IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; C.A., a minor, by and through her parent and guardian, N.A.; A.M., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A.T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his official capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as United States Attorney General; and SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS, Defendants, and STUDENTS A, B, and C, by and through their parents and legal guardians Parents A, B, and C, and the ILLINOIS SAFE SCHOOLS ALLIANCE, Intervenor-Defendants.	No. 1:16 CV 4945 The Hon. Jeffrey T. Gilbert, *Magistrate Judge*

INTERVENOR-DEFENDANTS' OPENING BRIEF ON
***HIVELY v. IVY TECH COMMUNITY COLLEGE*, NO. 15-1720 (7th CIR. 2016)**

INTRODUCTION

In *Hively v. Ivy Tech Community College, South Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016), the Seventh Circuit concluded that sexual orientation discrimination is not a form of sex discrimination, while claims of gender non-conformity plainly are. The *Hively* court's clear recognition that Title VII bars discrimination based on gender stereotypes offers strong support for Intervenor-Defendants' argument that "sex" includes "gender identity" for purposes of analyzing the claims in this case.

In addition, the factors that led the *Hively* court to the conclusion that sexual orientation discrimination is not a form of sex discrimination require a different result when it comes to discrimination on the basis of gender identity. The *Hively* court reasoned that Seventh Circuit precedent refusing to treat sexual orientation as coextensive with sex for purposes of Title VII "is in line with all other circuit courts to have decided or opined about the matter," *id.* at *2, and that "Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation . . . even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation [discrimination] in the workplace can no longer be tolerated." *Id.* at *3. By contrast, the precedent and legislative history regarding gender identity discrimination is entirely different and requires a different conclusion.[1]

A. *Hively* Confirmed That Gender Non-Conformity Discrimination Is Sex Discrimination.

Hively addressed a claim "solely for sexual orientation discrimination" because the plaintiff's bare-bones complaint alleged only that she was "'denied full time employment and

[1] Intervenor-Defendants firmly believe that *Hively* reached the wrong result when it concluded that sexual orientation discrimination is not a form of sex discrimination prohibited by Title VII. But even assuming that *Hively*'s conclusion on that score was correct and will survive further review by the panel or the full court, the panel's reasoning points to the opposite conclusion with respect to gender identity discrimination.

promotions based on sexual orientation'" and failed to include a claim of gender stereotyping. *Id.* at *1. The Seventh Circuit found that her sexual orientation discrimination claim "is beyond the scope of" Title VII's prohibition on sex discrimination. *Id*. By contrast, *Hively* affirmed that "gender non-conformity claims . . . have long [been] recognized as a form of sex-based discrimination under Title VII." *Id.* The court observed that "without exception" it has held that Title VII prohibits "discrimination based on 'sex,'" which extends to "discrimination based on a person's gender," but "not that aimed at a person's sexual orientation." *Id.* at *2. Like many other courts, the Seventh Circuit has imposed a "doctrinaire distinction between gender non-conformity discrimination," which is a form of sex discrimination, and "sexual orientation discrimination" which is not. *Id.* at *4. "As a result of *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]," courts have recognized "sex discrimination claims [couched] in terms of discrimination based on gender non-conformity," which is a type of "sex stereotype discrimination." *Id.* at *5. Accordingly, *Hively* soundly recognized the position that "sex" may not be so narrowly construed to ignore gender identity, as Plaintiffs have contended, even though it may not be read to include sexual orientation.

Plaintiffs' arguments why Student A should not be considered a girl are all founded in gender stereotypes. Plaintiffs contend that a person's sex is dictated by their "biological sex" or "genetic sex," and that transgender students must be required to use sex-segregated facilities based on their sex assigned at birth, rather than their gender identity. These "sex stereotype[s]" triggered by transgender students' "gender non-conformity" are the linchpin of Plaintiffs' entire case. *Id.* at *5. Plaintiffs seek to deny transgender students alone the ability to use gendered facilities that match their gender identity because (unlike cisgender students) they fail to conform to the stereotype that a person's gender identity aligns with their sex assignment at birth.

