EXPLORING GENDER MINORITIES' BATHROOM RIGHTS UNDER THE DONALD TRUMP PRESIDENCY

Marc Edelman[1]

I. INTRODUCTION

In the final two years of Barack Obama's administration as president of the United States, the U.S. executive branch made herculean strides to increase the bathroom rights of intersex and transgender Americans.[2] Most notably, on January 7, 2015, the U.S. Department of Education's Office of Civil Rights issued a memorandum that required all schools receiving federal funds to allow their intersex and transgender students to use the bathrooms consistent with their gender identities.[3] Thereafter, on May 2, 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a "Fact Sheet" that directed employers "to allow employees to use the bathrooms that correspond with their gender identities."[4]

Nevertheless, the Obama administration's great efforts to provide more flexible rules about bathroom access did not continue into the next presidential administration.[5] When Republican presidential candidate

---

[1] Professor Marc Edelman (Marc@MarcEdelman.com) is a tenured Professor of Law at the Zicklin School of Business, Baruch College, City University of New York. He is also an adjunct professor at Fordham University School of Law. Professor Edelman wishes to thank Professor Jennifer Gaboury and the students in her Bathroom Politics course at Hunter College, City University of New York for reviewing and commenting upon an earlier draft of this article.

[2] *See* Alfred P. Doblin, *Obama Makes Transgender Rights the New* Row v. Wade, N.J. REC., May 16, 2016, at A10; Julie Eilperin, *Obama's Quiet Yet Momentous Shift on Gender Identity*, WASH. POST, Dec. 6, 2015, at A6; David Plazas, *Lawmakers, Do Us a Favor, Stay Home*, TENNESSEAN, May 25, 2016, at A11; Julie Hirschfield Davis & Matt Apuzzo, *U.S. Directs Public Schools to Allow Transgender Access to Restrooms*, N.Y. TIMES (May 12, 2016), https://www.nytimes.com/2016/05/13/us/politics/obama-administration-to-issue-decree-on-transgender-access-to-school-restrooms.html.

[3] *See* Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secr'y for Policy, Office for Civil Rights, Dep't of Educ., to Emily T. Prince (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf (regarding transgender students' access to restrooms).

[4] Robert Baror, *Transgender Rights in the Workplace*, FED. LAW., Dec. 2016, at 10, 11; *c.f.* Sandra B. Reiss, *Transitioning to the Transgender Workplace*, 77 ALA. LAW. 428, 430 (2016) (noting that as far back as 2012, the Equal Employment Opportunity Commission had taken the position that discrimination based upon transgender status could fall within the scope of conduct prohibited by Title VII of the Civil Rights Act).

[5] *See* Derek Hawkins, *The Short, Troubled Life of Obama's Transgender Student Protections*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/23/the-short-troubled-life-of-obamas-transgender-student-protections/ (explaining that the Trump administration revoked former president Barack Obama's new bathroom regulation protections almost as quickly as

Donald Trump assumed the office of president on January 20, 2017, he almost immediately backtracked on the issue of bathroom choice.[6] Then, on February 22, 2017, the Trump administration rescinded the executive memoranda that had interpreted federal law to allow for individuals to use bathroom facilities consistent with their gender identity.[7]

This article explores the future of gender minorities' bathroom rights under the presidency of Donald Trump. Part I of this article provides a brief history of sex segregated bathrooms in the United States, as well as the reasons behind continuing to maintain these sex-segregated spaces. Part II explores the impact of bathroom segregation on two specific gender minority groups: the intersex and the transgender. Part III explores recent efforts by gender-minority plaintiffs to use federal law to obtain greater bathroom access. Finally, Part IV explores the likelihood of future gender-minority plaintiffs suing successfully to obtain bathroom access under existing federal laws.

II. THE HISTORY OF SEX SEGREGATED BATHROOMS

The Greek philosopher Plato once stated that dividing people into categories based on their biological sex represents a "ridiculous" position that is both arbitrary and capricious.[8] Because biological sex represents just one of myriad characteristics of an individual, Plato suggested that dividing people by their biological sex is as random as dividing them by eye color or hair length.[9]

---

former president Obama had implemented them); *see also* Jamie Stengel, *U.S. Withdraws Stay Request in Transgender Bathroom Case*, PBS (Feb. 12, 2017, 10:19AM), https://www.pbs.org/newshour/nation/u-s-transgender-bathroom-case (explaining that the election of Donald Trump as president of the United States has led to a step back from the strong, equal rights positions advanced by the Barack Obama administration in favor of transgender bathroom use).

[6] *See* Elise Viebeck, *Trump's First 100 Days: Illegal Immigrants, Anti-Semitism and Transgender Students*, WASH. POST (Feb. 21, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/02/21/trumps-first-100-days-on-illegal-immigrants-anti-semitism-and-transgender-students/ (pointing to statements by Donald Trump during the early days of his presidency indicating the likelihood of him reversing Barack Obama's policies in favor of bathroom choice for transgender individuals). *See also* David Cray, *Transgender Bathroom Bills Now Appear Stalled*, CHI. TRIB., Feb. 24, 2017, at 12 (discussing the decision of President Trump's administration to repeal the interpretation of Title IX that allowed transgender students the opportunity to use bathrooms and locker rooms associated with their gender identity).

[7] *See Dear Colleague Letter*, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC. (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download; *see also* Editorial, *Mr. Whitaker Can Graduate with Pride*, WASH. POST, Jun. 4, 2017, at A16 (noting that President Donald Trump and his administration wanted to leave the issue of bathroom choice up to the individual states).

[8] Plato, THE REPUBLIC BOOK V 132 (Allan Bloom trans., Basic Books 2d ed. 1991) (c. 380 B.C.E.).

[9] *Id.*

Nevertheless, most Western societies have long segregated people based on their biological sex.[10] Throughout history, Americans have divided people for military boot camps,[11] collegiate sports teams,[12] swimming pools use,[13] and even the use of certain public schools.[14] Meanwhile, the most conspicuous setting under which Americans implement sex segregation is for purposes of assigning bathroom access.[15]

Until around the year 1870, there was no such thing as single-sex bathrooms in the United States.[16] As plumbing technologies advanced, however, U.S. companies slowly replaced their individual-use bathrooms with communal-style bathrooms.[17] Recognizing this change in bathroom structure, the State of Massachusetts, in 1887, became the first state to legally require separate male and female communal bathroom facilities.[18] By 1922, 43 of 48 states had adopted similar bathroom laws.[19]

---

[10] Adam R. Chang & Stephanie M. Wildman, *Gender In/Sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 44 (2017) (citing *Gender*, MERRIAM-WEBSTER ONLINE DICTIONARY (2016), https://www.merriam-webster.com/dictionary/gender (last visited Mar. 24, 2018); *see also* Yamuna Menon, Note, *The Intersex Community and the Americans with Disabilities Act*, 43 CONN. L. REV. 1221, 1226 (2011) ("The traditional definitions of gender and sex yield a strict binary system in Western culture upon which society relies to categorize various components of life.").

[11] *See* Jesse Bogan, *U.S. Marine Corps Lt. Who Played Lacrosse in St. Louis Area Shares Her View of Afghanistan*, ST. LOUIS DISPATCH (Jan. 31, 2016), http://www.stltoday.com/news/local/govt-and-politics/u-s-marine-corps-lt-who-played-lacrosse-in-st/article_f7ebf285-36f5-5b50-b313-c63a1151075b.html (mentioning that the U.S. Marine Corps is the last military camp that continues to operate sex segregated boot camp).

[12] *See* Jack Dolgin, *The Week in Duke History: Female Kicker Sues after Being Cut from Duke Football Team*, DUKE CHRON. (Oct. 25, 2016), http://www.dukechronicle.com/blog/blue-zone/2016/10/this-week-in-duke-history ("Most college sports are segregated by gender—men's and women's soccer, men's and women's basketball, etc.").

[13] *See* Adam Chandler, *Who Should Public Swimming Pools Serve?*, ATLANTIC (Jun. 3, 2016), https://www.theatlantic.com/politics/archive/2016/06/public-pool-brooklyn/485489/ (discussing the Bedford Avenue public pool in Brooklyn, NY maintaining sex segregated hours to accommodate the religious preferences of the Chassidic Jewish community).

[14] *See* Vorchheimer v. Sch. Dist., 532 F.2d 880, 881 (3d Cir. 1976) (holding that the Constitution and the laws of the United States do not require that every public school be coeducational).

[15] *See* Brian Eisner, Note, *Being a Transgendered Student: An Uphill Fight for Equality*, 28 J.C.R. & ECON. DEV. 419, 430 (2016).

[16] *See* Terry S. Kogan, *Public Restrooms and the Distorting of the Transgender Identity*, 95 N.C. L. REV. 1205, 1212 (2017) (noting that, until that period, only single-stall bathrooms existed in the workplace).

[17] *See id.* at 1212–13.

[18] *See* Eisner, *supra* note 15. *See also* Shannon Price Miller, *Déjà vu All Over Again: The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1190 (2017) (discussing the emergence of unisex bathroom laws); *see generally* Mary Anne Case, *Why Not Abolish Urinary Segregation? in* TOILET: PUBLIC RESTROOM AND THE POLITICS OF SHARING 211–25 (Harvey Moloch & Laura Noren, eds., 2010) (discussing in general sex segregated bathrooms in the United States).

[19] *See* Eisner, *supra* note 15, at 431.

Today, public bathrooms remain sex-segregated by law in most U.S. states.[20] The policy underlying sex-segregated bathrooms arises from the desire to provide people with "a safe and comfortable environment for performing [bodily] functions."[21] This policy also emerges from some people's preference not to disrobe in front of the opposite sex.[22] Furthermore, law professor Julie Greenberg argues that sex-segregated bathrooms serve to prevent gender fraud, promote heteronormativity, and promote sex stereotypes.[23]

Nevertheless, maintaining sex-segregated bathrooms produces a unique set of difficulties for people who do not comport with the traditional definitions of "male" or "female."[24] Some of these people are born with ambiguous genitalia and mixed secondary sex characteristics.[25] Meanwhile, others have clearly identifiable genitalia but do not identify with the gender consistent with their genitalia.[26]

Providing gender-nonconformists with broader choice in terms of bathroom access presents a moral quandary in light of both traditional societal norms and the ideal of libertarian compassion.[27] Given the United States' historic ignorance toward gender minorities, many bathroom laws lag behind psychologists' and social workers' best practices for safeguarding the

---

[20] *See* Miller, *supra* note 18.

