


2017

Boys Will Be Girls, and Girls Will Be Boys: Urging the Supreme Court to Recognize a Transgender Student's Right to Use the Appropriate Facilities in a Federally Funded School

Dianna Felberbaum

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Fourteenth Amendment Commons](#)

Recommended Citation

Felberbaum, Dianna (2017) "Boys Will Be Girls, and Girls Will Be Boys: Urging the Supreme Court to Recognize a Transgender Student's Right to Use the Appropriate Facilities in a Federally Funded School," *Touro Law Review*: Vol. 33 : No. 3 , Article 15.
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol33/iss3/15>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.

**BOYS WILL BE GIRLS, AND GIRLS WILL BE BOYS:
URGING THE SUPREME COURT TO RECOGNIZE A
TRANSGENDER STUDENT’S RIGHT TO USE THE
APPROPRIATE FACILITIES IN A FEDERALLY FUNDED
SCHOOL**

*Dianna Felberbaum**

INTRODUCTION

In recent years, Americans have increasingly become more aware about gender identity and how gender has evolved to mean more than just the biological assignment an individual was given at birth.¹ This is due to the fact that not only are individuals becoming more comfortable questioning their gender identity due to increased acceptance of transgender individuals in society, but also because individuals are questioning their gender identities at a younger age.² As a result, schools throughout the nation have “increasingly . . . adopted policies protecting transgender students from discrimination, providing that transgender students be allowed to use restrooms and locker rooms and participate in sports in accordance with their gender identity.”³ However, there is vast inconsistency with how the nation’s

*J.D. Candidate 2018, Touro College Jacob D. Fuchsberg Law Center; TOURO LAW REVIEW, Associate Editor; B.A. in English, Stony Brook University. I would like to thank Professor Rena Sepowitz and Megan Forbes for their guidance and support.

¹ Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE. 89, 102-03 (2015) (defining “gender” as “that gender classification with which an individual identifies—an individual’s own sense of being male or female or something in between ‘whether or not that gender-related identity . . . is different from that traditionally associated with the person’s physiology or assigned sex at birth,’” defining “gender expression” as referring “to an individual’s ‘external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions,’” and defining a “transgender” as “an umbrella term encompassing the state of one’s gender identity or expression being inconsistent with that individual’s assigned sex at birth.”).

² *Id.* at 99.

³ *Id.* at 113.

federally funded school systems handle the presence of transgender students.⁴ The lack of uniformity of laws protecting transgender students is due to a split in the Circuit Courts of the United States.⁵ As a result, “schools are blindly navigating an unplowed terrain.”⁶ The most effective way to create uniformity in the absence of congressional action for these students is with definitive guidance from the Supreme Court of the United States.

The nation’s public education system and its transgender students were supposed to receive this desperately needed guidance in October 2017, when the Supreme Court was scheduled to hear *G.G. v. Gloucester County School Board*.⁷ In fact, the matter proved to be so urgent that the Court moved the hearing to the end of March 2017.⁸ However, on February 22, 2017, President Donald Trump withdrew special guidance that would protect transgender students in federally funded schools.⁹ As a result, the Supreme Court reversed its decision to hear the case, and in one sentence, sent the case back down to the Fourth Circuit.¹⁰ The Court explained that the first issue¹¹ before it concerned the guidance document given by former President Barack

⁴ *Id.* at 112-14.

⁵ See generally *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709 (4th Cir. 2016); *Kastl v. Maricopa County Community College Dist.*, 325 Fed. App’x. 492 (9th Cir. 2009).

⁶ Weatherby, *supra* note 1, at 104.

⁷ *Gloucester County Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017); see also Moriah Balingit & Robert Barnes, *Supreme Court Takes Up School Bathroom Rules for Transgender Students*, THE WASH. POST (Nov. 16, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae_story.html?utm_term=.f56d225e16c9.

⁸ *Gloucester County School Board v. G.G.*, SCOTUS BLOG (last visited Apr. 7. 2016), <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/>.

⁹ Letter from Edwin S. Kneedler, Deputy Solicitor General, to Scott S. Harris, Clerk for the Supreme Court of the United States (Feb. 22, 2017) (on file with author), <http://www.scotusblog.com/wp-content/uploads/2017/02/16-273-2.22.17-DOJ-Cover-Letter-Guidance.pdf>.

¹⁰ *G.G.*, 137 S. Ct. at 1239 (“Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”); see also SCOTUS BLOG, *supra* note 8.

¹¹ Brief for Respondent at i, *Gloucester County School Board v. G.G.*, 2017 WL 766063 (2017) (No. 16-273) (listing the first question presented as “[w]hether the Gloucester County School Board’s policy, which prohibits school administrators from allowing boys and girls who are transgender to use the restrooms that other boys and girls use, constitutes “discrimination” “on the basis of sex” under Title IX of the Education Amendments of 1972, 20 U.S.C § 1681(a)”) [hereinafter “Brief for Respondent”].

Obama which current President Donald Trump subsequently withdrew, and the second issue¹² regarded the school's policy which was unrelated to former President Obama's guidance.¹³ As a result, the Fourth Circuit was required to "take a closer look" at the school's policy without any additional guidance from the Supreme Court.¹⁴ However, it was argued that the Fourth Circuit could affirm "the judgment on any ground supported by the record"¹⁵ because despite the guidance's withdrawal, "the meaning of Title IX and 34 C.F.R. § 106.33 will remain the same."¹⁶ What is most troubling is that both Gavin—the plaintiff in this case—and the school board agreed that the Supreme Court should hear the case.¹⁷

This note will argue that the Fourth Circuit should affirm its previous ruling, allowing the parties to appeal to the Supreme Court, which should hold that federally funded schools are required to allow transgender students to use the restroom associated with their gender identity. Part I of this note will provide an overview of the individual rights at issue in this circuit split. These individual rights are established by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VII, Title IX, 34 C.F.R. § 106.33 and 42 U.S.C. § 1983. Part II will identify and discuss the circuit split that exists on this issue between the Fourth Circuit, in *G.G. v. Gloucester County School Board*, and the Ninth Circuit, in *Kastl v. Maricopa County Community College District*. Part III will provide an overview of Petitioner Gloucester County School Board's petition for a Writ of Certiorari to the Supreme Court, as well as identify the questions the Supreme Court should have addressed in *G.G.* and should address in the future. Part IV will highlight key Supreme Court cases that demonstrate that if the Supreme Court were

¹² *Id.* (listing the second question presented as "[w]hether the Department of Education's conclusion that 34 C.F.R. § 106.33 does not authorize schools to exclude boys and girls who are transgender from the restrooms that other boys and girls use - as set forth in an opinion letter, statement of interest, and amicus brief - is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997)?").

