"Equal Protection Can Follow You to the Bathroom:" The Eleventh Circuit's Decision in *Adams v. School Board of St. Johns County*

I. OVERVIEW

Drew Adams ("Mr. Adams"), a transgender man and a recent graduate of Nease High School in Florida's St. Johns County School District ("School District" or "School Board"), brought suit, by and through his mother, Erica Kasper, against the county school board alleging that his rights under the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972 were violated by the School District's bathroom policy, which prevented him from using the boys' restroom at the high school. Adams's designation as female has bothered him throughout his life, and as he started puberty, he suffered anxiety and depression about his developing body, which led him to start seeing a therapist and a psychiatrist.[1] When Adams was in eighth grade, he came to realize he was transgender with the help of therapy and introspection.[2] His psychiatrist eventually diagnosed him with "gender dysphoria," a condition of debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex.[3] Mr. Adams's psychiatrist recommended that he socially transition to living as a boy to treat and alleviate his gender dysphoria. Socially transitioning involved Adams cutting off his long hair, dressing in more masculine clothing, wearing a chest binder to flatten breast tissue,

1. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020).
2. *Id.*
3. *Id.*

adopting the personal pronouns "he" and "him," and using the men's restroom in public.[4]

Mr. Adams enrolled in Nease High School in the ninth grade, after he began transitioning and presenting as a boy, and his mother informed the school that he was transgender, currently transitioning, and should be considered a boy student; however, Mr. Adams's mother did not discuss his bathroom use with the school.[5] Mr. Adams used the boys' restroom for his first six weeks as a ninth grader, but the school eventually pulled him from class and told him he would no longer be permitted to use the boys' restroom at school because other students had complained. Although the complaints came from two unidentified female students and none of the male students who shared the restroom with Mr. Adams, the school gave him two choices: to either use a single-stall, gender neutral bathroom in the school office or to use the girls' restroom.[6] Mr. Adams asked for injunctive, declarative, and monetary relief, and then moved for a preliminary injunction to enjoin the School Board from enforcing its restroom policy. The Honorable Timothy J. Corrigan denied his motion for a preliminary injunction on August 10, 2017, but set the case for a bench trial in December 2017, on an expedited schedule.[7] After a three-day trial, Judge Corrigan issued findings of fact and conclusions of law, holding that Mr. Adams was entitled to declaratory, injunctive, and monetary relief on his Equal Protection and Title IX claims.[8] The School Board timely appealed, and the Eleventh Circuit reviewed the case de novo. The United States Court of Appeals for the Eleventh Circuit ultimately *held* that the School District's policy barring Mr. Adams, and other transgender students, from the bathroom matching his gender identity is in violation of the Equal Protection Clause and Title IX's prohibition of sex discrimination. *Adams v. School Board of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020).

II. BACKGROUND

The issue at the heart of this case is whether the School District's policy barring Mr. Adams from the boys' restroom is in conflict with the Constitution's guarantee of Equal Protection and Title IX's prohibition of

4. *Id.*
5. *Adams*, 968 F.3d at 1293.
6. *Id.*
7. *Id.* at 1295. Before trial, Judge Corrigan toured Nease High School with both sides' counsel to view the bathroom facilities. *Id.*
8. *Id.*

sex discrimination.[9] The Supreme Court of the United States has held that the Equal Protection Clause requires states to treat all similarly situated people alike.[10] The Equal Protection Clause does not require states to treat all groups of people the exact same way; however, it does deny states the power to create laws that "arbitrarily or irrationally" classify groups or that reflect "a bare desire to harm a politically unpopular group."[11] Title IX mandates that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination[12] under any education program or activity receiving Federal financial assistance."[13] Under Title IX, a school cannot subject any person to "separate or different rules of behavior, sanctions, or other treatment" on the basis of sex.[14]

A. Equal Protection and Classifications Based on Sex

When state classifications are based on sex or gender, courts will apply a heightened standard of review: intermediate scrutiny.[15] The intermediate scrutiny standard requires the government to prove that the gender classification is "substantially related to a sufficiently important government interest."[16] Because sex or gender generally provide no sensible ground for differential treatment, the Equal Protection Clause tolerates only "exceedingly persuasive" classifications based upon them.[17]

Mr. Adams argued that the School Board's exclusion of transgender students, like him, from the single-sex restrooms matching their gender identity treats transgender students differently than cisgender students who are similarly situated.[18] Under this discriminatory policy, cisgender students are permitted to use single-sex restrooms consistent with their gender identity, but transgender students are prohibited from

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9. Adams brought a § 1983 action, which requires the court to determine "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'" of the United States. Glenn v. Brumby, 663 F.3d 1312, 1315 (11th Cir. 2011).

10. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985).

11. *See id.*; Reed v. Reed, 404 U.S. 71, 75 (1971).

12. Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 174 (2005) (describing "discrimination" as "differential" and "less favorable" treatment).

13. 20 U.S.C. § 1681(a).

14. *Adams*, 968 F.3d at 1306 (citing 34 C.F.R. § 106.31(b)(4)).

15. *See City of Cleburne*, 473 U.S. at 440.

16. *Id.* at 441.

17. *See id.* at 440; United States v. Virginia, 518 U.S. 515, 534 (1996).

18. Complaint at 19, Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020) (No. 18-13592) [hereinafter Complaint].

using the single-sex restrooms consistent with their gender identity. This policy constitutes discrimination based on sex.[19] Discrimination based on sex includes, but is not limited to, discrimination based on gender, gender nonconformity, transgender status,[20] gender expression, and gender transition.[21] Ultimately, the School Board's policy deprives transgender students of their rights to equal dignity, liberty, and autonomy by marking them as second-class citizens and denying them equal protection of the laws.[22]

The School Board argued that the district court erroneously found that its restroom policy treated Mr. Adams differently than those similarly situated to him, because the policy treated Mr. Adams "the same way as all other biological females."[23] The School Board claimed that its important governmental interest in instating the policy was the protection of students' privacy in bathrooms.[24] The School Board relied on Supreme Court precedent recognizing that "the two sexes are not similarly situated in all relevant respects and that differences founded in the different biology of the sexes can be the basis of government classification so long as they are not based on stereotypes."[25] The School Board contended that its policy was not based on stereotypes, but the "real difference in anatomy between boys and girls and the privacy interest this implicates."[26]

There have been numerous cases on the meaning and scope of the Equal Protection Clause, and Supreme Court precedent makes clear that laws that classify by sex, a protected class, are to be reviewed with intermediate scrutiny. In *Reed v. Reed*, the Supreme Court explained that the Equal Protection Clause does deny states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that

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19. *Id.* at 20.

20. Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (U.S. 2020) (holding that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex).

21. Complaint at 20, *supra* note 18.

22. *Id.* at 21.

23. Initial Brief for Appellant at 10, Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020) (No. 18-13592).

24. *Compare* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., F.3d 1034, 1052 (7th Cir. 2017) (holding that a school district had a "legitimate interest in ensuring bathroom privacy rights are protected), *with* Parents for Privacy v. Barr, 949 F.3d 1210, 1222 (9th Cir. 2020) (holding that there is no Fourteenth Amendment privacy right not to share school restrooms with transgender students who were assigned a different sex at birth).

25. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981); Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001).

26. Complaint at 10-11, *supra* note 18.

statute.[27] To meet the standards of the Equal Protection Clause, a classification must be "reasonable, not arbitrary," and it must have a "fair and substantial relation to the object of the legislation."[28] Additionally, in *Price Waterhouse v. Hopkins*, the Court held that discrimination on the basis of gender stereotypes is sex-based discrimination.[29]

In *City of Cleburne v. Cleburne Living Center* the Supreme Court held the Equal Protection Clause requires states to treat all persons similarly situated alike, or "to avoid all classifications that are 'arbitrary or irrational' and those that reflect 'a bare . . . desire to harm a politically unpopular group.'"[30] Further, because gender or sex generally provide no reasonable grounds for differential treatment, legislative classifications based on gender or sex call for a heightened standard of review: intermediate scrutiny.[31] The Court explained that what differentiates sex or gender from "non-suspect statuses," such as physical disability, is that gender or sex as a characteristic typically bears no relation to the ability to perform or contribute to society.[32] In *United States v. Virginia*, the Supreme Court considered whether the Virginia Military Institute's (VMI) categorical exclusion of women from the educational opportunities VMI provides was in violation of the Equal Protection Clause.[33] Justice Ginsburg, delivering the Court's opinion, noted that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[34] A state must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives. This justification must be "genuine, not hypothesized or invented post hoc" and it cannot rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females," or stereotypes.[35] A rational justification must be offered in defense of categorical exclusions, describing actual state purposes rather than rationalizations for actions that