[21] Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015). *But see* Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 163–64 (2017) (providing a well-articulated opposing viewpoint, arguing against the maintenance of sex-segregated bathrooms).

[22] Johnston, 97 F. Supp. 3d at 678 (W.D. Pa. 2015) (quoting Vorchheimer v. Sch. Dist., 532 F.2d 880, 888 (3d Cir. 1976)).

[23] *See* JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 75 (2012) (asserting that courts denying transsexuals access to bathroom choice cite to four primary justifications: "(1) generalized fear about criminal activity, (2) the need to prevent gender fraud, (3) heteronormativity, and (4) the societal need to enforce sex stereotypes").

[24] *See* Hailey Branson-Potts, *Intersex Person Who was Denied Passport Over Gender Designation Sues U.S. Government*, L.A. TIMES (Jul. 20, 2016), http://www.latimes.com/nation/la-na-intersex-lawsuit-20160720-snap-story.html (describing an intersex individual who received a birth certificate with "unknown" marked under sex and, as an adult, still cannot answer that question in a biologically honest way); *see also* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1053 (7th Cir. 2017) ("[I]t is unclear that the sex marker on a birth certificate can even be used as a true proxy for an individual's biological sex [because t]he marker does not take into account an individual's chromosomal makeup, which is a key component of biological sex.").

[25] Chang & Wildman, *supra* note 10, at 58; *see also* Branson-Potts, *supra* note 24 (describing the case of Dana Zzyym, who is intersex).

[26] Chang & Wildman, *supra* note 10, at 59–61.

[27] *See supra* notes 8–23 and accompanying text.

wellbeing of gender minorities.[28] Meanwhile, other bathroom laws may lead to the increased bullying of gender minorities.[29]

III. BATHROOM USAGE AND THE PROBLEMS CAUSED BY GENDER BINARY CLASSIFICATIONS

Although binary gender classifications may sometimes serve as a useful heuristic for allocating people, the use of one's birth certificate sex (male or female) to determine access to a particular bathroom may cause substantial harm to individuals who do not fit neatly into the traditional sex classifications of "male" and "female."[30] Among those who do not conform to the gender binary includes both the "intersex" and the "transgender."[31]

A. Intersex Individuals

Intersex people compose approximately two percent of the U.S. population.[32] They are individuals who have both male and female biological

---

[28] *See generally* Tiq Milan, *First Came the Trans Tipping Point – Now We've Got the Backlash*, GUARDIAN (Apr. 21, 2016, 11:20AM), https://www.theguardian.com/commentisfree/2016/apr/21/transgender-rights-backlash-anti-lgbt-legislation (discussing ignorance and prejudice to transgender people in the United States, as well as how "bathroom laws reinforce archaic ideas that transgender people, particularly trans women, exist to deceive and manipulate").

[29] *See* Joel Ebert, *Bathroom Bill Moves Out of House Committee*, TENNESSEAN, Mar. 18, 2016, at A2 (quoting Sarah Warbelow, the legal director for the Human Rights Campaign as concluding that a Tennessee bill requiring transgender individuals to use the bathroom affiliated with their birth sex would that "lead to even higher rates of harassment, bullying and even suicide").

[30] *C.f.* Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of ... [Perceived] Sex"*, 34 N.Y.U. REV. L. & SOC. CHANGE 55, 74 (2010) ("[C]ourts have yet to address what happens when a doctrine dependent on a binary conceptualization of sex runs into an individual who does not fit into the binary."); GREENBERG, *supra* note 23, at 66–68 (explaining that many courts continue to deny people the opportunity to change their birth certificate unless/until they have undergone sex reassignment surgery).

[31] *See infra* notes 32–67 and accompanying text. A third category that is beyond the scope of this article are "genderqueer"—a category consisting of other individuals who do not identify with any single gender, but are not necessarily either intersex or transgender. *See generally* Steven Petrow, *Don't Know What 'Genderqueer' Is? Meet Someone Who Identifies That Way*, WASH. POST (May 9, 2016) https://www.washingtonpost.com/lifestyle/style/dont-know-what-genderqueer-is-meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12_story.html ("[Genderqueer] could also be called 'gender-nonconforming, bi-gender, non-binary, or just being fluid.'").

[32] JUSTIN J. LEHMILLER, THE PSYCHOLOGY OF HUMAN SEXUALITY 120 (2014). *But see generally* Gelfman, *supra* note 30, at 66 (explaining that it might not be proper to attempt to define the percentage of the U.S. population that is "intersex," as the term is subject to numerous definitions, and the percentage of the U.S. population that constitutes "intersex" increases substantially if one were to include those with oversized clitorises or micropenises); GREENBERG, *supra* note 23, at 2 (accepting the proposition that "1-2 percent of people are born with sexual features that vary from the medically defined norm for male and

traits, as well as ambiguous genitalia.[33] An individual may develop intersex characteristics based on chromosomal makeup, hormonal irregularities, or enzyme deficiencies.[34]

Individuals who are chromosomally intersex have chromosome patterns that are neither specifically male (XY) nor female (XX).[35] One chromosome pattern that produces intersex features is Klinefelter's Syndrome.[36] This is a genetic variation where a Y-carrying sperm fertilizes an egg that possesses two (rather than one) X-chromosomes—thus producing an XXY chromosomal combination.[37] People born with Klinefelter's Syndrome are anatomically male, but they possess testes that are usually smaller than average, and they produce less than the average amount of sperm.[38] Thus, individuals with Klinefelter's Syndrome may appear sexually ambiguous and lack the ability to reproduce.[39]

Another chromosomal configuration that yields intersex features is Turner's Syndrome—a condition that occurs when an individual has one X chromosome and either no second chromosome or a damaged second chromosome.[40] Individuals with Turner's Syndrome typically have a

---

female" but also noting that "[b]ecause experts do not agree on exactly which conditions fit within the definition of intersexuality . . . it is impossible to state with precision exactly how many people have an intersex condition").

[33] *See* LEHMILLER, *supra* note 32, at 120; *see also* Menon, *supra* note 10, at 1228 (explaining that the Intersex Society of North America defines "intersex" to include "a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fir the typical definitions of female or male") (internal citations and quotations omitted). As another author on the topic of intersex explains:

> When a person is born with an *intersex* condition, it is not clear whether the person should be regarded as female or male. Sometimes that is because the person's genitals are ambiguous (such as when the penis is very small or the clitoris is very large). Other times, the person's genitals seem to indicate that they are one sex, while their chromosomes and/or hormones indicate that they are the other sex.

Melina Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection*, 23 DUKE J. GENDER L. & POL'Y 163, 175 (2016) (providing a definition of intersex similar to the Intersex Society of North America); GREENBERG, *supra* note 23, at 1 (defining "intersexuality" broadly to include "anyone with a congenital condition whose sex chromosomes, gonads, internal or external anatomy do not fit clearly into the binary male/female norm").

[34] LEHMILLER, *supra* note 32, at 120–21.

[35] *See infra* notes 36–47 and accompanying text.

[36] LEHMILLER, *supra* note 32, at 120.

[37] *Id.*

[38] *Id.* at 120–21. *But see* Gelfman, *supra* note 30, at 106 (describing the rarest of situations where a patient diagnoses with Klinefelter's Syndrome had a fully functioning uterus and gave birth to three children).

[39] *See, e.g.*, Sylvia Pagán Westphal, *The Infertility Dilemma: A Popular Treatment Comes with a Striking Side Effect*, BOS. GLOBE, Aug. 8, 2010, at 11 (explaining that most people with Klinefelter's Syndrome cannot make sperm and thus cannot reproduce).

[40] LEHMILLER, *supra* note 32, at 120–21; *see also* Gelfman, *supra* note 30, at 62 (2010) (explaining that the classification of a Turner's Syndrome individual as intersex is "quite controversial in the field"

feminine bodily appearance, are shorter than average, and have little, if any, breast development.[41] In addition, individuals with Turner's Syndrome have underdeveloped ovaries, do not menstruate, and cannot become pregnant.[42]

Similarly, hormonally intersex people develop their intersex features based on one of two types of hormonal irregularities.[43] Individuals with Androgen Insensitivity Disorder have male chromosome patterns but develop female sex organs and female bodily characteristics based on their body's inability to respond to the hormone androgen.[44] Meanwhile, individuals with Congenital Adrenal Hyperplasia are chromosomally female but have genitals that present in a more masculine manner.[45] Individuals with Congenital Adrenal Hyperplasia, on average, report more interest in traditional male activities than traditional female activities.[46] They also may have a higher rate of same-gender attraction and bisexual orientation than the population at large.[47]

Finally, a fifth form of intersex emerges from a deficiency of the enzyme known as 5-alpha-reductase, which converts testosterone into dihydrotestosterone.[48] Individuals with 5-alpha-reductase deficiency are internally male, but they appear female at birth due to their enzyme deficiency.[49] After the onset of puberty, however, some individuals with 5-alpha-reductase deficiency gain enough natural testosterone to grow penises and develop male secondary characteristics.[50] At this point, many of these individuals begin to identify as male, even though they still have birth certificates that describe them as female.[51]

---

because technically a Turner's Syndrome individual does not have any male chromosomes, but rather the absence of a second female chromosome").

[41] LEHMILLER, *supra* note 32, at 120–21 (John Wiley & Sons, 2014).

[42] *Id.*

[43] *Id.* at 123–23; *see also* Menon, *supra* note 10, at 1229–30 (discussing complete and partial androgen insensitivity as a form of "genetic syndromes . . . due to an X chromosome defect").

