

# BORN THIS WAY: TRANSGENDER STUDENT ACCESS TO SCHOOL BATHROOMS

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## INTRODUCTION

Nicole Maines was born Wyatt Maines, and from a young age she knew that she was different from her twin brother; she knew that she was a girl despite the fact that she was born in a male body.<sup>1</sup> With the support of her family, Nicole was able to grow up openly transgender. She went through a gradual transition process in elementary school, and, initially, her school was supportive, including allowing her to use the girls' bathroom.<sup>2</sup> However, another student's grandparents found out about Nicole and they began making complaints to the school, and that student began to follow and harass Nicole.<sup>3</sup> The school then told Nicole and her family that she could not use the girls' bathroom anymore; she either needed to use the boys' bathroom or the bathroom in the nurse's office.<sup>4</sup> Nicole felt trapped; she couldn't use the bathroom consistent with her gender identity.<sup>5</sup> Nicole's family later sued the school, and in 2014, the Supreme Court of Maine ruled that Nicole's rights had been violated.<sup>6</sup>

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1. Nicole Maines, *Transgender: You're Part of the Story*, YOUTUBE: TEDX TALKS (May 6, 2016), <https://www.youtube.com/watch?v=bXnTAnsVfN8> [<https://perma.cc/2E38-QAJC>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014). Nicole prevailed on the grounds that the school district violated her rights under the Maine Human Rights Act (MHRA), ME. REV. STAT. ANN. tit. 5, § 4612(1)(B) (2016). *Reg'l Sch. Unit 26*, 86 A.3d at 606–07. The MHRA provides in relevant part:

It is unlawful public accommodations discrimination, in violation of this Act . . . [f]or any public accommodation . . . to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . sexual

Going to the bathroom is a matter of basic human need and biology. For most people, going to the bathroom simply involves walking through a door marked with a symbol of their sex. For transgender individuals, the signs and symbols gracing bathroom doors have unique meanings—the symbol on one door represents the biological sex of their birth, the symbol on the other door represents their gender, who they are, and how they live. For transgender students, on the other hand, this problem is often even more complicated than it is for transgender adults because most students are not yet old enough to medically transition.<sup>7</sup>

This Comment focuses on securing the right of transgender students in schools to use the facilities that correspond with their gender identity. The argument that follows is premised on the following key concepts: first, that gender identity is part of the overall concept of gender;<sup>8</sup> second, that because gender identity is an aspect of gender, laws implicating gender identity should be reviewed under an intermediate scrutiny standard;<sup>9</sup> and finally, that laws based in animus must be held invalid.<sup>10</sup> Part I provides a brief background on the challenges currently facing transgender students. Part II addresses the current statutory scheme in place and agency interpretation of Title IX. Part III analyzes the current disagreements among courts with regard to interpreting Title IX, and transgender students' challenges to laws and rules that prevent them from using facilities consistent with their gender identities. Part IV provides legal solutions focusing on an intermediate scrutiny standard that could be upheld even by a conservative Supreme Court.

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orientation . . . any of the accommodations . . . [or] facilities . . . of public accommodation. . . .  
tit. 5, § 4592(1).

7. Blakeley Simpson, *There's A(n) (Anatomical) Boy in the Little Girls' Room: Gender Nonconforming Children and Their Access to the Bathroom*, 23 S. CAL. REV. L. & SOC. JUST. 91, 102 (2013).

8. *The Psychology of Transgender: Eight Questions for Transgender Expert Walter Bockting, PhD*, AM. PSYCHOL. ASS'N (Nov. 19, 2015), <http://www.apa.org/news/press/releases/2015/11/psychology-transgender.aspx> [<https://perma.cc/67P9-R7UM>] [hereinafter *The Psychology of Transgender*].

9. *Frontiero v. Richardson*, 411 U.S. 677, 685–87 (1973).

10. *See Romer v. Evans*, 517 U.S. 620 (1996).

