

# THE BATHROOM RIGHT FOR TRANSGENDER STUDENTS AND HOW THE ENTIRE LGBT COMMUNITY CAN ALIGN TO GUARANTEE THIS

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## I. INTRODUCTION

On November 3, 2015, sixty-one percent of Houston voters approved by referendum the repeal of a nondiscrimination city ordinance.<sup>1</sup> This ordinance, known as the Houston Equal Rights Ordinance (“HERO”), prohibited discrimination on the basis of fifteen protected characteristics, which included both sexual orientation and gender identity.<sup>2</sup> The language of the ordinance was “similar to measures passed by every other major city in the country and by most local corporations.”<sup>3</sup> HERO had “broad-based and diverse support” from former Mayor Annise Parker, who was still in office when the referendum took place, the National Association for the Advancement of Colored People, Rice University, and several community organizations and nonprofit groups.<sup>4</sup>

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1. Dan Frosch, *HERO Rejected in Houston*, WALL STREET J., Nov. 4, 2015, at A6.
2. Hous., Tex., Ordinance No. 2014-530 (May 28, 2014).
3. Press Release, City of Hous. Mayor’s Office, Mayor Parker Releases Statement on HERO Court Ruling (July 24, 2015), <http://www.houstontx.gov/mayor/press/mayor-statement-hero-texas-supreme-court-ruling.html>.
4. Press Release, City of Hous. Mayor’s Office, Broad-Based Group Ready to Defend HERO (July 3, 2014), <http://www.houstongovnewsroom.org/go/doc/2155/2198858/Broad-based-Group-Ready-to-Defend-HERO>. *But see* Amanda Terkel, *Some LGBT-Friendly Businesses Stayed Silent on Houston Equal Rights Ordinance*, HUFFINGTON POST (Nov. 9, 2015, 2:50 PM), [http://www.huffingtonpost.com/entry/lgbt-business-houston-hero\\_us\\_5640ec34e4b0411d3071ed1b](http://www.huffingtonpost.com/entry/lgbt-business-houston-hero_us_5640ec34e4b0411d3071ed1b) (noting that several companies who are the biggest employers in

The ordinance, however, was repealed by popular vote<sup>5</sup> as the result of an opposing conservative movement, which shifted voters' attention away from nondiscrimination and instead towards transgender individuals' access to the restroom of the gender with which they identify. HERO did not explicitly mention bathrooms, but it did bar discrimination in public accommodations.<sup>6</sup> The opposition to HERO scared the public into thinking that male predators could claim transgender status to attack and assault women in bathrooms.<sup>7</sup> When sixty percent of voters opposed the ordinance, Lieutenant Governor Dan Patrick called HERO "the bathroom ordinance" and praised voters for "clearly understand[ing] that [HERO] was never about equality . . . . It was about allowing men to enter women's restrooms."<sup>8</sup>

The repeal of HERO represents the failure of the lesbian, gay, bisexual, and transgender ("LGBT") movement and the breakdown of the unity between the gay rights movement and the transgender rights movement. This is a clear example of how broader LGBT rights legislation failed because of transgender inclusivity. When the conversation turned to focus on transgender individuals' right to use a restroom consistent with their gender identity, the campaign in favor of HERO was silent.<sup>9</sup> The avoidance of the bathroom issue has proven especially troublesome for transgender students, who are subject to harmful school policies and experience bullying, harassment, and stigmatization.<sup>10</sup> Gay, lesbian, and bisexual ("LGB") students

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Houston, including BP, Chevron, Deloitte, and Shell, failed to show either support or opposition for the ordinance).

5. Frosch, *supra* note 1.

6. Hous., Tex., Ordinance No. 2014-530.

7. Amanda Terkel, *Defeat of Houston Equal Rights Measure Serves as a Wakeup Call for LGBT Movement*, HUFFINGTON POST (Nov. 4, 2015, 5:49 PM), [http://www.huffingtonpost.com/entry/houston-lgbt-vote\\_us\\_563a535ae4b0307f2caba1cc](http://www.huffingtonpost.com/entry/houston-lgbt-vote_us_563a535ae4b0307f2caba1cc).

8. *Houston Prop 1 HERO Fails to Win Approval*, CLICK 2 HOUS. (Nov. 4, 2015, 5:27 PM), <http://www.click2houston.com/news/houston-prop-1-hero-fails-to-win-approval>.

9. Terkel, *supra* note 7.

10. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf) ("Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%), and sexual violence (12%).").

suffer from similar bullying and harassment at alarming rates.<sup>11</sup> This is where the LGB community can support and align with the transgender rights movement. By advocating for transgender students' right to use the bathroom consistent with their gender identity, the discordant LGBT community can find success and equality both for these students and for the broader LGBT public. This issue goes beyond permitting transgender students to use the proper bathroom, and goes toward the need to secure safety in unsupervised spaces for all LGBT students in schools.

Part II will discuss federal agency guidance, state bills, and federal court cases that are currently affecting transgender students' right to use the restroom consistent with their gender identity.<sup>12</sup> Part III will argue that the interests of the transgender community regarding this issue intersect with the interests of the LGB community, which gives cause to the entire LGBT community to realign and advocate for a proper resolution to provide a safe space in bathrooms and locker rooms for all gender non-conforming students.

## II. THE CURRENT STATE OF THE RIGHTS OF TRANSGENDER STUDENTS

Federal law has been construed to protect transgender individuals from discrimination, although some states are not in accord with this interpretation. Title IX of the Education Amendments of 1972 provides that “[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>13</sup> The Supreme Court has held that discrimination “on the basis of sex” encompasses differential treatment based on “sex-based considerations.”<sup>14</sup> Although this holding addressed sex discrimination under Title VII of the Civil

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11. Shannon Gilreath, *“Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand”*: *Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557, 576 (2009).

12. At the time of this writing, the federal agency guidance, state bills and laws, and cases were current and up to date. This is a rapidly changing area of the law and will certainly be affected by the Trump administration, as has already been seen in the first months of his presidency.

