

NACUA
Webinar

Sponsored by



LAWVU



The Law of Gender Identity on Campus

Becca Gose, Vice President and General Counsel, Oregon State University
Esther Henry, Associate General Counsel, University of Tennessee System
Dan Kaufman, Partner, Michael Best & Friedrich LLP

Agenda

- Introduction
- Title IX
- Title VII
- Free Speech, Academic Freedom, Free Exercise of Religion, and Religious Accommodations
- State Trends
- Practical Tips and Considerations
- Audience Q&A and Closing Remarks

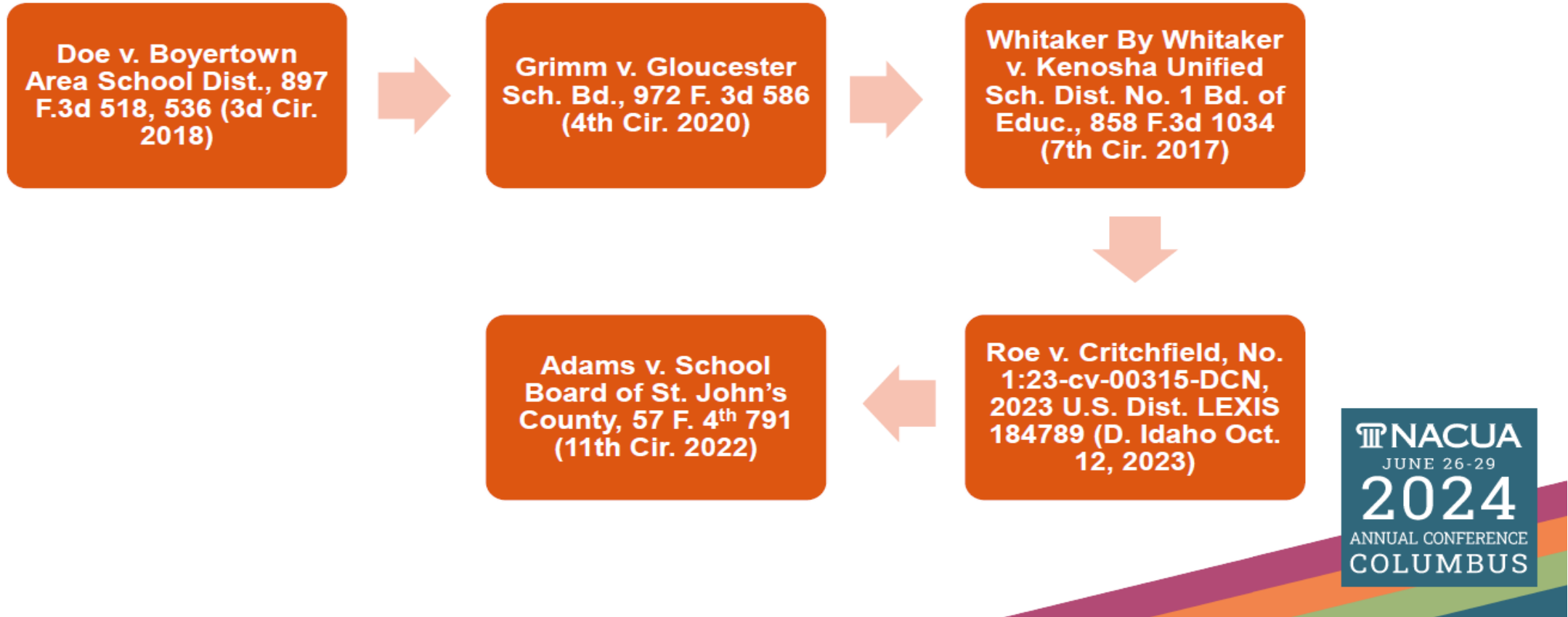
Title IX

Recent Developments in Title IX

- Cases interpreting Title IX's scope
- Challenges to federal guidance (2021 - ?)
- Notice and comment rulemaking (2022 – 2024)
- Final regulations published (2024)
- Lawsuits! (2024 - ?)
- Patchwork of compliance and enforcement between 2020 and 2024 regulations
- Where are we headed next?



Cases Interpreting Gender Identity



See 2024 Annual Conference Materials (Session 1J, "Title IX and Gender Identity and Sexual Orientation Discrimination: Where Are We Now?")

Challenges to Federal Guidance

- *State of Tennessee v. Department of Education (6th Cir.)(ongoing)*
 - 20 states challenged the Department's Interpretation, Dear Educator Letter, and Fact Sheet and the EEOC's Technical Assistance Document interpreting Title IX and Title VII, respectively, to prohibit discrimination based on sexual orientation and gender identity (2021)
 - District court granted preliminary injunction (2022)
 - The Department appealed (2022)
 - Sixth Circuit affirmed (June 2024)
- *State of Texas v. Cardona (5th Cir.)(ongoing)*
 - Texas challenged the Department's guidance similar to the above (2023)
 - District court granted State's motion for summary judgment, ruling that the documents are unlawful, and enjoined the Department from implementing or enforcing the documents (June 2024)
 - Notice of Appeal to the Fifth Circuit by the Department (October 2024)

Rulemaking --> Final Rule Published (April 2024)

- Includes protections for gender identity and sexual orientation
 - "Discrimination on the basis of sex includes discrimination on the basis of ... sexual orientation, and gender identity." (§ 106.10)
- Clarifies that, except as permitted by certain provisions of Title IX or the regulations, a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimus harm, including by adoption of a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity
 - "Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." (§ 106.31 (a)(2))
- Does NOT include a definition of gender identity
 - The Department "...determined that – consistent with the approach taken by many courts – it is unnecessary to articulate a specific definition of 'gender identity'...."
- Does NOT include eligibility criteria for participation in athletics
 - Still waiting since the NPRM published in April 2023

Lawsuits!

