Table of Contents

I. INTRODUCTION .................................................................................................................. 242

II. THE BACKGROUND AND CURRENT STATUS OF GLOUCESTER COUNTY SCHOOL BOARD V. GRIMM ................................................................. 244

III. THE BACKGROUND AND CURRENT STATUS OF WHITAKER V. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION 249

IV. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, THE FOURTH CIRCUIT, AND THE SUPREME COURT SHOULD RULE IN FAVOR OF THE TRANSGENDER STUDENT IN GLOUCESTER COUNTY SCHOOL BOARD V. GRIMM ........................................ 253
   A. THE CASE IS NOT MOOT ................................................................................................. 254
   B. GAVIN’S EQUAL PROTECTION AND TITLE IX RIGHTS WERE VIOLATED BY HIS SCHOOL ............................................................................................................. 257
      i. The Equal Protection Clause of the Fourteenth Amendment Protects Gavin Grimm and Other Transgender Individuals .................................................... 257
      ii. Title IX Protects Gavin Grimm and Other Transgender Individuals 272

V. CONCLUSION ...................................................................................................................... 273

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

-Fourteenth Amendment to the United States Constitution, Section 1

No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.

- Title IX of the Education Amendments of 1972

* Catherine Jean Archibald is an Assistant Professor of Law at the University of Detroit Mercy School of Law. She received an A.B. from Princeton University in 2000, a J.D. from Michigan State University College of Law in 2007, and an LL.B. from the University of Ottawa Faculty of Law in 2008. The author is grateful for the support and comments from Professors Erin Archerd, Cara Cunningham Warren, Patrick Meyer, and Julie St. John.


A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex . . .

- Implementing regulation of Title IX of the Education Amendments of 1972 at 34 C.F.R. § 106.33


ABSTRACT

On May 13, 2016, the Obama Administration issued a guidance document entitled “Dear Colleague Letter on Transgender Students,” which interpreted federal law as requiring that transgender students be permitted to use bathrooms that correspond with their gender identity in schools receiving federal funding. Considerable litigation ensued. Less than a year later, on February 22, 2017, the Trump Administration rescinded this guidance document. The Trump Administration asserts that it should be up to individual states to decide what bathrooms transgender children may use in schools.

This article addresses where transgender bathroom rights stand now that Obama’s Dear Colleague Letter has been rescinded, as well as what the decision of the Supreme Court should be in the pending transgender bathroom case, Gloucester County School Board v. Grimm. This Article concludes that, even though the student in the case has now graduated, the Fourth Circuit and the Supreme Court should issue a decision in the Gloucester County School Board case, and should hold that federal law requires that transgender students have access to bathrooms that correspond to their gender identity.

I. INTRODUCTION

Under Title IX, schools receiving federal funding may not discriminate against any “person . . . on the basis of sex.”\(^1\) However, Title IX does permit sex segregated “living quarters,”\(^2\) and the regulations issued pursuant to Title IX permit sex segregated bathrooms, locker rooms, and changing areas.\(^3\) Last year, in May 2016, the Federal Government, led by President Obama, issued a guidance document that interpreted Title IX to require that students with a male gender identity be allowed to use the men’s bathrooms, and that students with a female gender identity be allowed to use women’s bathrooms.\(^4\) This treatment

\(^3\) 34 C.F.R. § 106.33 (1994).
\(^4\) Catherine E. Lhamon & Vanita Gupta, Dear Colleague Letter on Transgender Students, U. S. Dep’t of Justice & Dep’t of Educ. (May 13,
of transgender students accords with the most recent recommendations from medical and psychiatric experts.\(^5\)

However, less than a year later, the Federal Government, led by President Trump, rescinded this interpretation of Title IX and its regulations.\(^6\) This article examines the pending Supreme Court case of *Gloucester County School Board v. Grimm*, and concludes that the Supreme Court should rule in favor of the transgender student under the Fourteenth Amendment to the United States Constitution and under Title IX. Part I of this article discusses the background and current status of the *Gloucester County School Board v. Grimm* case. Part II discusses the recent Seventh Circuit decision in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*\(^7\). Part III shows how the United States District Court for the Eastern District of Virginia, the Fourth Circuit, and the Supreme Court should decide the *Gloucester* case similarly to the decision in the *Whitaker* case, and find that schools receiving federal funding must allow transgender students to use bathrooms that correspond to the gender with which they identify. This article concludes that when the Supreme Court does decide the transgender bathroom issue, it should find that both Title IX and the Fourteenth Amendment to the United States Constitution require schools receiving federal funding to permit transgender students access to the bathrooms that match their gender identity.

---


\(^7\) *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).
II. THE BACKGROUND AND CURRENT STATUS OF GLOUCESTER COUNTY SCHOOL BOARD V. GRIMM.

In June 2015, Gavin Grimm (referred to as “G.G.” in all court documents prior to May 24, 20178), a 16-year-old student at Gloucester High School, brought a lawsuit in federal court in Virginia, alleging that his public school, Gloucester High School, refused to allow him access to the boys’ bathroom at school, in violation of Title IX and the Fourteenth Amendment.9 Gavin is a transgender boy, which means that “he was designated female at birth but he has a male gender identity.”10 Transgender individuals are individuals who identify as a gender different from the sex assigned at birth.11

Gavin and his mother informed his school shortly before his sophomore year began that he was transgender and that he wished to be treated as a boy in all respects.12 His school was initially supportive and allowed him to use the boys’ restroom, which he did for seven weeks without incident.13 However, due to complaints by some community members, the Gloucester County School Board passed a policy in December of Gavin’s sophomore year, which denied transgender students access to bathrooms matching their gender identity, and required all students to use bathrooms that corresponded to their “biological genders.”14 The policy provided that students with “gender identity issues” could use “an alternative appropriate private facility.”15

---

10 Complaint, supra note 9, at 1.
12 Id.
13 Id. at 2.
14 Id. at 2.
15 Id.
In his complaint, Gavin alleged that he was the only student who had to use a separate private restroom, and that it is stigmatizing to have to use a separate private restroom when all other students can use the multi-stall community bathrooms that are consistent with their gender identity.\(^{16}\) Gavin alleged that as a result of the stigma associated with using the private restroom he tried to avoid using any bathroom while at school.\(^{17}\) As a result of trying to avoid using the restroom, he tried to limit his fluid intake and to “hold it” when he needed to urinate.\(^{18}\) As a result, Gavin developed multiple urinary tract infections.\(^{19}\) Gavin’s complaint alleged violations of both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972.\(^{20}\) His complaint asked for preliminary and permanent injunctions requiring his school to allow him to use the boys’ bathrooms.\(^{21}\)

The District Court found for the school board, reasoning that the regulations under Title IX “clearly allow[s] the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex.”\(^{22}\) The regulation cited by the District Court can be found at 34 C.F.R. § 106.33, and provides that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex.”\(^{23}\) The District Court also reasoned that the Federal Government’s interpretation of Title IX and its regulations should not be deferred to.\(^{24}\) The Federal Government had issued an opinion letter a few months prior,\(^{25}\) interpreting Title IX and its regulations as requiring that schools allow transgender students to use the bathrooms that match their gender.