¹³ Amy Rowe, *Justices Send Transgender Bathroom Case Back to Lower Courts, No Action on Same-sex Marriage Case*, SCOTUSBLOG (Mar. 6, 2017), <http://www.scotusblog.com/2017/03/justices-send-transgender-bathroom-case-back-lower-courts/>.

¹⁴ *Id.*

¹⁵ Brief for Respondent, *supra* note 11, at 26 (citing *Bennett v. Spear*, 520 U.S. 154, 166 (1997)).

¹⁶ Brief for Respondent, *supra* note 11, at 26.

¹⁷ Brief for Respondent, *supra* note 11, at 26.

to hold that federally funded schools are required to allow transgender students to use the restroom associated with their gender identity, based upon giving deference to the Department of Education's interpretation of what constitutes discrimination under Title IX, this ruling would be consistent with existing precedent. Part V will discuss key lower court cases that would support a Supreme Court decision to hold that federally funded schools are required to allow transgender students to use the restroom associated with their gender identity. Finally, Part VI will provide a conclusion along with recommendations for both the Supreme Court and the Fourth Circuit in how they should hold in this case as well as future cases involving the rights of transgender students in the public-school system.

I. OVERVIEW OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, TITLE VII, TITLE IX, 34 C.F.R. § 106.33, AND 42 U.S.C. § 1983.

The liberty interests afforded to transgender students, which give them the right to use the bathroom associated with their gender identity in public schools, are rooted in several different areas of the law that work together to protect these individuals from impermissible discrimination. First, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution states that:

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁸

Second, Title VII prohibits employment discrimination based on “race, color, religion, sex or national origin,”¹⁹ which complements Title IX’s prohibition of discrimination “on the basis of sex.”²⁰ In addition, 34 C.F.R. § 106.33 allows for comparable facilities for “separate toilet, locker rooms, and shower facilities on the basis of

¹⁸ U.S. CONST. amend. XIV, § 1.

¹⁹ 42 U.S.C. § 2000e (1991).

²⁰ 20 U.S.C § 1681(a) (1986).

sex,” as long as the facilities are “comparable” for both sexes.²¹ In order to allege a Title IX violation, a plaintiff must show “1) that the plaintiff was excluded from participation in an education program based on sex; 2) that the educational institution was receiving federal financial assistance at the time of exclusion; and 3) that the improper discrimination caused the plaintiff harm.”²² Lastly, 42 U.S.C. § 1983 states:

Every person who . . . subjects, or causes to be subjected . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²³

When determining the scope of rights afforded to transgender students in the public- school system, it will be critical for the courts to turn to the above-mentioned provisions in order to ensure that these students are being treated equally among their peers. Furthermore, as discussed below, the courts should also seek guidance from the Department of Education’s interpretation of these regulations in evaluating school policies that discriminate against transgender students.

II. THE CIRCUIT SPLIT

A. The Fourth Circuit

In *G.G.*, Gavin, a transgender male high school student, who was biologically born a female, argued that his public school, Gloucester County School, wrongfully discriminated against him in “violation of the Equal Protection Clause of the Fourteenth Amendment and Title IX.”²⁴ *G.G.* argued that the school wrongfully discriminated against him by banning him from using the men’s restrooms.²⁵

²¹ 34 C.F.R. § 106.33 (2000).

²² *G.G.*, 822 F.3d at 718.

²³ 42 U.S.C. § 1983 (1996).

²⁴ *G.G.*, 822 F.3d at 715-16.

²⁵ *Id.* at 714.

The United States Department of Education (hereinafter “DOE”) enforces Title IX to allow for “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 for students of the other sex.”²⁶ The Gloucester County School Board (hereinafter “Gloucester Board”) wrote a letter to the DOE asking for advice on how to handle this matter.²⁷ The DOE responded and interpreted how Title IX should apply to transgender individuals.²⁸ The letter stated, “when a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”²⁹

At the beginning of his sophomore year, Gavin’s mother informed the school that Gavin was transgender.³⁰ The school was supportive and made sure that all staff treated Gavin as a male.³¹ At first, the school permitted Gavin to use the male restroom.³² Gavin used the male restroom without any issues for approximately seven weeks until community members, including parents of students who attend the school, contacted the school and objected to his use of the men’s restroom.³³ Members of the community argued at school district meetings that Gavin should not be allowed to use the men’s restroom.³⁴ They argued that Gavin’s use of the men’s restroom violated other students’ privacy, his use would lead to sexual assault in restrooms, and would cause non-transgender males to come to school wearing dresses in order to gain access to the women’s restroom.³⁵ One community member said that Gavin “has no right, or she has no right to use a bathroom where the men are exposed. That makes them uncomfortable. It makes me uncomfortable.”³⁶ Another community member said that bathrooms “are divided by sex not gender, not some made up term that some organization wants you to

²⁶ *Id.* at 715; 34 C.F.R. § 106.33 (2000).

²⁷ *G.G.*, 822 F.3d at 715.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *G.G.*, 822 F.3d at 715.

³³ *Id.* at 715-16.

³⁴ Balingit & Barnes, *supra* note 7.

³⁵ Balingit & Barnes, *supra* note 7.

³⁶ Balingit & Barnes, *supra* note 7.

believe as the truth.”³⁷ Additionally, a different member of the community said, “[w]e do not want a policy of biological boys and biological girls in the same facility where an expectation of privacy exists.”³⁸

In response to the school district meetings, Gavin was interviewed and said:

It was humiliating to have a publically facilitated discussion about a minor’s genitals and bathroom usage. It was very dehumanizing. It was almost as if I was another topic on a budget list or some sort of zoning management claim. It was as if there wasn’t a real person that was suffering in this case. What they did was send a message that this student is different. I am the only student in that High School required to use a separate alternate facility whereas my peers are free to use the restrooms in align with their gender identities. To go back to school after a public discussion has been had about your genitals explicitly and bathroom usage, it feels like you’re in one of those nightmares where you go to school without underwear except for it actually was really happening. It was humiliating. It felt like I had been stripped of all agency, privacy, all humanity that I had. Transgender people are real people with real needs. It is time for us to have a platform.³⁹

After the community members’ objections, the school suspended Gavin’s use of the men’s restroom.⁴⁰ In response to his suspension, Gavin argued that he could not use the women’s restroom because he would physically appear as a male in the women’s restroom.⁴¹ As a result, the women in the women’s restroom would see Gavin as a man in the women’s restroom, and “react negatively,” for example, by yelling at him and telling him to leave because men are not allowed in the women’s restroom.⁴² He further argued that using the women’s restroom would cause him severe psychological

³⁷ Balingit & Barnes, *supra* note 7.