- Injunctions are currently in place in seven lawsuits that span 26 states
- Some institutions outside of those states are also impacted by the Kansas injunction, which includes institutions attended by members of three plaintiff organizations
 - Moms for Liberty, Young America's Foundation, and Female Athletes United
 - ATIXA summary: <https://www.atixa.org/regs/#injunction>
 - Grand River Solutions' list (organized by state):
<https://www.grandriversolutions.com/wp-content/uploads/2024/07/LIST-OF-INJUNCTIONS-JULY-25-ORGANIZED-BY-LOCATION-5.pdf>
 - Note that the court has ruled that prospective members of the organizations are also included in the injunction; the three plaintiff organizations have the ability to supplement their lists moving forward

Lawsuits! (cont.)

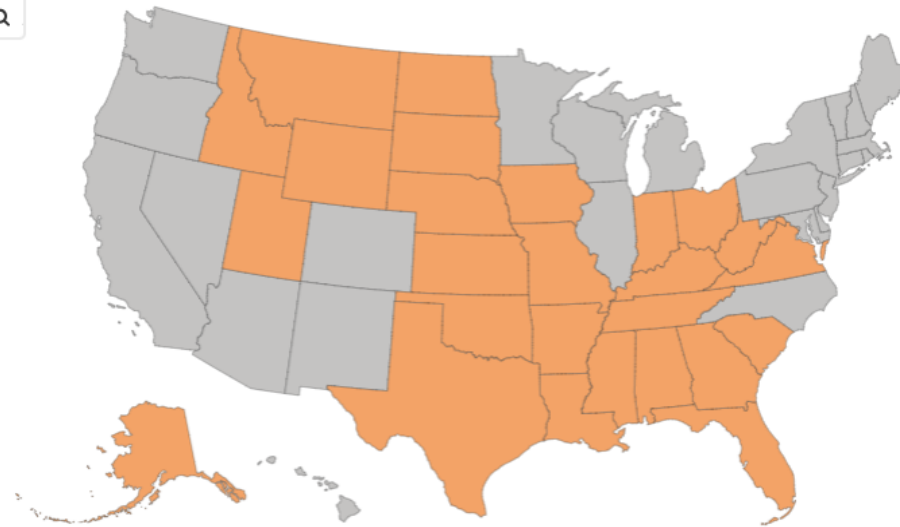
- The Department has now made clear in its Fact Sheet that it will continue to enforce the 2020 regulations in any state or against any institution that is subject to an injunction:
 - "As of September 13, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf>. Per Court order, this list of schools may be supplemented in the future. The Final Rule and this resource do not currently apply in those states and schools. **Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.**" (Emphasis added.)

Resulting Patchwork of Compliance and Enforcement Between 2020 and 2024 Regulations

Where Title IX Regulations Are Blocked

Federal judges have temporarily put the Biden administration's new Title IX rule on hold in 26 states, as of July 31, preventing the Education Department from enforcing the changes.

Yes No



Source: Inside Higher Ed Analysis • Katherine Knott, Inside Higher Ed



* A Flourish map

From: <https://www.insidehighered.com/news/government/2024/08/01/how-legal-challenges-tied-title-ix-26-states>

Lawsuits! (cont.)

- NACUA Title IX Injunction Tracker:
<https://docs.google.com/spreadsheets/d/1185wuTcSzwHHWaPJcytffpslUvtUJv3ld1yKBZAWnbY/edit?gid=0#gid=0>
- Summary of claims

Where Are We Headed Next?

- 2024 regulations were not issued within the federal lookback period
- Should not be able to be rescinded or modified via executive order
- Guidance from the Department on enforcement priorities or interpretations?
- More notice and comment rulemaking
 - Either regular or expedited
 - Either a new rule or amendments
- Congressional action
- Impacts from pending litigation
 - Currently no national injunction of the 2024 regulations
 - Currently no split between circuits

Athletics

From the 2024 Rule: "The Athletics NPRM said a categorical ban on transgender students playing sports consistent with their gender identity would not satisfy the proposed regulation, but more targeted criteria, substantially related to sport, level of competition, and grade or education level, could be permissible. The Department is continuing to evaluate comments on that proposed regulation, and will issue its final rule on this standard for criteria for a student's eligibility to participate on sex-separate athletic teams in the future. Until that rule is finalized and issued, **the current regulations on athletics continue to apply.**" (Emphasis added.)



Athletics (cont.)

- NCAA Transgender Student-Athlete Participation Policy
 - Participation for each sport to be determined by the policy for the national governing body of that sport
 - <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>
 - Updated May 2024
- NAIA Transgender Participation Policy
 - Participation in sports designated as male open to all
 - Participation in sports designated as female open to student-athletes whose biological sex is female (under certain specified conditions)("biological sex" is further defined in the policy)
 - https://www.naia.org/transgender/files/TG_Policy_for_webpage_v2.pdf
 - Approved April 8, 2024

Athletics (cont.)

