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CIVIL RIGHTS—Answering the “Million Dollar” Question: The Meaning of “Sex” for the Purposes of Title IX, Title VII, and the Equal Protection Clause, and Its Impact on Transgender Students’ Membership in Fraternal Organizations

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CIVIL RIGHTS—ANSWERING THE “MILLION DOLLAR” QUESTION: THE MEANING OF “SEX” FOR THE PURPOSES OF TITLE IX, TITLE VII, AND THE EQUAL PROTECTION CLAUSE, AND ITS IMPACT ON TRANSGENDER STUDENTS’ MEMBERSHIP IN FRATERNAL ORGANIZATIONS

I. INTRODUCTION

Meet Henry Watson¹ (“Watson”), an incoming freshman at a public university. In August of 2019, Watson moved into his residence hall and attended all of the freshman welcome-week events. Unlike the majority of his peers, however, Watson is transgender.² Specifically, Watson was born female and now identifies as a male. His family accepts him, his friends accept him, and he has been receiving cross-sex hormone therapy since he turned eighteen.³

On his second day at school, Watson and his new friends, who are all cisgender,⁴ attended the university’s student organization fair. All Registered Student Organizations (RSOs)⁵ participated in the fair, including fraternities⁶ and sororities.⁷ Watson and his new friends decided to go through

1. Henry Watson is fictional. His story is meant to evince the possible experiences transgender students face when seeking to join a fraternal organization that fails to maintain a clearly articulated membership policy.

2. *Sexual Orientation and Gender Identities Definitions*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Dec. 17, 2018) (“[Transgender is] [a]n umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.”).

3. Maria Hayon et al., *Effects of Cross-Sex Hormone Treatment on Body Composition in Transgender Persons*, ENDOCRINE ABSTRACTS (May 19, 2018), <https://www.endocrine-abstracts.org/ea/0056/ea0056p966> (“Cross-sex treatments are used to masculinize [through testosterone] or feminize [through estrogen] the bodies of female-to-male or male-to-female transsexuals.”).

4. *LGBTQ+ Definitions*, TRANS STUDENT EDUC. RES., <http://www.transstudent.org/definitions/> (last visited Dec. 17, 2018) (“Adjective that means ‘identifies as their sex assigned at birth.’”).

5. A Registered Student Organization program is a university program that grants student groups official university recognition. *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 669 (2010). As an RSO, the organization must meet certain requirements and follow university policies; in return, the organization is afforded certain benefits, such as space rental, use of school funds, and channels of communications. *Id.* at 669–70.

6. *Fraternity and Sorority Terminology*, UNLV, <https://www.unlvsl.com/greek-definitions-and-terminology> (last visited Dec. 17, 2018) (“The name that applies to all Greek organizations characterized by a ritual, pin, and strong ties to friendship and moral principles.”).

7. *Id.* (“Informally, women’s fraternities are called sororities.”).

formal recruitment⁸ and rush the fraternity Epsilon Phi Sigma (EPS).⁹ Watson's friends chose EPS because they built relationships with older chapter members during the first week of school. Watson, however, chose the group because the fraternity's creed¹⁰ and dedication to being different aligned with his moral compass.¹¹

Concerned about his eligibility to participate in recruitment because of his status as a transgender male, Watson reached out to the Greek Life Office to confirm that the university permitted him to participate. The university recognized the fraternity as a traditional single-sex, all-male fraternity. The state recognized Watson's female status because Watson had female genitals.¹² University policy, however, recognized Watson as male based on the gender he identified with at the time of admission.¹³ The Greek Life Office reassured Watson that the policy permitted him to participate in fraternity recruitment. Nevertheless, EPS had a national¹⁴ policy that vaguely de-

8. *Id.* Membership recruitment, commonly known as recruitment or rush, is the mutual selection process that chapter members facilitate, and prospective members go through during formal recruitment to learn more about one another. *Id.*

9. Tori Moore, *Sigma Phi Epsilon Welcomes Transgender Members*, ODYSSEY (Aug. 3, 2015), <https://www.theodysseyonline.com/sigep-welcomes-transgender> ("Sigma Phi Epsilon is a national Fraternity built on brotherhood and fellowship of men. Any individual who identifies as a man is welcome to seek membership in the Fraternity. This policy . . . should not be interpreted as changing the all-male character of the Fraternity or as a waiver of the Fraternity's exempt status under Title IX."). Unlike Sigma Phi Epsilon (hereinafter, generally, "SigEp"), the fictional fraternity EPS does not have a clear policy defining male or female for membership purposes and signifies what a fraternity or sorority should *not* do. *See infra* notes 14, 20 and accompanying text. Throughout this note I reference many aspects of SigEp's policies, creed, and values as a model example of a fraternal organization and a fraternal organization's clear and articulate membership policy defining male based on gender identity. Moore, *supra* note 9; *see infra* notes 9–10 and accompanying text.

10. Oscar E. Draper, *Our Creed*, SIGMA PHI EPSILON, <https://www.sigep.org/about/history-and-facts/our-ritual/our-creed/> (last visited Dec. 17, 2018) (examining Sigma Phi Epsilon's creed of Virtue, Diligence, and Brotherly Love stating, "I believe that Brotherly Love must be given in order to be received, and that it cannot exist without triumph of the principles of Virtue and Diligence, for these are essential parts of it.").

11. *History & Facts*, SIGMA PHI EPSILON, <https://sigep.org/about/history-and-facts/> (last visited Mar. 14, 2019) ("Throughout the decades, the men of Sigma Phi Epsilon have practiced their values and embraced the stated desire of the Founders, 'This Fraternity will be different.'").

12. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 708 n.3 (D. Md. 2018) (using the term birth-sex "to refer to the gender designations [as male or female] made at birth" and noting "birth-sex . . . is usually based on the appearance of the person's external genitalia.").

13. *Sexual Orientation and Gender Identities Definitions*, *supra* note 2 ("Gender identity [is] one's innermost concept of self as male, female, a blend of both or neither [and] how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.").

14. National or international fraternal organizations are amalgamations of smaller, local groups that follow their governance—called chapters—each of which is designated by a special Greek name. *See Fraternity and Sorority Terminology*, *supra* note 6.

fined the membership requirement as a male-only organization.¹⁵ Watson and his friends, dressed in tailored suits, went to all of EPS's recruitment events, and by the end of the week, Watson and his friends knew every single member of the ninety-man chapter.

To extend a bid,¹⁶ EPS's chapter by-laws required that all active members vote on potential new members¹⁷ ("PNM"), and each PNM must receive a "yes" vote from three-fourths of EPS members. After completing its secret voting, EPS issued thirty-three bids and rejected seventy-seven PNMs. On bid day, Watson and his friends visited the Greek Life Office and learned that EPS extended offers to his friends but declined to extend Watson a bid. As Watson left the office, an administrative assistant handed Watson a button with a large red "T."¹⁸ The button labeled him as another transgender victim of a fraternal organization's discriminatory membership practices. EPS's voting process is held in secret, making it impossible to know the reason for Watson's rejection.¹⁹ Various non-discriminatory factors could have played a role.²⁰ But what is clear is the absence of a clearly articulated policy addressing EPS's stance on the admission of transgender members.²¹

Title IX of the Education Amendments of 1972 ("Title IX") prevents discrimination on the basis of sex in all levels of education.²² What exactly "sex" means for discriminatory purposes—and, particularly, a person's

15. Stevie Tran, *Transgender Membership and Title IX*, FRATERNAL L., Nov. 2013, at 4, 5 ("Most organizations do not define the terms 'male,' 'man,' or 'woman' in their documents . . . creat[ing] confusion for potential new members who are transgender [and who are legally recognized as female but identify as male].").

16. A bid is "[a] formal invitation to membership in a particular fraternity or sorority." *Fraternity and Sorority Terminology*, *supra* note 6.

17. A potential new member is a college student "who is participating in formal recruitment." *Id.*

18. *See, e.g., Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) ("Adopting [a policy requiring transgender students to use single-user facilities] would very publicly brand all transgender students with a scarlet letter 'T,' and they should not have to endure that as the price of attending their public school.").

19. *But see Bates v. City of Little Rock*, 361 U.S. 516, 520–28 (1960) (holding that "the right of association" prevented cities from compelling the disclosure of membership lists by only showing a subordinating interest).

20. *Nance v. Rowan-Salisbury Bd. of Educ.*, 336 F. Supp. 3d 593, 593 (M.D.N.C. 2019) (granting defendants' motion to dismiss for failure to state a claim because the allegations were not cognizable under Title IX and, even if they were, Plaintiffs failed to allege deliberate indifference).

21. The question remains how one would show deliberate indifference if he or she does not know the reason for the denial. Man-or-male and woman-or-female are not defined in a given organization's policy, but, for transparency, they should be made to define these terms. Tran, *supra* note 15, at 5.

22. 20 U.S.C.A. § 1681(a) (Westlaw through Pub. L. No. 116-56).

transgender status—has not been made clear.²³ The statute, however, has a carve-out for traditionally single-sex social clubs²⁴ and has made clear that fraternities and sororities are not bound by Title IX.²⁵ This raises some issues. For example, what protections are offered to transgender students, such as Watson, who are victimized by the discriminatory practices of a fraternal organization? And can fraternities and sororities offer membership to transgender students without jeopardizing their single-sex status?²⁶ Currently, no legal guidance exists to inform an organization’s ability to offer inclusivity while maintaining single-sex status.²⁷ This lack of guidance insulates organizations and allows them to remain static on the inclusion of students whose gender identities do not adhere to traditional male and female distinctions.²⁸ Some fraternities and sororities, however, have implemented proactive policies that guarantee students are not discriminated against based on their gender identities.²⁹ Public and private universities have adopted university policies that define discrimination on the basis of sex to include gender identity.³⁰ Other universities have adopted “all-comers” policies, which require RSOs across the university to grant membership to all

23. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 & n.33 (W.D. Pa. 2017); see *infra* Section II.B.

24. § 1681(a)(6) (Westlaw).

25. Aivi Nguyen, *How Much Power Does a Higher Ed Institution Have over Including Transgender Students in Greek Life?*, CAMPUS PRIDE (Dec. 23, 2016), <https://www.campuspride.org/resources/how-much-power-does-a-higher-ed-institution-have/> (“[T]here is a carve-out for fraternities and sororities, meaning fraternities that allow only men as members and sororities that allow only women will not be in violation of Title IX.”).

26. Tran, *supra* note 15, at 4 (“Some organizations have interpreted Title IX’s . . . language as a requirement that they remain single sex and that they take a strong stance against inclusion of anyone who may potentially violate their single-sex status, especially transgender members.”).

27. *Id.*; see, e.g., Stevie Tran, *Embracing Our Values: Title IX, the “Single-Sex Exemption,” and Fraternities’ Inclusion of Transgender Members*, 41 HOFSTRA L. REV. 503, 518–19 (2012) (“As a consequence of the lack of legal clarity, transgender individuals . . . experience complications when seeking membership in a fraternity.”).

28. Tran, *supra* note 15; see, e.g., CATHERINE E. LHAMON & VANITA GUPTA, U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

29. *Trans Inclusion Policy: Key Recommendations for Fraternities and Sororities*, CAMPUS PRIDE (May 9, 2017), <https://www.campuspride.org/resources/trans-inclusion-policy-key-recommendations-for-fraternities-sororities/> (depicting inclusive fraternal policies).

30. *Title IX – UA Little Rock Policy for Sex- and Gender- Based Discrimination, Harassment, and Misconduct Complaints, and Complaint Retaliation*, U. ARK. LITTLE ROCK (Oct. 10, 2018), <https://ualr.edu/policy/home/facstaff/title-ix/> (“The University of Arkansas at Little Rock is committed to providing an environment . . . that is free from . . . discrimination based upon . . . sex, gender, sexual orientation, [and] gender identity.”).

students.³¹ Harvard University in particular has taken a stance by issuing sanctions against students participating in unrecognized single-sex organizations.³² Harvard's new rule and other universities' adoption of all-comers policies have increased the awareness of the need for change in higher education³³ but have also increased the awareness that the future of fraternities and sororities as single sex is uncertain.³⁴

This note addresses the application of Title IX, which prohibits an institution receiving federal funding from treating students differently on the basis of sex in educational programs or activities with a carve-out for the membership practice of single-sex social fraternities and sororities.³⁵ This note argues that: (1) discrimination on the basis of sex under Title IX includes transgender status and gender identity;³⁶ (2) courts should recognize transgender individuals as members of a quasi-suspect class entitled to a heightened level of scrutiny;³⁷ (3) Title IX does not apply to fraternities or sororities, but it applies to the host university receiving federal funding;³⁸ and (4) fraternities and sororities are empowered to make policy changes specifically permitting the inclusion of transgender students in the organizations.³⁹ This note further addresses the impact of strict anti-discrimination policies of host universities on single-sex organizations.⁴⁰

Part II of this note provides background information on the development of Title IX and the legislative history's impact on the exception for single-sex organizations.⁴¹ This part also canvasses different jurisdictions' approaches to defining "sex" under Title IX.⁴² Part II continues by addressing the three most influential anti-discriminatory laws that hinge on the definition of "sex," including Title IX, Title VII of the Civil Rights Act of 1964

31. See, e.g., *Nondiscrimination FAQ*, VAND. U., <https://www.vanderbilt.edu/about/nondiscrimination/> (last visited Mar. 12, 2019).

32. See, e.g., HARV. UNIV., HARVARD COLLEGE HANDBOOK FOR STUDENTS 2018–19 at 132 (2019), <https://handbook.fas.harvard.edu>.

33. Timothy M. Burke, *Two Lawsuits Filed Against Harvard*, 158 FRATERNAL L., Jan. 2019, at 19; Daniel J. McCarthy, *Ninth Circuit Upholds SDSU's Nondiscrimination Policy*, 117 FRATERNAL L., Sept. 2011, at 5 ("all-comers").

34. Burke, *supra* note 33 ("There can be little doubt that these two cases are of major importance and their outcomes may well impact far beyond how Harvard attempts to regulate Greek Organizations.").

35. 20 U.S.C.A. § 1681(a) (Westlaw through Pub. L. No. 116-56).

36. See *infra* Section III.A.1.

37. See *infra* Section III.A.2.

38. See *infra* Section III.B.

39. Nathan Arrowsmith & Stevie V. Tran, *Title IX Empowers Fraternities to Include Transgender Members*, ESSENTIALS E-PUB., May 2013, at 1, 2.

