UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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,

vs.

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.

Case No. 1:16-cv-04945

The Honorable Jeffrey T. Gilbert, Magistrate Judge

Plaintiffs' Response Brief to Defendant Board of Education of Township High School District 211's Supplemental Brief on *Hively v. Ivy Tech Community College* (ECF No. 115); Federal Defendants' Supplemental Brief (ECF No. 116); and Intervenor-Defendants' Opening Brief on *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. 2016) (ECF No. 117).

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INTRODUCTION

Throughout this action Defendants have hammered Plaintiffs' reliance on *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), which expressly held that "sex" in Title VII is narrowly defined to mean sex—objectively discerned genetic, biological, male-female sex—and does not encompass "an individual's sexual identity disorder or discontent with the sex into which they were born." *Id.* at 1085. Plaintiffs clearly got the better of that contest in light of *Hively v. Ivy Tech Community College*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016), which squarely affirmed *Ulane* while reviewing at length many of the same arguments made by our Defendants.

Hively strongly validates Girl Plaintiffs' privacy arguments—sex means sex; the Girl Plaintiffs are girls; Student A is a boy; and Federal and District defendants intentionally authorized Student A to enter all female single-sex facilities on campus which on its face violates Girl Plaintiffs' privacy. And given the affirmation of the narrow meaning of "sex" in these statutes, it is obvious that the Federal Defendants violate the APA by their rewriting both regulation and statute to include gender identity—something which Congress has repeatedly rejected through its deliberative legislative process.

Remarkably, Defendants now contrive to accept *Ulane's* and *Hively's* narrow "sex means sex" definition and *still* insist that "sex" actually means "gender identity," which is a subjectively-determined fluid continuum ranging from male to female to something else, that is determined solely by the perceptions of the person claiming the identity. For simplicity's sake, we shall respond to the three briefs in the order filed and to each material argument seriatim, and simply denote the briefs by an abbreviated party name and "Suppl. Br." e.g., I-D Suppl. Br.

But first, an important and nigh-dispositive aside. Just six days after *Hively* issued, the Supreme Court recalled the mandate in *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636 (August 3, 2016) (On Application to Recall and Stay). The facts in *G.G.* are quite similar to ours—a girl claiming a male gender identity sought access to boys' restroom facilities. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd*, 822 F.3d 709, 714-716 (4th

Cir. 2016). Like District 211, the Gloucester defendants provided individualized, entirely private facilities for the professed transgender student, but that was not enough: relying on our Federal Defendants' rewrite of Title IX and its implementing regulations to include "gender identity," she demanded access to communal boys restrooms. *Id*. The school resisted, winning at district court but losing at the Fourth Circuit. *Id*. at 717. The Fourth Circuit timely issued its mandate, and the lower court almost immediately (without even notifying the parties) enjoined the Gloucester defendants from admitting the girl to the boys' communal facilities.[1] Petitioners' App. for Stay 15.

Importantly, the *G.G*. Defendants specifically argued that failing to recall the Fourth Circuit mandate would threaten the constitutional and Title IX rights of the other students to access facilities reserved to their biological sex, and further argued that absent recall and stay, parents' rights to control when their children might be exposed to the opposite sex would be violated. *Id*. at 33-36. Such arguments are very much the same as those of our Girl Plaintiffs.

On August 3, 2016, the Supreme Court recalled the mandate and stayed the district court's injunction. *Gloucester*, 2016 WL 4131636 at *1. This returned Gloucester to the status quo which is virtually identical to that which Plaintiffs seek in this case: Student A (who is already well-served by the District with a dedicated multidisciplinary professional support team) would have fully private facilities for his personal needs while Girl Plaintiffs would be assured that they may use their single-sex communal facilities without the risk (or repeat) of a male being present in those facilities and the consequent violation of their privacy.

In short, the Supreme Court just telegraphed that the balance of harms falls in favor of *all* students' privacy rights, and it blueprinted the right decision, which certainly should inform this Court in deciding to issue preliminary relief forthwith to protect the privacy of Girl Plaintiffs.

We turn now to rebutting Defendants' arguments.

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[1] Petitioners' Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari at 33-36, Gloucester County School Board v. G.G. ex rel. Grimm, No. 16A52, 2016 WL 4131636 (August 3, 2016), a true and correct copy of which is attached as Exhibit 1.

ARGUMENT

I. Contra District Defendants, *Hively* bears directly on both the Title IX and constitutional claims against them.

District Defendants argue that they win (even if sex actually does mean sex, as Plaintiffs say), because the relevant sex for the Title IX claim is that of the Plaintiffs, and not the sex of Student A. Dist. Defs.' Suppl. Br. 2, ECF No. 115. That argument is simply wrong: it is the District Defendants' official policy that puts a boy in the girls' locker rooms and restrooms, and it is precisely because of the Girl Plaintiffs being girls that the Title IX harm arises. If the girls were boys, Student A's entrance may raise eyebrows but it would not raise a Title IX claim.

They further say that *Cruzan v. Special School District Number 1*, 294 F.3d 981 (8th Cir. 2002), dispositively rejects Girl Plaintiffs' facial argument that officially authorizing a boy to be in the girls' private communal facilities is somehow not creating a hostile environment for the Girl Plaintiffs. But *Cruzan* is easily distinguishable. In *Cruzan*, a teacher alleged that her school's policy of letting a transitioning male-to-female teacher use the female teachers' restroom was, among other things, a hostile work environment under Title VII. The district court disagreed, rejecting the hostile environment claim by noting that the male employee could only use <u>one</u> women's restroom (not every one), and saying "Cruzan has the option of using the female faculty restroom used by Davis **or using other restrooms in the school not used by Davis**." *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 969 (D. Minn. 2001), *aff'd sub nom. Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981 (8th Cir. 2002) (emphasis added). Thus, the male was granted access to but one restroom while all other restrooms on campus were off limits to him.

In stark contrast, in our case Student A is officially authorized to enter <u>*every*</u> female student restroom (and locker room) in the school. Consequently, Girl Plaintiffs have no refuge in any communal restroom designated for female student use only. And we note that *Cruzan* dealt with an adult whose employer was not in a custodial role, and had not taken the action the District has to mandate compliance with, and affirmation of, Student A's personal psychological condition.

No less importantly, Girl Plaintiffs pointed this Court to its own prior holding in *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984), to demonstrate that their zone of protection from the opposite sex begins at the restroom door, *id.* at 1415-17, a rule which—had *Cruzan* been brought in this Circuit—favored the plaintiff. And of course, the Eighth Circuit does not stand alone: the Tenth Circuit rejected *Cruzan's* rule which had said that the presence of a male in the women's restrooms, even in the form of a male-to-female transgender did not present a hostile work environment. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007).

And before we leave *Cruzan*, it's important to remember that "harassment in the workplace is vastly different from sexual harassment in a school setting."

> The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its younger victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.

Davis v. Monroe County Board of Education, 74 F.3d 1186, 1193 (11th Cir.1996) (citation omitted), *rev'd*, 120 F.3d 1390 (1997), *rev'd on other grounds*, 526 U.S. 629 (1999). Schools are charged with acting *in loco parentis*, while employers owe no such duty to their employees." *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226–27 (7th Cir. 1997).

District Defendants then argue that *Hively* has no bearing on Girl Plaintiffs' constitutional claim, pointing to the rambling dicta and the two judges' confusion over how to parse sex, sexual orientation, sexual stereotyping, and gender non-conformity claims. See *Hively*, 2016 WL 4039703 at *3-*13.

To bolster that point, District Defendants cite an extended passage from *Hively*, pointing to the blurred lines between gender nonconformity and sexual orientation claims, in which the

two judges are left agog that a lesbian displaying masculine characteristics would be protected under an *Oncale*[2] sex-discrimination analysis, but that a lesbian who was feminine but "violates the most essential of gender stereotypes by marrying another woman" would not be protected as that would be a sexual orientation claim. Dist. Defs.' Suppl. Brief 3-4, ECF No. 115 (quoting *Hively*, 2016 WL 4039703 at *11).

But as Plaintiffs previously pointed out, Title VII also doesn't cover discrimination grounded in a man marrying a woman because Title VII does not protect against marital status discrimination. As the *Hively* majority correctly decided, it is improper to read into Title VII and its narrow "sex" term protections that Congress did not insert—whether that is marital status protection to satisfy the two judges, or gender identity protection to satisfy the Defendants.

Hively defines sex as Congress meant and wrote it: sex, understood as a genetic, biological, male-female taxonomy that cannot be redefined to mean "gender identity." It thus bears directly on Girl Plaintiffs' constitutional claims as it confirms that school officials have authorized a boy[3] to enter the Girl Plaintiffs' private communal facilities.

II. Contra Federal Defendants, "sex" in Title IX means "sex," not gender identity.

Federal Defendants argue that this case is "about whether the term 'sex' in Title IX and its implementing regulations unambiguously means 'sex assigned at birth' or 'genetic sex'… and [a]s such, *Hively* does not affect, much less control, the outcome of this case." Fed. Defs.' Suppl. Br. 1, ECF No. 116.[4] But as Plaintiffs demonstrated in their opening supplemental brief, the *Hively* court ably discerned that "sex" was narrowly defined in Title VII as genetic sex, and that Title VII jurisprudence is a good guide for understanding Title IX. And once the word is narrowly defined to mean an immutable, genetic, reproductively-based binary male-female

[2] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), which held that male-on-male sex discrimination was actionable because it occurred because of the plaintiff's male sex—which is simply straightforward sex discrimination and no more.

[3] And there is no ambiguity that Student A is of the male sex, as Plaintiffs (and Title VII, and Title IX) define "sex." *See* Pls.' Reply Mem. in Supp. of Prelim. Inj. Mot. 22, ECF No. 94.

[4] Note that Federal Defendants here admit that their redefinition of "sex" reaches not only the implementing regulation but the statute itself. Such efforts merit no type of deference and violate the Administrative Procedures Act, as set forth in Pls.' Mem. in Supp. of Prelim. Inj. 18-19, ECF No. 94 and Pls.' Suppl. Br. 7, ECF No. 118.

taxonomy, it has everything to do with the question of whether the unambiguous meaning of "sex" can be radically expanded so that gender identity's self-perceived, subjective, fluid continuum of "male, female, or something else"[5] supplants the unambiguous term "sex."