- Developments and lawsuit surrounding individual team "boycotts"
 - <https://www.nbcnews.com/nbc-out/out-news/san-jose-state-volleyball-team-forfeits-transgender-rcna177314>
 - <https://www.nytimes.com/athletic/5923566/2024/11/14/san-jose-state-volleyball-lawsuit-transgender-player/>
- Other free speech developments regarding protests of transgender athletes
 - [Federal court gives mixed signals in free speech case over parents protesting transgender athletes • New Hampshire Bulletin](#)

Title VII

Title VII

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII and Gender Identity Before 2020

- For many years, there was an open question whether Title VII encompassed a prohibition against discrimination based on sexual orientation or gender identity.
- A split in the lower courts created uncertainty as the LGBTQ+ community increasingly sought to enforce their rights under Title VII.
- Some courts held that Title VII did not prohibit discrimination because of sexual orientation. *Bostock* remedied that split.





Bostock v. Clayton Cnty., **590 U.S. 644**

Decision by U.S. Supreme Court - June 15th 2020

- Violation of Title VII to discriminate against an employee on the basis of sexual orientation or gender identity.

Key Quotes:

- "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."
- "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Though *Bostock* involved a termination, courts are increasingly applying *Bostock* to other terms and conditions of employment.

6-3 DECISION FOR BOSTOCK

MAJORITY OPINION BY NEIL GORSUCH

Title VII prohibits an employer from discriminating against an individual on the basis of sexual orientation.

Thomas

Breyer

Sotomayor

Gorsuch



Roberts

Ginsburg

Alito

Kagan

Kavanaugh

Bostock Dissent

Kavanaugh

- Congress' role, not the courts, to amend Title VII.
- Discrimination "because of sex" is not reasonably understood to include discrimination based on sexual orientation.
- Traditional statutory interpretation requires a reading of what would be reasonably understood by the text. Any other interpretation would go against long-accepted notions of statutory interpretation.

Tudor v. Se. Okla. State Univ., 13 F.4th 1019 (10th Cir. 2021)

Tenth Circuit Court of Appeals - September 13, 2021

- Dr. Rachel Tudor – a transgender professor - sued her former employer, Southeastern Oklahoma State University, under Title VII claiming discrimination on the basis of sex, retaliation, and a hostile work environment after she was denied tenure and ultimately terminated.
- *Bostock* overruled the 10th Circuit's holdings in *Etsitty v. Utah Transit Authority* that transgender persons are not a protected class under Title VII.
- *Bostock* ruled that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. To discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.
- Dr. Tudor was discriminated against in violation of Title VII. Entitled to reinstatement and damages.



2024 Election Update: *Bostock* and Federal Law



- The Heritage Foundation’s plans for the Trump Administration (Project 2025) include narrowing the federal interpretation of *Bostock* .
- Other Heritage Foundation goals include deleting the following terms from all federal laws, regulations, contracts, and grants:
 - sexual orientation and gender identity;
 - diversity, equity and inclusion;
 - gender;
 - gender equality;
 - abortion;
 - reproductive health.
- JD Vance “Dismantle DEI” Act of 2024:
 - Legislation introduced by Vance in the Senate – June 2024.
 - Would eliminate all DEI programs and funding from the federal government.



Retaliation

- Prima facie case for retaliation under Title VII:
 - Protected activity;
 - Adverse action – that might have dissuaded a reasonable worker from making or supporting a charge of discrimination;
 - Analyzed on a case-by-case basis;
 - Must go beyond minor annoyances and petty slights;
 - Reprimands may be materially adverse when they are coupled with collateral consequences.
 - Causation;
- *Muldrow v. City of St. Louis*, 601 U.S. 346 – “some harm” standard.





Muldrow v. City of St. Louis

Muldrow v. City of St. Louis, 601 U.S. 346

U.S. Supreme Court – Decided April 17th 2024.

- 9 - 0 Decision

What level of harm to plaintiff's terms and conditions of employment from a forced job transfer is necessary to support a claim of Title VII sex discrimination?

- “Materially significant harm” v. “some harm” vs. no harm (discriminatory transfer itself is the harm)?
 - Court’s decision: **“some harm.”**
 - Less demanding “some harm” threshold will open the door to more plaintiffs.

EEOC 2024 Case Filing Statistics

- 4 cases under Title VII alleging sex discrimination based on sexual orientation;
- 3 cases under Title VII alleging sex discrimination based on gender identity;
- Over 40 cases alleging retaliation under various statutes enforced by the EEOC;
- 5 cases under the Pregnant Workers Fairness Act (PWFA).





New EEOC Guidance

Harassment and Discrimination Based On Gender Identity

April 29, 2024 - EEOC released new Enforcement Guidance on Harassment in the Workplace.

- Harassment based on gender identity included in what the EEOC considers unlawful harassment.
- Notably, misgendering included as harassment.
 - Misgendering: repeated and intentional use of a name or pronoun inconsistent with individual's known gender identity.

EEOC Strategic Enforcement Plan (2024-2028)

- Top Priority: Taking on cases that prevent harassment and discrimination against LGBTQI+ individuals.
- Commitment to addressing discrimination influenced by or arising out of backlash in response to local, national or global events – LGBTQI+ individuals listed as a group that may fall within this category.

Example: Misgendering As Harassment



2024 Election Update: EEOC Leadership



- President-elect Trump likely to swap out the EEOC's general counsel and commission chair.
- Andrea Lucas – current commissioner – likely new commission chair.
 - Opposed EEOC's updates to harassment guidance.
 - Disagreed with agency's official position that misgendering someone, even repeatedly, can be considered unlawful harassment.