27. 404 U.S. 71, 75-76 (1971).
28. *Id.* at 76.
29. 490 U.S. 228 (1989).
30. 473 U.S. 432, 446-47 (1985).
31. *Id.* at 441.
32. *Id.* at 440.
33. 518 U.S. 515 (1996).
34. *Id.* at 531 (citing J.E.B. v. Alabama ex. Rel. T.B., 511 U.S. 127, 136-37 (1994)
35. *Id.* at 533 (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975) (Stevens, J., concurring)).

were actually differently grounded.[36] Justice Ginsburg emphasized that "the notion that admissions of women would downgrade VMI's stature . . . is . . . a prediction hardly different other 'self-fulfilling prophec[ies]'. . . once routinely used to deny rights or opportunities."[37]

The Seventh Circuit in *Whitaker v. Kenosha Unified School Dist. No. 1 Board of Education* considered an issue nearly identical to the issue in *Adams*: a transgender boy and high school student was denied access to the boys' restroom at school because of his transgender status.[38] The school here also had similar arguments and justifications for its restroom policy as the School District in *Adams*: it contended that its policy did not violate the Equal Protection Clause because it treated "all boys and girls the same" and justified it on the basis of protecting the privacy rights of all students.[39] The court rejected these justifications as untrue because the school treated transgender students, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently by subjecting them to discipline if they chose to use the bathroom that conforms to their gender identity, and the school could not show that the "mere presence of a transgender student in the bathroom" infringed on other students' privacy rights, without facts supporting tangible breaches of privacy.[40] The court ultimately held that the school's restroom policy violated the Equal Protection Clause for these reasons.

The Eleventh Circuit has also previously held that a government agent violates the Equal Protection Clause's prohibition against sex-based discrimination when he or she fires a transgender employee because of that person's gender non-conformity.[41] The court reasoned that a person is defined as "transgender" because of the perception that his or her behavior defies gender stereotypes: "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."[42] Ultimately, discrimination against a transgender individual because of her gender-nonconformity is sex

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36. *Id.* at 535-36 (citing *Weinberger*, 420 U.S. at 648).

37. *Id.* at 541.

38. 858 F.3d 1034, 1039 (7th Cir. 2017).

39. *Id.* at 1052. The school in *Whitaker* asserted that "the mere presence of a transgender student in the bathroom . . . infringes upon the privacy rights of other students with whom he or she does not share biological anatomy." *Id.*

40. *Id.* at 1054.

41. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).

42. *Id.* at 1316 (citing Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007)); *see also* Taylor Flinn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001).

discrimination, whether it is described as being on the basis of sex or gender.[43]

B. Title IX and Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of race, color, religion, sex, or national origin.[44] Although Title VII is distinct from Title IX, both prohibit discrimination against individuals on the basis of sex.[45] The textual similarities between these titles allow courts to apply Title VII case law to decide Title IX issues.[46] Title VII protects "[a]ny individual"[47] from discrimination based upon sex, and Title IX protects "[a]ny person"[48] from discrimination based upon sex. The titles are also alike in that they both employ a "but-for causation standard."[49] Therefore, rulings on Title VII claims can be helpful in deciding Title XI claims.

In *Bostock v. Clayton County*, the Supreme Court sought to determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex . . ."[50] The Court concluded that "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."[51] The Court further reasoned that Title VII directly tells the Court three times that its focus should be on individuals, not groups.[52] The

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43. *Glenn*, 663 F.3d at 1317.

44. 42 U.S.C. § 2000e.

45. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020).

46. Supplemental Brief for Appellee at 4, Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020) (No. 18-13592) [hereinafter Supplemental Brief for Appellee].

47. 42 U.S.C. § 2000e-2(a)(1); Supplemental Brief for Appellee at 4, *Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020) (No. 18-13592), supra* note 46.

48. 20 U.S.C. § 168(a); Supplemental Brief for Appellee at 4, *supra* note 46.

49. *Adams*, 968 F.3d at 1305; Supplemental Brief for Appellee at 4, *supra* note 46 ("Title VII prohibits discrimination 'because of' sex . . . and Title IX prohibits discrimination 'on the basis of' sex'").

50. 140 S. Ct. 1731 (U.S. 2020); 42 U.S.C. § 2000e-2(a)(1).