Federal Defendants strive through several pages, Fed. Defs.' Suppl. Br. 2-8, ECF No. 116, to justify their substitution of a self-perceived, subjective, fluid continuum of male, female, or something else for the statutory term "sex." But that argument can prevail only by utterly ignoring our reproductive nature, and nobody proves that point better than the Federal Defendants themselves when they point to Webster's Third New International Dictionary definition for sex, which they quote as:

> "[T]he sum of the morphological, physiological, and behavioral peculiarities … that is typically manifested as maleness or femaleness."

Fed. Defs.' Suppl. Br. 4, ECF No. 116 (quoting *Gloucester*, 822 F.3d at 721). But the full dictionary definition for sex cited by the *Gloucester* court, and which Federal Defendants glaringly omitted by ellipsis, is:

> the sum of the morphological, physiological, and behavioral peculiarities **of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and** that is typically manifested as maleness and femaleness ....

Gloucester, 822 F.3d at 721 (emphasis added). Redactions in and of themselves are a good and necessary tool for the advocate. But here, the redaction completely eliminates what those "morphological, physiological, and behavioral peculiarities" *subserve*—which is our binary, genetically-determined reproductive nature as a species. *See* Pls.' Reply Mem. in Supp. of Prelim. Inj. Mot. 16-18, ECF No. 94 (expanding this argument).

The Federal Defendants' revealing redaction confirms Plaintiffs' position: Defendants' novel conception of "sex" can be credited only by unhinging it from critical characteristics of sex: it is binary, genetic, and necessary for reproduction. Absent those three factors in

[5] Expert Decl. of Robert Garofalo, M.D., M.P.H. ¶12, ECF No. 79-3

combination, "male" and "female" have no real meaning.

Having failed to redact reality, the Federal Defendants then attempt to inflate ambiguity by pointing to the same aberrations of life as did the *Gloucester* court—such as intersex individuals who are born with ambiguous or duplicative genitalia; an individual born with X-X-Y chromosomes; and most absurdly, a person who suffers traumatic loss of genitalia. But this simply reflects the reality that not every birth is perfect, and humans can develop abnormally in utero. A child who is born without a leg, or a person who later in life is tragically shorn of one, is no less a member of a bipedal species, just as intersex[6], XXY[7], and accidentally–maimed humans are nonetheless members of a sexed species.

Nor is their claim bolstered by reciting out-of-circuit authorities which they claim support a Title VII or Title IX cause of action for transgenderism. Fed. Defs.' Suppl. Br. 3. Plaintiffs previously dealt with those authorities (Pls.' Reply Mem. in Supp. of Prelim. Inj. Mot. 14-16, ECF No. 94) and more to the point, *Ulane* explicitly rejects protections for transgender status based on a narrow reading of "sex" to mean genetic sex, 742 F.2d at 1086, and *Hively* reaffirms that narrow reading of the term "sex," both of which inform the Title IX meaning of "sex."

Federal Defendants then make a footnote argument to say that recent medical studies "point in the direction" of a biological cause of gender dysphoria and that the data "suggest a biologic etiology" for transgender identity. Fed. Defs.' Suppl. Br. 4 n.2, ECF No. 116. But "pointing" and "suggesting" is a long way from evidentiary proof—and importantly, a close reading of Intervenor-Defendants' expert Dr. Garofalo's testimony reveals that he properly evaded saying that there was actually dispositive proof of such "suggestions."

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[6] Intersex conditions are rare. Two that are noted in the literature are 5 alpha reductase deficiency which is so rare that its incidence level is unknown and androgen insensitivity syndrome which is known to affect 2-5 persons per 100,000 people. U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/5-alpha-reductase-deficiency (last visited August 9, 2016); U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/androgen-insensitivity-syndrome (last visited August 9, 2016) Both represent aberrations of the normative binary male/female dichotomy.

[7]The XXY chromosomal condition is known as Klinefelter's syndrome and those who suffer it are nonetheless deemed males. U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/klinefelter-syndrome (last visited August 9, 2016); U.S. National Library of Medicine, https://medlineplus.gov/ency/article/000382.htm (last visited August 9, 2016)

With the last gasp of supplemental briefing, Federal Defendants invoke *Oncale* for the proposition that a law may "go beyond the principal evil to cover reasonably comparable evils…." Fed. Defs.' Suppl. Br. 6, ECF No. 116 (quoting *Oncale*, 523 U.S. at 79). This is hardly a startling principle, but to accept it here one must think that "gender identity," a subjectively-determined fluid continuum ranging from male to female to something else is "*reasonably comparable"* to an immutable, genetic, reproductively-based binary male-female taxonomy. Plaintiffs submit that substituting gender identity for sex is a contradiction, not a comparison, and should be roundly rejected.

III. Contra Intervenor-Defendants, sex and sexual stereotypes are different.

Intervenor-Defendants summarize their view of *Hively* in a single sentence: "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." I-D Suppl. Br. 3, ECF No. 117.

But Intervenor-Defendants don't cite to where *Hively* says that, because it doesn't. In fact, it doesn't even use the term "gender identity."

Intervenor-Defendants can reach that misguided conclusion only by misunderstanding *Price Waterhouse*, misunderstanding what a "stereotype" is, and misunderstanding what the legislative history of Title IX means.

A. Intervenor-Defendants misunderstand the scope of Price Waterhouse.

Intervenor-Defendants try to read gender identity as a protected class into *Hively* by saying that while the *Hively* court was bound by stare decisis to exclude sexual orientation, "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 stereotyping claims in *Price Waterhouse*." I-D Suppl. Br. 7-8, ECF No. 117. They then cite three cases that are apparently intended to support a cause of action for "gender identity discrimination" under Title VII: *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Circ. 1997), *judgment vacated*, 523 U.S. 1001 (1998); *Hamm v. Weyauwega Milk*

Prods., Inc., 332 F.3d 1058 (7th Cir. 2001); and *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001). I-D Suppl. Br. 8, ECF No. 117.

To begin with, Intervenor-Defendants again cited to *Hively* for what it did not say—i.e., anything about "gender identity" whatsoever. The term doesn't even appear in the opinion. Such arguments from silence are inherently weak.

More importantly, they err regarding what sex stereotyping means, thinking that by using that term, *Price Waterhouse* was embracing gender identity theory. Plaintiffs thoroughly rebutted that mistaken idea and direct the Court's attention to Pls.' Reply Mem. in Supp. of Prelim. Inj. Mot. 18-20, ECF No. 94.

One can pretty much sum up all that *Price Waterhouse* says about sex stereotyping in one sentence: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[8] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). That is pure traditional sex discrimination in which the stereotype is only evidence of discrimination, and is referenced to the fact that the complainant was a female—which is one half of the immutable, genetic, reproductively-based binary male-female taxonomy which is what sex is.

It is perplexing why the Intervenor-Defendants drag *Doe, Hamm,* and *Nichols* to the fight—none stands for anything more than what *Oncale* established: male-on-male sex discrimination is actionable under Title VII. *Nichols* and *Doe* both dealt with men who were harassed by other men because they were effeminate, and the respective courts allowed the claims to proceed. *Doe*, 119 F.3d at 593-594; *Nichols*, 256 F.3d at 874-875. And to the point that they simply follow *Oncale*, *Nichols* explicitly relies on *Oncale* as authorizing male-on-male sex discrimination claims, *Nichols*, 256 F.3d at 874, and *Doe* was remanded by the Supreme Court expressly "for further consideration in light of *Oncale* v. *Sundowner Offshore Services* …." *City of Belleville v. Doe by Doe,* 523 U.S. 1001 (1998). There is nothing new under the sun here.

[8] We note that the Court used "gender" and "sex" interchangeably, both meaning "sex," the fixed binary male/female taxonomy.

Enlisting *Hamm* is even more pointless, in that Mr. Hamm didn't even "fall within a sexual stereotyping claim cognizable under Title VII" (and pointed to *Doe* and *Nichols* as "cases in which courts have found such a claim"). *Hamm*, 332 F.3d at 1064. Mr. Hamm's strongest fact was that he was called a "girl scout," the problem being that the same pejorative term was applied to many other men. *Id*. at 1064. Hamm thus couldn't prove he was "treated differently because of his sex when other men at the plant were referred to by the same name." *Id*. *Hamm* stands for no more than sex stereotyping may evidence sex discrimination. All three cases consider discrimination based on sex; none treat sex stereotyping as anything but evidence of classic discrimination because of sex; and none even suggest that "sex" in Title VII should be read as anything other than genetic sex.

B. **Intervenor-Defendants mischaracterize "stereotypes."**

Intervenor-Defendants try to bootstrap gender identity into Title IX by conflating sex stereotyping with gender identity: "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." I-D Suppl. Br. 3, ECF No. 117.

In light of this startling statement, we repair to the dictionary to discover what "stereotype" actually means, which is "something conforming to a fixed or general pattern; *especially*: a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment." *Merriam-Webster Online Dictionary* (2015), http://www.merriam-webster.com/dictionary/stereotype.[9]

[9] Today's definition is almost verbatim the definition used in the drafting era of Title IX: "Stereotype: 2: something repeated or reproduced without variation**:** something conforming to a fixed or general pattern and lacking individual distinguishing marks or qualities, *esp* : a standardized mental picture held in common by members of a group and representing an oversimplified opinion, affective attitude, or uncritical judgment (as of a person, a race, an issue, or an event)**."** *Webster's Third New International Dictionary of the English Language*, Volume II (1971), G. & C. Merriam Company (Springfield, Massachusetts).

Consider, then the examples of stereotyping found in *Price Waterhouse*, such as "macho," needing "a course at charm school," a "lady using foul language," "somewhat masculine," and needing to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse*, 490 U.S. at 235. Such things fall squarely in the realm of "oversimplified opinion, prejudiced attitude, or uncritical judgment."

From such classic examples of sexual stereotyping, Intervenor-Defendants would stretch *Price Waterhouse* to say that the immutable, genetic, reproductively-based binary male-female taxonomy which defines humanity as a sexed species (which is discernible not only at birth, but in the womb) is no more than an "oversimplified opinion," "prejudiced attitude," or mere "uncritical judgment."

It is beyond absurdity to stretch "stereotype" to describe the normative fact that human children are born male and female. As discussed above, the fact that a minute fraction of children may be born with a chromosomal abnormality or ambiguous genitalia reflects only the imperfection of nature. That there are unfortunate variances from the norm only confirms that there is an objective, observable norm reflected in one of the most common questions asked of prospective and new parents—"boy or a girl?"