Pregnant Workers Fairness Act (PWFA)

Signed by President Biden – Effective June 27, 2023

- Creates reasonable accommodations for pregnant employees.
- Works in conjunction with ADA and previous Pregnancy Discrimination Act.

Covered Individuals: Employees and applicants who have known limitations related to pregnancy, childbirth, or related medical conditions.

Mandates interactive process. Employers may not require an employee to accept an accommodation other than a reasonable accommodation arrived at through the interactive process.

Cannot require employee to take leave if another reasonable accommodation can be provided that would let the employee keep working.





Signed by President Biden – Effective December 29, 2022

PUMP for Nursing Mothers

- Expands access to break time and space under the Fair Labor Standards Act to create better breastfeeding accommodations in the workplace. Requires employers to provide:
 - Reasonable break time for up to one year after giving birth in order to express breast milk.
 - A place, other than a bathroom, shielded from public view and free from intrusion of coworkers, to be used to express breast milk.

2024 Election Update: Pregnant Worker Fairness Act Final Rules



- Anticipated new EEOC Chair Andrea Lucas voted against the EEOC's final rules for the PWFA.
 - Vocal advocate for pregnant workers but opposed final rules.
- Released statement explaining her opposition:
 - New rules create protection and accommodation for workers needing time away from work due to abortion, birth control usage, menstruation, infertility and fertility treatments, endometriosis; and miscarriage or stillbirth.
 - Said that protections should only apply to "a specific, actual pregnancy and childbirth of an individual worker, and particular medical conditions related to them."



Free Speech; Academic Freedom

Free Speech: Employee Speech

- Private citizen speech vs. speech as part of official duties?
 - If part of official duties, generally unprotected under *Garcetti*
 - Academic Freedom "carve out" in *Garcetti* dicta (accepted by many circuit courts) if speech in scholarship/teaching context
- If not part of official duties (or in academic freedom context), is the speech on "a matter of public concern" under *Pickering/Connick*?
- If it's on a matter of public concern, engage in *Pickering* balancing of employee interests in their speech with interest of employer in maintaining orderly workplace

Free Speech: Student Speech

- Students do not "shed their constitutional rights at the school house door."
 - Does speech materially and substantially interfere with the operation of the school or interfere with the rights of others? Can't be "undifferentiated fear or apprehension of disturbance." (*Tinker; Mahanoy*) Can be "reasonable forecast" of substantial disruption.
- If speech is "school sponsored," can restrict speech if it's "reasonably related to legitimate pedagogical concerns." (*Hazelwood; Axson-Flynn* and other cases have extended to university context)

Free Speech/Academic Freedom Challenges to Pronouns/Preferred Name Requirements

- Courts have addressed free speech challenges by educators or students who object to being required to use others' preferred pronouns or names.
 - Basis of objection: use of pronouns/names carry important message, and plaintiffs argue they should not be compelled to state a message that is counter to their religious, moral, ideological or political view
- More free speech cases have come out in favor of the plaintiffs so far, but this is a developing area

Free Speech Challenges to Pronouns/Pref'd Name Requirements, cont...

- *Meriwether* (6th Circuit) - Professor's use of pronouns to address students in political philosophy class fell within the academic freedom carve-out of *Garcetti* and so wasn't automatically unprotected as part of "official duties."
 - Matter of public concern. "Powerful message" tied directly into the national and controversial "struggle over the social control of language in a crucial debate about the nature and foundation, or real existence, of sexes."
 - Professor's interests outweighed university's, since the university refused to compromise (*i.e.*, allow him to use all last names in class) and there was no evidence of harm/hostile environment caused. Could have been a "robust and insightful in-class discussion" in his philosophy course and universities can't be "thought police." Lots of discussion re academic freedom.

Free Speech Challenges to Pronouns/Pref'd Name Requirements, cont...

- Other cases have held similar to *Meriwether*, ruling against the school/university in free speech challenges.
- Some also rely on US Supreme Court's recent *303 Creative* opinion to find the use of pronouns to be "highly expressive" speech that cannot be compelled against someone's will (given lack of sufficient evidence of real harm or disruption to school operations)
- *Geraghty* (N.D. Ohio), *Vlaming* (Va. S. Ct.), *Tennessee v. Cardona* (6th Circuit)

Free Speech Challenges to Pronouns/Pref'd Name Requirements, cont...

- Some have ruled in favor of K-12 school policies
 - *Willey* (D. Wyo.) - ruling against teacher; analyzed pronoun and preferred name requirement as compelling speech that is within "official duties" under *Garcetti* and so unprotected, as well as not speech on a "matter of public concern." (Distinguished *Meriwether* because it was a university professor)
 - *Parents Defending Education* (S.D. Ohio) - ruling in favor of school in free speech challenge by student objecting to using pronouns. Analyzed under *Tinker* and *Mahanoy*, finding Title IX hostile environment is a "substantial disruption"; pointing to social science research on harms to transgender students. (Distinguished *Meriwether* because it was a political philosophy class.)

Free Speech Challenge to State Policy Precluding Use of Preferred Pronouns/Names

- *Wood* (ND Fla) - Court held in favor of a transgender teacher who brought a first amendment challenge to a Florida policy that defined "sex" for public schools. In issuing a preliminary injunction against the enforcement of the policy against the teacher, the court held:
 - Teacher had her own first amendment right to use her own pronouns (noting that was highly expressive and personal speech);
 - It was a matter of public concern under *Pickering*; and
 - There was insufficient evidence that her use of her pronouns would impede school operations, so balance weighed in her favor.

