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"Exceedingly Unpersuasive" - Discrimination, Transgender Students, And School Bathrooms

Mark Dorosin

Florida A&M University University College of Law

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“EXCEEDINGLY UNPERSUASIVE”— DISCRIMINATION, TRANSGENDER STUDENTS, AND SCHOOL BATHROOMS

MARK DOROSIN*

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* Associate Professor of Law and Director of Legal Clinics and Field Placement, Florida A&M University College of Law. Special thanks to Professors Jeff Brown and Barbara Fedders for their advice and input early on, and to Bronwyn Merritt for her constant encouragement and limitless patience.

INTRODUCTION

In 2015, the St. Johns County School District adopted a policy which prohibited transgender students from using the restroom matching their gender identity and required that they use either single stall restrooms or the multi-stall restroom corresponding to their gender listed on their birth certificate (their “biological” sex).¹ Similar policies targeting transgender students had been implemented by school districts across the country; and like many of them, St. Johns’ policy was quickly challenged by a transgender student who asserted that the policy violated his civil rights. In late December 2022, a divided Eleventh Circuit Court of Appeals, sitting *en banc*, issued its opinion in *Adams ex rel. Kasper v. School Board of St. Johns County*.² Over the ringing dissents of four judges, the majority reversed both the district and appellate courts, which had ruled in favor of the student. Recasting the civil rights claims as an attempt to eliminate sex separated restrooms entirely, the *en banc* majority held that the school district’s restroom policy did not violate the Equal Protection Clause of the Fourteenth Amendment or Title IX of the Civil Rights Act.³

Two years earlier, in *Grimm v. Gloucester County School Board*,⁴ the Fourth Circuit Court of Appeals reached the exact opposite conclusion regarding a similar policy of the Gloucester County School Board that required students to only use restrooms matching their “biological gender.” That policy, a divided panel of the court concluded, constituted sex discrimination and violated both the Equal Protection Clause and Title IX.⁵ The school board’s motion for rehearing *en banc* was denied,⁶ and in June 2021, the Supreme Court similarly rejected its petition for certiorari (with Justices Thomas and Alito dissenting).⁷

The two cases have extraordinarily similar fact patterns and worked their way through the courts at the same time. In fact, each opinion cites varying opinions of the other to support its decision (*Adams* drew heavily from the dissenting opinion in *Grimm*; its majority and concurring opinions cite to the district court and Eleventh Circuit panel holdings in the Florida case). One critical distinction is how each court considered the scope and application of the Supreme Court’s groundbreaking decision in *Bostock v. Clayton County*. In that groundbreaking case, the Court held that discrimination against a transgender person is discrimination “based on

1. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 798 (11th Cir. 2022).

2. *Id.* at 817.

3. *Id.*

4. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 587, 620 (4th Cir. 2020), *amended*, (Aug. 28, 2020).

5. *Id.* at 599, 613, 616, 619.

6. *Grimm*, 972 F.3d at 586, *reh’g denied*, 976 F.3d 399, 400 (4th Cir. 2020).

7. *Grimm*, 972 F.3d at 586, *cert. denied*, 141 S. Ct. 2878 (2021).

sex,” which therefore violates Title VII of the Civil Rights Act of 1964.⁸ Relying on *Bostock*, the Fourth Circuit specifically noted that interpretations of Title VII are regularly used to evaluate claims under Title IX, which was modeled on the earlier statute.⁹ The Eleventh Circuit ignored this well-established practice and held just the opposite, insisting that *Bostock* was limited to the employment context only.¹⁰ That court also stressed that the *Bostock* holding expressly stated it was *not* addressing “bathroom, locker rooms, or anything else of the kind,”¹¹ but only whether it was illegal discrimination to fire someone for being transgender.¹² The *Adams* majority then further distinguished *Bostock* by curiously inverting its central question, asking “whether discrimination based on biological sex necessarily entails discrimination based on transgender status,” concluding it does not.¹³

The significance of these contradictory outcomes goes beyond their competing interpretations of *Bostock*, however. The sixteen separate opinions issued in the litigation of these two cases lay out the most comprehensive arguments for and against recognizing the civil rights of transgender individuals.¹⁴ The former cast the issue in terms of segregation, exclusion, and prejudice; the latter on the immutability of biological sex, fears of sexual predators, and the potential elimination of all sex-designated spaces in our country.¹⁵

Despite the Court’s denial of certiorari in *Grimm*, the decision in *Adams* creates a circuit split that will likely pressure the Supreme Court to further consider whether the constitutional or civil rights statutes prohibit anti-transgender discrimination. This issue takes on even greater significance in light of the flood of anti-transgender legislation being passed or proposed in states across the country, much of which is targeted at transgender children in public schools.¹⁶ These new laws range from banning transgender youths from participating in school sports, removing

8. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020).

9. See *Grimm*, 972 F.3d at 616.

10. See *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808–09 (11th Cir. 2022).

11. *Bostock*, 140 S. Ct. at 1753.

12. See *Adams*, 57 F.4th at 808–09.

13. *Id.*

14. See *Grimm*, 972 F.3d at 609, 615, 618; *Adams*, 57 F.4th at 802, 805, 807–08.

15. See *Grimm*, 972 F.3d at 609, 615, 618; *Adams*, 57 F.4th at 802, 805, 807–08.

16. See, e.g., Priya Krishnakumar, *Anti-transgender Legislation in 2021: A Record-Breaking Year*, CNN POL. (Apr. 15, 2021, 10:46 AM), <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html> [https://perma.cc/L9MW-PD4L] (reporting on the record-breaking surge of state legislature bills targeting transgender rights, with a majority focus on transgender youth); Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far*, NBC NEWS (March 20, 2022, 5:00 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418> [https://perma.cc/ASN6-52P5] (reporting on continuing increase in state bills targeting transgender people in 2022).

books about sexual orientation, gender identity, and other LGBTQ issues from classrooms and school libraries, restricting classroom discussions of any LGBTQ topics, prohibiting teachers from using a student's preferred name or pronouns, and banning gender affirming health care.¹⁷ Because schools have become ground zero in the struggle for transgender rights, a detailed analysis of the arguments in *Grimm* and *Adams* and what their holdings mean for students, teachers, and schools is critical.

This Article is organized chronologically, in an effort to more effectively reflect the nearly identical fact patterns, timelines, and intersecting opinions of these cases. Part I provides the factual background of both cases. Part II summarizes the substantial preliminary litigation in *Grimm*; Part III examines the district court ruling in *Adams*; Part IV analyzes the summary judgment ruling in *Grimm*. Part V covers *Adams*' first appellate ruling; Part VI discusses the Fourth Circuit's ruling in *Grimm* three weeks later, and Part VII considers the aftermath of that decision. Parts VIII and IX explore the second panel ruling in *Adams* and the majority and dissenting *en banc* opinions, respectively. Part X considers the significant lessons from all these opinions and analyzes the relative strengths and weaknesses of the arguments for expanding or restricting the LGBTQ rights.

I. SOME FACTUAL BACKGROUND

One intriguing aspect of the *Grimm* and *Adams* cases is the incredibly similar factual histories of Mr. Grimm and Mr. Adams and the school districts' responses to their request to use the restroom that matched their gender identity. The very close factual, procedural, and evidentiary elements of these cases illuminates that the conflicting opinions of the Fourth and Eleventh Circuits are purely matters of constitutional and statutory interpretation. It is impossible to reconcile these holdings by attempting to distinguish the facts.

A. Gavin Grimm

Gavin Grimm attended Gloucester High School, a public school in Gloucester County, Virginia, from 2013 to 2017.¹⁸ He was identified at birth as female, and when he first enrolled in the Gloucester County school system, he was identified as a female in school records, although he asserted that he always personally identified as a boy.¹⁹ In 2014, Mr. Grimm came out to his parents as transgender, and shortly thereafter, he

17. See *What anti-trans bills passed in 2023?*, TRANS LEGIS. TRACKER, <https://translegislation.com/bills/2023/passed> [https://perma.cc/RZG7-8A53].

18. *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444, 448 (E.D. Va. 2019).

19. *Id.*

was diagnosed as having gender dysphoria.²⁰ As part of his treatment, his doctor prescribed that he should present as a male and be considered and treated as male, including using the restrooms consistent with his male gender identity.²¹ Mr. Grimm legally changed his name, used male pronouns, and began hormone treatment.²² Mr. Grimm’s mother shared the diagnosis and treatment plan with the school.²³ However, the school did not permit him to use the boys’ restroom, instead deciding that he should use the restroom in the nurse’s office.²⁴

This arrangement soon proved to be problematic. Mr. Grimm felt stigmatized and anxious about only being allowed to use the nurse’s bathroom, and the inconvenience of having one bathroom on campus, which was not near his other classrooms, often made him late for class.²⁵ He requested that, consistent with his gender identity, he be allowed to use the boys’ restrooms.²⁶ After consulting with the district superintendent, the school principal allowed Mr. Grimm to use the boys’ restrooms, which he did for seven weeks without incident or complaint from any other student.²⁷ After almost two months, however, adults in the community began complaining and demanded that Mr. Grimm be prohibited from using the boys’ restrooms.²⁸ As a result, in December 2014 the school board adopted a policy stating that restrooms “shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.”²⁹ The administration warned Mr. Grimm that he would be disciplined if he continued to use the boys’ restrooms at Gloucester High.³⁰

Following the adoption of the new policy, the school district announced it would build single-stall restrooms accessible to all students.³¹ These restrooms were not constructed when the new policy went into effect, however.³² This meant that, once again, Mr. Grimm was only allowed to use the restroom in the nurse’s office.³³ When the new single-occupancy restrooms were finally built, they were inconveniently located, and Mr. Grimm had to walk past the boys’ restrooms to get to the single-occupancy

20. *Id.*

21. *Id.* at 448–49.

22. *Id.* at 449.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 450.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

facilities, which made him feel further stigmatized.³⁴ Both he and the principal noted that they never saw any other student use those restrooms.³⁵

While in high school, Mr. Grimm suffered from significant physical and mental health issues as a result of the restroom policy, and in June 2015, he sued the school district, alleging that the restroom policy was unconstitutional and illegal discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Civil Rights Act of 1964 (“Title IX”).³⁶ While the initial complaint was pending, Mr. Grimm underwent both hormone treatment and reconstructive gender reassignment surgery and successfully petitioned the Virginia courts to issue him a revised birth certificate which identified him as male.³⁷ Nevertheless, the school district refused to update its records to reflect this change, insisting that, despite the court order and official documentation from the Virginia Department of Health, the revised birth certificate was invalid.³⁸

B. Drew Adams

Drew Adams attended Allen D. Nease High School in St. John’s County, Florida.³⁹ At birth, Mr. Adams was identified as a female, but by eighth grade, he realized he was transgender and came out to his parents.⁴⁰ He then began transitioning and presenting as male, using male pronouns and men’s restrooms in public.⁴¹ Mr. Adams’ doctor confirmed that he suffered from gender dysphoria, and he subsequently underwent the medical processes for transitioning, including hormone therapy and a double mastectomy.⁴² Like Mr. Grimm, Mr. Adams also went through the established legal steps in Florida to amend his driver’s license and birth certificate to identify him as male.⁴³

In September 2015, the school board adopted a new policy and guidelines related to transgender students.⁴⁴ In an attempt to accommodate these students, the policy stated that “transgender students will be given access to a gender-neutral restroom and will not be required to use the

34. *Id.*

35. *Id.*

36. *Id.* at 450–51.

37. *Id.* at 451.

38. *Id.*

39. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1296 (M.D. Fla. 2018).

40. *Id.* at 1300.

41. *Id.*

42. *Id.* at 1300–01.

43. *Id.* at 1301.