13. 20 U.S.C. § 1681(a) (2012).

14. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion).

Rights Act of 1964, its reasoning has been applied to claims arising under Title IX.<sup>15</sup>

### A. Agency Guidance

The Department of Education had previously interpreted Title IX to protect all students at recipient institutions from sex discrimination, including transgender students, until the Trump administration revoked such guidance.<sup>16</sup> According to that guidance, “[u]nder Title IX, a recipient [of federal funding] generally must treat transgender students consistent with their gender identity.”<sup>17</sup> Thus, a school is obligated to use the same procedures and standards in resolving complaints from LGBT students as it does for non-LGBT students.<sup>18</sup> The Department of Education also recommended proper training for professionals working with LGBT students.<sup>19</sup>

The Department of Education, jointly with the Department of Justice, published a “Dear Colleague” letter on May 13, 2016, detailing schools’ obligations to transgender students under Title IX.<sup>20</sup> Most importantly, this requires schools to treat a student’s gender identity as that student’s sex.<sup>21</sup> This includes providing a safe and nondiscriminatory environment, using the student’s preferred name and pronouns, allowing the student to use sex-segregated facilities and participate in sex-segregated activities consistent with his or her gender identity, and protecting the

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15. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), *cert. denied*, 552 U.S. 887 (2007).

16. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014) [hereinafter TITLE IX AND SEXUAL VIOLENCE], [http://www2.ed.gov/about/offices/list/ocr/d\\_ocs/qa-201404-title-ix.pdf](http://www2.ed.gov/about/offices/list/ocr/d_ocs/qa-201404-title-ix.pdf). *But see* Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), [https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643\\_story.html?utm\\_term=.cea0093b4173](https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.cea0093b4173).

17. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

18. TITLE IX AND SEXUAL VIOLENCE, *supra* note 16, at 5–6.

19. *Id.* at 6.

20. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016), <http://www2.ed.gov/about/offices/list/ocr/letters/collague-201605-title-ix-transgender.pdf>.

21. *Id.* at 2.

student's privacy within educational records.<sup>22</sup> The letter was determined to be significant guidance.<sup>23</sup> The document, however, was not without its critics. Almost immediately after it was published, officials in eleven states sued the federal government, challenging the scope and interpretation of federal anti-discrimination law.<sup>24</sup> This legal battle is far from over; although a federal court held in favor of the states thus far, that result may not endure.<sup>25</sup> Ultimately, although these guidance documents are not binding, they have a persuasive effect in demonstrating the Department of Education's perspective on the scope of the "on the basis of sex" language in Title IX.<sup>26</sup> The guidance is certainly sufficiently persuasive to the extent that a number of states have challenged the Obama administration's guidance.<sup>27</sup>

In a sharp departure from this guidance, the Trump administration revoked the joint Department of Education and Department of Justice Dear Colleague letter from May 13, 2016,

22. *Id.* at 2–5.

23. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007) (defining a significant guidance document "as a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; or (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended").

24. David Montgomery & Alan Blinder, *States File Suit in Test of Administration's Transgender Bathroom Policy*, N.Y. TIMES, May 25, 2016, at A12.

25. Erik Eckholm & Alan Blinder, *Judge Halts Obama Push on Transgender Access*, N.Y. TIMES, Aug. 23, 2016, at A15 (describing the impact of the judge's decision as "unclear and . . . likely to be limited"); Ariane de Vogue, *Judge Temporarily Blocks Obama School Transgender Bathroom Policy*, CNN POL. (Aug. 22, 2016, 6:48 PM), <http://www.cnn.com/2016/08/22/politics/transgender-school-bathroom-policy> (discussing a U.S. District Court for the Northern District of Texas judge's order barring federal agencies from taking action against school districts that do not comply with the Obama administration's policy regarding transgender students' right to use the bathroom congruent with their gender identities). *But see* Kevin Bohn, *Justice Department No Longer Fighting Injunction on Transgender School Guidance*, CNN POL. (Feb. 11, 2017, 6:44 PM), <http://www.cnn.com/2017/02/11/politics/justice-department-transgender-guidance-case> (discussing the Department of Justice's notice, filed jointly with the states, to cancel a hearing set in the Fifth Circuit just one day after Attorney General Jeff Sessions was confirmed by the Senate).

26. 20 U.S.C. § 1681(a) (2012).

27. Montgomery & Blinder, *supra* note 24.

which interpreted 34 C.F.R. § 106.33.<sup>28</sup> In rolling back the Obama administration's guidance, the Agencies did not offer a replacement but instead criticized the letter because it "lacked extensive legal analysis, did not go through a public vetting process, sowed confusion and drew legal challenges."<sup>29</sup> This rollback of protections for transgender students is a reflection of the current Trump administration and indicates that the political landscape may continue to work in a manner inimical to civil rights.

The right of transgender students to use the restroom consistent with their gender identity is bolstered by other federal agency guidance concerning Title VII.<sup>30</sup> The Department of Labor's Occupational Safety and Health Administration ("OSHA") published *A Guide to Restroom Access for Transgender Workers* on June 1, 2015, recommending that all employees have access to restrooms that correspond with their gender identity.<sup>31</sup> Requiring employees to use a bathroom inconsistent with their gender identity or limiting employees to using gender-neutral bathrooms singles out transgender employees and "may make them fear for their physical safety."<sup>32</sup> OSHA, therefore, advises that the employee determine for him or herself the "most appropriate and safest option" in his or her use of a bathroom at his or her place of employment.<sup>33</sup> Further, the Equal Employment Opportunity Commission has also participated in litigation of transgender rights, filing both lawsuits and amicus curiae briefs on behalf of employees.<sup>34</sup>

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28. Somashekhar et al., *supra* note 16.

29. *Id.*; see also Press Release, U.S. Dep't of Educ., U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance (Feb. 22, 2017), <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-issues-statement-new-title-ix-guidance> (defending the Department's decision to withdraw and rescind the previous Dear Colleague letter that required schools to protect transgender students in a manner consistent with their gender identity).

30. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (2012) (codified as amended at 42 U.S.C. § 2000e).

31. OCCUPATIONAL SAFETY & HEALTH ADMIN., DEP'T OF LABOR, A GUIDE TO RESTROOM ACCESS FOR TRANSGENDER WORKERS 1 (2015), <http://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf>.

32. *Id.*

33. *Id.* at 2.

34. *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm) (last updated July 8, 2016).

The Department of Education Office for Civil Rights has entered into agreements with several school districts to end discrimination against transgender students. In Downey Unified School District in California, a transgender student alleged that the school district “fail[ed] to respond adequately to complaints that the student was subjected to verbal harassment by peers.”<sup>35</sup> The school district voluntarily entered into an agreement before the investigation was complete, agreeing to give the student access to female-designated facilities and to provide students with educational information on gender identity, among other measures.<sup>36</sup> In Township High School District 211 in Illinois, a transgender student was barred from changing and showering in the female locker room.<sup>37</sup> There, the Department of Education determined that the school district had acted in violation of Title IX, and reached a settlement with the district to give the student access to the female locker room, install privacy curtains in the locker room, and provide a reasonable alternative to students requesting additional privacy.<sup>38</sup>

The Department of Education and the Department of Labor have interpreted civil rights legislation to protect all individuals on the basis of both sexual orientation and gender identity. This has the effect of putting stakeholders on notice of how those particular agencies will act in the future, either in rulemaking or adjudication. Although it can also indicate the trend of the law, quickly changing rhetoric in the federal government may indicate the opposite result. Agency guidance demonstrates the executive branch’s perspective, from former President Obama’s acceptance and assurance of equal transgender rights to President Trump’s denial and reversal of these issues.

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35. Press Release, U.S. Dep’t of Educ., U.S. Department of Education’s Office for Civil Rights Announces Resolution of Civil Rights Investigation of California’s Downey Unified School District (Oct. 14, 2014), <http://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-civil-rights-investigation-california-downey-unified-school-district>.

36. *Id.*

37. Mitch Smith & Monica Davey, *U.S. Says Transgender Student Has Rights in the Locker Room*, N.Y. TIMES, Nov. 2, 2015, at A1.

38. Press Release, U.S. Dep’t of Educ., Settlement Reached with Pallatine, Ill., Township High School District 211 to Remedy Transgender Discrimination (Dec. 3, 2015), <http://www.ed.gov/news/press-releases/settlement-reached-palatine-ill-township-high-school-district-211-remedy-transgender-discrimination>.

*B. Cases*

Both state and federal courts have been split, with most upholding school districts' policies requiring students to use bathrooms that correspond to their biological sex and few others holding in favor of the transgender student that suffered discrimination. Although it seemed likely that this would be resolved after certiorari was granted to hear an appeal from the Fourth Circuit, the Trump administration's reversal of the federal guidance supporting transgender students has caused the Supreme Court to decide not hear the case and has thus ensured a delayed conclusion.<sup>39</sup>

In *G.G. ex rel. Grimm v. Gloucester County School Board*, the District Court for the Eastern District of Virginia held that Title IX allows schools to maintain separate bathrooms on the basis of sex.<sup>40</sup> The plaintiff, G.G., began to present as a male during his sophomore year of high school.<sup>41</sup> The school changed his records to reflect G.G.'s new name and had him tell teachers to use that name.<sup>42</sup> While he was initially supposed to use the nurse's separate bathroom, he was later granted permission to use the male bathroom, which he used for seven weeks.<sup>43</sup> The school district subsequently proposed a resolution to require that the use of restroom and locker room facilities be limited on the basis of biological sex.<sup>44</sup> Parents supported the resolution because they argued that transgender students' use of bathrooms consistent with their gender identity "would violate the privacy of other students and might 'lead to sexual assault in the bathrooms.'"<sup>45</sup>

The court held that a Department of Education regulation, which allowed for separate facilities on the basis of sex if the facilities were comparable, authorized the district's action.<sup>46</sup> The

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39. *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273, 2017 WL 855755, at \*1 (U.S. Mar. 6, 2017).

40. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 744 (E.D. Va. 2015).

41. *Id.* at 739.

42. *Id.* at 739-40.

43. *Id.*

44. *Id.*

45. *Id.* at 740.

46. *Id.* at 744; *see also* Comparable Facilities, 34 C.F.R. § 106.33 (2016) ("A recipient [of federal funding] may provide separate toilet, locker room, and shower facilities on the

court furthered its position by holding that the Department's interpretation of Title IX cannot overrule the regulation.<sup>47</sup>

On appeal, G.G. claimed that the school district's policy is in violation of Title IX because it "stigmatiz[es] transgender students, depriv[es] them of physical access to school resources, jeopardiz[es] their health, and impair[s] their ability to participate equally in the educational benefits and opportunities of school."<sup>48</sup> During oral argument, G.G. argued that the language of Title IX is very broad and that it is in the Department of Education's discretion to make any distinctions regarding gender.<sup>49</sup> G.G. reasoned that the Department of Education's interpretation that school policy should define gender based on gender identity, rather than biological sex, is properly based on its status as an expert agency.<sup>50</sup>

The Department of Justice filed a brief as amicus curiae in favor of the plaintiff-appellant, G.G.<sup>51</sup> In its brief, the Department of Justice relied on *Price Waterhouse v. Hopkins* to establish that "differential treatment 'based on any sex-based consideration'" constitutes discrimination on the basis of sex.<sup>52</sup> An individual's status as a transgender person is related to his sex, in that the individual's gender identity does not match his biological sex.<sup>53</sup> Therefore, treating a transgender student differently from other students because he is transgender rises to the level of differential treatment on the basis of sex.<sup>54</sup> The school board's policy to assign bathrooms on the basis of biological sex "denies G.G. a benefit that every other student at his school enjoys: access to restrooms that are consistent with his or her gender identity."<sup>55</sup> This policy denies G.G. of an equal educational opportunity and "of equal

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basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

47. *Grimm*, 132 F. Supp. 3d at 746.