40. See *infra* Section III.C.

41. See *infra* Section II.A.

42. See *infra* Section II.B.

(“Title VII”),⁴³ and the Equal Protection Clause (“EPC”) of the Fourteenth Amendment.⁴⁴ Part II further describes the common progressive scheme that defines “sex” to include gender identity and identifies transgender individuals as members of a quasi-suspect class whose disparate treatment should receive a heightened level of constitutional scrutiny.⁴⁵ Part II concludes by articulating three foundational legal pillars upon which fraternities and sororities are established.⁴⁶

Part III argues that Title IX is inapplicable to fraternities and sororities under the first pillar,⁴⁷ and the organizations should create inclusive membership policies based on a student’s gender identity.⁴⁸ This section further addresses the second and third pillars, which are rooted in the Constitution’s First Amendment grant to fraternal organizations⁴⁹—specifically, the freedom of intimate and expressive association.⁵⁰ Finally, Part III urges fraternities and sororities to capitalize on the three pillars and extend membership to transgender individuals by following the modern practices of Title IX, Title VII, and the EPC jurisprudence that are transgender inclusive.⁵¹

II. BACKGROUND

The fight for gender equality gained momentum fifty years ago and inspired the enactment of Title VII, Title IX, and multiple other anti-discrimination laws.⁵² But the fight is not over.⁵³ This section begins with the evolution of Title IX and the birth of the statutory exemption for social fraternities and sororities.⁵⁴ Next, this section addresses the jurisdictional approaches to defining “sex” under Title IX, Title VII, and the EPC.⁵⁵

43. 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 116-56) (“[I]t shall be an unlawful practice for an employer . . . to discriminate against any individual . . . of such individual’s race, color, sex, or national origin.”).

44. U.S. CONST. amend. XIV, § 1.

45. *See infra* Section II.B.3.

46. *See infra* Section II.C.

47. Tran, *supra* note 27, at 517; *see infra* Section III.A.

48. Tran, *supra* note 27, at 517; *see infra* Section III.A.

49. U.S. CONST. amend. I; *see infra* Section III.B.

50. *See infra* Section III.B; *see, e.g.*, Tran, *supra* note 27, at 541.

51. *See infra* Section III.B.

52. *See, e.g.*, 20 U.S.C.A. § 1681(a) (Westlaw through Pub. L. No. 116-56); 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 116-56).

53. Nathan R. Cordle, *Title IX at 45: The Evolution and Impact on LGBTQ+ Rights*, AM. BAR ASS’N (Nov. 2, 2018), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/title-ix-at-45-the-evolution-and-impact-on-lgbtq-rights/.

54. *See infra* Section II.A.

55. *See infra* Section II.B.

A. The Birth of Title IX and the Fraternity/Sorority Exception

“Title IX⁵⁶ . . . had a simple goal: to end sex discrimination in schools that receive federal money.”⁵⁷ Specifically, Congress enacted Title IX to combat a distinct pattern of sex discrimination in schools.⁵⁸ Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,”⁵⁹ including colleges and universities.⁶⁰ In forty-six years, the statute has “evolved into a more powerful tool used to combat other forms of discrimination, harassment, and violence.”⁶¹ This fight, however, has not always had the support of law.⁶²

Case law reveals a debate concerning gender equality in education in terms of the statute’s application to a particular organization, the university as a whole, or the department receiving federal financial support.⁶³ The debate began in 1984 with the Supreme Court’s decision in *Grove City College v. Bell*, which expanded Title IX’s reach to include private universities whose populations include students receiving federally funded scholarships.⁶⁴ The holding, however, limited coverage under Title IX to the institution’s financial aid department.⁶⁵ Many critics of *Grove City College*’s holding believed that the decision gutted Title IX by only requiring it to apply to universities’ financial aid departments receiving direct funds.⁶⁶

56. Education Amendments of 1972, Pub. L. No. 92-318, title IX, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

57. Karen Blumenthal, *The Truth About Title IX*, DAILY BEAST (May 22, 2012), <https://www.thedailybeast.com/the-truth-about-title-ix>.

58. Kendyl L. Green, Note, *Title VII, Title IX, or Both?*, 14 SETON HALL CIR. REV. 1, 5 (2017).

59. 20 U.S.C.A. § 1681(a) (Westlaw through Pub. L. No. 116-56).

60. Green, *supra* note 58.

61. Cordle, *supra* note 53.

62. *See, e.g.*, *Grove City Coll. v. Bell*, 465 U.S. 555, 574–75 (1984); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 67 (1992); *Cohen v. Brown Univ.*, 101 F.3d 155, 187–88 (1st Cir. 1996).

63. *Grove City Coll.*, 465 U.S. at 574.

64. *Id.* at 573–76 (holding that private colleges, originally thought to be excluded from Title IX’s reach, whose students receive federally funded Basic Educational Opportunity Grants, now known as Pell Grants, are subject to Title IX).

65. *Id.* at 574–75.

66. Cordle, *supra* note 53 (“This ruling effectively eliminated Title IX’s application as to . . . educational activities.”); *Gender Equality in Athletics and Sports*, FEMINIST MAJORITY FOUND., <http://www.feminist.org/sports/titleIX.html> (last visited Nov. 5, 2018) (“The U.S. Supreme Court gutted Title IX . . . [and allowed] [o]ther programs, such as athletics, that did not receive federal funds, . . . free to discriminate on the basis of gender.”).

Despite the new limitations placed on Title IX by *Grove City College*, the decision inspired gender equality activists.⁶⁷ Four years later, Congress passed the Civil Rights Restoration Act of 1987,⁶⁸ which nullified the effects of *Grove City College* “by outlawing sex discrimination throughout [the] entire educational institution if any part of the institution received federal funding.”⁶⁹ The expansion of Title IX’s reach to all parts of an education institution increased the success of Title IX in the fight against gender discrimination.⁷⁰ The new law allowed individuals to sue and recover monetary damages for Title IX violations,⁷¹ created gender equality in universities’ athletic programs,⁷² and guaranteed protection against sexual harassment and sexual assault.⁷³ Fraternity and sorority membership, however, is one aspect of the university specifically shielded from Title IX’s reach.⁷⁴

Shortly after its enactment in 1974, “the Department of Health, Education, and Welfare attempted to apply Title IX to fraternities [and sororities].”⁷⁵ Many leaders of the single-sex organizations lobbied to demonstrate the organizational value of single-sex entities and their status as independent single-sex organizations.⁷⁶ To address these issues, Senator Birch Bayh, the principal architect of the new law, “proposed an amendment to Title IX,

67. Cordle, *supra* note 53 (“[T]he victory for Title IX opponents was short-lived.”).

68. 20 U.S.C.A. § 1687 (Westlaw through Pub. L. No. 116-56).

69. *Gender Equality in Athletics and Sports*, *supra* note 66; see also Hayley Macon et al., *Introduction to Title IX*, 1 GEO. J. GENDER & L. 417, 419 (2000) (“Within Title IX, Congress created a public remedy that permits the termination of federal funds when an institution providing educational programs discriminates against an individual on the basis of sex.”); Cordle, *supra* note 53 (“Essentially, the Act reversed the effect of *Grove City College*, and clarified that entire institutions are covered by Title IX if *any* program or activity within the institution receives federal aid.”).

70. See generally Green, *supra* note 58, at 5–6.

71. *Gwinnett Cty. Pub. Sch.*, 503 U.S. at 67; see also Cordle, *supra* note 53 (“This effectively provided ‘teeth’ to the enforcement of Title IX.”).

72. See generally *Cohen*, 101 F.3d at 178 (providing equality for athletic programs that are separated on the basis of sex).

73. See *Davis v. Monroe Cty. Bd. of Educ.* 526 U.S. 629, 648 (1999) (determining that sexual harassment is covered under Title IX).

74. 20 U.S.C. § 1681 (1972), amended by 20 U.S.C. § 1681(a)(6)(B) (1974).

75. Tran, *supra* note 15, at 4; see *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp. 2d 374, 388 (E.D.N.Y. 2006) (“Legislative history reveals that the exception for fraternities, sororities, and other traditionally single-sex organizations was originally not included in Title IX of the Education Amendment.”) *vacated*, 502 F.3d 136 (2d Cir. 2007).

76. *Educational Support for: Unanimous Agreement X: Protecting the Right of NPC Members to Remain Women-Only Organizations*, NAT’L PANHELLENIC CONF., Nov. 2018, at 1, <https://www.npcwomen.org/wp-content/uploads/sites/2037/2017/10/Resolved-to-Educate-Unanimous-Agreement-X.pdf> [hereinafter Unanimous Agreement] (National Panhellenic Conference (NPC) is an organization made up of twenty-six national sororities, an all woman’s group, that promoted the need for single-sex status as an organization.).

exempting the membership practices of fraternal organizations from the statute's reach."⁷⁷ Senator Bayh unambiguously stated that:

[I]t was not my intent, and I do not believe it was the intent of Congress that [T]itle IX be extended to organizations such as social fraternities and sororities. . . . I think it is important to point out that this exemption covers only social Greek organizations; it does not apply to professional fraternities or societies whose admissions practices might have a discriminatory effect upon the future career opportunities of a woman. (citation omitted) [f]raternal organizations have been a tradition in the country for over 200 years . . . [and] must not be destroyed in misdirected effort to apply Title IX.⁷⁸

In 1974, Congress adopted the amendment that carved out fraternities and sororities.⁷⁹ The language of the amendment articulated an unambiguous exemption for social fraternities, social sororities, and a finite number of other traditionally single-sex organizations from Title IX's scope.⁸⁰ However, as written, legal scholars have argued that "Congress specifically designated Title IX to bind the *university*, not the fraternal organization."⁸¹

B. The "Million Dollar" Question: What is "Sex"?

Title IX's ban on sex-based discrimination created a guarantee to equal opportunity for women in the educational system.⁸² However, as society has moved beyond defining "sex" as meaning male or female, the question arises as to whether "sex" includes gender identity.⁸³ In its final form, Title IX

77. Tran, *supra* note 15, at 4.

78. 120 CONG. REC. 39,992–93 (1974); *see also Chi Iota Colony*, 443 F. Supp. 2d at 388–89 (quoting Senator Birch Bayh) ("But § 1681 does not apply to the membership practices of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education."); Tran, *supra* note 27, at 524.

79. 20 U.S.C. § 1681 (1972), *amended by* 20 U.S.C. § 1681(a)(6)(B) (1974); Nathan Arrowsmith & Stevie Tran, *Redefining Fraternity*, PERSPECTIVE, Aug. 20, 2018, at 14, 14.

80. *Chi Iota Colony*, 443 F. Supp. 2d at 388 ("Also excluded from [Title IX] are 'the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, [and] Boy Scouts . . . which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.'").

81. Arrowsmith & Tran, *supra* note 39, at 1; *see infra* discussion Section III.B; *see also* NAT'L PANHELLENIC CONFERENCE, NPC GENDER IDENTITY STUDY GROUP 13 (2017) <https://www.npcwomen.org/wp-content/uploads/sites/2037/2017/11/Branded-Gender-Identity-August-2017.pdf>.

82. *See* KARLA SCHULTZ, "ON THE BASIS OF SEX . . . ": TITLE IX COMPLIANCE IN A TIME OF EVOLVING LEGAL INTERPRETATIONS OF "SEX" 1 (2017).

83. *Id.* (including females, males, and transgender individuals).

was “established as an anti-discrimination measure guaranteeing that no one would be excluded from federally assisted programs and activities regardless of gender.”⁸⁴ This inclusive concept of gender discrimination gives rise to the “million dollar” question⁸⁵ of whether Title IX’s protection against sex discrimination affords protection to members of the transgender community.⁸⁶

Many courts have weighed in on the issue, but the Supreme Court has yet to give a binding answer to the question.⁸⁷ Changes in presidential administrations in the last decade added to this lack of clarity.⁸⁸ Because there is little guidance from the Court, each jurisdiction has answered this question for itself.⁸⁹ This has resulted in the circuit courts being split on whether to define “sex” in terms of Title IX violations as sex assigned at birth⁹⁰ or in a more encompassing manner to include gender identity.⁹¹

1. The Lack of Clarity Has Created a Circuit Court Split: “Sex” v. “Gender”

There is no uniform definition of “sex” as applied to discrimination claims under Title IX.⁹² Because the words “sex” and “gender” are common-

84. Michael Lancaster, *Intercollegiate Athletics and Title IX*, ATHLETIC NETWORK, <https://www.athleticscholarships.net/title-ix-college-athletics-9.htm> (last visited Nov. 3, 2018).

85. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 n.33 (W.D. Pa. 2017). In *Evancho*, the United States District Court for the Western District of Pennsylvania articulated its appreciation for district counsel’s candor at oral argument for recognizing that the “million dollar” questions are: what is the “applicable Equal Protection standard as to classification based on transgender status” and what the term “sex” means for the purpose of Title IX. *Id.* at 286.

86. See SCHULTZ, *supra* note 82, at 16. The case law suggests that the judicial approach to interpreting anti-discrimination statutes requires courts “to examine more expressly what is meant by ‘sex’ under Title IX.” *Id.* “Does ‘sex’ mean only biological or birth sex? Does it contemplate gender (e.g. traits that are stereotypically associated with being male or female)? Or does it include sexual orientation, gender-identity, transgender status, and, if so, when?” *Id.*

87. The Supreme Court of the United States has not addressed the precise issue of what “sex” means in terms of Title IX’s application to discrimination claims and the determination has been left to the discretion of the district courts. See *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 671 n.14 (W.D. Pa. 2015); see also, *Evancho*, 237 F. Supp. 3d at 286.

88. See Timothy M. Burke, *More Uncertainty for Transgender Rights*, 147 FRATERNAL L., Mar. 2017, at 2, 2; see *infra* notes 175–82 and accompanying text.

89. *Johnston*, 97 F. Supp. 3d at 671 n.14.

90. *Id.* at 671 (holding “sex” for Title IX purposes is based on birth-sex, not gender identity).

91. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50 (7th Cir. 2017) (noting that “sex” for Title IX purposes is based on gender identity, and thus includes transgender status).