\(^{16}\) Id. at 2, 11.
\(^{17}\) Id. at 2.
\(^{18}\) Id. at 11.
\(^{19}\) Id.
\(^{20}\) Id. at 2.
\(^{21}\) Id. at 15.
\(^{23}\) 34 C.F.R. § 106.33 (1994).
\(^{25}\) This opinion letter was written by the United States Department of Education Office for Civil Rights and was issued a few months prior to the Dear Colleague Letter, but was consistent with the Dear Colleague Letter and how the federal government had been interpreting Title IX for several years. See Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec’y for Policy, Office for Civil Rights, U.S. Dep’t of Educ., to Emily T. Prince (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf; see also Catherine Jean Archibald, Transgender Bathroom Rights, 24 DUKE J. GENDER L. & POL’Y 1, 4–5 (2016) (discussing actions of the federal government taken pursuant to Title IX).
identity. The District Court reasoned that the Federal Government’s interpretation was “clearly erroneous” because the regulations allowing schools to provide separate bathrooms “on the basis of sex” could not mean “on the basis of gender identity.”

Gavin appealed to the United States Circuit Court of Appeals for the Fourth Circuit. The Fourth Circuit Court of Appeals reversed, finding that the Federal Government’s interpretation of Title IX and its regulations were reasonable and must be deferred to. The Fourth Circuit reasoned that Title IX and its regulations were silent as to which bathrooms transgender students should use. The Fourth Circuit reasoned that since it was unclear how schools should determine whether a transgender student was male or female in determining access to sex-segregated bathrooms, the Federal Government’s interpretation of Title IX and its regulations reasonably clarified an ambiguity in Title IX and its regulations, and should be deferred to. The Fourth Circuit remanded to the District Court for a decision on the request for a preliminary injunction consistent with its decision. The District Court entered an order for a preliminary injunction, requiring the school to allow transgender students to use the bathrooms that match their gender identity.

---

28 *Id.* at 720.
29 *Id.* at 723.
30 *Id.*
Gloucester County School Board appealed the case to the Supreme Court, and the Supreme Court granted certiorari in the case on October 28, 2016.\(^{35}\) Oral argument was set for March 28, 2017.\(^{36}\) The Trump Administration rescinded the guidance on February 22, 2017.\(^{37}\) Following the Trump Administration’s rescission of the Obama Administration’s guidance document, on March 6, 2017, the Supreme Court vacated the Fourth Circuit’s decision and remanded the case back to the Fourth Circuit for reconsideration in light of the Trump Administration’s action.\(^{38}\) On March 8, 2017, Gavin made a motion for expedited briefing and oral argument so that the Fourth Circuit could issue a decision before his graduation from high school on June 10, 2017.\(^{39}\) On April 7, 2017, the Fourth Circuit vacated the preliminary injunction issued by the district court,\(^{40}\) and denied the plaintiff-appellant’s motion for expedited briefing and oral argument.\(^{41}\) Oral argument in the Fourth Circuit was scheduled for September 2017.\(^{42}\) Gavin argued that he is still subject to the Board’s policy “whenever on school grounds as a guest at homecoming or prom and while attending alumni activities, football games, and other community events.”\(^{43}\) The Gloucester County School Board argued that the case may be moot because it is unclear whether Title IX applies to non-educational events with non-students, and it is unclear whether the Board’s policy on bathroom use applies to non-students.\(^{44}\) However, on August 2, 2017, the Fourth Circuit remanded the case down to the District Court to


\(^{37}\) 2017 Dear Colleague Letter, supra note 6.


determine “whether this case has become moot[,]”\(^45\) and removed the case from the oral argument calendar.\(^46\)

Gavin then filed an Amended Complaint in the District Court.\(^47\) The Amended Complaint, alleges that “[a]s an alumnus with close ties to the community, Gavin will continue to be on school grounds when attending football games, alumni activities, or social event with friends who are still in high school.”\(^48\) The Amended Complaint alleges violations of the Fourteenth Amendment to the United States Constitution and Title IX, and asks for: 1) a declaration that the school’s policy violated Gavin’s rights while he was a student; 2) nominal damages; 3) a declaration that the school’s policy continues to violate Gavin’s rights; and 4) a permanent injunction allowing Gavin to use “the same restrooms as other male alumni” of the school.\(^49\)

On September 22, 2017, the Gloucester County School Board filed a motion to dismiss the case, on the grounds that the Equal Protection Clause and Title IX do not require schools to allow transgender students access to bathrooms corresponding to their gender identity, and that since Gavin has graduated from the school, no controversy exists as he is no longer subject to the school’s policy.\(^50\) On October 26, 2017, the district court ordered the parties to provide supplemental briefing on the issue of mootness, and to address such questions as “[w]hether Plaintiff intends to visit Gloucester High School as an alumnus” and “[w]hether, if Plaintiff visits and uses Gloucester High School’s bathrooms, what policies, if any, apply to him, and how such policies would be enforced.”\(^51\) The court noted that “[d]iscovery may be useful to develop the factual record upon which the mootness issue will be resolved.”\(^52\) However, only a few days later, Gavin filed a “Notice of Consent,” voluntarily agreeing to dismiss the requests in his Amended Complaint asking for a declaration that the school’s policy continues to violate his rights, and asking for a permanent injunction

\(^48\) Id. at 14.
\(^49\) Id. at 17.
\(^52\) Id. at 5.
allowing him to use the male bathrooms at his former school. The Notice of Consent explains that the request for "a permanent injunction and prospective declaratory judgment" are being voluntarily dismissed because

[c]ontinuing to pursue [these] claims . . . would require the parties and the Court to expend time and resources resolving factual questions that would delay and distract from the central legal question of whether Defendant violated Gavin’s rights under Title IX and the Fourteenth Amendment while he was a student at Gloucester High School.

On the same date, Gavin asked the court to vacate its order requiring supplemental briefing on the mootness issue. Gavin argued that because he was no longer seeking relief for current actions of the school, but only for past actions of the school, no mootness issue remained. Whichever way the district court decides on the mootness issue or on the merits of the case, it is likely that the losing party will appeal the case to the Fourth Circuit. Whichever way the Fourth Circuit may decide, it is likely that the losing party will seek to appeal the case back to the United States Supreme Court. If the Supreme Court decides to take the case, it has another Circuit Court of Appeal decision on the transgender bathroom issue to consider, that of *Whitaker v. Kenosha Unified School District No. 1*.  

### III. The Background and Current Status of Whitaker v. Kenosha Unified School District No. 1 Board of Education

In March 2017, the Supreme Court sent the *Gloucester School Board v. Grimm* case back down to the Fourth Circuit Court of Appeals. Shortly afterwards, a different Federal Court of Appeals decided a transgender bathroom case in favor of the transgender
In May 2017, in the case of *Whitaker v. Kenosha Unified School District No. 1*, the United States Court of Appeals for the Seventh Circuit upheld a preliminary injunction issued by the United States District Court for the Eastern District of Wisconsin, that required the Kenosha Unified School District to allow a transgender boy, Ashton Whitaker, “Ash,” access to the boys’ bathrooms at school. Ash came out as transgender to his parents in eighth grade. When he began high school he publicly identified as a boy and began using the name Ashton.