44. *Id.* at 1302.

restroom corresponding to their biological sex.”⁴⁵ The district considered but rejected the possibility of allowing transgender students to use the restroom that corresponded to their gender identity.⁴⁶ The policy also established that “biological sex” would be determined exclusively by referring to the official documents (i.e. birth certificate) presented when the student enrolled in the district.⁴⁷

When Mr. Adams started high school, he did so presenting as a male and used the boys’ restroom without any complaint or incident for approximately six weeks.⁴⁸ Then, following a complaint by two female students that had seen him enter the boys’ restroom, Mr. Adams was told that he could only use the gender-neutral bathroom in the school’s office, or the girls’ restrooms, and that continuing to use the boys’ restroom would result in disciplinary action.⁴⁹

This prohibition from using the boys’ restroom confused, angered, and shocked Mr. Adams because it indicated that the school did not see him as a boy or accept him for who he was.⁵⁰ As Mr. Adams testified later, he was “living in every aspect of [his] life as a boy, and . . . [the school district had] taken that away from [him].”⁵¹ The gender-neutral restrooms were considerably further from his classes than the boys’ restrooms, which he walked past to get to gender-neutral restrooms he could use.⁵² Mr. Adams testified that he would think ahead about his classes and their proximity to a gender-neutral restroom, worrying that he would miss class time because there was not a gender-neutral restroom nearby.⁵³ As a result, he began to monitor his fluid intake and minimize his need to use the restroom to around once or twice a day.⁵⁴ Mr. Adams testified that the policy and having to walk past the boys’ restroom to reach the gender-neutral restrooms made him feel humiliated, alienated, anxious, and depressed.⁵⁵ Mr. Adams believed that the policy “[sent] a message to other students who see him use a ‘special bathroom’ that he is different, when all he want[ed]

45. *Id.* at 1303. The document also expressly noted that “there is no specific federal or Florida state law that requires schools to allow a transgender student access to the restroom corresponding to their consistently asserted transgender identity.”

46. *Id.*

47. *Id.* at 1304. When Mr. Adams enrolled in the district as an elementary school student, his birth certificate identified him as female. That was the only documentation the school would accept, and like Gloucester County, refused to accept the birth certificate and other documents with his gender amended, pursuant to state law. The exclusive reliance on enrollment documents was a key element in court rulings that the policy was arbitrary and therefore unable to withstand intermediate scrutiny. *See infra* Section V.A.

48. *Adams*, 318 F. Supp. 3d at 1307.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1307–08.

53. *Id.*

54. *Id.* at 1307.

55. *Id.* at 1308.

is to fit in.”⁵⁶ After numerous unsuccessful meetings with the school and district administration, Mr. Adams filed a lawsuit alleging discrimination in violation of the Fourteenth Amendment and Title IX in June 2017.⁵⁷

C. Comparing the Cases

The similarity in the fact patterns of these cases is striking: each student initially used the boys’ restrooms for weeks without any complaint; when complaints were eventually made, they came not from other male students but from parents or female students; the school districts’ refusals to consider the students’ legally amended documents; the emotional impacts of having their identities denied and being forced to use the gender-neutral restrooms; and the threats of disciplinary action. In response to these nearly identical claims, the school districts relied on virtually identical defenses, insisting that their policies were not adopted with an intent to discriminate against transgender students but to maintain sex-separated restrooms and locker rooms (the existence of which they claimed would be threatened by a ruling for the plaintiffs) and to protect student privacy, safety, and security.⁵⁸ Of the seven critical rulings in these two cases, only one would agree with the school districts’ argument.⁵⁹

II. GRIMM – PRELIMINARY FILINGS AND ORDERS 2015–2018

There were a number of preliminary motions, orders, and interlocutory appeals between the filing of Mr. Grimm’s complaint in 2015 and the district court’s dispositive summary judgment ruling in his favor in August 2019.⁶⁰ The original complaint alleged that the school board’s restroom policy violated both the Equal Protection Clause and Title IX and sought both compensatory damages and injunctive relief.⁶¹ The board filed a motion to dismiss, and in the first ruling in the case, the court denied the injunction and dismissed the Title IX claim.⁶² Notably, in dismissing the Title IX claim, the court refused to defer to the Office for Civil Rights, a sub-agency of the U.S. Department of Education, whose Guidance

56. *Id.*

57. *Id.* at 1297.

58. *See id.* at 1304–05; *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444, 460 (E.D. Va. 2019).

59. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 (11th Cir. 2022) (finding school board’s interest in protecting student privacy satisfied intermediate scrutiny of the adopted policy).

60. *See Grimm*, 400 F. Supp. 3d at 444, 451–52. In fact, as a result of the numerous preliminary actions, a final ruling was made in the *Adams* case almost a year before the one in *Grimm*, even though the Virginia case was filed two years earlier. *Compare Adams*, 318 F. Supp. 3d at 1293, *with Grimm*, 400 F. Supp. 3d at 444, 451.

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

62. *Id.*

Document⁶³ in effect at that time stated, “under Title IX, a recipient must generally treat transgender students consistent with their gender identity.”⁶⁴

Mr. Grimm filed an interlocutory appeal, and the Fourth Circuit reversed the district court’s ruling, concluding that the Guidance Document, as an agency interpretation of its own regulation that was not plainly erroneous or inconsistent, was entitled to deference.⁶⁵ The board then petitioned for certiorari, which the Supreme Court granted in October 2016.⁶⁶ In early 2017, while oral argument in the case was pending, the new administration rescinded the 2016 Guidance Document.⁶⁷ The Court then

63. Guidance Documents are produced by federal agencies which publicly state the agency’s legal or policy interpretations. These documents are not legally binding, but “help explain an agency’s programs and policies or communicate other important information to regulated entities and the public. . . . And guidance materials often convey important information to the public in language that is clearer and more accessible than the underlying statutes and regulations. Guidance documents can thus serve as an important tool to promote transparency, fairness, and efficiency.” U.S. Dep’t of Just., Justice Manual, § 1-19.000, Principles for Issuance and Use of Guidance Documents, <https://www.justice.gov/jm/1-19000-limitation-issuance-guidance-documents-1> (as of Jan. 4, 2024).

64. C.R. Div., U.S. Dep’t of Just. & Off. for C.R., U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/MYB7-L6D6>]. The letter stated:

This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. . . .

. . . Because transgender students often are unable to obtain identification documents that reflect their gender identity (e.g., due to restrictions imposed by state or local law in their place of birth or residence), requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

Id.

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

66. *Gloucester Cnty. Sch. Bd. v. G.G.*, 580 U.S. 951 (2016) (granting certiorari on questions two and three presented by the petitioner).

67. C.R. Div., U.S. Dep’t of Just. & Off. for C.R., U.S. Dep’t of Educ., Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/DL37-D92C>] (As of April 30, 2021, this Dear Colleague Letter was placed under review due to Executive Order 13988). The 2017 Guidance says that the 2016 Guidance:

vacated the Fourth Circuit ruling and remanded the case for reconsideration in light of the Department of Education's policy change.⁶⁸

By this time, Mr. Grimm had graduated from high school, so when the case was remanded to the district court, he amended the complaint and modified the relief to include only nominal damages and declaratory relief.⁶⁹ The new complaint also included additional factual information that emerged since the original filing, including that Mr. Grimm had his sex legally changed pursuant to Virginia law and was issued a new official state birth certificate listing his sex as "male."⁷⁰ The board again filed a motion to dismiss, but in May 2018, the court denied the motion, ruling that an effective Title IX claim had been plead pursuant to "a gender stereotyping theory" and that the Equal Protection claim would be subject to heightened scrutiny.⁷¹ Both parties subsequently filed cross motions for summary judgment, but those would not be heard by the district court until July 23, 2019, over four years since the filing of the initial complaint.⁷²

III. ADAMS – DISTRICT COURT TRIAL RULING – JULY 2018

Although *Grimm* was filed two years before *Adams*, because of the number of interlocutory appeals and concomitant delays in the Virginia case, the *Adams* case proceeded to trial first, in December 2017.⁷³ A final ruling was entered in July 2018, over a year earlier than the dispositive district court ruling in *Grimm*.⁷⁴ While a preliminary injunction to enjoin

[H]as given rise to significant litigation regarding school restrooms and locker rooms . . . the guidance was "legislative and substantive" and thus formal rulemaking should have occurred prior to the adoption of any such policy

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved.

Id.

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

69. See Grimm v. Gloucester Cnty. Sch. Bd., No. 4:14-cv-54, 2017 WL 9882602, at *1 (E.D. Va. Dec. 12, 2017).

70. Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730, 741 (E.D. Va. 2018).

71. *Id.* at 746–50, 752. In 2019, after the board refused to update his school records to reflect the legal change of his sex, Mr. Grimm filed a second amended complaint citing this refusal as an additional violation of Title IX and the Fourteenth Amendment.

72. Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444, 452 (E.D. Va. 2019).

73. See Grimm, 400 F. Supp. 3d at 451–52; Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293, 1297 (M.D. Fla. 2018).

74. See Adams, 318 F. Supp. 3d at 1293; Grimm, 400 F. Supp. 3d at 444.

the enforcement of the school board’s policy was filed and denied in both cases, Mr. Adams did not appeal that denial, likely because the court set an expedited trial date for the case.⁷⁵ The bench trial lasted three days and included testimony from thirteen witnesses. A month after the trial, the judge toured the school, “visiting every restroom on campus.”⁷⁶ The parties submitted proposed findings of facts and conclusions of law, and closing arguments were heard in February 2018.⁷⁷ The court issued its decision five months later, ruling that the school board violated Mr. Adams’ rights under the Equal Protection Clause and Title IX.⁷⁸

The court began its assessment of the Equal Protection claim by determining that the board’s policy was subject to intermediate scrutiny because it inherently involved a question of sex-based classifications.⁷⁹ Specifically, the court noted that the board treated Adams differently because “he does not act in conformity with the sex-based stereotypes associated with the sex he was assigned at birth (female).”⁸⁰ Notably, the school board did not disagree that intermediate scrutiny was appropriate.⁸¹ As a result, the board was required to prove that the policy was substantially related to an important government interest and that the justification for its sex-based classification was “exceedingly persuasive.”⁸² Additionally, the court noted that in conducting its equal protection review, “[the Supreme Court has] recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged.”⁸³

In its defense, the board proffered three important interests: privacy, safety, and what it described as “the realistic physical differences between the sexes.”⁸⁴ The court rejected all of these.⁸⁵ Regarding privacy, the court held that while the board had a legitimate interest in protecting student privacy, including in bathrooms, the evidence clearly demonstrated that “allowing transgender students to use the restrooms that match their gender identity does not affect the privacy protections already in place.”⁸⁶

75. *Adams*, 318 F. Supp. 3d at 1297. The court set the non-jury trial for mid-December 2017, just six months after the complaint had been filed.

76. *Id.* at 1298.

77. *Id.*

78. *Id.* at 1320, 1325.

79. *Id.* at 1311–12.

80. *Id.* The court quoted extensively from *Glen v. Brumby*, 663 F.3d 1312, 1318–19 (11th Cir. 2011) (“All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype” which includes “perceived gender-nonconformity.”). In *Brumby*, the court found that the defendant had violated the Equal Protection Clause when it fired the plaintiff because she was transgender. 663 F.3d at 1321.

81. *Adams*, 318 F. Supp. 3d at 1312–13.

82. *Id.* at 1313.

83. *Id.* (internal citations omitted).

84. *See id.* at 1313–17.

85. *Id.* at 1314–18.

86. *Id.* at 1314.

Specifically, the court noted that there had been no reports of any complaints or issues during the six weeks when Mr. Adams was allowed to use the boys' bathrooms; that there was no evidence that any official or administrator in the district had ever even heard of a privacy issue involving a transgender student in any school; that any student seeking additional privacy in a restroom could use the stalls or one of the single occupancy restrooms in the school; and that the unsubstantiated claims of the board ignored the reality of how transgender students actually used the restroom.⁸⁷ Tellingly, the board admitted that, based on its policy of relying on the gender listed on documents provided by the student when they enrolled in school, "there could be transgender students whose enrollment documents are consistent with the students' gender identity, and no one would know they are using restrooms that are different from the ones that match their sex assigned at birth."⁸⁸

The court was similarly unpersuaded by the claims about student safety.⁸⁹ The school board cited both risks of transgender students being bullied by cisgender students and cisgender students feeling unsafe in the restroom because of the presence of a student "with genitalia of the opposite sex."⁹⁰ Highlighting that there had been no evidence presented by the board of any actual safety concerns or risks to Mr. Adams or to other students, or that transgender students are more likely than any other students to assault another student in the bathroom,⁹¹ or that any school official had ever heard of such an incident, the court concluded that the alleged safety concerns could not meet the "exceedingly persuasive justification" for the discriminatory treatment of transgender students that intermediate scrutiny demands.⁹²

The board also relied on a number of "additional considerations" in defense of its policy. These included the number of single occupancy restrooms added by the school, fears that a more relaxed policy will inevitably lead to the elimination of single sex restrooms, and that the policy simply recognizes physical differences between the sexes.⁹³ The court rejected each of these arguments in turn, explaining first that the issue was not the number of single occupancy restrooms, but rather Mr. Adams'

87. *Id.* ("[T]ransgender students want to be discrete [sic] about their anatomy so other students do not recognize them as anything but the gender with which they identify.").