³⁸ Balingit & Barnes, *supra* note 7.

³⁹ Balingit & Barnes, *supra* note 7.

⁴⁰ *G.G.*, 822 F.3d at 716.

⁴¹ *Id.*

⁴² *Id.*

distress and would be inconsistent with his treatment for gender dysphoria.⁴³ In response to Gavin’s objections, the school provided an alternative, gender-neutral restroom for him to use; however, he also objected to the use of this restroom.⁴⁴ He explained that the gender-neutral restroom would make him feel even more stigmatized because “it sets him apart from his peers and served as a daily reminder that the school views him as ‘different.’”⁴⁵

The Fourth Circuit held in favor of Gavin, stating that the DOE’s letter interpreting its Title IX regulation permitting schools to provide sex-segregated bathrooms, in which the Department instructed that schools must treat transgender students consistent with their gender identity if they provided sex-segregated bathrooms, was entitled to *Auer* deference.⁴⁶ The *Auer* deference doctrine established by the Supreme Court states, “when an agency interprets its own regulation it is entitled to near-absolute deference,” unless its interpretation is “plainly erroneous or inconsistent with the regulation.”⁴⁷ The *Auer* deference is not applicable when it appears that the interpretation is no more than a convenient litigating position or when the interpretation is a post-hoc rationalization.⁴⁸

The Fourth Circuit reasoned that the DOE’s interpretation of its regulation, Title IX, is consistent with prior interpretation because although the DOE’s interpretation is “novel,” as the Supreme Court previously explained, “novelty alone is no reason to refuse

⁴³ *Id.*; Weatherby, *supra* note 1, at 110 (defining gender dysphoria as “simply the diagnosis that attaches to individuals manifesting the “clinically significant distress” associated with the conflict over their gender identity.”).

⁴⁴ *G.G.*, 822 F.3d at 716-17.

⁴⁵ *Id.*; Weatherby, *supra* note 1, at 122 (“[A]n individual’s conduct in using a restroom designated as either ‘male’ or ‘female’ expresses that individual’s belief that she belongs in that designated category of persons. By choosing to enter a facility labeled for a specific gender group, that individual is effectively stating her association with that gender. Although no words may ever be uttered, there is a strong mental association between the designation affixed to a restroom door and the fact that only those individuals identifying with that designation would enter and use that facility. Therefore, since a transgender student’s selection of a particular restroom is ‘sufficiently imbued with elements of communication,’ the conduct is expressive and sends a particularized message about the student’s gender identity.”) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

⁴⁶ *G.G.*, 822 F.3d at 723.

⁴⁷ *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1324 n.7 (Fed. Cir. 2016) (citing *Auer v. Robbins*, 519 U.S. 452, 461–463 (1997)); *see also* Nicholas R. Bednar, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, MINN. L. REV. VOL 100 (2015).

⁴⁸ *G.G.*, 822 F.3d at 722.

deference.”⁴⁹ The court continued to explain that the interpretation is a legitimate position because the DOE “has consistently enforced this position since 2014.”⁵⁰ Moreover, it reasoned that the DOE’s interpretation is not a post-hoc rationalization because “it is in line with the existing guidance and regulations of a number of federal agencies, all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.”⁵¹

B. The Ninth Circuit

In *Kastl v. Maricopa County Community College District*,⁵² Rebecca Kastl, a transgender female college student, who was biologically born a male, argued that Maricopa County Community College wrongfully discriminated against her in violation of Title VII, Title IX and her constitutional rights under 42 U.S.C. § 1983.⁵³ Rebecca argued that she was wrongfully discriminated against when the community college denied her access to the women’s restroom.⁵⁴ The school banned her from using the women’s restroom until she could prove that she had completed a “sex reassignment surgery.”⁵⁵

The district court granted summary judgment in favor of the school, and Rebecca appealed this judgment.⁵⁶ On appeal, the Ninth Circuit affirmed the lower court’s decision that Rebecca was properly banned from using the women’s restroom.⁵⁷ The Ninth Circuit reasoned that Rebecca stated a “prima facie case of gender discrimination under Title IV based on the theory that impermissible gender stereotypes were a motivating factor” in the school’s decision to ban her from the women’s restroom.⁵⁸ However, the Ninth Circuit found that Rebecca’s claims of gender discrimination failed.⁵⁹ The court reasoned that the establishment of a prima facie case is not

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 325 F. App’x 493 (9th Cir. 2009).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Kastl v. Maricopa County Community College Dist.*, 2006 WL 2460636, at *8 (D. Ariz. 2006).

⁵⁷ *Kastl*, 325 F. App’x at 494.

⁵⁸ *Id.* at 493.

⁵⁹ *Id.* at 493-94.

sufficient to overcome a summary judgment motion.⁶⁰ The court found that the school provided sufficient evidence that Rebecca was banned from using the women's restroom for safety reasons.⁶¹ Ultimately, the court concluded that Rebecca failed to provide sufficient evidence to prove that the school was motivated by her gender to ban her from the restroom.⁶²

III. GLOUCESTER COUNTY SCHOOL BOARD'S PETITION FOR A WRIT OF CERTIORARI IN *G.G. EX REL.*

The Gloucester Board argued that the Supreme Court should grant its petition for three reasons:

First, this case provides an excellent vehicle to reconsider, refine or abolish the *Auer* doctrine. Second, if the Supreme Court decides to retain *Auer* in some form, this case provides an excellent way to resolve important disagreements among the lower courts about *Auer's* proper application. Third, this case provides an excellent example to determine whether the Department of Education's understanding of Title IX reflected in the 'Ferg-Cadima'⁶³ and 'Dear Colleague'⁶⁴ letters must be given effect, thereby resolving once and for all the current nationwide controversy generated by these directives.⁶⁵

Shortly after the Gloucester Board's decision to ban Gavin from using the men's restroom, Emily T. Prince, one of Gloucester Board's attorneys, wrote to the DOE asking for "guidance or rules" relevant to this decision.⁶⁶ On January 7, 2015, James A. Ferg-Cadima, an Acting Deputy Assistant Secretary for Policy in the Department's Office of Civil Rights, responded and stated that "Title

⁶⁰ *Id.* at 494.