Free Speech Challenges by Counseling Students On Treating LGBTQ Patients

- *Keeton* (S.D. Ga.) - Dismissed lawsuit by counseling student who challenged the university's right to require students to treat LGBTQ patients in supportive manner (relying on professional codes of practice/accreditation).
 - No free speech violation as just about professional conduct, not expressive activity. Viewpoint neutral policy (on face and in facts) – espousing own views on LGBTQ was off-limits to all counselors in treatment settings
- *Ward* (6th Cir.) - Court ruled in favor of counseling student in free speech challenge re requirement to treat LGBTQ patient. Not viewpoint neutral because student sought to refer patient elsewhere, which was allowed for other kinds of objections. Also comments pointing to religious hostility.

Free Speech Challenges Re Student Speech Against Transgender Rights

- First Circuit recently found in favor of a middle school that restricted a student's ability to wear a shirt that said, "There are only two genders."
 - Analyzing under *Tinker*, court held that the shirt would substantially disrupt the learning environment because of negative impact on transgender students.
 - *L.M. v. Town of Middleborough, Mass.* (1st Cir. 2024) (summarizing other cases re student speech targeting protected characteristics)
- Remains to be seen with other courts, given that in multiple pronoun cases, courts have weighed more heavily free speech rights to *not* use preferred pronouns (as compared to negative impact on transgender students' learning environments).



Free Exercise of Religion

Free Exercise of Religion

- *Employment Division v. Smith* – If regulation burdens religion, is the regulation neutral and generally applicable? If so, only need to show rationally related to legitimate government interest. If not, strict scrutiny – show regulation advances interests of highest order and is narrowly tailored
 - *Church of the Lukumi Babalu Aye v. City of Hialeah* – Even if facially neutral, facts showing targeting religious practice or religious animus means not generally applicable and must meet strict scrutiny
- Reminder: many states have mini-RFRAs with higher standards for government action

Free Exercise Challenges to Pronoun/Preferred Name Policies

- Several courts have found in favor of educators challenging pronoun/preferred name policies as violating free exercise
- *Meriwether* (6th Cir.) - Finding that policy was not neutral or generally applicable given evidence of comments showing religious animus and irregularities in investigation process.
- *Geraghty* (N.D. Ohio) - Finding that policy was not neutral or generally applicable because there was not a policy written down, so it was a "moving target" with individualized exceptions and required strict scrutiny. Left for jury the "battle of the experts" in terms of whether the harm to transgender students was sufficient to justify the policy under strict scrutiny.

Free Speech & Free Exercise Challenges to Non-Discrimination Policies for Recognized Student Orgs

- *Business Leaders in Christ* (8th Cir.) - University violated free speech/free exercise in prohibiting religious student org from having membership/leadership policies that excluded LGBTQ students.
 - Key: inconsistent application of university policy, given other clubs that were allowed to discriminate in favor of LGBTQ, women, national origin, etc...
- *Fellowship of Christian Athletes* (9th Cir.) - University violated free exercise clause in revoking religious student org status based on discriminatory membership/leadership policies
 - Key: evidence of religious animus; inconsistency & treating secular activity more favorably than religious; individual exemptions means not "generally applicable"



Religious Accommodation Under Title VII

Title VII Religious Accommodation

- *Groff v. DeJoy* – Increased "undue hardship" standard for employers denying religious accommodations from "anything more than *de minimus costs*" to "substantial increased costs in relation to the conduct of its particular business."
 - Can take into account burden accommodation imposes on other employees, so long as the burden affects operations
 - Bias/hostility to religion cannot be undue hardship
 - Requires more than "mere burden" or "some additional costs"

Religious Accommodation Challenges Related to Pronoun/Name Policies

- *Kluge* (7th Cir.) - Ruling against teacher who sought Title VII religious accommodation of using last names only
 - Denied SJ for teacher because fact question as to whether teacher's religious belief was "sincerely held" (had used pronouns for transgender students in other contexts; questions regarding religious text)
 - Granted SJ for school because using last names only was "undue hardship" under *Groff*. Costs can be economic or non-economic.
 - Focused on mission – education for all and fostering learning environment of support/affirmation. Can define own legitimate mission. [Also *Trueblood*, WD Wash.]
 - Evidence that last name only caused substantial harm to students (complaints received re educational impact, disruption, students quitting orchestra)
 - Separate ground of undue hardship = unreasonable risk of liability from transgender students (noting Title IX, ADA, Equal Protection Clause)