48. Brief of Plaintiff-Appellant at 17, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (No. 15-2056), *cert. granted*, 137 S. Ct. 369 (2016).

49. Oral Argument, *Grimm*, 822 F.3d 709 (No. 15-2056), <http://coop.ca4.uscourts.gov/OAarchive/mp3/15-2056-20160127.mp3>.

50. *Id.* at 12:15.

51. Brief for the United States as Amicus Curiae Supporting Petitioner, *Grimm*, 822 F. Supp. 3d 709 (No. 15-2056).

52. *Id.* at 8.

53. *Id.* at 8–9.

54. *Id.* at 9.

55. *Id.*

status, respect, and dignity.”<sup>56</sup> G.G. has to suffer from being humiliated and stigmatized in school.<sup>57</sup> The policy goes beyond a “mere inconvenience or limitation on his ability to use the restroom—it can be an effective denial of a restroom altogether” and thus lead to health problems.<sup>58</sup>

Further, the Department of Justice stated that the school district could not rely on the concepts of privacy and safety to deny G.G. the use of the boys’ bathroom without any factual basis to support it.<sup>59</sup> If anything, the school district should be more concerned with G.G.’s privacy and safety, as this policy makes it more likely that he will be subject to bullying or harassment.<sup>60</sup> The Department of Justice also argued that the regulation, 34 C.F.R. § 106.33, which the district court relied on, does not permit this policy because it directly contradicts the interpretation of the Department of Education.<sup>61</sup> The Department of Education’s interpretation that schools, when providing sex-segregated restrooms, “generally must treat transgender students consistent with their gender identity” is consistent with the Department of Justice’s prior enforcement of Title IX.<sup>62</sup>

The Fourth Circuit held in favor of G.G.<sup>63</sup> First, in addressing the district court’s dismissal of G.G.’s Title IX claim, the Fourth Circuit held that the Department of Education’s interpretation of its own regulation was entitled to deference under *Auer v. Robbins*.<sup>64</sup> Thus, the Department of Education’s opinion that “[w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity” is “accorded controlling weight” in this case.<sup>65</sup> Because the regulation allowing comparable separate sex facilities

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56. *Id.* at 14 (internal quotations omitted) (quoting *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at \*10 (EEOC Apr. 1, 2015)).

57. *Id.* at 15.

58. *Id.* at 16.

59. *Id.* at 18.

60. *Id.* at 19.

61. *Id.* at 26–27.

62. *Id.* at 23 (citations omitted).

63. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 714 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016).

64. *Id.* at 723 (citing *Auer v. Robbins*, 519 U.S. 452, 458 (1997)).

65. *Id.* at 723, 732.

was ambiguous and the agency's interpretation of that regulation was reasonable, that interpretation governs.<sup>66</sup>

Further, the Fourth Circuit held that the district court wrongly denied G.G. a preliminary injunction against the school board, the grant of which would have allowed him to use the male restrooms and other facilities at school.<sup>67</sup> The court considered the four factors required for a plaintiff to win a preliminary injunction: "(1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest."<sup>68</sup> The court found that the district court erroneously failed to consider G.G.'s proffered evidence in support of the injunction and reversed that denial.<sup>69</sup>

This decision has far-reaching effects. It could provide other transgender students with a path to successfully assert the same claim to gain greater protection in schools.<sup>70</sup> The Fourth Circuit was the first federal appellate court to decide the bathroom rights of transgender students, but the issue became legally significant due, in part, to its notoriety and volatility throughout the country. By a 5–3 decision in August of 2016, the Supreme Court granted a stay of the Fourth Circuit's order granting a preliminary injunction against Gloucester County School Board.<sup>71</sup> Justice Breyer concurred in the opinion, calling it a "courtesy" to preserve the status quo until the Court decides whether to proceed with the case.<sup>72</sup> The Court then granted

66. *Id.* at 721.

67. *Id.* at 726.

68. *Id.* at 724 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014)).

69. *Id.* at 726.

70. Moriah Balingit, *Va. Transgender Student's Case Could Have National Implications*, WASH. POST (Jan. 27, 2016), [https://www.washingtonpost.com/local/education/va-transgender-students-case-could-have-national-implications/2016/01/27/1775ce0c-c45b-11e5-9693-933a4d31bcc8\\_story.html](https://www.washingtonpost.com/local/education/va-transgender-students-case-could-have-national-implications/2016/01/27/1775ce0c-c45b-11e5-9693-933a4d31bcc8_story.html).

71. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016); *see also* Adam Liptak, *Supreme Court Blocks Order Allowing Transgender Student Restroom Choice*, N.Y. TIMES (Aug. 3, 2016), <https://www.nytimes.com/2016/08/04/us/politics/supreme-court-blocks-order-allowing-transgender-student-restroom-choice.html> (discussing the Supreme Court's decision to grant a stay of G.G.'s preliminary injunction pending the case being heard in the Supreme Court).

72. *Grimm*, 136 S. Ct. at 2442.

certiorari on October 28, 2016.<sup>73</sup> As a reaction to the Trump administration's abrogation of support for transgender rights, the Supreme Court requested letters from the parties detailing how the case should proceed.<sup>74</sup> The Court then issued an opinion, which reads, "The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."<sup>75</sup>

The Supreme Court had the potential to determine the rights of transgender students in schools for the entire country until the Trump administration revoked the guidance that unequivocally lent towards transgender rights.<sup>76</sup> Although it was significant that the highest court entered the debate over transgender students' rights early in its thrust to the national stage,<sup>77</sup> the executive branch has demonstrated its intent to deny basic protections to transgender students in such a way that the Supreme Court had no choice but to remand to the Fourth Circuit to reconsider the case with regard to the new guidance.<sup>78</sup> The Supreme Court now will not resolutely determine the scope of transgender rights during this term, but can be expected to return to the issue in the near future.<sup>79</sup>

In *Johnston v. University of Pittsburgh*, the District Court for the Western District of Pennsylvania granted the defendant's motion to dismiss and held that the plaintiff college student did

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73. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2016); *see also* Adam Liptak, *Supreme Court to Rule in Transgender Access Case*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/politics/supreme-court-to-rule-in-transgender-access-case.html>.

