Stigma in the Sunshine State: How the Eleventh Circuit Ignored Important Equal Protection Considerations and Contributed to the Panic Against the Transgender Community*

During the past ten years, courts have been at the forefront of increasing the rights of LGBTQ+ Americans. In 2020, the United States Court of Appeals for the Fourth Circuit in Grimm v. Gloucester County School Board *determined that a school district's bathroom policy that prevented transgender students from using the bathroom that reflected their gender identity violated the Equal Protection Clause. However, in 2022, as the panic directed toward the transgender community ramped up, the Eleventh Circuit in* Adams *ex rel.* Kasper v. School Board of St. Johns County *determined that a Florida school district's similar bathroom policy did not violate the Equal Protection Clause. In doing so, the Eleventh Circuit failed to consider the impact on the transgender litigant and community at large. This is inconsistent with the approach taken by the Supreme Court in some of the most important equal protection cases, notably* Brown v. Board of Education *and* Obergefell v. Hodges*, which prominently placed the stigma felt by marginalized communities in its reasoning. Accordingly, the Fourth Circuit in* Grimm *provides the best approach to an equal protection analysis, which remains faithful to this rationale and provides greater protection to the transgender community when their rights are under attack.*

INTRODUCTION

In the twenty-first century, LGBTQ+ Americans have seen greater public acceptance[1] and significant gains on the road to equality, largely from Supreme Court decisions.[2] Recently, however, many prominent conservative influencers, news hosts, and politicians have stigmatized the LGBTQ+ community.[3] The

1. *See Majority of Public Favors Same-Sex Marriage, but Divisions Persist*, PEW RSCH. CTR. (May 14, 2019), https://www.pewresearch.org/politics/2019/05/14/majority-of-public-favors-same-sex-marriage-but-divisions-persist/ [https://perma.cc/C5T5-5RJ9]; Daniel Greenberg, Maxine Najle, Natalie Jackson, Oyindamola Bola & Robert P. Jones, *America's Growing Support for Transgender Rights*, PUB. RELIGION RSCH. INST. (June 11, 2019), https://www.prri.org/research/americas-growing-support-for-transgender-rights/ [https://perma.cc/J4F8-EZ4J].

2. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003); Obergefell v. Hodges, 576 U.S. 644, 681 (2015); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

3. *See* Jon Blistein, *Tucker Carlson and Libs of TikTok Spread Transphobia for the Holidays*, ROLLING STONE (Dec. 27, 2022), https://www.rollingstone.com/culture/culture-news/libs-of-tiktok-lgbtq-community-cult-tucker-carlson-1234653029/ [https://perma.cc/K8RX-CZS5]; Trip Gabriel, *After* Roe,

response by some states has been swift, with many state legislatures proposing anti-LGBTQ+ bills targeting the rights of transgender individuals in particular.[4] Florida was one of the most aggressive by passing a law to prevent discussion of sexual orientation in public schools[5] and moving to limit gender-affirming care,[6] perpetuating the markedly anti-LGBTQ+ rhetoric and agenda of Governor Ron DeSantis.[7] But this response was not limited to the legislative and executive branches. In *Adams ex rel. Kasper v. School Board of St. Johns County*,[8] the Eleventh Circuit contributed to this unjustified panic against the trans community and created a circuit split when it determined that preventing transgender students from using the bathroom reflecting their gender identity does not violate the Equal Protection Clause.[9]

In its analysis, the Eleventh Circuit failed to address this issue satisfactorily because it neglected an important rationale underlying previous Fourteenth Amendment jurisprudence.[10] A significant concern of the Supreme Court in such cases has been the stigma and impact that discriminatory policies place on litigants and marginalized communities.[11] Yet the *Adams* majority never considers the impact on the transgender community.[12] Furthermore, evaluating state action that discriminates based on sex classifications requires a

Republicans Sharpen Attacks on Gay and Transgender Rights, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/us/politics/after-roe-republicans-sharpen-attacks-on-gay-and-transgender-rights.html [https://perma.cc/9SLS-DDRK (dark archive)].

4. Gabriel, *supra* note 3; Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES, https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html [https://perma.cc/MYV2-HZ2F (dark archive)] (last updated June 20, 2023) (discussing some of the roughly 150 anti-trans bills proposed in the first half of 2023 alone, including details of such bills in Mississippi, Kansas, Oklahoma, South Carolina, and West Virginia, among others).

5. An Act Relating to Education, ch. 105, § 3, 2023 Fla. Laws (codified at FLA. STAT. § 1001.42(8)(c)(3)) (expanding the ban on teaching sexual orientation and gender identity to eighth grade and preventing teachers from using a student's preferred pronoun, among other things); *see* Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed "Don't Say Gay,"* NPR, https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis [https://perma.cc/84VD-D2SK] (last updated Mar. 28, 2022, 2:33 PM) (explaining the 2022 legislation and outlining both the support and opposition to it).

6. Jo Yurcaba, *Florida Medical Board Votes To Ban Gender-Affirming Care for Transgender Minors*, NBC NEWS (Oct. 29, 2022, 10:28 AM), https://www.nbcnews.com/nbc-out/out-news/florida-medical-board-votes-ban-gender-affirming-care-transgender-mino-rcna54632 [https://perma.cc/M2YK-L368].

7. *See GLAAD Accountability Profile: Ron DeSantis*, GLAAD, https://www.glaad.org/gap/ron-desantis [https://perma.cc/BL5Q-6XQL] (last updated July 27, 2023); Alanna Vagianos, *Ron DeSantis Mocks LGBTQ People in Campaign Mailer to Florida Voters*, YAHOO! NEWS, https://news.yahoo.com/ron-desantis-mocks-lgbtq-people-152752718.html [https://perma.cc/9FCM-6LF6] (last updated Nov. 2, 2022, 4:03 PM).