## I. BACKGROUND

Before discussing the current climate surrounding bathroom laws, it is necessary to understand the vulnerability of the transgender population and why courts should be suspicious of laws discriminating against transgender individuals. For the purposes of this Comment, the term “transgender” refers to having a gender identity that differs from the sex assigned at birth; transgender individuals are typically those who have been, or can be, diagnosed with gender dysphoria.<sup>11</sup> The factors for gender dysphoria include at least two of the following: (1) marked incongruence between one’s experienced/expressed gender and sex characteristics; (2) a strong desire to be rid of one’s sex characteristics; (3) a strong desire for the sex characteristics of the other gender; (4) a strong desire to be of the other gender; (5) a strong desire to be treated as the other gender; and (6) a strong conviction that one has the typical feelings and reactions of the other gender.<sup>12</sup> Children with gender dysphoria can normally begin hormone therapy once they are in the early stages of puberty. The process consists generally of a year of psychotherapy before receiving hormone blockers, which prevent the child from entering puberty. Then beginning at age sixteen, the child can start receiving cross-hormones, which assist the child in transitioning, and finally the child can receive gender reassignment surgery.<sup>13</sup>

The Supreme Court has characterized immutable characteristics as “determined solely by the accident of birth,” and while some may argue that gender identity is a choice and that sex and gender can be changed through medical treatment, the lack of a medical choice for students and children supports the view that the transgender trait is immutable.<sup>14</sup> As such, a diagnosis of gender dysphoria may indicate that transgender individuals have an immutable characteristic. Courts have noted in other contexts that

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11. *The Psychology of Transgender*, *supra* note 8.

12. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/5SZ8-R88L>].

13. Simpson, *supra* note 7, at 102.

14. Heather L. McKay, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 QUINNIPIAC L. REV. 493, 517–19 (2011) (quoting *Frontiero*, 411 U.S. at 686).

“transsexualism is not voluntarily assumed and is not merely a matter of sexual preference.”<sup>15</sup>

There are a number of issues facing transgender students that make them a particularly vulnerable population. Transgender individuals comprise an at-risk population.<sup>16</sup> They are often susceptible to extreme poverty, depression, and suicide.<sup>17</sup> For instance, in a survey, 41 percent of transgender respondents reported that they had attempted suicide at one point in their lives because of the harassment they faced.<sup>18</sup> This statistic is staggering when compared to the 1.6 percent of the general populace who have attempted suicide due to harassment.<sup>19</sup> There are countless cases of transgender adults facing severe workplace discrimination.<sup>20</sup>

Transgender students are a particularly vulnerable population within an already at-risk population.<sup>21</sup> For students who have made a social transition—namely living life and participating in school as a member of their affirmed gender—going to school and being accepted at school as a member of their affirmed gender is important to their academic, social, and psychological well-being.<sup>22</sup> Without proper support, transgender children have an increased risk of anxiety, depression, suicidal thoughts, and suicide.<sup>23</sup> Students who are transgender and are victimized due to their gender expression are also absent from school more often and may have lower

15. *Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 799 (W.D. Mich. 1990) (citing *Sommers v. Budget Mktg, Inc.*, 667 F.2d 748 (8th Cir. 1982)) (holding that an inmate suffered from serious medical need and was entitled to a preliminary injunction ordering correctional officials to provide her with estrogen therapy as a result of her transsexualism or gender identity disorder).

16. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 948 (2015).

17. *Id.*

18. Kathleen Conn, *Transgender Students on Campus: Challenges and Opportunities*, 330 ED. LAW REP. 441, 444 (2016).

19. *Id.*

20. *See, e.g., Schroer v. Billinton*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964 (D. Minn. 2001); *Goins v. West Grp.*, 635 N.W.2d 717 (Minn. 2001).

21. Katherine Szczerbinski, *Education Connection: The Importance of Allowing Students to Use Bathrooms and Locker Rooms Reflecting Their Gender Identity*, 36 CHILD. LEGAL RTS. J. 153, 153 (2016).

22. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 303, 306 (2013).

23. Szczerbinski, *supra* note 21, at 153.

GPA than their non-transgender peers.<sup>24</sup> Further, the 2011 School Climate Survey, administered by Gay, Lesbian & Straight Education Network found that 80 percent of transgender respondents reported feeling unsafe at school, 75.4 percent reported being verbally harassed, and 16.8 percent reported being physically assaulted.<sup>25</sup>

Because transgender individuals have an immutable characteristic determined by an accident of birth, and are members of a vulnerable community, the law should provide specific protections for them, and courts should find laws that disadvantage them unconstitutional. The current statutory scheme may provide relief for transgender students through Title IX.