88. *Id.*

89. *Id.* at 1316.

90. *Id.* at 1315.

91. *Id.* In *Grimm v. Gloucester County School Board*, the court identified this hypothetical fear as the "'transgender predator' myth" and explained that this allegation "although often couched in the language of ensuring student privacy and safety—is no less odious, no less unfounded, and no less harmful than . . . race-based or sexual-orientation-based scare tactics" that our courts and our country have moved beyond. 972 F.3d 586, 626 (4th Cir. 2020) (Wynn, J., concurring).

92. *Adams*, 318 F. Supp. 3d at 1316.

93. *Id.* at 1316–17.

testimony about “the stigma that attaches to his use of gender-neutral bathrooms, especially when he has to walk right past an available boys’ restroom to find one.”⁹⁴ The court also highlighted that entire case was based on *maintaining* separate restrooms for boys and girls:

The undisputed evidence is that [Adams] is a transgender boy and wants to use the boys’ restroom. There is no evidence to suggest his identity as a boy is any less consistent, persistent and insistent than any other boy. Permitting him to use the boys’ restroom will not integrate the restrooms between the sexes.⁹⁵

As to the argument based on genuine physical differences between the sexes, the court distinguished precedent that recognized that in some circumstances, a gender-neutral statute may limit the state’s ability to achieve an important government purpose.⁹⁶ Such circumstances did not apply here, however, because “the school bathroom policy does not depend on something innately different between the bodies of boys and girls or what they do in the bathroom.”⁹⁷

The court’s analysis of the Title IX claim focused primarily on the definition of the term “sex” in the context of the statute’s prohibition of discrimination “on the basis of sex.”⁹⁸ In pushing its argument that for Title IX purposes, “sex” must mean “biological sex,” the board emphasized that the statute’s implementing regulations expressly state that an institution “may provide separate toilet, locker, and shower facilities on the basis of sex.”⁹⁹ The board also highlighted that in 2017, the U.S. Department of Education rescinded its 2016 Guidance Document advising schools to treat “a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.”¹⁰⁰ According to the board, this withdrawal

94. *Id.* at 1316.

95. *Id.* at 1317. The board also raised concerns about how to deal with potential “gender fluid” students, who would use boys’ restrooms one day and girls’ restrooms the next. *Id.* The court rejected that argument as not relevant to the issues presented by this case, in which a transgender boy is seeking access to the boys’ restroom. *Id.* The court also stated that there was no evidence presented by the board regarding gender fluid students seeking any particular restroom access, and further commented that if the board was in fact worried about students pretending to be gender fluid to enter the opposite gendered bathroom, ordinary school discipline policies should be sufficient to address such behaviors. *Id.* at 1317 n.43.

96. *Id.* at 1317–18. The board relied on *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981), which upheld a California statute that criminalized men who had sexual intercourse with women under eighteen but did not punish the women. The Court held that the statute, which was designed to prevent illegitimate teen pregnancies, “realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” *Id.* at 469. Given that only women can get pregnant and would not report the crime if they could be prosecuted, the gender distinction was constitutional. *Id.* at 476, 479.

97. *Adams*, 318 F. Supp. 3d at 1318.

98. *Id.* at 1321.

99. *Id.* at 1320–21 (quoting 34 C.F.R. § 106.33).

100. *Id.* at 1323; C.R. Div., U.S. Dep’t of Just. & Off. for C.R., U.S. Dep’t of Educ., *supra* note 64 (“The Departments treat a student’s gender identity as the student’s sex for

effectively meant the U.S. Department of Education interpreted “sex” to mean biological sex only.¹⁰¹

The court rejected both arguments, noting that the absence of a definition for the term “sex” in Title IX and its implementing regulations does not create a presumption that it therefore means “biological sex.”¹⁰² As to the provisions permitting separate facilities on the basis of sex, the court noted that Mr. Adams was not claiming the school could not maintain bathrooms for separate sexes, but rather quite the opposite. “He just wants the school to recognize that, interpreting sex to include gender identity, he is a boy and should be permitted to use the boys’ restrooms.”¹⁰³

Additionally, the Department of Education’s rescission in 2017 of the earlier Guidance Document, without the issuance of new guidance, “does not provide any interpretation of Title IX from the Department of Education.”¹⁰⁴ The court noted that the 2017 rescission expressly stated that the agency “was withdrawing the earlier guidance because it had not undergone any formal public process and . . . [issued the decision] without extensive legal analysis or explanation.”¹⁰⁵ And although several courts had issued rulings in favor of transgender students under Title IX in reliance on the original guidance, the court noted that several others reached a similar conclusion even after the 2017 letter was issued.¹⁰⁶ The 2017 letter, the court thus concluded, provided no persuasive authority in its consideration of the Title IX claim.¹⁰⁷

Instead, the court relied on the more common practice of looking to Title VII for guidance on how to interpret the meaning of “sex” under Title IX, and in the context of transgender discrimination, that compelled the court to consider the Supreme Court’s decision in *Price Waterhouse v. Hopkins*.¹⁰⁸ This groundbreaking case held that disparate treatment based on gender stereotyping (e.g., ascribing attributes, characteristics, or roles to a person solely because of his or her gender)¹⁰⁹ or gender nonconformity (when a person’s behavior or appearance is not consistent with prevailing

purposes of Title IX and its implementing regulations.”) (rescinded by Dear Colleague Letter (Feb. 22, 2017) at *supra* note 67).

101. *Adams*, 318 F. Supp. 3d at 1323.

102. *Id.* at 1321–22.

103. *Id.* at 1322.

104. *Id.* at 1323.

105. *Id.*

106. *Id.* (citing, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1049–50 (7th Cir. 2017); *Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d 730, 742–48 (E.D. Va. 2018); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 329 (M.D. Pa. 2017)).

107. *Id.*

108. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The *Adams* decision noted that “[i]n looking for Title IX guidance, the transgender school bathroom decisions inevitably consider *Price Waterhouse* . . .” *Adams*, 318 F. Supp. 3d at 1324.

109. *Price Waterhouse*, 490 U.S. at 242–43, 250.

cultural expectations for their gender)¹¹⁰ is sex discrimination under Title VII.¹¹¹ The court concluded that, by definition, a transgender student does not conform to sex-based stereotypes and that the refusal to allow them to use the bathroom that matches their gender identity is sex discrimination.¹¹² Because the refusal to allow Mr. Adams to use the boys’ bathroom was harmful discrimination “on the basis of sex,” the school board, a federally funded institution, violated Title IX.¹¹³

IV. GRIMM – DISTRICT COURT RULING (SUMMARY JUDGMENT) – AUGUST 2019

In July 2019, following a series of preliminary motions, orders, and interlocutory appeals, the district court in Virginia heard arguments on cross motions for summary judgment.¹¹⁴ A month later, the Virginia district court granted Mr. Grimm’s motion and declared that the school board’s bathroom policy and its refusal to update his school records violated his rights under the Fourteenth Amendment and Title IX.¹¹⁵ Mr. Grimm was awarded one dollar in nominal damages, as well as all fees and costs, and the board was ordered to update its records to reflect that Mr. Grimm was male.¹¹⁶

Unlike the *Adams* trial court, here the analysis began with Title IX and the court’s reiteration of its ruling on the 2018 motion to dismiss that “discrimination on the basis of transgender status is *per se* actionable under a gender stereotyping theory.”¹¹⁷ In response, the board argued that its policy relied on the “biological gender” of the students and treated all students equally on that basis.¹¹⁸ The board further argued that the express language and implementing regulations of Title IX reflected its reliance on “biological gender” and the physiological differences between men and women.¹¹⁹

The court was unpersuaded and cited evidence in the record establishing that “biological gender” was an ambiguous and not medically accepted term.¹²⁰ More importantly, it noted that the ambiguity of the term allowed the board to arbitrarily choose which physical characteristics it used to classify students under the policy (e.g., “primary genitals” but not

110. *Id.* at 242–43.

111. *Id.* at 252, 255.

112. *See Adams*, 318 F. Supp. 3d at 1324–25.

113. *Id.* at 1325. As a remedy, the bathroom prohibition was enjoined against Mr. Adams, and he was awarded compensatory damages for emotional distress. *See id.* at 1326–27.

114. *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444, 452 (E.D. Va. 2019).

115. *Id.* at 459, 461.

116. *Id.* at 464.

117. *Id.* at 456.

118. *Id.*

119. *Id.* at 456–57.

120. *Id.* at 457.

gender reassignment surgery, hormones, genes, or other factors that contribute to a person's biology).¹²¹ The board's arbitrary inclusion of some gender related factors and the exclusion of others were based on gender stereotypes and were therefore discriminatory.¹²² The court noted that "[u]nder the policy, all students except for transgender students may use restrooms corresponding to their gender identity. Transgender students are . . . exclude[d] from spaces where similarly situated students are permitted to go."¹²³

The court also took time to explain how the discriminatory policy hurt Mr. Grimm, reflecting his testimony about feeling stigmatized and alienated by being forced to use separate restrooms, and the emotional stress and physical harms he suffered in trying to avoid using the restrooms at school at all.¹²⁴ The ruling also recognized that Mr. Grimm experienced severe emotional breakdowns and was hospitalized with suicidal ideation as a result of his distress.¹²⁵ In the midst of the predominantly legal analysis of the definition of sex, this discussion of the human impacts of the discriminatory policy is a compelling reminder of the actual harmful effects these policies can have on students.

On the Equal Protection claim, the court accepted the board's assertion that the privacy of students and their bodies was an important state interest.¹²⁶ Nonetheless, the board failed to show that the bathroom policy was substantially related to that asserted interest.¹²⁷ The court highlighted that Mr. Grimm used the boys' restrooms for several weeks without complaint or incident and that the school board failed to consider the realities of how transgender individuals like Mr. Grimm actually use the restroom (by entering a stall and closing the door).¹²⁸ The board's privacy arguments were based on conjecture, abstraction, and negative attitudes.¹²⁹ As such, the board failed to provide the "exceedingly persuasive justification" required for its sex-based classification to satisfy intermediate

121. *Id.*

122. *Id.*

123. *Id.* at 456–57. The Court also noted that since its 2018 ruling, district courts in Oregon, *Parents for Priv. v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1105 (D. Or. 2018); Florida, *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1323 (M.D. Fla. 2018)); and the Third Circuit Court of Appeals, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018), had concurred with its conclusions.

124. *Grimm*, 400 F. Supp. 3d at 458–59.

125. *Id.* at 458.

126. *Id.* at 460.

127. *Id.* The Court determined in its 2018 ruling that intermediate scrutiny applied. *Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d 730, 749–50 (E.D. Va. 2018).

128. *Grimm*, 400 F. Supp. 3d at 460. The board conceded at the summary judgment hearing "that there is no privacy concern for other students when a transgender student walks into a stall and shuts the door." *Id.* at 460–61.