All of the decisions cited in Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, Dkt. 79 at 6-7 & n.3, involve claims sounding in sex stereotyping in reliance on *Price Waterhouse*. *Hively* recognized, as it must, that transgender people have prevailed on sex-stereotyping claims (2016 WL 4039703, at *5), as have lesbians, gay men and bisexual people when discrimination against them has been based on stereotypical expectations. *Id.* at *7. Courts in the Seventh Circuit have repeatedly recognized that sex discrimination includes discrimination based on gender non-conformity. *See, e.g.*, *Vega v. Chicago Park Dist.*, 958 F. Supp. 2d 943, 958 (N.D. Ill. 2013) (declining to dismiss Title VII claim where plaintiff was told that she "looks like a guy"); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (allegation that a student's harassment was allowed to continue because of a stereotypical perception that he "'was not man enough' . . . presumably to either take the abuse without complaint or to stop the abuse by himself" was sufficient to state a Title IX claim). Transgender persons *by definition* violate "gender norms," *Hively*, 2016 WL 4039703, at *11, because they violate the stereotypical expectation that a person's gender identity does or should match his or her birth-assigned sex. As a result, discrimination against them falls easily within the category of sex discrimination claims recognized in these and other cases, including *Hively* itself. *See Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (there is inherently "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms"); *Hively*, 2016 WL 4039703, at *8 (plaintiffs who "look, act, or appear to be gender non-conforming" fit easily under Title VII).

B. The *Hively* court's reasons for rejecting sexual orientation claims support continued recognition that sex must be defined to include gender identity.

Hively rejected the argument that Title VII prohibits discrimination on the basis of sexual orientation for two primary reasons. First, the circuit courts have been unanimous in concluding

that sexual orientation is not a form of sex discrimination barred by Title VII. *See* 2016 WL 4039703, at *2; *id.* at *11 ("If we, and every other circuit to have considered it are wrong about the interpretation of the boundaries of gender discrimination under the 'sex' prong of Title VII, perhaps it is time for the Supreme Court to step in and tell us so."). Second, Congress has repeatedly rejected efforts to add sexual orientation to Title VII notwithstanding the uniform decisions of the courts concluding that sexual orientation discrimination is different from sex discrimination. "Congress' failure to act" in the face of court decisions from numerous circuits holding that discrimination on the basis of sexual orientation is not sex discrimination persuaded the Seventh Circuit that its "understanding in *Ulane* [*v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)] that Congress intended a very narrow reading of the term 'sex'" that does not include sexual orientation "so far, appears to be correct." 2016 WL 4039703, at *3. The same two factors, however, lead to a different result with respect to gender identity discrimination.

By contrast to sexual orientation discrimination, five federal courts of appeals have concluded that discrimination against transgender persons constitutes sex discrimination. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir.), *stay granted*, No. 16A52, 2016 WL 4131636 (U.S. Aug. 3, 2016);[2] *Glenn*, 663 F.3d at 1316; *Smith v. City of Salem*, 378 F.3d

[2] Although the Supreme Court recently granted a stay of the Fourth Circuit's mandate in *G.G.* pending the Supreme Court's consideration of a certiorari petition in the case, Justice Breyer wrote separately to explain that he cast the fifth and deciding vote for a stay "as a courtesy" to his colleagues "[i]n light of the fact that four Justices have voted to grant the application" for a stay, "that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari." 2016 WL 4131636, at *1. This courtesy vote comports with the standard practice of the Supreme Court whenever four Justices vote to stay a circuit court action. *See* Stephen M. Shapiro *et al.*, Supreme Court Practice 939 (10th ed. 2013). That the Court chose to stay the mandate until it can decide whether or not to grant a petition for certiorari does not indicate that the petition will be granted, let alone any view as to the correctness of the underlying decision. For example, in *Kitchen v. Herbert*, the Court initially stayed a preliminary injunction that would have granted same-sex couples in Utah the freedom to marry, 134 S. Ct.

566, 570 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1199-1203 (9th Cir. 2000).

In addition, a review of legislative history regarding efforts to add gender identity to Title VII tells a different story as compared to the unsuccessful efforts to add sexual orientation relied on by the *Hively* court. Congress did not consider legislation to add gender identity protections to Title VII until 2007, *see* H.R. 2015, 110 Cong., 1st Sess. (2007), *after* three federal circuits had concluded that federal sex discrimination statutes extend to discrimination against transgender individuals and well after the Supreme Court recognized sex stereotyping claims in *Price Waterhouse*. Accordingly, the *Hively* court's view that Congress's inaction on sexual orientation discrimination showed that sexual orientation discrimination is not actionable has no application at all to gender identity discrimination. There was no need for Congress to amend Title VII to include gender identity, other than to clarify its scope, because courts had already reached the conclusion that such discrimination is sex discrimination prohibited by Title VII. *See Fabian v. Hosp. of Cent. Conn.*, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *14 n.12 (D. Conn. Mar. 18, 2016) ("The fact that the Connecticut legislature added [language explicitly protecting gender identity] does not require the conclusion that gender identity was not already protected by the plain language of the statute [prohibiting sex discrimination], because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it."); *see also* Br. Amici Curiae of 128 Members of Congress, *Christiansen v. Omnicom*

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893 (2014), only to deny certiorari to the Tenth Circuit nine months later and allow the injunction to take effect, 135 S. Ct. 265 (2014), and finally to confirm in *Obergefell v. Hodges* that the Constitution grants same-sex couples the freedom to marry in all 50 states, 135 S. Ct. 2584 (2015).