## II. CURRENT STATUTORY SCHEME AS A BASIS FOR RELIEF AND EQUAL PROTECTION OF TRANSGENDER STUDENTS

While transgender individuals have yet to be explicitly recognized by Congress or the Supreme Court as a protected class, transgender students are potentially able to turn to three current legal schema for some level of protection: Title IX, Title VII, and the Equal Protection Clause of the Fourteenth Amendment. This Comment focuses primarily on Title IX, which establishes protection against discrimination in schools receiving federal funding. Title IX can provide protection to transgender students if the definition of “sex” is read expansively to include gender identity. The Department of Education (DOE) has previously read Title IX to include gender identity, making this reading plausible for courts.<sup>26</sup> Additionally, Title VII, which establishes protections for employees from discrimination, may provide another path to equal protection for transgender students.<sup>27</sup> Finally,

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24. Suzanne E. Eckes & Colleen E. Chesnut, *Transgender Students and Access to Facilities*, 321 ED. LAW REP. 1, 3 (2015).

25. JOSEPH G. KOSCIW ET AL, GLSEN, 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 3–5 (2012), <https://www.glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Executive%20Summary.pdf> [<https://perma.cc/K4AG-BYVK>].

26. See, e.g., U.S. Dep’t of Educ. Office for Civil Rights, “Dear Colleague” Letter on Transgender Students (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/34GK-AU8E>] [hereinafter May 13 “Dear Colleague” Letter].

27. Transgender rights have been more frequently litigated in the employment context under Title VII than under Title IX, and Title VII may

transgender students may seek protection under the Equal Protection Clause of the Fourteenth Amendment.

The gender and sex protections in schools receiving federal funding are established by Title IX, which provides that “on the basis of sex . . . [no one shall] be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>28</sup> Title IX can be read to include a prohibition of discrimination on the basis of gender because of its prohibition of discrimination on the basis of sex.<sup>29</sup>

In 2010 and 2014, the DOE’s Office of Civil Rights (OCR) under the Obama administration issued two “Dear Colleague” letters (DCLs)<sup>30</sup> confirming the idea that LGBTQ students could be entitled to protection under Title IX.<sup>31</sup> The OCR issued another DCL in 2016 reaffirming the Department’s interpretation that LGBTQ students were protected under Title IX.<sup>32</sup> The 2016 DCL stated that the OCR interpreted Title IX to require “that when a student or a student’s parents notifies the school administration that a student asserts a gender identity different from previous records, the school must treat the student according to that preferred gender identity.”<sup>33</sup> The DCL also provided that transgender students should have access to sex-segregated facilities and activities according to their preferred gender identity.<sup>34</sup> Prior to recent events such as the passage of North Carolina’s House Bill 2 (HB2) and the opinion letter issued by the OCR on January 7,

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therefore provide an informative basis for those moving forward with litigation under Title IX because the Department of Education “has maintained that Title VII and Title IX relate,” and many courts have noted that they interpret Title VII and Title IX similarly. *See, e.g.,* Lindsay Hart, *With Inadequate Protection Under the Law, Transgender Students Fight to Access Restrooms in Public Schools Based on Their Gender Identity*, 41 N. KY. L. REV. 315, 322 (2014).

28. 20 U.S.C. §§ 1681 et seq. (2012); 34 C.F.R. § 106 (2017).

29. Elias Shebar, *Title IX-A New Frontier for the Rights of Transgender Youth? The Demand for Federal Regulations Clarifying the Act’s Applicability*, 22 CARDOZO J.L. & GENDER 155, 159 (2015).

30. Dear Colleague Letters are also known as agency opinion letters and are internal agency guidelines. *Reno v. Koray*, 515 U.S. 50, 61 (1995), held that interpretations in agency opinion letters lack the force of law and do not warrant *Chevron* deference because they are not “subject to the rigors of the Administrative Procedure Act, including public notice and comment.”

31. Aaron J. Curtis, *Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination*, 53 HARV. J. ON LEGIS. 459, 470 (2016).

32. May 13 “Dear Colleague” Letter, *supra* note 26.

33. Conn, *supra* note 18, at 447.

34. *Id.*

2015, the case law around this issue was based largely on employment situations and employment discrimination.<sup>35</sup>

On February 22, 2017, the Trump administration rolled back the Obama administration's protections for transgender students.<sup>36</sup> The 2017 DCL issued by the Trump administration withdrew the January 5, 2015 and May 13, 2016 DCLs issued by the Obama administration "in order to further and more completely consider the legal issues involved."<sup>37</sup> The DCL also sought to protect states' rights in creating policies that impact schools.<sup>38</sup> While the Trump administration has revoked the agency guidance establishing protections for transgender students, the 2015 and 2016 DCLs may still provide useful insight into how Title IX can be read to provide protections for transgender students. Importantly, the Seventh Circuit Court of Appeals held that a transgender student was likely to succeed on the merits of a Title IX claim on a "sex-stereotyping theory" even after the DOE's interpretation of Title IX changed.<sup>39</sup>

Courts have disagreed on how to interpret the term "sex" in Title IX, and whether prior agency guidance on the issue should have been granted deference.

