UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO *et al.*, Plaintiffs, *v.* PATRICK MCCRORY *et al.*, Defendants	CASE NO. 1:16-CV-00236-TDS-JEP
UNITED STATES OF AMERICA, Plaintiff, *v.* STATE OF NORTH CAROLINA *et al.*, Defendants	CASE NO. 1:16-CV-00425-TDS-JEP

DEFENDANTS AND INTERVENOR-DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION AND REQUEST FOR STAY OF PROCEEDINGS IN LIGHT OF *G.G.*

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INTRODUCTION

Remarkably, in their Second Supplemental Brief ("SSB"), the *Carcaño* Plaintiffs and the United States ("Plaintiffs") assert that the Supreme Court's order (Ex. A) staying the Fourth Circuit's decision and the district court's preliminary injunction in *G.G.* "should not affect the proceedings in this case." SSB at 1. That head-in-the-sand approach is incorrect as a matter of both law and sound judicial administration.

The Supreme Court's *G.G.* stay indicates that these proceedings should be stayed as well, either entirely or in large part. The order plainly reveals that a majority of the Justices want policies such as the one challenged in *G.G.*—which for these purposes is identical to the North Carolina law challenged here—to remain in force until the Court has had an opportunity to address the issues common to *G.G.* and these cases. The stay makes equally plain that—regardless of whether it remains "binding precedent" today—the *G.G.* decision will almost certainly not be the law of this Circuit beyond next Term, when it will have been superseded by a Supreme Court decision. It follows that, as a matter of judicial administration, it makes no sense to conduct burdensome and expensive discovery and trial proceedings based on legal standards that are likely to be altered substantially in the coming months.

Instead, for reasons explained in greater depth below, Defendants respectfully submit that the proper approach in light of the *G.G.* stay is to do two things:

- Postpone these proceedings altogether, or—at a minimum—postpone the trial and the more burdensome and expensive portions of the current discovery efforts (including depositions) until after *G.G.* is resolved, either by a denial of certiorari or a decision on the merits; and
- Hear and deny both of the pending motions for preliminary injunction, without prejudice to their being asserted again depending on the outcome in *G.G.*

However, if this Court believes it has no choice but to issue a preliminary injunction now, it should be (a) limited to the named *Carcaño* plaintiffs, (b) limited to bathrooms, and (c) stayed pending the outcome in *G.G.*

I. In light of the Supreme Court's extraordinary action in *G.G.*, these proceedings should be stayed, either entirely or in large part, pending resolution of the *G.G.* certiorari petition.

Plaintiffs' argument for not staying this case relies on their claim that *G.G.* is still unambiguously "binding" notwithstanding the Supreme Court's order. SSB at 2-3. Although the matter is far from clear,[1] that technical issue is beside the point. Instead, the pertinent question is how the Supreme Court's extraordinary action in *G.G.* should affect continued proceedings in these cases. The answer is clear: well-settled principles establish that this Court should stay these proceedings, in whole or in part, because their outcome is heavily contingent on the resolution of *G.G.* and because the Supreme Court's action indicates it is strongly likely to review the Fourth Circuit's decision and alter the legal landscape underlying these proceedings.

[1] Plaintiffs do not cite—and defendants have not found—any binding precedent either from the Supreme Court or the Fourth Circuit on whether a recall and stay of a mandate stays the precedential effect of an opinion. The decision on which Plaintiffs primarily rely, *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005), does not address the effect of a *stayed* ruling. Likewise, decisions cited from other jurisdictions either do not address a Supreme Court stay, or do not address a broad order such as the recall and stay here. *See, e.g.*, *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (addressing stay granted by Eleventh Circuit); *Friel Prosthetics, Inc. v. Bank of America*, 2005 WL 348263, at *1 n. 4 (D. Md. Feb. 9, 2004) (addressing stay granted by Fourth Circuit). Authority from other jurisdictions, moreover, holds that "[a]n appellate court's decision is not final until its mandate issues," *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004), which implies that such a decision *loses* its "final" and binding character where, as here, the mandate has been recalled and stayed. *See also e.g.*, *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1141 (D. Or. 2014) ("In other words, the panel's decision … is not yet a truly final and binding decision" before issuance of the mandate).

A. *G.G.* lies at the core of Plaintiffs' case, not just their Title IX claims.

Plaintiffs concede that their Title IX claims rely overwhelmingly on *G.G.*, *see* SSB at 2 (claiming *G.G.* controls Title IX claim), but their reliance on *G.G.* extends well beyond Title IX. For instance, the *Carcaño* plaintiffs argue that *G.G.* "governs" their equal protection claim, *Carcaño* Doc. 22, at 18, and their *first* argument for a preliminary injunction on that claim is expressly built on *G.G.* *See id.* at 17 ("Under *G.G.*, H.B. 2 Discriminates Against Transgender Individuals on the Basis of Sex"). The United States' Title VII claim also relies extensively on *G.G.*—urging that it would be "incongruous" to interpret Title VII differently from *G.G.*'s view of Title IX; that the *G.G.* concurrence should control interpretation of Title VII cases; and that *G.G.* dictates "an unformed understanding of the real-life meaning of the term 'sex.'" *USA* Doc. 76, at 17-20, 24, 26. While *portions* of Plaintiffs' claims go beyond *G.G.*, this Court's eventual disposition of those claims will look quite different depending on whether it must follow or distinguish the Fourth Circuit's opinion, or follow a superseding Supreme Court opinion.

B. The premises underlying the Supreme Court's *G.G.* order dictate that all or most of this case should be stayed.

1. The Supreme Court order indicates that North Carolina's authority to set restroom policies should remain intact until G.G. *is resolved.*

The Supreme Court's *G.G.* action plainly reflects the desire of a majority of the Justices to preserve the Gloucester County School Board's authority to enforce its challenged policy. In its stay application, the Board urged preservation of the "status quo," which it explained meant the continuance of its policy designating school restrooms and locker rooms according to students' biological sex. *See* Stay App., *Gloucester Cnty. v. G.G.*, No. 16A52, at 3, 34 n.15 (July 13, 2016) ("Stay App.") (Ex. B).

Five Justices agreed and preserved the Board's policy pending certiorari review. Indeed, in providing the fifth vote for a stay, Justice Breyer embraced the conclusion "that granting a stay will preserve the status quo." Ex. A. Plaintiffs note that Justice Breyer's vote was a "courtesy," SSB at 4, but that only emphasizes that the stay he joined actually preserves the School Board's policy.

Here the status quo is identical to the one preserved by the *G.G.* order. Like the Gloucester policy, North Carolina's law designates public multiple-occupancy restrooms and locker rooms according to biological sex. The *G.G.* plaintiff obtained a circuit decision and a preliminary injunction halting the Gloucester policy, both of which the Supreme Court stayed. Here, Plaintiffs seek the same thing as the *G.G.* plaintiff—a preliminary injunction halting North Carolina's law. There is thus every reason to read the Supreme Court's *G.G.* order as foreclosing precisely that relief, and thus preserving North Carolina's authority to enforce its law pending Supreme Court review of *G.G.*

This conclusion is underscored by the School Board's arguments supporting the *G.G.* stay. Emphasizing the broad impact of the Fourth Circuit decision, the Board appealed to the fact that, "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" challenging HB2. Ex. B, at 29 n.9. The *G.G.* Respondent minimized any impact on the North Carolina litigation, arguing that "[t]he district courts in North Carolina … are fully capable of presiding over the legal proceedings before their courts," and that "the parties in those proceedings will have … the opportunity to seek a stay at the appropriate time." Response to Stay App., *G.G.*, No.

16A52 at 23 (July 26, 2016) ("Stay Response") (Ex. C). That argument proved prophetic. Because the Supreme Court has now stayed the Fourth Circuit's decision—including the preliminary injunction—now is the "appropriate time" for this Court to stay these proceedings as well.

2. The Court's order indicates a strong likelihood it will grant certiorari in* G.G.*, and a fair prospect it will reverse the Fourth Circuit.

Continuing their head-in-the-sand approach, Plaintiffs assert it is "undue speculation" to think the *G.G.* stay means the Supreme Court will likely review and reverse the Fourth Circuit's decision. SSB at 4. But merely reciting the stay standard refutes that argument: the Court grants stays only where there is "a *reasonable probability* that four Justices will consider the issue sufficiently meritorious to grant certiorari," where there is "a *significant possibility* that a majority of the Court will conclude that the decision below was erroneous," and where there is "*a likelihood* that irreparable harm will result if the decision below is not stayed." *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers) (emphases added). Nor is the stay standard "relatively generous" or "lenient," as Plaintiffs absurdly contend. SSB at 3, 4. To the contrary, a stay is "rarely" granted. *Curry v. Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers).[2]

[2] Contrary to Plaintiffs' suggestion, the Court does not routinely grant stays only then to deny certiorari. SSB at 4. The opposite is true: a stay is generally a prelude to granting certiorari. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 23 (2015) (per curiam) (granting stay), *cert. granted*, 136 S. Ct. 891 (2016); *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015) (per curiam) (granting stay), *cert. granted sub nom., Whole Woman's Health v. Cole*, 136 S. Ct. 499 (2015); *Maryland v. King*, 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers) (granting stay), *cert. granted*, 133 S. Ct. 594 (2012); *Florida v. Powell*, 129 S. Ct. 1693 (2009) (per curiam) (granting stay), *cert. granted*, 129 S. Ct. 2827 (2009).

Nor do Plaintiffs grasp the extraordinary nature of the *G.G.* stay. First, Plaintiffs ignore that the Supreme Court's order not only stayed but *recalled* the Fourth Circuit's mandate—a remedy which is not granted under a "relatively generous standard," SSB at 3, but instead is reserved for "extraordinary circumstances," and "to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998). Second, to grant the School Board complete relief, the Court reached beyond the Fourth Circuit's mandate and stayed the subsequently issued preliminary injunction. *See G.G.* Order (staying "the preliminary injunction entered by the United States District Court for the Eastern District of Virginia on June 23, 2016"). Plaintiffs cannot possibly argue that the Court granted this relief based on a "lenient" standard, given that the Fourth Circuit had denied the School Board's earlier request to stay that injunction. *See, e.g., New York v. Kleppe*, 429 U.S. 1307 (1976) (Marshall, J., in chambers) ("[A] Circuit Justice should not disturb, except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it.") (internal quotations omitted).

Finally, Plaintiffs overlook that the stay application presents the question whether the Court should overrule or refine the doctrine of *Auer* deference—a doctrine which three sitting Justices have called into serious question, and whose application has divided numerous circuit courts. *See, e.g., Decker v. NW Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring, joined by Alito, J.) (noting "it may be appropriate to reconsider that principle [of *Auer* deference] in an appropriate case"); Stay App. at 21-27 (describing multiple circuit splits concerning *Auer* implicated by *G.G.*). Nor do Plaintiffs

acknowledge that, even should the Court prove unwilling to abandon *Auer* wholesale, several Justices may wish to temper *Auer*'s application because they disfavor the extreme deference to agencies exhibited in *G.G.*[3] For these reasons, there is, at minimum, a fair prospect that the Supreme Court will reverse *G.G.* and substantially change the legal landscape governing this case.

C. Sound judicial administration strongly counsels a stay pending disposition of *G.G.*—at a minimum of the trial and of the more burdensome and expensive preparations for trial.

Familiar principles of judicial administration also counsel staying these proceedings, either entirely or partially, pending disposition of *G.G.* As the Fourth Circuit has recognized, a district court may stay proceedings "while awaiting guidance" from a higher court, including "the Supreme Court," "in a case that *could* decide relevant issues." *Hickey v. Baxter*, No. 87-2028, 1987 U.S. App. LEXIS 19080, at *3 (4th Cir. Nov. 19, 1987) (emphasis added). This follows from a district court's inherent power to stay proceedings to promote "economy of time and effort for itself, for counsel, and for litigants." *Id*. Thus, courts frequently stay proceedings to await a decision from a higher court,[4] including the Supreme Court's disposition of a certiorari petition.[5]

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[3] *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, slip op. at 10-12 (2016) (Kennedy, J., joined by Roberts, C.J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ) (rejecting deference to agency interpretation because agency failed to provide sufficient justification for changing rule); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2175 (2012) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ, dissenting) (concurring in the proposition that "we should not give the [Department of Labor's] current interpretive view any especially favorable weight."); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Ginsburg, J., dissenting) (reaching conclusion the opposite of agency interpretation).