92. See *id.* at 1049; *Johnston*, 97 F. Supp. 3d at 671–72.

ly misused interchangeably,⁹³ a circuit split exists on the legal meaning of “sex.”⁹⁴ Courts have interpreted “sex” for Title IX purposes as having one of two meanings.⁹⁵ The first and most historical definition of “sex” is based on a person’s genitalia at birth.⁹⁶ The second category broadly defines “sex” to include gender.⁹⁷ “Determination of gender, unlike the determination of ‘birth-sex,’ is based on multiple factors.”⁹⁸ The factors include: “‘chromosomes, hormone levels, internal and external reproductive organs, and gender identity,’ with gender identity being the ‘primary determinant.’”⁹⁹ The application of the second category’s factors results in a broader understanding of “sex” that logically includes transgender status,¹⁰⁰ because by definition a transgender individual has a gender identity that is different from the individual’s birth-sex.¹⁰¹ Despite the two definitional approaches, neither offers a binding answer to the “million dollar” question of what encompasses “sex.”¹⁰²

The courts’ lack of uniformity in defining “sex” under Title IX provides an opportunity to review how courts have interpreted other civil rights laws as a source of guidance.¹⁰³ The three most developed areas of the law

93. SCHULTZ, *supra* note 82, at 2 (“The Supreme Court has routinely, and without explanation, used the terms sex and gender interchangeably.”); *see, e.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

94. Adrienne Spiegel, *Supreme Court Grants Cert in Title VII Sexual Orientation and Gender Identity Cases*, ONLABOR (Apr. 22, 2019), <https://onlabor.org/supreme-court-grants-cert-in-title-vii-sexual-orientation-and-gender-identity-cases>. The Supreme Court, however, granted certiorari in three cases and will finally determine whether Title VII’s prohibition on discrimination “because of sex” includes discrimination on the basis of a person’s sexual orientation or a person’s gender identity. *Bostock v. Clayton Cty. Bd. of Comm’rs.*, 723 F. App’x 964, (11th Cir. 2018), *cert. granted* 139 S. Ct. 1599 (2019); *Altitude Express, Inc. v. Zarda*, 883 F.3d 100, (2d Cir. 2018), *cert. granted* 139 S. Ct. 1599 (2019); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, (6th Cir. 2018), *cert. granted* 139 S. Ct. 1599 (2019); Accordingly, the Supreme Court’s definitive answer on Title VII’s “scope would likely inform judicial interpretation of the similarly worded prohibition against ‘sex’ discrimination in Title IX.” Christine J. Back & Jared P. Cole, CONG. RESEARCH SERV., LSB10229, TITLE IX: WHO DETERMINES THE LEGAL MEANING OF “SEX”? 1 (2018).

95. *See Whitaker*, 858 F.3d at 1050 (gender identity); *Johnston*, 97 F. Supp. 3d at 671 (birth-sex).

96. *Adams v. Sch. Bd.*, 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018) (birth-sex).

97. *See id.* (including gender identity).

98. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 708 (D. Md. 2018).

99. *Id.*

100. *Adams*, 318 F. Supp. 3d at 1298; *M.A.B.*, 286 F. Supp. 3d at 708.

101. *Adams*, 318 F. Supp. 3d at 1299 (“A transgender individual is someone who ‘consistently, persistently, and insistentlly’ identifies as a gender different than the sex they were assigned at birth.”). Thus, a transgender individual by definition has a gender identity that is different from the individual’s assigned sex. *See, e.g., M.A.B.*, 286 F. Supp. 3d at 714.

102. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 n.33 (W.D. Pa. 2017).

103. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 746 (E.D. Va. 2018).

that rely on the term “sex” in the discrimination context are Title IX, Title VII, and the EPC.¹⁰⁴ A Title IX claim hinges on the definition of “sex” because sex determines if a violation has occurred.¹⁰⁵ Thus, it is important to determine if a plaintiff’s transgender status is encompassed within the definition of “sex” because it is the key to whether a transgender person will have a cause of action under Title IX.¹⁰⁶ Title VII is one of the most influential areas of civil rights law and provides significant guidance on how to define “sex” for Title IX purposes.¹⁰⁷ The EPC does not particularly give guidance to the definition of “sex” in terms of Title IX.¹⁰⁸ The lower courts’ interpretations of the EPC, however, have explored the relationship between sex, gender, and what classification is legally given to transgender individuals because gender is a protected class that receives a heightened level of judicial review under this Clause.¹⁰⁹

2. *The Hinging Effect of Defining “Sex”: Title IX, Title VII, & the Equal Protection Clause*

To state a Title IX claim, a plaintiff must allege that: “(1) he or she was excluded from participation in an educational program because of his or her sex; (2) that the educational institution was receiving federal financial assistance at the time of his or her exclusion; and (3) that the improper discrimination caused the plaintiff harm.”¹¹⁰ The cause of action hinges on what “sex” means, but as denoted above, the Supreme Court’s lack of an answer leads to reliance on other civil rights laws for guidance.¹¹¹

a. Title VII of the Civil Rights Act of 1964’s interpretation of “sex”

To resolve ambiguities and for guidance in interpreting “sex” in Title IX discrimination claims, lower courts look at interpretations of “sex” in Title VII employment discrimination claims.¹¹² This makes sense.¹¹³ Title IX

104. NAT’L CTR. TRANSGENDER EQUALITY, LEGAL DEVELOPMENTS ON GENDER IDENTITY DISCRIMINATION AS SEX DISCRIMINATION 1 (2018).

105. *Grimm*, 302 F. Supp. 3d at 746.

106. *Id.*

107. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 713 (D. Md. 2018).

108. *Id.*

109. *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011); *M.A.B.*, 286 F. Supp. 3d at 721.

110. *Grimm*, 302 F. Supp. 3d at 747.

111. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296 (W.D. Pa. 2017).

112. *Grimm*, 302 F. Supp. 3d at 744; *M.A.B.*, 286 F. Supp. 3d at 713; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047–49 (7th Cir. 2017).

protects students and employees in all levels of academia, and Title VII protects employees in the workforce.¹¹⁴ “The ‘on the basis of sex’ language of Title IX is similar, but not identical, to the ‘because of’ and ‘based on’ one’s sex (and race, color, national origin, and religion) language found in Title VII.”¹¹⁵ To determine the meaning of sex discrimination for purposes of Title IX, federal courts have routinely looked to the parallel and narrow judicial interpretations of Title VII.¹¹⁶ Specifically, “[g]iven the lack of definition within . . . [Title IX], and recognizing that a number of courts have struggled with this exact question,” the fact that “the term ‘sex’ as used in Title IX is ambiguous as applied to transgender students” requires courts to look to Title VII for guidance.¹¹⁷

In evaluating Title VII case law, however, there is no definitive answer on whether discrimination on the basis of sex includes transgender individuals, because, like Title IX,¹¹⁸ the Supreme Court has not addressed the issue directly.¹¹⁹ Various lower courts have either not addressed the issue or are split on whether transgender falls under Title VII’s definition of sex.¹²⁰ Despite the Supreme Court’s inaction in addressing the specific issue, the “Court has constructed a framework for addressing sex discrimination

113. Tina Sciocchetti & Zachary C. Osinski, *Uneven Recognition of Gender Identity Discrimination Claims Under Title VII and Title IX*, NIXON PEABODY (Apr. 9, 2018), <https://www.nixonpeabody.com/-/media/Files/Alerts/2018-April/uneven-recognition-of-gender-identity-discrimination-042018.ashx> (“Courts rulings concerning Title VII’s application in cases . . . will, in turn, affect how courts view similar Title IX claims given the parity with which courts typically interpret ‘sex discrimination’ under both federal laws.”).

114. Green, *supra* note 58, at 3.

115. SCHULTZ, *supra* note 82, at 2. Specifically, Title IX is written as a broad prohibition on discrimination followed by narrow exceptions. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Title VII, however, details the specific conduct that constitutes discrimination. *Id.*

116. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296 (W.D. Pa. 2017) (“As to the interpretation of Title IX, its prohibition of discrimination based on sex is generally viewed as being parallel to the similar proscriptions contained in Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of ‘sex’ in the employment context. These statutes’ [Title VII and Title XI] prohibitions on sex discrimination are analogous.”).

117. *Adams v. Sch. Bd.*, 318 F. Supp. 3d 1293, 1321 (M.D. Fla. 2018) (birth-sex).

118. *See supra* Section II.B.1.

119. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 713 (D. Md. 2018) (“The Supreme Court has never addressed the issue.”). But, as noted previously, the Court may once and for all answer the question. *See supra* authority cited at note 92 and accompanying text.

120. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 744 (E.D. Va. 2018); *see also* Sam Williamson, G.G. Ex Rel. *Grimm v. Gloucester County School Board: Broadening Title IX’s Protections for Transgender Students*, Note, 76 MD. L. REV. 1102, 1119 (2017).

claims brought by individuals who fail to conform to social expectations for their gender group.”¹²¹

Early Title VII case law relied on the plain meaning of “sex” to mean biological male or biological female.¹²² The court noted “if the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”¹²³ Justice Scalia, however, writing for a unanimous Supreme Court, notably observed that Congress intended to strike at the “entire spectrum” of discrimination and held Title VII bars all sex-based classifications.¹²⁴

In the late 1980s, the lower courts’ approaches to anti-discrimination statutes evolved¹²⁵ and began to interpret “sex” for Title VII purposes to go beyond birth-sex.¹²⁶ For example, in *Price Waterhouse v. Hopkins*,¹²⁷ “the Court found that failure to promote a cisgender woman because she was too ‘macho’ could constitute sex discrimination”¹²⁸ based on sex stereotyping, thus creating a Title VII framework that recognizes sex discrimination claims brought by individuals who fail to conform to social or gender norms.¹²⁹ The First, Second, Third, Fourth, Seventh, and Ninth Circuits recognize that a gender-stereotyping allegation “generally is actionable sex discrimination under Title VII”¹³⁰ based on the logic of *Price Waterhouse*.¹³¹

Other circuits disagree, noting that the sex stereotyping framework creates difficulty for courts distinguishing between discrimination on the basis

121. *Grimm*, 302 F. Supp. 3d at 744 (stating that the Supreme Court created an expansive sex stereotyping framework and that “the *Price Waterhouse* Court agreed that Title VII barred discrimination not only based on a plaintiff’s gender, but based on ‘sex stereotyping’ because the plaintiff had failed to act in accordance with gender stereotypes associated with women [or men].”).

122. *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that discrimination under Title VII does not extend to the transitional status of a person but is based on the individual’s biological sex; arguably overruled by *Price Waterhouse*).

123. *Id.* at 1087 (discussing the legislative history of Title VII and the last-minute inclusion of sex).

124. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–80 (1998) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018).

125. SCHULTZ, *supra* note 82, at 2.

126. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296 (W.D. Pa. 2017).

127. 490 U.S. 228, 235 (1989).

128. *Williamson*, *supra* note 120, at 1112–13.

129. *Price Waterhouse*, 490 U.S. at 251; *see, e.g., Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351–52 (7th Cir. 2017); *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 200–01 (2d Cir. 2017); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999).

130. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 745 (E.D. Va. 2018).

131. *See supra* note 129 and accompanying text.

of sex stereotyping and transsexuality,¹³² “when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, . . . is unprotected by Title VII.”¹³³ The circuits that follow this logic base their holdings on precedent that predates *Price Waterhouse*.¹³⁴ Courts have noted that *Price Waterhouse*’s holding, “by its own terms, took an expansive view as to the forms of sex discrimination that Title VII was meant to reach, expressly leaving open the possibility of other forms of gender stereotyping.”¹³⁵ For instance, numerous courts have held that Title VII’s prohibition of discrimination on the basis of sex stereotyping is expansive and includes discrimination based on a person’s transitioning status,¹³⁶ gender nonconformity,¹³⁷ and sexual orientation.¹³⁸

As society evolves, it appears that courts are beginning to establish a modern, expansive view of Title VII that includes discrimination on the basis of transgender status, because “by definition, transgender persons do not conform to gender stereotypes.”¹³⁹ “Even though the law is making progress, the long line of cases addressing discrimination against transgender employees does not provide a ‘stable basis’ to protect against discrimination.”¹⁴⁰ Legal scholars agree that there is a “judicial consensus that Title IX’s ‘because of sex’ language, as with Title VII, incorporates discrimination based on gender nonconformity and sex stereotyping.”¹⁴¹ The First, Fourth, Sixth, Ninth, and Eleventh Circuits made progressive court rulings that assist in the fight against gender discrimination by providing a thorough analysis of the reasons discrimination on the basis of transgender status is per se sex dis-

132. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 714, n.7 (D. Md. 2018) (“The only Courts of Appeals that arguably held to the contrary are the Seventh, Eighth, and Tenth Circuits’ rulings that transgender status, taken alone, is not entitled to Title VII protections.”); see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

133. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

134. See *M.A.B.*, 286 F. Supp. 3d at 714–15, 715 n.7.

135. *Grimm*, 302 F. Supp. 3d at 744.

136. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (discussing various findings related to Title VII, but ultimately addressing discrimination under the Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016).

137. *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 891 (11th Cir. 2016); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x 492, 493 (9th Cir. 2009).

138. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296 (W.D. Pa. 2017).

139. *M.A.B.*, 286 F. Supp. 3d at 714. (quoting *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 787–88 (D. Md. 2014)).

140. *Tran*, *supra* note 27, at 517. Similarly, the case law fails to provide a stable basis for transgender students in the academic setting. See *supra* note 132 and accompanying text.

141. SCHULTZ, *supra* note 82, at 8.

crimination.¹⁴² “However, there is no agreement about whether one’s status as a heterosexual, gay, lesbian, transgender, or bisexual person creates a valid Title IX claim.”¹⁴³ Until Congress acts or the Supreme Court makes a decision on the matter, the precedent established is binding authority only in each individual jurisdiction and merely persuasive authority for the remaining circuits who have either ruled in the alternative or have not addressed the issue thus far.¹⁴⁴ Title VII’s jurisprudence is not a stable basis for protecting transgender individuals from discrimination or answering the “million dollar” question.¹⁴⁵

b. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution’s interpretation of “sex”

Unlike Title VII, the Supreme Court fails to reference the Equal Protection Clause (“EPC”) sex discrimination jurisprudence to interpret “sex” in a cause of action under Title IX.¹⁴⁶ Two circuit courts, however, found a “consistent purpose” underlying a sex-stereotyping theory in *Price Waterhouse* that connects Title IX, Title VII, and the EPC.¹⁴⁷ Regardless, a plaintiff can bring both a Title IX and an EPC claim contemporaneously,¹⁴⁸ and because the Court has not issued guidance on how the law applies to transgender people in either area, it is important to reference the EPC when discussing Title IX jurisprudence.¹⁴⁹

EPC violations hinge on the level of judicial review the claim receives.¹⁵⁰ The EPC provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws”¹⁵¹ and “is essentially

142. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 745–46 (E.D. Va. 2018) (“Accordingly, allegations of gender stereotyping are cognizable Title VII sex discrimination claims and, by extension, cognizable Title IX sex discrimination claims.”).

143. SCHULTZ, *supra* note 82, at 8.

144. *See Grimm*, 302 F. Supp. 3d at 744.

145. Tran, *supra* note 27, at 517.

146. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 718 (D. Md. 2018).

147. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011).

148. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (holding that “Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools or a substitute . . .” and students can bring a Title IX claim and EPC simultaneously).

149. *M.A.B.*, 286 F. Supp. 3d at 719.