8. 57 F.4th 791 (11th Cir. 2022).

9. *Id.* at 800.

10. *See infra* Section II.C.

11. *See infra* Part I.

12. *See infra* Section II.C.

thorough and persuasive analysis using intermediate scrutiny.[13] However, the analysis conducted by the Eleventh Circuit was overly deferential to the state and to hypothetical concerns from cisgender students.[14] In contrast, the Fourth Circuit in *Grimm v. Gloucester County School Board*[15] provides a model for how equal protection claims involving transgender litigants should be considered that reflects this concern.[16]

This Recent Development is divided into four parts. Part I outlines important considerations in previous Fourteenth Amendment jurisprudence. Part II discusses the factual background and reasoning of the Eleventh Circuit's opinion in *Adams*. Part III considers how the Fourth Circuit has addressed this question and explains how its analysis better reflects important equal protection considerations. Lastly, Part IV discusses the potential impact of the *Adams* decision and provides recommendations to strengthen protections for the transgender community.

I. THE FOURTEENTH AMENDMENT AND IMPACTS ON MARGINALIZED COMMUNITIES

Previous Fourteenth Amendment jurisprudence from the Supreme Court has considered the stigma and impact that discriminatory policies place on marginalized communities. This has been seen in a variety of prominent Fourteenth Amendment cases, including equal protection cases involving race and the rights of the LGBTQ+ community.[17] For example, citing the intertwining nature of the Due Process and Equal Protection Clauses,[18] in *Obergefell v. Hodges*,[19] the Court determined that same-sex marriage bans violated the Fourteenth Amendment.[20] In doing so, Justice Kennedy explicitly referenced the impact on the community as part of its rationale, emphasizing that the effect of same-sex marriage bans results in "a grave and continuing harm . . . [that] serves to disrespect and subordinate them."[21] Further, in the context of the children of unmarried same-sex couples, Justice Kennedy wrote the following:

> Without the recognition, stability, and predictability marriage offers, [these] children suffer the stigma of knowing their families are somehow

13. *See infra* Section II.C.

14. *See infra* Section II.C.

15. 972 F.3d 586 (4th Cir. 2020).

16. *See id.* at 594–601 (considering the impact of the policy on transgender individuals and relying on psychological evidence within the school setting); *see also infra* Part III.

17. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 655 (2015); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003); Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

18. *Obergefell*, 576 U.S. at 672.

19. 576 U.S. 644 (2015).

20. *Id.* at 681.

21. *See id.* at 675.

> lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[22]

Thus, the stigma placed upon same-sex couples and their families was a critical component of the Court's reasoning.

This approach to equal protection can also be found in *Lawrence v. Texas*,[23] another case involving LGBTQ+ rights.[24] In *Lawrence*, the Supreme Court determined that the Texas statute prohibiting "two persons of the same sex to engage in certain intimate sexual conduct" violated the Fourteenth Amendment.[25] While the majority resolved the case on substantive due process grounds[26] in order to overrule *Bowers v. Hardwick*,[27] the majority opinion also discussed the equal protection claim.[28] There, the majority observed that the equal protection argument was "tenable," and further noted that the challenged Texas statute was stigmatizing and "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[29]

However, in a concurring opinion, Justice O'Connor determined that the Texas statute "banning same-sex sodomy is unconstitutional" on an equal protection basis.[30] There, Justice O'Connor noted that "[t]he Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause."[31] Accordingly, consideration of the impact of state action on the LGBTQ+ community has been a significant factor in the Court's Fourteenth Amendment jurisprudence.

Equal protection cases involving racial discrimination also emphasized the impact of the discriminatory policy on the litigant and marginalized communities in reaching their conclusions. Perhaps the most well-known example is *Brown v. Board of Education*,[32] where the Supreme Court determined

22. *Id.* at 668.

23. 539 U.S. 558 (2003).

24. *See id.* at 564.

25. *See id.* at 563, 578–79.

26. *See id.* at 564, 572. The majority noted that, if decided "under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently . . . to prohibit the conduct both between same-sex and different-sex participants." *Id.* at 574–75. Furthermore, the Court emphasized that "the central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons." *Id.* at 575.

27. 478 U.S. 186 (1986) (holding that Georgia's anti-sodomy law does not violate the Due Process Clause).

28. *Lawrence*, 539 U.S. at 575.

29. *Id.*

30. *Id.* at 579 (O'Connor, J., concurring).

31. *Id.* at 584 (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

32. 347 U.S. 483 (1954).

that racial segregation in schools violated the Equal Protection Clause.[33] There, the plaintiffs relied heavily on sociological and psychological evidence as part of their legal strategy, including what was popularly known as "the doll tests."[34] The *Brown* Court specifically credited such research showing the strong negative impact that such discrimination had on Black students.[35] The Court aptly noted that "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[36] Accordingly, considering the impact and stigma that discriminatory policies place on marginalized communities is a significant feature of not only Supreme Court equal protection jurisprudence involving the LGBTQ+ community, but other marginalized communities as well.

Similarly, scholars have previously observed that an important aspect of Fourteenth Amendment jurisprudence includes consideration of the subordination that marginalized communities face.[37] These scholars noted that the Fourteenth Amendment includes both "anticlassification" and "antisubordination principles."[38] Anticlassification "holds that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race."[39] In contrast, antisubordination theorists argue that the Equal Protection Clause is concerned primarily with preventing "the subordinate status of a specially disadvantaged group."[40] While these theories are thought to compete with one another, Professors Balkin and Siegel have argued that both theories are vital aspects of civil rights jurisprudence.[41]

Furthermore, other proponents of the antisubordination approach, such as Professor Laurence Tribe,[42] have also argued that recent cases such as *Obergefell* have some elements of antisubordination, but these cases also represent a

33. *Id.* at 495.