State Trends



Restrooms and Other Facilities

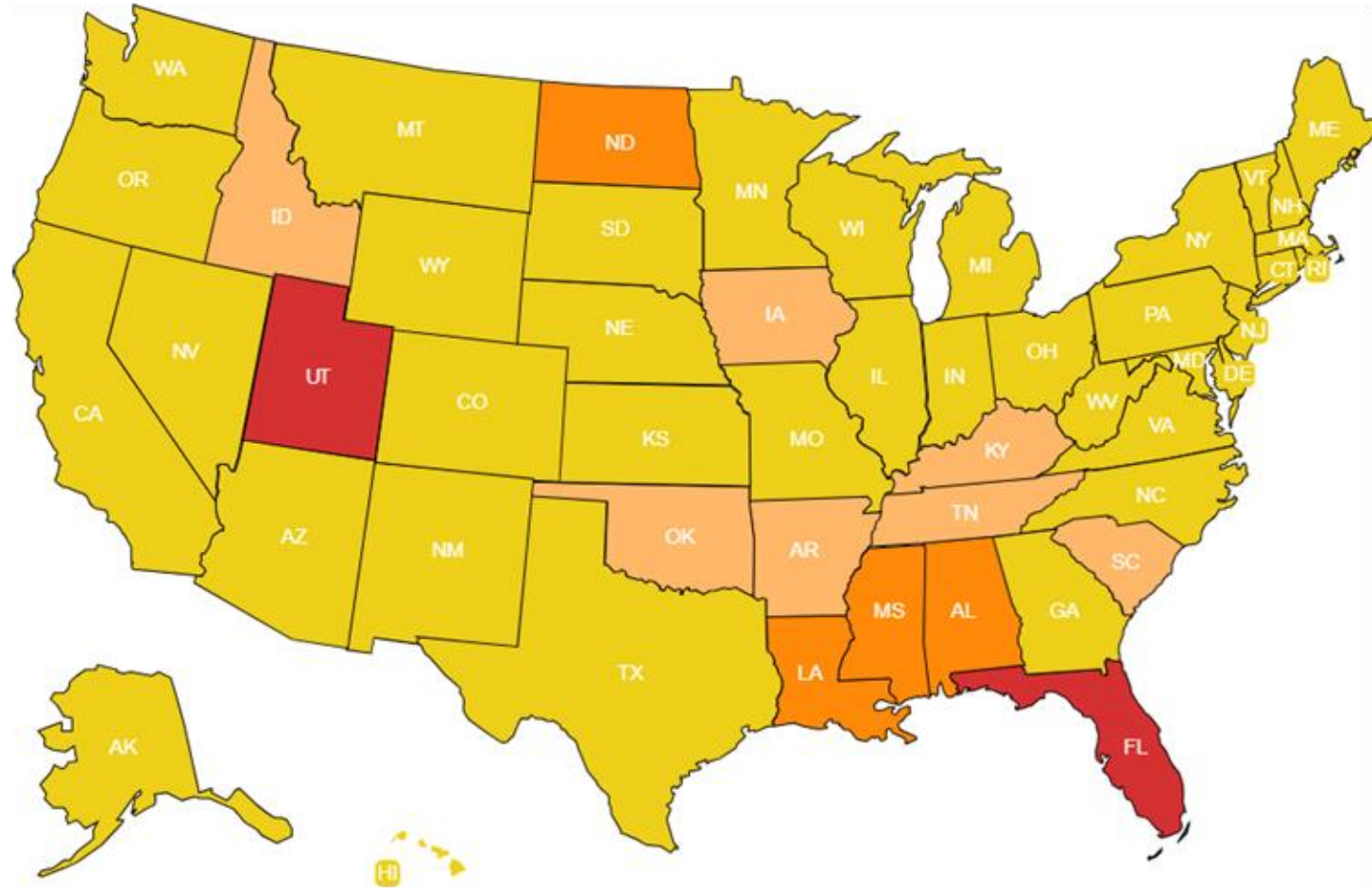
- Two (soon three?) states currently provide that individuals must use bathrooms and facilities consistent with their gender assigned at birth in all government-owned buildings and spaces (including public higher ed)
- Four states currently provide the above for K-12 and some government-owned buildings
- Seven states provide the above for K-12
- Ten states define "sex" in ways that *may* impact access to bathroom and other facilities
- Movement Advancement Project map (clickable by state):
https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans



[This Photo](#)

[CC BY-NC](#)

Bathrooms & Facilities



U.S. state-level law(s) regarding access to bathroom and facilities consistent with gender identity (eff. Nov. 8, 2024):

Two states ban use in government buildings, including K-12 schools and IHEs (Utah and Florida have criminalized usage).

Four states ban use in some government buildings, including K-12 schools.

Seven states ban use in K-12 schools (Idaho's ban was subject to temporary injunction.)

37 states, **five** territories, and **DC** have **no** state ban.