150. *Id.* at 718; *see also* Jody Feder, CONG. RESEARCH SERV., RL30253, SEX DISCRIMINATION AND THE UNITED STATES SUPREME COURT: DEVELOPMENTS IN THE LAW I (2018) (“Despite the fact that the Court’s analysis of sex discrimination challenges under the Constitution differs from its analysis of sex discrimination under . . . [Title VII and Title IX], it is apparent that the Court is willing to refine its standard of review under both schemes to accommodate the novel claims.”).

151. U.S. CONST. amend. XIV, § 1.

a direction that all persons similarly situated should be treated alike.”¹⁵² The Court has established a three-tier framework that is used to root out unfair prejudices.¹⁵³ The three-tiered framework includes: (1) rational basis review; (2) heightened or intermediate scrutiny, applied to a quasi-suspect class; and (3) strict scrutiny, applied to a suspect class.¹⁵⁴

Sex is considered a quasi-suspect classification.¹⁵⁵ The Court applies an “intermediate” level of scrutiny to classifications based on sex, “because sex ‘frequently bears no relation to the ability to perform or contribute to society.’”¹⁵⁶ If the Court determines that “sex” includes gender identity, a heightened level of scrutiny should apply in determining if illegal discrimination has occurred on the basis of a person’s transitioning status.¹⁵⁷ But, much like Title IX, the Court offers no guidance to determine whether transgender status is included in its sex discrimination analysis under the EPC.¹⁵⁸ Thus, a split in the lower courts’ interpretations of “sex” exists.¹⁵⁹ The Court recognizes criteria to consider in determining whether a state-classified group of people is entitled to suspect or quasi-suspect class status.¹⁶⁰ The criteria include: “(1) whether the class has historically been subject to discrimination;”¹⁶¹ (2) “whether the class has a defining characteristic that bears a relation to ability to perform or contribute to society;”¹⁶² (3) “whether the class exhibits obvious, immutable, or distinguishing characteristics that define the class as a discrete group;”¹⁶³ and (4) “whether the class is a minority or politically powerless.”¹⁶⁴ Multiple courts have held that transgender individuals

152. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

153. Susannah Pollvogt, *Beyond Suspect Classifications*, 16 U. PA.J. CONST. L. 739, 742 (2014).

154. *Id.*

155. *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973).

156. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 718; *see also* *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that the state bears the burden of demonstrating that its proffered justification for the use of a sex-based classification is “exceedingly persuasive”).

157. Mudasar Khan et al., *Eighteenth Annual Review of Gender and the Law: Annual Review Article: Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 479 (2017).

158. *Id.*

159. *See, e.g., F.V. v. Barron*, 286 F. Supp. 3d 1131, 1146 (D. Idaho 2018) (holding that transgender individuals are subject to a heightened level of scrutiny); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 293 (W.D. Pa. 2017) (same); *M.A.B.*, 286 F. Supp. 3d 704, 722 (quasi-suspect class).

160. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018).

161. *Id.* (citing *Bowen v. Gillard*, 483 U.S. 587, 602 (1987) (“As a historical matter, they have not been subjected to discrimination.”)).

162. *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985)).

163. *Id.* (citing *Bowen*, 483 U.S. at 602).

164. *Id.* (citing *Bowen*, 483 U.S. at 602.)

meet all four factors of the criteria and are therefore part of a quasi-suspect class.¹⁶⁵

In determining if the first prong is met, the lower courts explain that “there is no doubt”¹⁶⁶ that transgender people have been historically subject to discrimination and systemic oppression on the basis of their gender identities.¹⁶⁷ “Transgender people . . . suffer endemic levels of physical and sexual violence, harassment, and discrimination” in education, housing, and healthcare access.¹⁶⁸ The lower courts make it clear that transgender status has no bearing on a transgender individual’s ability to contribute to society, meeting the second prong.¹⁶⁹ “The most controversial of the elements required [for transgender status] to be a suspect class is the argument of immutability.”¹⁷⁰ The courts and the medical community debate whether a person’s transgender status is immutable.¹⁷¹ Courts that have held sex is not immutable reason that sex is based on the traditional concept of birth-sex.¹⁷² Other lower courts, however, give deference to “[e]xperts [that] agree . . . gender identity has a ‘biological component,’ . . . and is deep-seated, set early in life, and *impervious to external influences*.”¹⁷³ Thus, courts reason that being transgender is immutable and encompasses “distinguishing characteristics that define them as a discrete group,” meeting the third prong.¹⁷⁴

165. *Id.* at 749–50; *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015).

166. *Grimm*, 302 F. Supp. 3d at 749 (citing *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051; *M.A.B.*, 286 F. Supp. 3d at 720).

167. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 U.S. Dist. LEXIS 63563, at *31 (W.D. Wash. Apr. 13, 2018), *vacated*, 926 F.3d 1180 (9th Cir. 2018).

168. *Id.* at *31 (“According to a nationwide survey conducted by the National Center for Transgender Equality in 2015, 48 percent of transgender respondents reported being denied equal treatment, verbally harassed, and/or physically attacked in the past year because of being transgender . . .”).

169. *Id.* at *32 (“Discrimination against transgender people clearly is unrelated to their ability to perform and contribute to society.”); *Grimm*, 302 F. Supp. 3d at 749–50.

170. Kylee Reynolds, *Unmuting Immutability: How Strict Scrutiny for Transgender People is Changing the Game*, PENN. ST. J.L. & INT’L AFF.: JLIA BLOG (May 22, 2018), <https://sites.psu.edu/jlia/unmuting-immutability-how-strict-scrutiny-for-transgender-people-is-changing-the-game/> (“While the medical community has argued that being transgender is something that cannot be changed courts have not taken a stance on the issue.”).

171. *Id.*

172. *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Johnston v. Univ. of Pitt.*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015).

173. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *33.

174. *Id.*; *see, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 377 (9th Cir. 1990) (“The real question is whether discrimination on the basis of the class’s distinguishing characteristics amounts to an unfair branding or resort to prejudice, not necessarily whether the characteristic is immutable.”); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

The lower courts have taken a broad approach to determining if transgender people are politically powerless.¹⁷⁵ There has been a visible decrease in political power of transgender individuals in recent years because, as a group, transgender people “lack the relative political power to protect themselves from wrongful discrimination.”¹⁷⁶ The exact number is not known, but it is estimated that “transgender people make up less than one percent of the nation’s adult population.”¹⁷⁷ In *Karnoski v. Trump*, the United States District Court for the Western District of Washington furthers the argument that the transgender community lacks political power by giving deference to the lack of protections afforded to transgender people under state and federal laws.¹⁷⁸ “Fewer than half of the states have laws that explic-

175. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *33.

176. *Id.* at *34.

177. *Id.*

178. *Id.* Specifically, the district court addressed the constitutionality of President Trump’s ban on transgender individuals from serving in the U.S. Military. *Id.*; see Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 7:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>; see Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> (“After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . [t]ransgender individuals to serve in any capacity in the U.S. Military.”). In March 2019, President Trump authorized Secretary of Defense James Mattis to modify this policy based on a forty-four-page report he produced—addressing the medical condition gender dysphoria, rather than transgender status. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 U.S. Dist. LEXIS 63563, at *5 (W.D. Wash. Apr. 13, 2018), *vacated*, 926 F.3d 1180 (9th Cir. 2018) (“With few exceptions, the plan excludes from military service people ‘with a history or diagnosis of gender dysphoria’ and people who ‘require or have undergone gender transition.’ The plan provides that transgender people may serve in the military only if they serve in their ‘biological sex.’”). The district court identified transgender people as a suspect class and held that the ban failed to survive strict scrutiny and was therefore unconstitutional. *Id.* at *6 (striking down Defendants’ motion to dissolve a nationwide preliminary injunction and upholding the injunction preventing the Defendants from taking any action or attempting to exclude transgender individuals from serving in the military). In June 2019, the United States Court of Appeals for the Ninth Circuit, however, *vacated* and *remanded* the decision. *Karnoski v. Trump*, 926 F.3d 1180, 1208 (9th Cir. 2019) (holding that the Defendants demonstrated a significant change in fact by modifying the policy and that the district incorrectly applied strict scrutiny). The Ninth Circuit remanded the decision with the direction to provide deference to the military and to apply an intermediate level of scrutiny stating: “We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.” *Id.* at 1201. The district court had expanded anti-discrimination laws to transgender people by identifying transgender people as a protected class and applying strict scrutiny. *Karnoski*, 2018 U.S. Dist. LEXIS 63563 at *34–35. The circuit court’s decision arguably diminished the protections the district court provided to transgender people. *Karnoski*, 926 F.3d at 1201. Regardless, the Ninth Circuit provided some clarity by directing the district court to apply intermediate scrutiny, thus identifying transgender people as a quasi-suspect class. *Id.* The progressive litigation in *Karnoski v. Trump* further supports the notion that federal and state

itly prohibit discrimination against transgender people.”¹⁷⁹ Much like state laws, the federal laws are limited in the protections afforded to members of the transgender community.¹⁸⁰ The district court in *Karnoski* also noted that the “recent actions by President Trump’s administration have removed many of the limited protections afforded by federal law.”¹⁸¹ These actions, coupled with the fact that “openly transgender people are vastly underrepresented in and have been ‘systematically excluded from the most important institutions of self-governance,’” such as Congress and the federal judiciary, give weight to a finding of transgender people being politically powerless.¹⁸²

Following the lower courts’ jurisprudence and using the four-factor criteria, transgender people constitute a quasi-suspect class.¹⁸³ The courts’ identification of transgender people as an independent quasi-suspect class, however, are not consistent or controlling precedent.¹⁸⁴ But the issue is pressing, and, as lower courts continue to make decisions on the issue, it may lead the Supreme Court to determine what is encompassed within the term “sex”—thus, answering the “million dollar” question.¹⁸⁵

3. *Agencies’ Regulations and Interpretations of “Sex”*

Courts give great deference to other civil rights laws to interpret “sex” for the purposes of Title IX.¹⁸⁶ However, “[t]he statutory language is bold and aspirational . . . Title IX’s particulars have mostly been defined by subsequent agency regulations and interpretations.”¹⁸⁷ The Office of Civil Rights (OCR) of the United States Department of Education (DOE) is the

laws bolster the political powers of the transgender community. *See generally Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019); *Karnoski*, 2018 U.S. Dist. LEXIS 63563 at *34–35. Furthermore, the district court and the Ninth Circuit’s opinions offer an informative analysis on the proper classification for transgender individuals and the correlating standard of review to be applied. *See infra* Section III.A.2.

179. *Karnoski*, 2018 U.S. Dist. LEXIS 63563 at *34.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at *34–35; *see, e.g., M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 719–20 (D. Md. 2018); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

184. *Karnoski*, 2018 U.S. Dist. LEXIS 63563 at *35; *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015).

185. Despite the Supreme Court’s lack of guidance on the issue and the absence of binding precedent, “when an issue is fairly and squarely presented to a District Court, that Court must address it.” *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 286–88 (W.D. Pa. 2017). “Dodging the question is not an option.” *Id.* at 286.

186. *See supra* Section II.B.

187. *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 435 (D. Conn. 2013) (citing *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (stating that Title IX “sketches wide policy lines, leaving the details to regulating agencies.”)).

federal agency tasked with enforcing Title IX and has released multiple Dear Colleague Letters (DCL) and other materials for guidance to determine what “sex” means for purposes of the statute.¹⁸⁸ The DOE, however, has created an inconsistent and shifting interpretational approach in defining “sex” under Title IX.¹⁸⁹ Subsequently, the courts have more carefully and explicitly considered the “legislative history and intent behind Title VII and Title IX, and whether (or how much) judicial deference should be given to federal agencies especially in the absence of formal rulemaking.”¹⁹⁰

Specifically, the DOE caused more confusion in what exactly “sex” encompasses in terms of Title IX by issuing and repealing inconsistent DCLs and guidance materials.¹⁹¹ In 2016, during the Obama Administration, the DCLs expanded Title IX’s protection and “advised [schools] that Title IX required ‘access to sex-segregated facilities based on gender identity.’”¹⁹² In February of 2017, however, the Trump Administration revoked the Obama DCLs on the basis that they “did not ‘contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor undergo any formal public process.’”¹⁹³ The new DCLs give deference to each state to determine what “sex” means and to establish educational policy.¹⁹⁴

According to some legal scholars, the new DCLs seem to be geared toward the use of facilities and do not impact the application of the single-sex exception for fraternities and sororities to include transgender members.¹⁹⁵ The scholars believe the DCLs generated by the Obama Administration constitute the clearest guidance given to fraternities and sororities on membership practices concerning gender identity.¹⁹⁶

The DCLs make clear that “Title IX does not apply to the membership practices of social fraternities and sororities.”¹⁹⁷ The DCLs, however, do not offer a firm answer to whether fraternities and sororities can offer inclusivity

188. *Biediger*, 928 F. Supp. 2d at 435–52; Back & Cole, *supra* note 94, at 3.

189. SCHULTZ, *supra* note 82, at 11; *see, e.g.*, Back & Cole, *supra* note 94, at 3.

190. SCHULTZ, *supra* note 82, at 11.

191. Burke, *supra* note 88, at 3; DEAR COLLEAGUE LETTER, *supra* note 28.

192. Burke, *supra* note 88, at 2.

193. Back & Cole, *supra* note 94, at 3. The Trump administration rescinded the DCLs following the United States District Court for the Northern District of Texas’s decision issuing a nationwide preliminary injunction on the basis that the “guidance was ‘legislative and substantive,’ and thus formal rule making should have occurred prior to the adoption of any such policy.” Burke, *supra* note 88, at 3; *see, e.g.*, *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

194. Burke, *supra* note 88, at 3.

195. *Id.*

196. *Id.*

197. DEAR COLLEAGUE LETTER, *supra* note 28, at 4; Burke, *supra* note 88, at 3.

while maintaining single-sex status.¹⁹⁸ The inapplicability of Title IX to fraternities and sororities and the First Amendment of the United States Constitution establish the three legal foundational pillars discussed below¹⁹⁹ and answer the question for fraternities and sororities.²⁰⁰ The pillars provide fraternal organizations “extensive latitude under Title IX”²⁰¹ to choose how each chapter or national organization defines male or female for membership purposes²⁰² while safeguarding the organization’s single-sex status.²⁰³

C. Three Pillars Establishing the Legal Foundation for Fraternities and Sororities

Legal scholar Stevie Tran articulates three legal pillars that establish the foundation on which fraternities and sororities exist today: (1) the statutory exemption from Title IX, or more accurately referred to as the inapplicability of Title IX to fraternities and sororities; (2) the constitutional rights to *intimate* association; and (3) the constitutional right to *expressive* association.²⁰⁴ The three pillars establish that fraternities and sororities are legally permitted to define the membership criteria of each organization on a national, state, or local level.²⁰⁵ Furthermore, the three pillars establish the freedom of fraternities and sororities to determine how each organization defines “sex” for membership purposes and “whether the inclusion of transgender members aligns with the purpose for which their organizations exist.”²⁰⁶

1. *The First Foundational Pillar: Title IX’s Inapplicability to Social Fraternities and Social Sororities*

Understanding the application of Title IX to the host university and not the specific single-sex organization is critical.²⁰⁷ The plain language of Title IX is misleading and causes members of the fraternal world to believe that Title IX provides legal protection to “single-sex” fraternities and sorori-

198. Burke, *supra* note 88, at 3; Tran, *supra* note 27, at 517.

199. U.S. CONST. amend. I; 20 U.S.C.A. § 1681(a) (Westlaw through Pub. L. No. 116-56).

200. Tran, *supra* note 27, at 527; *see infra* Section II.C.

201. Tran, *supra* note 27, at 525, 527; *see also* Sean P. Callan, *Non-Binary Gender in a Binary System*, 151 FRATERNAL L., Nov. 2017, at 4, 5.