129. *Id.* at 461.

scrutiny, and the court granted summary judgment for Mr. Grimm on the Equal Protection claim.¹³⁰

The ruling concludes with a contemplative and thoughtful assessment that eloquently contextualizes the issue and its implications for transgender youth.¹³¹ It begins with a long citation from the opening of the *Adams* ruling, a quote from Nelson Mandela (“history will judge us by the difference we make in the everyday lives of children”),¹³² and empathy for the school board in attempting to balance the various interests of its constituents.¹³³ The court then wrote:

However well-intentioned some external challenges may have been and however sincere worries were about possible unknown consequences arising from a new school restroom protocol, the perpetuation of harm to a child stemming from unconstitutional conduct cannot be allowed to stand. These acknowledgments are made in the hopes of making a positive difference to . . . the everyday lives of our children who rely upon us to protect them compassionately and in ways that more perfectly respect the dignity of every person.¹³⁴

V. *ADAMS* – FIRST 11TH CIRCUIT PANEL DECISION – AUGUST 7, 2020

A year after the summary judgment ruling in *Grimm* became the second ruling district court ruling holding that these transgender bathroom policies are unconstitutional, the Eleventh Circuit issued the first appellate ruling in these cases (the Fourth Circuit would weigh in a few weeks later—see Part VI, *infra*). These initial majority and dissenting opinions in *Adams* framed the constitutional, political, and social elements that would define this issue going forward.

A. The Majority Opinion

A divided panel of the Eleventh Circuit affirmed the ruling in favor of Drew Adams on August 7, 2020, on both the Equal Protection and the Title IX claims.¹³⁵ As explained above, in the time since the district court

130. *Id.* The court also ruled that there was no privacy concern implicated by Mr. Grimm’s request that his school records be updated to reflect his gender transition and ruled in his favor on that claim as well, issuing a permanent injunction requiring the board to amend its records. *Id.* at 461–62.

131. *See id.* at 462–63.

132. *Id.* at 462.

133. *See id.* at 463.

134. *Id.*

135. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1311 (11th Cir. 2020).

issued its ruling, the federal court in Virginia granted summary judgment in favor of Gavin Grimm on his parallel claims,¹³⁶ and the Supreme Court issued its groundbreaking decision in *Bostock*, holding that discrimination based on transgender status was sex discrimination under Title VII.¹³⁷ Unsurprisingly, Justice Gorsuch's opinion figured prominently in both the majority and dissenting opinions.¹³⁸

The majority's analysis echoed much of the district court's framing—it established at the outset that the bathroom policy is based on sex and thus heightened scrutiny applies, that the school board has an important government interest in protecting the bodily privacy of students, and that it may effectuate that interest by having separate bathrooms for girls and boys.¹³⁹ Then, affirming the court below but with a somewhat different focus, the court concluded that the transgender exclusion policy is unconstitutional because it arbitrarily applies to some transgender students but not others; that the claimed injuries to student privacy are hypothetical and without evidentiary support; and that it discriminates against Mr. Adams because he fails to conform to gender stereotypes.¹⁴⁰

To satisfy the intermediate scrutiny standard of the Fourteenth Amendment, there must be “a substantial, accurate relationship between a gender-based policy and its stated purpose.”¹⁴¹ The court highlighted the board's admission that if a transgender student submitted documents at enrollment that matched their gender identity (as opposed to Mr. Adams, who transitioned after enrolling in the district), the student would be allowed to use the bathroom that matched that identity.¹⁴² This necessarily rendered the transgender exclusion policy arbitrary because “the criteria for determining a student's bathroom use do not achieve the School Board's stated goal of restricting transgender students to the restroom of their assigned sex at birth.”¹⁴³

As to the harm to the privacy interests of students, the court re-emphasized the district court's finding that the board presented no evidence of any harms or complaints by other students of inappropriate behavior by

136. See *Grimm*, 400 F. Supp. 3d at 461.

137. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). There were significant other circuit opinions on these issues in the two years following the District Court ruling, including *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (rejecting claims of other students that there is a Fourteenth Amendment privacy right not to share school restroom with transgender student using restroom that matches their gender identity); and in 2019, the Supreme Court denied certiorari in a similar case from the Third Circuit, *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019).

138. *Adams*, 968 F.3d at 1305.

139. See *id.* at 1296–97. This was the court's initial invocation of *Bostock*, quoting “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741.

140. *Adams*, 968 F.3d at 1297.

141. *Id.* at 1299.

142. See *id.* at 1316.

143. *Id.* at 1298–99.

Mr. Adams or anywhere “across the country” where transgender students were using the bathroom that matched their identity.¹⁴⁴ The court similarly noted the lack of any evidence to support the district’s argument that the *mere presence* of a transgender boy in the boys’ bathroom is a privacy violation and concluded that “the School Board singled out Mr. Adams’ use of the restroom as problematic, without showing what Adams did, in fact, flout or compromise the privacy of other boys when he was in the boys’ restroom.”¹⁴⁵ Although the opinion does not explicitly say it, the implication of its assessment is clear—there is no evidence of harm to privacy interests because there is no such harm.¹⁴⁶

The majority emphasized one additional and crucial point on the privacy issue that the district court did not mention. It pointed out that the board’s privacy concerns were “internally inconsistent,” specifically in light of the practicalities of the bathroom policy.¹⁴⁷ The court noted that Mr. Adams’ transition had progressed and included surgery and hormonal treatments that significantly altered his anatomical and physical appearance.¹⁴⁸ As a result, “[w]ere Mr. Adams to use the school’s restroom for girls, as the School Board maintains he could, his masculine physiology would present many of the same anatomical differences the School Board fears if non-transgender boys used the girls’ restroom.”¹⁴⁹

The majority’s final point on the Equal Protection claim was that the policy unconstitutionally discriminated based on gender stereotyping, a practice the Supreme Court had repeatedly recognized as sex discrimination.¹⁵⁰ Because he was identified as a female at birth but identifies and presents as a male, Mr. Adams (like all transgender students) “defies the stereotype that one’s gender identity and expression should align with one’s birth sex.”¹⁵¹ The school board’s insistence on labeling him a girl, despite his consistent and persistent legal and medical identification as a boy, was *prima facie* evidence of sex discrimination based on gender stereotyping and violated the Fourteenth Amendment.¹⁵²

144. *See id.* at 1299–300.

145. *Id.*

146. *See id.* at 1299.

147. *Id.* at 1301.

148. *See id.*

149. *Id.*

150. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138–40 (1994) (prohibiting peremptory challenges by on gender stereotyping).

151. *Adams*, 968 F.3d at 1302.

152. *See id.* at 1303. Of note, in reaching this conclusion, the opinion cited the district court ruling in *Grimm*: “[i]n determining the physical characteristics that define male and female, and the characteristics that are disregarded, the Board has crafted a policy that is based on stereotypes about gender.” *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d

The appellate court's analysis of the Title IX claim mirrored the district court, but with one important addition—the analysis of *Bostock*, which had been issued just two months earlier.¹⁵³ In that case, the Court held that, under Title VII, sex discrimination necessarily included discrimination based on transgender status, because “it is impossible to discriminate against a person for being . . . transgender without discriminating against that person on the basis of sex.”¹⁵⁴ Although acknowledging that Title VII and Title IX are separate elements of the Civil Rights Act of 1964 (focusing on employment discrimination and education discrimination, respectively), the *Adams* majority emphasized the parallel structures and intent of the statutes and the Supreme Court precedent relying on the former to interpret the latter.¹⁵⁵ The majority in *Adams* accordingly relied upon the Supreme Court's analysis of sex discrimination in *Bostock* to conclude that Title IX also prohibits discrimination against a person because they are transgender “because this constitutes discrimination based on sex.”¹⁵⁶

The remainder of the court's Title IX analysis reiterated the key findings of fact and conclusions of law of the district court: that Mr. Adams determination to use the boys' restroom was not an attempt to eliminate separate restrooms for boys and girls (it was in fact, just the opposite and grounded in the maintenance of separate restrooms); that he was discriminated against by the school board when compared with how it treated non-transgender boys; and that he was harmed and stigmatized by this discriminatory treatment. The court was also unpersuaded by the school board's arguments that under Title IX, “sex” must mean “biological sex,” and that the rescission of the 2016 guidance reaffirmed that conclusion.¹⁵⁷

B. Judge Pryor, Dissenting

Chief Judge William Pryor set the theme and framing for his vehement dissent at the outset of his opinion. “Not long ago, a suit challenging the lawfulness of separating bathrooms on the basis of sex would have been unthinkable.”¹⁵⁸ He also quickly discounted any precedential value of *Bostock*, because the Court specifically “declined to consider the permissibility of sex-separated bathrooms.”¹⁵⁹ The Chief Judge

444, 457 (E.D. Va. 2019). At the time of the Eleventh Circuit decision, the appeal in *Grimm* was still pending, although the Fourth Circuit would issue its ruling just three weeks later.

153. *See Adams*, 968 F.3d at 1305; *see generally Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

154. *Bostock*, 140 S. Ct. at 1741.

155. *See Adams*, 968 F.3d at 1309.

156. *See id.* at 1305.

157. *See id.* at 1310.

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

159. *Id.* Although the employer-defendants in *Bostock* argued that a ruling in favor of transgender employees would compel the elimination of sex-separated bathrooms and locker

asserted that the majority ruling mischaracterizes the school board policy, ignores precedent, and “would require all schoolchildren to use sex-neutral bathrooms.”¹⁶⁰

The dissent’s arguments that the policy satisfied the demands of intermediate scrutiny seemed to focus on the legitimacy of sex-separated restrooms generally, rather than the specific issue of transgender students’ access to restrooms that matched their persistent and consistent gender identity.¹⁶¹ Judge Pryor also attempted to counter the majority’s arguments about the arbitrariness of the bathroom policy by focusing on the small number of transgender students in the school district (16 out of approximately 40,000) that may be impacted, suggesting that the constitution is not implicated by such *de minimis* potential harm.¹⁶² Judge Pryor justified this minimal harm by stating:

Even if the district court were correct that gender identity, not biology, determines a person’s sex—that is, the school policy should have assigned these 16 students to the bathroom that aligned with their gender identity—the policy would still be 99.96 percent accurate in separating bathrooms by sex. This near-perfect result is certainly enough to satisfy intermediate scrutiny . . .¹⁶³

Moreover, Judge Pryor maintained that if any doubts remain about the constitutionality of the board policy, the court should have recognized that precedent demands deference to the school board regarding “student conduct in public schools,” just as it has in other cases involving drug searches, free speech, and corporal punishment.¹⁶⁴ Judge Pryor argued that “[t]he Board’s assessment of the privacy risks its students face and the effectiveness of its policy in mitigating those risks deserves deference.”¹⁶⁵

At its core, the dissent reframed the Equal Protection analysis to remove transgender status as the basis of the classification for different treatment under the bathroom policy, and thereby rejected any claim that transgender students are being treated differently at all, much less

rooms, Justice Gorsuch demurred, stating that “none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such questions today. Under Title VII, we do not purport to address bathrooms, locker rooms, or anything else of that kind.” *Bostock*, 140 S. Ct. at 1753.

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

161. *See id.* at 1312. Judge Pryor discussed at length the history, custom, and general acceptance of sex-separated bathrooms, specifically focusing on “biological sex,” and including a citation to Judge Niemeyer’s dissent in a preliminary ruling in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016).

162. *See Adams*, 968 F.3d at 1313 (Pryor, J., dissenting).

163. *Id.*

164. *See id.* at 1314.

165. *Id.*

discriminated against because of their transgender status.¹⁶⁶ As Judge Pryor explained:

The bathroom policy creates two groups—students who can use the boys’ bathroom and students who can use the girls’ bathroom. Both groups contain transgender students and non-transgender students, so a “lack of identity” exists between the policy and transgender status. . . .

So the relevant question is whether excluding students of one sex from the bathroom of the other sex substantially advances the schools’ privacy objectives. The question is not, as the majority frames it, whether excluding transgender students from the bathroom of their choice furthers important privacy objectives.¹⁶⁷

Given its assertion that there was no discrimination against or even classification of transgender students in the policy, the dissent then restated the framing it began with—that Mr. Adams was actually challenging sex-separated bathrooms generally, and that the majority opinion necessarily meant such facilities could not legally be maintained.¹⁶⁸ As the dissent reasoned, “if the privacy interest at stake is untethered from using the bathroom away from the opposite sex or from biological differences between the sexes, then no justification exists for separating bathrooms—or any related facility—by sex.”¹⁶⁹

Judge Pryor’s analysis of the Title IX claim focused on the majority’s refusal to concede that, under the statute, the term “sex” could not mean anything except “biological sex.”¹⁷⁰ His argument relied on dictionary definitions, psychiatric treatises and journal articles written at or near the time Title IX was adopted, canons of statutory interpretation, and the language of the implementing regulations that expressly allowed schools to provide separate restrooms and locker rooms based on sex.¹⁷¹ Implicitly acknowledging that these same arguments were made and rejected by the Supreme Court, the dissent stressed that *Bostock* had no

166. *See id.*

167. *Id.* at 1315–16. The dissent also reframed the availability of gender-neutral bathrooms as “an *accommodation* for transgender students, not a *special burden*.” *Id.* (emphasis in original).