51. *Adams*, 968 F.3d at 1740.

52. *Id.* (citing 42 U.S.C. § 2000e-2(a)(1) ("[e]mployers may not fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* sex").

Court ultimately held that an employer violates Title VII when it intentionally fires an individual employee based in part on sex.[53] It does not matter whether other factors contributed to the decision, or whether the employer treated women the same as a group and men the same as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge them; in other words, if changing the employee's sex would have yielded a different choice by the employer, Title VII has been violated.[54]

The Sixth Circuit also recognized that discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping in violation of Title VII.[55] The Seventh Circuit has also found that a school's policy prohibiting transgender students from using the bathrooms that conform to their gender identity was in violation of Title IX.[56] The court reasoned that a policy that requires an individual to use a restroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance in violation of Title IX.[57] The policy also subjected transgender students to different rules, sanctions, and treatment than non-transgender students in violation of the statute, and the fact that the school provided a gender-neutral alternative is not sufficient to relieve it from liability because the policy itself violates the statute.[58]

III. COURT'S DECISION

In the noted case, the Eleventh Circuit held that the School District's policy barring Mr. Adams, and other transgender students, from the bathroom matching his gender identity is in violation of the Equal Protection Clause and Title IX's prohibition of sex discrimination. In reaching this decision, the court found that intermediate scrutiny should be applied for the Equal Protection analysis, because the School District's policy constituted sex discrimination.[59] The court found the bathroom policy singles out transgender students for differential treatment because they are transgender.[60] The policy states: "Transgender students will be

53. *Id.* at 1741.
54. *Id.*
55. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
56. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., F.3d 1034, 1049 (7th Cir. 2017).
57. *Id.*
58. *Id.* at 1049-50.
59. *Adams*, 968 F.3d at 1296.
60. *Id.*

given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex."[61] The court relied on its decision in *Glenn*: "discrimination against a transgender individual because of [his or] her gender non-conformity is sex discrimination" because it is impossible to discriminate against a person for being transgender without discriminating against that person based on sex.[62] Once intermediate scrutiny was applied, the burden rested on the School District to show that there was a "sufficiently important governmental interest" to justify its use of gender classifications.[63] The School District argued that it adopted the restroom policy out of concern for its students' privacy.[64] The court recognized this as an "undoubtedly important government interest."[65] However, Mr. Adams did not question the societal practice of separate bathrooms for men and women, rather he argued that the School District's policy singled him out for differential treatment on the basis of his gender non-conformity, and without furthering student privacy at all.[66] The court found that the School District did not demonstrate a substantial relationship between excluding transgender students from communal restrooms matching their gender identity and protecting students' privacy for three reasons: (1) the policy was administered arbitrarily; (2) the School District's privacy concerns were merely hypothesized;[67] and (3) the School Board's bathroom policy subjected transgender students to unfavorable treatment simply because they defy gender stereotypes.[68]

As to the court's first reason for finding there was no substantial relationship between the policy and the School Board's concern for students' privacy, it relied on the Supreme Court's command in *Reed* that to pass muster under the Equal Protection Clause, a governmental gender classification must be "reasonable, not arbitrary."[69] The policy failed to establish a substantial relationship between its means and its end because

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61. *Id.*
62. 663 F.3d at 1317; *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (U.S. 2020).
63. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).
64. *Adams*, 968 F.3d at 1297.
65. *Id.* (citing Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., F.3d 1034, 1052 (7th Cir. 2017)).
66. *Id.*
67. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).
68. *Adams*, 968 F.3d at 1297.
69. 404 U.S. at 76.

it did not even succeed in treating all *transgender* students alike.[70] Because the School District determines a student's sex assigned at birth by looking to the forms the student provided at the time he or she enrolled in the District, a transgender student who enrolled with documents matching his or her gender identity would be permitted to use the restroom matching that gender identity.[71] This loophole would allow some of the District's transgender students to use the restrooms that match their gender identity, while others, who transitioned after enrollment, would be barred from using the restroom matching their gender identity. The court looked to *Craig v. Boren* for support of this finding.[72] Based on this decision, the court determined that the designation of a student's sex on his school enrollment documents was not a "legitimate, accurate proxy" for his sex assigned at birth.[73] The School District's criteria for determining a student's restroom use therefore did not achieve its stated goal of restricting transgender students to the restroom of their sex assigned at birth.[74]