### III. RECENT AND RELEVANT CASES

There is currently disagreement between several courts over how transgender bathroom access should be treated. The most recent cases to discuss the issue of gender discrimination with regard to transgender individuals and bathroom access have resulted in disagreement between the courts over the deference granted to the DOE's interpretation of the term "sex"

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35. See G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 714 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

36. U.S. Dep't of Justice Civil Rights Div. & U.S. Dep't of Educ. Office for Civil Rights, "Dear Colleague" Letter (Feb. 22, 2017), <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf> [<https://perma.cc/3B5A-33S6>] [hereinafter February 22 "Dear Colleague" Letter]; see also Ariane de Vogue et al., *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 23, 2017, 10:16 AM), <http://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/> [<https://perma.cc/BW3F-3CMV>].

37. February 22 "Dear Colleague" Letter, *supra* note 36.

38. *Id.*

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

in Title IX.<sup>40</sup>

The Fourth Circuit properly granted agency deference in reviewing *G.G. ex rel. Grimm v. Gloucester County School Board*.<sup>41</sup> G.G. is a transgender boy. His school administration gave approval for him to use the boys' bathroom, and then the school board passed a policy banning him from using the boys' bathroom.<sup>42</sup> G.G. brought suit alleging that the school board violated Title IX and the Equal Protection Clause by discriminating against him and preventing him from using the bathroom consistent with his gender identity.<sup>43</sup> The Fourth Circuit held that the DOE's interpretation clarified the ambiguous language contained in the statute.<sup>44</sup> The Fourth Circuit granted the agency *Auer* deference<sup>45</sup> because Title IX is ambiguous with regard to how educational institutions must treat transgender students, and the Department interpretation clarifies the ambiguities within the statutory language.<sup>46</sup> *Auer* deference requires that courts uphold an agency's reading of ambiguity in its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation.<sup>47</sup> The Fourth Circuit correctly recognized that while the term "sex" would have been understood to refer to binary gender standards when Title IX was adopted, biological sex is not universally descriptive, and therefore the statutory language was ambiguous.<sup>48</sup>

In a decision inconsistent with that in *G.G.*, the district court in *Texas v. United States* held that agency interpretation of Title IX was not entitled to *Auer* deference.<sup>49</sup> The plaintiffs

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40. See, e.g., *G.G.*, 822 F.3d 709; *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016); *Carcano v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016).

41. *G.G.*, 822 F.3d 709. In *G.G.*, the Fourth Circuit held that: (1) the DCL interpreting Title IX to provide for single-sex bathrooms must treat students consistently with their gender identity was entitled to deference; (2) the district court applied the incorrect evidentiary standard on motion for preliminary injunction; and (3) reassignment to another judge on remand was unnecessary. *Id.* at 721. The Supreme Court vacated and remanded *G.G.* back to the Fourth Circuit following the Trump administration's decision to withdraw the Obama administration's interpretation that Title IX requires schools to treat students consistently with their gender identity. 137 S. Ct. 1239, 1239 (2017).

42. *G.G.*, 822 F.3d at 714.

43. *Id.*

44. *Id.* at 721.

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

46. *G.G.*, 822 F.3d at 719.

47. *Auer*, 519 U.S. at 461.

48. *G.G.*, 822 F.3d at 721.

49. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). (holding

in *Texas* were several states, state agencies, and school boards that brought suit against the Departments of Education, Labor, and Justice, as well as the Equal Employment Opportunity Commission (EEOC) challenging the agencies' interpretation of Title IX and Title VII allowing transgender individuals access to sex-segregated facilities consistent with their gender identity.<sup>50</sup> The district court determined that the statutory language was not ambiguous because the plain meaning of the term "sex" was intended to refer to the "biological and anatomical differences between male and female students as determined at their birth."<sup>51</sup> Because the district court determined that the statutory language was clear, the agency interpretation was not granted *Auer* deference.<sup>52</sup>