34. *See* Brown v. Board *and "The Doll Test*," NAACP LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/significance-doll-test/ [https://perma.cc/A26E-MD55]. "The doll test" was one of many experiments conducted by Drs. Kenneth and Mamie Clark. *Id.* When presented with dolls of different races, most children in the study preferred the white doll, assisting the Clarks to determine that "'prejudice, discrimination, and segregation' created a feeling of inferiority among African-American children and damaged their self-esteem." *Id.*

35. *See Brown*, 347 U.S. at 494 n.11. The Court cited several psychological studies here, including a 1950 paper by Dr. Kenneth Clark. *Id.*

36. *Id.* at 494.

37. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9–10 (2003).

38. *Id.*

39. *Id.* at 10.

40. *Id.*

41. *Id.* at 10–11.

42. *Id.* at 9.

doctrine he refers to as "equal dignity."[43] Tribe notes that one of *Obergefell*'s impacts included that it "tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*."[44] Professor Tribe emphasizes that this doctrine has been prominent in LGBTQ+ rights cases.[45] In those cases, the Court was concerned with members of the LGBTQ+ community being a "stranger to its laws,"[46] and instead, in *Obergefell*, gave members of the community "equal dignity in the eyes of the law."[47] Accordingly, consideration of the impact on the litigant and marginalized communities is an important consideration of Fourteenth Amendment jurisprudence.

Not only is stigma and impact on marginalized communities a significant component of Supreme Court jurisprudence, but it is also consistent with the rationale underlying the Constitution and nation's founding. This is apparent from the views of some of the Framers, which explain the adoption of a republican government and concerns about minority protection.[48] For example, in *The Federalist No. 10*, James Madison wrote that in democracies, "there is nothing to check the inducements to sacrifice the weaker party."[49] Further, Madison wrote that "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[50] Similarly, in a work on constitutions in the United States, John Adams wrote that "the desires of the majority of the people are often for injustice and inhumanity against the minority, [which] is demonstrated by every page of the history of the whole world."[51] In addition, this view of the United States Constitution and government structure fits well with the role of the judiciary as a key protector of minority groups,[52] though it may not have not always lived up to this role.[53] However, this role is seen more

43. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

44. *Id.*

45. *Id.* at 23.

46. *Id.* (citing Romer v. Evans, 517 U.S. 620, 635 (1996)).

47. *Id.* (citing Obergefell v. Hodges, 576 U.S. 644, 681 (2015)).

48. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison).

49. *Id.*

50. *Id.*

51. JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1797), *reprinted in* 6 THE WORKS OF JOHN ADAMS 3, 48 (Charles Francis Adams ed., 1851).

52. *See* Nadine Strossen, *The Supreme Court's Role: Guarantor of Individual and Minority Group Rights*, 26 U. RICH. L. REV. 467, 467–68 (1992) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943))).

53. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 550–52 (1896) (finding that a state law mandating racial segregation does not violate the Fourteenth Amendment), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (upholding executive action to exclude Japanese Americans from the West Coast), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

frequently in modern times, where the Court has stepped in to ensure that the Fourteenth Amendment is vindicated by overturning discriminatory policies,[54] even despite significant backlash.[55]

As demonstrated by previous Supreme Court jurisprudence and the examples above, considering the stigma and impact on the litigant and marginalized communities has been a significant consideration in Fourteenth Amendment analyses. Furthermore, research on the mental health of transgender youth shows why this approach is necessary in cases involving discrimination against the community. For example, a study conducted on behalf of the Trevor Project shows that, in 2022, forty-five percent of LGBTQ+ youth seriously considered suicide, and nearly one in five transgender youths made an actual suicide attempt.[56] Furthermore, the same study indicated that "LGBTQ youth who found their school to be LGBTQ-affirming reported lower rates of attempting suicide."[57] Given these alarming statistics, it is particularly important to consider the impact that school policies place on transgender youth. Accordingly, Part II will consider the Eleventh Circuit's approach in *Adams* and how it failed to adequately evaluate the impact of the school policy on the transgender litigant and community.

II. EQUAL PROTECTION IN *ADAMS*

A. *Factual Background of* Adams

Plaintiff Drew Adams attended schools in St. Johns County beginning in the fourth grade, entering as a female, reflecting his sex assigned at birth.[58] By

54. *See, e.g.*, *Brown*, 347 U.S. at 495 (holding that segregation in education violates the Fourteenth Amendment); Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (holding that state same-sex marriage bans violate the Fourteenth Amendment).

55. *See* Brown v. Board of Education*: The Southern Manifesto and "Massive Resistance" to* Brown, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ [https://perma.cc/W3MY-X8VL].

56. TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 4 (2022), https://www.thetrevorproject.org/survey-2022/ [https://perma.cc/899X-LCGY (staff-uploaded archive)].

57. *Id.*

58. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796–97 (11th Cir. 2022). The Eleventh Circuit's majority opinion uses the term "biological sex." *See id.* at 796. Instead, I use the term "sex assigned at birth," reflecting the term used by groups like the Human Rights Campaign and the American Psychological Association. *See Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/5ZM9-6K2S]; *Understanding Transgender People, Gender Identity and Gender Expression*, AM. PSYCH. ASS'N, https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression [https://perma.cc/S3UC-PY3Y] (last updated June 6, 2023). For additional background on the use of these terms in the legal sphere, see generally Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821 (2022) (providing a historical account of the

the end of the eighth grade, Adams identified as male, and expressed this through his appearance, clothing, and pronouns.[59] Adams also began using men's public restrooms.[60] Upon entering Nease High School in August 2015, he used the men's bathroom instead of the women's bathrooms or the gender-neutral bathrooms available to students.[61] He successfully did this for several weeks; however, after several students complained and some parents objected to such an arrangement, the school required Adams to use a gender-neutral bathroom or the women's bathroom.[62] This left him "feeling anxious, depressed, ashamed, and unworthy—like 'less of a person' than his peers."[63]