[44] LEHMILLER, *supra* note 32, at 123–23; Menon, *supra* note 10, at 1229-30 (2011). Some chromosomal males with complete Androgen Insensitivity Disorder go through their entire lives as women, without knowing (or even having a reason to suspect) about the condition. For example, South African Olympic runner Caster Sememya purportedly did not know she was a chromosomal male with Androgen Insensitivity Disorder until the International Association of Athletics Federations had her undergo comprehensive genetic testing. *See* LEHMILLER, *supra* note 32, at 122.

[45] LEHMILLER, *supra* note 32, at 125; *see also* Menon, *supra* note 10, at 1230–31 (2011) (explaining that Congenital Adrenal Hyperplasia, among other things, produces XX embryos with "larger than average clitorises" that may present similarly to a penis).

[46] LEHMILLER, *supra* note 32, at 125.

[47] *Id.*

[48] *Id.* at 124–25.

[49] *Id.*

[50] *Id.*

[51] *Id.*

Collectively, all five intersex groups share certain similar life experiences.[52] These experiences relate to the challenges in conforming both physically and emotionally to a sexual-binary world.[53] Members of the intersex community additionally may face the hardship of being treated as if they suffer from a "monstrous defect."[54] The fear of persecution for being intersex makes it unlikely that the intersex community would publicly lobby or advocate on behalf of their own rights.[55]

B. Transgender Individuals

Transgender individuals, meanwhile, represent an estimated 0.3 percent of the U.S. population (nearly, one seventh the size of the intersex community).[56] Transgender individuals typically have biological traits consistent with one sex, but their behaviors and physical appearance are consistent with the opposite sex.[57] Within the general category of transgender, there are two major subcategories—transgender males (individuals who are born female and perceive themselves as male) and transgender females (individuals who are born male but perceive themselves as female).[58]

---

[52] *See generally* Eisner, *supra* note 15, at 440 (discussing the question of appropriate bathroom choice for intersex individuals).

[53] *See, e.g.*, GREENBERG, *supra* note 23, at 17–18 (describing the experience of Sherri Groveman Morris as growing up in the 1950s as an intersex individual with complete androgen insensitivity); *c.f. id.* ("According to one study, 24 percent of the people with an intersex condition interviewed developed a gender identity that did not conform to the sex assigned to them at birth.").

[54] *See* Hazel Glenn Beh & Milton Diamond, *David Reimer's Legacy: Limiting Parental Discretion*, 12 CARDOZO J.L. & GENDER 5, 8, 15 (2005) (discussing the longstanding sentiment by some that intersex individuals suffer from "monstrous defects"); Sharon E. Preves, *Out of the O.R. and Into the Streets: Exploring the Impact of Intersex Media Activism*, 12 CARDOZO J.L. & GENDER 247, 252 (2005) (discussing medical doctors performing "normalizing" surgeries to "mask [the] physically benign intersex variation"); GREENBERG, *supra* note 23, at 17 (discussing how, historically, intersex children were treated as "abnormal" and viewed as "freaks").

[55] *See generally* GREENBERG, *supra* note 23, at 17 (Because infants with an intersex condition were considered 'abnormal,' their birth typically was shrouded in shame and secrecy . . . . [and t]heir conditions were to be studied by physicians and hidden from society.").

[56] Reiss, *supra* note 4. *C.f.* Bell, *supra* note 33, at 178 ("According to the World Professional Association for Transgender Health, 1 in 11,900 to 45,000 people assigned male at birth, and 1 in 30,400 to 200,000 people assigned female at birth, is transsexual.").

[57] LEHMILLER, *supra* note 32, at 130; *see also* Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J. L. GENDER & SOC'Y 29, 34 (2016) ("Unlike intersex individuals, transgender individuals are born with typical male or female physical characteristics. Yet their internal sense of being male or female, that is, their gender identity, does not match those physical traits."); *c.f.* GREENBERG, *supra* note 23, at 2 ("The term *transsexual* is commonly used to refer to a person who does not have an intersex condition whose gender self-identity does not match the sex assigned at birth.").

[58] LEHMILLER, *supra* note 32, at 130.

Although the biological basis for transgender behavior is not well known, some current research suggests that being transgender has a "neurological basis and may be tied to prenatal hormone exposure."[59] Additionally, the American Psychiatric Association recognizes the medical condition of Gender Dysphoria, in which an individual experiences "a marked incongruence between one's experienced/expressed gender and assigned gender."[60]

Much like intersex individuals, transgender individuals may suffer from emotional harm as the result of living in a world that classifies sex in the binary.[61] For example, there is some literature to suggest that transgender individuals suffer from depression when they are required to use the bathroom of their biological sex rather than the bathroom associated with the gender with which they identify.[62] Meanwhile, some members of the transgender community also oppose third-bathroom solutions because they feel creating a 'third bathroom' would focus too much on their differences.[63]

To avoid the unwanted scrutiny, many transgender individuals often strive to blend with the gender with which they identify. Although not all transgender individuals change their physical appearance to conform to their

---

[59] *Id.* at 133; *see also* GREENBERG, *supra* note 23, at 19–20 ("A number of recent studies on gender identity development indicate that gender identity may be more dependent on brain function and hormonal influences than the appearance of the genitalia."); Francine Russo, *Is There Something Unique About the Transgender Brain?* SCI. AM. (Jan. 1, 2016), https://www.scientificamerican.com/article/is-there-something-unique-about-the-transgender-brain/ (describing a study done by a neurobiologist and a psychobiologist in Spain that showed, even before the treatment of transgender individuals, "the brain structures of the trans people were more similar in some respects to the brains of their experienced gender than those of their natal gender"); Judy Woodruff, *Is Gender Identity Biologically Hard-wired*, PBS (May 13, 2015, 8:10PM), http://www.pbs.org/newshour/bb/biology-gender-identity-children (addressing recent biological research on what causes a person to be transgender);. *But see* Bradford Richardson, *Born Gay or Transgender: Little Evidence to Support an Innate Trait*, WASH. TIMES (Aug. 24, 2016) http://www.washingtontimes.com/news/2016/aug/24/born-gay-transgender-lacks-science-evidence (discussing a 143-page paper published in *The New Atlantis* journal that concludes there is no scientifically significant, causal evidence to support a biological reasoning of gender identity).

[60] Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1040 (7th Cir. 2017) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUEL OF MENTAL DISORDERS 452 (5th ed, 2013)) (internal quotations and citations omitted). *See also* LEHMILLER, *supra* note 32, at 130; Reiss, *supra* note 4, at 429 ("[M]ost transgender persons describe their condition as one of feeling, with unbearable intensity, they were born in the wrong body.").

[61] *See infra* notes 62–67 and accompanying text.

[62] *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716–17 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017); *see also* Vincent Samar, *The Right to Privacy and the Right to Use the Bathroom Consistent with One's Gender Identity*, 24 DUKE J. GENDER L. & POL'Y 33, 34 (2016) ("Arguably, being forced to use a bathroom/locker room inconsistent with one's gender identity or to use a single-use facility, when others do not have to, can have devastating effects on the physical and psychological well-being of transgender people, who struggle for most of their lives with others telling them to conform to a gender identity with which they were not comfortable.").

[63] *Grimm*, 822 F.3d at 716–17.

gender identity, many undergo hormone therapy to make their external bodies appear more consistent with their gender identities.[64] Meanwhile, some transgender individuals even undergo sex reassignment surgery, which includes transforming one's genitalia to that representing their preferred gender identity.[65] Nevertheless, sex reassignment surgery generally remains a luxury available only for the wealthy.[66] It is an expensive procedure, and most private insurance carriers do not cover the costs.[67]

IV. THE BATHROOM LAWSUITS

In recent years, several gender-minority plaintiffs have brought federal lawsuits seeking to challenge their lack of bathroom access consistent with their gender identities.[68] These lawsuits have arisen under a variety of different statutes and circumstances.[69]

A. Gender Discrimination under the Equal Protection Clause of the Fourteenth Amendment

Members of gender minorities who have been denied access to their preferred bathrooms by state or municipal governments typically file lawsuits seeking bathroom access under the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment.[70] This clause of the Constitution requires state actors to treat similarly situated people alike, and to avoid any arbitrary or irrational classifications.[71]

Applying the Equal Protection Clause of the Fourteenth Amendment, the U.S. Supreme Court has long held that "sex" is a "suspect class," and thus, a court must review any allegations of sex-based discrimination by applying the "intermediate scrutiny" standard of review.[72] Nevertheless, no Supreme

---

[64] *See* LEHMILLER, *supra* note 32, at 134. *See also* Bell, *supra* note 33, at 178 (explaining that many transgender individuals do not undergo gender reassignment surgery because the process is both painful and expensive; in 2001 the estimated cost of gender reassignment surgery was projected a $7,000-$50,000 for trans women and $100,000 for trans men).

[65] LEHMILLER, *supra* note 32, at 134.

[66] *See* Chris Taylor, *Transgender Surgery Can Cost More than $100,000*, MONEY (Oct. 29, 2015), http://time.com/money/4092680/transgender-surgery-costs.

[67] *See id.*

[68] *See infra,* notes 73–81, 84 and accompanying text.

[69] *See infra,* notes 82–84 and accompanying text.

[70] 42 U.S.C. §1983 (2012); *see also* Glenn v. Brumby, 663 F.3d 1312, 1315 (11th Cir. 2011).

[71] 42 U.S.C. §1983; *see also Glenn*, 663 F.3d at 1315.

[72] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 555–56 (1996). This means a state actor violates the Equal Protection Clause if it treats someone disparately based on their sex, unless the state actor can show doing so is "substantially related to a sufficiently important government purpose." City of Cleburne

Court decision that applies the Fourteenth Amendment has addressed whether, under the law, there is any difference between sex discrimination and gender discrimination.