168. *See id.* at 1316. Judge Pryor uses this same reframed classification to distinguish the *Bostock* holding and discount its relevance to this case, stating, “*Bostock* clarified that ‘discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex’ . . . [But] this appeal concerns the converse question: whether discrimination on the basis of sex necessarily entails discrimination based on transgender status.” *Id.* As noted above, in his view, it simply does not.

169. *Id.* at 1319.

170. *See id.* at 1320.

171. *See id.* at 1320–22.

application in the case because *Bostock* “disclaimed deciding whether Title VII allows for sex-separated bathrooms,” and in any event, the Court’s Title VII jurisprudence “does not extend to Title IX” because of the specific language in the statute about sex-separated restrooms.¹⁷²

In closing, the dissent returned again to its recharacterization of the claims in the case from the discrimination experienced by Mr. Adams to an imagined demand for the elimination of sex-separated facilities in schools.¹⁷³ Again, relying on the language in the regulations, Judge Pryor wrote that even if the board policy was based on otherwise discriminatory sex stereotyping, it would not matter “because that question would determine only whether the Board acted on the basis of sex. Title IX and its regulations expressly allows the Board to do so to provide separate bathrooms.”¹⁷⁴ That Mr. Adams’ claims of discrimination were premised on the existence of sex-separated restrooms was assiduously ignored.¹⁷⁵

VI. GRIMM – FOURTH CIRCUIT DECISION – AUGUST 26, 2020

Three weeks after the Eleventh Circuit ruling in *Adams*, a split panel of the Fourth Circuit reached the identical outcome in *Grimm*, holding that the Gloucester County anti-transgender bathroom policy also violated the Fourteenth Amendment and Title IX.¹⁷⁶ Like the Eleventh Circuit, the majority opinion focused on the experience and unequal treatment of Mr. Grimm, while the dissent focused on reframing the categories of students who are “similarly situated” to conclude that there was no discrimination by the school.¹⁷⁷

A. The Majority Opinion

The majority opinion opened with several pages of important background on transgender people, the diagnosis and treatment of gender dysphoria, and the range of emotional, psychological, and social challenges the transgender community experiences.¹⁷⁸ Specifically focusing on transgender students, the court noted that these students very frequently face discrimination, harassment, and physical violence in schools, often resulting in depression, self-harm, and other negative health and educational outcomes.¹⁷⁹ Connecting that context to the case, the court

172. *Id.* at 1320. Judge Pryor was referring to the provision of Title IX that allows schools receiving federal funds to maintain “separate toilet, locker room, and shower facilities on the basis of sex.” 34 C.F.R. § 106.33.

173. *See Adams*, 968 F.3d at 1323.

174. *Id.*

175. *See id.* at 1319.

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

177. *See id.*; *see also id.* at 628 (Neimeyer, J., dissenting).

178. *See id.* at 594–97 (majority opinion).

179. *See id.* at 597.

stated, “[u]sing the school restroom matching their gender identity is one way that transgender students can affirm their gender and socially transition”¹⁸⁰

Unlike the school district in *Adams*, which agreed that intermediate scrutiny applied the Equal Protection claim, the Gloucester board argued for rational basis review, insisting that its policy treated all students identically regardless of sex “because the policy applies to everyone equally” and that any student could use the single stall restroom.¹⁸¹ The court rejected that argument, comparing it to the *Plessy*-era “equal application” arguments that were used to justify racial segregation.¹⁸² Moreover, because the board’s policy expressly referred to male and female biological genders and relied on the sex identified on the student’s birth certificate, the court—like others that have considered the question, including *Adams*—held that the policy created sex-based classifications and was therefore subject to heightened scrutiny.¹⁸³

The Fourth Circuit then took a significantly bolder step and said that intermediate scrutiny applied “because transgender people constitute at least a quasi-suspect class.”¹⁸⁴ Applying the general framework to assess whether a group should be considered a suspect class, the court concluded that transgender people have been subject to severe discrimination in all social contexts for decades; that transgender status has no substantive bearing on one’s ability to engage in or contribute to society; that being transgender “is as natural and immutable as being cisgender;” and finally that transgender people constitute a minority that lacks political power.¹⁸⁵

This alternative basis for heightened scrutiny is one of the most powerful aspects of the opinion and clearly distinguishes it from *Adams*—as well as from *Bostock*. While the sex-stereotyping/sex discrimination analysis still invokes intermediate scrutiny, it necessarily limited the consideration of discrimination against transgender students to the application of the bathroom policy in this case. But the conclusion that transgender people constitute a suspect class embraced the full range of discriminatory treatment to which transgender individuals are subjected, eliminated the similarly-situated classification arguments raised by the dissent in *Adams* (and here, *infra*, Part VI.C.), and forthrightly put the issue

180. *Id.*

181. *See id.* at 609.

182. *See id.* (“But that is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race. No one would suppose that also providing a ‘race neutral’ bathroom option would have solved the deeply stigmatizing and discriminatory nature of racial segregation; so too here.”).

183. *See id.* at 608–09.

184. *See id.* at 610. Before this ruling, only the Ninth Circuit Court of Appeals had made a similar determination. *See Karnoski v. Trump*, 926 F.3d 1180, 1201–02 (9th Cir. 2019).

185. *See Grimm*, 972 F.3d at 612–13.

of anti-transgender discrimination and equality at the jurisprudential center of these cases.¹⁸⁶ Tellingly, the court noted that there was no serious substantive challenge to its assessment of the suspect class criteria other than the generalized caution that courts should be reluctant to name new suspect classes.¹⁸⁷

Applying intermediate scrutiny, the court affirmed that the board policy was not sufficiently related to its stated interest in protecting student privacy.¹⁸⁸ The court noted Mr. Grimm’s use of the boys’ restroom for several weeks without complaints or problems; the measures implemented to enhance privacy in the boys’ restrooms; and the practical realities of how students like Mr. Grimm use the restrooms.¹⁸⁹ Reiterating the assessment in *Adams*, the court concluded that the privacy argument was based on nothing more than speculation and hypothetical concerns, and more significantly, discriminatory stereotypes and prejudice.¹⁹⁰

Turning to the Title IX claim, the court began with *Bostock*, which was decided after the district court decision and which the appeals court said resolved the matter.¹⁹¹ “We have little difficulty” in applying the Supreme Court ruling, the court stated, given that interpretations of Title VII guide judicial considerations of Title IX and that the board policy excluded Mr. Grimm from the boys’ restrooms on the basis of sex.¹⁹² The arguments that *Bostock* expressly declined to reach any conclusions on sex-separated bathrooms and that the Title IX implementing regulations specifically authorized them misapprehend the underlying discriminatory issue in the case.¹⁹³ The bathroom policy treated Mr. Grimm “worse than others who are similarly situated.” Additionally, he was not challenging the existence of sex-separated restrooms as discriminatory, but rather the refusal to let him, as a transgender male, access that sex-separated restroom.¹⁹⁴

186. *See id.* at 613.

187. *See id.* at 613. The suspect class issue—and its avoidance—has been an undercurrent in many major cases regarding LGBTQ rights. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 650–51 n.3 (1996) (expressly rejecting the Colorado Supreme Court’s application of strict scrutiny to strike down an anti-LGBTQ amendment under state constitution, but affirming the holding under a rational basis standard); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (affirming right of same-sex couples to marry as a fundamental liberty interest generally protected by due process and equal protection, and not considering whether sexual orientation is a suspect class); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (analyzing employment discrimination against LGBTQ persons as sex discrimination, not considering whether sexual orientation is a suspect class).

188. *See Grimm*, 972 F.3d at 613.

189. *See id.* at 613–14.

190. *See id.* at 614.

191. *Id.* at 616.

192. *Id.*

193. *See id.* at 618.

194. *Id.*

B. Judge Wynn, Concurring

Judge Wynn's powerful concurrence analyzed the unconstitutional treatment of Mr. Grimm in the context of the country's history of discrimination against African Americans.¹⁹⁵ He said that Mr. Grimm's treatment by the school "is indistinguishable from the sort of separate-but-equal treatment that is anathema to our jurisprudence" and produced a similarly "vicious and ineradicable stigma."¹⁹⁶ Recalling the forced racial segregation of restrooms and the feelings of isolation and inferiority caused by such treatment, Judge Wynn stated that he could "see little distinction between the message sent to Black children denied equal treatment in education under the doctrine of 'separate but equal' and transgender children relegated to the 'alternative appropriate private facilit[ies]' provided for by the Board's policy."¹⁹⁷

The concurrence is also the only opinion amongst the many written in both *Adams* and *Grimm* to so clearly call out the invidious prejudicial animus of the policy, which Judge Wynn said "discriminates against transgender students out of bare dislike or fear of those 'others' . . ."¹⁹⁸ The bathroom policy, the concurrence concludes, "has been applied to marginalize and demean Grimm for the mere fact that he, like other transgender individuals, is different from most. Even worse, it did so to a child at school."¹⁹⁹

This language lays out the fundamental civil rights core of transgender student/school bathroom cases. The abstract and decontextualized arguments over the appropriate level of scrutiny, the language of the Title IX regulations, the applicability of *Bostock*, and the correct classifications for "similarly situated," while generally important, obfuscate the underlying demand of both Mr. Grimm and Mr. Adams: the equal human treatment and basic dignity that the Constitution promises them, and for the courts to meaningfully guard those promises.

C. Judge Niemeyer, Dissenting

The primary argument of the dissent is similar to one Judge Pryor made in *Adams*—that there was no legitimate claim under either the Fourteenth Amendment or Title IX because there had been no discrimination between similarly situated persons. Judge Niemeyer simply

195. *See id.* at 625 (Wynn, J., concurring).

196. *Id.* at 620–21.

197. *Id.* at 624–25. The concurrence emphasized that the practical application of the policy meant that Mr. Grimm could only use the single-stall restrooms. He was prohibited from using the boys' restroom by the operation of the policy, and though the school said he could use the girls' restroom, his clearly male gender identity prevented him from doing so. *See id.* at 624 ("He could no more easily use the girls' restrooms than a cisgender boy.").

198. *See id.* at 621.

199. *Id.* at 625.

said that because Mr. Grimm was born female, even though he then identified as male, “for purposes of restroom usage, he was not similarly situated to students who were born biologically male.”²⁰⁰ Therefore, there was no discrimination in the board’s determination to provide single-stall restrooms for transgender students.²⁰¹

Elaborating on this “similarly-situated” framework, Judge Niemeyer explained that to state a claim for discrimination, the comparable groups must not just be generally similar, but rather, “in all relevant respects[,] alike.”²⁰² Given that schools may create separate restrooms for male and female students for the admittedly important government interest in protecting their bodily privacy, the dissent would have held that the “relevant respects” were “the anatomical differences between the two sexes.”²⁰³ Despite Mr. Grimm’s transition, the practicalities of his use of the restroom, and the fact that there had been no evidence of any privacy concerns presented by other male students, Judge Niemeyer nevertheless concluded that because Mr. Grimm “remained anatomically different from males . . . the School Board did not ‘treat[] differently persons who are in all *relevant* respects alike.’”²⁰⁴

Despite their overall similarity, there are some notable differences between Judge Niemeyer’s opinion and that of his dissenting counterpart from the Eleventh Circuit.²⁰⁵ The most critical relates to the assessment of the privacy interest that underlies the analysis discussed above.²⁰⁶ In discussing the scope and nature of the right to bodily privacy, Judge Niemeyer sidestepped both the evidence about how Mr. Grimm (and other transgender persons) actually used the restroom and the lack of evidence that there were any legitimate privacy issues by emphasizing that “these privacy interests [were] broader than *the risks of actual* bodily exposure. *They include the intrusion created by mere presence.*”²⁰⁷

200. *Id.* at 628 (Niemeyer, J., dissenting).