The school's response reflects a policy imposed by the School Board of St. Johns County ("School Board"), which required students to use the bathroom reflecting their sex assigned at birth.[64] Importantly, when considering how the bathroom policy affects transgender students, the School Board refused updates to enrollment documents to reflect a student's gender identity.[65] However, in September 2015, the School Board developed Best Practices Guidelines ("Guidelines") to address issues involving the LGBTQ+ community.[66] While these Guidelines allowed transgender students to use a gender-neutral restroom, the School Board otherwise retained its previous bathroom policy.[67] This prevented Adams and other transgender students from using communal bathrooms that reflected their gender identity.[68]

B. *The Eleventh Circuit's Narrow Approach to Equal Protection*

After being denied use of the men's bathroom at Nease High School, Drew Adams brought suit in 2017, alleging that the bathroom policy violated the Equal Protection Clause and Title IX.[69] The district court held in favor of Adams on both claims, and an Eleventh Circuit panel affirmed.[70] However, the Eleventh Circuit later granted the School Board's request for en banc review.[71]

use of the terms "biological sex" and "sex assigned at birth" in the legal realm and arguing for the use of "sex assigned at birth").

59. *Adams*, 57 F.4th at 797.

60. *Id.*

61. *Id.* at 797–98.

62. *Id.* at 798, 806.

63. *Id.* at 856 (Pryor, J., dissenting).

64. *Id.* at 797–98 (majority opinion).

65. *Id.* at 797.

66. *Id.* at 797–98.

67. *Id.* at 798. In addition, the Guidelines encouraged honoring personal pronouns and protected against "unnecessarily disclos[ing] a student's transgender status to others," among other things. *Id.* at 802–03.

68. *See id.* at 798.

69. *Id.*

70. *Id.* at 798–99.

71. *Id.* at 799.

There, Adams argued that the policy violated the Equal Protection Clause because it discriminated on the basis of sex and also against transgender students by preventing them from using the bathroom reflecting their gender identity.[72] Since the policy involved a sex-based classification, the court determined that intermediate scrutiny applied.[73] Accordingly, the court noted that the government must demonstrate that the challenged policy "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'" to satisfy this standard.[74]

In its attempt to satisfy this standard, the School Board argued that the policy should be upheld in light of the strong interest it has in maintaining the privacy of students to "us[e] the bathroom away from the opposite sex and in shielding their bodies from the opposite sex."[75] In its evaluation, the Eleventh Circuit cited Supreme Court precedent showing that the School Board should receive greater deference than in a typical equal protection analysis due to its responsibility to maintain the safety of students.[76] Providing such deference, it agreed that the School Board's objective was important.[77] In support, it relied heavily upon its observation that "sex-separated bathrooms ha[ve] been widely recognized throughout American history and jurisprudence,"[78] which "preceded the nation's founding."[79] Further, it pointed to precedents supporting this separation.[80]

Next, the Eleventh Circuit determined that the policy satisfied intermediate scrutiny because the policy was "clearly related" to the School Board's attempt to protect the privacy of students.[81] In contrast, the district court determined that the School Board failed to meet this burden. Instead, the district court emphasized that allowing transgender students to use the restroom that conforms with their gender identity did not impact privacy because Adams

72. *Id.* at 800–01.

73. *Id.* at 801 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)). For policies enacted that do not affect fundamental rights or affect certain communities, courts use a deferential standard of rational basis review, meaning those policies "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993). In contrast, strict scrutiny will be used to evaluate policies that discriminate on the basis of certain classifications such as race, and such policies "are constitutional only if they are narrowly tailored to further compelling governmental interests." *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

74. *Adams*, 57 F.4th at 801 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

75. *Id.* at 804.

76. *Id.* at 801–02.

77. *Id.* at 804–05.

78. *Id.* at 805.

79. *Id.* (quoting W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 YALE L. & POL'Y REV. 227, 229 (2019)).

80. *Id.*

81. *Id.*

used a private stall.[82] However, to the Eleventh Circuit, this analysis "misconstrue[ed] the privacy interests at issue and the bathroom policy employed."[83] Instead, the Eleventh Circuit's conception of the interest was to provide privacy for students away from the opposite sex, which it claimed was clearly reflected in the bathroom policy.[84] It emphasized that bathrooms were used by students to change clothing, and that the men's bathroom included undivided urinals.[85] However, the district court held that such privacy concerns were "only conjectural" because there were no actual problems for either Adams or other students while he used the men's restrooms.[86] The Eleventh Circuit disputed this determination because it found that several students and parents objected on account of "privacy, safety, and welfare concerns."[87]

The Eleventh Circuit also rejected the plaintiff's argument that the policy violated the Equal Protection Clause because it discriminates against transgender students.[88] This was because there was a "'lack of identity' between the policy and transgender status" since the policy "divides students into biological male and biological female groups—both of which can inherently contain transgender students—for purposes of separating the male and female bathrooms by biological sex."[89] Instead, the court maintained that the policy classifies based on "biological sex—not transgender status or gender identity."[90] Moreover, while Adams argued that *Bostock v. Clayton County*[91] supports his argument involving discrimination against transgender students, the court rejected this, emphasizing that *Bostock* centered around a policy that "discriminat[ed] based on homosexuality or transgender status" rather than biological sex as in *Adams*.[92] It also further distinguished *Bostock* by noting that it both involved an employment discrimination claim and explicitly refused to "address bathrooms, locker rooms, or anything else of the kind."[93]

C. *How the Eleventh Circuit Failed To Address Important Equal Protection Concerns*

In its analysis, the Eleventh Circuit failed to adhere to important equal protection concerns by ignoring the stigma placed on the transgender