[4] *See, e.g.*, *Hickey*, 1987 WL 39020, at *1; *Mey v. Got Warranty*, No. 15-101, 2016 U.S. Dist. LEXIS 36561, at *3, *8-*9 (N.D. W.Va. Mar. 22, 2016); *Harris v. Rainey*, No. 13-77, 2014 U.S. Dist. LEXIS 45559, at *2-*3 (W.D. Va. Mar. 31, 2014); *Gross v. Pfizer, Inc.*, No. 10-110, 2011 U.S. Dist. LEXIS 100346, at *1-*2 (D. Md. Sep. 7, 2011).

This Court has taken that approach in a procedurally similar case. *Fisher-Borne v. Smith*, No. 1:12CV589 (M.D.N.C.), involved a challenge to North Carolina's marriage laws, at a time when the Fourth Circuit's decision in *Bostic v. Schaefer* appeared to settle the issue in favor of same-sex plaintiffs. *See* 760 F.3d 352, 368 (4th Cir. 2014). The Supreme Court, however, stayed the *Bostic* mandate pending a certiorari petition, after the Fourth Circuit had refused a stay. *Compare Bostic v. Schaefer*, No. 14-1167 [Doc. 247] (4th Cir. Aug. 13, 2014) (declining stay), *with McQuigg v. Bostic*, 135 S. Ct. 32 (2014) (granting stay). Subsequently Chief Judge Osteen stayed *all* proceedings in *Fisher-Borne*, including the motion for preliminary injunction, "[i]n light of the Supreme Court's stay of the Fourth Circuit's mandate."[6]

Fisher-Borne counsels staying these cases. Although Plaintiffs believe the Fourth Circuit's *G.G.* decision ensures their success, the Supreme Court has now taken the extraordinary step of recalling and staying the *G.G.* mandate and the associated preliminary injunction. Prudence counsels the Court's staying these proceedings pending *G.G.*'s disposition, to promote "economy of time and effort for itself, for counsel, and for litigants," *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), as well as "to avoid

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[5] *See, e.g., Santos v. Frederick County Bd. of Comm'rs*, No. 09-2978, 2015 U.S. Dist. LEXIS 113776 at *11 (D. Md. Aug. 26, 2015); *McGee v. Cole*, 66 F. Supp. 3d 747, 760 (S.D.W. Va. 2014); *Ctr. For Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 670 (S.D. W.Va. 2011), *rev'd in part on other grounds*, 706 F.3d 270 (4th Cir. 2013).

[6] *Fisher-Borne*, No. 1:12CV589, 2014 U.S. Dist. LEXIS 119405, at *5 (M.D.N.C. Aug. 27, 2014) ; *cf. Fisher-Borne v. Smith*, No. 1:12CV589, 2014 U.S. Dist. LEXIS 128887, at *7 (M.D.N.C. June 2, 2014) (Magistrate's stay recommendation prior to *Bostic* stay). Many district courts took a similar approach in other marriage cases, staying dispositive orders in light of the stay in *Herbert v. Kitchen*, 134 S. Ct 893 (2014). *See, e.g., Wolf v. Walker*, No. 14-cv-64-bbc, 2014 U.S. Dist. LEXIS 27225, at *4 (W.D. Wis. Mar. 4, 2014); *and see Latta v. Otter*, Nos. 14-35420, 14-35421, 2014 U.S. App. LEXIS 16057, at *15 (9th Cir. May 20, 2014) (Hurwitz, J., concurring) (noting lower courts felt "virtually instructed to grant stays" in all cases that had no "relevant differences" from *Herbert*).

duplicative litigation" that will overlap with issues in *G.G.* *Great American Ins. Co. v. Gross*, 468 F.3d 199, 206 (4th Cir. 2006) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952)).

A stay is particularly urgent with respect to the accelerated trial and discovery schedule currently in force. Before *G.G.* was stayed, the Court scheduled a trial for mid-November and the parties agreed to an abbreviated schedule for written and deposition discovery that begins August 12 and ends October 7. Doc. #96, at 3-6 (July 25, 2016) (Magistrate's scheduling order). During that eight-week period, all parties will have to engage in written discovery that could encompass hundreds of thousands of pages of documents while simultaneously deposing numerous fact and expert witnesses, to be followed by three weeks of briefing. *Id.* The enormity of this task is suggested by the plaintiffs' initial disclosures filed last Friday, August 5, which list over seventy potential fact and expert witnesses. Ex. E (initial disclosures).

Undertaking this task under the shadow of Supreme Court review in *G.G.* would constitute an enormous waste of public resources. The trial would begin in mid-November, around the time when the Supreme Court will consider whether to grant certiorari. If the Court grants review—which as explained above is likely given the extraordinary stay—then some or all of the massive expense of accelerated trial preparation will have proven unnecessary: trial obviously could not proceed while the Supreme Court considers many of the same issues and the fate of a supposedly controlling Fourth Circuit precedent. Even worse, an eventual Supreme Court decision in

G.G. could obviate the need to try certain issues or introduce new triable issues not currently contemplated by the parties.

Thus, at a minimum, the Court should postpone the scheduled trial and deposition discovery, and allow the parties to work out a more reasonable schedule for written discovery. Indeed, the parties have already begun negotiations along these lines, and their written submissions to the Court do not reveal a great deal of distance between them. *See* Def. Ltr. to Court (Aug. 8, 2016); Pl. Ltr. to Court (Aug. 8, 2016). In this way, pretrial proceedings could go forward at a more reasonable pace, and when it becomes clear in November or December whether the Supreme Court will review *G.G.*, the parties and the Court can then craft an appropriate trial and pre-trial schedule. All Defendants have already formally proposed such an arrangement to the Plaintiffs. *See* Def. Ltr. to Court (Aug. 8, 2016); UNC Def. Ltr. to Court (Aug. 8, 2016).

To the extent Plaintiffs wish to have their pending preliminary injunction motions decided, Defendants have also shown a willingness to compromise by formally agreeing to allow the United States' motion to be submitted on the papers without discovery or an evidentiary hearing. *See* Def. Ltr. to Court (Aug. 8, 2016) (noting pending offer includes agreement to proceed on United States' motion). While Defendants believe that motion and the *Carcaño* motion should be denied based on *G.G.*, *see infra*—or at least stayed upon issuance, *see Fisher-Borne*, No. 1:12CV589, 2014 U.S. Dist. LEXIS 128887, at *5 (M.D.N.C. June 2, 2014)—Defendants' agreement would allow Plaintiffs to receive a ruling on their motions while avoiding the unnecessary burdens of an accelerated trial

and deposition schedule. This would serve the interests of all parties, as well as the Court, in avoiding needlessly burdensome accelerated pre-trial proceedings.

For those reasons, Defendants are submitting a formal motion later today to stay these proceedings, either in whole or in part, in light of the Supreme Court's extraordinary order staying *G.G.* and the subsequent preliminary injunction in that case.

II. The recall and stay in *G.G.* demonstrate that this Court should deny both motions for preliminary injunctions outright.

Additionally, the Supreme Court's recall and stay in *G.G.* also reinforce the conclusion that the pending motions for preliminary injunction should be denied. Not only does the Supreme Court's action call into question Plaintiffs' chances of ultimately prevailing on the merits, *see supra*, but it also reinforces Defendants' position on the remaining factors governing preliminary relief. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008). Specifically, even assuming *G.G.* was correctly decided, the Supreme Court's recall and stay reinforce the conclusions that (1) like the Gloucester County School Board, North Carolina would suffer substantial injury if Section I of HB2 were enjoined; (2) the public interest would be undermined by an injunction; and (3) the balance of equities tips decidedly in Defendants' favor.

A. The *G.G.* order shows that North Carolina would suffer substantial injury to its interests if a preliminary injunction were granted.

In its stay application, the Gloucester County School Board noted the familiar principle that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Ex. B, at 34 n. 15 (quoting *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers)). The School Board repeatedly emphasized this principle, noting for example in its reply brief

that the Fourth Circuit's decision "deprives the *people* of Gloucester County of their ability, acting through elected school board representatives, to establish a policy on one of the most sensitive matters imaginable—who may access single-sex student bathrooms." Reply (Ex. D) at 1 (emphasis added). And G.G.—represented by the ACLU—could not and did not dispute that conclusion. *See id.*

The same is true here: A preliminary injunction enjoining application of any portion of HB2 would likewise deprive North Carolina and its people of their right, through their elected representatives, to establish policies on the sensitive issue of who may access publicly owned bathrooms, locker rooms and showers. And that deprivation, standing alone, would constitute irreparable injury during whatever period the injunction remains in place. *See Maryland v. King*, *supra*, at 3 (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

B. The *G.G.* order shows that the public interest weighs heavily against a preliminary injunction.

In seeking a stay in *G.G.*, the School Board also emphasized that the main purpose of its bathroom policy was to "accommodate the need for privacy and safety of *all* students," and thus that the preliminary injunction entered in that case was contrary to the public interest. Ex. B, at 33. In so doing, the School Board relied extensively upon Judge Niemeyer's thoughtful dissenting opinion in *G.G.*, which concluded that the preliminary injunction ordered by the majority there created irreparable harm by intruding upon students' "legitimate and important interest in bodily privacy." Ex. D, at 12 (citing *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016)

(Niemeyer, J. dissenting). And it is a fair inference that the Supreme Court was moved by similar concerns in granting the stay in *G.G.*

These public interest concerns counsel even more strongly against a preliminary injunction here. Such an injunction would not only impinge upon the privacy and safety of students in a single school, but would threaten the privacy and safety of *all* North Carolinians whenever they use any public facilities—not only in schools throughout the State, but also in courthouses, administrative buildings, prisons and rest stops. Indeed, even the *G.G.* majority "agree[d]" that it has been "commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex," and also "agree[d] that 'an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts' are not involuntarily exposed." *G.G.*, 822 F.3d at 723. Given that the preliminary injunction sought here is far broader than the one approved in *G.G.*, it is evident that the public interest weighs against injunctive relief.

C. The *G.G.* order shows that, whatever harms Plaintiffs may assert, the potential harms to North Carolina and its citizens outweigh them.

The recall and stay in *G.G.* further confirm that the weighty interests described above outweigh any countervailing interests asserted by the Plaintiffs. In the reply brief in support of the stay, the School Board noted that the student there had asserted "painful urinary tract infections and daily psychological harm as a result of the Board's policy." Ex. D, at 14. In response, the Board noted: "While the Board does not minimize G.G.'s psychological pain, that pain is assuredly not the 'result of the Board's policy.' Any anatomical female wishing or attempting to live as a teenage boy is bound to face a

variety of psychological challenges, whatever policy the Board adopts." *Id.* Given that the Supreme Court stayed the preliminary injunction *G.G.*, the Court evidently determined that any potential harm caused by the School Board's policy was outweighed by the harms to the Board and its students.

So too here. While Plaintiffs may assert a variety of harms (as did the student in *G.G.*), because of the irreparable harm an injunction would inflict upon North Carolina and the privacy and safety of its citizens—harms that are far broader here than in *G.G.*—the balance of harms favors denial of any injunction.

In sum, North Carolina and its people have an even stronger interest in preserving the status quo than the Gloucester School Board. Thus, even if the Court assumes *G.G.* was correctly decided, granting the Plaintiffs' request to enjoin HB2 on the basis of the Fourth Circuit's *G.G.* decision would fly in the face of the Supreme Court's extraordinary action in halting *G.G.*—and the resulting preliminary injunction—in its tracks.

III. If the Court nevertheless grants a preliminary injunction, it must be limited to the individual *Carcaño* Plaintiffs and to bathrooms.

Even if this Court were to grant some preliminary relief, the Court must reject the Plaintiffs' request to extend that relief statewide, and to facilities beyond bathrooms.

A. Any preliminary injunction should apply only to the named Plaintiffs.

A preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (citation omitted). Accordingly, the general rule is that "an injunction must be limited to apply only to the individual plaintiffs unless the district

judge certifies a class of plaintiffs." *Zepeda v. INS*, 753 F.2d 719, 727-28 (9th Cir. 1983). Thus in the Fourth Circuit and elsewhere, "[o]rdinarily, class-wide relief for disparate treatment discrimination is appropriate only where there is a properly certified class," *Lowry v. Circuit City Stores*, 158 F.3d 742, 766 (4th Cir. 1998), *judgment vacated on other grounds*, 527 U.S. 103 (1999).[7] As shown below, no class has been sought, much less certified, in this case. And Plaintiffs' argument that state-wide relief is justified on the ground of "facial invalidity" is preposterous.