C. **Legislative history will not save Intervenor-Defendants' arguments.**

Intervenor-Defendants' open by saying something with which Plaintiffs actually agree: "[I]t is what Congress *says*, not what Congress *means* to say, that becomes the law of the land." I-D Suppl. Br. 7, ECF No. 117 (quoting *Bernstein v. Bankert*, 733 F.3d 190, 211 (7th Cir. 2013). This tracks nicely with what the *Ulane* court said: "It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning." 742 F.2d at 1085 (citation omitted). So if what Congress says is the law of the land, and if words are to have their common meaning, then it is worth revisiting *Ulane*'s words which bind every court within the Seventh Circuit:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they

> are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e–2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.

742 F.2d at 1085.

As to the legislative history, we note that Title IX's sponsor stated that the bill would not require co-ed dormitories or locker rooms,[10] and confirmed that Title IX would allow differential treatment among the biological sexes, such as "classes for **pregnant girls** …, in sport facilities or other instances where personal privacy must be preserved."[11]

Intervenor-Defendants have no possible response to Sen. Bayh's concern for pregnant girls—a term which absolutely cannot admit a transgender girl, as such a person is by definition a male who perceives himself to be female and consequently there is no possibility of pregnancy for a transgender girl.

Finally, Intervenor-Defendants seem to argue that there's a difference between the legislative histories of Title IX and Title VII, pointing out that the circuit courts "have been unanimous in concluding that sexual orientation is not a form of sex discrimination barred by Title VII[,]" I-D Suppl. Br. 4-5, ECF No. 117, and that Congress has repeatedly rejected efforts to include sexual orientation notwithstanding the courts' rejection of it as a protected class. *Id*. at 8. Defendants' point seems to be that legislative history is more informative when courts uniformly reject a position and Congressional efforts to a similar end also fail.

But that's akin to how Congress and the Courts have interacted regarding gender identity under Title IX. Congress rejected the Student Non-Discrimination Act, which would have provided remedies for gender identity discrimination in schools modeled on Title IX's prohibition of

[10] 117 Cong. Rec. 30407 (1971) (Statement of Sen. Bayh).
[11] 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added).

sex discrimination in 2011[12], 2013[13] and 2015.[14] But it was not until April 19, 2016, that the first federal appellate court read gender identity into "sex" under Title IX—and the longevity of that opinion has just come into serious question with the recall of the Fourth Circuit's mandate in the case. *Gloucester*, 822 F.3d at 723, mandate recalled, stay granted by *Gloucester*, 2016 WL 4131636.

Thus, the legislative history of Title IX, and the course of events in Congress since its enactment, clearly reject the notion that "sex" means "gender identity" and that the immutable, genetic, reproductively-based binary male-female taxonomy has been supplanted by "gender identity," a subjectively-determined fluid continuum ranging from male to female to something else.

CONCLUSION

Plaintiffs' theory of the case is that *Hivley* and *Ulane* in tandem confirm that Congress meant "sex" to mean sex—genetic, biological, binary sex—in Title VII and Title IX. This is an intentionally narrow gate for challenges to invidious sexual discrimination. This gate is closed to all but sex: it will not admit sexual orientation, nor gender identity, nor for that matter, marital discrimination. It regulates only invidious sex-based discrimination. So Congress said, and so courts should hold.

Defendants reject that theory, grudgingly conceding that *Hively* closed the gate in this circuit to sexual orientation claims under Title VII—but left the gate wide open (if not unhinged) under Title IX for gender identity to supplant "sex" with its subjectively-determined fluid continuum ranging from male to female to something else.

Defendants' theory goes too far. It allows the government to suppress all distinctions—not only invidious ones—that trench on the perceived "rights" of a male student who professes a female gender identity. It eviscerates the textual and historical protection Title IX offers for

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[12] Student Non-Discrimination Act of 2011, H.R. 998, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/house-bill/998; Student Non-Discrimination Act of 2011, S. 555, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/senate-bill/555.

[13] Student Non-Discrimination Act of 2013, H.R. 1652, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/1652; Student Non-Discrimination Act of 2013, S. 1088, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/senate-bill/1088.

[14] Student Non-Discrimination Act of 2015, H.R. 848, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/846/related-bills; Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/439.

women by authorizing female-specific facilities. And it leaves our adolescent Girl Plaintiffs having their privacy and modesty violated when a male enters their formerly sex-specific female facilities.

As *Hively* demonstrates, confusion runs rampant when a civil rights law that prohibits *invidious* discrimination based on objectively discernible, stable characteristics such as sex, race, and age are applied to suppress *all* distinctions that touch on "gender identity," that subjectively-determined fluid continuum ranging from male to female to something else.

To some extent, such confusion results from poor linguistic discipline—courts bat about the terms gender, sex, gender non-conformance, and sex stereotyping with abandon, so that sometimes gender means sex but other times it alludes to a sexual stereotype, and so on. And then when subjectively–determined characteristics are protected—sexual orientation and gender identity—the confusion only deepens as the extended *Hively* dicta so well demonstrates.

And perhaps the weary reader may begin to wonder why it matters—one may ask why it's so important to be clear that sex means sex when we discover that a properly plead *sex* discrimination complaint offers a route to judicial relief under traditional sex discrimination jurisprudence regardless of whether the claimant professes a particular sexual orientation or gender identity or neither?

The answer is that sometimes *sex actually matters*—and it particularly matters in the most intimate spaces in our daily public lives, such as single-sex communal facilities for showering, changing, attending to personal hygiene needs, and relieving oneself. Sex matters when protecting the privacy of adolescent girls: it is a necessary distinction to protect their rights, and certainly not invidious, irrational discrimination.

Adopting the Defendants' substitution of gender identity for sex means that the rightful privacy offered to students under Title IX vaporizes: they will undoubtedly confront a boy in their private spaces. Sex matters because the Girl Plaintiffs' privacy matters, and we respectfully request that this Court issue injunctive relief forthwith.

Respectfully submitted this the 9th day of August, 2016.

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EXHIBIT 1

No. A16-_____

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

G.G., by his next friend and mother, Deirdre Grimm,
Respondent

PETITIONER'S APPLICATION FOR RECALL AND STAY OF THE U.S. FOURTH CIRCUIT'S MANDATE PENDING PETITION FOR CERTIORARI

Directed to the Honorable John G. Roberts, Jr.
Chief Justice of the Supreme Court of the United States and
Circuit Justice for the United States Court of Appeals for the Fourth Circuit

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July 13, 2016

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Applicant Gloucester County School Board ("Board") respectfully requests a recall and stay of the Fourth Circuit's mandate, pending this Court's disposition of the Board's forthcoming certiorari petition. Additionally—because it is necessary in aid of this Court's jurisdiction and to prevent irreparable harm to the Board and its students—the Board respectfully requests a stay of the district court's injunction, which was immediately entered following issuance of the Fourth Circuit's mandate.

INTRODUCTION

This case presents one of the most extreme examples of judicial deference to an administrative agency this Court will ever see, thereby providing the perfect vehicle for revisiting the deference doctrine articulated in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and subsequently criticized by several Justices of this Court.

Enacted over forty years ago, Title IX and its implementing regulations have always allowed schools to provide "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. No one ever thought this was discriminatory or illegal. And for decades our Nation's schools have structured their facilities and programs around the sensible idea that in certain intimate settings men and women may be separated "to afford members of each sex privacy from the other sex." *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996).

The Fourth Circuit's decision in this case turns that longstanding expectation upside down. The court reasoned that the term "sex" in the applicable Title IX regulation does not simply mean biological males and females, which is what Congress and the Department of Education (and everyone else) thought the term

meant when the regulation was promulgated. To the contrary, the Fourth Circuit now tells us that "sex" is ambiguous as applied to persons whose "gender identity" diverges from their biological sex. App. A-21 to A-24. According to the Fourth Circuit, this means that a biologically female student who self-identifies as a male—as does the plaintiff here—must be allowed under Title IX to use the boys' restroom.

The Fourth Circuit reached this conclusion, not by interpreting the text of Title IX or its implementing regulation (neither of which refers to "gender identity"), but instead by deferring to an agency opinion letter written last year by James Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights. App. J-1. The letter is unpublished; it disclaims any definite opinion on how Title IX applies to transgender persons in any specific situation; its advice has never been subject to notice-and-comment; and it was generated in response to an inquiry about the School Board's restroom policy *in this very case*. Nonetheless, the Fourth Circuit concluded—over Judge Niemeyer's vehement dissent—that the opinion letter was due "controlling" deference under *Auer*. App. A-26. The Fourth Circuit denied the School Board's motions for *en banc* rehearing and to stay the mandate; on remand, the district court immediately entered a preliminary injunction allowing the plaintiff to use the boys' restroom during the upcoming school year that starts on September 6.

The School Board intends to file its certiorari petition by the current due date of August 29, 2016. In the interim, however, it urgently needs a stay of the

underlying action—including the preliminary injunction—in order to avoid irreparable harm to the Board, to the school system, and to the legitimate privacy expectations of the district's schoolchildren and parents alike. Moreover, as Judge Niemeyer pointed out in his dissent from the denial of the Board's stay request, App. G-6, the Fourth Circuit's application of *Auer* to the Title IX regulation at issue has assumed "nationwide" importance—given that the Department of Justice and the Department of Education have now promulgated a "guidance" document, expressly relying upon the Fourth Circuit's decision, that seeks to impose the Departments' Title IX interpretation on every school district in the Nation and, indeed, to extend that interpretation beyond restrooms to locker rooms, showers, single-sex classes, housing, and overnight accommodations.

Consequently, this application asks for two things: *first*, a recall and stay of the Fourth Circuit's *G.G.* mandate; and *second*, a stay of the preliminary injunction subsequently issued by the district court, which was based entirely on *G.G.* This will restore the *status quo ante* pending filing and disposition of the Board's certiorari petition, due on August 29. Alternatively, the Court could simply recall and stay the Fourth Circuit's *G.G.* mandate without also staying the preliminary injunction. In that event, the Board would immediately ask the district court to stay or vacate its preliminary injunction, a request the district court would presumably grant given that the injunction turned on *G.G.* App. E-1. However, the Board believes the better course is for this Court to stay the injunction at the same time it recalls and stays the *G.G.* mandate, something it has authority to do under

the All Writs Act, 28 U.S.C. § 1651(a). That would allow the Court to accord complete relief to the Board pending disposition of its certiorari petition.

QUESTIONS PRESENTED

1. Should the doctrine of judicial deference to agency interpretations of their own regulations—as expressed in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)—be overruled or modified?

2. Assuming that *Auer / Seminole Rock* deference is retained, can it properly be applied where, among other things, the agency interpretation (a) does not carry the force of law, (b) was developed in the context of the very litigation in which deference is sought, and (c) diverges from the understanding of the regulation when it was promulgated?