Until recently, there had been no published court decisions in which gender minorities had successfully brought suit under the Equal Protection Clause of the Fourteenth Amendment. But, in the 2011 federal decision *Glenn v. Brumby*, the U.S. Court of Appeals for the Eleventh Circuit held that the Equal Protection Clause entitles transgender individuals to the same heightened level of legal protection as women.[73] Applying this heightened standard of review, the court in *Glenn* held that the Georgia General Assembly violated the Equal Protection Clause by firing a transgender worker for transitioning from male to female in the workplace.[74]

Although the Eleventh Circuit's ruling in *Glenn* did not directly address the question of whether an individual may use public bathrooms consistent with their gender identity, an even more recent federal court ruling from May 2017, *Whitaker ex rel. Whitaker v. Kenosha Unified School District*, did just that.[75] In *Whitaker*, the U.S. Court of Appeals for the Seventh Circuit upheld a preliminary injunction that entitled a transgender male high-school student who was in the process of undergoing hormone replacement therapy to use the boys' bathroom.[76] Although school administrators had told the plaintiff that he was only allowed to use either the girls' bathroom or a gender-neutral bathroom, the court held that the school administrators' order violated the Equal Protection Clause.[77]

---

v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

[73] *Glenn*, 663 F.3d at 1317 ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.").

[74] *Id.* at 1314 (explaining that the plaintiff was under the supervision of health care providers and living as a woman outside of the workplace, which was a prerequisite for the plaintiff to undergo gender reassignment surgery).

[75] *See id.* at 1321 (explaining that the Georgia General Assembly office that had engaged in illegal discrimination had only single-occupancy restrooms, thus making any allegations of bathroom disturbance dubious at best).

[76] Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017) *See also id.* at 1044 (explaining that the standard to obtain a preliminary injunction is that the plaintiff must show "(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits").

[77] *Id.* at 1039. It is worth noting that, in addition to distance, the plaintiff in *Whitaker* opposed the option of using a gender-neutral bathroom because it "would single him out and subject him to scrutiny from his classmates." *Id.* at 1041. After the school administrators refused to make the boys' bathroom available as an option to the plaintiff, he became increasingly depressed and anxious and even "contemplated suicide." *Id.* The plaintiff was likely to suffer irreparable harm in light of expert opinions presented, reporting the plaintiffs' suicidal thoughts increased "each time he had to meet with school officials regarding his bathroom use." *Id.* at 1045.

In ruling in favor of granting this particular transgender student access to the bathrooms consistent with his gender identity, the U.S. Court of Appeals for the Seventh Circuit concluded that the Kenosha Unified School District's bathroom policy was a form of sex-classification and was subject to the court's review under a heightened level of scrutiny.[78] In addition, the court rejected the school district's purported defense that there was a strong privacy interest in favor of keeping the plaintiff out of the boys' bathroom.[79] In rejecting this defense as "sheer conjecture," the court explained that the Kenosha Unified School District received just one complaint, from one parent, during an entire six month period in which the plaintiff was using the boys' bathroom.[80] This lack of documented evidence of privacy complaints negated the school district's arguments in favor of keeping the transgender plaintiff out of his preferred bathroom.[81]

B. Gender Discrimination under Title VII of the Civil Rights Act

A second theory under which some gender minority plaintiffs have attempted to challenge rules that limit their bathroom access is under Title VII of the Civil Rights Act of 1964.[82] Title VII states that "it shall be an unlawful employment practice for an employer . . . to discriminate . . . because of [an] individual's race, color, religion, sex or national origin."[83] Much like under the Equal Protection Clause of the Fourteenth Amendment, there is limited legal precedent under Title VII about how broadly Congress intended to define the term "sex."[84] Nevertheless, in recent years, courts have begun to interpret the term more broadly.[85]

While there are no cases on the record that have attempted to apply Title VII to individuals discriminated against based on intersex status, there have

---

[78] *Id.* at 1050.

[79] *See id.* at 1051 ("[T]he School District treats transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently.").

[80] *Id.* at 1052.

[81] *See id.*

[82] Title VII of the Civil Rights Act of 1964 § 701, 42 U.S.C. §2000e–2000e-17 (2012); *see also* Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 674–82 (W.D. Pa. 2015) (utilizing the Title VII framework to dismiss a transgender student's Title IX claim).

[83] 42 U.S.C. §2000e-2(a)(1).

[84] *See* Holloway v. Arthur Anderson, 566 F.2d 659, 662 (9th Cir. 1977), *abrogated by* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *as recognized in* Schwenk v. Hartford, 204 F.3d 1187 (2000). This is not surprising as Congress had drafted the Civil Rights Act mainly as a means to combat racial discrimination. *See id.* The last-minute addition of "sex" to the act was proposed by "a gambit of Southern congressmen" who had attempted to create a "poison pill" to "scuttle the whole Civil Right Act." *See* Baror, *supra* note 4, at 10 (internal citations and quotations omitted).

[85] *See infra* notes 101–05 and accompanying text.

been several court decisions that have addressed whether transgender individuals are protected by Title VII.[86] In the earliest Title VII sex discrimination claims brought by transgender plaintiffs, courts nearly ubiquitously ruled against the plaintiffs.[87] For example, one of the earliest Title VII cases filed by a transgender plaintiff was *Holloway v. Arthur Andersen*—a 1977 decision by the U.S. Court of Appeals for the Ninth Circuit, in favor of the employer.[88] There, the plaintiff, Ramona Holloway, alleged that it violated Title VII for Arthur Andersen to fire her based on her decision to take female hormones and transition to the female gender.[89] However, the U.S. Court of Appeals for the Ninth Circuit disagreed, concluding that Arthur Andersen was within its rights to dismiss Holloway because Title VII did not protect gender expression, but rather served only "to ensure that men and women are treated equally."[90]

Thereafter, several other federal court decisions cited to *Holloway* in support of their similar outcome.[91] Among these decisions, in the 1982 case, *Sommers v. Budget Marketing*, the U.S. Court of Appeals for the Eighth Circuit cited to *Holloway* as support for granting summary judgment to an employer that had terminated a male-to-female transgender worker who had attempted to use the company's female bathroom.[92] There, the court

---

[86] On May 19, 2017, I conducted a Westlaw search of all federal cases that included the team "Title VII" within fifty words of the term "intersex." Only two cases appeared. The first case, *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) involved a transgender plaintiff whose lawyers briefly made the allegations of intersex status, but these claims were dismissed for lack of support; this case appears later in this article in the section involving Title VII and transgender. *See infra* notes 95–97 and accompanying text. The second case, *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006), was also a Title VII case related to a transgender individual; however, the case included a footnote that discussed intersex.

[87] *See infra* notes 88–100 and accompanying text.

[88] *Holloway*, 566 F.2d 659.

[89] *Id.* at 664.

[90] *Id.* at 663 (9th Cir. 1977) ("This court cannot conclude that transsexuals are a suspect class. Examining the traditional indicia of suspect classification, we find that transsexuals are not necessarily a discrete and insular minority . . . .") (internal citations and quotations omitted). The *Holloway* decision, however, was not a unanimous ruling. In a strong and progressive dissent that was perhaps before its times, Judge Goodwin wrote that while "Congress probably never contemplated that Title VII would apply to transsexuals," there should be some protection offered to "a person completing surgically that part of nature's handiwork which apparently was left incomplete somewhere along the line." *See id.* at 664 (Goodwin J., dissenting). Implicit in Judge Goodwin's opinion is the belief that sex reassignment surgery allows an individual to conform their body to nature's intent, rather than utilizing surgery as a way to alter nature's classification of a given person. The issue of nature versus nurture in sexual identity goes far beyond the scope of this article; however, this debate plays a substantial role in the way some Americans think about the rights of gender minorities and whether they should be afforded protection based on their adopted gender expression or identity.

[91] *See infra* notes 92–100 and accompanying text.

[92] Sommers v. Budget Mktg. Inv., 667 F.2d 748, 748–49 (8th Cir. 1982).

explained that given the plaintiff had not undergone sex reassignment surgery, the plaintiff still had an anatomical body of a male, and thus could not state a claim for sex discrimination under Title VII.[93] The court also concluded that the plain meaning of Title VII, as well as the legislative history, "does not show any intention to include transsexualism in Title VII."[94]

Similarly, in the 2003 case *Johnson v. Fresh Mark*, the U.S. District Court for the Northern District of Ohio dismissed the Title VII claims of a male-to-female transsexual who argued that she had been wrongfully terminated by her employer for using the women's bathroom.[95] In *Fresh Mark*, the plaintiff had argued that, despite having a male driver's license, she should be legally construed as a woman because she had lived for ten years continuously as a woman.[96] Nevertheless, the court concluded that the plaintiff was still legally male, and thus not protected under Title VII.[97] Meanwhile, in the 2007 decision *Etsitty v. Utah Transit Authority*, the U.S. Court of Appeals for the Tenth Circuit granted summary judgment to the Utah Transit Authority in a Title VII case filed by a male-to-female transsexual who alleged she was fired for using the women's restrooms while driving bus routes.[98] In ruling in favor of the Utah Transit Authority, the court found that transgender individuals are not a protected class under Title VII,[99] and that the Utah Transit Authority's fear of liability based on Etsitty's use of the public female restrooms justified the firing.[100]

Nevertheless, more recently, some courts have adopted a more favorable view of transgender plaintiffs' sex discrimination claims under Title VII.[101]

---

[93] *Id.* at 749–50 ("It is . . . generally recognized that the major thrust of the 'sex' amendment was toward providing equal opportunities to women."); *see also id.* at 750 ("[E]ven medical experts disagree as to whether Sommers is properly classified as male or female.").

[94] *See id.* at 750 (noting further that proposals to amend the Civil Rights Act to extend its protections to other groups such as those of minority sexual preference had failed).

[95] Johnson v. Fresh Mark, Inc., 337 F.Supp.2d 996, 998 (N.D. Ohio 2003), *aff'd*, 98 Fed. Appx. 461 (6th Cir. 2004).

[96] *Id.* at 998–1000. One of the weird aspects of the *Fresh Mark* case is that there are aspects of the pleadings in which the plaintiff seems to allege intersex status rather than transgender status; however, the court dismissed these factual allegations as the plaintiff failed to submit any medical evidence to the court to support the claim of being intersex, as well as failed to make such claims to the employer prior to filing suit. *See id.* at 1000.