201. *See id.* at 632. Judge Niemeyer, like Judge Pryor, said the school board “fully complied” with Title IX when it created the single-stall restrooms “to accommodate transgender persons.” *Id.*

202. *See id.* at 635 (internal citations omitted).

203. *Id.* at 636. Judge Niemeyer uses this point to rebut the comparison to racial segregation. Schools can separate bathrooms by gender but not by race “because there are biological differences between the two sexes that are relevant with respect to restroom use in a way that a person’s skin color is demonstrably not.” *Id.*

204. *Id.* (emphasis in original).

205. One distinction is tone. Unlike Judge Pryor’s strident and aggressively contemptuous tone, Judge Niemeyer offers some consideration of the real challenges Mr. Grimm experienced, albeit still rejecting his claims. *See, e.g., id.* at 628 (“I cast no doubt on the genuineness of Gavin Grimm’s circumstances, and I empathize with his adverse experiences.”); *id.* at 637 (“I readily accept the facts of Grimm’s . . . felt need to be treated with dignity. Affording all persons the respect owed to them by virtue of their humanity is a core value underlying our civil society.”).

206. *See id.* at 634.

207. *See id.* (emphasis in original).

This statement is striking, both in its candor and as a counterpoint to Judge Wynn's conclusion about the critical civil rights issues at stake in the case. It is the clearest judicial summation of the broader opposition to equal rights for transgender people, and it is the same one that has been used to subjugate all oppressed groups in our nation's history.²⁰⁸ The marginalization of others necessarily depends on their exclusion from the social, legal, economic, and political benefits that the dominant groups share.²⁰⁹ As the legacy of various struggles for civil rights in America demonstrates, it becomes much more difficult to maintain discriminatory hierarchies—by race, sex, or gender identity—when members of subordinate groups are no longer excluded from otherwise shared spaces.²¹⁰ Their “mere presence” undermines stereotypes, indicates tolerance, and to some measure, acceptance; this in turn becomes the foundation of true equality.

Because the concurring and dissenting opinions in *Grimm* so clearly frame the issue of the rights of transgender students in schools in the context of the broader historical and continuing struggle for equal justice for marginalized groups, the case represents the apex of the forward movement in that struggle. The challenge ahead will be whether that momentum can be maintained.

VII. GRIMM V. GLOUCESTER COUNTY—CODA

Following its loss at the panel, the school board moved for reconsideration *en banc*, which was denied.²¹¹ No judge requested a poll, so there is no recorded vote on the motion.²¹² However, both Judges Niemeyer and Wynn wrote short concurrences with the denial—albeit for very different reasons. Judge Niemeyer was unconvinced an *en banc* hearing would change the outcome, given that the court had now ruled twice in favor of Grimm.²¹³ He expressed hope that the Supreme Court, which had

208. *See id.* at 626 (Wynn, J., concurring) (The “transgender predator” mirrors the baseless claims used to excuse racial segregation. It was the mere presence of African Americans that was loathed).

209. *See* Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HIST. (Aug. 8, 2023), <https://www.history.com/news/jim-crow-laws-black-vote> [<https://perma.cc/4WMZ-CYWP>] (explaining how white legislators manipulated the Fifteenth Amendment to disenfranchise black voters and maintain white supremacy in America).

210. *Id.* (“Almost as swift as the resistance to Black voter participation had been nearly a century earlier, so had the response to [the Voting Rights Act of 1965] . . . Within a year, only four of the 13 southern states had fewer than 50 percent of African American registered voters.”).

211. *Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399, 400 (4th Cir. 2020).

212. *Id.*

213. *Id.* Judge Niemeyer was referring to this panel decision and the Court's 2016 ruling in favor of Mr. Grimm on the motion for preliminary injunction. *See G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 715 (4th Cir. 2016).

granted certiorari and reversed the earlier decision on the preliminary injunction, would do so again. As he noted in his comments denying *en banc* review, “[t]he issues in the case certainly merit doing so.”²¹⁴ Judge Wynn’s opposition to reconsideration reiterated the key points of his concurrence.²¹⁵ He concluded by again placing the case in its more sweeping social justice context, saying, “the rights guaranteed by our Constitution enshrine this country’s most fundamental values and inviolable principles designed to protect individuals and minorities against majoritarian politics. This is especially true of the Fourteenth Amendment’s . . . which was adopted with the specific purpose of protecting minorities from majoritarian discrimination.”²¹⁶

The school board filed a petition for a certiorari on February 21, 2021, which presented the following question for the Court: “Does Title IX or the Equal Protection Clause require schools to let transgender students use multi-user restrooms designated for the opposite biological sex, even when single-user restrooms are available for all students regardless of gender identity?”²¹⁷ The petition was denied on June 28, 2021, with the notation that Justices Thomas and Alito would grant the petition,²¹⁸ however, neither issued a written dissent.²¹⁹

VIII. ADAMS, REDUX – REVISED PANEL OPINION – JULY 14, 2021

Two days after the original panel decision affirming the lower court’s ruling in favor of Drew Adams, the Clerk of the Eleventh Circuit issued a one line order stating, “[a] judge of this Court withholds issuance of the mandate in this appeal.”²²⁰ While such an order is not unusual when a petition for rehearing *en banc* has been filed, the school district did not file such a petition until August 28—three weeks after the panel issued its ruling.²²¹

Under the Internal Operating Procedures of Federal Rules of Appellate Procedure, “[a] petition for rehearing *en banc* will also be treated as petition for rehearing before the original panel. . . . [T]he filing of a petition for rehearing *en banc* does not take the appeal out of the plenary

214. *Grimm*, 976 F.3d at 400 (Niemeyer, J., concurring).

215. *See id.* at 401–03; *see also* *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 620 (4th Cir. 2020) (Wynn, J., concurring).

216. *Grimm*, 976 F.3d at 403 (Wynn, J., concurring).

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

218. *Id.*

219. *Id.*

220. *Adams v. Sch. Bd.*, Doc. 196, USCA 11, 18-13592 (11th Cir. 2020). This is extraordinarily unusual. Rule 41 of the Federal Rules of Appellate Procedure describes in detail the process by which a party can move to stay the mandate but says nothing about the authority of a judge to do *sua sponte*. FED. R. APP. P. 41.

221. *Adams*, Doc. 200. Notably, but for the issuance of the August 10 order (which presumably came at the request of Chief Judge Pryor), the petition for rehearing would have been untimely. FED. R. APP. P. 35.

control of the panel deciding the appeal.”²²² Exercising this control “in an effort to get broader support among our colleagues,” the panel vacated its 2020 opinion and issued a revised one in July 2021, just a few weeks after the Supreme Court denied certiorari in *Grimm*.²²³

The revised opinion reached the same outcome as the previous one, with the same 2-1 split. However, the majority opinion was significantly more limited this time. Its Equal Protection analysis focused only on the arbitrariness of the school’s reliance on documents presented at enrollment;²²⁴ it did not consider the Title IX claim at all.²²⁵ Almost half of the majority opinion was dedicated to rebutting Judge William Pryor’s repetitive and lengthy dissent, much of which was directed at arguments from the prior opinion that had been abandoned in this substitute opinion.²²⁶

The majority distilled its analysis to two fundamental flaws in the bathroom policy. First, by relying on documents presented at enrollment, the board admitted that the policy applied to some transgender students (those that transition after enrolling) but not others (those that transition before enrolling).²²⁷ “In this way, the bathroom policy [did] not apply to all transgender students equally” and could not legitimately serve the purported interest of protecting student privacy.²²⁸ Secondly, the policy also failed to meet intermediate scrutiny because the district offered no legitimate justification for prioritizing enrollment documents over current official government records “even though those government-issued documents constitute[d] controlling identification for any other purpose.”²²⁹

Chief Judge Pryor again dissented in the substitute opinion. His dissent doubled down on his earlier arguments, celebrated what he called the majority’s “retreat” from the previous opinion, and continued to recast the case as a comprehensive challenge to “separating bathrooms by sex.”²³⁰ It also included new and more direct arguments that “sex” and “gender identity” are wholly distinct, that the former cannot be changed, and that the school district has no obligation to account for the latter.²³¹ Judge Pryor then used that rationale to justify the district’s refusal to consider the revised legal documents, arguing “[a] student’s sex does not come with an expiration date, and it does not require periodic updates to confirm its continuing accuracy [A]ccepting updated documents would make the schools’ records less likely to reflect a student’s sex.”²³² Continuing in this

222. I.O.P. 2, FED. R. APP. P. 35.

223. *Adams v. Sch. Bd.*, 3 F.4th 1299, 1304 (11th Cir. 2021).

224. *See id.* at 1307–10.

225. *Id.* at 1304.

226. *See id.* at 1311–20.

227. *See id.* at 1307.

228. *See id.* at 1309.

229. *See id.* at 1310.

230. *See id.* at 1321 (Pryor, J., dissenting).

231. *See id.* at 1321–22.

232. *See id.* at 1323.

vein, he derided the majority for failing to accept that sex is “a biological reality,” and that its opinion “makes sense only if ‘sex’ means the same thing as ‘gender identity.’ But the terms do not share the same meaning.”²³³

Although the opinions in this iteration of *Adams* do not present the conflict in the broad civil rights context offered by *Grimm*, they do distill the issue in a very direct and concrete way: whether the law will recognize the significance of gender identity and expression or exclusively rely on a narrow, binary definition of “biological” sex. Given the continued intensity of disagreement among the panel, it was unsurprising that the *en banc* petition was granted a month later.²³⁴

IX. ADAMS – EN BANC – DECEMBER 2022

Sitting *en banc*, the Eleventh Circuit reversed the panel ruling and issued the only opinion in favor of the school district in either *Adams* or *Grimm*.²³⁵ The 7-4 decision²³⁶ is also an outlier from other circuits (in addition to the Fourth) that have considered the issue, including the Ninth, the Third, the Sixth, and the Seventh.²³⁷ Nevertheless, the ruling foreshadowed a sweeping wave of anti-transgender youth legislation adopted in 2023, including eight bills that specifically restricted the use of bathrooms by transgender students.²³⁸

Writing for the majority, Judge Lagoa adopted virtually all of the Equal Protection arguments from the two dissents by Chief Judge Pryor (with several nods to Judge Niemeyer as well). She found that the policy was effective enough to satisfy intermediate scrutiny, given that there were only sixteen transgender students in the district;²³⁹ that biological sex is an immutable characteristic, unrelated to or in any way affected by gender

233. *See id.* at 1325.

234. *See Adams v. Sch. Bd.*, 9 F.4th 1369, 1372 (11th Cir. 2021).

235. *See Adams v. Sch. Bd.*, 57 F.4th 791, 796 (11th Cir. 2022).

236. Of the seven judges voting to rule against Mr. Adams, six were appointed by Donald Trump. *See Active Judges: United States Court of Appeals for the Eleventh Circuit*, BALLOTPEdia, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Eleventh_Circuit [https://perma.cc/TH2C-PQEV]. Judge Beverly Martin, who wrote both majority opinions for the panel, retired from the court in September 2021, just a few months after the second panel decision was issued. Kevin Penton, *Judge Beverly Martin to Retire from 11th Cir.*, LAW360 (May 18, 2021, 4:16 PM), <https://www.law360.com/articles/1385709> [https://perma.cc/ZHQ3-3QZM].

237. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1218 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017).

238. *See What anti-trans bills passed in 2023?*, *supra* note 17. In addition to school bathrooms, the eighty-three bills passed (so far) in 2023 restrict the rights of transgender youth to access healthcare, to participate in organized sports, to be called by their preferred name or pronouns, or to curricula or books that deal with sexual orientation or identity. *Id.*

239. *See Adams*, 57 F.4th at 809.

identity;²⁴⁰ and that the policy permissibly classifies students by biological sex, and therefore cannot discriminate against transgender students.²⁴¹ The Eleventh Circuit held, therefore, that the board policy thus comported with Equal Protection.²⁴²

The majority also reversed the district court's Title IX ruling, rejecting the idea that there can be any ambiguity in the statute, which must have intended the word "sex" to be solely defined by "biology and reproductive function."²⁴³ The court concluded that if gender identity were included in the meaning of "sex," then Title IX would somehow "provide more protection against discrimination on the basis of transgender status . . . than it would against discrimination on the basis of sex."²⁴⁴ The opinion closed by reiterating Judge Pryor's doomsday scenario, explaining that if the district court opinion were allowed to stand, schools would be forced to transform their "living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities."²⁴⁵

The four dissents each critiqued various elements of the majority opinion, and together created a comprehensive rebuttal to its retreat from the progressive civil rights rulings of the district court and the panel.²⁴⁶ Judge Jill Pryor's dissent was the longest and most detailed and opened with what she considered the primary flaw in all of the majority's

240. *See id.* at 807.