202. Callan, *supra* note 201, at 5.

203. Tran, *supra* note 15, at 5–6; *see supra* Section II.C.; *infra* Section III.B.

204. Tran, *supra* note 27, at 540–41 (emphasis added).

205. *Id.* at 541.

206. *Id.* at 525; Tran, *supra* note 15, at 5.

207. NAT’L PANHELLENIC CONFERENCE, *supra* note 81, at 13.

ties.²⁰⁸ The belief is centered on the idea that fraternal organizations must adhere to the constructs of male-only or female-only to maintain single-sex status.²⁰⁹ However, two scholars, Stevie Tran and Nathan Arrowsmith, argue that, as written, the protections of Title IX do not protect or bind fraternities or sororities.²¹⁰ The scholars' argument rests on the premise that "visibly missing from the language . . . is any mention of 'single sex.'"²¹¹ The provision states that "this section shall not apply to membership practices-- (A) of a social fraternity or social sorority which is exempt from taxation . . . the active membership of which consists primarily of students in attendance at an institution of higher education."²¹² The scholars bolster this argument by addressing the congressional record of Title IX which contains a letter from Department of Defense Secretary Casper Weinberger that states, "[o]bligations under Title IX run to the recipient institution of higher education and not to a fraternal organization unless the organization itself received Federal financial assistance."²¹³

The congressional record and the language of the provision reflect the statutory scheme and prove that Congress designated Title IX to bind each university that receives federal funding and chooses to recognize single-sex fraternities and sororities on that particular campus.²¹⁴ Universities, however, are not required to recognize fraternities or sororities.²¹⁵ "Rather, it allows universities to recognize single-sex social fraternities without risking the university's federal funding" and leaves the fraternal organization unscathed by Title IX's application.²¹⁶ The inapplicability of Title IX to fraternities and sororities does not provide any rights to individuals seeking membership or impose any requirements on the fraternal organizations' member-

208. *Id.*

209. Arrowsmith & Tran, *supra* note 78, at 15.

210. *Id.*

211. *Id.*

212. 20 U.S.C.A. § 1681(a)(6)(A) (Westlaw through Pub. L. No. 116-56).

213. Arrowsmith & Tran, *supra* note 78, at 15.

214. NAT'L PANHELLENIC CONFERENCE, *supra* note 81, at 13; *see also* Arrowsmith & Tran, *supra* note 78, at 15 ("Congress specifically designated Title IX to bind the educational institution, not a fraternal organization. Title IX's statutory scheme focuses solely on the educational institution, in that a college or university that receives federal funding must comply with Title IX throughout the institution and within its education programs and activities . . . [it] permits a college or university to recognize social fraternal organizations without the risking loss of federal funds.").

215. NAT'L PANHELLENIC CONFERENCE, *supra* note 81, at 13 (stating that the 2016 DCL confirms that Title IX applies to the host university and not the fraternal organization). Despite President Trump's repeal of the 2016 DCLs, the DCLs are the only guidance fraternal organizations have received in terms of transgender membership. *Id.*

216. *Id.*

ship practices.²¹⁷ Title IX's inapplicability, however, is only the first foundational pillar that supports today's fraternal organizations.²¹⁸

2. *The Second and Third Foundational Pillars: The First Amendment Right to Intimate Associational Relationships and Expressive Associational Relationships*

The First Amendment of the United States Constitution establishes the freedom of association.²¹⁹ The associational freedoms grant fraternities and sororities the right to discriminate in the fraternal organizations' membership practices.²²⁰ The associational rights are the freedom of *intimate* associational relationships and *expressive* associational relationships.²²¹ This establishes the second and third foundational pillars.²²² The two associational freedoms are not explicitly set out in the First Amendment,²²³ but the "Court has held that such associations are 'central to our constitutional scheme' and are 'a fundamental element of liberty protected by the Bill of Rights.'"²²⁴ The Court established corresponding frameworks to determine whether a fraternal organization meets the associational status that affords it First Amendment protections.²²⁵ "To determine whether an associational relationship is entitled to constitutional protection, courts assess, 'where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.'"²²⁶

The second legal foundational pillar afforded to fraternities and sororities is the right to intimate associations.²²⁷ The right to intimate associations is deeply rooted in the Bill of Rights and is an "element of personal liberty"²²⁸ and "human relationships [that] must be secured against undue intru-

217. Arrowsmith & Tran, *supra* note 79, at 16.

218. Tran, *supra* note 29, at 540–41.

219. U.S. CONST. amend. I; *see also* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958) (recognizing the right to expressive association).

220. Arrowsmith & Tran, *supra* note 79, at 16.

221. *Id.*

222. Tran, *supra* note 27, at 540–41.

223. *See, e.g.*, U.S. CONST. amend. I; Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (recognizing the right to intimate association); NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958) (recognizing the right to expressive association); Timothy M. Burke, *Even the Unpopular Have Associational Rights*, 125 FRATERNAL L., Nov. 2017, at 3.

224. Tran, *supra* note 27, at 541 ((quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (establishing the framework for intimate associational rights); *Boy Scouts of Am. v. Dale*, 540 U.S. 640, 659 (2000) (establishing the framework for expressive associational rights)).

225. Arrowsmith & Tran, *supra* note 79, at 16.

226. *Id.* (citing *Roberts*, 468 U.S. at 618).

227. Tran, *supra* note 27, at 541.

228. *Roberts*, 468 U.S. at 618.

sion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."²²⁹ The Court established factors, commonly known as the *Roberts* test,²³⁰ to "determin[e] if the relationship between an organization's members is sufficiently intimate includ[ing]: 'the organization's size, purpose, policies, level of selectivity, 'congeniality' among members, and 'other characteristics that may in a particular case be pertinent.'"²³¹ For an organization to successfully claim the right to intimate association the court must determine whether the organization is relatively small in size, fostering an intimate relationship that resembles the characteristics of a family,²³² and whether the organization safeguards the relationship by "carrying on their activities in an atmosphere of privacy."²³³

Distinguishing intimate associations, the Court established the freedom of expressive association, which is the third and final foundational pillar supporting fraternal organizations.²³⁴ Expressive associations are protected by the First Amendment to allow groups to engage in "speech, assembly, petitioning for redress of grievances, and the exercise of religion."²³⁵ The Court noted that the freedom of association "plainly presupposes a freedom not to associate."²³⁶ To "[i]nsist[] that an organization embrace unwelcome members directly and immediately affects associational rights"²³⁷ but only if "accept[ing] certain members . . . impair[s] the ability of the group to express those views, and only those views, that it intends to express."²³⁸ Expressive associational rights are implicated if the forced inclusion of unwelcomed members impairs the intended views and messages of the group.²³⁹

The first question that must be asked is whether the organization is involved in some form of expressive activity.²⁴⁰ The Court has cautioned that

229. *Id.* at 617–18.

230. *Id.*; NAT'L PANHELLENIC CONFERENCE, *supra* note 81, at 9 ("For the Jaycees, the local chapters could be quite large with few criteria for membership, generally limited only by age and sex. The central activities among members were open to strangers. The Court concluded that the 'chapters lack the distinctive characteristics that might afford constitutional protection to . . . exclude women.'") (quoting *Roberts*, 468 U.S. at 621).

231. Arrowsmith & Tran, *supra* note 79, at 16 (citing *Roberts*, 468 U.S. at 621).

232. *Roberts*, 468 U.S. at 619–21.

233. Arrowsmith & Tran, *supra* note 79, at 16 (quoting *Roberts*, 468 U.S. at 621).

234. Tran, *supra* note 27, at 540–41.

235. *Roberts*, 468 U.S. at 618; *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 678 (2000).

236. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 680 (2010) (quoting *Roberts*, 468 U.S. at 623).

237. *Id.* (quoting *Dale*, 540 U.S. at 659).

238. Arrowsmith & Tran, *supra* note 79, at 17 (quoting *Dale*, 540 U.S. at 648) (quotation marks omitted).

239. *Dale*, 540 U.S. at 648.

240. Arrowsmith & Tran, *supra* note 79, at 17.

“[i]t is possible to find some kernel of expression in almost every activity a person undertakes,”²⁴¹ but the activity must be sufficient to bring it within the protections of the First Amendment.²⁴² The organization’s creed, guidelines, constitution, or bylaws can provide the expressive message;²⁴³ the group does not have to advocate or “trumpet its views from the housetops” to engage in protected expression.²⁴⁴ Types of “activities that may bear on a group’s classification as an expressive association include: community service,²⁴⁵ ‘transmit[ting] . . . a system of values,’²⁴⁶ and ‘civic, charitable, lobbying, [or] fundraising’²⁴⁷ activities.”²⁴⁸ Once a court determines that the activity is expressive in nature, it must look at whether the government’s action of requiring the group to accept the person as a member impermissibly infringes on the organization’s expressive message.²⁴⁹

The Court has never answered the question of whether a fraternity or sorority qualifies as an intimate or expressive association.²⁵⁰ Two lower appellate courts, however, addressed the issue and demonstrate that the two pillars may be perilous.²⁵¹ In *Pi Lambda Phi Fraternity v. University of Pittsburgh*, the fraternity claimed that the University’s failure to recognize its local chapter violated the fraternity’s intimate and expressive association rights.²⁵² The U.S. Court of Appeals for the Third Circuit applied the *Roberts* test and held that the fraternity is “not the type of association that warrants constitutional protection as an intimate [or expressive] association.”²⁵³ In *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City of New York*²⁵⁴ the fraternity claimed that the University’s anti-discrimination policy infringed

241. *City of Dallas v. Stranglin*, 490 U.S. 19, 25 (1989).

242. *Id.*

243. *Tran*, *supra* note 15, at 5.

244. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp. 2d 374, 391 (E.D.N.Y. 2006), *vacated*, 502 F.3d 136 (2d Cir. 2007) (quoting *Dale*, 540 U.S. at 656).

245. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

246. *Dale*, 530 U.S. at 650.

247. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984).

248. *Chi Iota Colony*, 443 F. Supp. 2d at 391.

249. *Arrowsmith & Tran*, *supra* note 79, at 18 (citing *Rotary Club of Duarte*, 481 U.S. at 549).

250. *Id.* at 17.

251. *See Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438–39 (3d Cir. 2000); *Chi Iota Colony*, 443 F. Supp. 2d at 391, *vacated*, 502 F.3d 136 (2d Cir. 2007).

252. *Id.* at 440.

253. *Id.* at 442; *Arrowsmith & Tran*, *supra* note 79, at 17 (“The court held that the chapter did not meet intimate or expressive association because the chapter was (1) ‘not a particularly small association,’ (2) was ‘not particularly selective in whom it admitted,’ (3) ‘the national organization encourages it chapters to recruit new members aggressively so as to continue the growth of the organizations,’ and (4) the chapter ‘invites members of the public into its house for social activities and participates in many public University events.’”).

254. 502 F.3d 136 (2d Cir. 2007).

on the organization's right of intimate association due to the university's refusal to recognize the organization because it discriminated on the basis of gender.²⁵⁵ The U.S. Court of Appeals for the Second Circuit held that the fraternity did not meet the standard for intimate association,²⁵⁶ because the members of the fraternity were not "literally brothers, [sisters, or siblings]."²⁵⁷

The precedent established in *Phi Lambda Phi* and *Chi Iota Colony* is not binding on the other circuits, but it is worth considering when determining whether a fraternal organization meets the standards for intimate or expressive association.²⁵⁸ The associational pillars are the strongest foundational principles on which fraternities and sororities exist; however, they may be in danger.²⁵⁹ Within the first three months of 2019, three students filed lawsuits against multiple fraternities and two universities directly challenging the pillars and the single-sex status of fraternities and sororities.²⁶⁰ Stevie Tran and Nathan Arrowsmith agree that the "*Roberts* test is extremely stringent, and the likelihood that any private organization, fraternal or otherwise, could satisfy the *Roberts* test is slim."²⁶¹ Despite the outcome of the lawsuits, the pillars make it expressly clear that the law expresses no limit on fraternities' and sororities' ability to include transgender members.²⁶² Fraternal organizations would do well to pay attention to other anti-discrimination laws' interpretations of "sex," including Title IX, Title VII, and the EPC, and how courts are applying the laws to other non-social organizations in deciding whether to be inclusive.²⁶³

III. ARGUMENT

The meaning of the term "sex" as used in Title IX, Title VII, and the EPC is the "million dollar" question that must be answered to determine whether transgender students, employees, or individuals are protected under

255. *Id.* at 139.

256. *Id.* at 147; Arrowsmith & Tran, *supra* note 79, at 17 ("The court held the colony did not meet intimate associations protections because: (1) the colony 'places no limit on membership size,' (2) the colony's purposes were 'broad, public-minded goals that do not depend on their promotion on close-knit bonds,' and (3) the colony involved 'non-members in several crucial aspects of its existence.'").

257. Greg Lukianoff, *To Survive, Fraternities Need to Stand for Something, Anything*, 117 FRATERNAL L., Sept. 2011, at 1.

258. Arrowsmith & Tran, *supra* note 79, at 17.

259. Tran, *supra* note 27, at 542.

260. Timothy M. Burke, *Lawsuit Filed Against Yale Is an Attack on Greek Organizations*, 158 FRATERNAL L., Mar. 2019, at 5, 6.

261. Arrowsmith & Tran, *supra* note 79, at 17 ("Indeed, the Supreme Court has never concluded that a private organization of any kind satisfied the *Roberts* test.").

262. Tran, *supra* note 15, at 5.

263. *Id.*; see also *infra* Section III.A.

the discriminatory prohibitions.²⁶⁴ This section begins by arguing that the courts' interpretations of sex discrimination under Title IX, Title VII, and the EPC are shifting.²⁶⁵ The interpretational shift affords greater anti-discrimination protections to transgender individuals.²⁶⁶ This section argues that the interpretation of "sex" as used in the context of discrimination is no longer based on the presence of a person's genitals at birth.²⁶⁷ Rather, it is more encompassing to include gender identity, thus including transgender status.²⁶⁸

Fraternal organizations, however, are not bound by the discriminatory prohibitions of Title IX, Title VII, and the EPC²⁶⁹ and, therefore, are free to

264. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 n.33 (W.D. Pa. 2017).