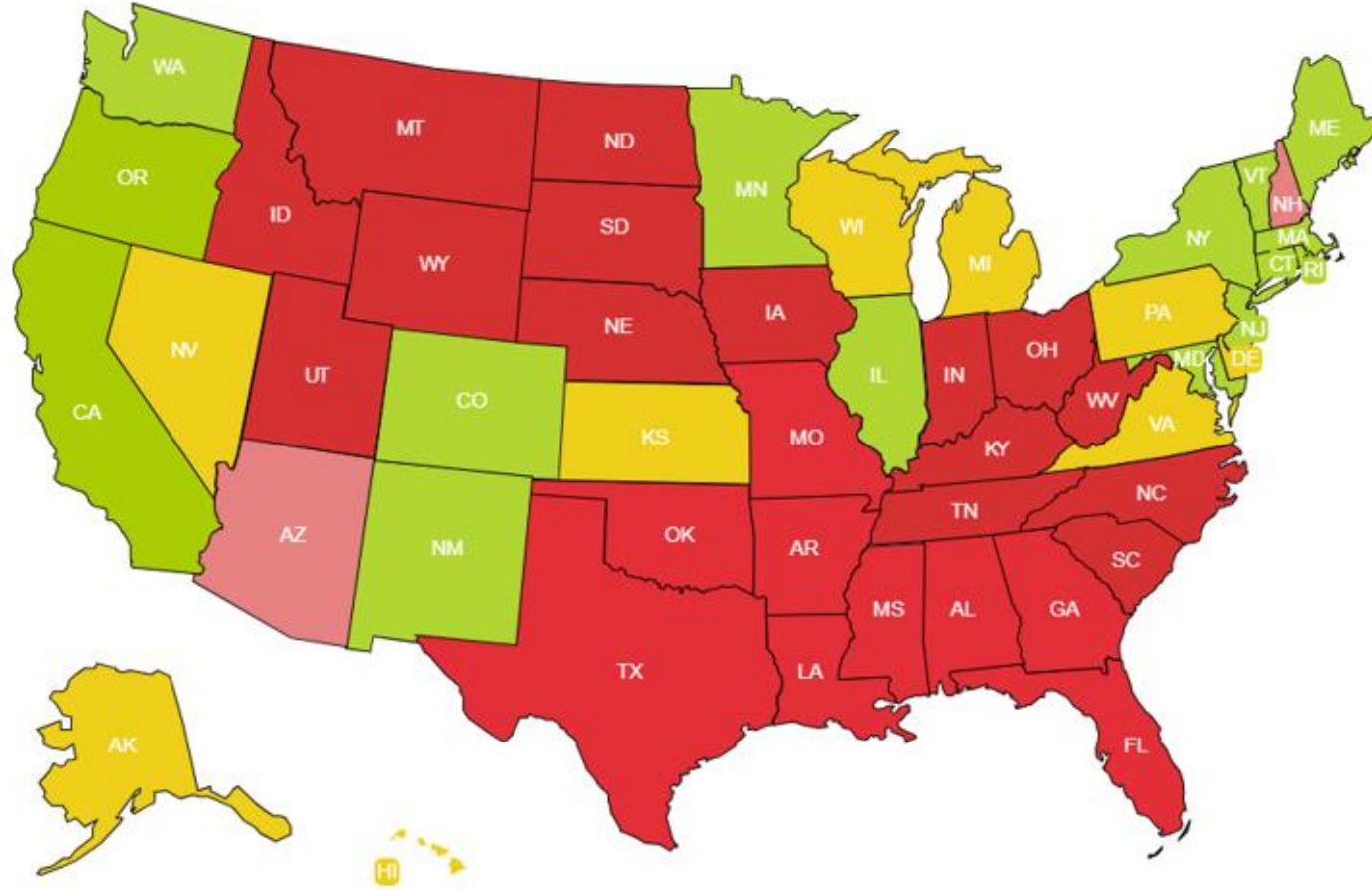
Note: Ten states across various categories have legal definitions of "sex" that may complicate access for people who are transgender.

Medical Care

- Monitor *U.S. v. Skrametti*;
- Set for argument December 4, 2024;
- Challenge to 2023 Tennessee law banning gender-affirming care for those under 18;
- Alleges the ban violates the Equal Protection Clause and Due Process Clause (right of parental autonomy) and conflicts with the Affordable Care Act.



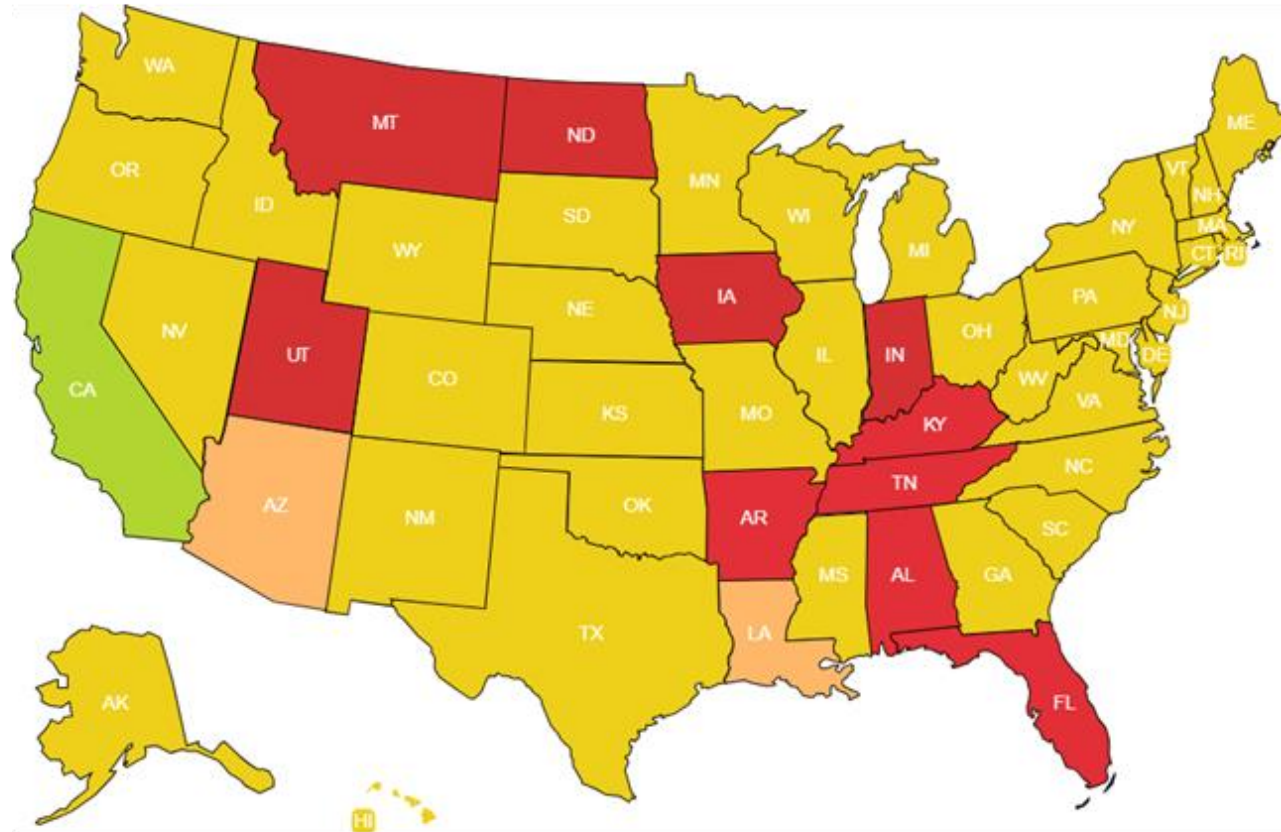
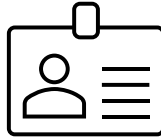
Affirming Medical Care