The court then found that the School District's policy was based on a hypothesized justification.[75] Here, the court relied on its decision in *Glenn*, in which it held that an employer's claim that he fired a transgender woman because "other women might object to her restroom use"[76] was hypothetical because the record revealed that his concerns about restroom use were unfounded.[77] The court found that the School's District's concerns about privacy in the boys' restroom were as hypothetical as the concerns raised in *Glenn*.[78] The district court, after extensive evidence was presented, found that Mr. Adam's presence in the boys' restroom did not jeopardize the privacy of his peers "in any concrete sense," because when he uses the restroom, Mr. Adams, like most people, "enters a stall, closes

70. *Adams*, 968 F.3d at 1298.

71. *Id.*

72. In *Craig*, the Supreme Court struck down an Oklahoma statute that outlawed the sale of 3.2 percent beer to young men under the age of twenty-one and to young women under the age of eighteen as a means to promote traffic safety. The Supreme Court concluded that the evidence did not demonstrate that gender was a "legitimate accurate proxy for the regulation of drinking and driving," and further, the statute as written did not prevent young men from driving under the influence because it prohibited only the sale of beer, not the consumption. 429 U.S. 190, 191-92, 204 (1976).

73. *Adams*, 968 F.3d at 1299.

74. *Id.*

75. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that the government's justification for a gender classification "must be genuine, not hypothesized").

76. 663 F.3d at 1321.

77. *Id.*

78. *Adams*, 968 F.3d at 1299.

the door, relieves himself, comes out of the stall, washes his hands, and leaves."[79] Additionally, the School District did not receive any complaints of privacy breach during the six weeks that Mr. Adams used the boys' restroom at school, nor could it produce any "complaints of untoward behavior involving a transgender student" in the restroom, nor could it identify *any* incidents in the United States in which allowing transgender students access to the restroom matching their gender identity compromised other students' privacy.[80] The School Board next argued that Mr. Adams *mere presence* in the boys' restroom constitutes a violation of privacy; however, the Court declined to recognize "such an expansive [formulation of] privacy . . . that would be violated by the presence of students who do not share the same birth sex," because the record did not support the assertion.[81]

The School District also argued that its policy survived heightened scrutiny because excluding transgender students from the restroom matching their gender identity keeps private the "different physiological characteristics between the two sexes."[82] However, the district court found that the School District's policy did not turn on "something inherently different between how boys and girls use the restroom."[83] Further, the court points out that the School District ignored that Mr. Adams had already changed the physiological manifestation of his gender in many ways: he surgically eliminated his breast tissue and started on hormonal treatment that would "alter the appearance of the genitals, suppress menstruation, and produce sex characteristics such as increased muscle mass, increased body hair… and a deepening of the voice."[84] If Mr. Adams were to use the girls' restroom, his masculine physiology would present essentially the same situation that the School District feared.[85] Therefore, the School District failed in presenting a genuine and non-hypothetical

79. *Id.*
80. *Id.* at 1299-1300.
81. *Id.*; *see also* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 531 (3d Cir. 2018). (holding transgender students' access to bathrooms matching their gender identity did not violate non-transgender students' constitutional privacy rights); Parents for Privacy v. Barr, 949 F.3d 1210, 1222 (9th Cir. 2020) (holding that there is no Fourteenth Amendment privacy right not to share school restrooms with transgender students who were assigned a different sex at birth).
82. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1300 (11th Cir. 2020).
83. *Id.*
84. *Id.*
85. *Id.*

justification for excluding transgender students from the restroom matching their gender identity.[86]

After deciding that the School District's policy violated the Equal Protection Clause, the court turned to Mr. Adams's Title IX claim. He claimed that the School Board excluded him from the boys' restroom because he is transgender, and this policy constituted discrimination on the basis of sex in violation of Title IX.[87] The court found that excluding Mr. Adams amounted to sex discrimination in violation of Title IX for three reasons: (1) Title IX protects students from discrimination based on their transgender status; (2) the School District treated Mr. Adams differently because he was transgender, and this differential treatment caused him harm; and (3) nothing in Title IX's regulations or any administrative guidance excuses the School District's discriminatory policy.[88] In support of its finding that Title IX protects students from discrimination based on their transgender status, the court turned to *Bostock*. In this case, the Supreme Court held that Title VII's prohibition on sex discrimination also forbids discrimination based on transgender status[89] because "it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex."[90] The court explained that its reliance on the Supreme Court's interpretation of Title VII is applicable in this case, concerning Title IX, because both titles prohibit discrimination against individuals on the basis of sex, and they also both employ a "but-for causation standard."[91] The School District argued that Title IX was only "intended to address discrimination plaguing biological women," so it therefore is not concerned with discrimination against transgender people.[92] However, the court again relies on *Bostock*, which found that even if the legislature never contemplated that Title VII could forbid against transgender discrimination, the "starkly broad terms" of the statute "require nothing less."[93] The School District still argued against the comparison of Title VII and Title IX, claiming that "schools are a wildly different environment than the workplace" and education "is the province