265. Early Title VII and Title IX case law held that "sex" for Title VII and Title IX is based on the denotation of male or female genitals at birth. *See Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982). The jurisprudence, however, is shifting to be more inclusive. NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 3. More courts hold that "sex" under Title VII and Title IX encompasses gender identity based on the sex-stereotyping framework established in *Price Waterhouse*. *Id.*; *see Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351 (7th Cir. 2017); *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 744–45 (E.D. Va. 2018); *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 200 (2d Cir. 2017); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999).

266. If the term "sex" is interpreted to mean sex-based for discriminatory purposes under Title IX, Title VII, and the EPC, then transgender individuals will not be safeguarded by the anti-discriminatory prohibitions. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015). But if "sex" is interpreted to be based on gender identity, the discriminatory prohibitions will provide a cause of action for transgender discrimination. *Whitaker*, 858 F.3d at 1049.

267. *Whitaker*, 858 F.3d at 1048. The Supreme Court's decision in *Price Waterhouse*, coupled with the decision in *Oncale*, provide the foundation that Title IX, Title VII, and the EPC bar discrimination based on all sex-based classification, including transgender status. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. at 228, 235 (1989); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998)). Since the Court's decisions in both cases, only three Circuits ruled in the alternative—holdings based on precedent predating *Price Waterhouse*. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane*, 742 F.2d at 1085; *Sommers*, 667 F.2d at 750; *see also infra* Section III.A.3.

268. *Whitaker*, 858 F.3d at 1051; *Grimm*, 302 F. Supp. 3d at 749; *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *see also infra* Section III.A.3.

269. Congress expressly carved out historically single-sex social clubs, including fraternities and sororities, from Title IX's mandates. 20 U.S.C.A. § 1681(a) (Westlaw through Pub. L. No. 116-56); *see supra* Section II.B.2.; *infra* Section III.B. Title VII only applies to the workplace. 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 116-56); *see supra* Section II.B.3. The Equal Protection Clause does not apply to fraternities and sororities because students and individuals do not have a fundamental right to be in fraternities and sororities, it "is a privilege." Michael J. Lenzi, *The Trans Athlete Dilemma: A Constitutional Analysis of High*

establish inclusive or anti-inclusive membership policies.²⁷⁰ This section argues that fraternities and sororities are empowered to use the new era of inclusivity under the jurisprudence of Title IX, Title VII, and the EPC to create policies that reflect the fraternal organizations' true values and the societal constructs of gender identity.²⁷¹ This section offers steps fraternal organizations should take to be more inclusive and to safeguard their single-sex status.²⁷² Finally, this section addresses university policies and the current lawsuits threatening the single-sex status of fraternal organizations.²⁷³

A. Answering the "Million Dollar" Question—"Sex" Includes Gender Identity

If the term "sex" is narrowly interpreted to mean sex assigned at birth, transgender individuals will not be safeguarded by the discriminatory prohibitions of Title IX, Title VII, and the EPC.²⁷⁴ By contrast, if the term "sex" is interpreted to include gender identity "independently or through the theory of sex-stereotyping,"²⁷⁵ then the discriminatory prohibitions will protect transgender students, employees, and individuals.²⁷⁶ The *answer* to the "million dollar" question is "sex" should be interpreted to include gender identity, thus including transgender status.²⁷⁷

School Transgender Student-Athlete Policies, 67 AM. U.L. REV. 841, 875 (2018). A transgender person, however, may have a viable claim against a public university that chooses to recognize a single-sex fraternity or sorority. *See infra* Section III.C.; Burke, *supra* note 32, at 3.

270. Tran, *supra* note 15, at 5; *see, e.g.*, Tran, *supra* note 27, at 525; Arrowsmith & Tran, *supra* note 39, at 2.

271. Tran, *supra* note 15, at 5–6; *see infra* Section III.B.

272. JAMES R. FAVOR & CO., FRATERNAL HEALTH & SAFETY INITIATIVE: TRANSGENDER MEMBERSHIP POLICY GUIDANCE 1 (2017), <http://fhsi.jrfco.com/assets/resource---transgender-membership-guidance-update-3-17.pdf>; *see infra* Section III.B.

273. *See infra* Section III.C. Harvard's sanction policy, the widespread adoption of all-comers policies by other universities, and the current Yale lawsuits are a "direct attack on single-sex fraternal organizations" and increase the awareness that fraternities' and sororities' future as single-sex organizations is undecided. Burke, *supra* note 260, at 3.

274. Kyle C. Velte, *Mitigating the "LGBT Disconnect": Title IX's Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformation Potential of Connecting the Two*, 27 AM. U.J. GENDER SOC. POL'Y & L. 29, 54 (2019).

275. *Id.*; *see generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

276. Velte, *supra* note 274, at 54.

277. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017); *see infra* Section III.A.1–3.

1. *Why “Sex” Encompasses Gender Identity—Title IX and Title VII*

The Supreme Court has yet to address the “million dollar” question.²⁷⁸ But the majority of lower courts provide an answer to the question by interpreting and applying the sex-stereotype framework established in *Price Waterhouse*.²⁷⁹ The modern interpretation of sex discrimination under Title IX and Title VII affirms that sex is based on gender identity and prohibits discrimination based on a person’s transgender status.²⁸⁰ The U.S. Court of Appeals for the Seventh Circuit in *Whitaker v. Kenosha Unified School District Number One Board of Education*²⁸¹ articulates a thorough analysis of why “sex” under Title IX and Title VII is based on gender identity and includes discrimination on the basis of an individual’s transgender status.²⁸² The court in *Whitaker*, however, expands the analysis beyond Title IX and Title VII.²⁸³ The court establishes why discrimination on the basis of a person’s transgender status is sex-based under the EPC and why a heightened level of scrutiny applies in determining if illegal discrimination occurred against a transgender individual.²⁸⁴ *Whitaker* establishes the answer to the “million dollar” question.²⁸⁵

In *Whitaker* the plaintiff, Ashton Whitaker (“Ash”), a transgender 17-year-old high school senior filed a claim²⁸⁶ alleging that the Kenosha Unified School District’s (“School District”) unwritten policy preventing him from using the boys’ bathroom violated Title IX and the EPC.²⁸⁷ The court’s

278. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 n.33 (W.D. Pa. 2017).

279. *See, e.g., Whitaker*, 858 F.3d at 1051; *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883 (11th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. Appx. 492 (9th Cir. 2009); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 746 (E.D. Va. 2018); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 718 (D. Md. 2018).

280. *Whitaker*, 858 F.3d at 1034.

281. *Id.*

282. *Id.* at 1049.

283. *Id.* at 1050.

284. *Id.* 1050–54; *see infra* Section III.A.2.

285. *Id.* at 1046–50.

286. *Whitaker*, 858 F.3d at 1038–39 (“‘Ash’ . . . [had] a simple request: to use the boys’ restroom while at school.”). While Ash’s birth certificate denotes him as female, he began openly identifying as male his freshman year of high school. *Id.* at 1040. A therapist diagnosed Ash with gender dysphoria shortly after publicly transitioning. *Id.* The School District prevented Ash from entering or using the boys’ restroom because it believed “that his mere presence would invade the privacy rights of his male classmates.” *Id.* at 1039. The School District only allowed him to use the gender neutral or female restrooms. *Id.* at 1040. The School District’s rejection of Ash’s transition caused him to suffer from suicidal thoughts and other mental traumas associated with gender dysphoria. *Whitaker*, 858 F.3d at 1039.

287. *Id.* at 1039 (“In addition to filing suit, Ash . . . moved for preliminary injunctive relief, seeking an order granting him access to the boys’ restrooms.”). The School District

Title IX analysis focuses on the “million dollar” question and determines whether a “transgender student who alleges discrimination on the basis of his or her transgender status can state a claim of sex discrimination.”²⁸⁸ The court reiterates that “neither the statute nor the regulations define the term ‘sex’” and that the statute is visibly missing the words biological and gender identity.²⁸⁹ The statute’s ambiguity requires the court to turn to the Supreme Court and other case law for guidance.²⁹⁰

Looking at Title VII jurisprudence, the court debates whether to apply the sex-stereotyping framework established in *Price Waterhouse*.²⁹¹ The debate centers around whether the policy behind the theory only applies to the stereotypical behaviors of a transgender individual such as the way a person “walks, talks, or dresses”²⁹²—thus, the requirement that a biological female’s use of the women’s restroom would not be sex discrimination under the stereotyping theory.²⁹³ The court, however, rejects the narrow interpretation, reasoning that discrimination on the basis of a person’s transgender status is sex discrimination because “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”²⁹⁴ The Supreme Court’s broad interpretation of “sex” in *Price Waterhouse* “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²⁹⁵ The Court’s interpretation intended to bar discrimination based

responded by filing a motion to dismiss Ash’s complaint, arguing that Ash could not state a cognizable claim under Title IX or the EPC. *Id.* The lower court denied the School District’s motion, which the School District appealed. *Id.* The Appeal’s Court denied the School District’s motion to dismiss and granted Ash’s injunction. *Id.* at 1039.

288. *Whitaker*, 858 F.3d at 1047.

289. *Id.* The School District argued that gender identity is not encompassed in the definition of sex under Title IX, and the necessary modifier and interpretation is based on the biological birth-sex of the claimant. *Id.* But the court debunks the argument by asserting that the word biological is visibly missing from the statute, in the same way the word gender identity is missing. *Id.* The court noted the Sixth Circuit’s reasoning “that *Price Waterhouse* established that the prohibition on sex discrimination ‘encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.’” *Id.* at 1049 (quoting *Smith v. City of Salem*, 368 F.3d 566, 573 (6th Cir. 2004)); see also *infra* Section III.A.3.

290. *Whitaker*, 858 F.3d at 1047.

291. *Id.*

292. *Id.* at 1048.

293. *Id.*

294. *Whitaker*, 858 F.3d at 1048; see also *M.A.B.*, 286 F. Supp. 3d at 715–717 (citing *Whitaker*, 858 F.3d at 1048) (rebutting a similar argument, stating the “Supreme Court did not require gender stereotyping to take the specific form of discrimination on the basis of appearance or behavior.”).

295. 490 U.S. 228, 251 (1998); see, e.g., NAT’L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 3; *Whitaker*, 858 F.3d at 1048 (noting that in *Oncale* the Supreme Court confirmed its earlier broad interpretation of sex stereotyping discrimination in *Price Water-*

on *all* sex-based considerations and by definition logically includes discrimination on the basis of an individual's transitioning status.²⁹⁶

Whitaker's inclusive interpretation of "sex" is not unsupported.²⁹⁷ The First, Fourth, Sixth, Ninth, and Eleventh circuits all held similarly.²⁹⁸ Each Circuit decision provides an analysis akin to *Whitaker* but further recognizes that "claims of discrimination on the basis of transgender status [are] per se sex discrimination under Title VII or other federal civil rights law based on *Price Waterhouse*."²⁹⁹ Following the Supreme Court's guidance, all sex-based discrimination should be barred under Title IX, Title VII, and the EPC.³⁰⁰ Thus, discrimination on the basis of an individual's transgender status, at minimum, is based on the societal constructs of gender identity and includes being transgender, because a transgender person does not conform to the sex, sex stereotype, or sex-based classification assigned to him, her, or they at birth.³⁰¹

2. *Why "Sex" Encompasses Gender Identity—The Equal Protection Clause*

As a threshold matter for an EPC claim, a court must determine what standard of review applies.³⁰² Regarding the "million dollar" question, the issue is whether transgender status is encompassed in a sex-based classification or as part of a quasi-suspect class, resulting in transgender discrimina-

house). In *Oncale*, the Court held that "sex discrimination is broad enough to include same-sex harassment claims." 523 U.S. 75 (1998). Considering *Oncale* and *Price Waterhouse* together, courts have increasingly held that Title VII, Title IX, the EPC, and other anti-sex discrimination laws provide protection to transgender individuals from sex discrimination. NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 3; *see, e.g., Whitaker*, 858 F.3d at 1051; *M.A.B.*, 286 F. Supp. 3d at 718–20.

296. *Whitaker*, 858 F.3d at 1051; *see also* NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 10.

297. *Id.* The *Whitaker* court is not alone in the determination that transgender individuals do not conform to sex-based stereotypes. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."); *Chavez v. Credit Nation Auto Sale, LLC.*, 641 F. App'x 883 (11th Cir. 2016); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

298. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 744–45 (E.D. Va. 2018); *see, e.g., Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351 (7th Cir. 2017); *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 200 (2d Cir. 2017); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3rd Cir. 2009); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

299. *M.A.B.*, 286 F. Supp. 3d at 714.

300. *See Whitaker*, 858 F.3d at 1051.

301. *See id.* at 1051; *see also* NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 4 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000)).

302. *Id.*; *M.A.B.*, 286 F. Supp. 3d at 718.

tion receiving a heightened level of judicial review.³⁰³ *Whitaker* provides an answer to the “million dollar” question—a heightened level of scrutiny, and not rational basis, applies to EPC claims because transgender status is based upon sex.³⁰⁴ Furthermore, in *Karnoski*, the United States District Court for the Western District of Washington³⁰⁵ and the United States Court of Appeals for the Ninth Circuit,³⁰⁶ collectively, expand the decision in *Whitaker* and identify transgender people as a quasi-suspect class.³⁰⁷

In *Whitaker*, the court held the School District’s policy could not be stated without referencing sex, is logically sex-based, and receives a heightened level of scrutiny.³⁰⁸ This places the burden on the School District to prove that “the justification for its bathroom policy is not only genuine, but also ‘exceedingly persuasive.’”³⁰⁹ If the policy cannot justify a sex-based classification under Title IX or Title VII “by relying upon overbroad generalizations,” then “sex-based stereotypes are also insufficient to sustain a classification” under the EPC.³¹⁰ Without addressing the classification of transgender people, *Whitaker* held transgender identity is sex-based because, by definition, transgender individuals do not conform to sex-stereotypes, thus receiving a heightened level of judicial review.³¹¹

The *Whitaker* decision, however, fails to answer the question of “whether transgender status is per se entitled to [a] heightened level of scru-

303. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 n.33 (W.D. Pa. 2017).

304. 858 F.3d at 1051; *see also M.A.B.*, 286 F. Supp. 3d at 719.

305. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 U.S. Dist. LEXIS 63563 (W.D. Wash. Apr. 13, 2018).

306. *Karnoski v. Trump*, 926 F.3d 1180 (2019).