U.S. state-level law(s) regarding access to gender affirming medical care (eff. Nov. 1, 2024):

- **24 states** have laws that **prohibit/restrict**
- **Nine states + five U.S. territories** (American Samoa, Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, & U.S. Virgin Islands) **neither protect nor prohibit**
- **15 states + the District of Columbia** have laws that **protect/extend**
- **Two states** have a **mixed legal framework**: AZ banned surgical care for minors in 2022, but in 2023 the Governor issued an EO protecting other forms of healthcare; NH's law prohibiting care goes into effect Jan. 1, 2025

Pronouns



U.S. state-level law(s) regarding use of student pronouns consistent with their gender identity (eff. Nov. 21, 2024):

Ten states passed laws that teachers, staff, and peers are not required to use students' pronouns or names, if they do not align with the student's sex assigned at birth. Six states require parental notification when minor request to use a different name or pronouns.

Two states passed legislation restricting use of student pronouns that do not correspond with sex assigned at birth, that were not signed into the law by the state's governors. One of the two putative laws in LA would have permitted school personnel to decline to use students' pronouns and names based upon their personal "religious or moral convictions" regardless of parental approval of the name and pronouns.

37 states, **five territories**, and **DC** have **no state ban** expressly pertaining to student pronouns.

One state banned local school rules requiring parental notification regarding student-led request to change pronouns.

Note(s): MT and TN's laws also provide that school employees cannot be compelled to use students' pronouns; ND's law provides that school personnel may disregard the pronouns of both their students and colleagues; HB 686 was introduced in OH Nov. 15, 2024, which seeks to prohibit public postsecondary institutions from including a "pronoun" field in college applications.



State Trends: Restricting

- Barriers to requested gender on IDs;
- Free speech & expression bans;
- Healthcare restrictions;
- Public accommodations bans;
- Restricting student & educator rights;
- Weakening civil rights laws.



State Trends: Expanding

- Employment protections;
- Protections against conversion therapy;
- Laws against harassment and bullying;
- Laws permitting record updates to reflect gender identity;
- Laws enhancing insurance coverage for gender affirming care.



Practical Tips and Considerations



Gender Identity in University Records

Be mindful of how gender (and gender identity) is reflected in educational records.
Ask whether the recordkeeping options available reflect your institution's values.

Inquiries Into Gender Identity

EEOC Pre-Employment Inquiries As To Sex

- May ask if applicant is male or female
- May ask them to specify if they go by “Mr.” “Mrs” or “Miss”
 - If a pre-employment inquiry expresses any limitation as to sex, it is considered unlawful unless based on a Bona Fide Occupational Qualification

Student Information (Blends with Title IX)

- Title IX is silent on the collection of information regarding a student’s gender identity and/or sexual orientation.
- Once such information is collected, it would be protected from release without the student’s consent under the Family Educational Rights and Privacy Act (FERPA)
- Sometimes information on gender identity is requested as a matter of course.
- **Recommendation:** make the collection of gender identity information optional and only share on a need-to-know basis.
- **Ask:**
 - Is the information necessary to ensure that a person is qualified for a role?
 - Is information being used in a way that is permitted by law?



**KEY
TAKEAWAYS**

Tips and Takeaways

- Be human;
- Be proactive and collaborative;
- Be aware of changes in legal landscape;
- Be mindful of university policies, which may be more expansive than state/federal law;
- Be persistent and creative in finding ways to fulfill your institution's values, including in situations where individual's rights may appear to conflict;
- Be careful to honor all of the rights involved, even where in conflict with other viewpoints.



Tips and Takeaways

- Be reasonable and viewpoint neutral
- Avoid evidence of religious/discriminatory animus (even where the policy itself is neutral and generally applicable)
- Apply policies thoughtfully and consistently
- Engage fully in the accommodation process
- Put the institution in a position to succeed – to avoid and defend claims; assess litigation risks
- Be wary of retaliation claims



Questions?

NACUA materials, PowerPoint slides, and recordings available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides, and comments of the presenters should not be used as legal advice. Any hypothetical scenarios presented are based on fictional facts and persons. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides, or recordings should contact NACUA (nacua@nacua.org) prior to any re-use.