⁶¹ *Id.* at 493-94.

⁶² *Kastl*, 325 F. App'x at 494.

⁶³ *See generally* Letter from James A. Ferg-Cadima to the Gloucester School Board at 121a (May 13, 2016) (on file with author).

⁶⁴ *See generally* Letter from Catherine E. Lhamon and Vanita Gupta to the Gloucester School Board, 126a (May 13, 2016) (on file with author).

⁶⁵ Petition for Writ of Certiorari at 3, Gloucester County School Bd., 2016 WL 4610979 (2016) (No. 16-273).

⁶⁶ *Id.* at 8.

IX... prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity*,” and further that “Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes *under certain circumstances*.”⁶⁷ As a result, Ferg-Cadima concluded that “when a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.”⁶⁸ Shortly after the Fourth Circuit’s decision in *G.G.* gave the Ferg-Cadima letter *Auer* deference, the DOE, as well as the Department of Justice, wrote a “Dear Colleague” letter seeking to impose that same requirement on every Title IX-covered educational institution in the nation.⁶⁹

On October 28, 2016, the Supreme Court granted a Writ of Certiorari to the Gloucester Board in *G.G.*⁷⁰ The Supreme Court limited the questions it would address to the following two issues:

- (1) [w]hether courts should extend deference to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought; and (2) whether, with or without deference to the agency, the Department of Education’s specific interpretation of Title IX and 34 C.F.R. § 106.33 . . . should be given effect.⁷¹

On March 6, 2017, the Supreme Court vacated the judgment and remanded the case to the Court of Appeals for the Fourth Circuit “for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”⁷²

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.*

⁶⁹ Letter from Catherine E. Lhamon and Vanita Gupta, *supra* note 64.

⁷⁰ SCOTUS BLOG, *supra* note 8.

⁷¹ SCOTUS BLOG, *supra* note 8.

⁷² SCOTUS BLOG, *supra* note 8.

IV. IF THE SUPREME COURT WERE TO RULE THAT FEDERALLY FUNDED SCHOOLS ARE REQUIRED TO ALLOW TRANSGENDER STUDENTS TO USE THE RESTROOM ASSOCIATED WITH THEIR GENDER IDENTITY, THE RULING WOULD BE COSISTENT WITH PRECEDENT

A. Review of Supreme Court Cases

The argument that the Court should give deference to the Department of Education's interpretation of Title IX, which gives transgender students the right to use the facilities that associates with their gender identity, is consistent with existing precedent where the Court has also given deference to an agency's interpretation of their own regulations. In *Price Waterhouse v. Hopkins*,⁷³ the Supreme Court held that sex discrimination that violates Title VII includes differential treatment positioned on "sex based" considerations which include gender.⁷⁴ In *Price Waterhouse*, Ann Hopkins was denied a position as a partner at an accounting firm because, in the opinion of the partners of the accounting firm, she did not meet the standards of how a woman should be portrayed.⁷⁵ The Court reasoned that this constituted sex discrimination in violation of Title VII because Hopkins was subjected to differential treatment solely because of considerations based on her gender and because she "failed to act like a woman."⁷⁶

In *Auer v. Robbins*,⁷⁷ the Supreme Court held that the Secretary of Labor's interpretation of its own regulation was entitled to deference.⁷⁸ In that case, police sergeants sued their employer, the St. Louis Police Department.⁷⁹ The sergeants argued that they were entitled to overtime payment under § 7(a)(1) of the Fair Labor Standards Act of 1938 (hereinafter "FLSA").⁸⁰ Section 213(a)(1) of the FLSA exempts "bona fide executive, administrative, or

⁷³ 490 U.S. 228 (1989).

⁷⁴ *Id.* at 241-42.

⁷⁵ *Id.* at 234-35.

⁷⁶ *Id.* at 258.

⁷⁷ 519 U.S. 452 (1997).

⁷⁸ *Id.* at 453.

⁷⁹ *Id.* at 455.

⁸⁰ *Id.*; 29 U.S.C. § 207(a)(1) (2010).

professional” employees from overtime pay requirements.⁸¹ In response, the St. Louis Police Department argued that the sergeants were not entitled to the overtime pay because they fell under this exemption as “bona fide executive, administrative or professional employees.”⁸² Under the FLSA, one of the requirements needed to qualify under the exemption is that the employee must earn a specified minimum amount of money on a “salary basis.”⁸³ According to the FLSA, an employee is paid under a salary basis if “under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”⁸⁴

The sergeants argued “that the ‘salary basis’ test was not met in their case because under the terms of the St. Louis Metropolitan Police Department Manual, their compensation could be reduced for a variety of disciplinary infractions related to the ‘quality or quantity’ of the work that they performed.”⁸⁵ However, the Secretary of Labor interpreted the “salary basis” test and determined that the test is satisfied when an employee’s compensation may not, “as a practical matter,” be adjusted in ways inconsistent with the test.⁸⁶ Furthermore, the Secretary of Labor determined that the “salary basis” test is violated if there is either an actual practice of making deductions, or an employment policy that creates a “significant likelihood” of deductions.⁸⁷ The Supreme Court explained that since the words “subject to,” the regulation’s critical phrase, “comfortably bears the meaning the Secretary assigns,” the Secretary of Labor’s interpretation of its own test was not “plainly erroneous or inconsistent with the regulation,” and was therefore controlling.⁸⁸

In *Jackson v. Birmingham Board of Education*,⁸⁹ the Supreme Court held that the unequal treatment of a public high school’s girls’

⁸¹ 29 U.S.C. § 213(a)(1) (2014).

⁸² *Auer v. Robbins*, 519 U.S. 452, 455 (1997).

⁸³ *Id.*; 29 C.F.R. § 541.1(f) (2014); 29 C.F.R. § 541.2(e) (2014); 29 C.F.R. § 541.3(e) (2014).

⁸⁴ *Auer*, 519 U.S. at 455.