241. *See id.* at 809. Once again, the court is able to reach this conclusion by redrawing the groups for its "similarly situated" analysis. "Because the bathroom policy divides students into two groups, both of which include transgender students, there is a 'lack of identity' between the policy and transgender status." *Id.* However, to assert that there is no discrimination because transgender boys can't use the boys' bathroom, and transgender girls can't use the girls' bathroom is the equivalent of the *Plessy*-based argument that there was no discrimination in Louisiana's Separate Car Act because Blacks couldn't ride in the white car, and whites couldn't ride in the Black one. *See supra* text accompanying note 182.

242. *See Adams*, 57 F.4th at 810.

243. *See id.* at 814.

244. *Id.* Here is a new anti-transgender rights argument in these opinions (although one that has been regularly used to contest expanding civil rights for excluded groups)—that recognizing equal treatment of transgender students somehow gives them *more* rights than non-transgender persons.

245. *Id.* at 817. In yet another procedural anomaly, Judge Lagoa then wrote a second opinion, "specially concurring" with her own majority opinion. *Id.* (Lagoa, J., *specially concurring*). Her concurrence focused exclusively on her belief that if the definition of "sex" in Title IX included gender identity, it would mean the end of opportunities for women in sports and athletics. *Id.* at 821. The concurrence discusses physiology and testosterone, expresses fears about competitive advantages of transgender women, and concludes that the district court ruling would "remove[] distinctions based on biological sex from sports," and thereby cause a broad range of harms to the rights of (biological) women. *Id.* No other judges joined this opinion. *See id.* at 817. The implication of this argument—that recognizing rights of transgender students would actually amount to discrimination against (biological) women—became the justification for state laws banning transgender students from school sports. *See supra* note 238.

246. *See Adams*, 57 F.4th at 821 (Wilson, J., dissenting); *id.* at 824 (Jordan, J., dissenting); *id.* at 830 (Rosenbaum, J., dissenting); *id.* at 832 (Pryor, J., dissenting).

reasoning,²⁴⁷ stating that “the majority opinion simply declares—without any basis—that a person’s ‘biological sex’ is comprised solely of chromosomal structure and birth-assigned sex. So, the majority opinion concludes, a person’s gender identity has no bearing on this case *about equal protection for a transgender boy*.”²⁴⁸

The dissent then explained that this “counterfactual” redefining of the term “sex” infects every aspect of the court’s ruling.²⁴⁹ First, by insisting that Mr. Adams is and can only ever be a female, the majority manipulated the issue presented from discrimination against transgender students to the legality of sex-separated bathrooms.²⁵⁰ Regarding the Equal Protection claim, the dissent relied on the district court’s framing and recognized that because transgender boys were being denied a benefit provided to all cisgender boys, the policy was unconstitutional discrimination.²⁵¹ This categorization for comparison (transgender boys/cisgender boys) is the only one that makes sense, because “under the policy, *only* transgender students are denied the benefit of using the restrooms corresponding to their gender identities.”²⁵² Judge Pryor’s dissenting opinion also recognized intermediate scrutiny should apply because transgender individuals are a quasi-suspect class—the only one in all of the *Adams* litigation to do so.²⁵³

The rest of the dissent summarized and elaborated on the analyses of the panel and district court holdings and the Fourth Circuit’s ruling in *Grimm*.²⁵⁴ It clarified that the policy could not survive heightened scrutiny because, *inter alia*, the board produced only hypothetical evidence that the policy was related to student privacy; that it ignored the practicalities and evidence presented about the policy, including how transgender students actually used the restrooms; the likely impacts on privacy if Mr. Adams (male by all outward appearances) using the girls’ bathroom; and the fact that cisgender students actually seeking additional privacy could use the single-stall restrooms.²⁵⁵

247. *See id.* at 832 (Pryor, J., dissenting).

248. *Id.* (emphasis in original). Judge Jill Pryor was the other member of the panel that voted in favor of Mr. Adams, and with the retirement of Judge Martin, provided the voice of the majority.

249. *See id.* at 843.

250. *Id.* at 843. This issue manipulation comes even though previous decisions in the case (as well as *Grimm*) repeatedly made clear that the entire basis for both lawsuits was the plaintiffs’ desire to be able to use the sex-separated bathroom matching their gender identity.

251. *Id.* at 851–53.

252. *Id.* at 846 (emphasis added).

253. *Id.* at 850. This was offered as an alternative ground for heightened scrutiny, which was already invoked because the policy created a sex-based classification. The dissent cited *Grimm* which similarly held that transgender individuals are a suspect class. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th. Cir. 2020).

254. *Adams*, 57 F.4th at 832–50 (Pryor, J., dissenting).

255. *Id.* at 851–53. Not only did the district fail to present any evidence to support its claim of protecting student safety, but there was testimony from its own witnesses to the

In concluding, the dissent discounted the majority's "slippery slope" argument that a ruling for Mr. Adams would usher in a new world of "sex neutral areas and activities"²⁵⁶ in which football players would claim to "feel like a girl today" to go into girls' restrooms and attack female students.²⁵⁷ Judge Pryor again explained that Mr. Adams' entire case was based on the existence of sex-separated restrooms, not their elimination.²⁵⁸ The majority's claim that allowing a transgender student to use the sex-separated restroom that corresponds to their gender identity meant the end of those bathrooms "is simply not so."²⁵⁹ Similarly, the hypothetical questions that a gender-fluid student might present for the school district have no bearing on this case or its consideration of the bathroom policy, which "bans only transgender students—defined as those who 'consistently, persistently, and insistentlly' identify as one gender—from using the restroom that matches their gender identity By its plain terms, the policy simply does not apply to gender fluid individuals."²⁶⁰

The final paragraphs echoed Judge Wynn's concurrence on the broader context of Mr. Adams claims, stating "[o]ur law . . . recognizes a legitimate, protectible privacy interest in the practice of separating bathroom facilities by sex. But that interest is not absolute: it must coexist alongside fundamental principles of equality. Where exclusion implies inferiority, as it does here, principles of equality prevail."²⁶¹

contrary: that in fact there were no safety issues, as well as conceding that it would be safer for a transgender girl *not* to use the boys' restroom. A similar analysis was applied to the Title IX claim, which Judge Pryor would have also affirmed.

256. *Id.* at 859.

257. *Id.*

258. *Id.* at 842–43.

259. *Id.* at 860.

260. *Id.* at 859.

261. *Id.* at 860. The other dissents were more narrowly focused. *Id.* at 831 (Rosenbaum, J., dissenting) (emphasizing that the equal protection analysis "is an extremely fact-bound test" and suggested that the district's evidentiary failures in this case had no bearing on how another district might respond to a similar challenge); *id.* at 822–23 (Wilson, J., dissenting) (emphasizing—through the use of an example of intersex students (that "have physical and anatomical sex characteristics that are a mixture of those typically associated with male and female designations)—that the district's limited definition of biological sex demonstrates that its policy regarding privacy is discriminatory); *id.* at 829 (Jordan, J., dissenting) (focusing on the inconsistent and arbitrary application of the policy as shown by its reliance on enrollment documents, which is decried as, at best, "administrative convenience, and that does not satisfy intermediate scrutiny.").

X. WHAT IS TO BE LEARNED? SOME THEMES AND STRATEGIC LESSONS

*“Law cannot stand aside from the social changes around it.”*²⁶²

Justice William J. Brennan, Jr.

These complementary cases, with their similar fact patterns, timing, and often cross-referenced and overlapping citations, provide a comprehensive canvas of the legal arguments regarding discrimination against transgender youth and the prospects for their equal treatment and full inclusion in the benefits and privileges of our American society. The clear trend in these cases (and in those from other circuits) is the advancement of equal rights of transgender individuals and the evolution of the law to reflect “the social changes around it.”²⁶³ *Adams* and *Grimm* offer several key takeaways, some of which go further than access to school restrooms and apply to the broader struggle for LGBTQ rights. Collectively, these cases demonstrate that the arguments in defense of these policies are not based on the actual experiences of transgender students but rely instead on prejudice, fear-mongering, and invidious discrimination against a politically vulnerable and historically marginalized group.

A. The Privacy & Safety Myths

The school districts asserted that these exclusionary policies were necessary to protect the privacy and safety of students in school restrooms.²⁶⁴ In the abstract these proffered rationales seem reasonable; even the opinions that would strike down the policies acknowledged that maintaining student privacy and safety are important government interests.²⁶⁵ The problem, however, is that no evidence was presented in either case of any actual risk of harm to either privacy or safety by transgender students using restrooms that match their gender identity. In fact, the evidence in both cases showed the opposite. Both Mr. Adams and

262. See P. Robert Rigney, Jr., *Crime in the Fields: The Forgotten American in Michigan*, PAPER 20 NEW DIMENSIONS IN LEGIS. 83, 83 (attributing the quote “Law cannot stand aside from the social changes around it” to Justice Brennan).

263. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619–20 (4th Cir. 2020) (affirming district court’s holding that the school’s action of denying transgender students the ability to use the bathroom corresponding to the gender of which they associate violates equal protection); *Adams*, 57 F.4th at 851–53 (Pryor, J., dissenting) (holding that denying transgender students the ability to use the bathroom associated with their identified gender was unconstitutional).

264. *Adams*, 57 F.4th at 803; *Grimm*, 972 F.3d at 599, 614.

265. See, e.g., *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1297 (11th Cir. 2020); *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F. Supp. 3d 444, 460 (E.D. Va. 2019).

Mr. Grimm used the boys' restrooms at their schools for weeks without incident or complaint.²⁶⁶ When complaints were finally made to the schools, they came not from other boys who may have used the bathroom with the transgender students but from parents or female students who simply noticed Mr. Adams going into the boys' restroom.²⁶⁷ Not only did the school districts fail to present evidence about privacy or safety issues in their own schools, neither could point to such harms in any other school district, or to any evidence that such harms were more likely to be caused by transgender students.

The absence of any evidence—actual, historical, scientific, statistical, or anecdotal—made clear that the stated harms the policies claimed to address were based on prejudices and biases about transgender people. These prejudices included, most reprehensibly, that transgender individuals are sexual predators seeking access to restrooms to assault vulnerable cisgender persons.²⁶⁸ Even when not explicitly stated, the “predator myth” is reflected in arguments, like those in the *Adams en banc* opinion, that suggest that transgenderism and gender identity is not real, and that striking down the bathroom policies means that “biological” boys could, at any time, claim to be girls to gain access to girls' restrooms to engage in violent or criminal behavior.²⁶⁹

In attempting to defend the absence of actual privacy or safety issues, Judge Niemeyer explained that the real purpose behind these bathroom policies was to eliminate the “mere presence” of transgender people from any “sex-designated” spaces or activities.²⁷⁰ This argument encapsulates the social and political realities of the struggle for LGBTQ rights, and, thematically, the struggle for equal rights of all marginalized groups. Maintaining the discriminatory hierarchies that have characterized American society—racial, gender, ethnic, sexual orientation—has always

266. *Adams*, 57 F.4th at 798; *Grimm*, 972 F.3d at 598.

267. *Adams*, 57 F.4th at 840; *Grimm*, 972 F.3d at 593.

268. *Grimm*, 972 F.3d at 599.