3. With or without deference to the agency, can the prohibition on "sex" discrimination in Title IX and its implementing regulations properly be extended to discrimination on the basis of a person's subjective "gender identity"?

BACKGROUND

A. Facts

1. G.G. is a 17 year old student at Gloucester High School in Gloucester County, Virginia. G.G. is biologically female, but from an early age G.G. "did not feel like a girl." App. A-2; App. H-1. In G.G.'s words, "[a]t approximately age twelve, I acknowledged my male gender identity to myself." App. H-2.

During G.G.'s 2013-14 freshman year at Gloucester High School, G.G. began therapy and was diagnosed with gender dysphoria, a condition described by the American Psychiatric Association as the "distress that may accompany the incongruence between one's experienced and expressed gender and one's assigned gender." App. A-3 & n.4 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013)); H-2. The

therapist recommended that G.G. "immediately begin living as a boy in all respects," including "using a male name and pronouns and using boys' restrooms." App. A-3; App. H-2. The therapist also recommended that G.G. "see an endocrinologist and begin hormone treatment." App. H-2. In July 2014, G.G. legally changed her female name to a male name and now refers to herself using male pronouns. App. A-3; App. H-2.

2. In August 2014, before the beginning of the 2014-15 sophomore year, G.G. and his mother met with the Gloucester High School principal and guidance counselor to discuss G.G.'s "need … to socially transition at school as part of [G.G.'s] medical treatment." App. H-3. The school officials accommodated all of G.G.'s requests and "expressed support for [G.G.] and a willingness to ensure a welcoming environment for [G.G.] at school." *Id.* School records were changed to reflect G.G.'s new male name, and the guidance counselor helped G.G. send an email to teachers explaining that G.G. was to be addressed by the male name and pronouns. G.G. was also permitted to continue with a home-bound physical education program "while returning to school for the rest of [G.G.'s] classes," because G.G. did not wish to use the school's locker room. *Id.*

G.G. initially agreed to use a separate restroom in the nurse's office because G.G. was "unsure how other students would react to [G.G.'s] transition." *Id.* However, after the school year began G.G. "quickly determined that it was not necessary … to continue to use the nurse's restroom" and also "found it stigmatizing

to use a separate restroom." App. H-4. Consequently, the school principal allowed G.G. to use the boys' restroom beginning on October 20, 2014. *Id.*

3. The next day, however, the Gloucester County School Board began receiving numerous complaints from parents and students about G.G.'s use of the boys' restroom. App. L-1. The Board considered the problem and, after two public meetings, see App. A-4 to A-5, adopted the following restroom and locker room policy on December 9, 2014:

> Whereas the GCPS [*i.e.*, Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

App. A-4; App. L-2. The School Board immediately had three single-stall unisex bathrooms installed at Gloucester High School, which were operational by December 16, 2014. App A-5 to A-6. These bathrooms are for all students, regardless of their biological sex or gender identity. App. L-2.

4. In December 2014, a request for an opinion on the Gloucester School Board policy was sent to the U.S. Department of Education, which referred the matter to its Office for Civil Rights ("OCR"). App. A-13; App. B-15; App. B-51; App. I-1. Shortly thereafter, on January 7, 2015, the OCR responded in relevant part:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. OCR also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

App. J-2 ("OCR Letter").

B. District Court proceedings

1. G.G. sued the School Board in federal district court in June 2015, alleging that its restroom and locker room policy violates the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. G.G. sought declaratory relief, injunctive relief, and damages. The Board moved to dismiss G.G.'s claims for failure to state a claim. App. A-6 to A-7.

2. Following a hearing, the district court dismissed G.G.'s Title IX claim for failure to state a claim and denied a preliminary injunction. (The court did not rule on G.G.'s equal protection claim but took the claim under advisement.) App. A-7. The court concluded that the Title IX claim was "precluded by Department of Education regulations"—specifically, by the 1975 regulation allowing "separate toilet, locker room, and shower facilities on the basis of sex," provided that "such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." App. A-11 (citing 34 C.F.R. § 106.33). The court reasoned that the regulation "specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable," and

thus concluded that "the School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex." App. A-12.

The court also rejected the United States' argument—made in a "Statement of Interest"—that the Department of Education's OCR Letter should receive deference under *Auer* v. *Robbins*. *See* App. A-14 (an agency's interpretation of its own regulation is given controlling weight under *Auer* "if (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation") (citing *Christensen* v. *Harris Cnty*., 529 U.S. 576, 588 (2000)). First, the court found that the regulation at issue "is not ambiguous" because "it clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." App. A-14. Second, the court found that the agency interpretation was "plainly erroneous and inconsistent with the regulation" because it would supplant the concept of "sex" with "gender," a result supported by neither the regulation's text or history and one contradicted by the United States' own briefing. App. A-14 to A-15.

Furthermore, the district court noted that the OCR Letter was supported only by a December 2014 "guidance document" concerning claims of gender identity discrimination—not in restrooms or locker rooms—but in "single-sex classes." App. A-13 to A-14.[1] The court also observed that, "[d]espite the fact that Section 106.33

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[1] See Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 25 (Dec. 1, 2014).

[2] See*, e.g., Mullins Coal Co. of Va.* v. *Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (warning *Seminole Rock* deference is not "a license for an agency effectively to rewrite a regulation through interpretation"); John F.

has been in effect since 1975, the Department does not cite any documents published before 2014 to support the interpretation it now adopts." *Id.* at A-14. The court thus reasoned that, to defer to the Department's "newfound interpretation … would be nothing less than to allow the Department … to 'create a *de facto* new regulation' through the use of a mere letter and guidance document." *Id.* at A-15 (quoting *Christensen*, 529 U.S. at 588). The Department, the court held, could accomplish such an amendment to its regulations only "through notice and comment rulemaking, as required by the Administrative Procedure Act." App. A-15 (citing 5 U.S.C. § 553).

C. Fourth Circuit proceedings

G.G. appealed to the Fourth Circuit, which reversed the district court and concluded in a 2-1 decision that the OCR Letter merits *Auer* deference.

1. First, the panel majority considered whether the Title IX regulation at issue "contains an ambiguity." App. B-18. With respect to the regulation's text, the panel had "little difficulty concluding that the language itself—'of one sex' and 'of the other sex'—refers to male and female students." App. B-19 (quoting 34 C.F.R. § 106.33). With respect to the regulation's "specific context," the panel likewise found that its "plain meaning" was that "the mere act of providing separate restroom facilities for male and females does not violate Title IX." *Id.* (internal quotations omitted). And with respect to the regulation's "broader context," the panel also concluded that "the only reasonable reading" of the language was "that it references male and female." App. B-19 & n.6. The panel thus concluded that,

"plainly," the regulation at issue "permits schools to provide separate toilet, locker room, and shower facilities for its male and female students," and also "permits schools to exclude males from the female facilities and vice-versa." App. B-19.

Despite this "straightforward conclusion," the majority nonetheless found that the regulation was ambiguous because "it is silent as to how a school should determine whether a transgender individual is a male or a female for the purpose of access to sex-segregated restrooms." App. B-20. The panel believed the regulation was "susceptible to more than one plausible reading"—namely, the School Board's reading that "determin[es] maleness or femaleness with reference exclusively to genitalia," and the Department's contrary reading that "determin[es] maleness or femaleness with reference to gender identity." *Id.* The panel therefore concluded that the Department's interpretation "resolves ambiguity" in the regulation by providing that a transgender student's "sex as male or female is to be determined by reference to the student's gender identity." *Id.*

2. Second, the panel considered whether the Department's interpretation was "plainly erroneous or inconsistent with the regulation or statute." App. B-21 (citing *Auer*, 519 U.S. at 461). Observing that the regulation was promulgated in 1975 and adopted unchanged by the Department in 1980, the panel consulted "[t]wo dictionaries from the drafting era [to] inform [its] understanding of how the term 'sex' was understood at that time." App. B-22. The panel cited the American College Dictionary's 1970 definition of "sex" as "the sum of those anatomical and physiological differences with reference to which male and female are

distinguished." *Id.* (quoting AMERICAN COLLEGE DICTIONARY 1109 (1970)). It also cited Webster's Third New International Dictionary, which in 1971 defined "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change," and which "in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness." App. B-22 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1181 (1971)).

The panel conceded that these definitions suggested that, "at the time the regulation was adopted," the word "sex" was understood "to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed 'biological sex,' namely reproductive organs." App. B-22. Nonetheless, the panel thought that the definitions' use of qualifiers (like "sum of" and "typical") suggested that "a hard-and-fast binary division on the basis of reproductive organs … was not universally descriptive." App. B-22 to B-23. In any event, the panel concluded that the regulation at issue "assumes a student population composed of individuals of what has traditionally been understood as the usual 'dichotomous occurrence' of male and female where the various indicators all point in the same direction." App. B-23. As promulgated, then, the regulation "sheds little light on how exactly to determine the 'character of being either male or female' where those indicators diverge." *Id.* The panel therefore found that the

Department's interpretation of how the regulation should apply to transgender individuals—"although perhaps not the intuitive one"—is not "plainly erroneous or inconsistent with the text of the regulation." *Id.*

3. Third, the panel considered whether the Department's interpretation was a result of its "fair and considered judgment"—specifically, whether it was "no more than a convenient litigating position, or … a *post hoc* rationalization." App. B-24 (citing *Christopher* v. *Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)).

The panel concluded that the Department's interpretation was not a "convenient litigating position" because the Department has "consistently enforced this position since 2014" in two enforcement actions regarding transgender students' access to restrooms. App. B-25. The panel also concluded that the Department's interpretation was not a "*post hoc* rationalization" because "it is in line with the existing guidances and regulations of a number of federal agencies." App. B-25 to B-26.

The panel did concede that the Department's interpretation was "novel," given that "there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015." App. B-24. It nonetheless thought this was no reason to deny the Department's interpretation *Auer* deference, since the issue of transgender students' access to restrooms consistent with their gender identity "did not arise until recently." *Id.* (internal quotations omitted).

4. The panel also reversed the district court's denial of G.G.'s motion for preliminary injunction and remanded the case to the district court for further consideration of the evidence. App. B-33.

5. Judge Niemeyer vigorously dissented from the majority's decision to grant *Auer* deference to the interpretation of the Title IX regulation at issue. Calling the decision "unprecedented," Judge Niemeyer criticized the majority for "misconstru[ing] the clear language of Title IX and its regulations" and "reach[ing] an unworkable and illogical result." App. B-47 to B-48.