Other courts have viewed the holding in *Texas* with skepticism.<sup>53</sup> In *Carcano v. McCrory*, two transgender students and an employee of the University of North Carolina brought suit seeking an injunction against North Carolina's HB2, which requires public agencies to ensure that sex-segregated facilities such as bathrooms and locker rooms are "designated for and only used by persons based on their biological sex."<sup>54</sup> The *Carcano* court was bound by the Fourth Circuit's holding in *G.G.*, but noted that even held to intermediate scrutiny standards, the purported state interest in protecting bodily privacy in sex-segregated bathrooms would likely prevail.<sup>55</sup> In applying an intermediate scrutiny standard, because "Part I [of HB2] facially classifies and discriminates among citizens on the basis of sex," the court found that the

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that: (1) the plaintiffs had standing (several states, agencies and school districts brought suit against the DOE, DOL, and DOJ); (2) the claim was ripe for judicial review; (3) that the federal guidelines released were final agency action subject to judicial review; (4) that the guidelines were subject to notice and comment rulemaking procedures, though none were followed here; and (5) that *Auer* deference was not owed to the agency).

50. *Id.* at 815–16.

51. *Id.* at 832.

52. *Id.* at 833.

53. *Carcano v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016). The court held that: (1) plaintiffs had a justiciable Title IX claim; (2) that claim was ripe; (3) that individual plaintiffs were likely to succeed on the merits of the claim that the law violated Title IX; (4) but that they were not likely to succeed on the equal protection grounds; (5) plaintiffs would suffer irreparable damage were they not granted a preliminary injunction; (6) the balance of equities favored a preliminary injunction; and (7) it was in the public interest to grant the preliminary injunction. *Id.*

54. *Id.* at 621.

55. *Id.* at 635.

state's interest in protecting bodily privacy was an important interest and that the law was substantially related to the state's interest in protecting bodily privacy.<sup>56</sup>

Importantly, the Seventh Circuit in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, held that a transgender student's claim of sex-stereotyping discrimination was entitled to heightened scrutiny despite the revised agency interpretation under the Trump administration.<sup>57</sup> The *Whitaker* court noted the expansive view of Title VII taken by the Supreme Court in several cases, which has been read to prohibit discrimination on the basis of sex stereotypes.<sup>58</sup> The *Whitaker* court thus determined that "by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."<sup>59</sup> The court determined that the student was likely to succeed on the merits of a Title IX claim on a sex-stereotyping theory, and that his equal protection claim was entitled to heightened scrutiny.<sup>60</sup> The court also noted that while the school district had a legitimate interest, its privacy argument was based on "sheer conjecture and abstraction."<sup>61</sup>

Additionally, while the Supreme Court has not directly addressed the level of scrutiny that should be applied based on LGBTQ status, it provided some guidance in *U.S. v. Carolene Products* on the level of scrutiny that should be applied to discrimination on an as-of-yet unaddressed class of persons who may not be able to protect themselves politically.<sup>62</sup> *Carolene Products* asks "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."<sup>63</sup>

Now that the Trump administration has withdrawn the agency interpretation of Title IX and Title VII that included protection for transgender individuals, courts must determine

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56. *Id.* at 640, 644.

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

58. *Id.* at 1047.

59. *Id.* at 1048.

60. *Id.* at 1050.

61. *Id.* at 1052.

62. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

63. *Id.* at 152 n.4.

how to respond to challenges by transgender individuals.

#### IV. LEGAL SOLUTION

##### A. *How Courts Should Proceed Now that the Department's Interpretation of Title IX Has Changed*

Since the Trump administration has withdrawn the Obama administration's interpretation of Title IX as applying to transgender students, the Supreme Court has remanded *G.G.* to the Fourth Circuit.<sup>64</sup> In both *Texas*<sup>65</sup> and *Johnston*,<sup>66</sup> the courts determined that there was no need for agency deference, and the *Carcano*<sup>67</sup> court determined that even under an intermediate scrutiny standard, the State successfully met its burden. Each of these cases provides support for those arguing, at worst, that transgender students should not have access to the sex-segregated facilities that correspond with their gender identity or, at best, that the decision should be left to the states. However, even without the agency guidance in support of transgender bathroom access, transgender individuals may succeed on the grounds that these laws do not even have a rational basis because they are arguably based in animus. The Court has held that where a law "is a status-based enactment divorced from any factual context... it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."<sup>68</sup> As discussed below, laws preventing transgender students from accessing sex-segregated facilities that correspond with their gender identities on the basis of protecting the bodily privacy and safety of cisgender<sup>69</sup> individuals are not intended to protect a legitimate government interest.<sup>70</sup> Additionally, courts can look to circuit precedents in the context of Title VII to

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64. *G.G. ex rel. Grimm v. Gloucester Cty., School Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated*, 123 S. Ct. 1239 (2017).

65. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

66. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

67. 203 F. Supp.3d 615, 645 (M.D.N.C. 2016).

68. *Romer v. Evans*, 517 U.S. 620, 635 (citing *Civil Rights Cases v. Stanley*, 109 U.S. 3, 24 (1883)).

69. Cisgender individuals are those whose gender identity corresponds with the biological sex the person was identified as having at birth. *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> (last visited Nov. 13, 2017) [<https://perma.cc/G4AM-AY6S>].

70. *See infra* Part IV.B.

extrapolate equal protection for transgender students to Title IX.<sup>71</sup>

*B. Laws Affecting Transgender Individuals Should Be Analyzed Under Intermediate Scrutiny*

As discussed above, transgender individuals, and particularly transgender students, are an especially vulnerable class of people who likely require judicial action to secure equal protection under the law.<sup>72</sup> The first step to reforming the treatment of transgender individuals, and students specifically, is to view them as a class of individuals that are politically disadvantaged through the lens of the *Carolene Products* analysis.<sup>73</sup> Political powerlessness can signal to courts that they should scrutinize laws disadvantaging these groups more closely.<sup>74</sup> If transgender issues are characterized specifically as issues of sex or gender, then the Court will apply intermediate scrutiny.<sup>75</sup> Sex classifications fall under an intermediate scrutiny standard of review because “the sexes are not similarly situated in certain circumstances.”<sup>76</sup>

Under intermediate scrutiny, the burden is on the state to demonstrate that it has an important interest and that the means are substantially related to protecting that state interest.<sup>77</sup> The court in *Carcano* stated that even under intermediate scrutiny the transgendered plaintiffs would fail on their constitutional claims because the state’s interest of protection of bodily privacy is an important interest, and the law was substantially related to the state interest.<sup>78</sup> Schools have responded to allegations that denying transgender students access to sex-segregated facilities on the basis of their preferred gender identity are violations of gender protections

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71. Katherine A. Womack, *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1371 (2010).

72. See *supra* Part II.C.

73. Hart, *supra* note 27, at 334.

74. Andrew R. Flores, Jody L. Herman, & Christy Mallory, *Transgender Inclusion in State Non-Discrimination Policies: The Democratic Deficit and Political Powerlessness*, RES. & POL., Oct.–Dec. 2015, <http://rap.sagepub.com/content/2/4/2053168015612246.full.pdf+html> [<https://perma.cc/5E2G-GL5Z>].

75. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

76. McKay, *supra* note 14, at 503 (quoting *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 468 (1980)).

77. *Craig*, 429 U.S. at 197–98.

78. *Carcano v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016).

by saying that these actions are based in their legal obligation and ethical need to “protect the privacy of cisgender students.”<sup>79</sup>

The reality seems to be that the state’s purported interest in bodily privacy as the purpose of the law is a pretext, and therefore the laws discriminating against transgender individuals should fail. The Transgender Law Center, Human Rights Campaign, and the ACLU have all stated that there are no reported instances of transgender individuals attacking cisgender individuals in bathrooms, leading to a question of whether these legislative measures are actually warranted.<sup>80</sup> In fact, the only reported case of someone abusing a nondiscrimination ordinance in the thirty-five years they have been used to protect transgender individuals was found in Canada.<sup>81</sup> Generally, people who commit sexual assaults in bathrooms are not pretending to be transgender in order to gain access to bathrooms.<sup>82</sup> Because these bills are passed out of animus, that is to say that these laws are passed out of hostility or ill feeling, and not out of need or protection of the bodily rights and privacy of cisgendered people, it is possible that the dicta in *Carcano* is incorrect, and that transgender plaintiffs could win on the merits of their equal protection claim. The Court has found animus as the motivation for laws that prohibited legislative, executive, or judicial action designed to protect homosexual individuals from discrimination when the state claimed it wanted to treat gays and lesbians as

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79. Conn, *supra* note 18, at 450.

80. Marcia Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, MIC (Apr. 2, 2015), <https://mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms#.UrLey67VF> [<https://perma.cc/UXQ6-WBHX>].