82. *Id.* at 805–06.
83. *Id.* at 805.
84. *Id.* at 806.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 808.
89. *Id.* at 809.
90. *Id.* at 808.
91. 140 S. Ct. 1731 (2020).
92. *Adams*, 57 F.4th at 808 (quoting *Bostock*, 140 S. Ct. at 1747).
93. *Id.* (quoting *Bostock*, 140 S. Ct. at 1753).

community and by failing to conduct a thorough intermediate scrutiny analysis. Instead of deferring to a state actor, the government must provide an "exceedingly persuasive justification" for its discriminatory bathroom policy to satisfy this standard.[94] Accordingly, several judges dissented in *Adams*, each finding that the School Board's bathroom policy violated the Equal Protection Clause because it failed intermediate scrutiny.[95]

First, Judge Wilson wrote that "[w]e should not adopt haphazard and incomplete analyses that will ripple out for cases to come, nor should we do so in order to avoid engaging in the rigorous intermediate scrutiny analysis the Constitution requires."[96] For Judge Wilson, the failure of the School Board to account for intersex students in its policy shows that it was not "truly concerned about male genitalia in the female bathroom, or vice-versa," so it must fail intermediate scrutiny.[97]

In addition, Judge Jordan's dissent also argued that the policy fails intermediate scrutiny because it relies on administrative convenience.[98] Judge Jordan emphasized the district court's factual findings, which suggested that the School Board would allow a newly enrolled transgender student to be classified according to their gender identity.[99] This position would allow them to use the restroom reflecting their gender identity, yet the School Board would prohibit this for students that transitioned after enrollment.[100] Judge Jordan emphasized that this position means that the School Board cannot satisfy intermediate scrutiny because the sex classification used does not "actually further its asserted interests . . . [of] safety and privacy."[101]

Judge Pryor, in the most thorough dissent, also determined that the policy fails intermediate scrutiny.[102] Responding to the majority's argument, Judge Pryor argued that the policy was not "substantially related" to the privacy interest because the School Board provided only speculation rather than evidence that transgender students would make cisgender students feel uncomfortable.[103] Instead, a transgender man like Adams with "'facial hair,' 'typical male muscle development,' a deep voice, and a short haircut . . . would be unsettling for all the same reasons the School District does not want any

94. *Id.* at 845 (Pryor, J., dissenting) (citing United States v. Virginia, 518 U.S. 515, 531 (1996)).

95. *Id.* at 821–24 (Wilson, J., dissenting); *id.* at 824–30 (Jordan, J., dissenting); *id.* at 830–32 (Rosenbaum, J., dissenting); *id.* at 832–60 (Pryor, J., dissenting).

96. *Id.* at 824 (Wilson, J., dissenting).

97. *Id.*

98. *Id.* at 829 (Jordan, J., dissenting).

99. *Id.* at 828.

100. *Id.*

101. *Id.* at 829.

102. *Id.* at 845 (Pryor, J., dissenting).

103. *Id.* at 851.

other boy in the girls' restroom."[104] Judge Pryor's dissent also disputed the majority's assertions that the policy does not discriminate against transgender students due to lack of identity because "the bathroom policy categorically deprives transgender students of a benefit that is categorically provided to all cisgender students—the option to use the restroom matching one's gender identity."[105]

In addition to conducting an inadequate intermediate scrutiny analysis, the Eleventh Circuit failed to rely on important considerations in previous Supreme Court equal protection cases, like *Brown* and *Obergefell*, where stigma and the impact on marginalized communities were part of the Court's considerations.[106] Instead, in *Adams*, the majority opinion suggests that it refuses to make these considerations from the outset. In fact, the first line of the majority opinion is: "This case involves the unremarkable—and nearly universal—practice of separating school bathrooms based on biological sex."[107] But this policy was not "unremarkable" for Adams. Instead, it was "stigmatizing and humiliating," yet this observation was only present in the dissent.[108] Further, the court implies that students like Drew Adams have no right to complain. After all, through the adoption of its guidelines developed for LGBTQ+ issues, the Eleventh Circuit emphasized that "the School Board has gone to great lengths . . . to accommodate LGBTQ students."[109] Similarly, the majority also juxtaposes the 2,450 students at Nease High School with the 5 transgender students.[110] It then calls these students' need to use the bathroom that conforms with their gender identity as a "prefer[ence]"[111] rather than the necessity it actually is.[112] Instead, the majority considers only the impact on cisgender students, noting that their privacy interests are particularly important because "school-age children 'are still developing, both emotionally and physically,'"[113] yet fails to recognize the interests that transgender students have in expressing their identity and maintaining their mental health.[114]

104. *Id.* at 852.

105. *Id.* at 845.

106. *See supra* Part I.

107. *Adams*, 57 F.4th at 796 (majority opinion).

108. *Id.* at 832 (Pryor, J., dissenting).

109. *Id.* at 802 (majority opinion).

110. *Id.* at 797.

111. *Id.*

112. *See* Tanya Albert Henry, *Exclusionary Bathroom Policies Harm Transgender Students*, AM. MED. ASS'N (Apr. 17, 2019), https://www.ama-assn.org/delivering-care/population-care/exclusionary-bathroom-policies-harm-transgender-students [https://perma.cc/SJG9-YR2D (staff-uploaded archive)] (describing the impact that transgender students often face as a result of discriminatory policies, including anxiety and other mental health issues, but also constipation and urinary tract infections); *see also supra* Part I.

113. *See Adams*, 57 F.4th at 804 (quoting Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 636 (4th Cir. 2020) (Niemeyer, J., dissenting)).

114. *See* Henry, *supra* note 112; *see also supra* Part I.