During his sophomore year, Ash was informed that the school administration had decided that he could only use the girls’ bathroom, or a unisex bathroom in the main office. Because the unisex bathroom was far from his classrooms and he believed being the only student to use the unisex bathroom would draw unwanted attention to his transgender status, and because he was not comfortable using the girls’ bathroom as he identified as a boy, Ash began limiting his intake of fluids and avoiding using any bathroom. This aggravated a pre-existing medical condition, and caused him to experience dizziness and fainting. When needed, Ash used the boys’ bathroom, but was pulled out of class several times by school administrators who admonished him for using the boys’ bathroom, and reminded him that the only bathrooms he was permitted to use were the girls’ bathrooms and the unisex bathroom. As a result of his school’s unwritten policy, Ash worried about being disciplined and how that would affect his college applications; he experienced anxiety, depression, and even contemplated suicide.

Ash brought a case before the United States District Court for the Eastern District of Wisconsin, and argued in his compliant that his school was violating both Title IX and the Fourteenth Amendment, by not allowing him to use the bathrooms that correspond to his gender identity. Just after the start of his senior year at high school, the District Court granted his request for a preliminary injunction and required his school to allow him to use the boys’ bathrooms, forbade his

---

59 *Whitaker*, 858 F.3d at 1034.
60 *Id.* at 1039.
61 *Id.* at 1040.
62 *Id.*
63 *Id.*
64 *Id.* at 1041.
65 *Id.*
66 *Id.*
67 *Id.* at 1040–41.
school for disciplining him for using the boys’ bathrooms, and forbade his school from monitoring his bathroom use in any way.69 Ash felt a huge sense of relief and used the boys’ bathrooms at school without incident for the rest of his senior year at high school.70 Just a few days before he finished high school, the Seventh Circuit Court of Appeals upheld the District Court’s grant of a preliminary injunction.71

In deciding that a preliminary injunction was warranted in this situation, the Seventh Circuit examined four factors: 1) the likelihood of irreparable harm to Ash if the preliminary injunction was not granted; 2) the lack of ability of money damages to compensate for the harm Ash would suffer if the preliminary injunction was not granted; 3) the likelihood that Ash would win this case on the merits; and 4) the balance of harm to Ash if the injunction was not issued versus the harm to the public and the school district if the injunction was issued.72

On the first factor, the Seventh Circuit noted that the District Court’s finding that Ash would suffer irreparable harm was well supported by the evidence, which included expert opinions that not permitting Ash to use the boys’ restrooms would undermine his gender transition and significantly negatively impact “his mental health and overall well-being.”73 The expert psychologist’s opinion was that the school’s bathroom policy singled out Ash as different and put him at risk for serious psychological distress and “at risk for experiencing life-long diminished well-being and life-functioning.”74

On the second factor, the Seventh Circuit upheld the District Court’s finding that monetary damages at the end of litigation could not adequately compensate the potential harm that Ash would face were he not awarded a preliminary injunction, because money would not be adequate to compensate for Ash’s potential suicide or “life-long diminished well-being and life-functioning.”75

On the third factor, the Seventh Circuit found that Ash had “established a probability of success on the merits of his Title IX claim”

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017).
71 Id.; Whitaker, 858 F.3d at 1039.
72 Whitaker, 858 F.3d at 1044.
73 Id. at 1045.
74 Id.
75 Id. at 1046.
because his school’s policy of requiring him to use a bathroom that he did not identify with “punishe[d] him for his . . . gender non-conformance”76 which is prohibited by Title IX because the sex discrimination forbidden by Title IX includes discrimination “based on a failure to conform to stereotypical gender norms.”77

Also on the third factor, the Seventh Circuit addressed Ash’s Equal Protection claim and found that he had shown likely success on this claim.78 The court reasoned that the school’s bathroom policy was based on sex because the policy “cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate.”79 Because classifications based on sex are subjected to heightened scrutiny under the Equal Protection Clause and can only be upheld if the government actor (here, the public school) shows an “exceedingly persuasive” justification, the court examined the school’s justifications, and found them unpersuasive.80

Addressing the school’s argument that Ash’s use of the boys’ bathroom interfered with other boys’ privacy interests, the court noted that the record contained no evidence that any student had complained about Ash’s bathroom use.81 Further, the court noted that the school’s policy “does nothing to protect the privacy rights of each individual student vis-à-vis students who share similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door.”82 The court also reasoned that “[c]ommon sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.”83

Finally, the court reasoned if the school’s interest was to have separate bathrooms for children who did not look anatomically the same, then it would have had separate bathrooms for pre-pubescent and post-pubescent children, who also do not look anatomically the same.84 Finding all the school’s justifications for its bathroom policy

76 Id. at 1048–50.
77 Id. (quoting Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989))).
78 Whitaker, 858 F.3d at 1050–51.
79 Id. at 1051.
80 Id. at 1052 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
81 Id.
82 Id. at 1052.
83 Id.
84 Id. at 1052–53.
unpersuasive, the Seventh Circuit found that Ash had shown a likelihood of success on his Equal Protection claim.\footnote{Id. at 1054.}

Finally, on factor four of the preliminary injunction test, the Seventh Circuit upheld the District Court’s determination that granting a preliminary injunction was the correct decision when looking at the balance of harms to Ash, the school district, and the public.\footnote{Id. at 1054–55.} The court reasoned that Ash had used the boys’ bathrooms at school for six months without any complaints by students that they felt their privacy had been infringed.\footnote{Id. at 1054.} The court also noted that the \textit{amici} statements of school administrators from 21 states and the District of Columbia that had implemented school bathroom policies allowing transgender students to use bathrooms that matched their gender identity had experienced no harm from doing so.\footnote{Id. at 1054–55.}

Thus, having examined all four preliminary injunction factors and finding that Ash showed a likelihood of irreparable harm if the preliminary injunction was not ordered, finding that monetary damages after the fact would not adequately compensate Ash for his injuries if the preliminary injunction was not issued, finding that Ash had shown a likelihood of success on his Title IX and Equal Protection Claims, and finding that in looking at the balance of the harms to the parties and the public, preliminary injunction was warranted, the Seventh Circuit upheld the District Court’s award of a preliminary injunction to Ash.\footnote{Id. at 1055.} The United States District Court for the Eastern District of Virginia, the Fourth Circuit, and the Supreme Court, should it decide to take the case, should decide Gavin Grimm’s case similarly to the Seventh Circuit’s decision in \textit{Whitaker}.

\textbf{IV. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, THE FOURTH CIRCUIT, AND THE SUPREME COURT SHOULD RULE IN FAVOR OF THE TRANSGENDER STUDENT IN GLOUCESTER COUNTY SCHOOL BOARD V. GRIMM.}

Gavin Grimm’s case is almost identical to Ashton Whitaker’s, with the difference being that the United States District Court for the Eastern District of Virginia and the Fourth Circuit will make their upcoming decisions after Gavin has graduated high school, whereas the Seventh Circuit made its decision while Ashton was still a high school student.
However, as discussed below, the United States District Court for the Eastern District of Virginia, the Fourth Circuit, and the Supreme Court should decide the case in Gavin’s favor because: 1) his case is not moot; and 2) Gavin’s Equal Protection and Title IX rights were violated by his school.