[97] *Id.*

[98] Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1219–20 (10th Cir. 2007).

[99] *Id.* at 1221.

[100] *Id.* at 1219 (explaining that the articulated reason for Krystal Etsitty's administrative leave and ultimate termination by the Utah Transit Authority was "the possibility of liability for UTA arising from Etsitty's restroom usage").

[101] *See infra* notes 102–05 and accompanying text.

Most notably, in *Schroer v. Billington*, the U.S. District Court for the District of Columbia rejected a motion to dismiss plaintiffs' claim for sex based discrimination, finding that failure to hire an individual solely based on sexual identity would constitute sex based discrimination.[102] While it is too soon to predict whether many courts will adopt the reasoning in *Schroer*,[103] one legal scholar has predicted "Schroer's acknowledgment that discrimination against a sexual minority is *per se* discrimination [will prove] revolutionary in the development of Title VII doctrine."[104] Nevertheless, the *Schroer* decision specifically relates to the issue of wrongful termination based on one's transgender status and not to one's purported right to use bathrooms consistent with one's gender identity.[105]

C. Sex Stereotyping Claims under Title VII of the Civil Rights Act

A third legal theory under which some transgender plaintiffs have sought to obtain greater bathroom access is based on Title VII's prohibition against "sex stereotyping."[106] Title VII claims that allege illegal sex stereotyping are somewhat different from Title VII claims alleging *per se* sex discrimination.[107] As explained by the Supreme Court in *Price Waterhouse v. Hopkins*, sex stereotyping claims typically emerge where a woman is discriminated against by an employer who acts on the basis of a belief about the difference as to how men and women should behave, such as the belief that a woman cannot be aggressive or must dress or walk in a certain way.[108]

---

[102] *See* Schroer v. Billington, 424 F. Supp. 2d 203, 213 (D.D.C. 2006) (recognizing that the definition of sex cannot be assed solely based on chromosomes).

[103] The Sixth Circuit recently adopted some of the reasoning outlined in *Schroer*, holding that just as "discrimination because of religion easily encompasses discrimination because of a *change* in religion," then "discrimination because of sex inherently includes discrimination against employees because of a change in their sex." Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., No. 16-2424, 2018 WL 1177669, at *8 n.4 (6th Cir. Mar. 7, 2018) (citations and marks omitted) ("Moreover, discrimination because of a person's transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person's identification with two religions, an orthodox religion, or no religion at all.").

[104] Gelfman, *supra* note 30, at 83.

[105] *See Schroer*, 424 F. Supp. 2d at 213.

[106] *See infra* notes 107–13 and accompanying text; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that when one's gender plays a motivating role in an employment decision—including, the belief that one of a particular gender is supposed to behave in a particular manner—then "the defendant may avoid a finding of liability only by providing by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account").

[107] *See infra* notes 109–13 and accompanying text.

[108] *See infra* notes 109–13 and accompanying text; *see also Price Waterhouse*, 490 U.S. at 250–51. *But see Schroer*, 424 F. Supp. 2d at 209–211 (expressing that the actual holding of *Price Waterhouse* may be narrower than some people believe because the "sex stereotype" theory is intended to provide

While the *Price Waterhouse* decision involved a cisgender plaintiff who was denied promotion to the rank of partner because her colleagues did not find her to be adequately feminine, the U.S. Supreme Court's decision in *Price Waterhouse* perhaps "unwittingly . . . opened the door" for some courts to allow individuals who were denied employment based on their transgender status to state a claim for sex-stereotype discrimination.[109] For instance, thereafter in *Smith v. City of Salem*, the U.S. Court of Appeals for the Sixth Circuit held that, similar to how an employer is forbidden from discriminating against a woman for not wearing dresses or makeup, "[i]t follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination."[110] Similarly, in *Barnes v. City of Cincinnati*, the U.S. Court of Appeals for the Sixth Circuit upheld a finding of discrimination based on "sex stereotyping" in favor of a demoted police officer who lived as a woman outside of work and occasionally wore makeup to work.[111]

Only one court to date has extended the *Price Waterhouse*, *Smith* or *Barnes* holdings to explicitly protect transgender plaintiffs' right to use the bathrooms consistent with their gender identity.[112] Nevertheless, much like bathroom access cases brought under the theory of *per se* gender discrimination, bathroom access cases brought based on a sex stereotypes theory thus far have generally failed.[113]

---

protection for a male with female traits or a male with male traits, but not somebody who is trying to express the gender identity of a sex different from their biological sex).

[109] Baror, *supra* note 4, at 10.

[110] *See* Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004) ("*Price Waterhouse* . . . does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual.").

[111] *See* Barnes v. City of Cincinnati, 401 F.3d 729, 738 (6th Cir. 2005).

[112] In *Roberts v. Clark Cty. Sch. Dist.*, the Nevada District Court relied on *Price Waterhouse* and EEOC rulings in *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) and *Lusardi v. McHugh*, EEOC Decision No. 0120133395, 2015 WL 1607756—the latter of which concerns a transitioning transgender woman's access to the restroom—to hold that a transitioning transgender school employee was discriminated against when he was forced to use a gender-neutral restroom at work. 215 F. Supp. 3d 1001, 1011–14 (D. Nev. 2016). In so holding, the court in *Roberts* noted that the employer failed to "articulate a legitimate nondiscriminatory reason for the bathroom ban" because there was no evidence to support the contention the ban was "implemented to protect the privacy rights of other . . . employees and its students." *Id.* at 1016 (quotation marks omitted).

[113] *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (declining to extend Title VII protections to transgender persons and concluding that the firing of a female transgender employee with male genitalia for insisting on using the women's public restrooms while in her employee uniform could result in liability for the employer and thus "constitutes a legitimate, nondiscriminatory reason for . . . termination"); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 1000–01 (N.D. Ohio 2003) (declining a Title VII claim based on gender stereotypes because the employer "did not require Plaintiff to conform her appearance to a particular gender stereotype, instead, the company only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms").

D. The Americans with Disabilities Act

A fourth means by which some gender minorities have attempted to challenge their limited bathroom access entails suing under the Americans with Disabilities Act ("ADA").[114] The Americans with Disabilities Act, in pertinent part, states that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regards to . . . terms, conditions, and privileges of employment."[115] While the plain language of the Americans with Disabilities Act excludes from its definition of disabilities both "transsexualism" and "gender identity disorders," the act is silent regarding intersex disorders.[116] This leaves open the possibility that intersex plaintiffs could prevail on an ADA claim.[117]

To date, no intersex individual has brought a lawsuit seeking broader bathroom rights under the ADA.[118] One likely reason for this is based on the extreme efforts many intersex people undergo to maintain their privacy.[119] Another reason is that some intersex activists frown on the "disabled" label because they believe it implies that their condition needs to be fixed.[120] Nevertheless, if an intersex individual were to file an ADA lawsuit seeking to secure broader bathroom access, one could make a relatively strong argument that the intersex plaintiff would prevail.[121]

---

[114] 42 U.S.C. § 12101–12213 (2012); *see also Fresh Mark*, 337 F. Supp. 2d at 1001–02.

[115] 42 U.S.C. §12112(a).

[116] 42 U.S.C. §12211(b)(1). According to various sources, the transgender community is split on whether to seek to remove this language from the Americans with Disabilities Act. As both articulately and concisely explained by Columbia Law School student Katie Aber in her student note: "Some fear the stigma that comes from labeling one's gender identity as a disability, while others see the value in using disability law to achieve anti-discrimination protections, noting that disability law provides broad coverage based on a social model of disability (being "regarded as" having a disability)." Katie Aber, Note, *When Anti-Discrimination Law Discriminates*, 50 COLUM. J.L. & SOC. PROBS. 299, 308–09 (2017).

[117] *See Fresh Mark*, 337 F. Supp. 2d at 1001–02 (noting that the plaintiff has failed to inform the employer about purported intersexuality; however, leaving open the possibility that if the plaintiff had done so, rather than simply arguing transgender status, the plaintiff might have been able to state a claim under the Americans with Disabilities Act). For an interesting an in-depth discussion by one legal scholar about how she believed Title VII should apply to intersex, *see* Gelfman, *supra* note 30.

[118] GREENBERG, *supra* note 23, at 114. *See also* Menon, *supra* note 10, at 1236 (noting the lack of case law with respect to intersex individuals under the Americans with Disabilities Act).

[119] *C.f. id.* at 4 (acknowledging that "the intersex activist movement is still in its infancy and in the process of developing its advocacy strategies").

[120] *See id.* at 84 (discussing intersex advocates' opposition to "disability"); *c.f. id.* at 93 (explaining that some intersex activists even oppose replacing the term "intersex" with the term "disorders of sexual development" because they do not want their condition to be labeled as a "disorder").

[121] *See generally* GREENBERG, *supra* note 23, at 113 ("The likelihood of success employing a disability rights model [to protect the interests of intersex individuals] is enhanced now that the United States has agreed to become a signatory to the United Nations Convention on the Rights of Persons with Disabilities,

E. Title IX of the Education Amendments Act of 1972

Finally, students who are members of gender minorities also have begun to file lawsuits seeking bathroom access under Title IX of the Education Amendments Act of 1972.[122] This section of the Education Amendments Act states that "[n]o person ... shall, on the basis of sex, be ... subjected to discrimination under any education program or activity receiving federal financial assistance."[123] To prevail on a Title IX claim, a plaintiff must prove three elements: (1) exclusion from participation in an educational program based on sex; (2) that the educational institution was receiving federal funding at the time of exclusion; and (3) that the improper exclusion caused harm.[124]

As of the publishing of this article, there have been three significant federal court cases that have addressed whether a transgender plaintiff could successfully secure bathroom access under Title IX of the Education Amendments Act.[125] In each of these cases, courts have applied fundamentally different reasoning in their analysis.