First, Judge Niemeyer emphasized that the majority's holding with respect to the definition of "sex" in Title IX and its implementing regulations "relies entirely on a 2015 letter sent by the Department of Education's Office of Civil Rights *to G.G.*" App. B-46 (emphasis added). As Judge Niemeyer pointed out, not only is the letter "*not* law," but the letter actually approves the Board's policy by encouraging schools "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." App. B-48.

Second, contrary to the majority's reasoning, Judge Niemeyer explained that "Title IX and its implementing regulations are not ambiguous" in providing for separate restrooms, locker rooms, and showers on the basis of "sex." App. B-48. To the contrary, those provisions "employ[ ] the term 'sex' as was generally understood at the time of enactment," as referring to "the physiological distinctions between males and females, particular with respect to their reproductive functions." App. B-61 to B-63 (quoting five dictionary definitions of "sex" from 1970 to 1980).

Consequently, Judge Niemeyer would have found that the major premise for applying *Auer* deference—*i.e.*, that the regulation is ambiguous—was absent.

Third, Judge Niemeyer explained that the Department's conflation of "sex" in Title IX with "gender identity" would produce "unworkable and illogical result[s]," and would undermine the very concerns with bodily privacy and safety that motivated the regulation's express allowance of sex-separated restrooms and locker rooms in the first place. App. B-48, B-57 to B-60. By making "gender identity" determinative of "sex," the Department's interpretation "would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex," and, even if a school attempted to do so, "enforcement of any separation would be virtually impossible." App. B-65, B-66.

Furthermore, Judge Niemeyer recognized that underlying Title IX's allowance of sex-separated restrooms, locker rooms, and showers are "commonplace and universally accepted … privacy and safety concerns arising from the biological differences between males and females." App. B-57. Interpreting the word "sex" to encompass "gender identity," however, would severely undermine Title IX's goal of protecting privacy and safety in intimate settings. For instance, "a biological male identifying as female could hardly live in a girls' dorm or shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower." App. B-60. Indeed, these concerns with privacy and safety are no mere policy preferences but are instead interests of constitutional magnitude. As Judge Niemeyer explained, "courts have consistently

recognized that the need for such privacy is inherent in the nature and dignity of humankind." App. B-57 to B-58 (and collecting cases).

6. Following the decision, the School Board timely moved for *en banc* rehearing, which the panel denied on May 31, 2016. App. C-2. Dissenting, Judge Niemeyer explained that he had declined to call for an *en banc* poll of his colleagues only because "the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application." App. C-4.

7. The School Board then timely moved for a stay of the Fourth Circuit's mandate pending filing of a certiorari petition to this Court. The panel—again over Judge Niemeyer's dissent—denied the School Board's request on June 9, 2016. App. D-3. The Fourth Circuit's mandate subsequently issued on June 17, 2016.

8. Immediately thereafter, on June 23, 2016, the district court entered a preliminary injunction requiring the Board to allow G.G. to use the boys' restroom. App. E-2. The district court did so without giving the Board any notice, nor allowing the Board to submit additional evidence or briefing in opposition to G.G.'s preliminary injunction request. On June 27, the School Board appealed the preliminary injunction to the Fourth Circuit, and on June 28 asked the district court to stay the injunction pending appeal or pending resolution of this application. The district court denied those requests on July 6. App. F-2.

9. That same day, the Board filed an emergency motion asking the Fourth Circuit to stay the injunction pending appeal or pending resolution of this

application. The Fourth Circuit denied those requests on July 13. App. G. Again dissenting, Judge Niemeyer would have granted the stay because:

- the *G.G.* decision underlying the injunction was "groundbreaking" and "unprecedented"; violated the "clear, unambiguous language of Title IX"; and was a "questionable" application of *Auer* to "a letter from the U.S. Department of Education, imposing an entirely new interpretation of 'sex' in Title IX without the support of any law" (App. G-5);

- the injunction will deprive Gloucester High School students of "bodily privacy when using the facilities" which is "likely to cause disruption in the school and among the parents" (*id.*);

- staying the injunction would not substantially harm G.G. because "the School Board has constructed three unisex bathrooms to accommodate any person" (*id.*); and

- the public interest supports a stay because "the changes that this injunction would require—and that the Department of Justice and Department of Education now seek to impose nationwide on the basis of our earlier decision—mark a dramatic departure from the responsibilities of local school boards have heretofore understood and the authorizations that Congress has long provided."

App. G-5 to G-6.

10. Absent a recall and stay of the Fourth Circuit's mandate—including a stay of the subsequently issued preliminary injunction—the School Board will have to decide how to respond to the Fourth Circuit's decision and the district court's injunction in preparation for the coming school year, which begins on September 6.

JURISDICTION

The final judgment of the Fourth Circuit on appeal is subject to review by this Court under 28 U.S.C. § 1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a recall and stay of the mandate pending filing of a petition for certiorari under 28 U.S.C. § 2101(f). Additionally, this Court has

jurisdiction to entertain and grant a stay of the subsequently-issued preliminary injunction pursuant to its authority to issue stays in aid of its jurisdiction under 28 U.S.C. § 1651(a).

REASONS FOR GRANTING A RECALL AND STAY OF THE MANDATE

The standards for granting a stay pending review are "well settled." *Deaver* v. *United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers); *see also, e.g., Teva Pharms. USA, Inc.* v. *Sandoz, Inc.*, 134 S. Ct. 1621, 1621 (2014) (Roberts, C.J., in chambers) (applying same standards to application for recall and stay of mandate). Preliminarily, the applicant must show that "the relief is not available from any other court or judge," Sup. Ct. R. 23.3—a conclusion established here by the fact that the Fourth Circuit denied the School Board's timely motion to stay issuance of its mandate, and to stay the subsequently issued injunction, pending filing of the board's certiorari petition. App. D-3. A stay is then appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 189 (2010) (per curiam). Moreover, in close cases the Circuit Justice or the Court will "balance the equities" to explore the relative harms to applicant and respondent, as well as the interests of the public at large. *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Each of these considerations points decisively toward issuing a recall and stay of the Fourth Circuit's mandate—as well as a stay of the

subsequently issued preliminary injunction—pending the Court's disposition of the School Board's forthcoming certiorari petition.

I. There is a strong likelihood that the Court will grant certiorari to review the Fourth Circuit's decision.

A. This case presents an ideal vehicle to reconsider the doctrine of Auer *deference.*

The Court is likely to review in the decision below because it cleanly presents an issue on which several members of the Court have expressed increasing interest over the past five years—namely, whether *Auer* should be reconsidered.

The origins of *Auer* deference lie in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945), which expressed in *dicta* the unsupported principle that a court must give "controlling" deference to an agency's interpretation of its own ambiguous regulation. The doctrine has long been subject to judicial and scholarly criticism.[2] Nonetheless, "[f]rom … [*Seminole Rock's*] unsupported rule developed a doctrine of deference that has taken on a life of its own" and "has been broadly applied to regulations issued by agencies across a broad spectrum of subjects." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1214 (2015) (Thomas, J., concurring in the judgment).

In the last five years, however, several members of this Court have called for reconsideration of the doctrine. In 2011, Justice Scalia—the author of *Auer*—wrote

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[2] See*, e.g., Mullins Coal Co. of Va.* v. *Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 170 (1987) (Marshall, J., dissenting) (warning *Seminole Rock* deference is not "a license for an agency effectively to rewrite a regulation through interpretation"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 638-39, 654, 696 (1996) (criticizing *Seminole Rock* deference).

that, "while I have in the past uncritically accepted that rule [of *Seminole Rock / Auer* deference], I have become increasingly doubtful of its validity." *Talk Am., Inc.* v. *Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The following term in *Decker* v. *Northwest Environmental Defense Center*, Justice Scalia advocated rejecting *Auer* based on his view that it has "no principled basis [and] contravenes one of the great rules of separation of power [that he] who writes a law must not adjudge its violation." 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part). In the same case, the Chief Justice, joined by Justice Alito, observed that it "may be appropriate to reconsider that principle [of *Auer* deference] in an appropriate case" where "the issue is properly raised and argued." *Id.* at 1338-39 (Roberts, C.J., concurring).

More recently, in *Perez* v. *Mortgage Bankers Association*, three Justices expanded the case for reconsidering *Auer*. Reiterating his view that he was "unaware of any … history justifying deference to agency interpretations of its own regulations," Justice Scalia advocated "abandoning *Auer*" and instead "applying the [Administrative Procedure] Act as written," under which a court would independently decide whether an agency's interpretation of its own regulations were correct. *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment). Justice Thomas's concurrence comprehensively attacked *Auer* deference. See *id.* at 1213-1225 (Thomas, J, concurring in the judgment). He demonstrated that the doctrine violates the Constitution in two related ways—as "transfer of judicial authority to the Executive branch," and "an erosion of the judicial obligation to

serve as a 'check' on the political branches." *Id.* at 1217 (Thomas, J., concurring in the judgment). "This accumulation of governmental powers," Justice Thomas wrote, "allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties." *Id.* at 1221 (Thomas, J., concurring in the judgment). He therefore urged reconsideration of "the entire line of precedent beginning with *Seminole Rock* … in an appropriate case." *Id.* at 1225 (Thomas, J., concurring in the judgment). Finally, Justice Alito observed that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect" and that consequently he "await[s] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment).

The Fourth Circuit's decision in this case presents an ideal vehicle for reconsidering *Auer* deference. The decision turns entirely on whether the *Auer* doctrine requires a court to give controlling deference to the Department of Education's interpretation—contained in the OCR Letter—of the Title IX regulation allowing provision of sex-separated restrooms and other facilities. Moreover, the decision poses the *Auer* issue in as clean a factual setting as possible: the case arrived on appeal at the Fourth Circuit on a motion to dismiss and therefore does not involve any contested factual matters. See App. C-4 (Niemeyer, J., dissenting from denial of rehearing) (noting that "the facts of this case are especially 'clean,' such as to enable the [Supreme] Court to address the [*Auer*] issue without the distraction of subservient issues").

B. This case directly implicates a disagreement among multiple Circuits over the proper application of Auer.

The Court is also likely to review the Fourth Circuit's decision because it implicates at least three circuit splits over the application of *Auer* deference, an issue that "arise[s] as a matter of course on a regular basis," *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring). Indeed, as one scholar has observed, "panels of several circuits have interpreted the [*Auer*] doctrine in a way that squarely conflicts with both Supreme Court precedent and other circuit courts' decisions." Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference by the U.S. Courts of Appeal*, 66 Admin. L. Rev. 787, 801 (2014).