81. Brynn Tannehill, *Debunking Bathroom Myths*, HUFFINGTON Post (Nov. 28, 2015, 8:29 AM), [http://www.huffingtonpost.com/brynn-tannehill/debunking-bathroom-myths\\_b\\_8670438.html](http://www.huffingtonpost.com/brynn-tannehill/debunking-bathroom-myths_b_8670438.html) [<https://perma.cc/5SEB-6R8S>].

82. *Id.*; see also, e.g., Erin Hassanzadeh, *Man Charged With Sexually Assaulting Juvenile in Westroads Mall Bathroom*, KETV OMAHA (Mar. 10 2017, 5:49 PM), <http://www.ketv.com/article/man-arrested-for-allegedly-sexually-assaulting-juvenile-in-bathroom-at-westroads-mall/9110578>

[<https://perma.cc/3RBB-2WUS>]; *2 Male Students Charged with Raping Girl in School Bathroom*, AP NEWS (Mar. 17, 2017), <https://apnews.com/28f0da4c70e74da1b9fdf65cc316cc5d> [<https://perma.cc/93P4-R2MR> ]; Sara Jean Green, *Sex Offender Hid in Golden Gardens Restroom, Aiming to Rape Woman, Charges Say*, SEATTLE TIMES (Mar. 8, 2017, 5:01 PM), <http://www.seattletimes.com/seattle-news/crime/sex-offender-hid-in-golden-gardens-restroom-aiming-to-rape-woman-charges-say/> [<https://perma.cc/TM8X-DSV2>].

all other persons by denying them special rights.<sup>83</sup>

The arguments preventing students from using the bathroom of their identified gender are different than those applied to adults.<sup>84</sup> Since children are not sexually mature, the arguments of safety and sexual abuse are diminished.<sup>85</sup> While there are students in middle and high school who are engaging in sexual activity, that activity can be regulated and punished without limiting bathroom access for transgender students. However, because they are children, the involvement of parents and parents' desire to protect their children tends to have great sway over schools.<sup>86</sup> Gender identity discrimination is real and consistent for those dealing with it on a daily basis, including school-aged children.<sup>87</sup> Thus, protection must be consistent in all aspects of their lives, not in a haphazard way when it suits others.<sup>88</sup>

C. *How a Conservative Court Can Use Current Precedent to Uphold the Rights of Transgender Individuals*

It is possible for a conservative-leaning Court<sup>89</sup> to use existing precedent, both its own precedent and the precedent set within the district and circuit courts, to hold that transgender individuals are members of a quasi-suspect class and that government discrimination against transgender individuals must meet intermediate scrutiny. For example, both the Sixth Circuit and the Eleventh Circuit have found that the intermediate scrutiny applied in cases of gender classifications also applies in cases dealing with transgender issues.<sup>90</sup> Furthermore, the Eleventh Circuit, the DOE, and the EEOC have found that the word "sex" extends to gender in the

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83. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

84. Simpson, *supra* note 7, at 105.

85. *Id.*

86. *Id.* at 106.

87. Tobin & Levi, *supra* note 22, at 310.

88. *Id.*

89. See, e.g., Lydia Wheeler, *Supreme Court Enters New Era, Raising Conservative Hopes*, HILL (Apr. 8, 2017), <http://thehill.com/regulation/court-battles/327884-supreme-court-entering-new-era> [<https://perma.cc/V327-X2CA>]; Erwin Chemerinsky, *Gorsuch Has Quickly Made His Ideology Clear*, A.B.A. J. (Aug. 2, 2017), [http://www.abajournal.com/news/article/chemerinsky\\_gorsuch/](http://www.abajournal.com/news/article/chemerinsky_gorsuch/) [<https://perma.cc/26SA-L5E9>].

90. Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 PENN ST. L. REV. 187, 197 (2016).

context of both Title VII and Title IX.<sup>91</sup>

#### CONCLUSION

In society today, transgender students are subject to severe discrimination and harassment when trying to access the facilities that correspond with their gender identities. The rules that discriminate against them are passed out of unfounded and unsubstantiated fears. Any undesirable activity that these rules seek to prevent could easily be prevented in ways that are far more narrowly tailored to their purpose. Additionally, these laws and rules actively cause harm to transgender students by further stigmatizing them and by forcing them to make untenable choices. Equal protection dictates that these laws simply cannot stand.

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91. *Id.* at 206.