1. *Johnston v. University of Pittsburgh*

The first federal decision to address whether a student who was denied bathroom access could state a claim under Title IX of the Education Amendments Act was *Johnston v. University of Pittsburgh.*[126] There, a transgender male student at the University of Pittsburgh sought the legal right to use the men's bathrooms and locker rooms at his college.[127] Upon reviewing his complaint, the U.S. District Court for the Western District of Pennsylvania ruled against the transgender student, concluding that "the

---

a treaty that elevates disability beyond a health and social welfare issue to a human rights issue.").

[122] Education Amendments of 1972 § 901, 20 U.S.C. §1681 (2012); *see also* Favia v. Ind. Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993) ("Title IX provides a cause of action to battle discrimination based upon gender by educational institutions which receive federal funding, and was intended to prevent the use of federal resources to support gender discrimination.").

[123] 20 U.S.C. §1681(a); *see generally* Baror, *supra* note 30 ("While Title IX is often thought of as merely being about banning sex discrimination in funding for and access to educational programs, it has been interpreted to provide a private right of action for sex discrimination and retaliation in the employment context for employees of educational institutions receiving federal funds.").

[124] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd. 822 F3d 709, 718 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

[125] *See* Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657 (W.D. Pa. 2015); *Grimm*, 822 F.3d 709; Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046–50 (7th Cir. 2017).

[126] *Johnston*, 97 F. Supp. 3d 657.

[127] *Id.* at 663.

University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination."[128]

The *Johnston* court cited numerous reasons for rejecting the plaintiff's Title IX claim. First, the court concluded that "the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex."[129] In addition, the court held that, as a matter of statutory intent, "Congress's purpose in enacting Title IX was to establish equal educational opportunities for women and men in education" during an era in which biological women faced great discrimination.[130] Finally, the court opined that language within Title IX explicitly allows "educational institutions . . . to provide separate toilet, locker room, and shower facilities on the basis of sex"—thus purportedly supporting the maintenance of segregated bathrooms and locker rooms based on biological sex.[131]

Furthermore, the *Johnston* court indicated a separation of powers argument against ruling in favor of the transgender plaintiff.[132] Specifically, the court opined that "[i]t is within the providence of Congress—and not this Court—to identify those classifications that are statutorily prohibited."[133] Thus, the court believed that if Title IX protections were intended to attach to transgender plaintiffs, the transgender community would need to seek statutory change rather than judicial redress.[134]

---

[128] *Id.* at 672–73. Separately, the court concluded that the plaintiff failed to make a successful sex stereotyping claim because the plaintiff "has not alleged that Defendants discriminated against him because of the way he looked, acted, or spoke." *Id.* at 680. Not all claims alleged by any given plaintiff are equally strong, and the "sex stereotyping" claim as alleged by the plaintiff, based on the existing facts, seems to require a far greater stretch than the "transgender status" claim. Thus, the "sex stereotyping" claim is not addressed within the text of this article.

[129] *Id.* at 676.

[130] *Id.* at 677.

[131] *Id.* at 678 (citing 34 C.F.R. § 106.33 (2017)) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided to students of the other sex."). To further support this interpretation, the court in *Johnston* cited to a different case in which the court concluded that Title IX actually supports single-sex athletic teams. *Id.* at 677 (citing Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 174 (3d. Cir. 1993).

[132] *See id.* at 676–77 n.19 ("The issue of deconstructing sex-segregated bathrooms is a policy matter that is better suited for Congressional consideration and deliberation.").

[133] *Id.* at 676–77.

[134] *See id.* at 676 n.19 (citing Jill D. Weinberg, *Transgender Bathroom Usage: A Privileging of Biology and Physical Difference in the Law*, 18 BUFF. J. GENDER L. & SOC. POL'Y 147 (2009–10) (noting that advocating legislative change to the law has been successful in other contexts, such as legislative change under the Americans with Disabilities Act to meet various needs).

2. *Grimm v. Gloucester County School Board*

Following *Johnston*, courts in the Fourth Circuit addressed a very similar issue in *Grimm v. Gloucester County School Board*.[135] There, the particular legal issue related to whether Title IX prevented high school administrators from preventing a transgender boy, who had undergone hormone therapy, from using the bathroom of his choice.[136]

Much like the district court decision in *Johnston*, the U.S. District Court for the Eastern District of Virginia's decision in *Grimm* held that the plaintiffs' Title IX claim was precluded by language in Title IX that stated "[nothing in the act] shall be construed to prohibit any educational institution receiving funds under this Act from maintaining separate living facilities for the different sexes."[137] In addition, the district court relied on the Department of Education's regulations that stated a recipient of Title IX funding may "provide separate toilet, locker room, and shower facilities on the basis of sex."[138]

Nevertheless, unlike in *Johnston*, the district court's decision in *Grimm* was reversed on appeal.[139] On appeal, the U.S. Court of Appeals for the Fourth Circuit cited to the U.S. Department of Education's legal opinion memorandum on bathroom choice to support the plaintiff's Title IX right to use the bathroom associated with his gender identity.[140] The appellate court, nevertheless, explained that if the executive branch were to repeal its memorandum on bathroom choice, the court's decision in *Grimm*, too, would cease to apply.[141]

Thereafter, Gloucester County School Board petitioned for certiorari to the U.S. Supreme Court, which initially agreed to hear the case.[142] However,

---

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

[136] *Id.* at 714–15.

[137] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 744 (E.D. Va. 2015) (quoting 20 U.S.C. §1686 (2012)) (internal quotations omitted).

[138] *Id.* (quoting 34 C.F.R. §106.33 (2017)). Although the plaintiff in *Grimm* pointed to a recent memorandum from the U.S. Department of Education that required all schools that accept federal funds to allow transgender students to use the bathrooms consistent with their gender identity, the district court declined to give substantial weight to the memorandum because it was merely a memo and not formal department regulations. *See id.* at 745–47. According to the district court, if the Department of Education wanted to amend its regulations, it needed to "go through notice and comment rulemaking, as required by the Administrative Procedure Act" rather than issuing a mere memo. *Id.* at 746.

[139] *See infra* notes 140-41 and accompanying text.

[140] *Grimm*, 822 F.3d at 718.

[141] *See id.* at 724 ("[A] subsequent administration [may] choose to implement a different policy . . . .").

[142] *See* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442, *cert. granted*, 137 S. Ct. 369

in the interim, the Trump administration retracted the Department of Education's bathroom-choice memorandum.[143] This repeal led the Supreme Court to simply vacate the Fourth Circuit's ruling in *Grimm* and remand the case for further proceedings.[144]

3. *Whitaker ex rel. Whitaker v. Kenosha Unified School District*

Finally, the most recent federal decision to consider whether a transgender plaintiff could challenge a school district's restrictive bathroom policy under Title IX is *Whitaker ex rel. Whitaker v. Kenosha Unified School District*—a case this article references in Section III(A).[145] Unlike in either *Johnston* or *Grimm*, the plaintiff in *Whitaker* had secured a preliminary injunction at the district court level, enjoining his school district from interfering with his bathroom use.[146] Thereafter, the Kenosha Unified School District appealed this injunction to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the district court's decision, despite the Trump administration's repeal of the bathroom-choice memorandum.[147]

Rather than rely on the executive branch's interpretation of Title IX to rule in favor of the plaintiff, the U.S. Court of Appeals for the Seventh Circuit in *Whitaker* instead relied on the reasoning applied in both *City of Salem* and *Glenn*.[148] In doing so, the appellate court concluded that "[a] policy that requires an individual to use a bathroom that does not conform to his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[149]

(2016) (staying the appellate court decision); *see also* Baror, *supra* note 4. ("The stay means that the transgender student is not allowed to use the boys' restroom at his school.").

[143] *See Dear Colleague Letter*, *supra* note 7.

[144] *See* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016); *see also* Miller, *supra* note 18, at 1169 ("Shortly after the election of Donald Trump, however, the Department of Education and the Department of Justice withdrew the [Title IX] guidance. In response, the [Supreme] Court reversed course, vacating the [*Grimm*] decision."); *Mr. Whitaker Can Graduate with Pride*, *supra* note 7 (explaining that the Trump administration's memorandum "prompted the Supreme Court not to hear scheduled arguments [in Gloucester County School Board v. G.G. *ex rel.* Grimm]"); *Dear Colleague Letter*, *supra* note 7.

[145] Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).

[146] *See* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016), *aff'd* 858 F.3d 1034 (7th Cir. 2017).

[147] *See Dear Colleague Letter*, *supra* note 7.

[148] *Whitaker*, 858 F.3d at 1048–49 (citing Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883, 883 (11th Cir. 2016).

[149] *Id.* at 1049.

Based upon the Seventh Circuit's ruling in *Whitaker*, it is reasonable to presume that the Kenosha Unified School District will either seek an *en banc* review or file a petition for certiorari to the U.S. Supreme Court.[150] If the school district files a petition for certiorari, it is reasonably likely the Court would grant certiorari even though the Supreme Court grants certiorari less than five percent of the time.[151] One reason why it is so likely the Supreme Court would grant certiorari is because it did so in *Grimm*, but never had the opportunity to hear the *Grimm* case on its merits.[152]

V. AN ASSESSMENT OF TRANSGENDER BATHROOM RIGHTS UNDER DONALD TRUMP'S PRESIDENCY

As long as Donald Trump remains President of the United States, the bathroom rights of intersex and transgender individuals remain in flux.[153] On the one hand, the Trump administration's repeal of the Department of Education's bathroom-choice memorandum negates the reasoning that underlies the U.S. Court of Appeals for the Fourth Circuit's favorable ruling for the plaintiff in *Grimm*.[154] On the other hand, even despite the Trump administration's decision to rescind the Department of Education's 2015 bathroom-choice memorandum, recent court decisions such as *Glenn*, *Schroer*, *City of Salem*, *Barnes*, and *Whitaker* provide some hope for future plaintiffs that courts will continue to order bathroom choice.[155]

---

[150] *See* Emma Brown, *Appeals Court Sides with Transgender Student in Wis. Bathroom Case*, WASH. POST (May 30, 2017), https://www.washingtonpost.com/local/education/appeals-court-sides-with-transgender-student-in-wis-school-bathroom-case/2017/05/30/3f5f6e98-4572-11e7-bcde-624ad94170ab_story.html (quoting the lawyer who represents the Kenosha Unified School District as "considering whether to appeal to the Supreme Court or ask a full panel of 7th Circuit judges to hear the case"); *see also Mr. Whitaker Can Graduate with Pride*, *supra* note 7 (stating that eventually the issue of bathroom choice for intersex and transgender students will need to be decided by the Supreme Court).