1. No class has been asserted, much less certified.

Despite already filing both a complaint and an amended complaint, Plaintiffs have never sought to bring an action under Federal Rule of Civil Procedure 23. Moreover, the only claim that seeks to enjoin HB2 under Title IX is brought only on behalf of the *individually* named plaintiffs (*i.e.*, Carcano, McGarry, and H.S.) and not the ACLU itself. *See* D.E. #9: Pls.' Am. Comp. ¶¶ 235-43. Plaintiffs' decision to craft their pleadings in this way precludes the granting of relief to anyone other than these individual plaintiffs.

Plaintiffs nevertheless rely on *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), in arguing that relief can run to all persons similarly situated irrespective of whether the suit was brought as a class action. What Plaintiffs' characterization omits is that, previously in that case, the Supreme Court had "specifically noted that this is a class

[7] *Accord McCormack v. Hiedeman*, 694 F.3d 1004, 1020 (9th Cir. 2012); *Berger v. Heckler*, 771 F.2d 1556, 1567 (2d Cir. 1985); *Hollon v. Mathis Ind. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974); *see also Alabama v. United States Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005) ("[G]reat care must be taken to assure that the power of a court to require or deter action does not result in unwarranted harm to the defendant or the public.").

action," and therefore on remand the Fifth Circuit found it unnecessary to determine "whether this action was properly brought under Rule 23(a)[.]" 323 F.2d at 206 .

Moreover, the relief sought in *Bailey* was very different from the relief sought here. As the court noted, the "[a]ppellants do not seek the right to use those parts of segregated facilities that have been set aside for use by 'whites only.' They seek the right to use facilities which … are open to all persons … without regard to race." *Id.* This presents a stark contrast with this case, where the relief sought is the right to use facilities that are *not* "open to all persons." The only way *Bailey* could support Plaintiffs is if they had sought to abolish all separation of the sexes in restrooms and similar facilities and make them open to all persons—a goal they purportedly do not seek.

The Sixth Circuit's decision in *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), is also easily distinguished. There the court upheld a nationwide injunction concerning the use of federal inmate trust funds, even though the case was not certified as a class action at the time injunctive relief was granted. Not only did *Reno* involve a clearly defined set of beneficiaries—federal inmates—but the relief sought "would also necessarily extend to all federal inmates" because it involved specific funds held in trust. 35 F.3d at 1104.[8]

[8] Likewise, in the two district court opinions plaintiffs cite, granting injunctive relief to the named plaintiffs necessarily brought benefits to others. In *Planned Parenthood Southeast, Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015), that relief was restoration of state Medicaid funds to Planned Parenthood. And in *National Organization for Reform of Marijuana Laws (NORML) v. Mullen*, 608 F. Supp. 945 (N.D. Cal. 1985), it was an injunction against police search and surveillance practices over large geographical areas that were challenged as facially unconstitutional. Additionally, in *Bentley*, the Court noted that a class certification motion had been filed and was likely to be granted, 141 F. Supp. 3d at 1227 & n.3, and *NORML* also involved a putative class action, 608 F. Supp. at 964.

In contrast, here granting the named Plaintiffs preliminary relief from Section I would not necessarily require granting similar relief to other individuals. If Plaintiffs wish to represent a broader and more diverse category of persons who are not actually before the Court (*e.g.*, all transgender individuals), they must properly establish the prerequisites for proceeding in such a manner under Rule 23. Given the stringent requirements for class certification, however, it is unsurprising that plaintiffs did not bring a class action. *See generally Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). While plaintiffs purport to speak on behalf of all transgender North Carolinians, there are in fact variations in this community that cast serious doubt on Plaintiffs' ability to define an appropriate class. For example, as noted elsewhere, a transgender individual who has undergone sex reassignment surgery and obtained a revised birth certificate is not adversely affected by Section I. At the other end of the spectrum, a transgender individual who has not taken steps toward gender transitioning may prefer to (at least temporarily) continue using the facility that matches his or her biological or birth sex, thereby leaving that individual also unaffected by Section I.

In short, given the absence of a class action, any preliminary injunctive relief should be limited to the individual named Plaintiffs.

2. Given Plaintiffs' concession that Section I validly applies to individuals who are not transgender, Plaintiffs' "facial invalidity" argument is preposterous.

Plaintiffs' "facial invalidity" argument likewise provides no basis for an injunction that extends beyond the named Plaintiffs. Plaintiffs have repeatedly disclaimed any desire to abolish separate restrooms and changing facilities for men and women. *See*,

e.g., D.E. #22: Mem. of Law in Supp. of Pls.'s Mot. for Preliminary Injunction 18 n.2. Inexplicably, though, Plaintiffs also ask this Court to declare as *facially* invalid Section I of HB2, which simply protects the time-honored practice of sex-specific bathrooms and related facilities. Plaintiffs' purported goals are thus irreconcilable with their requested relief, namely facial invalidation of Section I.

To succeed on a facial challenge, a plaintiff must show that a statute is unconstitutional in every instance to which it might be applied. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). A facial challenge to Section I necessarily fails that standard because, for example, Plaintiffs do not allege that a non-transgender man must be allowed access to a women's restroom and vice versa. Such separation by sex is one of the results compelled by Section I, and it thereby precludes invalidation of Section I on its face. Section I also makes clear that, under North Carolina law, some transgender individuals—those who have had sex reassignment surgery and obtained an updated birth certificate—*may* access the restroom or changing facility consistent with his or her gender identity. *Cf.* SSB at 12. Surely, Plaintiffs do not find fault with this result of Section I. Because Section I accomplishes these ends, which are indisputably permissible, facial invalidation cannot be an appropriate remedy, even if Plaintiffs can establish that Section I is unconstitutional or invalid in certain instances, including as applied to them.[9]

[9] *See Kentuckians for Commonwealth, Inc. v. Rivenburg*, 317 F.3d 425, 436 (4th Cir. 2003) (vacating injunction issued by district court because it was overbroad in contravention of the principle "that '[a]n injunction should be carefully addressed to the circumstances of the case.'") (quoting *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001)); *see also United States v. Masciandaro*, 648 F. Supp. 2d 779, 792 (E.D. Va. 2009) ("And where, as here, a law has at least some constitutional

In reality, Plaintiffs have only an as-applied challenge to Section I. *See Fisher v. King*, 232 F.3d 391, 395 n.4 (4th Cir. 2000) ("[A]n 'as-applied' challenge consists of a challenge to the statute's application only to the party before the court. If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable.") (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758-59 (1988)). Accordingly, if Plaintiffs prevail in establishing that Section I is invalid in certain instances, the most they can obtain from the Court is injunctive relief that is "no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added). Or, as the Fourth Circuit has put it, while "injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing *party*, it should not go beyond the extent of the established violation." *Hayes v. North State Law Enforcement Officers Assoc.*, 10 F.3d 207, 217 (4th Cir. 1993) (emphasis added). Thus, even though they request facial invalidation of Section I, Plaintiffs have not even attempted to explain why, for example, the State must allow a *non-transgender* male into a women's restroom. Yet this would necessarily follow from a declaration that Section I is facially unconstitutional. Accordingly, a broad and untailored injunction of the sort sought by Plaintiffs would contravene established limitations on injunctive relief.

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applications, a facial challenge to that law ordinarily succeeds only where the challenging party demonstrates that any unconstitutional applications of the law are not 'severable' as a matter of statutory construction.").

B. As in *G.G.*, any preliminary injunction should be limited to bathrooms.

The Fourth Circuit's opinion in *G.G.* also compels the conclusion that any injunctive relief must be limited to bathrooms. The *G.G.* majority pointedly observed that "[o]nly restroom use is at issue in this case." 822 F.3d at 715 n.2. Furthermore, in responding to the dissent's concerns, the majority stated that "G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present in" cases where individuals have been observed in a state of undress. *Id.* at 723 n.10. Whether a gender identity based access policy is appropriate for locker rooms, showers, and similar facilities that involve more bodily exposure than generally occurs in a bathroom is thus not a question the Fourth Circuit addressed in *G.G.* And without any guidance from the Fourth Circuit or Supreme Court, prudence dictates that any injunctive relief be limited to bathrooms rather than extended to these heretofore unaddressed facilities.

CONCLUSION

For all these reasons, Defendants respectfully submit that the sound approach in light of the Supreme Court's *G.G.* stay decision is to (1) postpone these proceedings in their entirety, or (2) alternatively, postpone the trial and the more burdensome and expensive portions of the current discovery efforts (including depositions) until after the Supreme Court's *G.G.* proceeding is resolved, and (3) hear and deny both of the pending motions for preliminary injunction. But if this Court believes it has no choice but to issue a preliminary injunction now, it should be limited to the named *Carcaño* plaintiffs, limited to bathrooms, and stayed pending the outcome in *G.G.*

Respectfully submitted,

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert N. Driscoll
Robert N. Driscoll*
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
MCGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
Telephone: (202) 802-9950
E-mail: rdriscoll@mcglinchey.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ S. Kyle Duncan
S. Kyle Duncan* (DC Bar #1010452)
Gene Schaerr* (DC Bar #416638)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
SCHAERR-DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 714-9492
Email: kduncan@schaerr-duncan.com
gschaerr@schaerr-duncan.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert C. Stephens
Robert C. Stephens (State Bar #4150)
Counsel for the State of North Carolina and Governor McCrory
General Counsel
Office of the Governor of North Carolina
20301 Mail Service Center
Raleigh, NC 27699
Telephone: (919) 814-2027
E-mail: bob.stephens@nc.gov
*appearing as Local Rule 83.1 Counsel

By: /s/ William W. Stewart, Jr.
William W. Stewart, Jr.
(State Bar #21059)
Frank J. Gordon (State Bar #15871)
B. Tyler Brooks (State Bar #37604)
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
Telephone: (919) 836-0090
Email: bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com

By: /s/ Robert D. Potter, Jr.
Robert D. Potter, Jr. (State Bar #17553)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
2820 Selwyn Avenue, #840
Charlotte, NC 28209
Telephone: (704) 552-7742
Email: rdpotter@rdpotterlaw.com

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys, and that I have mailed the document to the following non-CM/ECF participant:

Chris Sevier
9 Music Square South 247
Nashville, TN 37203

This the 12th day of August, 2016.

By: /s/ William W. Stewart, Jr.
William W. Stewart, Jr. (State Bar #21059)
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
Telephone: (919) 836-0090
Fax: (919) 836-8027
Email: bstewart@mgsattorneys.com

Appendix

SUPREME COURT OF THE UNITED STATES

No. 16A52

GLOUCESTER COUNTY SCHOOL BOARD *v.* G. G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM

ON APPLICATION TO RECALL AND STAY

[August 3, 2016]

The application to recall and stay the mandate of the United States Court of Appeals for the Fourth Circuit in case No. 15–2056, presented to THE CHIEF JUSTICE and by him referred to the Court, is granted and the preliminary injunction entered by the United States District Court for the Eastern District of Virginia on June 23, 2016, is hereby stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court.

JUSTICE BREYER, concurring.

In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy. See *Medellín* v. *Texas*, 554 U. S. 759, 765 (2008) (BREYER, J., dissenting).

JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

Exhibit A

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

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER, JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
Tel: (804) 747-5200
dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner Gloucester County School Board

July 13, 2016

Exhibit B

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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), httD://www.iustice.gov/crt/about/edu/documents/arcadialener.Ddf (resolution letter), at 7); OCR Case No. 09-12-1095 (October 14, 2014), httD://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

[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'

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[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.

Respectfully submitted,

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER, JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
Tel: (804) 747-5200
Email: dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 714-9492
Email: KDuncan@Schaerr-Duncan.com

Counsel for Petitioner Gloucester County School Board

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:

JOSHUA A. BLOCK
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(202) 549-2500
jblock@aclu.org

_____
S. Kyle Duncan
Counsel for Petitioner

No. 16A52

In the
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Applicant,

v.

G.G., by and through his mother, DEIRDRE GRIMM,

Respondent.

RESPONSE TO APPLICATION TO STAY PRELIMINARY INJUNCTION AND RECALL AND STAY MANDATE PENDING A 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

Gail M. Deady
Rebecca K. Glenberg (of counsel)
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
701 E. Franklin Street, Suite 1412
Richmond, VA 23219
(804) 644-8080

Joshua A. Block
Counsel of Record
James D. Esseks
Leslie Cooper
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
jblock@aclu.org
.