269. The argument that gender identity is not connected or has no relevance to the determination of one's “sex,” or that it is something that people change randomly is a core tenet of anti-LGBTQ advocacy. During the confirmation hearings for Justice Ketanji Brown Jackson, Senator Ted Cruz asked a series of questions premised on this idea, saying “If I decide right now that I am a woman, then apparently I’m a woman” and “If I could change my gender . . . I can be a woman and then an hour later decide I’m not a woman anymore.” See *Jackson Confirmation Hearing Day 3 Part 3*, C-SPAN (Mar. 23, 2023), <https://www.c-span.org/video/?518343-103/jackson-confirmation-hearing-day-3-part-3#> [<https://perma.cc/B9LE-PKX3>]. This idea has also been used to justify legislation banning gender-affirming health care for minors in several states. See generally *What anti-trans bills passed in 2023?*, *supra* note 17.

270. *Grimm*, 972 F.3d at 620. The push for excluding transgender people, as well as anyone whose identity or presence is perceived as a challenge to the social dominance of cisgender, heterosexual men is reflected in dozens of new state laws banning transgender students from participating in sports or receiving gender-affirming medical care, as well as laws attempting to ban drag performances. See generally *What anti-trans bills passed in 2023?*, *supra* note 17.

depended on the exclusion, othering, and dehumanization of subordinate groups.²⁷¹ Inclusion implies acceptance and tolerance, exposes the injustices and inequities of those hierarchies, and is an essential first step to dismantling them. In this regard, the Fourth Circuit’s analogies to racial segregation are particularly resonant.

B. Manipulating the Equal Protection Framework

Because any Equal Protection claim requires a determination of whether similarly situated groups are being treated differently, the legal analysis begins with the court defining the comparator groups. This categorization is often determinative of the ultimate outcome. If a court can define the comparators differently than the party claiming discrimination, it can circumvent the alleged discriminatory treatment entirely.²⁷²

This strategy was the centerpiece of the opinions that found in favor of the school districts. The Equal Protection framing relied on by Mr. Adams and Mr. Grimm compared the disparate treatment of cisgender, “biological” boys, who could use the restroom that matched their gender identity, and transgender boys, who could not, as well as the disparate treatment of transgender students who enrolled with pre-transition documents and those who enrolled with post-transition ones.²⁷³ In contrast, the dissents of Judges Niemeyer and William Pryor, and the Eleventh Circuit *en banc* opinion, reframed the comparator groups to “biological” boys and “biological” girls and then noted that, since there were transgender students in both groups, there was no discrimination or unequal treatment of those students.²⁷⁴

This reframing took gender identity out of the analysis completely, and in doing so, not only ignored the issues with how the schools identified individual students and the impracticalities of implementing the policy (discussed below), but also allowed the claims of discrimination to be

271. See Tosin Tunrayo & Erhabor Sunday Idemudia, *Social Dominance Orientation and Outgroup Intolerance: The Role of Transcendence in Outgroup Attitude*, 43 SOC. DEV. ISSUES 45, 46 (2021) (“Motivation for outgroup tolerance has been linked to social/political attitudes that emphasize and justify group domination, societal hierarchy, and social inequality.”).

272. One illustrative example is *General Electric Company v. Gilbert*, 429 U.S. 125, 127–28, 134, 145–46 (1976). Female employees challenged the exclusion of pregnancy-related illnesses from the company’s health plan as gender discrimination. *Id.* at 127–28. The Court determined that male/female was the incorrect comparison. *See id.* at 134. The correct framing was pregnant/non-pregnant employees, and since there were women in both of those groups, the policy could not discriminate on the basis of gender. *See id.* at 145–46. Congress adopted the Pregnancy Discrimination Act of 1978 to reverse this ruling. Pregnancy Discrimination Act, Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified as 42 U.S.C. § 2000e(k)).

273. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 797–99 (11th. Cir. 2022); *Grimm*, 972 F.3d at 593, 609–10.

274. *Adams*, 57 F.4th at 808; *Grimm*, 972 F.3d at 628 (Niemeyer, J., dissenting).

reimagined as an attack on the legality of sex-separated restrooms. That is, if there were only “biological” boys and girls, and a “biological” girl (e.g. Mr. Adams and Mr. Grimm) is allowed to use the “biological” boys’ restroom, there would be no basis to maintain separate facilities at all.²⁷⁵ But as the opinions in favor of the students made clear, this is a specious argument; both lawsuits were *premised* on the existence of sex-separated bathrooms and the students’ desire to access the one consistent with their gender identities, just like cisgender boys. But by reframing the Equal Protection comparators, the pro-school board opinions were able to ignore the discriminatory treatment and concomitant harms the plaintiffs suffered.

C. The Birth Certificate Conundrum

One of the more “apolitical” arguments against the constitutionality of these policies is the arbitrariness of their reliance on the students’ birth certificates presented at enrollment. In both cases, the students were identified as female; both subsequently had their birth certificates changed through the controlling legal processes in their respective states; and both school boards refused to accept those new certificates.²⁷⁶ Both boards also conceded that if a transgender student enrolled with a birth certificate or other documents that reflected their gender identity (i.e., after transitioning), that student would be allowed to use the matching restroom.²⁷⁷

Many opinions found this inconsistent and arbitrary outcome—allowing some transgender students to use the restroom that matched their gender identity while denying that same treatment to others—fatal to the districts’ ability to satisfy intermediate scrutiny. Importantly, this analysis was reached without regard to the more contentious issue regarding the definition of “sex” because it showed that, regardless of how that term was used, the policy as implemented was divorced from the harm it purportedly addressed.

The only response to this argument is the assertion—as stated by Judge Lagoa for the *en banc* majority—that “biological” sex as determined at birth can never be changed and that gender identity or expression has no

275. Raising the specter that the expansion of gender equity will mean the elimination of sex-separated bathrooms is nothing new. In the 1970s, opponents of the Equal Rights Amendment, which would have constitutionally enshrined equal treatment for women (and said nothing about bathrooms), argued that if it passed, sex-separated bathrooms would be no more. *See, e.g.,* Neil J. Young, *How the Bathroom Wars Shaped America*, POLITICO (May 18, 2016), <https://www.politico.com/magazine/story/2016/05/2016-bathroom-bills-politics-north-carolina-lgbt-transgender-history-restrooms-era-civil-rights-213902/> [<https://perma.cc/T7YA-ZPPT>].

276. *Adams*, 57 F.4th at 796–97; *Grimm*, 972 F.3d at 593. Both Mr. Adams and Mr. Grimm also had their driver’s licenses—the most commonly used form of official government identification that indicates gender—changed as well.

277. *See, e.g.,* *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1298–99 (11th Cir. 2020); *Grimm*, 972 F. 3d at 622 (Wynn, J. concurring).

significance or meaning under the law.²⁷⁸ This extremist position not only ignores the inherent inconsistency within these policies, but it also goes against prevailing medical opinion, state laws that expressly allow transgender persons to secure legal documentation reflecting their gender identity, and other school district policies in these cases that acknowledged and accommodated transgender students, as well as the holding in *Bostock*.²⁷⁹ Instead, this argument clings to outdated, inaccurate, and misleading concepts of gender, in doing so, denies the very personhood of transgender individuals and perpetuates their marginalization.

D. The Impracticalities of Bathroom Policies

As several of the opinions pointed out, the school districts’ bathroom policies ignored some important facts about transgender students, their appearance, and the actual implications of them being forced to use the restrooms that matched their “biological” sex. Many transgender persons modify their appearance to align with their gender identity.²⁸⁰ Both Mr. Adams and Mr. Grimm undertook sex reassignment surgery and hormone therapy, and were, in all aspects, male.²⁸¹ Both testified that they used male restrooms when in public, and both also used the boys’ restrooms at their high schools for several weeks without any complaint or incident.²⁸² Their use of the girls’ restroom—as the policies demanded—would have actually created the potential privacy and safety concerns the school boards were claiming to address. However, these students “could no more easily use the girls’ restroom than a cisgender boy.”²⁸³ As a result, Mr. Adams and

278. *Adams*, 57 F.4th at 807–08.

279. The issue of updating legal documentation—driver’s licenses and birth certificates—to reflect one’s gender identity is likely to take on new prominence in light of these cases and the wave of anti-transgender state legislation that has been adopted since the *Adams* ruling. In September 2023, Kansas joined Tennessee, Montana, Oklahoma, and North Dakota in prohibiting residents from changing the gender on their birth certificates. See generally *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (current as of Nov. 29, 2023), https://www.mapresearch.org/equality-maps/identity_document_laws [<https://perma.cc/63LB-XYD9>].

280. See *Understanding Transgender People, Gender, Identity and Gender Expression*, AM. PSYCH. ASS’N. (June 6, 2023), <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression> [<https://perma.cc/M2H3-NCXK>] (“Gender identity refers to a person’s internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics.”).

281. *Adams*, 57 F.4th at 798; *Adams*, 57 F.4th at 835 (Pryor, J., dissenting); *Grimm*, 972 F.3d at 593, 600–01.

282. *Adams*, 57 F.4th at 798; *Grimm*, 972 F.3d at 598.

283. See *Grimm*, 972 F.3d at 624 (Wynn, J., concurring). The point was expressly conceded in *Adams*, where the school district who led the taskforce to create the policy admitted that “it would be ‘more comfortable and safe with all parties involved’ if that transgender girl did not use the boys’ restroom.” *Adams*, 57 F.4th at 854 (Pryor, J., dissenting).

Mr. Grimm were consigned to the single-stall facilities only, with the attendant humiliation, embarrassment, isolation, and physical harm that this discriminatory treatment imposed upon them.²⁸⁴

The failure to consider these realities further revealed that these policies were not based on any legitimate concerns about the privacy or safety of students, but on hypothetical fears, stereotypes, and prejudice. It also demonstrated a willful ignorance of the lived experience of transgender people, which is itself the foreseeable product of their discriminatory treatment and exclusion from the social community. The power of these opinions—including the adverse *en banc* ruling in *Adams*—is how they expose this injustice and force school districts to meaningfully address it.

CONCLUSION

Both the majority and concurring opinions in *Grimm* analogize the discriminatory treatment Mr. Grimm and other transgender people suffer to the country's legacy of racial segregation and to the actual psychological and physical harms it imposed on those excluded.²⁸⁵ This analogy is appropriate to contextualize the significance of this unconstitutional treatment, but also to frame the reactionary political response to court decisions remedying that treatment. In the wake of the Court's ruling in *Brown*, state legislatures engaged in a campaign of massive resistance, passing dozens of laws to thwart or circumvent their constitutional obligation to integrate public schools.²⁸⁶ Similarly, in the wake of *Bostock* and several Court of Appeals decisions recognizing the rights of transgender students, eighty-five anti-transgender laws have passed in twenty-three states in 2023 alone.²⁸⁷ This legislative backlash re-emphasizes the judiciary's critical role in protecting the rights of the marginalized "separate from the vicissitudes of political controversy."²⁸⁸

Although an outlier, the *Adams* ruling creates a split in the circuits that may compel the Court to revisit the issue of transgender rights, particularly as related to schools and the scope of Title IX. The need for more clarity will be even more urgent as new challenges to anti-transgender legislation regarding access to healthcare, school curriculum, and participation in sports are litigated. The outcome will depend on whether the Supreme Court will view these cases as limited questions of statutory language, or as the next front in the country's long struggle to fulfill its

284. *Adams*, 57 F.4th at 832 (Pryor, J., dissenting); *Grimm*, 972 F.3d at 598.

285. *Grimm*, 972 F.3d at 609; *id.* at 624–25 (Wynn, J., concurring); *id.* at 636 (Niemeyer, J., dissenting).

286. See *Aftermath of Brown v. Board of Education*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/aftermath-of-brown-v-board-of-education> [<https://perma.cc/5MPU-WJF7>].

287. See *What anti-trans bills passed in 2023?*, *supra* note 17.

288. *Grimm*, 972 F.3d at 627 (Wynn, J., concurring) (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

commitment to equality and inclusion. Given the Court’s refusal to accept certiorari in *Grimm* and allow the Fourth Circuit’s powerful and eloquent defense of LGBTQ rights to stand; its forward looking and progressive opinion in *Bostock*; and its statement in *Obergefell* “that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged,”²⁸⁹ the interests of justice demand that the Court issue a compelling ruling in defense of transgender rights, ideally by recognizing, as the *Grimm* majority and Judge Jill Pryor’s dissent did, that transgender people constitute a quasi-suspect class.

289. *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015).