⁸⁵ *Id.*

⁸⁶ *Id.* at 461.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 544 U.S. 167 (2005).

basketball team in comparison with the boys' basketball team was a violation of the girls' rights under Title IX.⁹⁰ In that case, Roderick Jackson was the coach of the girls' sports teams at Ensley Public High School.⁹¹ He discovered that the girls' teams were not receiving equal funding or equipment in comparison with the boys' sporting teams.⁹² As a result, Roderick confronted the school and argued that the unequal treatment was not only unfair, but that it kept him from adequately doing his job.⁹³ The school did not respond to his complaints.⁹⁴ Roderick was subsequently fired for not adequately doing his job.⁹⁵ Roderick sued the school and argued the school discriminated against him in violation of Title IX when he was fired in retaliation for complaining about sex discrimination.⁹⁶

When the case reached the Supreme Court, the Court held that retaliation constituted discrimination in Roderick's case, and therefore the school violated Title IX.⁹⁷ The Court found that in previous Title IX violation cases, Title IX "broadly" prohibits a funding recipient from subjecting any person to "discrimination . . . on the basis of sex."⁹⁸ Retaliation against a person who has complained about sex discrimination is a form of intentional sex discrimination that is protected by Title IX.⁹⁹ Retaliation is an intentional act which is a form of "discrimination" because the complainant is being subjected to differential treatment.¹⁰⁰ The Supreme Court reasoned that discrimination is a term that covers a wide range of intentional unequal treatment¹⁰¹ and that Congress intended to give the statute a long reach by using such a broad term as discrimination.¹⁰²

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁰³ the Supreme Court held that an agency has the authority to

⁹⁰ *Id.* at 171.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 171-72.

⁹⁴ *Jackson*, 544 U.S. at 171-72.

⁹⁵ *Id.* at 172.

⁹⁶ *Id.*

⁹⁷ *Id.* at 178.

⁹⁸ *Id.* at 173.

⁹⁹ *Jackson*, 544 U.S. at 173-74.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 175.

¹⁰³ 467 U.S. 837 (1984).

interpret its own statute.¹⁰⁴ In 1977, Congress encouraged states to meet the Environmental Protection Agency's (hereinafter "EPA") standards through the Clean Air Act Amendments (hereinafter "CAA Amendments").¹⁰⁵ The CAA Amendments require states to enact programs that regulate "new or modified major stationary sources of air pollution."¹⁰⁶ The CAA Amendments allow a state to adopt a definition of the phrase "stationary source."¹⁰⁷ That definition is then controlling in determining when "an existing plant that contains several pollution emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant."¹⁰⁸

The Supreme Court held that the program agencies were entitled to deference in interpreting the meaning of the "stationary source."¹⁰⁹ The Court reasoned that when a court analyzes an agency's interpretation of its own statute there are two questions the Court must ask.¹¹⁰ The first question is "whether Congress has directly spoken to the precise question at issue."¹¹¹ Accordingly, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹¹² Yet, if "the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute"¹¹³ The Court continued to state that "if the statute is silent or ambiguous with respect to the specific issue, the [second] question for the court to ask is whether the agency's answer is based on a permissible construction of the statute."¹¹⁴

In *Chevron*, the Court acknowledged that the statute was silent on the specific issue and, therefore, the Court must ask whether the EPA's definition of "stationary source" is based on a reasonable

¹⁰⁴ *Id.* at 866.

¹⁰⁵ *Id.* at 839-40.

¹⁰⁶ *Id.* at 840.

¹⁰⁷ *Id.*

¹⁰⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840 (1984).

¹⁰⁹ *Id.* at 866.

¹¹⁰ *Id.* at 842.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Chevron*, 467 U.S. at 842.

¹¹⁴ *Id.*

interpretation of the statute.¹¹⁵ The Court found that the EPA's definition of "stationary source" was based on a reasonable interpretation of the statute because the statute "seeks to accommodate progress in reducing air pollution with economic growth."¹¹⁶ The Court explained that:

the language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms; a single building, not part of a larger operation, would be covered if it emits more than one-hundred tons of pollution, as would any facility, structure, or installation.¹¹⁷

The EPA interpreted the phrase "stationary source" to mean "any building, structure, facility, or installation" that emits air pollution.¹¹⁸ Furthermore, the Court explained that it has:

long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. It has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.¹¹⁹

B. Analysis of Supreme Court Cases

If the Supreme Court were to hold that federally funded schools are required to allow transgender students to use the restroom associated with their gender identities, it would be consistent with the

¹¹⁵ *Id.* at 843-44.

¹¹⁶ *Id.* at 866.

¹¹⁷ *Id.* at 861.

¹¹⁸ *Chevron*, 467 U.S. at 861-62.

¹¹⁹ *Id.* at 844.

Court's prior rulings in *Price Waterhouse*,¹²⁰ *Auer*,¹²¹ *Jackson*,¹²² and *Chevron*.¹²³ The Court expressly established in *Price Waterhouse* that differential treatment based on sex, like the differential treatment Gavin is being subjected to, is sex discrimination in violation of Title VII.¹²⁴ As the Court ruled in *Auer* and *Chevron*, and as the Fourth Circuit has already held, it is appropriate for an agency to be afforded deference to interpret the meaning of its own regulations.¹²⁵ Although former President Obama's guidance was withdrawn by President Trump, "the meaning of Title IX and 34 C.F.R. § 106.33 [] remain[s] the same."¹²⁶

In Gavin's case, the DOE was asked to interpret its own regulation, Title IX, in relation to the use of restrooms by transgender students in Gloucester County Public School.¹²⁷ The DOE interpreted Title IX and determined that "when a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."¹²⁸ This Court previously reasoned in *Auer* that an agency's interpretation of its own regulation is not plainly erroneous when a statute's critical phrases "comfortably bear the meaning to which it is assigned."¹²⁹ In Gavin's case, Title IX "comfortably bears the meaning to which" the DOE assigns.¹³⁰ Title IX's critical phrase prohibiting "discrimination on the basis of sex" establishes that a public school may not discriminate against a student on the basis of sex.¹³¹ As the Supreme Court ruled in *Jackson*,¹³² an individual is discriminated against when they are subjected to "differential treatment."¹³³ When a public high school requires only one student out of the entire school population to

¹²⁰ 490 U.S. 228 (1989).