307. *See supra* authority cited note 178 and accompanying text. In *Whitaker*, the court never reached the question of whether transgender individuals are a part of quasi-suspect or suspect classification. 858 F.3d at 1051. The court held that if “sex” for the purposes of Title IX and Title VII includes gender identity, then the same concept logically applies to Equal Protection claims; therefore, transgender status is encompassed in the sex-based classifications and a heightened level of scrutiny applies. *Id.* at 1051–52.

308. *Whitaker*, 858 F.3d at 1051 (“[T]he School District’s policy cannot be stated without referencing sex, as the School District decides which bath-room a student may use based upon the sex listed on the student’s birth certificate.”).

309. *Id.* at 1051–52 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

310. *Id.* at 1051 (Ash argued that “[t]he School District’s bathroom policy creates a sex-based classification such that heightened scrutiny should apply.”).

311. *Id.* (“There is no denying that transgender individuals face discrimination . . . because of their gender identity But this case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny. It is enough to say that, just as in *Price Waterhouse*, the record . . . shows sex stereotyping . . . [and] that Ash has experienced this form of discrimination.”); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *see generally Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that a transgender firefighter stated a cognizable sex discrimination claim under the EPC without specifying the applicable level of scrutiny).

tiny.”³¹² But, the district court addresses the issue in *Karnoski* and identifies “transgender people as one of the most vulnerable groups in our society.”³¹³ The district court applied the Supreme Court’s four-prong criteria and determined that, as a group, transgender people are entitled to suspect classification.³¹⁴ Thus, transgender people should receive the highest level of judicial review, strict scrutiny.³¹⁵ The Ninth Circuit, however, vacated and remanded the decision on the basis that the district court applied the incorrect standard of review.³¹⁶ Specifically, on remand, the Ninth Circuit instructed the district court to apply an intermediate level of scrutiny.³¹⁷ Despite the Ninth Circuit’s holding, both courts make it clear that transgender individuals are a part of quasi-suspect class and receive a heightened level of scrutiny.³¹⁸ Furthermore, the analysis the district court applied is almost identical to multiple lower courts that have held transgender status constitutes a quasi-suspect classification.³¹⁹

As such, the analysis is relevant and applicable in identifying transgender people as a quasi-suspect class.³²⁰ History reveals that transgender people suffer and continue to suffer from endemic levels of discrimination in the work place, education, healthcare, and housing.³²¹ A transgender individual’s ability to contribute to society is not diminished or altered by the person’s transgender status.³²² To determine if a person’s

312. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 722 n.15 (D. Md. 2018) ((quoting *Whitaker*, 858 F.3d at 1051) (“[T]his case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny.”)).

313. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 U.S. Dist. LEXIS 63563, at *10 (W.D. Wash. Apr. 13, 2018).

314. *Id.* at *30–32. (holding that: (1) transgender people have historically been subject to discrimination; (2) transgender people have a defining characteristic that bears no relation to the ability to perform or contribute to society; (3) transgender people exhibit immutable characteristics; and (4) transgender people are politically powerless); *see also supra* Section II.B.2.b.

315. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *30. *Karnoski* is the first district court to hold that transgender status rises to the level of suspect classification. *Id.*

316. *Karnoski v. Trump*, 926 F.3d 1180, 1199 (2019).

317. *Id.* at 1202–1203.

318. *Id.* at 1199–1200; *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *30; *see supra* note 178 and accompanying text.

319. *Id.*; *see, e.g.*, *Doe v. Trump*, 275 F. Supp. 3d 167, 208 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

320. *See supra* authority cited note 178 and accompanying text.

321. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *31–33; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

322. *See cases cited supra* note 321.

transgender status is immutable, the court must look at whether the “distinguishing characteristic amounts to an unfair branding or resort to prejudice.”³²³ Some courts agree that “[t]ransgender people clearly have ‘immutable’ and ‘distinguishing characteristics that define them as a discrete group.’”³²⁴ Furthermore, the modern medical community agrees that gender identity includes a “biological component” that starts early in life and is “impervious to external influences.”³²⁵ The transgender community is a “tiny minority”³²⁶ comprised of “less than one percent of the nation’s adult population,”³²⁷ which results in the group’s underrepresentation in Congress, the federal judiciary, and state legislatures.³²⁸ Therefore, transgender individuals meet the Supreme Court’s four-prong test and constitute a quasi-suspect class, receiving an intermediate level of judicial review.³²⁹ *Whitaker* and *Karnoski* establish the answer to the “million dollar” question: transgender status is encompassed in a sex-based classification,³³⁰ and transgender people are a part of a quasi-suspect class.³³¹

3. *Why Courts Holding in the Alternative Are Wrong*

The Seventh, Eighth, and Tenth Circuits are the only Courts of Appeals to hold that transgender status is *not* included in Title VII or Title IX’s discriminatory prohibitions³³²—“ruling that transgender status, taken alone, is not entitled to [Title IX or] Title VII protection.”³³³ The Eighth and Tenth Circuits’ holdings are based on precedent predating *Price Waterhouse*,³³⁴

323. *High Tech Gays v. Def. Sec. Off.*, 909 F.2d 375, 377 (9th Cir. 1990).

324. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *33 (“In other contexts . . . the Ninth Circuit has held that ‘[s]exual orientation and sexual identity’ are ‘immutable’ and are ‘so fundamental to one’s identity that a person should not be required to abandon them.’”) (quoting *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000)); see also *Highland*, 208 F. Supp. at 874.

325. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *33.

326. *Highland*, 208 F. Supp. at 874.

327. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *34.

328. *Id.* (“There are no openly transgender members of the United States Congress or the federal judiciary, and only one out of more than 7,000 state legislators is openly transgender.”).

329. *Id.* at 30–32; *Karnoski v. Trump*, 926 F.3d 1180, 1201–1203 (2019).

330. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017).

331. *Karnoski*, 2018 U.S. Dist. LEXIS 63563, at *11.

332. *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 714 n.7 (D. Md. 2018); see *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

333. *M.A.B.*, 286 F. Supp. at 715 n.7.

334. *Ulane*, 742 F.2d at 1085 (holding occurred in 1984); *Sommers*, 667 F.2d at 750 (holding occurred in 1982).

and these Circuits refuse to apply the sex-stereotyping framework to transgender status.³³⁵ The Seventh Circuit, however, arguably shifted its approach and applied the sex-stereotype framework in *Whitaker*.³³⁶ The Circuits refusing to apply the framework reason that the framework expands Title VII's application beyond the traditional concepts of "sex."³³⁷ Furthermore, a number of district courts refuse to apply the sex-stereotyping framework and reason that if the term "sex" is to include transgender status, then the new definition must come from Congress.³³⁸ *Price Waterhouse and Oncale v. Sundowner Offshore Services*,³³⁹ however, "eviscerated" this logic.³⁴⁰ *Whitaker* provides a thorough analysis of why the district courts and the Eighth and Tenth Circuits' holdings offer a misguided answer to the "million dollar" question and are wrong.³⁴¹

First, *Whitaker* acknowledges that the Circuit courts' rulings in the alternative follow precedent predating *Price Waterhouse*.³⁴² The Supreme Court's holding in *Price Waterhouse* occurred in 1989.³⁴³ Immediately following the decision, courts hesitantly embraced the sex-stereotyping frame-

335. *Etsitty*, 502 F.3d at 1221 (citing *Ulane*, 742 F.2d at 1086) (giving deference to the "common and traditional interpretations" of "sex" for purpose of sex discrimination).

336. *Whitaker*, 858 F.3d at 1049. The court's ruling in the alternative, however, suggest that "[s]cientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female." *Etsitty*, 502 F.3d at 1222; see, e.g., *Schoer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). The shift started in 1998 and is occurring now. *Whitaker*, 858 F.3d at 1051 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998)); see also NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 4; see *supra* Section III.A.2. Specifically, in *Whitaker*, the Seventh Circuit addresses its 1984 decision in *Ulane v. Eastern Airlines* and clarifies that the decision pre-dated the Supreme Court's decision in *Price Waterhouse* and *Oncale*. *Whitaker*, 858 F.3d at 1047. The court held the decision "cannot and does not foreclose . . . transgender students from bringing sex-discrimination claims based upon a theory of sex-stereotyping . . ." *Id.*

337. *Etsitty*, 502 F.3d at 1221.

338. *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 672–79 (W.D. Pa. 2015) (quoting *Ulane*, 742 F.2d at 1086–87) ("[I]f the term 'sex' as used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.").

339. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

340. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); see, e.g., *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

341. *Whitaker*, 858 F.3d at 1049.

342. *Id.* at 1047. Specifically, courts holding in the alternative follow the precedent established in *Ulane v. Eastern Airlines* which occurred four years prior to the decision in *Price Waterhouse*. 742 F.2d at 1084–85; see *Etsitty*, 502 F.3d at 1221. The courts adhering to the precedent established in *Ulane* "narrowly interpret 'sex' under Title IX and Title VII to be sex-based." *Etsitty*, 502 F.3d at 1221; *Johnston*, 97 F. Supp. 3d at 672–79 (W.D. Pa. 2015). *Whitaker*, however, argues that the combined Supreme Court precedent of *Price Waterhouse* and *Oncale* arguably overrule *Ulane*. *Whitaker*, 858 F.3d at 1048–49; see also NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 4; *infra* Section III.A.3.

343. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).

work.³⁴⁴ Nevertheless, in 1998, the Court reaffirmed the policy behind the framework in *Oncale*³⁴⁵ and held that Title VII's "because of sex" language applied to all claims of sexual harassment, even same-sex harassment.³⁴⁶ Thus, the courts more uniformly started applying the framework to same-sex harassment,³⁴⁷ sexual orientation,³⁴⁸ and transgender status³⁴⁹—reasoning that *Oncale* expressly established that Title IX, Title VII, and other civil regulatory "laws are not limited by presumed legislative intent."³⁵⁰ *Whitaker* expands on the lower courts' justifications for applying the framework to transgender status by addressing the Court's directive that "Congressional inaction is not determinative."³⁵¹

Congressional inaction or failed attempts to "explicitly add[] transgender status as a protected characteristic to either Title VII or Title IX, despite having opportunities to do so," fails to preclude the lower courts from inferring that the statute's "because of sex" language includes transgender identity.³⁵² A presumption that the legislature's inaction or failed attempts to explicitly include gender identity in the definition of "sex" "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."³⁵³ Thus, congressional

344. *Shermer v. Ill. Dep't of Transp.*, 937 F. Supp. 781, 785 (C.D. Ill. 1996); *Klein v. McGowan*, 36 F. Supp. 2d 885, 889–90 (D. Minn. 1999); *Hopkins v. Balt. Gas & Elec. CO.*, 77 F.3d 745, 751–53 (4th Cir. 1996); *McWilliams v. Fairfax Cty. Bd. of Supervisors*, 72 F.3d 1191, 1195–96 (4th Cir. 1996); *Ward v. Ridley Sch. Dist.* 940 F. Supp. 810, 812 (E.D. Pa. 1996).

345. *Oncale v. Sundower Offshore Servs.*, 523 U.S. 75, 79 (1998). The Court in *Oncale* acknowledged that "[a]s some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* But Scalia, writing for a unanimous court, made it expressly clear that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* Thus, holding that "Title VII prohibits 'discrimination . . . because of . . . sex' . . . includes sexual harassment [and] must extend to sexual harassment of any kind that meets the statutory requirement." *Id.* at 80; *see, e.g.*, NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 11–12.

346. *Id.* at 79.

347. *Id.* at 80.

348. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296 (W.D. Pa. 2017).

349. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

350. NAT'L CTR. TRANSGENDER EQUALITY, *supra* note 104, at 10; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (citing *Oncale*, 523 U.S. at 79).

351. *Whitaker*, 858 F.3d at 1049.

352. *Id.*

353. *Id.* (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); *United States v. Wise*, 370 U.S. 405, 411 (1962); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 344 (7th Cir. 2017).

inaction and attempted legislation is not determinative and fails to preclude lower courts from interpreting that “sex” under Title IX, Title VII, and the EPC encompasses gender identity and transgender status.³⁵⁴

The answer to the “million dollar” question is that “sex” under Title IX, Title VII, and the EPC is based on the societal constructs of gender identity and includes transgender identity.³⁵⁵ The anti-discriminatory prohibitions of Title IX, Title VII, and the EPC, however, do not apply to the membership practices of fraternities and sororities.³⁵⁶ This raises issues such as what protections are offered to transgender students like Watson,³⁵⁷ who are victimized by the discriminatory practices of a fraternal organization and whether the organizations can offer membership to transgender students without jeopardizing their single-sex status.³⁵⁸ Currently, no legal guidance exists to inform an organization’s decision to offer inclusivity while maintaining single-sex status.³⁵⁹ Legal scholars and fraternal experts, however, have devised steps that fraternal organizations can take to be more inclusive and to safeguard their single-sex status.³⁶⁰

B. What Fraternities and Sororities Should Do

The first step in safeguarding the single-sex status of a fraternal organization is to establish clear and definitive policies regarding membership practices.³⁶¹ “Most organizations do not define the terms ‘male,’ ‘man,’ or ‘woman’ in their documents.”³⁶² Fraternities and sororities failing to define these terms create issues that leave transgender individuals seeking to join the fraternity or sorority unclear about whether the organization permits transgender students to join.³⁶³ “Trans[gender] individuals should not have to show up to every door and out themselves to find organizations that will accept them.”³⁶⁴ The fraternal organization should define what “male” or “female” means within the organization’s governing documents and submit

354. *Whitaker*, 858 F.3d at 1049.

355. *Id.*; see *supra* Section III.A.

356. See *supra* authority cited note 269 and accompanying text.

357. See *supra* Part I.

358. See *infra* Section III.B.

359. See *infra* Section III.B.

360. See *infra* Section III.B; see, e.g., Tran, *supra* note 15, at 5–6; FAVOR, *supra* note 272, at 3–4.

361. Tran, *supra* note 14, at 5.

362. *Id.*

363. Arrowsmith & Tran, *supra* note 39, at 3 (failing to define the terms also creates inconsistency in the individual organizations’ applications of the policies to transgender students).