Counsel for Respondent, G.G., by and through his mother, Deirdre Grimm

Exhibit C

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

G.G., by and through his mother, Deirdre Grimm, submits the following Response to the Application to Stay the Preliminary Injunction and Recall and Stay the Mandate Pending a Petition for Certiorari filed by the Gloucester County School Board (the "Board").

INTRODUCTION

The Board has utterly failed to demonstrate that it will suffer irreparable harm if G.—and only G.—is allowed to use the boys' restroom at Gloucester High School while this Court considers the Board's forthcoming petition for certiorari. Stay App'x G-4 (Davis, J., concurring). The narrow, limited preliminary injunction will not inflict any of the purported irreparable injuries the Board claims it will suffer. It does not force the Board to develop "new policies" for students in "kindergarten through twelfth grade," Stay Application at 34; it does not apply to locker rooms, showers, or other situations in which students may be "in a state of full or complete undress," *id.* 35; and it certainly does not "extend[] to every school district in the Fourth Circuit" or "the entire Nation," *id.* at 38. No irreparable harm will occur if G. is allowed to use the boys' restroom while this Court considers whether to grant certiorari.

That is enough to deny the current application. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621 (2014) (Roberts, C.J., in chambers). Attempting to compensate for that deficiency, the Board asserts that the Fourth Circuit's decision

will have far-reaching consequences in future cases for the Gloucester County School District and other school districts nationwide. On this application for an emergency stay, however, purported harms resulting from how precedent applies in future cases are beside the point. The district courts in North Carolina and elsewhere are fully capable of presiding over the legal proceedings before their courts, and the parties in those proceedings will have all the protections of judicial review, including the opportunity to seek a stay at the appropriate time if actually confronted with irreparable injury. An application for an emergency stay, however, is not a mechanism for obtaining the equivalent of a declaratory judgment to enjoin future legal disputes that could develop as a result of the precedential force of the lower court's decision. "[T]he expense and annoyance of litigation" does not constitute "irreparable injury." *FTC v. Standard Oil. Co. of Cal.*, 449 U.S. 232, 244 (1980).

Moreover, the Board's anticipated petition for certiorari has little prospect of being granted. This Court does not usually intervene without waiting for a final judgment[1] or a conflict among the Courts of Appeals. Even if this Court were to overlook those procedural obstacles, the Board's request for this Court to grant certiorari to reconsider *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), is unlikely to garner the support of

[1] The Board contends that its forthcoming petition for certiorari will seek review of a final judgment by the Fourth Circuit. Stay App'x A-16. There has been no final judgment in this case. The Board seeks review of a Fourth Circuit decision that overturned a district court ruling in the Board's favor on a motion to dismiss and vacated the denial of a preliminary injunction. On remand, the district court issued a preliminary injunction that has not yet been reviewed by the Fourth Circuit.

four Justices in light of the Court's recent denial of certiorari on that precise issue in *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607 (2016). This Court is also not likely to be persuaded by the Board's fallback attempt to cobble together a circuit split with respect to how the Courts of Appeals apply *Auer*. There is no disagreement among the circuits regarding the underlying legal principles. The Board simply disagrees with how the Fourth Circuit applied those principles to the facts of this case.

Finally, if the Court does grant certiorari, it is not likely to reverse the Fourth Circuit's decision. The Fourth Circuit correctly determined that the term "sex" in Title IX and its implementing regulations encompasses all of the "morphological, physiological, and behavioral" components of an individual's sex. Stay App'x B-22.[2] That conclusion is consistent with the dictionary definition of the term and with this Court's landmark decisions in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). When a school singles out a transgender student and declares that he is so inherently gender non-conforming that he cannot use the common restrooms the school has established for everyone else, that student has unquestionably been "excluded from participation in" and "denied the benefits of" an "education program or activity" on the basis of sex. 20 U.S.C. § 1681(a).

[2] The Board's assertion that the Fourth Circuit did not "interpret[] the text of Title IX or its implementing regulation," Stay Application at 2, is inaccurate. *See* Stay Application App'x B-19-20, 22-24.

Title IX categorically prohibits disparate treatment on the basis of sex unless that disparate treatment is explicitly authorized by an exception in the statute or regulations. Title IX's implementing regulations provide a narrow exception allowing schools to create separate restrooms for boys and girls, but they do not authorize schools to single out transgender students in this manner. 34 C.F.R. § 106.33. The plain text of the regulation does not address how restrooms should be assigned in the context of a transgender student, for whom the various "morphological, physiological, and behavioral" components of sex are not all aligned Stay App'x B-23-24. In light of that textual ambiguity, the Department of Education has issued an opinion letter and comprehensive guidance explaining that the regulation does not authorize schools to effectively banish transgender students from the common restrooms by prohibiting them from using restrooms consistent with their gender identity. The Department's interpretation of its own regulation is the only interpretation that harmonizes the text of 34 C.F.R. § 106.33 with the underlying non-discrimination requirements of 20 U.S.C. § 1681(a). At a bare minimum, the Department's interpretation is reasonable and, therefore, entitled to controlling deference under *Auer*.

Because the Board has failed to establish a likelihood of irreparable harm, a reasonable probably of this Court granting certiorari, or a fair prospect of reversal, the application for a stay and/or recall of the mandate should be denied.

STATEMENT

A. Factual Background

1. G. is a 17-year-old transgender boy who has just completed his junior year at Gloucester High School. He is a boy and lives accordingly in all aspects of his life, but the sex assigned to him at birth was female.[3] In accordance with the standards of care for treating Gender Dysphoria, he is undergoing hormone therapy, he has legally changed his name, and his state identification card identifies him as male. Stay App'x H-2-3; Response App'x 1a. In every context outside school, he uses the boys' restrooms, just like any other boy would. Stay App'x H-3.

"Gender identity" is a well-established medical concept, referring to one's sense of oneself as belonging to a particular gender. Response App'x 3b. It is an innate and immutable aspect of personality that is firmly established by age four, although individuals may come to understand and express their gender identity at different ages. *Id.* Gender Dysphoria is the medical diagnosis for a feeling of

[3] The terms "biological sex" or "biological gender," which the Board uses to refer to a transgender person's sex assigned at birth, do not accurately distinguish between sex assigned at birth and gender identity because gender identity also is an immutable characteristic with biological roots. See Aruna Saraswat, M.D., et. al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (2015). For these reasons, current guidelines from the American Psychological Association no longer use the term "biological sex" when referring to sex assigned at birth. *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, App. A (December 2015), http://www.apa.org/practice/guidelines/transgender.pdf.

incongruence between an individual's gender identity and an individual's sex assigned at birth, and the resulting distress caused by that incongruence. *Id.* Gender Dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International Classification of Diseases (ICD-10). *Id.* The criteria for diagnosing Gender Dysphoria are set forth in the DSM-V (302.85). Response App'x 4b. Untreated Gender Dysphoria can result in significant clinical distress, debilitating depression, and suicidal thoughts and acts. *Id.* The World Professional Association for Transgender Health has established international Standards of Care for treating people with Gender Dysphoria (the "WPATH Standards"). *Id.* The leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, and the American Psychological Association, recognize the WPATH Standards as the authoritative standards of care for Gender Dysphoria. *Id.*

Under the WPATH Standards, treatment for Gender Dysphoria is designed to help transgender individuals live congruently with their gender identity and eliminate clinically significant distress. Response App'x 5b. Attempting to change a person's gender identity to match the person's sex assigned at birth is ineffective and harmful to the patient. *Id.* "It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition." Am. Psychiatric Ass'n, *Gender Dysphoria Fact Sheet*, at 1 (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf.

Living one's life fully in accordance with one's gender identity is a critical component of treatment for Gender Dysphoria under the WPATH standards. Response App'x 5b. For a transgender male, that typically includes dressing and grooming as a male, adopting a masculine name, and presenting oneself to the community as a boy or man. *Id.* The social transition takes place at home, at work or school, and in the broader community. *Id.* Impeding any aspect of social transition undermines a person's entire transition. *Id.* Negating a person's gender identity poses serious health risks, including depression, post-traumatic stress disorder, hypertension, and self-harm. Response App'x 7b.

2. At a very young age, G. was aware that he did not feel like a girl. Stay App'x H-1. By approximately age twelve, G. acknowledged his male gender identity to himself and to close friends. Stay App'x H-2. By ninth grade, most of G.'s friends knew his gender identity, and they treated him as male when socializing away from home and school. *Id.*

G.'s untreated Gender Dysphoria, and the stress of concealing his gender identity from his family, caused him to experience severe depression and anxiety. *Id.* G.'s mental distress was so serious that he could not attend school in 2014 during the spring semester of his freshman year. *Id.* Instead, he took classes through a home-bound program that follows the public high school curriculum. *Id.*

In April 2014, G. told his parents that he is transgender. *Id.* At his request, he began seeing a psychologist with experience working with transgender youth. *Id.* G.'s psychologist diagnosed G. with Gender Dysphoria and, consistent with the

WPATH Standards, recommended that he begin living in accordance with his male gender identity in all aspects of his life. *Id.* G.'s psychologist also provided G. with a "Treatment Documentation Letter" confirming he was receiving treatment for Gender Dysphoria and, as part of that treatment, should be treated as a boy in all respects, including his use of the restroom. *Id.* G. uses the boys' restrooms in public venues such as restaurants, libraries, and shopping centers. Stay App'x H-3.

Also consistent with the WPATH Standards, G.'s psychologist recommended that he see an endocrinologist to begin hormone treatment. Stay App'x H-2. G. has received hormone treatment since late December 2014. Stay App'x H-3. Among other therapeutic benefits, the hormone treatment has deepened G.'s voice, increased his growth of facial hair, and given him a more masculine appearance. *Id.*

G. successfully petitioned the Circuit Court of Gloucester County to change his legal name to G. Stay App'x H-2. G. now uses that name for all purposes, and his friends and family refer to him using male pronouns. *Id.* The Virginia Department of Motor Vehicles has also approved G.'s request for the sex designation "M" for male to appear on his driver's license or identification card. Response App'x 1a.

3. In August 2014, before beginning his sophomore year, G. and his mother informed officials at Gloucester High School that G. is a transgender boy and that he had legally changed his name to G. Stay App'x H-3. G. and his mother also met with the school principal and guidance counselor to explain that G. is a transgender

boy and that, consistent with his medically supervised treatment, he would be attending school as a male student. *Id.*

With the permission of school administrators, G. used the boys' restrooms at school for seven weeks without incident. Stay App'x H-4.[4] After some parents complained, however, the Board adopted a new policy that singles out transgender students for different treatment than all other students. Stay App'x L-2.[5] The policy states that restrooms will be restricted to students based on their "biological gender" and that students with "gender identity issues" will be provided an "alternative appropriate private facility." *Id.*[6]

According to the Board member who drafted the policy, the new policy was not based on concerns that G.'s use of the restrooms would disrupt the learning

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[4] G. requested and was permitted to continue using the home-bound program for his physical education requirements. He therefore does not use the school locker rooms. Stay Appx. H-3. The Board's assertion that he requested to use the home-bound program *because* he did not wish to use those locker rooms is incorrect. Stay Application 5.

[5] The Board has never disclosed the source or content of the complaints it received.

[6] Six days before voting on the new policy, the Board announced in a press release that it planned to increase privacy in restrooms for all students—whether transgender or not—by "adding or expanding partitions between urinals in male restrooms," "adding privacy strips to the doors of stalls in all restrooms," and "designat[ing] single-stall, unisex restrooms . . . to give all students the option for even greater privacy." See Gloucester County School Board Press Release, Dec. 3, 2014 ("Dec. 3 Press 11 Release") at 2, http://gets.gc.k12.va.us/Portals/Gloucester/District/docs/SB/GlouSBPressRelease120314.pdf. At the school board meeting, however, several adult speakers voiced their opinion that the added privacy protections would be insufficient and threatened to vote the Board members out of office if they did not also prohibit transgender students from using restrooms consistent with their gender identity. Stay App'x B-9.

environment, and was designed solely to protect students' privacy. Gloucester County School Board Video Tr., Dec. 9, 2014, ("Dec. 9 Video Tr.") at 1:48:37, 1:49:52. http://gloucester.granicus.com/MediaPlayer.php?view_id=10&clip_id=1090. The dissenting Board member warned that the policy conflicted with guidance and consent agreements by the Department of Justice and the Department of Education's Office of Civil Rights. *Id.* at 2:07:02.