¹²¹ 519 U.S. 452 (1997).

¹²² 544 U.S. 167 (2005).

¹²³ 467 U.S. 837 (1984).

¹²⁴ *Price Waterhouse*, 490 U.S. at 258.

¹²⁵ See generally *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005); *Auer v. Robbins*, 519 U.S. 452, 455 (1997); *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709 (4th Cir. 2016).

¹²⁶ Letter from Edwin S. Kneedler, Deputy Solicitor General, *supra* note 9.

¹²⁷ *G.G.*, 822 F.3d at 715.

¹²⁸ *Id.*

¹²⁹ *Auer*, 519 U.S. at 461.

¹³⁰ *Id.*

¹³¹ 20 U.S.C. § 1681(a) (1986).

¹³² *Jackson*, 544 U.S. at 173-74.

¹³³ *Id.* at 172.

use a separate alternate restroom facility, while all other students and staff members are free to use the restrooms aligned with their gender identity, this is a clear example of differential treatment.¹³⁴ As the Court has already established, discrimination of an individual through differential treatment is a violation of Title IX.¹³⁵ Accordingly, Title IX comfortably bears the meaning to which the DOE assigns because the DOE's interpretation is that "a school must treat transgender students consistent with their gender identity" and, thus, may not discriminate against transgender students by subjecting them to differential treatment.¹³⁶

Additionally, according to the Court's previous reasoning in *Chevron*, in analyzing an agency's interpretation of its own regulation, the appropriate question to ask is whether the agency's definition is based on a reasonable interpretation of the statute.¹³⁷ A reasonable interpretation of Title IX is that discriminating and subjecting someone to differential treatment on the basis of sex is prohibited.¹³⁸

V. IF THE SUPREME COURT RULES THAT FEDERALLY FUNDED SCHOOLS ARE REQUIRED TO ALLOW TRANSGENDER STUDENTS TO USE THE RESTROOM ASSOCIATED WITH THEIR GENDER IDENTITY, THE RULING WOULD BE CONSISTENT WITH LOWER COURT PRECEDENT

A. Review of Lower Court Cases

In *Schwenk v. Hartford*,¹³⁹ the Ninth Circuit held that sex discrimination includes any "differential treatment based on a consideration 'related to the sex of' the individual."¹⁴⁰ In this case, Crystal Schwenk was a transgender individual who was biologically born a male.¹⁴¹ She was diagnosed with gender dysphoria at a young age.¹⁴² Although Schwenk had not undergone sex reassignment

¹³⁴ *Id.* at 173-74.

¹³⁵ *Id.*

¹³⁶ *Auer*, 519 U.S. at 461.

¹³⁷ *Chevron*, 467 U.S. at 843-44.

¹³⁸ *Jackson*, 544 U.S. at 173.

¹³⁹ 204 F.3d 1187 (9th Cir. 2010).

¹⁴⁰ *Id.* at 1202.

¹⁴¹ *Id.* at 1193.

¹⁴² *Id.*

surgery, she identified as a woman, both physically and mentally.¹⁴³ While incarcerated, a prison guard was told that Schwenk was a transgender.¹⁴⁴ Once the prison guard was informed of this information, the guard began treating her differently than non-transgender inmates.¹⁴⁵

The Ninth Circuit relied on the Supreme Court's analysis in *Price Waterhouse* and concluded that under Title VII, sex included both biological sex and gender.¹⁴⁶ As a result, the court reasoned the terms "sex" and "gender" are "interchangeable."¹⁴⁷ Accordingly, the Ninth Circuit found that the prison guard's actions were "at least in part" motivated by Schwenk's gender¹⁴⁸ because the prison guard began to treat her differently from non-transgender inmates only upon learning that she was transgender.¹⁴⁹ As a result, the Ninth Circuit determined that the actions constituted differential treatment as defined by the Supreme Court, which violated Title VII and the Fourteenth Amendment.¹⁵⁰

In *Smith v. City of Salem, Ohio*,¹⁵¹ the Sixth Circuit held that a transgender's Title VII rights were violated when the individual was subjected to gender discrimination.¹⁵² In this case, plaintiff Jimmie L. Smith was biologically born a male but identified as a female.¹⁵³ Smith was diagnosed with gender dysphoria¹⁵⁴ and began to undergo a sex change by changing her physical appearance to become more feminine.¹⁵⁵ Her co-workers noticed these changes.¹⁵⁶ As a result, her co-workers held a meeting and determined that Smith needed to undergo multiple psychological evaluations because she was a

¹⁴³ *Id.*

¹⁴⁴ *Schwenk*, 204 F.3d at 1193.

¹⁴⁵ *Id.* at 1193-94.

¹⁴⁶ *Id.* at 1202.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Schwenk*, 204 F.3d at 1202.

¹⁵⁰ *Id.*

¹⁵¹ 378 F.3d 566 (6th Cir. 2004).

¹⁵² *Id.* at 572.

¹⁵³ *Id.* at 568.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Smith*, 378 F.3d at 569.

transgender.¹⁵⁷ However, none of the non-transgender employees had to undergo such evaluation.¹⁵⁸

The Sixth Circuit held that forcing Smith to undergo psychological evaluations because she was a transgender constituted unconstitutional gender discrimination because, as the Supreme Court established in *Price*, sex discrimination includes differential treatment based on sex.¹⁵⁹ The Sixth Circuit explained that “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘trans[gender],’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”¹⁶⁰ As a result, the Sixth Circuit determined that “discrimination against a plaintiff who is trans[gender]—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse*,” which the Supreme Court determined was unconstitutional.”¹⁶¹

In *Carcaño v. McCrory Berger*,¹⁶² the District Court for the District of Maryland held that students of a federally funded school were “likely to succeed on the merits of their Title IX claim that the law violated Title IX by discriminating against them on the basis of sex.”¹⁶³ In this case, transgender students sued their federally funded public school.¹⁶⁴ The students argued that a state law mandating that restrooms and changing facilities could only be used by individuals based on their biological sex discriminated against transgender individuals in violation of Title IX as well as the Equal Protection and Due Process clauses of the Fourteenth Amendment.¹⁶⁵ The students’ first argument was that the state law violated Title IX because the law subjected them to unconstitutional differential treatment.¹⁶⁶ The state law required public entities to ensure that restrooms and other similar

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 572.

¹⁶⁰ *Id.* at 575.