[151] *See* Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of* American Needle v. Nat'l Football League, 16 STAN. J.L. BUS. & FIN. 183, 194 (2011).

[152] *See supra* notes 142–44 and accompanying text; *see also* Miller, *supra* note 18, 1169 (recognizing the "possibility that a case involving [transgender bathroom rights and Title IX] might reach the Supreme Court in the near future").

[153] *See Dear Colleague Letter*, *supra* note 7.

[154] *See id.*

[155] *See infra* notes 163–72, 187–94 and accompanying text.

A. Gender Discrimination under the Equal Protection Clause of the Fourteenth Amendment

Future bathroom challenges under the Equal Protection Clause of the Fourteenth Amendment will likely seek to build upon the U.S. Court of Appeals for the Eleventh Circuit's holding in *Glenn*.[156] To the extent that courts continue to apply "intermediate scrutiny" in gender discrimination cases, state actors would bear the burden to prove that their bathroom policies are "substantially related to a sufficiently important government interest."[157]

In defending sex-segregated bathroom policies based on birth-certificate assigned sex, a defendant municipality would likely cite to issues related to safety and privacy interests.[158] Plaintiffs, however, would likely seek to rebut these arguments with counterpoints ranging from the academic position of Plato about "absurdity" in *Republic V* to the practical reality about the lack of municipal crime in municipalities where individuals are currently allowed to use bathrooms associated with their gender identity.[159]

Based on the foregoing, the best strategy for the intersex and transgender community to secure access to bathrooms that conform to their gender identity might be the slow play.[160] As long as the courts do not stop certain municipalities from allowing individuals to use the bathrooms associated with their gender identity, there will emerge a *bona fide* opportunity for researchers to conduct natural experiments on how gender minority bathroom choice (independent variable) affects bathroom crime and privacy

---

[156] *See* Glenn v. Bumbry, 663 F.3d 1312, 1320 (11th Cir. 2011); *see also* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1054 (7th Cir. 2017).

[157] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985).

[158] *See supra* notes 20–23 and accompanying text (discussing reasons that bathroom segregation exists in the first instance). *See also* F.V. v. Barron, no. 1:17-CV-00170-CWD, 2018 WL 1152405, at *1, *10–*12 (D. Idaho Mar. 5, 2018) (holding that the state interest in prohibiting individuals from amending the sex on their birth certificate is not rationally related to a legitimate government interest and, further, that transgender individuals warrant heightened scrutiny under an Equal Protection framework).

[159] *See* PLATO, *supra* note 8, at 130–31; *see also* Robin Fretwell Wilson, *The Nonsense about Bathrooms: How Purported Concerns Have Nothing to Do with Risks from Trans People*, 20 LEWIS & CLARK L. REV. 1373, 1400–01 (2017) (pointing out that members of the trans community have used bathrooms associated with their gender identity for many years, without legal authorization, and there have been few, if any, cases related to the safety concerns of women related to their doing so); *see also id.* at 1401 (quoting multiple high-ranking law enforcement officials for the proposition that they had never heard of a situation where a transgender individual has attacked another in a restroom). Indeed, the longer that places such as California and New York City allow gender minorities to use bathrooms associated with their gender identity, the more difficult it becomes for state actors to argue that their *status quo* bathroom policy is needed to protect any "important government interest," as required by intermediate scrutiny under Equal Protection. *City of Cleburne*, 473 U.S. at 441.

[160] *See infra* notes 187–91 and accompanying text.

infringement (dependent variable).[161] To the extent researchers cannot find a direct relationship in these studies, it would become extraordinarily difficult for municipalities to defend excluding gender minorities from their choice of bathrooms.[162]

B. Gender Discrimination Under Title VII of the Civil Rights Act

Similarly, future challenges by intersex and transgender plaintiffs to workplace bathroom rules as a form of sex discrimination under Title VII would likely seek to build upon the U.S. District Court for the District of Columbia's 2006 decision in *Schroer v. Billington*, which is, to date, the only Title VII decision to extend *per se* "sex discrimination" directly into the realm of "gender discrimination."[163] Although the U.S. District Court for the District of Columbia applied *Schroer* specifically in the context of wrongful termination, it is possible, if not likely, that other courts will now adopt the same view that "gender discrimination" is cognizable as "sex discrimination" under Title VII.[164]

Furthermore, an intersex plaintiff, should one arise, might not even need to rely on such an expansive definition of "sex" as applied in *Schroer* to prevail on a Title VII claim.[165] A court could reasonably find that a bathroom policy based on binary classifications (male/female) discriminates on the basis of their biological sex—especially with respect to individuals with

---

[161] *See generally* THOMAS GILOVICH ET. AL., SOCIAL PSYCHOLOGY 54-55 (4th ed. 2016) (defining a "natural experiment" as "[a] naturally occurring event or phenomenon having somewhat different conditions that can be compared with almost as much rigor as in experiments where the investigator manipulates the conditions"); Saul McLeod, *Experimental Method*, SIMPLY PSYCHOLOGY (2012), https://www.simplypsychology.org/experimental-method.html ("Natural experiments are conducted in the everyday (i.e. real life) environment of the participants, but here the experimenter has no control over the [independent variables] as it occurs naturally in real life.").

[162] *See supra* notes 158–59 and accompanying text.

[163] *See* Schroer v. Billington, 424 F. Supp. 2d 203, 213 (D.D.C. 2006). Recently, the Seventh Circuit and the Second Circuit, sitting en banc to overrule contrary precedent, similarly expanded their interpretation of sex discrimination under Title VII to include sexual orientation discrimination. *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853, F.3d 339 (7th Cir. 2017); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018). In both cases, the courts in *Hively* and *Zarda* held plainly that discrimination because of sexual orientation, regardless of whether the plaintiff acted contrary to gender stereotypes, is necessarily protected under Title VII's prohibition against sex discrimination. *See Hively*, 853 F.3d at 351–52; *Zarda*, 883 F.3d at 119 ("[S]exual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.").

[164] *See generally* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017) (reaching a similar legal conclusion with respect to college student bathroom access under the context of Title IX, rather than Title VII).

[165] *See Schroer*, 424 F. Supp. 2d at 213.

Klinefelter's Syndrome, who can reasonably argue they are chromosomally both male and female (XXY).[166]

C. Sex Stereotyping Claims Under Title VII of the Civil Rights Act

Similarly, future legal challenges by intersex and transgender plaintiffs to private entities' bathroom policies under a Title VII sex stereotyping theory would likely build upon the broad interpretation of sex stereotyping adopted by the U.S. Court of Appeals for the Sixth Circuit in both *Smith* and *Barnes*.[167] Nevertheless, applying a sex stereotyping theory to bathroom-choice lawsuits seems like somewhat of a stretch under the law, as interpreted by most other circuits.[168] In essence, what the Supreme Court held in *Price Waterhouse* was that one cannot require female partner candidates to act feminine in order to make partner.[169] However, the Court, in earnest, went no further than that.[170]

Even in *City of Salem* and *Barnes* (which extended the Supreme Court's holding in *Price Waterhouse* into the realm of transgender rights) the underlying case still related specifically to protecting men who behaved in a feminine manner and not gender identity *per se*.[171] Since the closest the law comes to gender-identity stereotyping cases is the Title IX decision in *Whitaker*, bathroom-choice lawsuits grounded in Title VII may have greater success, at least during the Trump administration, under a "sex discrimination" theory (as referenced above) rather than a sex stereotyping theory.[172]

---

[166] *See* LEHMILLER, *supra* note 32, at 120 (explaining that individuals with Klinefelter's Syndrome have an XXY chromosomal combination, whereas the traditional female pattern in XX and the traditional male pattern is XY). *See generally* GREENBERG, *supra* note 23, at 124 (concluding that "under the court's holding in *Schroer*, people with an intersex condition could potentially state a sex discrimination claim").

[167] *See* Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004); Barnes v. City of Cincinnati, 401 F.3d 729, 737–38 (6th Cir. 2005).

[168] *See infra* notes 169–72 and accompanying text.

[169] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

[170] *See id.* at 251–52.

[171] *See Smith*, 378 F.3d at 574; *Barnes*, 401 F.3d at 737. *But see* Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned with at birth."); M.A.B. v. Bd. of Educ., No. GLR-16-2622, 2018 WL 1257097, at *5–*9 (D. Md. Mar. 12, 2018) (utilizing a gender-stereotyping theory set out under *Price Waterhouse* to hold policies discriminating against transgender students necessarily discriminate because of gender stereotypes); *see also* A.H. *ex rel.* Handling v. Minersville Area Sch. Dist., No. 3:17-CV-391, 2017 WL 5632662, at *7 (M.D. Pa. Nov. 22, 2017).

[172] *See supra* notes 106–13, 145–52 and accompanying text.

D. The Americans with Disabilities Act

Next, with respect to future claims for bathroom choice brought under the Americans with Disabilities Act, the plain language of the ADA almost undoubtedly forecloses transgender individuals or those with gender dysphoria from stating a reasonable claim.[173] Nevertheless, the Americans with Disabilities Act does not seem to include any bar against claims by intersex individuals.[174] Indeed, an Americans with Disabilities Act claim for bathroom access may prove quite successful if brought by an intersex plaintiff.[175]

At present, there are no legal challenges that directly address whether intersex individuals are protected by the Americans with Disabilities Act.[176] However, under the plain language of the Americans with Disabilities Act, a "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[177] Furthermore, "life activities" are defined to include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[178] Because most intersex conditions implicate, at a minimum, "reproductive function" and the "bladder" system, a court reasonably could find intersex individuals to fall within the scope of the Americans with Disabilities Act.[179]

To further buttress this point, the underlying purpose of the Americans with Disabilities Act, as articulated by Congress, is to remedy the "isolating

---

[173] *See* 42 U.S.C. §12211(b)(1) (2012) (explicitly excluding both "transsexualism" and "gender identity disorders" from the categories of disabilities where individuals are offered protection).

