 2022. As to the remaining active judgeship, six judges—Judge Newsom, Judge Branch, Judge Grant, Judge Luck, Judge Lagoa, and Judge Brasher—were all appointed by President Trump. Judge Wilson was appointed by President Clinton. Judge Jordan and Judge Rosenbaum were appointed by President Obama. While a judge's appointing party does not always correlate to decision-making, it is clear that LGBTQI+ rights have been hotly debated across political party lines. Thus, it may be until at least May of 2022 before a new opinion is issued. All the while, this debate continues to churn in other judicial circuits and will inevitably end up before the Supreme Court.

VI. LOOKING OUTSIDE THE ELEVENTH CIRCUIT

Before turning to what other decisions may be percolating throughout the country, it is first important to note that the Supreme Court recently turned down an opportunity to weigh-in on school district bathroom policies that exclude transgender students. In *Grimm*

85. Memorandum to Couns. or Parties, Adams v. Sch. Bd. of St. Johns Co., App. No. 18-13592-U, Docket No. 3:17-CV-00739-TJC-JBT (11th Cir. Sept. 16, 2021).

86. *Id.*

87. *Id.*

88. *Id.*

89. Bill Rankin, *Judge to Leave Atlanta Appeals Court, Giving President Biden a Vacancy to Fill*, AJC (May 18, 2021), https://www.ajc.com/news/atlanta-news /judge-to-leave-atlanta- appeals-court-giving-president-biden-a-vacancy-to-fill/KO4YIGOP BBHH7FAR4JUVEMF4RM/.

v. Gloucester County School Board,[90] the United States Court of Appeals for the Fourth Circuit held that the school district's bathroom policy was a sex-based classification subject to intermediate scrutiny and was not substantially related to an important governmental interest in protecting students' privacy.[91]

Unlike *Adams*, wherein the school district insisted on utilization of the documents provided upon the student's enrollment, in *Grimm*, the school district refused to honor an Order from the Gloucester County Circuit Court that changed Grimm's gender to male and provided him with an amended birth certificate.[92] As such, the Fourth Circuit not only held that the bathroom policy violated Grimm's Equal Protection rights, but also the refusal to amend Grimm's school records to reflect his legal gender violated his Equal Protection rights.[93] Moreover, along these same lines, the Fourth Circuit held that the bathroom policy and the failure to amend school records also amounted to discrimination under Title IX.[94]

The school district attempted to have this opinion vacated and reheard by the entirety of the Fourth Circuit *en banc*; however, this request was denied on September 22, 2020.[95] Undeterred, the school district then sought to appeal the decision to the Supreme Court. On June 28, 2021, the Supreme Court issued the following opinion: "Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. Justice Thomas and Justice Alito would grant the petition for writ of certiorari."[96]

Of course, as is typical, the short opinion denying certiorari did not provide any reasoning as to why the case was not being taken up by the Supreme Court.[97] One could surmise that Justice Thomas and Justice Alito sought to grant the writ of certiorari because they would ultimately disagree with the Fourth Circuit's reasoning. The same could not be said for certain about Chief Justice Roberts or newly appointed Justices Gorsuch, Kavanaugh, and Barrett. Perhaps the Supreme Court

90. 972 F.3d 586 (4th Cir. 2020).
91. *Id.* at 608–09.
92. *Id.* at 615.
93. *Id.*
94. *Id.* at 616–17.
95. Grimm v. Gloucester Cnty. Sch. Bd., 976 F.3d 399, 400 (4th Cir. 2020).
96. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021).
97. *Id.*

is waiting for more opinions to be drafted in other circuits before weighing in; however, it is clear that this issue will not sit idle long.[98]

In addition to the guidance being passed down by the courts, the Biden Administration has also provided updated guidance (and rescinded some of the prior Administration's guidance) regarding rights of LGBTQI+ students under Title IX. On June 23, 2021, the United States Department of Education Office of Civil Rights (OCR) issued a "Dear Educator Letter" that sought to bring attention to the Supreme Court's recent decision in *Bostock v. Clayton County*.[99] OCR "clarifies that the Supreme Court's decision in *Bostock* applies to the Department interpretation of Title IX."[100] Accordingly, OCR "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department."[101] Thus, from OCR's perspective, it is clear that schools receiving federal funding should be acting in accordance with the decision in *Grimm* and what would have been the decision in *Adams*.