The new policy had no effect on other students because, for non-transgender students, assigning restrooms based on sex assigned at birth or gender identity is a distinction without a difference. The one and only result of the policy was that G. could no longer use the same restrooms as other boys and was relegated to single-stall, unisex restrooms that no other student is required to use. The separate restrooms physically and symbolically mark G. as "different," isolate G. from his peers, and brand him as unfit to share the same restrooms as other students. Stay App'x. H-5-6.[7]

To escape such stigma and humiliation, G. tries to avoid using the restroom entirely while at school, and, if that is not possible, he has used the nurse's restroom. Stay App'x H-5. Using the nurse's restroom makes him feel embarrassed

[7] The Board asserted below that G. is permitted to use the girls' restroom, but that is not a viable possibility for G. The claim that G. has the choice of using the girls' restroom is reminiscent of the sophistry that gay people were free to marry as long as they married a different-sex partner. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (explaining that the "immutable nature" of sexual orientation "dictates that same-sex marriage is [the] only real path to this profound commitment" for lesbians and gay men). For all practical purposes, denying G. access to the boys' restroom denies G. access to the common restrooms entirely.

and humiliated, which increases his dysphoria, anxiety, and distress. Stay App'x H-5-6. G. feels embarrassed that everyone who sees him enter the nurse's office knows he is there because he has been prohibited from using the same boys' restrooms that the other boys use. Stay App'x H-6. To avoid using the restroom, G. limits the amount of liquids he drinks and tries to "hold it" when he needs to urinate during the school day. Stay App'x H-5. As a result, G. has repeatedly developed painful urinary tract infections and has felt distracted and uncomfortable in class. Stay App'x H-6. The stress at school also places G. at increased risk for lifelong harms, including post-traumatic stress disorder, depression, anxiety, and suicidality in adulthood. Response App'x 8b. A nationally recognized expert in the treatment of Gender Dysphoria in adolescents has evaluated G. and concluded that the stigma he experiences every time he needs to use the restroom "is a devastating blow to G.G and places him at extreme risk for immediate and long-term psychological harm." Response App'x 9b.

B. Proceedings Below.

1. The day after the end of the 2014-15 school year, G. filed a Complaint and Motion for Preliminary Injunction against the Board, arguing that the Board's new policy discriminated against G. on the basis of sex, in violation of Title IX and the Equal Protection Clause. Stay App'x B-10. In support of his arguments, G. relied on case law holding that discrimination against transgender individuals constitutes discrimination on the basis of "sex" under federal statutes and the Fourteenth Amendment. *See Glenn v. Brumby*, 663 F.3d 1312, 1315-16 (11th Cir.

2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

One of Title IX's implementing regulations authorizes schools to provide separate restrooms for boys and girls, but does not specifically address which restrooms transgender boys and transgender girls should use. The regulation states: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Department of Education issued an opinion letter clarifying that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." Stay App'x J-2.[8] The opinion letter was consistent with the position the Department had previously taken in multiple enforcement actions since 2013. *Id.* It was also consistent with previous guidance the Department had issued with respect to the treatment of transgender students in sex-segregated programming. *Id.*

Before the district court, G. argued that the Department's interpretation of 34 C.F.R. § 106.33 is the only interpretation that harmonizes the regulation with

[8] The dissent below incorrectly states that G. "sought an opinion letter about his situation." Stay App'x B-51 (Nieymeyer, J., dissenting). G. did not seek the opinion letter, and the identity of the individual who requested the letter has not been disclosed by the Department.

Title IX's mandate of equal educational opportunity. G. further argued that, at a minimum, the Department's interpretation is reasonable and entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997). After hearing G.'s motion for a preliminary injunction together with the Board's cross-motion to dismiss, the district court granted the Board's motion to dismiss the Title IX claim and denied G.'s motion for a preliminary injunction. Stay App'x A. The district court refused to extend *Auer* deference to the Department's interpretation of its own regulation because, in the court's view, the authorization to assign restrooms based on "sex" necessarily authorizes schools to require transgender students to use restrooms based on the sex that was assigned to them at birth, as opposed to their gender identity. Stay App'x A-12, A-14-15. The district court then denied G.'s motion for a preliminary injunction because G.'s claim under Title IX had been dismissed and because the evidence G. presented regarding the balance of harms contained hearsay that would be inadmissible at trial. Stay App'x A-15-18.

2. G. filed an interlocutory appeal from the denial of a preliminary injunction with the U.S. Court of Appeals for the Fourth Circuit and asked the court to exercise pendant appellate jurisdiction to review the district court's dismissal of G.'s Title IX claim. Stay App'x B-12. On April 19, 2016, the Fourth Circuit reversed the district court's dismissal of the Title IX claim and vacated the district court's denial of G.'s motion for preliminary injunction. Stay App'x B-1-36.

With respect to G.'s Title IX claim, the Fourth Circuit held that "the Department's interpretation of its own regulation, [34 C.F.R.] § 106.33, as it relates

to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case." Stay App'x B-26. In reaching that conclusion, the Fourth Circuit methodically considered all the conditions for *Auer* deference. First, the Fourth Circuit examined the text of the regulation to determine whether the text unambiguously resolved which restroom a transgender student should use. Stay App'x B-18-21. The Fourth Circuit concluded that "[a]lthough the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms." Stay App'x B-20.

The Fourth Circuit then examined whether the Department's interpretation of 34 C.F.R. § 106.33 was plainly erroneous or inconsistent with the regulation's text. Stay App'x B-21-24. Once again, the Fourth Circuit independently reviewed the text of the regulation and determined that, in the context of a transgender student using the restroom, the plain meaning of "sex" did not unambiguously refer to the student's sex assigned at birth. The Fourth Circuit looked to dictionaries contemporaneous to the passage of Title VII and Title IX, which defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral peculiarities . . . that is typically manifested as maleness or femaleness." Stay App'x B-22. The court concluded that the dictionary definitions of the term "sex" indicate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally

descriptive." Stay App'x B-22-23. The dictionary definition thus "sheds little light on how exactly to determine the 'character of being either male or female'" where the morphological, physiological, and behavioral indicators of sex "diverge." Stay App'x B-23.

Finally, the Fourth Circuit determined that the Department's interpretation was the product of the Department's fair and reasoned judgment and not adopted as a post-hoc litigating position. Stay App'x B-24-26. As the court noted, the Department's interpretation was consistent with "the existing guidance and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities." Stay App'x B-25.

In response to the argument that G.'s use of the boy's restroom would infringe the constitutional privacy rights of other students, the Fourth Circuit noted that this case is not analogous to the cases cited by the Board, which involved students who were videotaped naked in a locker room or indiscriminately subject to a strip search. "G.G.'s use—or for that matter any individual's appropriate use—of a restroom [does] not involve the [same] type of intrusion." Stay App'x B-27 n.10. What is true generally is especially true here. The likelihood that anyone in the restroom would be accidently exposed to nudity has been virtually eliminated by the extra privacy protections installed by the Board, such as partitions between urinals in male restrooms and privacy strips for the doors of stalls in all restrooms. All students who want greater privacy for any reason also have the option of using one

of the new single-stall restrooms installed by the Board. Stay App'x B-10; *accord* Stay App'x B-41 (Davis, J., concurring); Stay App'x G-4 (Davis, J., concurring).

After reversing the district court's dismissal of the Title IX claim, the Fourth Circuit also vacated the district court's denial of G.'s motion for preliminary injunction. Stay App'x B-29-33. The Fourth Circuit explained that the district court applied an improper evidentiary standard for a motion for preliminary injunction; specifically, "it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial." Stay App'x B-31-32.

Senior Judge Davis issued a concurring opinion stating that "while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, *this Court* would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record." Stay App'x B-37 (Davis, J., concurring) (emphasis in original). Judge Davis noted that "[t]he uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past." Stay App'x B-40. Finally, Judge Davis urged the district court on remand to take "prompt action" and noted that "[b]y the time the district court

issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year." Stay App'x B-43.

Judge Niemeyer dissented. Stay App'x B-45-69. His dissent, however, did not identify any privacy concerns raised by the facts of this case and acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Stay App'x B-60. The dissent instead focused on transgender students' use of locker rooms and dormitory facilities, an issue not presented here. *Id.*

After the Fourth Circuit issued its decision, the Department of Education and the Department of Justice issued comprehensive guidance for schools on how to provide transgender students equal access to educational resources consistent with Title IX. Stay App'x K-1-7. In a separate document, the Department of Education's Office of Elementary & Secondary Education provided examples of school policies from across the country to address questions, such as "How do schools confirm a student's gender identity?" and "How do schools protect the privacy rights of all students in restrooms or locker rooms?"[9]

On May 31, 2016, the Fourth Circuit denied the Board's petition for rehearing en banc, noting that no judge had called for an en banc poll. Stay App'x C-2. Judge Niemeyer dissented from the denial of panel rehearing. Stay App'x C-3-5. On June 9, 2016, the Fourth Circuit denied the Board's motion to stay the

[9] U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* ("*Examples of Policies*") at 1-2, 7-8 (May 2016), http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

mandate pending disposition of a forthcoming petition for certiorari. Stay App'x D-1-3.

4. On remand, the district court entered a preliminary injunction on June 23, 2016, allowing G. to use the boys' restroom at Gloucester High School. Stay App'x E-1. The court emphasized that the preliminary injunction applies only to G. and does not apply to any facilities other than restrooms. Stay App'x E-2. The district court and the Fourth Circuit denied the Board's motions to stay the preliminary injunction pending appeal. Stay App'x F-1-2, G-1. In an opinion concurring in the denial of a stay, Judge Davis responded to the dissent's assertion that the *G.G.* opinion was "unprecedented." Stay App'x G-4. Judge Davis explained that, in accordance with this Court's decision in *Price Waterhouse*, "[t]he First Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on the person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Stay App'x G-3 (Davis, J., concurring). Judge Davis explained that the Fourth Circuit's decision to defer to the Department of Education's interpretation of its own regulations rested on "this long-settled jurisprudential foundation." *Id.* In response to the dissent's argument that the Board would suffer irreparable injury absent a stay, Judge Davis noted that "the dissent contains its own rebuttal." Stay App'x G-3 (Davis, J., concurring).

ARGUMENT

Three conditions must be met before the Court issues a stay pursuant to 28 U.S.C. § 2101: "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Teva Pharm.*, 134 S. Ct. at 1621 (internal quotation marks and brackets omitted). However, the three conditions "*necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (emphasis in original). "It is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (internal quotation marks omitted).

The Board's requests to stay of the preliminary injunction and recall and stay of the mandate satisfy none of these fundamental requirements. Presented with essentially the same arguments, both lower courts in this case denied a stay. Under these circumstances, "a heavy burden rests on the applicant to demonstrate the need for a stay." Stephen M. Shapiro, *et al.*, Supreme Court Practice 907 (10th ed. 2013) (and collected cases). That burden has not been met here.

I. THE BOARD HAS NOT IDENTIFIED ANY FORM OF IRREPARABLE HARM.

"The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury." *Nken v. Holder*, 556 U.S. 418, 432 (2009) (internal quotation marks omitted). If an applicant fails to establish a likelihood of

irreparable harm, the request for a stay must be denied. *Teva Pharm.*, 134 S. Ct. at 1621 (denying stay for lack of irreparable harm even though there was a reasonable probability of granting certiorari and a fair prospect of reversal); *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (denying stay after finding no irreparable harm). The Board has failed to articulate any irreparable harm that would occur if the preliminary injunction is not stayed or the mandate is not recalled.

