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

INTRODUCTION

Plaintiffs argue that *Hively v. Ivy Tech Community College, South Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016), "decisively supports" their conception of "sex" and their motion for preliminary injunction. Pls. Br. 1 [Docket No. 118]. This remarkable assertion ignores the actual content of the Seventh Circuit's decision, which reluctantly followed *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) *only* to the extent that sexual orientation discrimination, standing alone, is not sex discrimination under Title VII. As Intervenor-Defendants have explained, and as Plaintiffs cannot refute, the *Hively* court took pains to distinguish gender non-conformity discrimination, which is at issue in this case, from sexual orientation discrimination. In so doing, the court made unmistakably clear that after *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the former is recognized as discrimination on the basis of sex. Any notion to the contrary, as the *Hively* court showed, has been superseded by over 25 years of case law from the Supreme Court, the Seventh Circuit, and other courts.

Plaintiffs Have Failed to Refute *Hively*'s Confirmation That Discrimination Based on Gender Non-Conformity Is Sex Discrimination.

The court in *Hively* unequivocally recognized what is by now long settled: that under "that intervening Supreme Court case," *Price Waterhouse*, the protections of Title VII extend to discrimination against people "for failing to live up to various gender norms." 2016 WL 4039703, at *4; *id.* at *5 (noting that "gender norm discrimination . . . can form the basis of a legal claim under *Price Waterhouse*'s interpretation of Title VII"); *id.* at *9 (citing Seventh Circuit precedent applying Title VII to "failure to conform to stereotypic gender norms").[1] As

[1] The Seventh Circuit cited two of its own cases as support for this statement: *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir 1997), *vacated on other grounds*, 523 U.S. 1001 (1998), "finding that a worker who wore an earring and was habitually called 'fag' or 'queer' made a sufficient allegation of gender-based discrimination to defeat a motion for summary judgment," and *Bellaver v. Quanex Corp.*, 200 F.3d 485 (7th Cir.

Intervenor-Defendants have explained, transgender persons are conclusively entitled to these protections as discussed in *Hively*. A person's status as transgender breaks the stereotype that a person's gender identity as well as the way that person looks or acts should align precisely with the sex the person was assigned at birth.[2] Transgender individuals do not, in other words, conform to stereotypical gender norms, and it is for that reason that Title VII provides them with a cause of action. *See id.* at *4 ("gender non-conformity claims . . . are cognizable under Title VII"). The Seventh Circuit's overwhelming concern in *Hively* was the difficulty in separating claims of sexual orientation discrimination, which the panel concluded are not (without more) cognizable under Title VII, from those of "employees who fail to comply with typical gender stereotypes," which unquestionably are. *Id.* at *4–11 (concluding that the court will "continue to extricate the [valid] gender nonconformity claims from the [invalid] sexual orientation claims").

Plaintiffs simply ignore the vast majority of this analysis. Only by doing so are they able to conclude that "*Hively*, like *Ulane* before it, recognized that the term 'sex' in Title VII refers unambiguously to *genetic* sex, and nothing else." Pls. Br. 7 (citing *Hively*, 2016 WL 4039703, at *11). In fact, nowhere in *Hively* did the court discuss the concepts of "genetic sex" or "biological sex" that form the basis of Plaintiffs' case. And Plaintiffs fail to mention that on the same page of *Hively* they cite for the court's supposed affirmation that "sex" means "*genetic* sex," the Seventh Circuit unambiguously stated that Title VII "protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing make up." *Hively*, 2016 WL 4039703, at *11. At bottom, Plaintiffs claim that gender identity and sexual orientation (as it is discussed in *Hively*) are

---

2000), in which an employer "'may have relied on impermissible stereotypes of how women should behave.'" *Hively*, 2016 WL 4039703, at *4.

[2] Plaintiffs' argument that "gender identity" is a "subjective, psychological construct," Pls. Br. 1, is factually incorrect, but also beside the point, since it is the behavior of transgender young people that Plaintiffs are challenging—their social transition to living and using gendered facilities consistent with their gender identity.

indistinguishable, Pl. Br. 6, when they plainly are not. The distinction between the two was the driving force behind the *Hively* court's analysis.

Of equal importance is that nowhere in *Hively* did the Seventh Circuit discuss or even mention what Plaintiffs assert is a *Ulane* holding that *Hively* affirmed: that Title VII affords no protection to transgender individuals. Plaintiffs appear to believe that because *Hively* followed *Ulane* in its holding regarding sexual orientation discrimination, it necessarily also endorsed statements from *Ulane* doubting that Title VII encompasses "transsexual" discrimination. *Ulane*, 742 F.2d at 1084. The opposite is true. Although the court stated it was bound by precedent from *Ulane* and other several other cases "that Title VII does not redress sexual orientation discrimination," 2016 WL 4039703, at *2, it connected *Ulane*'s "very narrow reading of the term 'sex'" solely to the issue of sexual orientation discrimination. *Id.* at *3. The court then proceeded to discuss post-*Ulane* developments in Title VII law brought about by *Price Waterhouse*'s recognition that the statute protects against gender norm discrimination because that is discrimination based on "sex." *Id.* at *4–5. This discussion refutes Plaintiffs' view that only "out-of-Circuit authority" shows that *Price Waterhouse* "'eviscerated' *Ulane*." Pls. Br. 2. To the contrary, *Hively* itself details the evisceration: it repeatedly references the recognition in *Price Waterhouse* and subsequent cases of "gender non-conformity claims" under Title VII. *E.g.*, 2016 WL 4039703, at *4, 5, 6, 7, 9, 10, 13, 14. In doing so, it flatly contradicts Plaintiffs' arguments in their supplemental brief, all of which rest on the false premise that *Hively* followed *Ulane* in holding "sex" in Title VII to mean "genetic sex."