¹⁶¹ *Smith*, 378 F.3d at 575.

¹⁶² 203 F. Supp. 3d 615 (M.D.N.C. 2016)

¹⁶³ *Id.* at 615; 632-33.

¹⁶⁴ *Id.* at 621.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

facilities were used by individuals based on their biological sex.¹⁶⁷ The North Carolina law defined biological sex as the sex listed on an individual's birth certificate.¹⁶⁸

The District Court reasoned that the students were excluded from a federally funded educational program because of their sex.¹⁶⁹ The court found that this violated Title IX because it provides:

'[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance' As a result, institutions may not 'limit any person in the enjoyment of any right, privilege, advantage, or opportunity' on the basis of sex.¹⁷⁰

Under Title IX, "access to bathrooms, showers, and other similar facilities qualifies as a 'right, privilege, advantage, or opportunity.'"¹⁷¹ The school's enforcement of the North Carolina law caused the students medical harm, among other injuries.¹⁷²

In analyzing the students' second claim that they were discriminated against, the court stated that to evaluate a Title IX claim,

the court must undertake a two-part analysis. First, the court must determine whether the North Carolina law violates Title IX's general prohibition against sex discrimination. Second, if the North Carolina law does violate Title IX's general prohibition against sex discrimination, the court must then determine whether an exception to that general prohibition applies.¹⁷³

In analyzing the first part of the test, the court observed that the Supreme Court established in *Jackson* that, "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition."¹⁷⁴ The court acknowledged that one of the DOE regulations that permits schools to

¹⁶⁷ *Carcaño*, 203 F. Supp. 3d at 621.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 622.

¹⁷⁰ *Id.* at 633.

¹⁷¹ *Id.* at 650.

¹⁷² *Carcaño*, 203 F. Supp. 3d at 635.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 635-36.

“provide separate toilet, locker room, and shower facilities on the basis of sex,” is a potential exception.¹⁷⁵ However, the court looked to *G.G.*, which stated that “the court must give controlling weight to the DOE opinion letter, which states that schools ‘generally must treat transgender students consistent with their gender identity,’ when considering the scope of this exception during the second stage of the analysis.”¹⁷⁶ As a result, the court found that the North Carolina law requires that schools allow students to use restrooms and similar facilities on the basis of sex.¹⁷⁷ Because the provision of sex-segregated facilities requires schools to treat individuals differently depending on their sex, the North Carolina law fell within Title IX’s general prohibition against sex discrimination.¹⁷⁸

In analyzing the second part of the test, the only potentially applicable exception is regulation § 106.33,¹⁷⁹ which allows for sex-segregated bathrooms and similar facilities.¹⁸⁰ However, the court looked to *G.G.* and the DOE opinion letter which stated that a school must treat students consistent with their gender identity.¹⁸¹ In contrast, the North Carolina law required “schools to treat students consistent with their birth certificates, regardless of gender identity.”¹⁸² The court reasoned that although the North Carolina law “is consistent with the DOE opinion letter when applied to most students, it is inconsistent with the DOE opinion letter as applied to the individual transgender Plaintiffs, whose birth certificates do not align with their gender identities.”¹⁸³ Consequently, the court determined that the North Carolina school’s actions do not fall within the exception.¹⁸⁴

In *Schroer v. Billington*,¹⁸⁵ the District Court for the District of Columbia held that a transgender job applicant was discriminated against on the basis of sex in violation of Title VII.¹⁸⁶ In that case, the plaintiff, Diane Schroer, was a transgender female who was born a

¹⁷⁵ *Id.* at 636.

¹⁷⁶ *Id.*

¹⁷⁷ *Carcaño*, 203 F. Supp. 3d at 636.

¹⁷⁸ *Id.* at 636.

¹⁷⁹ 34 C.F.R. § 106.33 (2000).

¹⁸⁰ *Carcaño*, F. Supp. 3d at 636.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 577 F. Supp. 2d 293 (D.D.C. 2008).

¹⁸⁶ *Id.* at 308.

male.¹⁸⁷ Diane applied for a job as a “[s]pecialist in Terrorism and International Crime” with the Congressional Research Service at the Library of Congress.¹⁸⁸ However, she applied for the job prior to holding herself out as a woman.¹⁸⁹ Thus, she applied for the job as “David J. Schroer,” the name she was legally given at birth.¹⁹⁰ Nevertheless, Diane was well qualified for the job and as a result was offered the position.¹⁹¹ However, when Diane informed the employer that she was a transgender and planned to undergo sex reassignment surgery prior to starting her employment, the employer rescinded her offer of employment.¹⁹² The employer claimed that her transition would “divert” her “full attention away from the mission” at the library.¹⁹³

The court found that the employer’s decision to rescind Diane employment offer was based on sex stereotyping.¹⁹⁴ The court reasoned that under Title VII, it does not matter “whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.”¹⁹⁵ The court compared Diane’s case to an employee being fired “because she converts from Christianity to Judaism.”¹⁹⁶ It explained that this example would be a “clear case of discrimination ‘because of religion.’”¹⁹⁷ Accordingly:

Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that “transsexuality” is unprotected by Title VII. In other

¹⁸⁷ *Id.* at 295.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Schroer*, 577 F. Supp. 2d at 295.

¹⁹¹ *Id.*

¹⁹² *Id.* at 299.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 305-06.

¹⁹⁵ *Schroer*, 577 F. Supp. 2d at 305.

¹⁹⁶ *Id.* at 306.

¹⁹⁷ *Id.*

words, courts have allowed their focus on the label “transsexual” to blind them to the statutory language itself.¹⁹⁸

B. Analysis of Lower Court Cases

As established in *Schwenk* and *Smith*, subjecting a transgender individual to differential treatment solely because he or she is transgender constitutes sex discrimination as defined by the Supreme Court in violation of Title VII.¹⁹⁹ Just as Crystal in *Schwenk* was treated differently by the prison guard solely because she was transgender, and as Jimmie in *Smith* was treated differently by the employer solely because he was a transgender, here, Gavin is being treated differently by the school because he is not allowed to use the restroom associated with his gender identity, as all the other students are, solely because he is a transgender.²⁰⁰ Like Gavin who has not undergone sex reassignment surgery, both Crystal Schwenk and Jimmie Smith had not undergone sex reassignment surgery when they were subjected to such differential treatment.²⁰¹ Nevertheless, like Gavin, both Crystal Schwenk and Jimmie Smith were otherwise fully identifiable as the gender with which they sought to be identified.²⁰² Both courts recognized that the differential treatment that Crystal Schwenk and Jimmie Smith were subjected to constituted unconstitutional sex discrimination as established by the Supreme Court.²⁰³

As demonstrated in *Carcaño*, prohibiting transgender individuals from using facilities consistent with the gender they identify with “causes significant and irreparable physical, psychological, economic, social, and stigmatic harm to transgender people including the more than 44,000 transgender adults residing in North Carolina”²⁰⁴ The privacy and safety interests that North

¹⁹⁸ *Id.* at 306-07.