1. First, multiple circuits are split over whether an agency's interpretation of its regulation, if it is to receive *Auer* deference, must appear in a format that carries the force of law. See generally Leske, *supra*, at 823-28, 824 (describing "a conflict" on this issue "between some circuits and the Supreme Court, as well as splits among the circuits"). Several circuits continue to hold that *Auer* deference protects an agency's interpretation regardless of whether it has followed formal procedures (such as notice-and-comment) that would clothe its interpretation with binding legal force. For example, the Second, Fourth, Ninth, and Federal Circuits have held that informal agency interpretations that "lack the force of law"—such as interpretations announced in agency opinion letters like the one at issue here—are nonetheless entitled to *Auer* deference.[3]

[3] See*, e.g., Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 207-08 (2nd Cir. 2009) (holding that "agency interpretations that lack the force of law," while not warranting deference when interpreting ambiguous statutes, "do normally warrant deference when

By contrast, the First and Seventh Circuits have taken the contrary view that informal agency determinations, such as those expressed in opinion letters which have not undergone public notice-and-comment, do not merit *Auer* deference. See generally Leske*, supra,* at 826-28. For instance, in *Sun Capital Partners III, LP* v. *New England Teamsters & Trucking Industry Pension Fund*, the First Circuit held that *Auer* deference did not apply to an unpublished agency letter because "[t]he letter was not the result of public notice and comment" and "merely involved an informal adjudication" resolving a dispute between the parties. 724 F.3d 129, 139-40 & n.13 (1st Cir. 2013). Based on this Court's decision in *Christensen*, the panel reasoned that "interpretations contained in formats such as opinion letters are 'entitled to respect' … only to the extent that those interpretations have the power to persuade." *Id.* at 140 (quoting *Christensen*, 529 U.S. at 587; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Years before the First Circuit's opinion in *Sun Capital Partners*, Judge Posner had anticipated this view by reasoning that, in light of *Christensen*, *Auer* likely did not apply to agency determinations that "'lack the force of law.'" *Keys* v. *Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (Posner, J.) (quoting *Christensen*, 529 U.S. at 587). Subsequently, in *Exelon* v. *Generation*

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they interpret ambiguous *regulations*"); *Encarnacion ex. rel George* v. *Astrue*, 568 F.3d 72, 78 (2nd Cir. 2009) (holding agency's interpretation is entitled to *Auer* deference "regardless of the formality of the procedures used to formulate it"); *Humanoids Group* v. *Rogan*, 375 F.3d 301, 306 (4th Cir. 2004) (concluding that "agency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) … receive deference under *Auer* when interpreting ambiguous *regulations*"); *Bassiri* v. *Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006) (granting *Auer* deference to agency interpretation "even if through an informal process" that "is not reached through the normal notice-and-comment procedure" and that "does not have the force of law"); *Smith* v. *Nicholson*, 451 F.3d 1344, 1350 (Fed. Cir. 2006) (affording *Seminole Rock* deference "even when [the agency's interpretation] is offered in informal rulings such as in a litigating document").

Company, LLC v. *Local 15 IBEW*, the Seventh Circuit held that *Auer* deference does not apply to guidance documents the agency itself has "disclaimed … as authoritative or binding interpretations of [the agency's] own rules." 676 F.3d 576, 577 (7th Cir. 2012).[4]

The Fourth Circuit's decision in this case squarely implicates this split of authority. The OCR Letter, to which the Fourth Circuit granted *Auer* deference, is an informal, unpublished opinion letter that has not undergone notice-and-comment proceedings and therefore lacks the force of law. See App. J-1 (addressee redacted); App. J-2 (letter "refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws"). Furthermore, the only prior agency opinion referred to in the OCR Letter is a 2014 "guidance" document that, by definition, lacks binding legal force.[5] Finally, in an attempt to buttress the OCR Letter, the Fourth Circuit referred to two DOJ enforcement actions against school districts alleging gender-identity discrimination under Title IX. App. B-25. But the resolution letters accompanying those actions state that they are "not a formal

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[4] The Sixth Circuit appears to agree with the Seventh on this point. See *Air Brake Sys., Inc.* v. *Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) (declining to apply *Auer* deference where Department of Justice "emphatically denies" opinion letters issued by agency general counsel "are authoritative views entitled to *any* deference"). Furthermore, the Sixth Circuit's opinion in *Air Brake Systems* points to a related split concerning whether *Auer* deference applies to opinion letters issued by agency general counsels. *See id.* (suggesting split on this issue with Federal and Fifth Circuits); see also *Am. Express Co.* v. *United States*, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001) (affording *Auer* deference to IRS general counsel memorandum); *Gavey Prop./762* v. *First Fin. Savings & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (affording deference to published general counsel opinion letter).

[5] See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007) (setting forth standards for guidance documents and providing that "[n]othing in this Bulletin is intended to indicate that a guidance document can impose a legally binding requirement").

statement of OCR policy and should not be relied upon, cited, or construed as such."[6] Consequently, the Fourth Circuit's decision to grant the non-binding OCR Letter *Auer* deference is consistent with the views of the Second, Ninth, and Federal Circuits (and with the Fourth Circuit's own previous opinion in *Humanoids*), but inconsistent with the views of the First and Seventh Circuits.

2. Second, multiple circuits are split over whether an agency interpretation of a regulation merits *Auer* deference if the interpretation is developed in the context of the particular litigation at issue. The Fourth, Sixth, Seventh, Tenth and Eleventh Circuits follow the rule that an agency's interpretation of a regulation developed in the specific context of the current litigation nonetheless merits *Auer* deference.[7] By contrast, the Ninth and the Federal Circuits have ruled that an agency determination developed solely in the context of the current litigation may not, for that reason, obtain *Auer* deference. See *Mass. Mut. Life* v. *United States*, 782 F.3d 1354, 1369-70 (Fed. Cir. 2015) (refusing *Auer* deference to IRS interpretation "advanced for the first time in this litigation" and therefore not "'reflect[ing] the agency's fair and considered judgment on the matter in question'")

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[6] See App. J-2 nn. 5, 6 (referencing OCR Case No. 09-12-1020 (July 24, 2013), htt D://www.iustice.gov/crt/about/edu/documents/arcadialener.Ddf (resolution letter), at 7); OCR Case No. 09-12-1095 (October 14, 2014), htt D://www2.ed.gov/documents/Dress-releases/downev-sChnnldistnct-letter.pdf (resolution letter), at 5).

[7] See, *e.g., Intracomm, Inc.* v. *Bajaj,* 492 F.3d 285, 293 & n.6 (4th Cir. 2007) (deferring to Secretary's interpretation advanced in case under review); *Woudenberg* v. *U.S. Dep't of Agriculture*, 794 F.3d 595, 599, 601 (6th Cir. 2015) (deferring to agency ruling in the case under review); *Bible ex rel. Proposed Class* v. *United Student Aid Funds, Inc.,* 799 F.3d 633, 639, 651 (7th Cir. 2015) (deferring to agency's interpretation advanced in amicus briefs), *cert. denied,* 136 S. Ct. 1607 (2016); *Biodiversity Conservation Alliance* v. *Jiron*, 762 F.3d 1036, 1062-68 (10th Cir. 2014) (deferring to agency interpretation advanced during administrative appeal); *Polycarpe* v. *E&S Landscaping Serv. Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010) (deferring to agency interpretation advanced in amicus brief).

(quoting *Auer*, 519 U.S. at 462); *Vietnam Veterans* v. *CIA*, 811 F.3d 1068, 1078 (9th Cir. 2015) (declining *Auer* deference to agency interpretation where agency "developed [its] interpretation only in the context of this litigation").

The Fourth Circuit's decision in this case also implicates this split of authority. As the United States' briefing in this case demonstrates, the OCR Letter advancing the agency's regulatory interpretation was issued in response to an inquiry regarding the Gloucester County School Board policy itself.[8] The OCR Letter would therefore *not* receive *Auer* deference if this case arose in the Ninth or Federal Circuits.

3. Third, the Fourth Circuit's decision in this case conflicts with the decisions of several circuits that have placed strong weight on whether the agency's present interpretation diverges from the understanding of the regulation at the time it was promulgated. These circuit decisions "look[ ] at whether the agency expressed an intent at the time it promulgated the regulation in question, especially if that inquiry impact[s] whether acceptance of the new agency interpretation would result in 'unfair surprise.'" Leske, *supra*, at 806 & n.116 (and collecting decisions from the First, Third, Fourth, Fifth, Sixth, Tenth, and Federal Circuits). For instance, in deciding whether to defer to the SEC's current regulatory interpretation in *Morrison* v. *Madison Dearborn Capital Partners III L.P.*, the Third Circuit placed "[p]articular weight" on "the agency's interpretations made at the time the

[8] See U.S. Stmt. of Int., at 9 & n.11, Ex. A & B [Dist. Ct. ECF No. 28] (referencing letter and response regarding "a school district's restroom policy"); see also App. B-51 (Niemeyer, J., dissenting) (explaining that, "[i]n December 2014, G.G. sought an opinion letter from [OCR], and on January 15, 2015, the Office responded" with the OCR Letter).

regulations are promulgated." 463 F.3d 312, 315 (3rd Cir. 2006) (citing *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988)). Similarly, in *Gose* v. *U.S. Postal Service*, the Federal Circuit explained that a factor counting against *Auer* deference is "evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation." 451 F.3d 831, 838 (Fed. Cir. 2006).

The reasoning in *G.G.* contradicts those circuits' application of *Auer*. As the Fourth Circuit conceded in *G.G.*, the original 1975-era understanding of the Title IX regulation at issue here was based on the longstanding "dichotomous" understanding of male and female. See App. B-23 (observing that "Section 106.33 assumes a student population composed of … the usual 'dichotomous occurrence' of male and female"). Without giving any weight to that original understanding, however, the Fourth Circuit deferred to the agency's current interpretation of the regulation in the context where a person's gender identity "diverge[s]" from biological sex. *Id.* Yet the court candidly admitted that this interpretation of the regulation was "novel," was "perhaps not intuitive," and was supported by "no interpretation of how [the regulation] applied to transgender individuals before January 2015." App. B-24, B-23. This application of *Auer* sharply diverges from the other circuits that place "particular weight" on the regulation's understanding at the time it was promulgated, see *Morrison*, 463 F.3d at 315, and that refuse deference to novel interpretations that would result in "unfair surprise" to regulated entities. See, *e.g.*, *Southwest Pharmacy Solutions, Inc.* v. *Centers for Medicare & Medicaid Serv's.*, 718 F.3d 436, 442 (5th Cir. 2013) (no *Auer* deference where new

interpretation would result in "unfair surprise"); *Sun Capital Partners*, 724 F.3d at 140 (no *Auer* deference where "significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue") (citing *Christopher*, 132 S. Ct. at 2167).