A. The Case is Not Moot

Although Gavin Grimm graduated on June 10, 2017, the United States District Court for the Eastern District of Virginia, the Fourth Circuit, and the Supreme Court should hear and decide his case as the case is not moot. Under Article III of the United States Constitution, federal courts have jurisdiction over various types of “cases” and “controversies.” Federal courts have interpreted this case-or-controversy requirement to mean that both parties must demonstrate a “personal stake” in the case. A case becomes moot when one or both parties “lack a legally cognizable interest in the outcome” of the case. Additionally, the Supreme Court has made it clear that the requirements for a case becoming moot are stricter than the requirements for a party to have standing to bring a case in the first place. This is because while the “[s]tanding doctrine ensures . . . that the resources of the federal courts are devoted to disputes in which the parties have a concrete stake . . . by the time mootness is an issue, abandonment of the case may prove more wasteful than frugal.” This principle applies “particularly in a case that has been litigated up to [the Supreme] Court and back down again . . . mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.” Thus, although mootness may be found if a party clearly has no interest in the litigation, so long as the court can make a ruling that will “affect the rights of [the] litigants” before it, the case is not moot.

---

90 U.S. CONST. art. III, § 2.
94 Id.
Put another way, “as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” In addition, a party may claim nominal damages on the basis of a past constitutional deprivation. Thus, even when a student’s claim for injunctive relief is mooted by a student’s graduation, a claim for damages based on a past violation of a constitutional right will keep the case alive.

A student’s claims for injunctive and declaratory relief from her school will be mooted by her graduation if she will not suffer similar harm in the position of an alumnus as she alleges she suffered as a student. However, her claim for damages caused by the past alleged violation of her rights will not be moot.

In Mellen v. Bunting, students at the Virginia Military Institute sued the superintendent of their school, alleging that the supper prayer they were forced to sit through before eating dinner was unconstitutional because it was in violation of the Establishment Clause of the First Amendment. The students asked for declaratory, injunctive, and damage relief. Because the students had graduated and no longer had to sit through the supper prayers by the time the case reached it, the United States Court of Appeals for the Fourth Circuit found that the plaintiffs’ injunctive and declaratory relief claims were moot, but not their claim for damages. Thus, the court

---

99 See, e.g., Univ. of Tex. v. Camenisch, 451 U.S. 390, 393–94 (1981); Fox v. Bd. of Trs. of the State Univ., 42 F.3d 135, 141 (2d Cir. 1994) (stating that “relief in the form of damages for a past violation of . . . constitutional rights is not adversely affected by [a student’s graduation].”)
101 Mellen, 327 F.3d at 365.
102 Id. at 363.
103 Id.
104 Id. at 364–65.
reached the First Amendment claim, and found that the supper prayer was unconstitutional.\textsuperscript{105}

A child’s claim for nominal damages due to a school’s constitutional violation will not be mooted by the child leaving the school.\textsuperscript{106} In \textit{American Humanist Association v. Greenville County School District}, plaintiffs were students and parents challenging as unconstitutional several religious practices and policies of the students’ schools, such as holding school events in religious venues.\textsuperscript{107} During the litigation, the students and parents moved to a different state and so no longer attended the schools in question.\textsuperscript{108} The Fourth Circuit held that the claim for nominal damages was not moot as the plaintiffs’ claimed injury was due to past constitutional violations that the court could compensate with an award of nominal damages.\textsuperscript{109}

If a student fails to make a request for damages in her complaint, a court will not “read a damages claim into” a request for damages when deciding that that case is moot.\textsuperscript{110} In \textit{Fox v. Board of Trustees of The State University of New York}, some students sued their university, alleging that the university’s policy of prohibiting sales demonstrations in student rooms violated their constitutional free speech rights.\textsuperscript{111} During the adjudication of the case, the students graduated from the university.\textsuperscript{112} In ruling that the case was moot, the court reasoned that because the students’ complaint only asked for declaratory and injunctive relief, and did not ask for damages, the students lacked a “cognizable interest” in any requested relief.\textsuperscript{113}

In contrast to the plaintiffs in \textit{Fox}, but similar to the plaintiffs in \textit{Mellon} and \textit{American Humanist Association}, Gavin made a claim for damages in his complaint\textsuperscript{114} and in his amended complaint.\textsuperscript{115}

Therefore, the United States District Court for the Eastern District of

\textsuperscript{105} \textit{Id.} at 375–76. Nonetheless, the defendant was not required to pay damages due to being immune under the doctrine of qualified immunity, a doctrine not at issue in the \textit{Grimm v. Gloucester County School Board} case. \textit{See id.} at 376–77.

\textsuperscript{106} \textit{Am. Humanist Assn. v. Greenville Cty. Sch. Dist.}, 652 F. App’x 224, 228 (4th Cir. 2016) (unpublished).

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{See Fox v. Bd. of Trs. of the State Univ.}, 42 F.3d 135, 141 (2d Cir. 1994).

\textsuperscript{111} \textit{Id.} at 137.

\textsuperscript{112} \textit{Id.} at 139.

\textsuperscript{113} \textit{Id.} at 140 (quoting Cty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)).

\textsuperscript{114} \textit{Complaint, supra} note 9, at 15.

\textsuperscript{115} \textit{Amended Complaint, supra} note 47, at 17.
Virginia and the Fourth Circuit should find that Gavin’s claim for damages based on past violations of his rights is not moot.

B. Gavin’s Equal Protection and Title IX Rights Were Violated by His School

Gavin has strong claims of discrimination both under the Fourteenth Amendment of the United States Constitution and under Title IX, and, as the Seventh Circuit found in *Whitaker*,116 he is likely to succeed on both claims.

i. The Equal Protection Clause of the Fourteenth Amendment Protects Gavin Grimm and Other Transgender Individuals

The Equal Protection Clause of the Fourteenth Amendment requires that Gavin Grimm and other transgender individuals be permitted to use bathrooms that correspond to their gender identities. The Equal Protection Clause of the Fourteenth Amendment provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”117 The Supreme Court has held that this clause means that for most unequal treatment, government discrimination will be upheld so long as the government can meet a “rational basis” test.118 This rational basis test requires only that the government be able to show a rational link to a “legitimate” governmental interest.119 However, for certain suspect or quasi-suspect classifications, the government must meet a higher, heightened scrutiny standard before its discrimination will be upheld.120

For suspect classifications, such as those based on race, national origin, and alienage, the government must meet the most demanding test, the strict scrutiny test, before its classification will be upheld by a court.121 To pass this test, the government must show that its classification is narrowly tailored to meet a compelling governmental