74. *Gloucester County School Board v. G.G.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/> (last visited Mar. 12, 2017).

75. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273, 2017 WL 855755, at \*1 (U.S. Mar. 6, 2017).

76. Somashekhar et al., *supra* note 16.

77. *Id.* (statement of Shannon Minter, the legal director of the National Center for Lesbian Rights: "This is one of the most important days in the history of the transgender movement. The outcome of this case is likely to shape the future of that movement in ways that will resonate for a very long time.").

78. *Grimm*, 2017 WL 855755, at \*1.

79. Adam Liptak, *Justices Step Out of the Debate in a Transgender Rights Case*, N.Y. TIMES, Mar. 7, 2017, at A1 ("The issue will almost certainly return to the Supreme Court, probably in a year or two. Until then, lawsuits in the lower courts will proceed, the political climate and public opinion may shift, and the court's composition will almost certainly change.").

not state a claim under the Equal Protection Clause of the Fourteenth Amendment or under Title IX.<sup>80</sup> Johnston began identifying as a male at the age of nine.<sup>81</sup> He changed his documents and records to reflect his male identity.<sup>82</sup> When he applied to the University of Pittsburgh in 2009, he indicated his sex as female on his application forms.<sup>83</sup> When he began attending classes, however, he identified and lived as male in all aspects of his life.<sup>84</sup> He used the male restrooms and locker room until a faculty member of the university told him he could no longer use the male locker room and instead had to use a unisex locker room.<sup>85</sup>

The court held that Johnston did not “state a cognizable claim . . . under Title IX.”<sup>86</sup> Transgender status is not a protected characteristic under the plain language of Title IX, as “sex” only means male or female consistent with biological sex.<sup>87</sup> The court compared cases involving Title VII and transgender employees, finding that “Title VII does not provide an avenue for a discrimination claim on the basis of transgender status.”<sup>88</sup> The court held that the University’s policy of sex-segregated bathrooms and locker rooms based on biological sex, rather than gender identity, does not rise to the level of a violation of Title IX.<sup>89</sup> After appealing to the Court of Appeals for the Third Circuit, however, Johnston and the University of Pittsburgh settled the case and the parties issued a joint statement, stating that “[f]aculty, staff, and students are welcome to use . . . any restroom that corresponds to their gender identity.”<sup>90</sup> Preferably, the district court’s decision would have been overturned by the Third Circuit because, like in *Grimm*, the district court contravened the Department of Education’s interpretation of Title IX.

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80. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 661 (W.D. Pa. 2015).

81. *Id.* at 662.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 663.

86. *Id.* at 672.

87. *Id.* at 674, 676.

88. *Id.* at 676.

89. *Id.* at 672–73.

90. Press Release, Univ. of Pittsburgh, Joint Statement from University of Pittsburgh and Seamus Johnston (Mar. 29, 2016), <http://www.news.pitt.edu/news/joint-statement-university-pittsburgh-and-seamus-johnston>.

In a 2014 decision, the Maine Judicial Supreme Court ruled in favor of a transgender teenager named Nicole Maines.<sup>91</sup> This landmark decision marked the first time that a state's highest court ruled that a transgender person has the right to use the restroom that is consistent with his or her gender identity.<sup>92</sup> When she was still in elementary school, her school district began requiring Maines to use a staff bathroom after a classmate's grandfather complained about her use of the female restroom.<sup>93</sup> In its opinion, the court emphasized Maines' educational needs. The court held that a school violates the Maine Human Rights Act when the school denies a student access to the communal bathroom consistent with her gender identity and when the use of that bathroom would ensure the student's "psychological well-being and educational success."<sup>94</sup> Although this decision is not binding in other states, it will provide persuasive guidance to other courts. The decision offers compelling reasons to hold that a school violated a plaintiff student's rights.

### C. State Statutes

Several states have attempted—and failed—to pass statutes directed at denying transgender individuals the right to use public accommodations, specifically bathrooms, consistent with their gender identity. For example, in January 2016, the South Dakota House of Representatives introduced a bill aimed to "restrict access to certain restrooms and locker rooms in public schools."<sup>95</sup> The bill would have restricted public school students' use of restrooms, locker rooms, and shower rooms on the basis of biological sex, which was defined as "the physical condition of being male or female . . . as identified at birth."<sup>96</sup> The bill also provided for "a reasonable accommodation" to be provided to a student whose gender identity is different from his or her

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91. David Stout, *Transgender Teen Awarded \$75,000 in School Restroom Lawsuit*, TIME (Dec. 3, 2014), <http://time.com/3615599/transgender-student-restroom-lawsuit-maine>.

92. *Id.*

93. *Id.*

94. Judy Harrison, *Maine Supreme Court Rules in Favor of Transgender Girl in Orono School Bathroom Case*, BANGOR DAILY NEWS (Jan. 30, 2014, 5:07 PM), <http://bangordailynews.com/2014/01/30/news/bangor/maine-supreme-court-rules-in-favor-of-transgender-girl-in-orono-school-bathroom-case/?ref=search>.

95. H.B. 1008, 2016 Leg., 91st Sess. (S.D. 2016).

96. *Id.*

biological sex, but such accommodation could not include the use of restrooms consistent with the student's gender identity and instead could only include the use of "a single-occupancy restroom, a unisex restroom, or the controlled use of a [facility] that is designated for use by faculty."<sup>97</sup> This kind of accommodation also could not "impose an undue hardship on a school district."<sup>98</sup>

Both the state's House and Senate overwhelmingly passed the bill.<sup>99</sup> Republican Governor Dennis Daugaard vetoed the bill due to his belief that this was a more personal, local issue.<sup>100</sup> He stated, "Local school districts can, and have, made necessary restroom and locker room accommodations that serve the best interests of all students, regardless of biological sex or gender identity."<sup>101</sup> The legislature's attempt to override the veto fell ten votes short of the required two-thirds majority.<sup>102</sup>

The veto of this bill was even more of a victory for the transgender community than previous victories because South Dakota's attempt came much closer to becoming law than several other states that have tried to pass similar legislation.<sup>103</sup> This

97. *Id.*

98. *Id.*

99. Holly Yan, *South Dakota Could Be First State to Ban Transgender Students in Some Restrooms*, CNN (Feb. 17, 2016, 6:56 PM), <http://www.cnn.com/2016/02/17/politics/south-dakota-school-restrooms-transgender-bill/index.html> (stating that the House passed the bill in a 58–10 vote and the Senate passed it in a 20–15 vote).