In addition to these unmistakable statements from *Hively*, Intervenor-Defendants have also debunked Plaintiffs' theory that "sex" for purposes of Title VII or Title IX encompasses only "genetic sex" or "the traditional notion of 'sex.'" *See* Pls. Br. 2, 5, 7. As Intervenor-

Defendants have shown, modern medical science and standards of care recognize that a transgender person's sex is based on their gender identity, efforts to change a person's gender identity and expression are unsuccessful and harmful, and gender identity has a biological basis. *See, e.g.*, Int.-Defs.' Resp. to Pls.' Mot. for Prelim. Inj. [Docket No. 79] at 2–3 (observing that "[t]he sole medically supported determinant of sex for individuals with gender dysphoria is gender identity," that attempts "to force alignment of an individual's gender identity and birth-assigned sex . . . were destructive failures," that "research shows transgender individuals possess a genetic factor that does not exist in cisgender persons," and "other studies have shown that persons with gender dysphoria have structural and connectivity differences in their brains as compared to other persons of their birth-assigned sex"). The United States likewise recognizes this scientifically established fact. *See* Fed. Defs.' Supp. Br. [Docket No. 116] at 4 n.2 (citing "current research" that "increasingly indicates that gender identity has physiological or biological origins").

As for Plaintiffs' refrain that "'sex' means sex," which presupposes some sort of universal meaning of "sex," it is notable that there has never been a static definition of "sex" discrimination. As just one example, courts initially rejected sexual harassment as a form of sex discrimination. *E.g.*, *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (sexual harassment could not be discrimination "because of sex" because "[t]he attraction of males to females and females to males is a natural sex phenomenon"), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (Title VII is not meant to provide a remedy "for what amounts to physical attack motivated by sexual desire . . . which happened to occur in a corporate corridor rather than a back alley"), *rev'd*, 568 F.2d 1044 (3d Cir. 1977). Yet they later reversed course, as evidenced in the Supreme Court's 1986

ruling that conduct creating a sexually hostile work environment violates Title VII, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and its decision 12 years later that Title VII also encompasses same-sex sexual harassment. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

Plaintiffs conclude their presentation on *Hively* by rehashing arguments about the legislative history of Titles VII and IX, including the purported meaning of "sex" during the drafting period. Pls. Br. 7–10. Defendant-Intervenors agree with the contrary analysis set out by the United States. The government has demonstrated that Plaintiffs' dictionary-driven conception of "sex" is belied both by definitions contemporaneous to the enactment of Title IX and by the Supreme Court's decision in *Oncale*, which rejected reference to Congress's drafting-era concerns in determining the reach of Title VII. *See* Fed. Defs.' Supp. Br. at 4–6.[3]

Similarly, Plaintiffs' reference to failed attempts to amend Title IX to include explicit reference to "professed gender identity discrimination," Pls. Br. 10, also represents an approach the Supreme Court has conclusively disavowed. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (rejecting reference to "subsequent legislative history" in determining reach of statute as lacking in "persuasive significance" and as "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law"). And even that now-rejected approach would offer Plaintiffs no support here. There has been no need for Congress to amend Titles VII or IX to state expressly that gender

[3] Plaintiffs' contention that statutory language referring to "one sex" and "the other sex" establishes a "binary understanding of sex" misses the point. Pls. Br. 8. The question in this case is not whether sex is "binary." The question is how Title IX applies to transgender students, such as Student A. The answer to that question is simple: Student A is a girl, therefore, Title IX requires that she be allowed to use girls' facilities. This conclusion is wholly consistent with the statutory language Plaintiffs quote. Moreover, that some individuals may have a gender identity that is neither male nor female does not mean that those individuals may be denied equal educational opportunity. In any event, no such individuals are parties to this case.

nonconformity discrimination is prohibited, for *Price Waterhouse* and subsequent decisions hold it already is covered.

CONCLUSION

Hively does not come close to supporting Plaintiffs' quest for a preliminary injunction. The decision makes plain what the Seventh Circuit and other courts have consistently held in the 25 years after *Price Waterhouse*: that the term "sex" in Title VII and other federal statutes specifically encompasses the notion of gender norms and sexual stereotypes. The central premise of Plaintiffs' case rests on an entirely different definition of the term, limited to "genetic" or "biological" sex, a notion that Plaintiffs even now fail to adequately explain given modern science and common sense. Because Plaintiffs' conception of "sex" fails under *Hively* and *Price Waterhouse*, Plaintiffs cannot succeed in showing they are likely to prevail on the merits of their claims.

Dated: August 9, 2016

Respectfully submitted,

/s/ *Britt M. Miller*

Britt M. Miller
Timothy S. Bishop
Laura R. Hammargren
Linda X. Shi
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
bmiller@mayerbrown.com
tbishop@mayerbrown.com
lhammargren@mayerbrown.com
lshi@mayerbrown.com

- and –

John Knight
ROGER BALDWIN FOUNDATION OF ACLU, INC.
180 North Michigan Avenue
Suite 2300
Chicago, IL 60601
Telephone: (312) 201-9740 ext. 335
Facsimile: (312) 288-5225
jknight@aclu-il.org

- and -

Ria Tabacco Mar*
American Civil Liberties Union FOUNDATION

125 Broad St., 18th Floor
New York, NY 10004
Telephone: (212) 549-2627
Facsimile: (212) 549-2650
rmar@aclu.org

** Admitted pro hac vice*

Catherine A. Bernard
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
cbernard@mayerbrown.com

Counsel for Students A, B, and C, and the Illinois Safe Schools Alliance