117 U.S. CONST. amend. XIV, § 1.
119 See *New Orleans v. Dukes*, 427 U.S. 297 (1976) (stating that non-suspect classifications must only “be rationally related to a legitimate state interest.”); *Ry. Express Agency*, 336 U.S. at 110 (establishing that a classification in the law must have a “relation to the purpose for which it was made”).
interest.\footnote{See Adarand Constructors, 528 U.S. at 227.} For quasi-suspect classifications, such as sex or illegitimacy, an intermediate scrutiny test applies.\footnote{Craig v. Boren, 429 U.S. 190, 197 (1976); see also Lalli v. Lalli, 439 U.S. 259, 265 (1978).} In order for a court to uphold a government classification under the intermediate scrutiny test, the government must show that its classification is “substantially related” to “important governmental objectives”\footnote{Craig, 429 U.S. at 197.} The Supreme Court has held that under the intermediate scrutiny test, the government has the burden of showing “an exceedingly persuasive justification” for the discrimination.\footnote{Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 273 (1979); see also United States v. Virginia, 518 U.S. 515, 533–534 (1996) (finding a violation of the Fourteenth Amendment because no “exceedingly persuasive justification” for excluding women from the Virginia Military Institute) (internal quotation omitted).}

Bathroom policies that require people to use bathrooms that correspond with the sex they were assigned at birth discriminate against transgender people because under such policies, transgender people are not permitted to use bathrooms that correspond to their gender identity, whereas non-transgender people are permitted to use bathrooms that correspond to their gender identity. This discrimination should be judged with heightened scrutiny for two independent reasons: 1) discrimination against transgender individuals should be judged with heightened scrutiny; and 2) discrimination against transgender individuals is sex discrimination and sex discrimination must be judged with heightened scrutiny.\footnote{Craig, 429 U.S. at 218.} Judged with heightened scrutiny, transgender bathroom restrictions should be found in violation of the Fourteenth Amendment.

a. Discrimination Against Transgender Individuals Should Be Judged with Heightened Scrutiny

Discrimination against transgender individuals should be judged with heightened scrutiny. In order to decide whether discrimination against a particular group should be judged with heightened scrutiny (either strict or intermediate scrutiny), courts look at: 1) whether the group has suffered from historic discrimination;\footnote{See, e.g., Bowen v. Gilliard, 483 U.S. 587, 602 (1987).} 2) whether the characteristic of the group is related to ability to perform or contribute

\footnote{See, e.g., Bowen v. Gilliard, 483 U.S. 587, 602 (1987).}
to society;\textsuperscript{128} 3) whether the characteristic of the group is “obvious, immutable, or distinguishing;”\textsuperscript{129} and 4) whether the group is politically weak.\textsuperscript{130}

All four factors weigh in favor of applying heightened scrutiny to transgender discrimination because: 1) transgender individuals have suffered and continue to suffer terrible discrimination in our society; 2) transgender status is unrelated to the ability to perform in or contribute to our society; 3) transgender status is an obvious, immutable, or distinguishing characteristic that defines a discrete group, and in any event, is not a characteristic that a person should have to change in order to be treated equally in society; and 4) transgender individuals are a small minority of the overall population, and thus are politically weak. Thus, examining these four factors, it is clear that discrimination against transgender individuals should be judged with heightened scrutiny, as several courts have already determined,\textsuperscript{131} including the United States District Court for the District of Columbia in the recent case of Doe 1 v. Trump, where the Court blocked President Trump’s attempted ban of transgender individuals in the military.\textsuperscript{132}

Transgender individuals have suffered and continue to suffer from historic discrimination.

As several courts have recognized, transgender individuals have experienced and are experiencing discrimination at alarming rates.\textsuperscript{133}

\textsuperscript{129} Bowen, 483 U.S. 587, 602 (1987).
\textsuperscript{130} Id.
Discrimination is widespread in family homes, employment, housing, healthcare access and public accommodations.\(^{134}\) According to a recent survey done by the National Center for Transgender Equality, approximately one in ten transgender individuals have been physically assaulted in the past year because they are transgender, and more than three quarters of transgender children out at school have been mistreated at school because of their transgender status.\(^{135}\)

Being transgender is unrelated to the ability to perform or contribute to society.

The Ninth Circuit stated in *United States v. De Gross*, that “[g]ender bears no relationship to an individual’s ability to perform or contribute to society.”\(^{136}\) Similarly, another court notes “there is obviously no relationship between transgender status and the ability to contribute to society.”\(^{137}\) Additionally, the psychological profession recognizes that there is no inherent detriment to functioning in society by virtue of being transgender.\(^{138}\) Transgender people function in all parts of society: they are elite athletes, members of the military, and politicians, among other things.\(^{139}\)

---


\(^{135}\) 2015 Transgender Survey, supra note 133, at 4, 45.

\(^{136}\) United States v. De Gross, 960 F.2d 1433, 1439 (9th Cir. 1992).


Being transgender is “obvious, immutable, or distinguishing,” and in any event is an extremely personal characteristic that a person should not have to change.

Being transgender is an “immutable, obvious, or distinguishing characteristic”\textsuperscript{140} that often results in discrimination when the characteristic is noticed or discovered by others.\textsuperscript{141} What matters for this factor is whether there is a distinguishing characteristic that: 1) defines the group, and; 2) often results in discrimination once others learn that an individual has the characteristic.\textsuperscript{142} Being transgender certainly fulfills both requirements. As one court notes “transgender people often face backlash in everyday life when their status is discovered,” for example when presenting government documents in order to assert legal rights, and whenever the gender listed on the government document is different than the gender identity of the individual.\textsuperscript{143} Additionally, people should not have to identify with a particular sex in order to receive equal protection under the law.\textsuperscript{144}

Transgender individuals make up a small proportion of the overall population and thus are politically weak.

The most recent estimate is that less than one percent of the United States population is transgender.\textsuperscript{145} As about one in 170 adults in the United States identifies as transgender, for a total of 1.4 million

\textsuperscript{140} Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (quoting Windsor v. United States, 699 F.3d 169 (2d Cir. 2012)).
\textsuperscript{141} See Adkins, 143 F. Supp. 3d at 139.
\textsuperscript{143} Adkins, 143 F. Supp. 3d at 140.
\textsuperscript{144} See Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (finding that “the immutability prong of the suspectness inquiry surely is satisfied when the identifying trait is so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change it”) (citations and quotations omitted); cf. In re Marriage Cases, 183 P.3d 384, 400 (Cal. 2008) (noting that a person should not have to change their sexual orientation in order to receive equal protection under the law).
\textsuperscript{145} Andrew R. Flores, et al., \textit{How Many Adults Identify as Transgender in the United States?}, \textsc{The Williams Inst.} (June 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf (noting about .6% of adults in the United States identify as transgender, for a total of about 1.4 million adults in the United States).
adults, this is clearly a minority population. As one court notes, this is a group that is politically weak because they “lack the political strength to protect themselves,” as evidenced by the fact that “there is no indication that there have ever been any transgender members of the United States Congress or the federal judiciary.”

Thus, because all four factors used to determine whether discrimination against a certain group of people should receive heightened scrutiny are present in the case of transgender people, heightened scrutiny should apply to the discrimination against transgender people present in bathroom restrictions that prohibit transgender individuals from using bathrooms that correspond with their gender identity.

b. Discrimination Against Transgender Individuals is Sex Discrimination, Which is Already Judged with Heightened Scrutiny

Discrimination against transgender individuals is a type of sex discrimination, thus, it should be judged with heightened scrutiny. In 1989, the Supreme Court held, in *Price Waterhouse v. Hopkins*, that discrimination because someone does not conform to sex stereotypes is sex discrimination. *Price Waterhouse* involved Title VII, which prohibits employment discrimination “because of . . . sex,” a provision that numerous courts have noted is similar to Title IX’s prohibition of discrimination “on the basis of sex.”