The Board's arguments for staying the preliminary injunction have little connection to the injunction that was actually issued by the district court. The preliminary injunction applies only to G.; it applies only to the boy's restrooms; and it applies only at Gloucester High School. The preliminary injunction does not force the Board to develop "new policies" for students in "kindergarten through twelfth grade," Stay Application 34; it does not apply to locker rooms or other situations in which students may be "in a state of full or complete undress," *id.* at 35; and it certainly does not "extend[] to every school district in the Fourth Circuit" or "the entire Nation," *id.* at 38. *See Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 834 (10th Cir. 1993) ("Because this is not a class action, the broad sweep of the remedy exists only in defendant's imagination."). Any broader implications this case might have for other students, other facilities, or other school districts would follow from

the precedential effect of *G.G.*—not from the preliminary injunction issued by the district court.[10]

The narrow preliminary injunction will not infringe upon other students' right to bodily privacy. Stay Application 36-37. As the Fourth Circuit explained, "G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in the cases cited by the Board. Stay App'x B-27 n.10. Even the dissent acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Stay App'x B-60 (Niemeyer, J., dissenting). *Cf. Cruzan v. Special Sch. Dist, No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing transgender woman to use women's restroom created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present"). If any other male student is uncomfortable using the same restroom as G., that student also has the option to use one of the three single-user facilities installed by the

[10] The Board attempts to bolster its argument by relying on "in chambers" opinions of individual Justices stating that "any time a State is enjoined by a court from effectuating statues enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The Gloucester County School Board, however, is not a State and its restroom policy is not a statute. "Municipalities are not sovereign. And for this reason, federal law often treats municipalities differently from States." *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1122 (2015) (Alito, J., dissenting) (citation omitted).

Board. Stay App'x B-10; *accord* Stay App'x B-41 (Davis, J., concurring); Stay App'x G-4 (Davis, J., concurring).[11]

The Board asserts that G.'s use of the restrooms will cause "disruption" because people will complain to the Board. Stay Application 34. The uncontested record, however, demonstrates that, while some people complained to the Board, G's use of the restrooms for seven weeks did not cause any physical disruption at all. Stay App'x H-4. Indeed, the Board member who authored the new policy emphasized that the proposal was *not* based on concerns that G.'s use of the restrooms would disrupt the learning environment, and was designed solely to protect students' privacy. Dec. 9 Video Tr. 1:48:37, 1:49:52.

In contrast, a stay would have irreparable consequences for G., who, according to the uncontested evidence before the district court, experiences painful urinary tract infections and daily psychological harm as a result of the Board's policy. Stay App'x B-40 (Davis, J., concurring). Moreover, a stay would almost certainly mean that G. will be prohibited from using the same restrooms as his peers for the remainder of his time at Gloucester High School. *Cf. Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d. 771, 778 (S.D.W.V. 2012) (granting a preliminary

[11] Parents' fundamental rights to direct the upbringing and education of their children are not at issue in this case. Stay Application 35. "While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

injunction because plaintiffs "will experience their middle school years only once during their life").

The Board's further request for this Court to recall and stay the Fourth Circuit's mandate in *G.G.* fails to identify any irreparable harm at all. The Board asserts that the mandate must be recalled because the precedent in *G.G.* has been cited in formal guidance issued by the Department of Education and the Department of Justice, and has led to additional litigation in North Carolina and elsewhere. Stay Application at 29 n.9, 27-28, 38. This Court, however, has made clear, time and time again, that "the expense and annoyance of litigation" does not constitute "irreparable injury." *Standard Oil*, 449 U.S. at 244 (citing *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938), and *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *cf. Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108-09 (2009). The district courts in North Carolina and elsewhere are fully capable of presiding over the legal proceedings before their courts, and the parties in those proceedings will have all the protections of judicial review, including the opportunity to seek a stay at the appropriate time if actually confronted with irreparable injury. An application for an emergency stay, however, is not a mechanism for obtaining the equivalent of a declaratory judgment to enjoin future legal disputes that could develop as a result of the precedential force of the lower court's decision.

II. THE BOARD HAS NOT SHOWN A REASONABLE PROBABILITY THAT CERTIORARI WILL BE GRANTED.

There is no reasonable probability that this Court will grant certiorari in this case without a final judgment or circuit split. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for certiorari); *accord Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of petition for certiorari because "[t]he current petitions come to us in an interlocutory posture").

Moreover, there is no disagreement among the Courts of Appeals that could justify granting certiorari before final judgment. Sup. Ct. R. 10(a). Indeed, the Fourth Circuit is the only Court of Appeals to rule on whether Title IX and its implementing regulations protect the ability of transgender students to use restrooms consistent with their gender identity. The Board asks this Court to grant certiorari now because lawsuits raising similar issues are currently pending in various district courts across the country. Stay Application at 28-29 & n.9. This Court's ordinary practice, however, would be to wait until those cases are actually decided and grant certiorari if a circuit split develops. Granting certiorari now, without the benefit of consideration by any other Court of Appeals, would be an unwarranted deviation from this Court's settled practice.

In addition to these prudential considerations about the timing of review, there is no reasonable probability that four Justices will vote to grant certiorari on the questions to be presented. The Board notes that three Justices in dissenting

and concurring opinions have either called for *Auer* and *Seminole Rock* to be overruled or expressed interest in reconsidering those precedents. Stay Application 18-20. The majority of this Court, however, has never embraced those views. Moreover, this Court passed up the opportunity to consider these questions last term when it denied certiorari in *United Student Aid Funds*, 136 S. Ct. at 1608. There is not a reasonable probability that four Justices will grant certiorari to reconsider *Auer* deference so recently after declining to grant certiorari in that case.

The Board also attempts to cobble together a circuit split by identifying cases in which other Courts of Appeals have examined an agency's interpretation of a regulation and concluded that *Auer* deference was unwarranted based on the particular circumstances at issue. The purported "splits" identified by the Board are nonexistent.

First, the Board asserts that the circuits are split over whether an agency's interpretation of its regulation must appear in a format that carries the force of law in order to qualify for *Auer* deference. Stay Application at 21. If an interpretation carried the force of law, however, it would qualify for deference under *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, (1984). The whole point of *Auer* deference is to allow agencies to interpret and apply existing regulations without undergoing full notice-and-comment rulemaking. The Board purports to identify such a requirement in the First Circuit's decision in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129, 139-40 n.13 (1st Cir. 2013). The First Circuit's reference to the

lack of notice-and-comment rulemaking, however, was contained in a paragraph explaining why an unpublished agency letter was not entitled to *Chevron* deference. The First Circuit then turned to the issue of *Auer* deference and concluded that deference was inappropriate because the letter would impose monetary liability for conduct that took place before the interpretation was issued. *See Christopher v. SmithKline Beecham Corp.,* 132 S. Ct. 2156 (2012). The lack of notice-and-comment rulemaking played no role in the court's application of *Auer*. *Cf. Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 76 (1st Cir. 2006) (applying *Auer* deference to statements in agency manual despite lack of notice-and-comment rulemaking).[12]

Second, the Board asserts there is a split within the circuits regarding whether *Auer* deference applies when an interpretation is advanced for the first time in litigation. Every circuit, including the Fourth Circuit, agrees that *Auer* deference is inappropriate when an interpretation is "a convenient litigating position." Stay App'x B-24. That principle, however, applies when an interpretation is a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462. In contrast, when an agency is not itself a party, this Court has repeatedly applied *Auer* deference even when an

[12] Similarly, the cited decisions from the Sixth and Seventh Circuits do not require notice-and-comment rulemaking before applying deference. Stay Application at 23 & n.4. They withheld deference because the agencies themselves disclaimed the relevant interpretations as an authoritative representation of the agency's views. Stay Application at 23 & n.4. The Fourth Circuit, like every other Court of Appeals, agrees that *Auer* deference is inappropriate when an interpretation does not reflect "the agency's fair and considered judgment." Stay App'x B-24.

agency advances an interpretation for the first time in an amicus brief. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 209 (2011); *Auer*, 519 U.S. at 462. The Department of Education "is not a party to this case," *Chase Bank*, 562 U.S. at 209, and it had adhered to its interpretation of 34 C.F.R. § 106.33 long before this dispute arose. Stay App'x B-25.

Finally, the Board asserts that the Fourth Circuit's decision conflicts with decisions in other circuits that withhold deference when an interpretation is inconsistent with the understanding of a regulation at the time it was enacted. The Fourth Circuit agrees with that underlying principle. *See Dickenson-Russell Coal Co., LLC v. Sec'y of Labor*, 747 F.3d 251, 257 (4th Cir. 2014). The Fourth Circuit simply disagrees with the Board's assertion that the original understanding of 34 C.F.R. § 106.33 was that a transgender student like G. would be assigned restrooms based his sex assigned at birth even when that assignment conflicts with his gender identity, his secondary-sex characteristics resulting from hormones, and the gender marker on his government identification card. The Fourth Circuit explained that the regulation "assume[d] a student population composed of individuals" for whom "the various indicators of sex all point in the same direction," and, therefore, "sheds little light" on which restroom a transgender student should use "where those indicators diverge." Stay App'x B-23.

The Fourth Circuit follows the same legal principles as every other Court of Appeals. The Board has not identified a circuit split. It simply disagrees with how the Fourth Circuit applied those principles to the facts of this case.

III. THE BOARD HAS NOT SHOWN A FAIR PROSPECT OF REVERSAL.

There is no fair prospect that a majority of this Court would vote to reverse the Fourth Circuit's decision, which is consistent with Title IX and its implementing regulations and faithfully applies this Court's precedents.

A. The Term "Sex" In Title IX Encompasses All The "Morphological, Physiological, And Behavioral" Components Of An Individual's Sex.

The Fourth Circuit correctly determined that the term "sex" in Title IX and its implementing regulations encompasses all of the "morphological, physiological, and behavioral" components of an individual's sex. Stay App'x B-23-24. The Board's attack on the Fourth Circuit's decision is built on factually incorrect assertions about the plain meaning of the term "sex" in Title IX, and a method of interpretation that this Court repudiated in *Oncale* and *Price Waterhouse*.

Relying on an anachronistic distinction between "sex" as a physical term and "gender" as a behavioral term, the Board asserts that the term "sex" in Title IX and its implementing regulations unambiguously refers solely to a student's so-called "biological sex." At the time that Title VII and Title IX were drafted, however, contemporaneous dictionaries did not distinguish between sex and gender as distinct concepts, and they included psychological and behavioral differences within the definition of "sex." As the Fourth Circuit explained, contemporaneous dictionaries defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral peculiarities . . . that is typically

manifested as maleness or femaleness." Stay App'x B-22.[13] Those dictionary definitions indicate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive." Stay App'x B-22-23. The dictionary definition of the term sex therefore "sheds little light on how exactly to determine the 'character of being either male or female'" where the morphological, physiological, and behavioral indicators of sex "diverge." Stay App'x B-23.

The Board's assertions about the "plain meaning" of "sex" are really assertions about what was in the minds of individual legislators in 1972. No one contends that those legislators considered how the statute would apply to transgender individuals. This Court, however, has steadfastly refused to restrict the meaning of the word "sex" to what was in the minds of legislators who drafted Title VII or Title IX. For example, under Title IX, sexual harassment is discrimination on the basis of sex, even though "[w]hen Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting). Title VII (like Title IX) also protects against discrimination between members of the same sex even

[13] *See also* Am. Heritage Dictionary 548, 1187 (1973) (defining "sex" as, *inter alia*, "the physiological, functional, and psychological differences that distinguish the male and the female" and defining "gender" as "sex"); Webster's Seventh New Collegiate Dictionary 347, 795 (1970) (defining "sex" to include "behavioral peculiarities" that "distinguish males and females" and defining "gender" as "sex"); 9 Oxford English Dictionary ("OED") 577-78 (1st ed. 1939) (defining "sex" as, *inter alia*, a "distinction between male and female in general").

though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*; *cf. Barr v. United States*, 324 U.S. 83, 90 (1945) ("[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.")

Moreover, the Board's attempt to restrict the definition of "sex" to chromosomes or genitals conflicts with *Price Waterhouse,* in which six Justices agreed that an employer discriminated on the basis of "sex" when it denied promotion to an employee based, in part, on her failure to conform to stereotypes about how women should behave. 490 U.S. at 251 (plurality); *id.* at 260-61 (White, J., concurring the judgment); *id.* at 272 (O'Connor, J., concurring in the judgment). The employee was advised that if she wanted to advance in her career she should be less "macho" and learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. In ruling for the plaintiff, *Price Waterhouse* confirmed "that Title VII barred not just discrimination based on the fact that [the employee] was a woman, but also discrimination based on the fact that she failed 'to act like a woman.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). *Price Waterhouse* thus "eviscerated" the reasoning of some lower court decisions that attempted to narrow Title VII by

drawing a distinction between discrimination based on sex and discrimination based on gendered behavior. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). Consistent with *Price Waterhouse*, the First, Sixth, Eleventh, and Ninth Circuits have all held that discrimination against transgender individuals is discrimination on the basis of sex. *See Glenn v. Brumby*, 663 F.3d 1312, 1317-18 (11th Cir. 2011); *Smith*, 378 F.3d at 573; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk*, 204 F.3d at 1202; Stay Application at G-3 (Davis, J., concurring). "The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination" under our civil rights laws, including Title IX. *Glenn*, 663 F.3d at 1319.