Grp., Inc., No. 16-748-cv, 2016 WL 3551468, at *8 (2d Cir. June 28, 2016) ("[I]t is equally plausible that ENDA was introduced to *clarify* as well as expand Title VII's protections . . . .").

Moreover, as explained in Intervenor-Defendants' Response Brief, Dkt. 79 at 10, the Supreme Court has repeatedly cautioned that acts of subsequent Congresses "deserve little weight in the interpretative process" regarding federal statutes. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). At a bare minimum, subsequent legislative action (or inaction) has no bearing on what Congress intended (or did not intend) in 1964 when it enacted Title VII. Nor can congressional intent—whatever it may have been—alter the meaning of the words Congress actually used. "[I]t is what Congress *says*, not what Congress *means* to say, that becomes the law of the land." *Bernstein v. Bankert*, 733 F.3d 190, 211 (7th Cir. 2013). This maxim underscores one of the central errors of the Seventh Circuit's *Ulane* decision: its assumption that transgender persons are "clearly" not covered under Title VII because "Congress never considered nor intended" that they be covered. 742 F.2d at 1085. The Supreme Court has flatly rejected the notion that "sex" discrimination is limited by unwritten exceptions. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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.").

Although the *Hively* court stated that it was bound by *stare decisis* to follow the portion of *Ulane* "holding that Title VII does not redress sexual orientation discrimination," 2016 WL 4039703, at *2, it stated no such obligation with reference to *Ulane*'s refusal to recognize gender identity discrimination, for the obvious reason that this portion of *Ulane* has been superseded by

the Supreme Court's recognition of sex stereotyping claims in *Price Waterhouse*.[3] *See Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 879 (N.D. Ill. 2014) ("If existing circuit precedent cannot be reconciled with a subsequent ruling from the Supreme Court, then the latter governs."). Indeed, the Seventh Circuit has repeatedly recognized that gender non-conformity claims are based on sex stereotyping and are barred by Title VII under *Price Waterhouse*. *See Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 575 (7th Cir. 1997) (recognizing that where plaintiff was questioned as to whether he was "a guy or a girl," it could be inferred that he did not conform to inquirers' impermissible sex stereotypes), *judgment vacated sub nom. City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998); *Hamm v. Weyauwega Milk Prods., Inc*., 332 F.3d 1058, 1064-65 (7th Cir. 2003) (citing *Nichols v. Azteca Restaurant Enters., Inc*., 256 F.3d 864, 874 (9th Cir. 2001), where plaintiff, who identified as male, was "referred to as 'she' and 'her' and experienced vulgar name-calling cased in female terms," as an example of impermissible stereotyping).

A third reason the *Hively* court offered in support of its holding that sexual orientation discrimination is not coextensive with sex discrimination is that sexual orientation discrimination may not always "stem from employers' and co-workers' discomfort with a lesbian woman's or a gay man's failure to abide by gender norms." 2016 WL 4039703, at *7. Gender identity discrimination, by contrast, is by its very nature a reaction to gender non-conformity. *See, e.g.*, *Glenn*, 663 F.3d at 1316-18 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."). As many courts have recognized, gender identity is literally a part of a person's sex. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (reasoning that in contrast to gender identity discrimination

[3] Moreover, what we know about the complexities of sex as well as how to assign sex to a transgender person has changed significantly since the time that *Ulane* was decided.

that is prohibited by Title VII, discrimination on the basis of sexual orientation is not discrimination for "fail[ing] to act and/or identify with his or her gender"); *Fabian*, 2016 WL 1089178, at *11 n.8 (finding that circuit precedent excluding sexual orientation discrimination from Title VII does not exclude discrimination on the basis of transgender status); *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 590 (E.D.N.C. 2015) (same). In consequence, discrimination based on a person's gender identity falls squarely within the category of gender non-conformity discrimination that *Hively* recognizes is prohibited by Title VII.

CONCLUSION

Hively recognizes without question that gender non-conformity claims *are* sex discrimination claims covered by Title VII. That conclusion is reinforced, not undermined, by *Hively*'s conclusion that Title VII's prohibition against sex discrimination encompasses sexual orientation discrimination when it is based on gender non-conformity. And it is equally beyond dispute that this case involves gender non-conformity, as is amply demonstrated in Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction. Accordingly, *Hively* supports Intervenor-Defendants' arguments about the scope of Title VII (and Title IX) as applied to protections against discrimination based on gender identity.

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Respectfully submitted,

/s/ *Britt M. Miller*

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