100. Katy Steinmetz, *Vote to Override South Dakota 'Bathroom Bill' Veto Narrowly Fails*, TIME (Mar. 3, 2016), <http://time.com/4246972/south-dakota-bathroom-bill-veto-transgender>.

101. Greg Botelho & Wayne Drash, *South Dakota Governor Vetoes Transgender Bathroom Bill*, CNN (Mar. 2, 2016, 1:51 AM), <http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill>.

102. Steinmetz, *supra* note 100.

103. The Kentucky Senate introduced a bill that defined "biological sex" as "the physical condition of being male or female, which is determined by a person's chromosomes, and is identified at birth by a person's anatomy." S.B. 76, 15 Reg. Sess. (Ky. 2015). The Senate passed the bill on February 27, 2015, by a vote of 27–9. Mitch Kellaway, *Kentucky's Transphobic Legislation Dies After "Last Ditch Effort"*, ADVOCATE (Mar. 25, 2015, 3:10 PM), <http://www.advocate.com/politics/transgender/2015/03/25/kentuckys-transphobic-legislation-dies-after-last-ditch-effort>. The majority-Democrat House refused to hear the bill, and it died even after the bill's sponsor attempted to add it as an amendment to a different bill. *Id.* The Minnesota legislature introduced a similar bill for the purpose of ensuring "the privacy and safety of all students" and maintaining "order and dignity" in schools. S.F. 1543, 89th Leg., Reg. Sess. (Minn. 2015). Like the Kentucky bill, it also defined sex by chromosomes and anatomy at birth. *Id.* After failing to be withdrawn from committee and placed on the General Orders list, it failed in the Senate ten days after it was introduced. Andy Birkey, *MN Senate Committee Rejects Anti-Transgender Bill*, THE

victory, however, was diminished when considering that Governor Dugaard vetoed the bill both in reliance on local school districts' action and in fear of federal litigation against the state.<sup>104</sup> The Republican governor's veto, therefore, was not based on his support for equal rights. Because of conservative opposition to the equal rights argument, various state legislatures have attempted to pass "bathroom bills" like South Dakota's, targeting transgender students and adults alike.<sup>105</sup> While there have been some attempts to provide equal rights and greater protections to transgender individuals,<sup>106</sup> the actions of state legislatures and city councils are largely focused on attempts to discriminate.

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COLUMN (Mar. 20, 2015), <http://thecolu.mn/16304/mn-senate-committee-rejects-anti-transgender-bill>. The Nevada legislature also failed to advance a bill that would have required students to use restrooms on the basis of biological sex. A.B. 375, 2015 Leg. (Nev. 2015). This bill addressed transgender students, allowing a school to provide "the best available accommodation," but which may not include access to a restroom that is designated for use by students whose biological sex is different from the transgender students' biological sex. *Id.* The bill failed in the Nevada State Assembly by only two votes after its third reading and no further action was taken. *Assembly Rejects Transgender Bathroom Bill*, KOLO TV (Apr. 23, 2015, 12:05 PM), <http://www.kolotv.com/home/headlines/Assembly-Rejects-Transgender-Bathroom-Bill-300872261.html>.

104. Bradford Richardson, *GOP Governor Shocks Conservatives, Vetoes Transgender Bathroom Bill*, WASH. TIMES (Mar. 1, 2016), <http://www.washingtontimes.com/news/2016/mar/1/dennis-daugaard-vetoes-south-dakota-transgender-ba/?page=all>.

105. See H.B. 1008, 2016 Leg., 91st Sess. (S.D. 2016). *But see* CAL. EDUC. CODE § 221.5(f) (West 2015) ("A pupil shall be permitted to . . . use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.").

106. The Charlotte, North Carolina, City Council passed an ordinance in February of 2016 amending its nondiscrimination ordinance to include the protected characteristics of "sexual orientation, gender identity, [and] gender expression." Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016). This ordinance was passed despite threats of retaliation by North Carolina Governor Pat McCrory. Steve Harrison, *McCrory: If Charlotte Approves LGBT Protections, "Immediate" State Response Likely*, CHARLOTTE OBSERVER (Feb. 22, 2016, 1:00 AM), <http://www.charlotteobserver.com/news/politics-government/article61307857.html>. The North Carolina General Assembly then, in the course of one day, passed the Public Facilities Privacy & Security Act, which would effectively repeal all local LGBT ordinances by establishing single-sex multiple occupancy bathroom and changing facilities and by mandating that the state law supersede all local ordinances to ensure statewide uniformity. H.B. 2, 2016 Leg., 2d Extra Sess. (N.C. 2016). President Obama was quick to criticize the law and recommended that it be overturned. Laura Wagner, *Justice Department Says N.C. Bathroom Law Violates Civil Rights*, NPR (May 4, 2016, 5:55 PM), <http://www.npr.org/sections/thetwo-way/2016/05/04/476794234/justice-department-says-north-carolina-bathroom-law-violates-civil-rights>. The U.S. Department of Justice then sent a letter to Governor McCrory warning him that this law violates Title IX. *Id.* In response, Governor McCrory filed suit against the Department of Justice, arguing that the Department of Justice was blatantly overreaching its authority. Alan Blinder et al., *Countersuits over North Carolina's Bias Law*, N.Y. TIMES (May 9, 2016), <http://www.nytimes.com/2016/05/10/us/north-carolina-governor-sues-justice-department-over-bias-law.html>. The Department of Justice also sued North Carolina. *Id.* Attorney General Loretta Lynch