In contrast, Judge Pryor's dissent acknowledges the stigma felt by Drew Adams as a result of the bathroom policy.[115] It noted that Adams "was forced to endure a stigmatizing and humiliating walk of shame—past the boys' bathrooms and into a single-stall 'gender neutral' bathroom."[116] Rather than a "preference," Adams needed to use the boys' bathroom so that he could feel he was "just like every other boy."[117] Further, it emphasized the "hatred he felt for his body" during puberty and before he identified as male.[118] Judge Pryor cited the anxiety and depression he felt, along with this similar experience of other transgender youth with gender dysphoria.[119] While acknowledging this impact was important, it was not a consideration in Judge Pryor's equal protection analysis.[120] Instead, Part III provides another approach that incorporates the impact and stigma felt by a transgender litigant directly into its equal protection analysis.

III. EQUAL PROTECTION IN *GRIMM*

While the Eleventh Circuit in *Adams* emphasized that applying traditional methods of "constitutional and statutory interpretation" resulted in an "appeal [that] largely resolves itself,"[121] it stands opposed to much recent case law preventing discrimination against the transgender community.[122] In fact, other federal courts that have considered cases involving school policies preventing transgender students from using the bathroom that reflects their gender identity determined that such policies violate the Equal Protection Clause.[123] Not only was the slate on this issue far from blank, the Supreme Court has also refused an opportunity to overturn the Fourth Circuit's conclusion that a similar bathroom policy violated the Equal Protection Clause in *Grimm v. Gloucester County School Board*.[124]

Despite the similar question posed to the Fourth Circuit, the *Grimm* majority and Judge Wynn's concurrence have little in common with *Adams*, not only in terms of the case's outcome, but also in its reasoning and presentation of the facts. In *Grimm*, the plaintiff, a transgender boy, challenged the

115. *See Adams*, 57 F.4th at 832 (Pryor, J., dissenting).

116. *Id.*

117. *Id.* at 835.

118. *Id.* at 833–34.

119. *Id.* at 834.

120. *See id.* at 844–56.

121. *Id.* at 800 (majority opinion).

122. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020); Williams v. Kincaid, 45 F.4th 759, 773–74 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023) (mem.).

123. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1050–54 (7th Cir. 2017); Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 530 (3d Cir. 2018).

124. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (mem.). Only Justices Alito and Thomas would have agreed to hear the case. *Id.*

Gloucester County School Board's ("GCSB") policy which prohibited him from using the bathroom that conformed with his gender identity.[125] Like Drew Adams, Gavin Grimm was initially allowed to use the boys' restroom, however, the GCSB subsequently required him to either use the bathroom reflecting his sex assigned at birth or an individual gender-neutral bathroom.[126] Grimm sued the GCSB maintaining that the policy violated the Equal Protection Clause and Title IX.[127]

From the outset, the *Grimm* majority considered the impact of the bathroom policy on transgender individuals, including Grimm himself, and also relied on psychological evidence, particularly within the school setting.[128] It emphasized that the policy resulted in Grimm having to use the bathroom in the nurse's office, which he found as "alienating" and "humiliating."[129] This sometimes even deprived him from using a bathroom at all on an occasion when the nurse's office was locked.[130] The Fourth Circuit also emphasized that Grimm's practice of avoiding the bathroom led to urinary tract infections, and he eventually was hospitalized on account of "suicidal ideation resulting from being in an environment where he felt 'unsafe, anxious, and disrespected.'"[131]

The *Grimm* majority also determined that intermediate scrutiny applied in light of the sex classification and its conclusion that transgender people are a quasi-suspect class.[132] The majority, similar to the dissent in *Adams*, rejected that the policy applies to every student equally since all students are prohibited from using the bathroom of the opposite sex.[133] The *Grimm* majority compared this rationale to racially segregated bathrooms, noting that requiring separate bathrooms, as the policy does for transgender students, involves a similar impact as the "deeply stigmatizing and discriminatory nature of racial segregation."[134]

Like the School Board in *Adams*, the GCSB similarly relied on privacy interests for purposes of intermediate scrutiny.[135] The court rejected that argument, citing, for example, evidence that Gavin Grimm used the bathroom for seven weeks without incident.[136] Instead, once the community became aware of Grimm's use of the men's bathroom, the GCSB actually altered the bathrooms to increase privacy and provided no evidence that transgender

125. *Grimm*, 972 F.3d at 593.
126. *Id.*
127. *Id.*
128. *Id.* at 594–601.
129. *Id.* at 600.
130. *Id.*
131. *Id.*
132. *Id.* at 607.
133. *Id.* at 609.
134. *Id.*
135. *Id.* at 602.
136. *Id.* at 613–14.

students posed any safety or privacy risk.[137] The Fourth Circuit also emphasized that evidence from other school districts shows that schools allowing transgender students to use the bathroom that conforms with their gender identity did not result in safety or privacy concerns.[138] Instead, what appeared to be a large consideration in forming the policy was the vitriolic response from parents about Gavin Grimm and threats to vote out the members of the GCSB.[139]

While the Fourth Circuit properly analyzed the equal protection claim, only Judge Wynn in a concurrence adequately incorporated the impact of the policy on the litigant and marginalized community into his analysis.[140] Judge Wynn's concurrence also emphasized his opinion concerning some troubling aspects of the school policy.[141] Notably, it greatly emphasized the protections provided by the Fourteenth Amendment.[142] Specifically, in his view, for purposes of the Equal Protection Clause, Judge Wynn noted that "[e]nsuring the Constitution's mandate of equal protection is satisfied for marginalized and minority groups, separate from the 'vicissitudes of political controversy,' is one of our most vital and solemn duties."[143] Accordingly, he concluded that "the policy *grossly offends* the Constitution's basic guarantee of equal protection under the law."[144] Discussing the GCSB's policy, Judge Wynn observed:

> That is indistinguishable from the sort of separate-but-equal treatment that is anathema under our jurisprudence. No less than the recent historical practice of segregating Black and white restrooms, schools, and other public accommodations, the unequal treatment enabled by the Board's policy produces a vicious and ineradicable stigma. The result is to deeply and indelibly scar the most vulnerable among us—children who simply wish to be treated as equals at one of the most fraught developmental moments in their lives—by labeling them as unfit for equal participation in our society. And for what gain?[145]

Additionally, Judge Wynn placed significant emphasis on the impact on the community affected by the policy and presented a strong rebuttal to some of the dissent's arguments.[146] Specifically, the dissent argued that the "'mere presence' of someone with female genitals in a male bathroom would create an

137. *Id.* at 614.
138. *See id.*
139. *See id.* at 615.
140. *See id.* at 620–21 (Wynn, J., concurring).
141. *Id.* at 620.
142. *See id.* at 627.
143. *Id.*
144. *Id.* at 621 (emphasis added).
145. *Id.* at 620–21.
146. *See id.* at 623–24.

untenable intrusion on male privacy interests."[147] In response, Judge Wynn noted that this argument "echoes the sort of discomfort historically used to justify exclusion of Black, gay, and lesbian individuals from equal participation in our society."[148] For transgender individuals particularly, Judge Wynn emphasized the harm to their "sense of self . . . cultural marginalization . . . and horrific oppression and lethal violence at worst."[149] Furthermore, he emphasized that policies like this send a "message—that transgender students like Grimm should exist only at the margins of society, even when it comes to basic necessities like bathrooms."[150] Importantly, Judge Wynn also considered the harm to Grimm specifically, emphasizing his hospitalization and that the policy made him feel "unsafe, anxious, and disrespected."[151]

Accordingly, future courts considering cases involving transgender litigants, specifically school age children, should follow the Fourth Circuit's approach by placing greater emphasis on the stigma that this community faces rather than the Eleventh Circuit's approach. Doing so would better reflect Supreme Court precedent on equal protection and would be more likely to provide the protection that the transgender community requires.[152]

IV. LOOKING TOWARD THE FUTURE

Both the outcome and reasoning from *Adams* could set a dangerous precedent. The court overwhelmingly considered the needs not of transgender individuals, but only of the cisgender individuals who may have vastly different experiences. Further, it emphasized the complaints from only a few students and angry parents in the community.[153] Yet a few complaints are hardly sufficient to establish that any privacy or safety interests were actually invaded. In fact, studies suggest that trans individuals are the ones at risk of having their privacy or safety interests violated, not cisgender individuals.[154] Instead, the

147. *Id.* at 623.

148. *Id.*

149. *Id.* at 624.

150. *Id.* at 625.

151. *Id.*

152. *See supra* Part I.

153. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 854 n.22 (11th Cir. 2022) (Pryor, J., dissenting).

154. Gabriel R. Murchison, Madina Agénor, Sari L. Reisner & Ryan J. Watson, *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, PEDIATRICS, June 2019, at 1 (finding that sexual assault is "highly prevalent in transgender and nonbinary youth and that restrictive school restroom and locker room policies may be associated with risk"); Amira Hasenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL'Y 70, 70 (2018) (finding that enactment of "gender identity inclusive public accommodation nondiscrimination ordinances" in Massachusetts "is not related to the

majority downplayed the reasoning of the dissent and other courts and argued that they "discount[ed] the parties' stipulation that students and parents objected to any bathroom policy that would commingle the sexes out of privacy concerns."[155] It then noted that this stipulation is an example of "formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.'"[156] Given the lack of meaningful equal protection analysis in the majority's opinion,[157] *Adams* could represent that a few complaints might be enough to sustain discriminatory policies so long as the policy responds to some rational interest, regardless of the motivations of those complaints.

Further, this analysis suggests that school boards and parents, working in tandem, may be able to enact discriminatory policies, and as long as both parties frame their concerns in a certain way, such as privacy or safety, they might still be upheld on equal protection grounds even if they are enacted simply to "harm a politically unpopular group."[158] This is alarming for several reasons. First, this is exactly what happened in *Grimm*, with the school board bowing down to angry parents who made their transphobia clear.[159] Next, school boards have recently received greater attention amongst board candidates and people holding views hostile to the LGBTQ+ community and critical race theory.[160] The fact that this case comes from the Eleventh Circuit is particularly concerning, given that Florida has been one of the most aggressive in enacting laws and policies targeted against the LGBTQ+ community, diversity and inclusion, and issues involving race.[161]

Despite some substantial gains in recent years, the rights of the LGBTQ+ community are under attack. While the federal judiciary has been the source for much of these gains, it has also participated in this recent "moral panic" against

number or frequency of criminal incidents in these spaces" and that the "study provides evidence that fears of increased safety and privacy violations as a result of nondiscrimination laws are not empirically grounded").

155. *Adams*, 57 F.4th at 806 (majority opinion).

156. *Id.* (quoting 2 GEORGE E. DIX, EDWARD J. IMWINKELRIED, D.H. KAYE, ROBERT P. MOSTELLER, E.F. ROBERTS, JOHN W. STRONG & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 254, at 181 (Kenneth S. Broun ed., 6th ed. 2006)).

157. *See id.* at 823–24 (Wilson, J., dissenting).

158. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535 (1973)).

159. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 615 (4th Cir. 2020).

160. *See* KK Ottesen, *When the National Culture Wars Come to Your School*, WASH. POST: MAG. (Oct. 17, 2022, 10:00 AM), https://www.washingtonpost.com/magazine/2022/10/17/students-masks-incident-racism-gay-book-banning/ [https://perma.cc/28RR-NHBP (dark archive)].