¹⁹⁹ *Schwenk*, 204 F.3d at 1202; *Smith*, 378 F.3d at 572.

²⁰⁰ *Schwenk*, 204 F.3d at 1202; *G.G.*, 822 F.3d at 716; *Smith*, 378 F.3d at 575.

²⁰¹ *G.G.*, 822 F.3d at 715; *Schwenk*, 204 F.3d at 1202; *G.G.*, 822 F.3d at 716; *Smith*, 378 F.3d at 575.

²⁰² *G.G.*, 822 F.3d at 715; *Schwenk*, 204 F.3d at 1193; *Smith*, 378 F.3d at 568.

²⁰³ *Schwenk*, 204 F.3d at 1202; *Smith*, 378 F.3d at 575.

²⁰⁴ Memorandum of Law in Support of Plaintiff United States’ Motion for Preliminary Injunctive Relief at 1, *Carcaño v. McCrory Berger*, 203 F. Supp. 3d 615 (M.D. 2016) (No. 1:16-cv-425).

Carolina claimed as a defense “in enacting and implementing” the state law “are factually baseless and legally insufficient to justify the discrimination.”²⁰⁵ This is because the “more than 44,000 transgender individuals” in North Carolina have been using facilities “consistent with their gender identity” for a long time without causing any privacy or safety issues.²⁰⁶

As the court reasoned in *Schroer*, “whether viewed as discrimination based on the divergence between [Gavin’s] gender identity and ‘biological’ sex or discrimination due to gender transition, a policy that allows for differential treatment solely based on an individual’s gender or sex ‘literally discriminates because of . . . sex.’”²⁰⁷ Just as it would clearly be unconstitutional to allow for differential treatment of an individual who converted to another religion, the court must not turn a “blind eye” to the differential treatment to which Gavin is subjected.²⁰⁸

VI. CONCLUSION AND RECOMMENDATIONS

The Fourth Circuit should affirm its previous ruling, allowing the parties to appeal to the Supreme Court, which should hold that federally funded schools are required to allow transgender students to use the restroom associated with their gender identity. First, the Fourth Circuit court should look to the parties who agree that it is urgent for the Supreme Court to hear and decide this case.²⁰⁹ Second, the Supreme Court should examine societal values, as reflected in the policies underlying Titles VII and IX when making its determination. Society seeks to protect transgender persons.²¹⁰ Since President Trump’s withdrawal of guidance to federally-funded schools that allowed students to use restrooms associated with their gender identity, countless organizations, experts, and celebrities have all put forth great efforts to support the transgender community and their determination

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 15.

²⁰⁷ *Schroer*, 577 F. Supp. 2d at 305.

²⁰⁸ *Id.* at 306-07.

²⁰⁹ Rowe, *supra* note 13.

²¹⁰ On March 2, 2017, Yelp joined 52 other companies in signing onto an amicus brief supporting Gavin Grimm. Sara Ashley O’Brien, *Yelp is Making it Easier to Find Gender-Neutral Restrooms*, CNN, (Mar. 3, 2017), <http://money.cnn.com/2017/03/03/technology/yelp-transgender-bathroom-rights/>.

to seek justice.²¹¹ On March 30, 2017, North Carolina repealed its state law, as discussed in *Carcaño*, which required individuals to use bathrooms associated with the gender on their birth certificate.²¹² The Court must focus on what really matters in this case: the well-being of the nation's most vulnerable communities, like its youth. There has been no claim that the students in Gavin's school feel threatened by his use of the men's restroom. Gavin stated himself that he had "nothing to fear" from his peers.²¹³ It is only the parents who have made Gavin's use of the men's restroom an issue; however, they are not the ones using the school bathrooms, but it is their children who are using them. Society not only seeks to protect order, but also to avoid abuse of the system.²¹⁴ Finally, since the students do not have a problem with Gavin's use of the men's restroom, neither should their parents and, therefore, neither should a court.

²¹¹ *Id.*

²¹² Governor Roy Cooper signed the new bill, repealing the old bill and stated: "For over a year now, House Bill 2 has been a dark cloud hanging over our great state. It has stained our reputation. It has discriminated against our people and it has caused great economic harm in many of our communities." Jason Hanna, Madison Park & Elliott C. McLaughlin, North Carolina repeals "Bathroom Bill," CNN, (Mar. 30, 2017), <http://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>. The economic harm the Governor referred to refers to the fact that since North Carolina passed the prior bathroom law that is now repealed, business and organizations have deserted the state in order to express their disagreement with the law. *Id.* Since that law has been repealed, the Governor expressed that these businesses and organizations plan to come back to the state. *Id.*

²¹³ Balingit & Barnes, *supra* note 7.

²¹⁴ In 2016 a man in Seattle entered a Women's locker room and claimed that "the law has changed and I have a right to be here." Alison Morrow, *Man in Women's Locker Room Cites Gender Rule*, KING, (Feb 16, 2016), <http://www.king5.com/news/local/seattle/man-in-womens-locker-room-cites-gender-rule/65533111>. Witnesses claimed that the man made no physical or verbal attempt to identify as a woman. *Id.* A woman who uses this locker room frequently said this event was "a first" and that it was "bizarre" and questioned "why would anyone want to do that?" *Id.* The women said "either identify yourself as a transgender or you're not and you're just taking advantage of a loophole." *Id.* This event, although disturbing and "bizarre," pointed out a pertinent matter that the law that addresses this issue must be clear as to not allow for individuals like this man to take advantage of the system. *Id.* Currently, "there is no specific protocol as to how someone should perform gender in order to access a bathroom. Morrow, *supra* note 214. They just rely on verbal identification or physical appearance." In this case, the Seattle man performed neither. Morrow, *supra* note 214.