The veto of the South Dakota bill and other states' bills that died elsewhere in the legislative process may carry strong implications, perhaps serving as an example to other lawmakers. The opposition to such laws, however, may go beyond cries for equality. The threat of lawsuits from the federal government, reduction in tourism, and loss of reelection are all pressures against enacting laws that discriminate against transgender individuals and the rest of the LGBT community.<sup>107</sup>

### III. HOW THE GAY AND TRANSGENDER COMMUNITIES CAN ALIGN

Very recently, there have been a staggering number of losses in the gay rights movement. The defeat of HERO,<sup>108</sup> the uncertainty of the contemporary political landscape in the federal government,<sup>109</sup> and the various state bills that have been introduced,<sup>110</sup> particularly the North Carolina bill that was passed to override all nondiscrimination city ordinances,<sup>111</sup> are just a few of the ways that the legal system is negatively reacting to the grassroots success of the LGBT movement. The common denominator contributing to all of these losses is transgender inclusivity.

Such inclusion of gender identity in the broader LGBT movement has been criticized. Those critics give reminders that there is a difference between sexual orientation and gender identity, and one large coalition cannot serve the needs and goals

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asserted that House Bill 2 requires “public agencies to follow a facially discriminatory policy.” *Id.* These multiple lawsuits have yet to see any sort of resolution. In August 2016, however, a federal district court judge in North Carolina limited the enforcement of the bill but did not issue a full injunction. Alan Blinder, *Federal Judge Curbs Enforcement of North Carolina Transgender Access Law*, N.Y. TIMES (Aug. 26, 2016), <http://www.nytimes.com/2016/08/27/us/federal-judge-curbs-enforcement-of-north-carolina-transgender-access-law.html>.

107. See Nico Lang, *Opinion, Veto of South Dakota Transgender Bathroom Bill Shows Boycotts Work*, L.A. TIMES (Mar. 3, 2016, 12:44 PM), <http://www.latimes.com/opinion/la-o-l-south-dakota-trans-bill-boycotts-work-lgbt-community-20160303-story.html>.

108. See discussion *supra* Section I.

109. See discussion *supra* Section II-A, II-B.

110. See discussion *supra* Section II-C.

111. Harrison, *supra* note 106.

of the smaller communities.<sup>112</sup> One commentator described the South Dakota bill<sup>113</sup> as the “perfect example” of the need to dissociate the movements, as the bill shows the complete difference in issues facing the LGB and transgender communities.<sup>114</sup> He argued that the transgender movement is seeking to “upend the human experience,” whereas the gay movement seeks only to gain equal participation in society.<sup>115</sup> Additionally, an online petition, called “Drop the T,” advocated for excluding the transgender community from the LGBT community.<sup>116</sup> The petition argued that transgender ideology is different from the LGB community and “is ultimately regressive and actually hostile to the goals of women and gay men.”<sup>117</sup> This commentary demonstrates that there is a subset of the LGBT community that believes the movements should be dissociated because gender identity and sexual orientation are markedly different and should be treated as such.

On the specific question of bathrooms, however, the LGB and transgender movements are aligned. This is a clear example of the interests of the two movements intersecting. There is an extraordinary problem of bullying and harassment in schools that affect all LGBT students alike.<sup>118</sup> Bullying and harassment does not distinguish amongst the victim’s identification with a particular group; rather, it is aimed towards anyone who “violate[s] the rules

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112. Tyler Curry, *Why Gay Rights and Trans Rights Should Be Separated*, HUFFINGTON POST (Feb. 17, 2014, 7:44 PM), [http://www.huffingtonpost.com/tyler-curry/gay-rights-and-trans-rights\\_b\\_4763380.html](http://www.huffingtonpost.com/tyler-curry/gay-rights-and-trans-rights_b_4763380.html).

113. H.B. 1008, 2016 Leg., 91st Sess. (S.D. 2016); *see also* discussion *supra* Section II-C.

114. Joseph R. Murray II, Column, *Gay, Transgender Movements Need a Divorce*, USA TODAY (Feb. 28, 2016, 3:06 PM), <http://www.usatoday.com/story/opinion/2016/02/28/gay-rights-trans-rights-south-dakota-bathroom-legislation-column/80710176>.

115. *Id.*

116. *Drop the T*, CHANGE.ORG, <https://www.change.org/p/human-rights-campaign-glad-lambda-legal-the-advocate-out-magazine-huffpost-gay-voices-drop-the-t#response-31450> (last visited Feb. 19, 2017).

117. *Id.*

118. Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12—United States and Selected Sites, 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 12, 2016), [https://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm?s\\_cid=ss6509a1\\_w](https://www.cdc.gov/mmwr/volumes/65/ss/ss6509a1.htm?s_cid=ss6509a1_w) (reporting that 34.2% of LGBT students experience bullying on school property, while only 18.8% of heterosexual students faced such bullying).

of gender in this culture.”<sup>119</sup> The intersection of interests and goals has brought a new perspective to the bathroom issue that affects both LGB and transgender students equally. Therefore, the LGB community should work with the transgender community towards securing this personal right to use the bathroom of one’s choice, whether it is for the purpose of acting consistently with one’s gender identity or for the purpose of securing one’s safety in one of the only unsupervised places in schools.

Transgender students have reported startling rates of harassment in schools. Seventy-eight percent of transgender students in K–12 schools reported harassment, while thirty-five percent reported physical assault.<sup>120</sup> Fifteen percent of transgender students even left their school in K–12 or higher education because of the severity of the harassment.<sup>121</sup> LGB students experience similar levels of harassment. Fifteen percent of LGB students have been injured so badly in a physical attack at school that they had to seek medical attention.<sup>122</sup> Additionally, ninety-seven percent of students in public high schools regularly hear homophobic remarks by their peers.<sup>123</sup> Over half of students hear homophobic comments made by school staff.<sup>124</sup> A high school student typically hears anti-gay remarks more than twenty-five times per day.<sup>125</sup> It is clear from these statistics that gender non-conforming youth experience regular harassment, hateful slurs, discrimination, and violence at alarming rates, which is in stark contrast to their non-LGBT peers.