C. The Fourth Circuit's application of Auer *implicates issues of nationwide importance concerning the meaning of Title IX and its implementing regulations.*

This Court's review is also likely because the Fourth Circuit's application of *Auer* implicates issues that have recently assumed nationwide importance.

After the decision below, on May 13, 2016, DOE and DOJ issued a joint "Dear Colleague Letter" that amplifies the Title IX interpretation in the OCR Letter at issue in this case. App K. Citing *G.G.* as authority, see App. K-2 n.5, the Dear Colleague Letter instructs that, in order to "[c]ompl[y] with Title IX," and "[a]s a condition to receiving Federal funds," a school "must not treat a transgender student differently from the way it treats other students of the same gender identity." App. K-2; see also App. K-1 (noting the letter "summarizes a school's Title IX obligations regarding transgender students and explains how [DOE and DOJ] evaluate a school's compliance with these obligations"). The Dear Colleague Letter offers specific Title IX guidance across an array of topics—not only restrooms, but also showers, locker rooms, housing and overnight accommodations, athletic teams, and other "sex-specific activities." App. K-2 to K-5. In addition, the Letter claims that:

- Schools must treat a student in accordance with his gender identity when "a student or the student's parent or guardian … notifies the school

administration that the student will assert a gender identity that differs from previous representations or records." App. K-2

- "Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity." *Id.*

- Schools "must allow transgender students access to [restroom and locker room] facilities consistent with their gender identity" and "may not require transgender students … to use individual-user facilities when other students are not required to do so." App. K-3

- While Title IX allows "sex-segregated athletic teams," a school "may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students." *Id.*

- While Title IX allows "separate housing on the basis of sex," a school nonetheless "must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students." App. K-4

And to re-emphasize: DOE and DOJ explicitly offer this guidance to instruct schools on their "compliance" with Title IX, which, the agencies baldly claim, "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status." App. K-1.

The Dear Colleague Letter has now been challenged by twenty-three States in two federal lawsuits. See *State of Texas, et al.* v. *United States of America, et al.*, No. 7:16-cv-00054 (N.D. Tex. May 25, 2016); *State of Nebraska, et al.* v. *United States of America, et al.*, No. 4:16-cv-03117 (D. Neb. July 8, 2016). The deference issue presented in this case—while it probably would not settle all of the legal issues in the States' cases—would nonetheless clarify the principles of administrative deference applicable to guidance documents like the Dear Colleague

Letter and, having done so, allow those cases to focus on more pertinent issues of state sovereignty. The nationwide Dear Colleague Letter thus amplifies the nationwide impact of the Fourth Circuit's decision and thereby increases the likelihood that this Court will review it.[9]

II. There is a strong likelihood that the Court will overturn the Fourth Circuit's decision.

For numerous reasons, the Court is also likely to overturn the Fourth Circuit's decision to grant *Auer* deference to the agency opinion letter at issue in this case. Most obviously, given that "the … doctrine is on its last gasp," *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari), a majority of the Court is likely to abandon *Auer* altogether, thus removing the only doctrinal basis for the Fourth Circuit's decision to defer to the OCR Letter.

But even if the Court is unwilling at present to abandon *Auer* wholesale, it is nonetheless likely to overturn the Fourth Circuit's application of *Auer* in this case

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[9] Furthermore, less than a month after the Fourth Circuit rendered its decision, DOJ brought an enforcement action against the State of North Carolina, its public officials, and its university system, alleging that a North Carolina law (commonly known as "HB2") violates Title IX and other federal laws by designating public multiple-occupancy restrooms, locker rooms and shower facilities for use only by persons of the "biological sex" reflected on their birth certificates. See *United States* v. *State of North Carolina, et al.*, No. 1:16-cv-00425 (M.D.N.C. May 9, 2016). Relying on the Dear Colleague Letter and on the *G.G.* decision, the DOJ lawsuit argues that Title IX's bar on "sex" discrimination extends to "gender identity" discrimination and, hence, claims that a law like HB2 violates Title IX. *See* Mem. ISO Prelim. Inj, at 12-16, in *United States* v. *North Carolina*, *supra*. Indeed, DOJ asserts that the *G.G.* decision "dictates" that result. *Id.* at 15. The ACLU has taken the same position in related litigation. See Mem. ISO Prelim. Inj. at 12 in *Carcaño, et al.* v. *McCrory, et al.*, No. 1:16-cv-00236 (M.D.N.C. May 16, 2016) (arguing that "[t]he Fourth Circuit's binding decision in *G.G.* compels the conclusion that Plaintiffs are likely to succeed on the merits of their Title IX claim").

for several reasons—in addition to those discussed above in explaining the various circuit conflicts exacerbated by the decision below.

First, the fundamental premise for applying *Auer* in this case is lacking because the agency opinion letter at issue—while purporting to interpret a Title IX *regulation*—is in reality a disguised interpretation of Title IX's *statutory* prohibition on "sex" discrimination. The letter tells schools that to comply with Title IX they "generally must treat transgender students consistent with their gender identity," but this guidance is explicitly premised on the letter's view that Title IX's proscription of "sex" discrimination "includ[es] gender identity." App. J-2, J-1. Plainly that is not an interpretation of a Title IX regulation, but an interpretation of Title IX itself. See, *e.g.*, App. C-3 (Niemeyer, J., dissenting from denial of rehearing) (noting that "the statutory text of Title IX provides no basis" for the government's "acceptance of gender identification as the meaning of 'sex'"); *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (declining *Auer* deference where agency interpretation "cannot be considered an interpretation of the regulation"). *Auer* does not apply to an agency's interpretation of a statute, which is a subject addressed by *Chevron* and not *Auer*. See, *e.g.*, *id.*, at 255 (*Auer* involves deference to interpretation of "the issuing agency's own ambiguous regulation," whereas *Chevron* involves deference to an agency's "interpretation of an ambiguous statute").

Second, even assuming the agency letter interprets a Title IX regulation and not Title IX itself, another basic premise for applying *Auer* is lacking because the regulation at issue is not ambiguous. See, *e.g.*, *Christensen.*, 529 U.S. at 588

(explaining "*Auer* deference is warranted only when the language of the regulation is ambiguous"). The plain text of 34 C.F.R. § 106.33 allows public restrooms to be separated by "sex," which the *G.G.* panel conceded was "understood at the time the regulation was adopted to connote male and female." App. B-22. As Justice Niemeyer's dissent explained, with respect to allowing separate male and female facilities such as living quarters, restrooms, locker rooms, and showers, "Title IX and its implementing regulations are not ambiguous." App. B-48.

Third, *Auer* deference should not apply to what the *G.G.* panel conceded was a "novel" agency interpretation unsupported by the plain language or the original understanding of the regulation.[10] To accord controlling deference to that novel interpretation would be to allow the agency to "create *de facto* a new regulation" through a mere letter and guidance document. *Christensen*, 529 U.S. at 588; see also*, e.g., Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (*Auer* deference warranted unless alternative reading is "compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"). Moreover, it "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or prescribes.'" *Christopher*, 132 S. Ct. at 2167 (quoting *Gates & Fox Co.* v. *Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)).

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[10] App. B-24 (stating "the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015"); App. B-22 (stating "the word 'sex' was understood at the time the regulation was adopted to connote male and female … determined primarily by reference to … reproductive organs").

Finally, the agency interpretation reflected in the OCR Letter is both plainly erroneous and inconsistent with the regulation itself, and does not merit *Auer* deference for that reason alone. See *Christopher*, 132 S. Ct. at 2166 (*Auer* deference is "undoubtedly inappropriate" when agency's interpretation is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer*, 519 U.S. at 461). For example, by conflating the term "sex" with the concept of "gender identity" (which appears nowhere in Title IX or its regulations) the agency's new interpretation ignores the reality that Title IX, by regulation and by statute, expressly authorizes the provision of facilities and programs separated by "sex"—including, of course, restrooms, locker rooms, and shower facilities. 34 C.F.R. § 106.33.[11] Furthermore, numerous instances in the U.S. Code and other federal provisions show that the concept of "gender identity" is distinct from the concept of "sex" or "gender."[12] Consequently, it is clear Title IX's prohibition on "sex" discrimination does not cover "gender identity" discrimination, and that the OCR letter's interpretation of the Title IX regulation at issue is flatly wrong.

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[11] See also, *e.g.,* 20 U.S.C. § 1686 (allowing educational institutions to "maintain[ ] separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing funding recipients to "provide separate housing on the basis of sex," provide those facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact").

[12] See, *e.g.,* 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination in programs funded through Violence Against Women Act "on the basis of actual or perceived race, color, religion, national origin, *sex*, *gender identity* …, sexual orientation, or disability"; 18 U.S.C. § 249(a)(2) (providing criminal penalties for "[o]ffenses involving actual or perceived religion, national origin, *gender*, sexual orientation, *gender identity*, or disability").

III. Without a stay, the School Board, its officials, and parents and children in the school district will suffer irreparable harm.

It is equally clear that, absent a recall and stay of the Fourth Circuit's mandate in *G.G.*, the School Board—including parents and children in the Gloucester County school district—will suffer irreparable harm.

First, expressly relying on the *G.G.* decision, the district court on remand in this case has already issued a preliminary injunction requiring the School Board to disavow its policy and allow G.G. to use the boys' restrooms at school. App. E. The district court entered the injunction on June 23—less than a week after the *G.G.* mandate issued on June 17—and, moreover, without notice to the parties and without allowing introduction of any further evidence or additional briefing.[13] As this action makes plain, the *G.G.* decision has now essentially stripped the School Board of its most basic authority to enact policies that accommodate the need for privacy and safety of *all* students.[14] This is a particularly devastating blow to the School Board's authority, given that the school has made every effort to accommodate G.G.'s requests from the moment that G.G. approached school

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[13] As explained above, the School Board immediately appealed the preliminary injunction to the Fourth Circuit and moved for a stay pending appeal in the district court and the Fourth Circuit. Both motions were denied, see Apps. F & G, leaving this Court as the only avenue for relieving the Board from the threat of irreparable harm. As noted previously, however, it is likely that the district court would vacate or stay its preliminary injunction if this Court stayed the Fourth Circuit's mandate. But requiring the Board to go back to the district court with such a request would seem to impose an unnecessary burden on that court as well as the parties.