86. *Id.*
87. *Id.* at 1306 (citing 34 C.F.R. § 106.31(b)(4)).
88. *Id.* at 1304.
89. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (U.S. 2020).
90. *Id.* at 1741.
91. *Adams*, 968 F.3d at 1305; 42 U.S.C. § 2000e-2(a)(1); 20 U.S.C. § 1681(a).
92. *Id.*
93. 140 S. Ct at 1753.

of local governmental officials."[94] However, the court was not persuaded by this argument, because Congress saw it necessary to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces.[95]

Additionally, the court found that Mr. Adams succeeded on his claim of sex discrimination under Title IX.[96] Title IX's implementing regulations explain that a school cannot "subject any person to separate or different rules of behavior, sanctions, or other treatment" on the basis of sex.[97] Neither can a school "provide different aid, benefits, or services or provide aid, benefits or services in a different manner" because of sex.[98] Discrimination here refers to "distinctions or differences in treatment that injure protected individuals" or "differential and less favorable treatment."[99] The School District argued that Mr. Adams did not suffer any discrimination under Title IX, because it read *Bostock* to hold that "a woman who identifies as a man—a transgender man—is a woman' and it claimed that Mr. Adams was treated just the same as all "girl students" at the high school.[100] The court rejects this argument, because the School District, like the dissenting opinion, misapprehend *Bostock*, which explain that if an employer fires a transgender female employee but retains a non-transgender female employee, this differential treatment is discrimination on the basis of sex.[101] Consequently, Mr. Adams can show sex discrimination by comparing the School Board's treatment of him, a transgender boy, to its treatment of non-transgender boys, who are allowed to use the boys' restroom at school.[102] Mr. Adams was also *generally* treated differently than all non-transgender students, because he faced school discipline if he entered a restroom matching his gender identity and the sex recorded on his legal documents, but non-transgender students did not.[103] The School District excluded Mr. Adams from communal

94. Brief for Appellant at 43–44, Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020) (No. 18-13592).

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

96. *Id.*

97. 34 C.F.R. § 106.31(b)(4).

98. *Adams*, 968 F.3d at 1306 (quoting § 106.31(b)(4)).

99. *Id.* (citing Burlington N. & Santa Fe. Ry. Co. v. White, 548 U.S. 53 (2006); Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 174 (2005) (describing sex discrimination under Title IX as "differential" and "less favorable" treatment).

100. *Id.* at 1306.

101. 140 S. Ct at 1741-42.

102. *Adams*, 968 F.3d at 1306.

103. *Id.*

restrooms and gave him no choice but to use the single-stall facilities, or to face punishment, so it therefore subjected Mr. Adams "as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX."[104]

IV. ANALYSIS

The Eleventh Circuit's decision in *Adams* adds to the precedents already established by the Supreme Court and other Circuit Courts of Appeals: that transgender discrimination is sex discrimination.[105] This is incredibly important in the legal fight for transgender rights, because protected classes, like sex, allow courts to implement a higher standard of scrutiny, which makes it more difficult for state-implemented rules and regulations involving classifications based on an individual's transgender status to pass muster under the Equal Protection Clause. It is also essential to a transgender plaintiff's claim of workplace or educational discrimination under Title VII and Title IX, respectively.