[174] 42 U.S.C. §12211(b)(1).

[175] *See generally* Menon, *supra* 10, at 1238–42 (discussing three prongs through which an intersex plaintiff may find relief under the Americans with Disabilities Act).

[176] *See generally* 42 U.S.C. §12211(b)(1) (not including "intersex" *per se* among the excluded groups under the act); Menon, *supra* note 10, 1223–24 ("The medicalization of intersex issues and the more recent references to intersex persons as individuals with [disorders of sexual development] suggest that members of the intersex community may be qualified individuals with disabilities under the Americans with Disabilities Act."). *C.f.* GREENBERG, *supra* note 23, at 107 ("Lawsuits brought by or against people with an intersex condition have been rare.").

[177] 42 U.S.C. §12102(1)(A) (2012).

[178] 42 U.S.C. §12102(2)(B).

[179] 42 U.S.C. §12101–12213 (2012); *see also* Johnson v. Fresh Mark, 337 F. Supp. 2d 996, 1001–02 (N.D. Ohio 2003); Menon, *supra* note 10, at 1236 ("[A] person may be considered to have an impairment [under the amendments to the Americans with Disabilities Act] if the person has partially developed or underdeveloped sex organs preventing them from operating with normative levels of sexual, reproductive and biological functioning."); GREENBERG, *supra* note 23, at 114 (noting that people with an intersex condition may reasonably have impairment to their endocrine and bladder functions, as well with respect to the ability to reproduce).

and segregating of individuals with disabilities."[180] Much like other disabled people, intersex people are highly isolated and segregated by a bathroom and locker room culture that labels them as different, and does not recognize their naturally non-conforming physical features.[181] Thus, not only do intersex individuals seem to fall within the clear language of the Americans with Disabilities Act, but they also fall squarely within the act's policy goals.[182]

Presuming a court were to agree that intersex individuals fall within the scope of the Americans with Disabilities Act, courts must then entitle intersex individuals to "reasonable accommodations" under the law.[183] In the context of an individual whose biological gender is ambiguous, allowing that person to use the bathroom or locker room facilities associated with their gender identity is an eminently "reasonable accommodation."[184] In essence, this amounts to an acknowledgement that, where society has no reasonable basis to assign an individual to a particular "sex," that individual should have the privilege of choosing how to self-identify.[185] Such self-rule, at the margins, does not upset the underlying intent of the longstanding social norm of bathroom segregation.[186]

---

[180] 42 U.S.C. §12101(a)(2)–(3).

[181] *See generally* Moonhawk River Stone, *Approaching Critical Mass: An Explanation of the Role of Intersex Allies in Creating Positive Education, Advocacy and Change*, 12 CARDOZO J.L. & GENDER 353, 354 (2005) (describing intersex individuals as being "isolated in secrecy, shame and lies" based on their bodies).

[182] *See supra* notes 179–81 and accompanying text; *c.f.* Menon, *supra* note 10, at 1224 ("While the [Americans with Disabilities Act] explicitly proscribes transgender legal disability protections, a critical statutory ambiguity may lend itself to a broader interpretation encompassing intersex disability protections."); GREENBERG, *supra* note 23, at 113 ("A disability model may prove to be a beneficial framework for protecting people with an intersex condition.").

[183] *See* U.S. Airways Inc. v. Barnett, 535 U.S. 391, 396 (2002) ("[D]iscrimination includes an employer's *not making reasonable accommodations* to the known physical or mental limitations of an otherwise qualified . . . employee, *unless* [the employer] can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business." (citation and marks omitted) (emphasis in original)).

[184] 42 U.S.C. §12111(8)(A) (defining "reasonable accommodations" as including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities").

[185] *See generally* GREENBERG, *supra* note 23, at 4 (discussing how advocates on behalf of both intersex and transgender individuals "seek to enhance the right to sexual self-determination"). *C.f.* Nicole Antonopoulos, Note, *The Unconstitutionality of the Current Housing Arrangements for Intersex Prisoners*, 42 HASTINGS CONST. L.Q. 415, 427–29 (2015) (arguing that, in the context of the U.S. prison system, intersex prisoners, for housing purposes, should have the right to choose how they self-identify).

[186] *C.f.* GREENBERG, *supra* note 23, at 4 (discussing the importance of "self-determination" for gender minorities).

E. Title IX of the Education Amendments Act of 1972

Finally, the Trump administration's conduct with respect to rescinding the Department of Education's Office of Civil Rights memorandum related to bathroom choice may have its most meaningful consequences on future minority gender students that seek to bring Title IX claims.[187] The U.S. Supreme Court's decision to vacate the U.S. Court of Appeals for the Fourth Circuit's ruling in *Grimm* marks a substantial step backwards for bathroom choice advocates.[188] Even though the U.S. Court of Appeals for the Seventh Circuit more recently reached a favorable ruling under Title IX for the plaintiff in *Whitaker*,[189] the Supreme Court's decision to vacate *Grimm* leaves inevitable caution about whether the Court would uphold the *Whitaker* decision on review—especially if the Trump administration were to intermittently issue a new memorandum that expressly interprets Title IX as not extending to transgender individuals' bathroom rights.[190]

While either party in *Whitaker* is legally entitled to file a petition for certiorari, it is reasonable that the best course of action for intersex and transgender plaintiffs who are seeking to challenge bathroom regulations under Title IX would be to wait until 2020—especially given the *bona fide* possibility that, with a Supreme Court case looming, the Trump administration may issue an explicitly negative memorandum on the issue.[191]

If a prospective Title IX plaintiff cannot exercise patience until 2020, then some comparatively reasonable forums in which one may attempt to challenge their bathroom access under Title IX include the Seventh Circuit (based on its directly relevant Title IX ruling in *Whitaker*),[192] the D.C. Circuit

---

[187] *See supra* notes 135–44 and accompanying text (discussing how the Trump administration's rescinding of its bathroom access memorandum led to the U.S. Supreme Court vacating the Fourth Circuit's ruling in *Grimm*); *see also Dear Colleague Letter*, *supra* note 7 (rescinding the Barack Obama administration's directives on bathroom choice).

[188] *See* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (vacating the U.S. Court of Appeals for the Fourth Circuit's ruling); *c.f.* Robert Barnes, *Supreme Court Sends Virginia Transgender Case Back to Lower Court*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-sends-transgender-case-back-to-lower-court/2017/03/06/0fc98c62-027a-11e7-b9fa-ed727b644a0b_story.html (quoting leaders of Conservative groups praising the Supreme Court's decision to vacate the appellate court ruling in *Grimm*).

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

[190] *See Grimm*, 137 S. Ct. 1239.

[191] *See* Edelman, *supra* note 151, at 195 (providing the example of *American Needle v. Nat' Football League* as one of the rare instances in which a party that was victorious at the appellate court level favored Supreme Court review for purposes of trying to obtain consistency in the law, across all circuits).

[192] *Whitaker*, 858 F.3d at 1046–50 (7th Cir. 2017).

(based on the Title VII ruling in *Schroer*),[193] and the Eleventh Circuit (based on its ruling in *Glenn*).[194]

VI. CONCLUSION

The segregation of bathroom and locker room access on the basis of birth certificate sex rather than gender identity remains a source of great contention within U.S. society. Although the final years of U.S. President Barack Obama's leadership featured significant efforts by the executive branch to expand bathroom access, the Trump administration has repealed these memorandums and fact sheets—leaving federal courts with little guidance about whether intersex or transgender people are entitled to use the bathrooms consistent with their gender identities.

In the absence of meaningful guidance from the executive branch, federal courts will likely face ongoing challenges regarding whether to expand individuals' access to bathrooms related to their gender identity based on a reasonable interpretation of the Equal Protection Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and Title IX of the Education Amendments Act. With regard to each of these federal statutes, legal precedent provides limited guidance, because parties can point to important court decisions favoring both positions. In addition, with respect to certain statutory claims, the legal arguments put forth by intersex plaintiffs appear comparatively stronger than those set forth by transgender plaintiffs.

Moreover, even though delaying with future legal challenges would be antithetical to the goals of some advocates of bathroom reform, there seems to be certain advantages for transgender individuals to delay challenging certain bathroom segregation laws until 2020. By doing so, they leave open the possibility that a different presidential candidate could succeed Donald Trump in the White House in 2020 and reinstitute the Department of Education's 2015 memorandum that interpreted Title IX of the Education Amendments Act to require schools receiving funds to allow students to use facilities associated with their gender entity. It also allows for individuals seeking to challenge certain bathroom laws under the Equal Protection Clause to gather statistical evidence rebutting any causative relationship between providing gender minorities with greater bathroom access and an increase in safety and privacy violations.

---

[193] Schroer v. Billington, 424 F. Supp. 2d 203, 213 (D.D.C. 2006).

[194] Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

Finally, intersex individuals seeking to challenge current bathroom laws will not likely need to delay their legal efforts, as, even under the Trump administration, they have a strong legal argument to secure bathroom choice under the Americans with Disabilities Act.[195] Indeed, intersex individuals are far better positioned to bring a disability rights claim in support of access to bathrooms consistent with their preference both because the Americans with Disabilities Act does not explicitly exclude intersex individuals, and because being intersex reasonably implicates reproductive and urinary functions. This conclusion is by no means an indictment of the transgender community and its cause, but rather an earnest depiction of the law and the way the law is currently being interpreted by most courts.

---

[195] *See supra* notes 116–21 and accompanying text. *See also See* JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 126 (NYU Press, 2012) (concluding that "current statutes prohibiting disability and sex discrimination could provide persuasive frameworks to protect adults with an intersex condition from discriminatory actions").