---

146 See id.
147 *Adkins*, 143 F. Supp. 3d at 140.
148 490 U.S. 228 (1989).
149 Six members of the Supreme Court agreed that discrimination based upon failure to conform to sex stereotypes was sex discrimination. *Id.* at 258 (four justice plurality opinion); *Id.* at 258–61, (White, J., concurring); *Id.* at 272–73 (O'Connor, J., concurring).
2017]  

TRANSGENDER BATHROOM RIGHTS 263

Waterhouse, a female accountant was denied a promotion at least in part because she was too masculine in the eyes of her colleagues. In her promotion evaluations, she was described as “macho” and one comment suggested that she should “take a course at charm school.” When Hopkins was given an explanation as to why she did not receive a promotion, Hopkins was told she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” The Supreme Court noted that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” Therefore, the Court found that because Hopkins had been discriminated against because of failure to conform to sex stereotypes, she had shown sex discrimination.

Since Price Waterhouse, many courts have recognized that discriminating against a transgender person because they are transgender is sex stereotyping and thus is sex discrimination. Transgender individuals are those people “whose gender identity or expression differs from what is associated with the gender they were thought to be at birth.” It is a sex stereotype that a person born identified as a girl will grow up identifying as a girl and then a woman, and conform to stereotypes of what girls and women should look like and be like. Similarly, it is a sex stereotype that a person born identified as a boy will grow up identifying as a boy and then a man, and conform to stereotypes of what boys and men should look like and be like. A transgender person is usually a person who is born identified as a girl, who grows up identifying as a boy and then a man, and conforms to at least some stereotypes of what boys and men should look like and be like; or, a person who is born identified as a boy who grows up identifying as a girl and then a woman, and conforms to at least some stereotypes of what girls and women should look like and be like. Thus, transgender people, by definition, are people who do not conform to

v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 381 (W.D. Pa. 2008) ("Title IX freely borrows the jurisprudence of Title VII.").

152 490 U.S. at 255.
153 Id. at 235.
154 Id.
155 Id. at 250.
156 See id. at 258.
157 2015 Transgender Survey, supra note 133, at 40.
158 Id. at 5 (reporting that 2/3 of transgender people have a consistent identity as either male or female, while 1/3 are “non-binary” and do not identify as either male or female all the time).
certain sex stereotypes, described above.\textsuperscript{159} Therefore, discriminating against a transgender person because they are transgender is discrimination based on failure to conform to sex stereotypes, which is sex discrimination.

Indeed, since \textit{Price Waterhouse}, and relying on \textit{Price Waterhouse}, five United States Circuit Courts of Appeal have already recognized that discrimination against a person because they are transgender is discrimination because of sex.

In 2000, the United States Court of Appeals for the First Circuit recognized this in \textit{Rosa v. Park West Bank & Trust Co.},\textsuperscript{160} when a plaintiff made a claim under the Equal Credit Opportunity Act (ECOA),\textsuperscript{161} which prohibits discrimination in credit transactions “on the basis of . . . sex.”\textsuperscript{162} The plaintiff alleged that the Bank refused him a loan application because he was a man dressed in feminine attire.\textsuperscript{163} Reasoning that in \textit{Price Waterhouse}, the Supreme Court held that “stereotyped remarks [including statements about dressing more ‘femininely’] can certainly be evidence” of sex discrimination,\textsuperscript{164} the First Circuit found that the plaintiff had stated a valid claim of sex discrimination under the ECOA.\textsuperscript{165}

In 2004, the United States Court of Appeals for the Sixth Circuit recognized that discrimination against a transgender individual is sex discrimination in \textit{Smith v. City of Salem}.\textsuperscript{166} In \textit{Smith}, the plaintiff alleged sex discrimination in violation of Title VII when he was suspended after he began dressing more femininely at work and after he had told his supervisor that he identified as a transsexual.\textsuperscript{167} The Sixth Circuit held that the plaintiff had sufficiently pled a case of sex discrimination under both Title VII and the Equal Protection Clause of

\textsuperscript{159} See also Whitaker v. Kenosha Unified Sch. Dist. No 1 Bd. of Educ., 858 F.3d 1034, 1048 (7th Cir. 2017) (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”) (citing Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011)); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016).
\textsuperscript{160} 214 F.3d 213, 215 (1st Cir. 2000).
\textsuperscript{162} Rosa, 214 F.3d at 215 (citing 15 U.S.C. § 1691(a)).
\textsuperscript{163} Rosa, 214 F.3d at 214.
\textsuperscript{164} \textit{Id.} at 216 (quoting \textit{Price Waterhouse} v. Hopkins, 490 U.S. 228, 251 (1989) (brackets in original)).
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} 378 F.3d 566, 573–75 (6th Cir. 2004).
the Fourteenth Amendment and overturned the District Court’s dismissal of his case.\textsuperscript{168} The Sixth Circuit noted that earlier cases holding that transgender individuals were not protected from discrimination under Title VII had been overruled by the Supreme Court’s decision in \textit{Price Waterhouse}.\textsuperscript{169} The \textit{Smith} Court reasoned that:

After \textit{Price Waterhouse}, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.\textsuperscript{170}

As discussed above,\textsuperscript{171} in 2017, in \textit{Whitaker v. Kenosha Unified School District No. 1 Board of Education}, the United States Court of Appeals for the Seventh Circuit found that discrimination against a transgender student was sex discrimination in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{172} In determining that discrimination against a transgender student was sex discrimination and thus heightened scrutiny should apply to the analysis, the Seventh Circuit noted that “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”\textsuperscript{173} Thus, citing \textit{Price Waterhouse}, the Seventh Circuit reasoned that because discrimination against a transgender individual is discrimination based on sex stereotypes, discrimination against a transgender individual is prohibited sex discrimination.\textsuperscript{174}

\begin{itemize}
\item \textsuperscript{168} \textit{Smith}, 378 F.3d at 572, 575, 577.
\item \textsuperscript{169} \textit{Id.} at 572–73 (noting that \textit{Price Waterhouse} had overruled the reasoning in: Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085, 1086 (7th Cir. 1984) (holding that transgender people are not protected by Title VII); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661–63 (9th Cir. 1977) (same); and Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (same).
\item \textsuperscript{170} \textit{Smith}, 378 F.3d at 574.
\item \textsuperscript{171} See supra notes 38-66 and accompanying text.
\item \textsuperscript{172} 858 F.3d 1034 (7th Cir. 2017); supra notes 44–73 and accompanying text.
\item \textsuperscript{173} \textit{Whitaker}, 858 F.3d at 1048.
\item \textsuperscript{174} \textit{Id.}
\end{itemize}
In 2000, in *Schwenk v. Hartford*, the United States Court of Appeal for the Ninth Circuit found that the Gender Motivated Violence Act (GMVA), which prohibits “crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender,”175 was a parallel statute to Title VII and thus the logic and reasoning of *Price Waterhouse* applied.