The Eleventh Circuit was correct in holding that the School District's restroom policy constituted sex discrimination in violation of the Equal Protection Clause and Title IX. Although the Supreme Court has yet to weigh in on this specific issue, its decision in *Bostock* was sufficient to provide the Eleventh Circuit guidance in deciding this case.[106] The *Bostock* Court held that Title VII's prohibition on sex discrimination also forbids discrimination based on transgender status[107] because "it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex."[108] The Eleventh Circuit correctly relied on this decision to interpret Title IX's prohibition of sex discrimination in education to include discrimination based on an individual's transgender status, because the titles prohibit discrimination on the basis of sex, and both employ the "but-for causation standard."[109]

Although the Eleventh Circuit did not extensively expand on its use of the "but-for" test, the *Bostock* Court explained that if an employee's sex was just one "but-for cause" of the decision to fire her, it is enough to trigger Title VII.[110] This Court further explained that "if [an] employer

104. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., F.3d 1034, 1049-50 (7th Cir. 2017); *see also* 34 C.F.R. § 106.31(b)(4).

105. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (U.S. 2020).

106. *Id.* at 1737.

107. *Id.*

108. *Id*. at 1741.

109. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1305 (11th Cir. 2020).

110. 140 S. Ct. at 1739.

[fires a transgender woman and] retains an otherwise identical employee who was identified as female at birth, [an] employer intentionally punishes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.[111] In this case, the transgender employee's sex was the "but-for" cause of her discharge, and it is easy to apply the same test in *Adams*. The School District allowed students who were identified as male at birth to use the boys' restrooms, but it did not allow transgender boys students, who were identified as female at birth, to use the boys' restrooms; therefore, the School District was intentionally punishing its transgender boy students for actions that it would tolerate from its non-transgender boy students.[112]

Policies and rules that exclude transgender individuals from using the bathrooms that match their gender identity and are allegedly justified by concerns for privacy between the sexes work to amplify the horrible discrimination that transgender people already face.[113] By using privacy to justify these discriminatory policies, the government and places of business ignore the fact that transgender individuals value privacy just like anyone else. These policies fail to consider that transgender individuals use the restroom just like a cisgender person would: by entering a stall, closing and locking the door, and then leaving.[114] They also ignore the fact that a student's privacy could just as easily be breached by a student of the same biological sex.[115] As Justice Ginsburg famously wrote in the *VMI* opinion, the notion that allowing transgender individuals to use bathrooms matching their gender identity would infringe upon or diminish the

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111. *Id.* at 1741-42.

112. *Adams*, 968 F.3d at 1306; *see also* 34 C.F.R. § 106.31(b)(4) (explaining that a school cannot "subject any person to separate or different rules of behavior, sanctions, or other treatment" on the basis of sex).

113. *See* Initial Brief for Appellant at 21, Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020) (No. 18-13592) (explaining that transgender people are a discrete and insular group, they lack the political power to protect their rights through the legislative process, and they have largely been unable to secure explicit state and federal protections to protect them against discrimination); *see also* U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (Justice Stone explained in a footnote that legislation that prejudices "discrete and insular minorities . . . which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . ." is an exception to "the presumption of constitutionality").

114. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., F.3d 1034, 1052 (7th Cir. 2017).

115. *See id.* (reasoning that "[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").

privacy of cisgender individuals "is . . . a prediction hardly different other 'self-fulfilling prophec[ies]'. . . once routinely used to deny rights or opportunities."[116]

The Eleventh Circuit's ruling comes at a time where transgender individuals are subject to acts of discrimination even by the highest office in the land. The Trump Administration has repeatedly attacked transgender rights since the day the President took office.[117] Many of the Administration's Cabinet Department have attempted to diminish the rights of transgender Americans, sometimes successfully.[118] The federal courts' expansion of "sex discrimination" to include transgender discrimination[119] is a sign to transgender Americans that the government respects, values, and is willing to protect their rights and freedoms. Therefore, the Eleventh Circuit's decision in *Adams* is a step in the right direction to prevent transgender discrimination on the state and federal government level.

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116. United States v. Virginia, 518 U.S. 515, 541 (1996).

117. For example, on August 28, 2017, President Donald J. Trump formally directed the Departments of Defense and Homeland Security to place a ban on transgender individuals from joining the military. Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, 82 Fed. Reg. 41319 (Aug. 28, 2017).

118. For example, on August 16, 2019, the United States Department of Justice filed a brief in the Supreme Court, arguing that federal law "does not prohibit discrimination against transgender persons based on their transgender status." Brief for the Federal Respondent Supporting Reversal, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (U.S. 2019) (No. 18-107).

119. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (U.S. 2020) (holding that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex); *see also* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that "discrimination against a transgender individual because of [his or] her gender non-conformity is sex discrimination").

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