VII. ATHLETICS

The other hot-topic issue when examining the rights of transgender students within schools is athletics. There are currently multiple lawsuits pending in district courts across the country seeking to either allow transgender students to participate in athletics that correspond with their gender identity or, conversely, to categorically exclude transgender students from athletics that correspond with their gender identity.

In Connecticut, multiple cisgender girls sued their school district seeking a preliminary injunction to prevent transgender girls from

98. *See, e.g.,* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (holding that, as a matter of first impression, transgender students may bring sex-discrimination claims under Title IX based on a theory of sex-stereotyping); Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3rd Cir. 2018) (affirming the denial of cisgender high school students' request for a preliminary injunction to oppose the school district's policy of allowing transgender students to access bathrooms and locker rooms in accordance with their gender identity); Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020) (affirming the grant of defendants' motion to dismiss for failure to state a claim where complaint alleged that a school district' policy of allowing transgender students to use restrooms and locker rooms that matched their gender identity violated the other high school students' rights).

99. Suzanne B. Goldberg, *Letter to Educators on Title IX's 49th Anniversary*, U.S. DEPT. OF EDUC. OFFICE OF CIVIL RIGHTS (Jun. 23, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.

100. Goldberg, *supra* note 99.

101. *Id.* at 2.

competing in sporting events scheduled to take place during the 2020 track season.[102] Prior to filing suit, the plaintiffs filed a complaint with the OCR; however, the OCR took no action. In their complaint, the plaintiffs alleged that allowing transgender girls to participate in high school athletics discriminated against cisgender girls and would prevent plaintiffs from receiving honors, opportunities to compete at higher levels, public recognition for college recruiting, and scholarship opportunities in violation of Title IX.[103] Ultimately, the plaintiffs' request to enjoin enforcement of the policy that would allow transgender girls to equally participate in athletics was rendered moot due to the cancellation of the track season as a result of the COVID-19 pandemic and the graduation of the two transgender girls who were implicated in the plaintiffs' complaint.[104] However, the court did note that "[i]f it turns out that a transgender student does register to compete in girls' track next season, [the plaintiffs] will be able to file a new action under Title IX along with a motion for a preliminary injunction."[105]

In Idaho, a group of plaintiffs sought to challenge the constitutionality of Idaho's Fairness in Women's Sports Act.[106] This Act excludes transgender women from participating on women's sports teams.[107] The United States District Court for the District of Idaho tees up the dispute beautifully:

> The primary question before the Court—whether the Court should enjoin the State of Idaho from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports—involves complex issues relating to the rights of student

102. Soule by Stanescu v. Connecticut Association of Schools, Inc., No. 3:20-CV-00201 (RNC), 2021 U.S. Dist. LEXIS 78919, at *4 (D. Conn. Apr. 25, 2021).

103. *Id.* at *4–5.

104. *Id.* at *19–20.

105. *Id.* at *19. The plaintiffs also requested that the United States District Court for the District of Connecticut change the transgender girls' records to eliminate them from the order of finish and move everyone else up one position. *Id.* at *20. It ultimately held that changing the records would likely not make a substantive difference in the plaintiffs' employment prospects and, as such, the plaintiffs did not have standing to make any such request of the court. *Id.* at *20–21.

106. IDAHO CODE §§ 33-6201–6206 (2020). This law also establishes a "dispute" process that allows a currently undefined class of individuals to challenge a student's sex, forcing the student to undergo a potentially invasive sex verification process, and provides for a cause of action against a school for any student who is deprived an opportunity as a result of a transgender woman on a women's team. IDAHO CODE §§ 33-6203(3), 33-6205(2) (2020).

107. Hecox v. Little, 479 F. Supp.3d 930, 943 (D. Idaho 2020).

> athletes, physiological differences between the sexes, an individual's ability to challenge the gender of other student athletes, female athlete's rights to medical privacy and to be free from potentially invasive sex identification procedures, and the rights of all students to have complete access to educational opportunities, programs, and activities available at school. The debate regarding transgender females' access to competing on women's sports teams has received nationwide attention and is currently being litigated in both traditional courts and the court of public opinion. Despite the national focus on the issue, Idaho is the first and only state to categorically bar the participation of transgender women in women's student athletics. This categorical bar to girls and women who are transgender stands in stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally—including the National Collegiate Athletic Association ("NCAA") and the International Olympic Committee ("IOC")—which allow transgender women to participate on female sports teams once certain specific criteria are met.[108]

The district court engaged in a substantive discussion as to whether or not Idaho's law would be considered unconstitutional when analyzing the plaintiffs' likelihood to have success on the merits for their request for a preliminary injunction.[109] The State of Idaho argued that the law did not discriminate against transgender individuals because it does not expressly use the term "transgender"; however, the court disagreed.[110] It found that the Act "on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity."[111] Thus, similar to *Adams*, the court must determine whether an important governmental interest justifies the difference in treatment.