Far from redefining the word "sex," the Fourth Circuit's recognition that an individual's sex includes more than genitals and chromosomes is fully consistent with the plain meaning of the term and faithful to this Court's precedents. "There is nothing unplain, untraditional, unusual, or new-fangled about this understanding." *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *13 (D. Conn. Mar. 18, 2016). The Board's arguments, in contrast, would turn back the clock thirty years and reinstate a method of statutory interpretation this Court repudiated long ago.

B. The Only Way To Reconcile 34 C.F.R. § 106.33 With The Underlying Requirements Of Title IX Is To Allow Transgender Students To Use Restrooms Consistent With Their Gender Identity.

The Department's interpretation of 34 C.F.R. § 106.33 is not merely reasonable; it is the only interpretation of the regulation that prevents transgender students from being excluded from participation in or denied the benefits of educational opportunities on the basis of sex. When a school establishes common restrooms for boys and girls, it must allow transgender boys and transgender girls to use those restrooms too. Excluding transgender students from the restrooms consistent with their gender identity effectively banishes those students from the common restrooms entirely.

"Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). The statute contains exceptions for activities such as father-daughter dances, 20 U.S.C. § 1681(a)(8); scholarships for beauty pageants, *id.* §1681(a)(9); and separate living facilities, *id.* §1686. But the statute creates no exemptions for school restrooms. Instead, Congress delegated broad power to the administrative agencies to decide whether additional exceptions should be created as part of the rulemaking process. 20 U.S.C. § 1682. Any disparate treatment that is not specifically authorized by one of the statutory or regulatory exceptions is prohibited.[14]

[14] Congress was well aware that policy decisions regarding access to restrooms and locker rooms would be made by the administrative agencies. When asked how the

The implementing regulations recognize that, under certain circumstances, some distinctions based on sex may not constitute a denial of educational benefit and opportunity under Title IX. In particular, the simple act of providing separate restrooms for boys and girls does not ordinarily stigmatize individuals or interfere with their ability to thrive in school. In recognition of that social context, 34 C.F.R. § 106.33 authorizes schools to provide separate restrooms for members of "one sex" and members of "the other sex." The regulation clarifies that "the mere act of providing separate restroom facilities for males and females does not violate Title IX." Stay App'x B-19.

The Board's policy is very different. By declaring that G. cannot use the same restroom as other boys, the Board's policy effectively banishes G. from the communal restrooms entirely. The Board does not argue that it would be appropriate for a transgender boy like G. to use the girls' restroom. The Board's policy thus singles out G. and declares that he is so inherently gender non-conforming that he cannot use the restrooms the school has established for everyone else. *Cf. Oncale*, 523 U.S. at 81-82 (recognizing that the discrimination must be assessed from "the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" which "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target").

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text of the statute would affect sex-segregated facilities like locker rooms, Senator Bayh stated that "the rulemaking powers . . . give the Secretary discretion to take care of this particular policy problem"—not that the plain text of Title IX would not apply. 117 Cong. Rec. 30407 (1971); *accord* 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) ("[R]egulations would allow enforcing agencies to permit differential treatment by sex . . . where personal privacy must be preserved.").

Being forced to use separate restrooms also impairs transgender students' physical and psychological wellbeing, which necessarily interferes with their ability to thrive at school. *Cf. Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014) (evidence "established that a student's psychological well-being and educational success depend[ed] upon being permitted to use the communal bathroom consistent with her gender identity").

Banishing transgender students from the restrooms used by their peers unquestionably interferes with their equal educational opportunity under Title IX. The text of Title IX not only protects students "from discrimination, but also specifically shield[s] [them] from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.'" *Davis*, 526 U.S. at 650 (quoting 20 U.S.C. § 1681(a)). "The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Id.*

Nothing in the text of 34 C.F.R. § 106.33 authorizes schools to relegate transgender students to separate single-stall restrooms. The regulation allows schools to provide separate restrooms for boys and girls, but the school must allow transgender boys and transgender girls to use those restrooms too. In order to ensure that transgender students are not effectively banished from the common restrooms entirely, the Department properly concluded that when a school creates separate restrooms for boys and girls, transgender boys and transgender girls must be allowed to use the restroom consistent with their gender identity. That

interpretation does not impose new regulatory obligations on funding recipients; it simply clarifies how the existing regulation applies when a student is transgender.

Allowing transgender students to use restrooms consistent with their gender identity also coincides with social mores regarding sex-segregated restrooms. No one disputes that separating restrooms on the basis of sex reflects traditions of modesty between men and women. But, as the panel explained, "the truth of these propositions" does not answer the question of which restroom a transgender boy like G. should use. Stay App'x B-27. The Board, like the dissent, assumes that social customs regarding privacy are built entirely around a person's genitals even in contexts where there is no exposure to nudity. But that assertion is hardly self-evident. For many people, the presence of a transgender man (who may look indistinguishable from a non-transgender man) in the women's restroom would be far more disruptive and discomfiting than the presence of a transgender woman (who may look indistinguishable from a non-transgender woman). *See* Stay App'x B-25 n.8.

Allowing transgender boys to use the boys' restroom and transgender girls to use the girls' restroom is the only option that is consistent with the text of 34 C.F.R. § 106.33, social customs regarding modesty, and the underlying requirements of Title IX.

C. The Fourth Circuit Appropriately Deferred To The Department's Reasonable Interpretation Of Its Own Regulation.

Instead of deciding whether the Department' s interpretation is mandated by Title IX, the Fourth Circuit resolved the appeal on the narrowest available grounds by deferring to the Department's interpretation of its own regulations. Even without the benefit of deference, the Department's interpretation would have the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994). But because the Department's interpretation is at the very least reasonable, it is entitled to controlling deference under *Auer*.

None of the Board's attacks on the Fourth Circuit's application of *Auer* hits its target. The Board argues that because the word "sex" is contained in both the regulation and the underlying statute, the Fourth Circuit improperly applied *Auer* deference to the agency's interpretation of the statute itself. Stay Application 30. But this is not a case in which the Department has interpreted a "parroting" regulation that "does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). The policy decision to permit sex-segregated restrooms is "a creature of the Secretary's own regulations." *Id.* at 256. The regulation reflects the Department's policy judgment that the mere act of providing separate restrooms for boys and girls does not deprive students of equal educational opportunity under Title IX. Having made that policy decision, the Department's interpretation of 34 C.F.R. § 106.33 clarifies that the regulation does

not permit schools to deny transgender students equal educational opportunity by excluding them from restrooms consistent with their gender identity.

Moreover, the Board is in no position to argue that the Department's interpretation of the regulation resulted in "unfair surprise." Stay Application 25. The Board was well aware of the Department's position at the time it passed the new policy. Assertions of unfair surprise do not relieve parties of their obligation "to conform their conduct to an agency's interpretations once the agency announces them." *Christopher*, 132 S. Ct. at 2168.

There is not a reasonable probability that a majority of this Court will agree with the Board's arguments and vote to reverse the Fourth Circuit's decision.

CONCLUSION

For all these reasons, the Application to Stay the Preliminary Injunction and Recall and Stay the Mandate Pending a Petition for Certiorari should be denied.

Respectfully submitted,

Joshua A. Block
Counsel of Record
James D. Esseks
Leslie Cooper
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
jblock@aclu.org

Gail M. Deady
Rebecca K. Glenberg (Of Counsel)
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
701 E. Franklin Street, Suite 1412
Richmond, VA 23219
(804) 644-8080

Dated: July 26, 2016

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM, Plaintiffs, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant.	)	Civil No. 4:15cv54

SUPPLEMENTAL DECLARATION OF G.G.

1. My name is G.G. I am the plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. On or about May 27, 2015, I went to a local branch of the Virginia Department of Motor Vehicles (DMV) to apply for a learner's permit and to complete Gender Change Designation Request in order to ensure that the permit would reflect my gender as male.

3. I subsequently received a letter from DMV dated June 5, 2015 stating: "The Department of Motor Vehicles (DMV) has approved your request to have the gender indicator on your credential changed from F to M." A copy of the letter (with my name, address, and DMV Customer Number redacted) is attached to this Declaration as Exhibit A.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 10, 2015.

By: G.G.
G.G.

COMMONWEALTH of VIRGINIA
Department of Motor Vehicles
2300 West Broad Street

Richard D. Holcomb
Commissioner

Post Office Box 27412
Richmond, VA 23269-0001

June 5, 2015

Dear

The Department of Motor Vehicles (DMV) has approved your request to have the gender indicator on your credential changed from F to M.

Please visit your local DMV to complete this transaction. Please present this letter to the Customer Service Representative (CSR) as it will help to expedite your request. You will then be issued a new credential with the new gender indicator.

Please retain this letter in the event you need to return to a Customer Service Center for a replacement or reissue credential.

If you or the CSR has any questions regarding the re-issuance of your credential or our gender change policy, you may contact us Monday-Friday from 8:15 a.m. until 5:00 p.m. at (804) 367-6203.

Sincerely,

R. Smalls

R. Smalls
Medical Evaluator Senior
Medical Review Services

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

G.G., by his next friend and mother, DEIRDRE GRIMM, Plaintiffs, v. GLOUCESTER COUNTY SCHOOL BOARD, Defendant.	)	Civil No. 4:15-cv-00054-RGD-DEM

CORRECTED EXPERT DECLARATION OF RANDI ETTNER, Ph.D

PRELIMINARY STATEMENT

1. I have been retained by counsel for Plaintiff as an expert in connection with the above-captioned litigation. I have actual knowledge of the matters stated in this declaration.

2. My professional background, experience, and publications are detailed in my curriculum vitae, a true and accurate copy which is attached as Exhibit A to this report. I received my doctorate in psychology from Northwestern University in 1979. I am the chief psychologist at the Chicago Gender Center, a position I have held since 2005.

3. I have expertise working with children and adolescents with Gender Dysphoria. During the course of my career, I have evaluated or treated between 2,500 and 3,000 individuals with Gender Dysphoria and mental health issues related to gender variance. Approximately 33% of those individuals were adolescents. I have also served as a consultant to the Wisconsin and Chicago public school systems on issues related to gender identity.

4. I have published three books, including the medical text entitled "Principles of Transgender Medicine and Surgery" (co-editors Monstrey & Eyler; Routledge, 2007). I have

authored numerous articles in peer-reviewed journals regarding the provision of health care to this population. I have served as a member of the University of Chicago Gender Board, and am a member of the editorial board for the *International Journal of Transgenderism*.

5. I am a member of the Board of Directors of the World Professional Association for Transgender Health (WPATH) (formerly the Harry Benjamin International Gender Dysphoria Association), and an author of the WPATH *Standards of Care* (7th version), published in 2011. The WPATH-promulgated Standards of Care are the internationally recognized guidelines for the treatment of persons with Gender Dysphoria and serve to inform medical treatment in the United States and throughout the world.

6. In preparing this report, I reviewed the materials listed in the attached Bibliography (Exhibit B). I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this report, as additional support for my opinions. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein. The materials I have relied upon in preparing this report are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject.

7. In addition to the materials in Exhibit B, I personally met with G.G. and Deirdre Grimm on May 26, 2015, to conduct a clinical assessment of G.G. The evaluation consisted of a clinical interview with, and observation of, G.G.; a subsequent interview with his mother; the administration of psychological testing; and a review of health records from his pediatrician and endocrinologist. I am confident that the opinions I hereafter render based on that assessment are both reliable and valid.

8. In the past four years, I have testified as an expert at trial or deposition in the following matters: *Kothmann v. Rosario*, Case No. 5:13-cv-28-Oc-22PRL (M.D. Fla.); *Doe et al v. Clenchy*, Case No cv-09-201 (Me. Super. Ct.)

9. I am being compensated at an hourly rate for actual time devoted, at the rate of $245 per hour for any clinical services, review of records, or report; $395 per hour for deposition and trial testimony; and $900 per day for travel time spent out of the office. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

GENDER IDENTITY AND GENDER DYSPHORIA

10. The term "gender identity" is a well-established concept in medicine, referring to one's sense of oneself as male or female. All human beings develop this elemental internal view: the conviction of belonging to one gender or the other. Gender identity is an innate and immutable aspect of personality that is firmly established by age four, although individuals vary in the age at which they come to understand and express, their gender identity.

