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12 July 2021

Mr. Wayne Hoffman
Idaho Freedom Foundation, Inc.
802 W. Bannock St. #405
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via email to wayne@idahofreedom.org

Re: Binding Precedential Effect of the Fourth Circuit Court of Appeals decision in *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) in Idaho

Wayne,

Your organization forwarded me an email from Quinn Perry, Policy and Government Affairs Director for the Idaho School Boards Association referencing the United States Supreme Court's denial of a petition for a writ of certiorari by the Gloucester County School Board from the above-referenced decision. This means that the Supreme Court declined to hear the case, allowing the lower court decision to stand. In her email, Ms. Perry asserted that this decision "leave[s] as the last word on the matter the Fourth Circuit's decision," "the *Grimm v. Gloucester County School Board* 2020 decision is the law," and that "[a] prohibition on transgender students using the bathrooms of their identified gender is unconstitutional" [emphases original]. Pursuant to your request for my opinion, and for the following reasons, I do not believe these are legally accurate statements.

I. A denial of a petition for a writ of certiorari is not necessarily "the last word on the matter," and expresses no opinion whatsoever on the merits.

Prior to the Judiciary Act of 1891, there was a right of appeal to the United States Supreme Court in cases over which it has jurisdiction, and in each case so appealed, the Court would have to render a decision after reviewing the issues on the merits and holding oral argument. To reduce the Court's workload, the Act provided for the creation of circuit courts of appeal. Appeals from the circuit courts is through a petition for a writ of certiorari, which is a request that the Supreme Court review a decision. The Supreme Court is not required to grant any particular petition for a writ of certiorari and, indeed, denies the vast majority of them. For instance, during the 2012 term, only 1.2% of petitions were granted. In real world numbers, this means that 92 of 7,602 cases which were appealed to the Supreme Court were granted a full review on the merits.[1]

[1] https://www.cocklelegalbriefs.com/blog/supreme-court/not-the-long-shot-you-thought/

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The consent of four of nine justices is required to grant a petition for a writ of certiorari. In the *Grimm* case, Justices Clarence Thomas and Samuel Alito would have granted review. It must be reiterated that a decision not to grant a petition for a writ of certiorari is not a decision on the merits; it is a logistical and administrative decision.[2] Because of the Court's limited resources relative to the number of appeals, it simply cannot grant review in every case.[3] Moreover, nothing would prevent the Supreme Court from granting a writ of certiorari and ruling on a case presenting the exact same issue in the future.

II. Decisions of federal circuit courts of appeal have binding precedential effect only within their own circuits.

In our legal system, "precedent" is a court decision which establishes a principle or rule that guides the decisions of other courts reviewing a case with similar facts or legal issues. Generally, the decisions of higher courts are binding upon lower courts within the same jurisdiction. For instance, in Idaho, decisions of the Idaho Supreme Court are considered binding on the Idaho Court of Appeals and state district and magistrate courts. Decisions of the Court of Appeals are binding on the state district and magistrate courts, but not our state supreme court.

[2] "As we have often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.' United States v. Carver, 260 U.S. 482, 490 (1923) (Holmes, J.). Accord, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 366, n. 1 (1973); Brown v. Allen, 344 U.S. 443, 489-497 (1953). The 'variety of considerations [that] underlie denials of the writ,' Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.), counsels against according denials [109 S.Ct. 1068] of certiorari any precedential value. Concomitantly, opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits." *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

[3] United States Supreme Court Rule 10: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

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The federal judiciary (with the exception of the United States Supreme Court) is statutorily established by Congress to be comprised of courts of "limited jurisdiction," hearing only certain types of cases, such as those involving questions of the federal constitution and federal law (the *Grimm* case presented both Equal Protection Clause issues and issues relating to Title IX of the Education Amendments Act of 1972).[4] Federal district courts are the federal trial courts, equivalent to our state district courts. In Idaho, we have only one federal district court for the entire state, but some states are broken up into multiple federal districts. Decisions of the federal district courts may be appealed as a matter of right to the court of appeals for the relevant circuit.

The United States is broken into thirteen judicial circuits: twelve comprised of states and territories, one for the District of Columbia, and the Federal Circuit for certain special federal appeals. Idaho is in the Ninth Circuit, joining Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington. All decisions of the United States District Court for the District of Idaho are appealable to the Ninth Circuit; they are not appealable to any other circuit. Conversely, decisions of the Ninth Circuit are legally binding on the federal district courts for Idaho, Oregon, and Washington, but not on federal district courts in, for instance, Florida.

The *Grimm* case was decided by the Fourth Circuit Court of Appeals, which is based in Richmond, Virginia. That court's decisions are binding upon the federal courts of Maryland, North Carolina, South Carolina, Virginia, and West Virginia. However, its decisions do not have binding precedential effect on the federal courts of Idaho, on those of any other state or territory within the Ninth Circuit, or within any other circuit.[5]

Precedent can be "persuasive" rather than binding, and decisions such as these, while not binding, would be used by attorneys in other circuits to attempt to either have their courts adopt the same legal reasoning as "the law of the circuit," or attempt to draw distinctions to persuade judges to rule oppositely. But in any case, until any circuit court has ruled definitively on an issue over which it has jurisdiction, it is simply not legally correct to call the decision of another circuit court "the law" in that circuit. Likewise, a statement like "A prohibition on transgender students using the bathrooms of their identified gender is unconstitutional" is legally incorrect. Such a prohibition has been ruled unconstitutional within the Fourth Circuit only. There is absolutely nothing which would legally prevent the United States District Court for the District of Idaho to rule differently than the Fourth Circuit on a similar issue, nor is there anything which would prevent the Ninth Circuit from affirming such a ruling, which would lead to a "circuit split."

[4] *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994).
[5] "Nothing the eighth circuit decides is 'binding' on district courts outside its territory. Opinions 'bind' only within a vertical hierarchy. A district court in Wisconsin must follow our decisions, but it owes no more than respectful consideration to the views of other circuits." *United States v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994).

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It is interesting to me that Ms. Quinn references the fact that "there is no conflict among Circuits and no U.S. Supreme Court decision on the topic" (emphasis original) in support of her assertion that the decision of the Fourth Circuit is "the law" in Idaho. A "conflict among circuits" (circuit split) can only arise precisely because a case was decided differently in a different circuit. Issues on which there is a circuit split are far more likely to be taken up by the United States Supreme Court, but even then, sometimes the Supreme Court will wait until several circuits have ruled on the matter to see if any national consensus has arisen.

For these reasons, it is not correct to assert that the decision of the Fourth Circuit in the *Grimm* case is "the law" in Idaho, nor is it correct to assert that "[a] prohibition on transgender students using the bathrooms of their identified gender is unconstitutional" in Idaho. It remains a matter of unsettled law within this state and in our circuit. If a decision of the Fourth Circuit is not "the law" in the Ninth Circuit the day before a denial of a petition for a writ of certiorari in the case is announced, the announcement of the denial cannot convert it into law here; only an affirmation on the merits by the United States Supreme Court can do that. To claim otherwise indicates a fundamental misunderstanding of the structure and procedure of the federal judiciary.

Very truly yours,
DINDINGER & KOHLER, PLLC

/s/ Edward W. Dindinger

Edward W. Dindinger, Esq.
Partner

signed electronically to avoid delay