[14] See, *e.g.*, *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 829 (2002) (noting public schools' "'custodial and tutelary responsibility for children'") (quoting *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 655 (1995)); *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 684 (1986) (recognizing "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children").

officials, including providing access to a separate restroom in the nurse's office and subsequently installing three single-occupancy unisex restrooms for the use of *any* student, including G.G., who may not feel comfortable using multiple-occupancy restrooms corresponding to their biological sex.

Notwithstanding all this, the School Board now faces an order from a federal court—based entirely on the *G.G.* decision—enjoining enforcement of its policy before the upcoming school year begins in September, giving the Board scant time to make any further changes to school district facilities or to develop new policies to safeguard the privacy and safety rights of its students, kindergarten through twelfth grade. Putting the School Board in this untenable position *alone* constitutes irreparable harm justifying a recall and stay of the Fourth Circuit's mandate and a stay of the preliminary injunction.[15]

Second, compliance with the preliminary injunction will likely cause severe disruption to the school as the upcoming school year approaches in September. When the school previously attempted to allow G.G. to use the boys' restroom, outcry from parents and students was immediate and forceful, leading to two rounds of public hearings and ultimately to the issuance of the policy at issue. See App. A-4; see also App. L-1 (immediately after G.G. was allowed to use boys'

[15] *Cf., e.g.*, *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (observing that "'any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury'") (quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Houchins* v. *KQED, Inc.*, 429 U.S. 1341, 1346 (1977) (Rehnquist, J., in chambers) (granting stay pending certiorari in First Amendment access case because "preservation of th[e] status quo … is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time") (citing *Edelman* v. *Jordan*, 414 U.S. 1301, 1303 (1973) (Rehnquist, J., in chambers)).

restroom, "the School Board began receiving numerous complaints from parents and students"). There is every reason to expect the same reaction if the School Board is now enjoined from enforcing its policy. This also constitutes irreparable harm. See, *e.g.*, *N.J.* v. *T.L.O.*, 469 U.S. 325, 341 (1985) (noting "the substantial need of teachers and administrators for freedom to maintain order in the schools").

Third, compliance with the preliminary injunction will also put parents' constitutional rights in jeopardy. Depriving parents of any say over whether their children should be exposed to members of the opposite biological sex, possibly in a state of full or complete undress, in intimate settings deprives parents of their right to direct the education and upbringing of their children.[16] Indeed, it is natural to assume that parents may decide to remove their children from the school system after reaching the understandable conclusion that the school has been stripped by the *G.G.* decision of its authority to protect their children's constitutionally guaranteed rights of bodily privacy. See, *e.g.*, *Doe* v. *Luzerne Cnty.*, 660 F.3d 169, 176, 177 (3rd Cir. 2011) (concluding that a person has a constitutionally protected privacy interest in "his or her partially clothed body" and "particularly while in the

[16] See generally *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000) (observing that, "[i]n light of … extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children") (and collecting cases); see also, *e.g.*, *Meyer* v. *Nebraska*, 262 U.S. 390, 401 (1923) (recognizing that the liberty interest protected by due process includes the right of parents "to control the education of their own").

presence of members of the opposite sex"). The resulting dilemma—to the school district, to students, and to parents—constitutes irreparable harm.[17]

All of this threatened harm would be prevented in the interim if the Court recalls and stays the Fourth Circuit's *G.G.* mandate and the subsequently issued preliminary injunction, while it considers whether to review the Fourth Circuit's erroneous application of *Auer* deference in this case.

IV. The balance of equities and the broader public interest support a stay.

The balance of equities also weighs in favor of recalling and staying the mandate in *G.G.* and in favor of staying the subsequently issued preliminary injunction.

Absent a stay, the Board will be stripped of its authority to enact a restroom, locker room, and shower policy which—in the Board's judgment and in the judgment of the vast majority of its parents and schoolchildren expressed at public hearings—is necessary to protect the basic expectations of bodily privacy of Gloucester County students. Those expectations are of constitutional magnitude and it is the Board's responsibility to safeguard them for all students. If the Board's policy is enjoined and it must therefore allow G.G. to use the boys' restrooms, recent

[17] See, *e.g.*, *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (noting the constitutionally protected "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Frederick* v. *Morse*, 551 U.S. 393, 409 (2007) ("School principals have a difficult job, and a vitally important one."); see also, *e.g.*, *Schleifer* v. *City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) (observing that government has a "significant interest" in "strengthening parental responsibility" and that "[s]tate authority complements parental supervision").

and painful experience has shown that this will cause serious disruption among parents and children at the school. See App. A-4 to A-5; App. L-1.

When the new school year begins in September, G.G., like all students at Gloucester High School, will have access to three single-user restrooms, or, if G.G. prefers, to the restroom in the nurse's office. The latter option is significant because G.G. had previously *agreed* to use the separate restroom in the nurse's office after having explained his gender identity issues to school officials. See App. A-3 to A-4 (noting that, "[b]eing unsure how students would react to his transition, G.G. initially agreed to use a separate bathroom in the nurse's office"). Only later did G.G. decide that this arrangement was "stigmatizing" and refuse to use the facility. App. A-4. It is not plausible that G.G. would suffer substantial harm—justifying maintenance of a preliminary injunction—based on a subjective change in preference about whether to use the nurse's restroom.

Moreover, now G.G. need not even suffer the subjective discomfort of the nurse's restroom, because the school has now made generic single-user facilities available to *all* students. App. A-5. Nor can G.G. credibly claim that having to use those facilities rises to the level of constitutional harm. After all, DOE expressly *encourages* such accommodations for gender dysphoric students. See App. J-2 (OCR Letter stating that "to accommodate transgender students, schools are encouraged to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities").

In weighing the equities, the Court should also consider the broader public interest in putting the *G.G.* mandate on hold while considering the School Board's forthcoming certiorari petition. See, *e.g.*, *Edelman*, 414 U.S. at 1303 (Rehnquist, J., in chambers) (noting that balance of equities includes consideration of "the interests of the public at large"). Simply put, the current harm being caused by the Fourth Circuit's *G.G.* decision goes far beyond the harm to the Board and extends to every school district in the Fourth Circuit and, indeed, the entire Nation.

As explained above, *supra* I.C, DOE and DOJ have already seized momentum from the *G.G.* ruling by issuing on May 13 a nationally applicable Dear Colleague Letter that amplifies the policy in the OCR Letter at issue in this case. App. K. The Dear Colleague Letter, which prominently cites *G.G.*, instructs schools throughout the Nation on their "Title IX obligations regarding transgender students," informs them that Title IX's prohibition on "sex" discrimination "encompasses discrimination based on a student's gender identity," and pointedly notes that "compliance with Title IX" is "a condition of receiving Federal funds." App. K-1 to K-2 & n. 5. And *G.G.* provides a ready-made argument that the Dear Colleague Letter now merits *Auer* deference at least in the Fourth Circuit.[18]

To give a specific example of the severe disruption now being caused by *G.G.*, consider the situation confronting parents and students in the public schools of Fairfax County, Virginia. The Fairfax County School Board has recently been

[18] As already discussed, *supra* I.C, pending lawsuits against North Carolina by the ACLU and DOJ have taken the position that the *G.G.* decision "compels" the conclusion that North Carolina's HB2 law violates Title IX.

convulsed by proposals to alter the anti-discrimination policies in its Student Rights and Responsibilities Booklet.[19] On June 9, 2016, a sharply divided board voted to add sexual orientation and gender identity to the booklet, over parents' vociferous objections. See App. M (school board agenda noting amendment of Chapter I, Part J to add "sexual orientation" and "gender identity" to discrimination norms in booklet).[20] The board has expressly relied on the *G.G.* decision as justification for moving forward with this new policy for the upcoming school year.[21]

Like the Fairfax County School Board, school boards throughout the Fourth Circuit—and indeed, the entire Nation—must now contemplate whether they must change their policies and alter their facilities, or else be found out of compliance with Title IX and therefore at risk of losing all federal funds, all before the new school year begins in September or late August. As noted, moreover, because of the Dear Colleague Letter the question is no longer only about restrooms: it is also

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[19] See, *e.g.*, Moriah Balingit, *Move to protect transgender students' rights leads to school board uproar*, Washington Post, June 10, 2016 ("The Fairfax County School Board set off a furious debate when it decided to amend its student handbook to ban discrimination against transgender students, a move that angered some board members who saw the move as an 11th-hour change without proper vetting."), available at: https://www.washingtonpost.com/local/education/move-to-protect-transgender-students-rights-leads-to-school-board-uproar/2016/06/10/5fa11674-2f30-11e6-9de3-6e6e7a14000c_story.html.

[20] The agenda and Student Rights and Responsibilities Booklet are publicly available at http://www.boarddocs.com/vsba/fairfax/Board.nsf/Public. A video of the June 9 board meeting is available at https://www.youtube.com/watch?v=jMS21yVGqdY&feature=youtu.be ("June 9 Meeting Video") (the relevant discussion begins at 1:30.11 and continues to 4:29.12). The vote approving the amended policy occurs around 4:29.00.

[21] See June 9 Meeting Video, at 3:05.10—3:07.50 (dissenting board member reading email into record indicating that school board is "waiting on the decisions from the court cases before we submit proposed regulations," and that "Fairfax County Public Schools anticipates [*sic*] that the court of appeal in the Fourth Circuit will provide Virginia schools with binding legal interpretation of the requirements").

about locker rooms, showers, dormitories, athletic teams, and all "sex-specific activities," as well as record keeping, disciplinary policies, and other administrative measures. App. K.

A recall and stay of the Fourth Circuit's *G.G.* mandate would bring an immediate halt to these repercussions, which are now being caused by the decision below and which will only increase in severity and urgency as the next school year approaches in September and August. If, instead, the *G.G.* mandate is left operative, the effect may well be to convert non-binding regulatory "guidance" from DOE and DOJ into the law of the land, with irreversible consequences to school district policies, to the authority of those districts to protect the legitimate expectations of their students to bodily privacy and safety, and to their relationships of trust with students and parents.

To prevent this irreparable harm to the Board and to school districts, officials, parents, and children throughout the Fourth Circuit and the entire Nation, the Board respectfully asks for a recall and stay of the *G.G.* mandate and a stay of the preliminary injunction that was subsequently issued based on *G.G.*

CONCLUSION

The Fourth Circuit's *G.G.* mandate should be recalled and stayed, and the subsequently issued preliminary injunction should also be stayed.

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July 13, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2016 I sent a copy by United States mail as well as an electronic copy of the foregoing to the following counsel of record:

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