Further, the legal fight for transgender students’ right to use the bathroom corresponding to the gender with which they identify can only advance as far as public opinion will allow. Certainly, public opinion is not dispositive in influencing the decisions of agencies, courts, and state legislatures. Without public support, however, there are many issues that may have never

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119. Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y. L. SCH. J. HUM. RTS. 589, 613 (2000).

120. GRANT ET AL., *supra* note 10.

121. *Id.*

122. Gilreath, *supra* note 11.

123. *Id.*

124. *Id.*

125. *Id.*

garnered legal attention.<sup>126</sup> Therefore, in order to bring the bathroom right of transgender students to the forefront of legal discourse and decision-making, there must be widespread public advocacy in favor of it. The LGBT community is best equipped to provide this advocacy and support.

The rhetoric surrounding the movement for LGBT rights, in addition to the statistics that illustrate the need for advocacy to secure those rights, demonstrates that the entire LGBT movement must put forth a unified front. The need for a safe space in unmonitored and intimate areas of schools is a need that is felt by all gender non-conforming youth. Thus, the fractured LGBT community should again work towards a coalition to resolve this issue that faces transgender and LGB students equally.

There are two possible solutions to this bathroom issue. First, schools could create bathrooms that are only unisex. Both LGBT and non-LGBT students would use singular bathrooms, therefore subjecting no one to separation, humiliation, discomfort, and harassment. This may be the more expensive solution, but it would appease both sides of the issue. LGBT students would no longer have to choose which bathroom is consistent with their gender identity or which is safer. Anti-LGBT students and parents would no longer have a reason to express discomfort or hatred towards LGB and transgender students for bathroom usage.

Second, schools could establish policies that allow students to use the bathroom that is consistent with the student's gender identity or feeling of safety. Considering that there have been no reports of a woman being attacked by a non-transgender male entering a female bathroom, this would not threaten the safety of non-LGBT students.<sup>127</sup> Rather, it would enable LGBT students to protect themselves in unsupervised bathrooms and locker rooms.

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126. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (stating that the recognition of rights “rise[s], too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era”).

127. Amanda Terkel, *Bathroom Panic Has Long Stood in the Way of Equal Rights*, HUFFINGTON POST (Mar. 24, 2016, 2:45 PM), [http://www.huffingtonpost.com/entry/bathroom-panic\\_us\\_56f40300e4b0c3ef521820e3](http://www.huffingtonpost.com/entry/bathroom-panic_us_56f40300e4b0c3ef521820e3) (noting that areas that have LGBT-inclusive nondiscrimination ordinances have not seen an increase in bathroom-related assaults).

Such policies have successfully been established in a number of schools.<sup>128</sup>

A proper solution to this problem is essential. Bathrooms and locker rooms are the only places in schools that are completely unsupervised and unmonitored. They are more intimate places. They are polarizing on the basis of gender. Considering the fact that gender non-conforming youth are already subject to significant levels of bullying and harassment in the public areas in schools, bathrooms and locker rooms carry an even greater risk of physical injury and emotional distress to these students.

#### IV. CONCLUSION

In conclusion, the ability to use the restroom or locker room consistent with one's gender identity should be a right guaranteed to all students in all public schools. This right is essential to the safety and the comfort of all gender non-conforming youth. Although transgender students had been assured this right by federal agencies before its revocation by the Trump administration, the guidance was never dispositive. In contravention of that earlier agency direction, both courts and state legislatures have worked to bar transgender students' access to single-sex restrooms in public schools, effectively denying them equal rights. This issue is unlikely to be resolved in the near future since the Trump administration revoked federal guidance supporting transgender students,<sup>129</sup> causing the Supreme Court to vacate the Fourth Circuit's judgment and to not hear the appeal as scheduled.<sup>130</sup>

To fully guarantee the right to use a bathroom of one's choice, the LGBT community must realign to jointly advocate for these students that are underrepresented in the legal system. The recent defeats based on gender-specific spaces have created a

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128. See Ed Payne, *Transgender First-Grader Wins the Right to Use Girls' Restroom*, CNN (June 24, 2013, 3:15 PM), <http://www.cnn.com/2013/06/24/us/colorado-transgender-girl-school> (discussing a Colorado case requiring an elementary school to allow a transgender female to use the girls' facilities at school); Stout, *supra* note 91 (discussing a case from Maine where the court prohibited a school district from forcing a transgender female student from using staff bathrooms rather than student bathrooms).

129. Somashekhar et al., *supra* note 16.

130. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273, 2017 WL 855755, at \*1 (U.S. Mar. 6, 2017); Liptak, *supra* note 79.

tense moment in the LGBT community. The movement towards equality can fall apart from within itself, or it can coalesce. Although transgender issues have typically been used as a wedge in the movement for gay rights, this is an issue where the interests of LGB and transgender students converge. This is an opportunity for the LGBT community to reconcile and reconvene in order to effectively advocate for the proper resolution of the issue.

There is an especial reason to move towards coalition and not digression here. LGB and transgender students are most imperiled physically in intimate spaces, such as bathrooms and locker rooms, which are unmonitored and unsupervised.<sup>131</sup> While it is important to ensure that transgender students are permitted to behave in a manner consistent with their gender identity, it is also essential to ensure that any LGBT student has the option to use the safer facilities. Therefore, the assurance of this right for transgender students will secure less discriminatory treatment in schools for all LGBT students. Establishing school policy to permit students to use the bathroom of their choice will not only allow transgender students to embrace their identities, but it will also save lives. As seen by the defeat of HERO, advocacy efforts are likely to falter in the face of opposition without a collaborative and united front from the entire LGBT community.

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131. Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who Is at Risk?*, NPR (May 15, 2016, 7:48 AM), <http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk>.