In *Schwenk*, a transgender woman was sexually assaulted in prison by a male prison guard because she was a transgender woman.176 In deciding that the plaintiff had stated a claim under the GMVA, the Ninth Circuit noted that in *Price Waterhouse* the Supreme Court “held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed “to act like a woman”—that is, to conform to socially-constructed gender expectations.”177 The court also noted that “under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”178 Therefore, the Ninth Circuit concluded that because the GMVA and Title VII were parallel statutes and the plaintiff had shown that the assault was motivated at least in part by her gender because it was motivated by “her assumption of a feminine rather than a typically masculine appearance or demeanor,” the plaintiff had stated a claim under the GMVA.179

Finally, in 2011, the United States Court of Appeals for the Eleventh Circuit recognized that discrimination against transgender individuals is sex discrimination in *Glenn v. Brumby*.180 In *Glenn*, the Eleventh Circuit found that a state government office violated the Fourteenth Amendment’s Equal Protection Clause when it fired a transgender employee because she was transgender.181 In affirming summary judgment for the government employee, the Eleventh Circuit applied heightened scrutiny because it noted that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.”182

---

175 Schwenk v. Hartford, 204 F.3d 1187, 1193 (9th Cir. 2000) (quoting 42 U.S.C. § 13981(c)).
176 *Id*.
177 *Id.* at 1201–02.
178 *Id*.
179 *Id.* at 1202.
180 663 F.3d 1312 (11th Cir. 2011).
181 *Id.* at 1316.
182 *Id.* at 1317.
Other lower level courts have also found that discrimination against transgender individuals is sex discrimination.\(^\text{183}\) For example, on October 30, 2017, the United States District Court for the District of Columbia, in blocking President Trump’s attempt to ban transgender individuals from military service, found that discrimination against transgender individuals is a form of sex discrimination, and must therefore pass the intermediate scrutiny test.\(^\text{184}\) Thus, discrimination against transgender individuals is sex discrimination and merits the heightened review given to sex discrimination under the Equal Protection Clause.

In addition, discrimination based on sex is discrimination where sex is taken into account to mete out different rights and responsibilities.\(^\text{185}\) Therefore, when a school decides what bathrooms an individual should use based on any judgment about their sex, it discriminates based on sex. As the Seventh Circuit stated in \textit{Whitaker}, “the School District’s policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate. This policy is inherently based upon a sex-classification and heightened review applies.”\(^\text{186}\)

\(^{183}\) See, e.g., Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (discrimination against a transgender plaintiff is sex discrimination); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (holding that discrimination “on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination ‘because of sex.’”).


\(^{185}\) See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (finding prohibited sex discrimination when a statutory scheme gave different benefits to male service-members than it gave to female service-members).

\(^{186}\) Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017). This argument leads to the question: is it prohibited sex discrimination under the Fourteenth Amendment to separate people by sex for bathroom use? I have previously argued that it is, but that argument is beyond the scope of this article. See Catherine Jean Archibald, \textit{Transgender Student in Maine May Use Bathroom that Matches Gender Identity - Are Co-ed Bathrooms Next?} 83 UMKC L. REV. 57–71 (2014) (arguing that sex-segregated bathrooms violate the Fourteenth Amendment); Catherine Jean Archibald, \textit{De-Clothing Sex-Based Classifications - Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era}, 36 N. KY. L. REV. 1 (2009) (same).
c. Judged with Heightened Scrutiny, the Transgender Bathroom Restrictions Cannot Stand.

Policies requiring people to use bathrooms that correspond to the sex they were identified as at birth discriminates against transgender people. To see why, consider the following: Transgender people, by definition, do not identify with the sex they were identified as at birth. Non-transgender people, by definition, do identify with the sex they were identified as at birth. Thus, requiring people to use bathrooms that correspond to the sex they were identified as at birth means that while non-transgender people may use bathrooms that correspond with the gender that they identify with, transgender people may not. Imagine being only allowed to use a bathroom corresponding with a gender you do not identify with. This state of affairs leads to stress, anxiety, depression, and increased suicide risk in transgender people. Under such policies, many transgender people avoid using any bathroom at all, by limiting their food and liquid intake, and by “holding it” if they do need to use the bathroom, actions which are bad for their health.

Because bathroom policies discriminate against transgender people, and because discrimination against transgender people is only permissible if the discrimination can pass heightened scrutiny, as discussed above, courts considering the issue must consider whether the discrimination against transgender people is “substantially related” to an “important” government interest. Additionally, under the intermediate scrutiny test, the government has the burden of showing

\[187\text{ See supra notes 11, 157, and accompanying text (most transgender people either: identify as male, but were identified at birth as female; or, identify as female, but were identified at birth as male).}\]

\[188\text{ See, e.g., Kristie L. Seelman, Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality, 63 J. HOMOSEXUALITY 1378 (2016), http://www.tandfonline.com/doi/full/10.1080/00918369.2016.1157998 (finding more than 15% chance increase in suicide among those transgender people who had been denied access to bathrooms matching their gender identity compared with those who had not been denied such access); 2015 Transgender Survey, supra note 133, at 7 (documenting increased rate of harm to transgender people when their community does not affirm in their gender identity).}\]

\[189\text{ See, e.g., 2015 Transgender Survey, supra note 133, at 17 (finding that over half of transgender people have avoided using a public restroom in the past year for fear of encountering hostility, and that such avoidance leads to health problems).}\]

\[190\text{ United States v. Virginia, 518 U.S. 515, 533 (1996).}\]
“an exceedingly persuasive justification” for the discrimination.\textsuperscript{191} In addition, “The justification must be genuine, not hypothesized or invented \textit{post hoc} in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”\textsuperscript{192}

Schools requiring that transgender students use bathrooms that correspond with the sex they were identified with at birth cannot meet their burden of showing “an exceedingly persuasive justification” for the discrimination. Schools wanting to maintain the discriminatory policies usually proffer two justifications for their policies: 1) safety of students; 2) privacy of students.\textsuperscript{193} Neither justification is persuasive.

Safety justifications are not persuasive.