364. MR Zimmer & Wendi Kinney, *Beyond the Binary: From Sisterhood to Siblinghood*, ESSENTIALS E-PUBLICATION, Nov. 2017, at 1, 2.

the policy to the organization's host university so that a transgender individual can understand if he, she, or they meet the requirements of membership and so that the organization itself can apply the policy consistently.³⁶⁵

In order for a fraternity or sorority to maintain associational freedom, organizations should function as a close-knit family with the "doors and windows closed to non-members."³⁶⁶ This note does not suggest that fraternities and sororities keep their governing documents secret but that the organizations limit participation in certain membership practices, such as facilitating recruitment events, voting rights, rituals, and other benefits of being a part of the chapter, to members only.³⁶⁷ A common issue threatening fraternities' and sororities' associational rights and ability to survive the *Roberts* test are "auxiliary groups" and the involvement of members of the opposite sex in recruitment events.³⁶⁸ To safeguard the single-sex status of the fraternal organization, many national groups, such as the National Panhellenic Conference ("NPC"), created policies that forbid organizational recognition of auxiliary groups as well as the involvement of members of the opposite sex, whether the person is a part of another Greek organization or a layperson.³⁶⁹

Complementary to the associational rights is that the fraternal organization must actually adhere to the policies defined in its governing documents.³⁷⁰ Creating a membership policy is only one step, but following the policy allows the fraternal organizations to "stand for something."³⁷¹ As Greg Lukianoff, former President of the Foundation for Individual Rights in Education, suggests, in order for fraternities and sororities to qualify for associational rights, the organizations must "choose a cause to stand up for and commit to defending and advocating for it."³⁷² If a fraternity, on a local or national level, chooses to define "male" or "female" broadly to include gender identity, then the organization must respect the policy and determine

365. *Id.*; Tran, *supra* note 27, at 528–29.

366. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546–47 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York*, 502 F.3d 136, 144–48 (2d Cir. 2007); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000); *see, e.g., Arrowsmith & Tran, supra* note 79, at 17; *supra* Section II.C.

367. *But see* Zimmer & Kinney, *supra* note 364, at 2 (stating that the fraternal organizations should give a copy of their policy on transgender membership to the university or publish it on a website for easy access).

368. UNANIMOUS AGREEMENT, *supra* note 76 ("Because . . . to protect our right as women-only organizations, sorority women should not serve as members of an auxiliary group or a subsidiary to men's fraternities. This can include . . . language such as little sister or daughter of . . . [a] recruitment process, meetings, dues and outward recognition.").

369. *Id.*

370. Tran, *supra* note 15, at 5.

371. LUKIANOFF, *supra* note 257, at 1.

372. *Id.* at 2.

if the candidate for membership meets the gender criteria and any subsequent requirements for membership.³⁷³ Timothy Burke urges that “[t]he bottom line is that membership selection decisions should be made in a positive manner on the basis of the criteria contained in the organization’s governing documents. Denying membership solely on the basis of some broad category into which an individual is pigeonholed is an invitation to legal trouble.”³⁷⁴ The legal trouble centers around the potential challenges organizations that choose not to include transgender status in the group’s membership policy will face from the growing legal precedent established by state and lower federal courts that afford greater anti-discriminatory protections to the transgender community.³⁷⁵

As an alternative to being inclusive, if a fraternity or sorority chooses not to define “sex” to broadly include gender identity or transgender individuals, the organization is afforded the right to deny such individuals membership under the same foundational pillars.³⁷⁶ Title IX makes it clear that fraternities and sororities are not governed by the statute and can choose whether to include transgender members.³⁷⁷ The constitutional pillars, however, are perilous and less clear.³⁷⁸

“A fraternal organization has a First Amendment right to determine who is and is not a member, [and,] [i]n the same way a fraternity can say ‘no women’ and a sorority can say ‘no men,’ both organizations may also say ‘[n]o men/no women means no transgender members.’”³⁷⁹ Fraternities and sororities should not be forced to include transgender members,³⁸⁰ but the organizations should examine their governing documents and determine whether the organization’s history reflects any opposition of transgender inclusion on any level.³⁸¹ In addition, before making the decision to be exclusive, the organization should take into consideration the legal aspects of Title IX, Title VII, the EPC, and the policies of the host university.³⁸² Title IX and Title VII interpretations are shifting to find discrimination on the basis of a person’s transgender status as per se discrimination on the basis of sex stereotypes,³⁸³ as with the EPC incorporating transgender status as per se

373. Tran, *supra* note 15, at 5.

374. FAVOR, *supra* note 272, at 3; Tran, *supra* note 27, at 527.

375. Tran, *supra* note 15, at 5.

376. *Id.*

377. *Id.* (“Under the language of Title IX, fraternal organizations have full latitude to say yes or not to transgender members. Constitutionally speaking, however, the answer becomes less clear.”).

378. *Id.*

379. *Id.*

380. Zimmer & Kinney, *supra* note 364, at 2.

381. Tran, *supra* note 15, at 5.

382. NAT’L PANHELLENIC CONFERENCE, *supra* note 81, at 3–4; Tran, *supra* note 15, at 5.

383. *See supra* Section II.B.2.

discrimination on the basis of gender receiving a heightened level of scrutiny.³⁸⁴ As the fight for gender equality continues and the legal developments progress, fraternal organizations should ask themselves where they want to see themselves along the arc of this historical and legal development.³⁸⁵

In 2013, Stevie Tran noted that “as transgender people continue to gain acceptance . . . it is unlikely that their exclusion from fraternal organizations will continue to go unnoticed.”³⁸⁶ In the six years since Tran made the statement, the courts’ interpretations and applications of Title IX, Title VII, the EPC, and other anti-sex discrimination laws have increased the protections afforded to the transgender community.³⁸⁷ The protections have yet to reach the fraternal walls of any particular organization, but as the issue presses to the doors of the Supreme Court, it will likely influence the legal foundation of fraternities and sororities.³⁸⁸

C. The Greatest Threat to Fraternities and Sororities: The Host University

Currently, the “greatest threat to fraternities [or sororities] choosing not to permit transgender membership comes from [the] host institutions.”³⁸⁹ Title IX is applicable *only* to the federally funded host university that recognizes single-sex fraternities and sororities.³⁹⁰ It is important that fraternities and sororities take the university’s policies into consideration as the university controls procedures and other Greek life events that are subject to the university’s anti-discrimination policies.³⁹¹ Two policy approaches affecting fraternal organizations are an “all-comers policy” and the newly established Harvard University policy sanctioning students that choose to participate in unrecognized single-sex organizations.³⁹² The two approaches create con-

384. See *supra* Section II.B.2.

385. Email from Dr. Gary Bunn, Dir. of Candidate Serv. & Sigma Phi Epsilon Advisor, U. of Cent. Ark, to Author (Mar. 11, 2019) (on file with author) [hereinafter Email Dr. Bunn]

When SigEp took [a] hard look at who we are as an organization, we were confronted with a decision . . . [whether to expand membership criteria to African Americans]. I remember being challenged with the question: Which side of history do you want to be on? With our decision, history would be made as we chose between exclusivity and narrow-mindedness or inclusivity and acceptance.

Id. If a fraternity or sorority is faced with the decision of whether to be transgender inclusive or exclusive the organizations will be confronted with a similar decision. The members of the organization should give serious weight to the issue because their decision will ultimately determine the side of history they are on.

386. Tran, *supra* note 15, at 6.

387. See *supra* Part II.B.

388. Tran, *supra* note 15, at 5; see Burke, *supra* note 260, at 4.

389. NAT’L PANHELLENIC CONFERENCE, *supra* note 81, at 15.

390. Tran, *supra* note 27, at 523.

391. Burke, *supra* note 33, at 3.

392. See *Nondiscrimination FAQ*, *supra* note 31; HARV. UNIV., *supra* note 32 at 68–69.

flicting relationships between the policies and the three legal foundational pillars of the fraternal organizations.³⁹³

An “all-comers policy” is a university policy that requires student groups to permit membership to all students who wish to join despite the race, religion, or gender of the individual.³⁹⁴ The Supreme Court determined that a public university’s decision to require all student organizations to adopt an “all-comers policy” as a condition for university recognition and associated benefits is reasonable and viewpoint neutral,³⁹⁵ and therefore does not violate the First Amendment.³⁹⁶ As such, legal scholar Timothy Burke noted, “it would be difficult to successfully challenge a public university’s decision to deny recognition to a fraternity that chooses to . . . [deny membership on the basis of sex],” and until the Court or Congress addresses the issue directly, the issue will remain undecided.³⁹⁷

The second type of policy that poses a threat to single-sex fraternities and sororities is Harvard University’s “sanction policy” for students participating in unrecognized single-sex organizations.³⁹⁸ Harvard created the policy with the “aim of dealing with issues of sexual assault, which the university blamed in part on the culture within all-male organizations.”³⁹⁹ The policy forbids students who “choose” to be a part of unrecognized single-sex organizations from holding leadership positions in any student organizations,

393. See McCarthy, *supra* note 33, at 5; Timothy M. Burke, *Are You Now or Have You Ever Been a Member of . . . ?*, 117 FRATERNAL L., Mar. 2017, at 1, 1.

394. See Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 671 (2010) (compiling university policies under the umbrella of “all comers” policies).

395. *Id.* at 669.

396. NAT’L PANHELLENIC CONFERENCE, *supra* note 81, at 15.

397. *Id.* Currently, multiple fraternities are suing Harvard, challenging a university policy that prohibits members of same-sex fraternal organizations from holding school wide office and from benefitting from school programs and fellowships. Burke, *supra* note 33, at 17. If the lawsuits progress, the decisions may well determine fraternities’ and sororities’ ability to remain single sex. *Id.* at 19; see also Kappa Alpha Theta, Inc. v. Harvard Univ., No. 18-12485-NMG, 2019 U.S. Dist. LEXIS 134852 (D. Mass. Aug. 9, 2019).

398. Burke, *supra* note 393, at 1; HARV. U., *Policy Regarding Undergraduate Student Organization*, <https://handbook.fas.harvard.edu/book/policy-regarding-undergraduate-organizations> (last visited Sept. 11, 2019) (“[A]ny such student who becomes members of unrecognized single-gender social organizations will not be eligible to hold leadership positions in recognized student organizations or athletic teams” and “will not be eligible to receive College-Administered fellowships.”); U. OF ARK. LITTLE ROCK, *Policy for Sex- and Gender-Based Discrimination, Harassment, and Misconduct Complaints, and Complaint Retaliation*, <https://ualr.edu/policy/home/facstaff/title-ix/> (last visited Oct. 3, 2019) (“The University of Arkansas at Little Rock is committed to providing an environment . . . that is free from . . . discrimination based upon . . . sex, gender, sexual orientation, [and] gender identity.”).

399. Jacqueline Tempera, *Sororities, Fraternities Sue Harvard University Saying Ban on Single-Gender Clubs is Unfair to Women*, MASSLIVE (Dec. 3, 2018), https://www.masslive.com/news/boston/2018/12/sororities_sue_harvard_univers.html.

including being voted captains of Harvard's intercollegiate athletic teams or being recommended for thirty-plus scholarships.⁴⁰⁰ The "sanction policy" forces students to make the choice of what is more important to them⁴⁰¹—being a part of single-sex organizations or access to privileges and resources.⁴⁰² The policy caused two fraternities and sororities to disenfranchise from the organization's national chapter and become "multi-sex."⁴⁰³

As of December 3, 2018, three sororities filed lawsuits claiming the policy violates Title IX, infringes on students' and single-sex organizations' First Amendment Rights to intimate and expressive association, and violates the EPC.⁴⁰⁴ As of February 12, 2019, "three female students at Yale filed suit against the University and nine fraternity chapters, their international organizations, and their house corporations" claiming violation of Title IX, public accommodation laws, and sexual misconduct.⁴⁰⁵ Legal scholar Timothy Burke noted that the lawsuit is a "direct attack on single sex fraternal organizations,"⁴⁰⁶ but the three foundational pillars offer numerous defenses.⁴⁰⁷

IV. CONCLUSION

As time goes on, the effect of the lower courts' decisions in the Harvard and Yale lawsuits may establish a precedent for strict university policies on campuses across the nation.⁴⁰⁸ Until then, much like other legal implications on fraternities and sororities, "the case law is incomplete, inconclusive, and inconsistent" and it is undecided.⁴⁰⁹ The ability of fraternities and sororities to extend membership to transgender individuals, however, is not undecided.⁴¹⁰

400. Burke, *supra* note 393, at 1; Burke, *supra* note 33, at 17.

401. See Burke, *supra* note 393, at 1 (explaining a student's dilemma between eligibility for school privileges and a desire to join a same-sex fraternal organization).

402. See Burke, *supra* note 223, at 3.

403. Tempera, *supra* note 399.

404. Burke, *supra* note 33, at 17–19 ("At first blush, that might seem like a strange claim because Harvard is a private school. In most cases private schools are not required to comply with the U.S. Constitution in its dealings with students. However the . . . state court complaint bases the argument that Harvard's students are entitled to the rights protected in the Constitution of the United States because the Massachusetts Declaration of Rights, set forth in the Massachusetts Civil Rights Act, provides those protections by reference.").

405. Burke, *supra* note 260, at 4.

406. *Id.*

407. *Id.*

408. See *id.*; Burke, *supra* note 33, at 19.

409. NAT'L PANHELLENIC CONFERENCE, *supra* note 81, at 11.

410. See *supra* Part III.

The “million dollar” question is whether “sex” encompasses gender identity and transgender status.⁴¹¹ Following the Court’s guidance in *Price Waterhouse* and *Oncale*, the lower courts’ interpretations of sex discrimination provide an answer to the question and why fraternities and sororities are empowered to extend membership to transgender individuals.⁴¹² Title IX and Title VII intended to bar discrimination based on *all* sex-based considerations and logically include discrimination on the basis of an individual’s gender identity and transgender status.⁴¹³ Under the EPC, the same concepts apply, and discrimination on the basis of an individual’s transgender status is sex-based and per se entitled to a heightened level of judicial review.⁴¹⁴ Furthermore, transgender people per se constitute a quasi-suspect class and are entitled to the same heightened level of scrutiny.⁴¹⁵ Discrimination on the basis of a transgender status is per se discrimination under Title IX, Title VII, and the EPC.⁴¹⁶

Fraternities and sororities are empowered to use the new era of inclusivity under the discriminatory prohibitions to create policies that reflect the fraternal organizations’ true values and the societal constructs of gender identity.⁴¹⁷ We are beyond the days of the evils of discriminating on the basis of sex,⁴¹⁸ and if fraternities and sororities remain stagnant on the issue it could “brand all transgender students with a scarlet letter ‘T.’”⁴¹⁹ Transgender students “should not have to endure that at the price of attending their public school,” university, or joining a fraternal organization.⁴²⁰ Fraternities and sororities are empowered to be transgender inclusive.⁴²¹

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411. *See supra* Section II.B.

412. *See supra* Section III.A–B.

413. *See supra* Section III.A.1.

414. *See supra* Section III.A.2.

415. *See supra* Section III.A.2.

416. *See supra* Section III.A–B.

417. *See supra* Section III.B.

418. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998).

419. *Doe v. Boyertown Area Sch.*, 897 F.3d 518, 530 (3d Cir. 2018).

420. *Id.*

421. Arrowsmith & Tran, *supra* note 39, at 1.

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