The Idaho law was replete with legislative findings and purposes to attempt to get ahead of this argument—the State of Idaho argued that the law promoted sex equality and provided opportunities for female athletes and that the law ensured access to athletic scholarships.[112] The district court, however, disagreed, and found that these legislative findings, in actuality, "reinforce[d] the idea that the law is directed at excluding women and girls who are transgender, rather than on

108. *Id.* at 943–44.
109. *Id.* at 975–76.
110. *Id.* at 975.
111. *Id.*
112. *Id.* at 978.

promoting sex equality and opportunities for women."[113] It was also not lost on the court that the same day this bill was signed into law, another bill was signed that banned transgender individuals from changing the gender on their birth certificates to match their gender identity.[114] Thus, because the law itself was not substantially related to the important governmental interest cited by the State, the plaintiffs were likely to succeed on the merits.[115] In sum,

> The Court recognizes that this decision is likely to be controversial. While the citizens of Idaho are likely to either vehemently oppose, or fervently support, the Act, the Constitution must always prevail. It is the Court's role—as part of the third branch of government—to interpret the law. At this juncture, that means looking at the Act, as enacted by the Idaho Legislature, and determining if it may violate the Constitution. In making this determination, it is not just the constitutional rights of transgender girls and women athletes at issue but, as explained above, the constitutional rights of every girl and woman athlete in Idaho. Because the Court finds Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written, it must issue a preliminary injunction at this time pending trial on the merits.[116]

Of course, the State of Idaho appealed this decision to the United States Court of Appeals for the Ninth Circuit.[117] Then, the Ninth Circuit remanded the case back to the district court to determine whether one of the plaintiff's claims are moot given the plaintiff's changed enrollment status at her university.[118]

Last, but certainly not least, in West Virginia, a transgender female student sued the West Virginia State Board of Education, among others, after the West Virginia State Legislature passed what is referred to as the "Save Women's Sports Bill."[119] This law requires that:

> Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education . . . shall be expressly designated as

113. *Id.* at 983.

114. *Id.* at 984.

115. *Id.* at 984–85.

116. *Id.* at 988.

117. Order, Hecox v. Little, No. 20-35813, 2021 U.S. LEXIS 18903 (9th Cir. Jun. 24, 2021).

118. *Id.* at *6.

119. B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-CV-00316, 2021 LEXIS 135943, at *6–7 (S.D. W. Va. Jul. 21, 2021).

> one of the following based on biological sex: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed.[120]

Unlike the prior cases, the Fourth Circuit already issued an opinion on point, the *Grimm* case discussed previously.[121]

As such, the United States District Court for the Southern District of West Virginia made quick work of determining that the law was subject to intermediate scrutiny and required an important governmental objective.[122] While the State of West Virginia contended that the law provides equal athletic opportunities for female athletes, the court disagreed and cited to many of the supporting factors provided by the district court from Idaho in *Hecox*.[123] Thus, the district court similarly held that the law was not substantially related to protecting girls' opportunities in athletics or their physical safety in athletics and, consequently, that B.P.J. was likely to succeed on the merits of her equal protection claim and her Title IX claim.[124] As a result, B.P.J.'s Motion for Preliminary Injunction was granted while the case continues to play out.[125]

VIII. CONCLUSION

From bathrooms to locker rooms to athletics, there are a number of issues to be resolved when examining the rights of transgender students in today's schools. The litigation in many of the cases referenced in this Article continues to trend toward requiring an ultimate decision by the Supreme Court. All the while, the Biden Administration has made it very clear that it will continue to hold school districts to the ruling passed down in *Bostock* as applied to Title IX.

120. *Id.* at *7–8 (alterations in original) (quoting W. VA. CODE § 18-2-25d(c)(1) (2021)).
121. *Grimm*, 972 F.3d at 586.
122. *B.P.J.*, 2021 LEXIS 135943, at *11–12.
123. *Id.* at *15.
124. *Id.* at *16–17.
125. *Id.* at *20.