161. Jeffrey S. Solochek, *Florida Criticizes School Districts over Race, LGBTQ Rules*, TAMPA BAY TIMES, https://www.tampabay.com/news/education/2022/12/12/florida-criticizes-school-districts-over-race-lgbtq-rules/ [https://perma.cc/L3J4-NCWU (dark archive)] (last updated Dec. 12, 2022).

the community.[162] Not only is this seen by the circuit split created by *Adams*,[163] but also at the Supreme Court. For example, in 2022, Justice Thomas recommended overturning *Obergefell*.[164] In 2023, in *303 Creative LLC v. Elenis*,[165] the Supreme Court, "for the first time in its history, grant[ed] a business open to the public a constitutional right to refuse to serve members of [the LGBTQ+ community]" on First Amendment grounds.[166]

Additionally, the community has faced backlash outside of the judiciary. State legislatures have recently ridden a wave of homophobia and transphobia to propose and enact discriminatory laws against the community.[167] Outside of the law itself, but arguably not unrelated to it, hate crimes against the community are prevalent.[168] In 2022, the community faced one of its deadliest attacks since the Pulse massacre of 2016 in a mass shooting at Club Q, a LGBTQ+ nightclub in Colorado Springs.[169] But the community is not a monolith, and those with different identities may face different issues than other community members. For example, transgender individuals have been targeted relentlessly, with many Black trans women being murdered for simply trying to live as themselves.[170]

Accordingly, the LGBTQ+ community and transgender individuals in particular must have greater legal protections. By considering the impact on the litigant and marginalized communities as the Fourth Circuit has done, courts may be more likely to continue to fulfill their role as protectors of those who are attacked simply because they are politically unpopular. However, due to the

162. *See* Farhad Manjoo, *America Is Being Consumed by a Moral Panic over Trans People*, N.Y. TIMES (Sept. 1, 2022), https://www.nytimes.com/2022/09/01/opinion/america-is-being-consumed-by-a-moral-panic-over-trans-people.html [https://perma.cc/X9T8-PE4X (dark archive)] (arguing that the significant negative attention directed towards the trans community constitutes a "moral panic").

163. *See* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 800 (11th Cir. 2022).

164. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

165. 143 S. Ct. 2298 (2023).

166. *Id.* at 2322 (Sotomayor, J., dissenting).

167. *See* Astor, *supra* note 4.

168. Press Release, Williams Inst., Univ. of Cal., L.A. Sch. of Law, LGBT People Nine Times More Likely than Non-LGBT People To Be Victims of Violent Hate Crimes (Dec. 21, 2022), https://williamsinstitute.law.ucla.edu/press/lgbt-hate-crimes-press-release/ [https://perma.cc/R7GW-GTQK].

169. Radio Interview by A. Martínez, NPR, with Eddie Meltzer (Nov. 21, 2022), https://www.npr.org/2022/11/21/1138179746/colorado-lgbtq-club-shooting-evokes-memories-of-the-pulse-nightclub-massacre [https://perma.cc/5URA-EFAL] (discussing Colorado LGBTQ club shooting and how it evoked memories of the Pulse nightclub shooting).

170. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2022*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2022 [https://perma.cc/76L5-SKPR] ("[I]t is clear that fatal violence disproportionately affects transgender women of color—particularly Black transgender women—and that the intersections of racism, sexism, homophobia, biphobia, transphobia and unchecked access to guns conspire to deprive them of employment, housing, healthcare and other necessities.").

needs of the community, other branches must also act. Fortunately, in 2022, the Biden Administration's Department of Education proposed new regulations for Title IX, which "will require that all students receive appropriate supports in accessing all aspects of education. [The regulations] will strengthen protections for LGBTQI+ students who face discrimination based on sexual orientation or gender identity."[171] Further, in 2023, the Department of Education proposed a regulation that would prevent schools from "categorically exclud[ing]" transgender students from school sports teams consistent with their gender identity.[172] If finalized, these new regulations will hopefully protect transgender students in schools and prevent courts from interpreting Title IX in the same manner as the Eleventh Circuit. Furthermore, while many states have attempted to limit the rights of the LGBTQ+ community,[173] other states have increased protections.[174] For example, in 2023, Michigan amended the Elliott-Larsen Civil Rights Act to prohibit discrimination on the basis of sexual orientation and gender identity or expression and also passed a bill to ban conversion therapy.[175] Nonetheless, similar efforts in all branches of government are necessary to combat discrimination against the LGBTQ+ community.

CONCLUSION

While the Eleventh Circuit had an opportunity to provide another step on the path to equality, it instead chose to contribute to the recent panic against the transgender community. As this Recent Development has demonstrated, it ignored important considerations used in previous equal protection jurisprudence. Given the significant impact and stigma those discriminatory policies have on the community, the Fourth Circuit and Judge Wynn's analysis, in particular, provide the best approach for equal protection cases because they incorporate the impact on marginalized communities into its reasoning. By doing so, courts will live up to their role as protectors of minority groups.

171. Press Release, U.S. Dep't of Educ., The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment [https://perma.cc/AG6P-UH7J].

172. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860, 22873 (proposed Apr. 13, 2023); U.S. DEP'T OF EDUC., FACT SHEET: U.S. DEPARTMENT OF EDUCATION'S PROPOSED CHANGE TO ITS TITLE IX REGULATIONS ON STUDENTS' ELIGIBILITY FOR ATHLETIC TEAMS (2023), https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams [https://perma.cc/XU4E-Q2F2].

173. *See* Astor, *supra* note 4.

174. *See* Act of Mar. 16, 2023, Act No. 6, 2023 Mich. Pub. Acts 5 (effective Mar. 21, 2024) (codified as amended in scattered sections of MICH. COMP. LAWS § 37); Act of July 26, 2023, Act No. 117, 2023 Mich. Pub. Acts 50 (effective Mar. 21, 2024) (codified at MICH. COMP. LAWS § 330.1901a).

175. Act of Mar. 16, 2023 sec. 102, § 37.2102; Act of July 26, 2023 § 901a.

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