Schools seeking to justify bathroom policies that prevent transgender people from accessing bathrooms corresponding to the gender that they identify with often assert that they are necessary to protect women and girls from assault by biological males who will pretend to be transgender in order to enter an all-female space in order to assault women and girls.\textsuperscript{194} However, this fear is unfounded. School administrators who come from schools and school districts that already allow transgender youth to use bathrooms that correspond to the gender identity have filed an \textit{amici} brief in the Grimm case.\textsuperscript{195} These administrators work in 33 different states and the District of Columbia, and their schools collectively educate over 2.1 million youth.\textsuperscript{196} These \textit{amici} note that, in their experience, none over the fears over safety have materialized.\textsuperscript{197} As one sheriff from Washington state points out:

\begin{itemize}
  \item \textsuperscript{191} \textit{Id.} (finding a violation of the Fourteenth Amendment because no exceedingly persuasive justification for excluding women from the Virginia Military Institute).
  \item \textsuperscript{192} \textit{Id.}
  \item \textsuperscript{193} \textit{See, e.g.}, Evancho v. Pine-Richland Sch. Dist., CV 2:16-01537, 2017 WL 770619, at *5, *14 (W.D. Pa. Feb. 27, 2017) (noting that the objections to inclusive bathroom policies stemmed from a fear that “a student would in essence masquerade as being transgender, and would then use a designated student restroom inconsistent with their assigned sex” and include privacy concerns and safety concerns).
  \item \textsuperscript{194} \textit{See, e.g.}, \textit{id.}
  \item \textsuperscript{195} Brief of \textit{Amici Curiae} School Administrators from Thirty-One States and the District of Columbia in Support of Respondent at 3, Gloucester Cty Sch. Bd. v. G.G. \textit{ex rel. Grimm}, 137 S. Ct. 1239 (No. 16-273) (2017) [Hereinafter \textit{Amici Brief of School Administrators}].
  \item \textsuperscript{196} \textit{Id.}
  \item \textsuperscript{197} \textit{Id.} at 4.
\end{itemize}
“We’ve protected gay and transgender people from discrimination in Washington for 10 years, with no increase in public safety incidents as a result. It’s important to remember that indecent exposure, voyeurism, and sexual assault, are already illegal, and police use those laws to keep people safe.”

Privacy justifications are not persuasive.

Schools seeking to justify bathroom policies that prevent transgender people from accessing bathrooms corresponding to the gender that they identify with often assert that these policies are necessary to protect the privacy of other students. However, this concern is unfounded. Indeed, several courts have noted that when transgender students use the bathrooms that corresponded with their gender identity, the privacy of other students is not disturbed. Similarly, *amici* in schools that already have transgender inclusive

---


199 *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist. No 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017).

200 *Id.* (“For nearly six months, Ash [the transgender student] used the boys’ bathroom while at school and school-sponsored events without incident or complaint from another student. In fact, it was only when a teacher witnessed Ash washing his hands in the restroom that his bathroom usage once more became an issue in the School District’s eyes.”); *Evancho*, 2017 WL 770619, at *37 (“[G]iven the actual physical layout of the student restrooms at the High School, it would appear to the Court that anyone using the toilets or urinals at the High School is afforded actual physical privacy from others viewing their external sex organs and excretory functions. Conversely, others in the restrooms are shielded from such views.”); Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dept. of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (“[T]he Court notes that Highland Elementary students use sex-segregated bathrooms with stall dividers that open on the top and bottom by approximately two feet. . . . There is no evidence that Jane herself, if allowed to use the girls’ restroom, would infringe upon the privacy rights of any other students. Therefore, Third-Party Defendants have failed to put forth an ‘exceedingly persuasive justification,’ or even a rational one, for preventing Jane from using the girls’ restroom.”).
policies note that privacy concerns have not materialized in their schools.\textsuperscript{201} As the Seventh Circuit noted in \textit{Whitaker},

A transgender student’s presence in the restroom provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall. Nothing in the record suggests that the bathrooms at Tremper High School are particularly susceptible to an intrusion upon an individual’s privacy. Further, if the School District’s concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line. Therefore, this court agrees with the district court that the School District’s privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.\textsuperscript{202}

Inclusive bathroom policies are beneficial to everyone.

As the \textit{Gloucester amici} point out, their collective experience is that inclusive bathroom policies create a positive environment for all students because students learn from their schools how to treat others who are different than them.\textsuperscript{203} Additionally, respecting students’ gender identity is comforting for all students because students know that if others are respected and treated with dignity, they will be too.\textsuperscript{204} As one educator states:

Respecting students’ gender identity eliminates the disruption that results from singling out, stigmatizing,

\footnotesize{\textsuperscript{201} \textit{Amici} Brief of School Administrators, \textit{supra} note 195, at 9–11.  
\textsuperscript{202} \textit{Whitaker}, 858 F.3d at 1052.  
\textsuperscript{203} \textit{Amici} Brief of School Administrators, \textit{supra} note 195, at 16.  
\textsuperscript{204} \textit{Id.} at 5.}
and discriminating against transgender students, and avoids disrupting the normal social interactions involved in use of communal facilities. By contrast, refusing to respect a student’s gender identity is “toxic for the student – it says ‘you are not welcome,’ every day.”

ii. Title IX Protects Gavin Grimm and Other Transgender Individuals

The Fourth Circuit and the Supreme Court should interpret Title IX as requiring that schools allow students, employees, alumni, and others who use school buildings and facilities for school-related events, to use bathrooms that match their gender identity. Title IX requires that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

“Program or activity” is defined as including “all of the operations of . . . a local educational agency . . . [or] school system.”

Because Title IX prohibits discrimination “on the basis of sex,” the Fourth Circuit and the Supreme Court should find that forbidding a person to use a bathroom that aligns with that person’s gender identity, simply because of the person’s sex, is prohibited discrimination “on the basis of sex,” in violation of Title IX. Title IX and its regulations allow schools to have separate boys’ and girls’ bathrooms. However, the statute and its regulations are silent on which bathrooms transgender individuals should use.

For all the reasons, discussed above, discriminating against transgender individuals by not permitting them to access the bathrooms that correspond to their gender identity, when all other students may access bathrooms that correspond to their gender identity, is sex discrimination. Therefore, since Title IX prohibits discrimination “on the basis of sex,” the Fourth Circuit and the Supreme Court should find that bathroom policies that prohibit transgender individuals from using bathrooms that match their gender identity are in violation of Title IX.

---

205 Id. at 6 (quoting Interview with Robert A. Motley (Oct. 11, 2016)).
208 34 C.F.R. § 106.33 (1994) (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”).
V. CONCLUSION

The Supreme Court should decide Gavin’s case in his favor. The United States District Court for the Eastern District of Virginia, and probably the Fourth Circuit (should the losing party appeal) must make a decision in Gavin’s case. Once they do, it is likely that the losing party will appeal to the Supreme Court. The Supreme Court may or may not decide to hear the case. There is good reason for it to take this case as there is currently a circuit split on the transgender bathroom issue. On one side, the Seventh Circuit recently upheld the grant of a preliminary injunction requiring a school to allow a transgender student to use the bathrooms that he identifies with.\textsuperscript{209} Additionally, the Sixth Circuit recently denied a stay application from a school seeking to stay the grant of a preliminary injunction requiring a school to permit a transgender student to use the bathrooms that she identifies with.\textsuperscript{210} On the other hand, in an older case, the Tenth Circuit held that discrimination against a transsexual is not sex discrimination under Title VII, and that an employer may fire a transsexual for using the “wrong” bathroom.\textsuperscript{211} Even if the Supreme Court chooses not to decide Gavin’s case, as long as the law is unsettled, as it currently is, there will doubtless be a future court case on the same issue that the Supreme Court will decide to hear. When it does, for the reasons discussed in this article, it should decide in the transgender students’ favor.

\textsuperscript{209} Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).
\textsuperscript{210} See Dodds v. U.S. Dept. of Educ., 845 F.3d 217 (6th Cir. 2016).
\textsuperscript{211} Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007).