11. Typically, people born with female anatomical features identify as girls or women, and experience themselves as female. Conversely, those persons born with male characteristics ordinarily identify as males. However, for transgender individuals, this is not the case. For transgender individuals, the sense of one's self—one's gender identity—differs from the natal, or birth-assigned sex, giving rise to a sense of being "wrongly embodied."

12. The medical diagnosis for that feeling of incongruence is Gender Dysphoria, which is codified in the Diagnostic and Statistical manual of Mental Disorders (DSM-V) (American Psychiatric Association) and the International Classification of Diseases-10 (World Health Organization). The condition is manifested by symptoms such as preoccupation with

ridding oneself of primary and secondary sex characteristics. Untreated Gender Dysphoria can result in significant clinical distress, debilitating depression, and often suicidality.

13. The criteria for establishing a diagnosis of Gender Dysphoria in adolescents and adults are set forth in the DSM-V (302.85):

A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).

2. A strong desire to be rid of one's primary/and or secondary sex characteristics because of a marked incongruence with one's experienced/ expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

3. A strong desire for the primary and /or secondary sex characteristics of the other gender.

4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

14. The World Professional Association for Transgender Health (WPATH) has established internationally accepted Standards of Care (SOC) for the treatment of people with Gender Dysphoria. The SOC have been endorsed as the authoritative standards of care by leading medical and mental health organizations, including the American Medical Association, the Endocrine Society, and the American Psychological Association.

15. In accordance with the SOC, individuals undergo medically-recommended transition in order to live in alignment with their gender identity. Treatment of the condition is multi-dimensional and varies from individual to individual depending on their needs, but can consist of social role transition, hormone therapy, and surgery to alter primary and/or secondary sex characteristics to help the individual live congruently with his or her gender identity and eliminate the clinically significant distress caused by Gender Dysphoria.

16. Social role transition is a critical component of the treatment for Gender Dysphoria. Social role transition is living one's life fully in accordance with one's gender identity. That typically includes, for a transgender male for example, dressing and grooming as a male, adopting a male name, and presenting oneself to the community as a boy or man. Social transition is crucial to the individual's consolidation of his or her gender identity. The social transition takes place at home, at work or school, and in the broader community. It is important that the individual is able to transition in all aspects of his or her life. If any aspect of social role transition is impeded, however, it undermines the entirety of a person's transition.

17. In prior decades before Gender Dysphoria was well-studied and understood, some considered it to be a mental condition that should be treated by psychotherapy aimed at changing the patient's sense of gender identity to match assigned sex at birth. There is now a medical consensus that such treatment is not effective and can, in fact, can cause great harm to the patient.

TREATMENT OF GENDER DYSPHORIA IN ADOLESCENTS AND HARMFUL EFFECTS OF EXCLUSIONS FROM SCHOOL RESTROOMS

18. As with adults, treatment for Gender Dysphoria in adolescents frequently includes social transition and hormone therapy, but genital surgery is not permissible under the WPATH Standards of Care for persons who are under the legal age of majority. Hormone therapy has a

profound virilizing effect on the appearance of a transgender boy. The voice deepens, there is growth of facial and body hair, body fat is redistributed, and muscle mass increases.

19. As with adults, for teenagers with Gender Dysphoria, social transition is a critical part of treatment. And as with adults, it is important that the social transition occur in all aspects of the individual's life. For a gender dysphoric teen to be considered male in one situation, but not in another, is inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child. The integration of a consolidated identity into the daily activities of life is the aim of treatment. Thus, it is critical that the social transition is complete and unqualified—including with respect to the use of restrooms.

20. Access to a restroom available to other boys is an undeniable necessity for transgender male adolescents. Restrooms, unlike other settings (e.g. the library), categorize people according to gender. There are two, and only two, such categories: male and female. To deny a transgender boy admission to such a facility, or to insist that one use a separate restroom, communicates that such a person is "not male" but some undifferentiated "other," interferes with the person's ability to consolidate identity, and undermines the social-transition process.

21. When transgender adolescents are not permitted to use restrooms that match their appearance and gender identity, the necessity of using the restroom can become a source of anxiety. The Chicago Gender Center physicians clinically report that youngsters often avoid drinking fluids during the day and hold their urine for the entire school day, making them prone to developing urinary tract infections, dehydration, and constipation. Anxiety regarding use of the restroom also makes it difficult for students to concentrate on learning and school activities.

22. Transgender adolescents like G.G. are particularly vulnerable during middle adolescence. Middle adolescence, approximately 15-16 years, is the period of development

when a teenager becomes extremely concerned with appearance and one's own body. This stage is accompanied by dramatic physical changes, including height and weight gains, growth of pubic and underarm hair, and breast development and menstruation in girls. Boys will experience growth of testicles and penis, a deepening of the voice and facial hair growth. There is an increased effort to make new friends, and an intense emphasis on the peer group. "Fitting in" is the overarching motivation at this stage of life.

23. While peers are developing along a "normal" and predictable trajectory, however, transgender teens like G.G. feel betrayed by the body, anxious about relationships, and frustrated by the challenges of a "non-normative" existence. At the very time of life when nothing is more important than being part of a peer group, fitting in, belonging, they may conspicuously stand out. Research shows that transgender students are at far greater risk for severe health consequences – including suicide – than the rest of the student population, and more than 50% of transgender youth will have had at least one suicide attempt by age 20.

24. If school administrators amplify this discomfort by sending a message that the student is different than his peers or shameful, they stigmatize nascent identity formation, which can be devastating for the student. Studies show that external attempts to negate a person's gender identity constitute *identity threat*. Developing and integrating a positive sense of self—identity formation—is a developmental task for all adolescents. For the transgender adolescent, this is more complex, as the "self" violates society's norms and expectations. Attempts to negate a person's gender identity – such as excluding a transgender male adolescent from the restrooms used by other boys – challenge this blossoming sense of self and pose health risks, including depression, post-traumatic stress disorder, hypertension, and self-harm.

25. School administrators and other adults play a critical role in "setting the tone" for whether a student will be stigmatized and ostracized by peers. Excluding a transgender adolescent from the same restroom as his peers puts a "target on one's back" for potential victimization and bullying. When adults—authority figures—deny an adolescent access to the restroom consistent with his lived gender, they shame him—negating the legitimacy of his identity and decimating confidence. In effect, they revoke membership from the peer group.

26. In a study of transgender youth age 15 to 21, investigators found school to be the most traumatic aspect of growing up. Experiences of rejection and discrimination from teachers and school personnel led to feelings of shame and unworthiness. The stigmatization they were routinely subjected to led many to experience academic difficulties and to drop out of school.

27. Until recently, it wasn't fully understood that these experiences of shame and discrimination could have serious and enduring consequences. But it is now known that stigmatization and victimization are some of the most powerful predictors of current and future mental health problems, including the development of psychiatric disorders. The social problems these transgender teens face at school actually create the blueprint for future metal health, life satisfaction, and even physical health. A recent study of 245 gender non-conforming adults found that stress and victimization at school was associated with a greater risk for post-traumatic stress disorder, depression, life dissatisfaction, anxiety, and suicidality in adulthood.

ASSESSMENT OF G.G.

28. It is my professional opinion that the Gloucester County School Board's policy of excluding G.G. from the communal restroom used by other boys and effectively banishing him to separate single-stall restroom facilities is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm.

29. As noted above, I personally met with G.G. on May 26, 2015, to conduct a clinical assessment. G.G. meets the criteria for Gender Dysphoria in adolescents and adults (302.85), in the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (F64.1) in the International Classification of Diseases. Indeed, G.G. has a *severe* degree of Gender Dysphoria. By adolescence, children with G.G.'s severe degree of Gender Dysphoria are so dysphoric they cannot even attempt to live as female. Such individuals seek hormones and, when they are old enough, surgeries that can offer them the only real hope of a normal life. As an adolescent, medically necessary treatment for G.G. currently includes testosterone therapy and social transition in all aspects of his life – including with respect to use of the restrooms. Untreated, many of these youngsters commit suicide.

30. As a result of the School Board's restroom policy, however, G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his "otherness," undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 2, 2015.

By: [ORIGINAL SIGNATURE UNDER SEAL]

Randi Ettner Ph.D.

RANDI ETTNER, PHD

1214 Lake Street
Evanston, Illinois 60201
Tel 847-328-3433 Fax 847-328-5890
rettner@aol.com

POSITIONS HELD

Clinical Psychologist
Forensic Psychologist
Fellow and Diplomate in Clinical Evaluation, American Board of Psychological Specialities
Fellow and Diplomate in Trauma/PTSD
President, New Health Foundation Worldwide
Board of Directors, World Professional Association of Transgender Health (WPATH)
Chair, Committee for Incarcerated Persons, WPATH
University of Minnesota Medical Foundation: Leadership Council
Psychologist, Chicago Gender Center
Adjunct Faculty, Prescott College
Editorial Board, International Journal of Transgenderism
Television and radio guest (more than 100 national and international appearances)
Internationally syndicated columnist
Private practitioner
Medical staff privileges attending psychologist Advocate Lutheran General Hospital

EDUCATION

PhD, 1979 Northwestern University (with honors)
Evanston, Illinois

MA, 1976 Roosevelt University (with honors)
Chicago, Illinois
Major: Clinical Psychology

BA, 1969-72 Indiana University (cum laude)
Bloomington, Indiana
Major: psychology, Minor: sociology

1972 Moray College of Education
Edinburgh, Scotland
International Education Program

1970 Harvard University
Cambridge, Massachusetts
Social relation undergraduate summer program in group dynamics and processes

CLINICAL AND PROFESSIONAL EXPERIENCE

Present	Psychologist: Chicago Gender Center Consultant: Walgreens; Tawani Enterprises Private practitioner
2011	Instructor, Prescott College: Gender - A multidimensional approach
2000	Instructor, Illinois Professional School of Psychology
1995-present	Supervision of clinicians in counseling gender non-conforming clients
1993	Post-doctoral continuing education with Dr. James Butcher in MMPI-2 interpretation University of Minnesota
1992	Continuing advanced tutorial with Dr. Leah Schaefer in Psychotherapy
1983-1984	Staff psychologist, Women's Health Center, St. Francis Hospital, Evanston, Illinois
1981-1984	Instructor, Roosevelt University, Department of Psychology: Psychology of Women, Tests and Measurements, Clinical Psychology, Personal Growth, Personality Theories, Abnormal Psychology
1976-1978	Research Associate, Cook County Hospital, Chicago, Illinois Department of Psychiatry
1975-1977	Clinical Internship, Cook County Hospital, Chicago, Illinois Department of Psychiatry
1971	Research Associate, Department of Psychology, Indiana University
1970-1972	Teaching Assistant in Experimental and Introductory Psychology Department of Psychology, Indiana University
1969-1971	Experimental Psychology Laboratory Assistant, Department of Psychology, Indiana University

LECTURES AND HOSPITAL GRAND ROUNDS PRESENTATIONS

Gender reassignment surgery- Midwestern Association of Plastic Surgeons, 2015

Adult development and quality of life in transgender healthcare- Eunice Kennedy Shriver National Institute of Child Health and Human Development, 2015

Healthcare for transgender inmates- American Academy of Psychiatry and the Law, 2014

Supporting transgender students: best school practices for success- American Civil Liberties Union of Illinois and Illinois Safe School Alliance, 2014

Addressing the needs of transgender students on campus- Prescott College, 2014

The role of the behavioral psychologist in transgender healthcare – Gay and Lesbian Medical Association, 2013

Understanding transgender- Nielsen Corporation, Chicago, Illinois, 2013;

Role of the forensic psychologist in transgender care; *Care of the aging transgender patient*- University of California San Francisco, Center for Excellence, 2013

Evidence-based care of transgendered patients- North Shore University Health Systems, University of Chicago, Illinois, 2011; Roosevelt-St. Vincent Hospital, New York; Columbia Presbyterian Hospital, Columbia University, New York, 2011

Children of Transsexuals-International Association of Sex Researchers, Ottawa, Canada, 2005; Chicago School of Professional Psychology, 2005

Gender and the Law- DePaul University College of Law, Chicago, Illinois, 2003; American Bar Association annual meeting, New York, 2000

Gender Identity and Clinical Issues – WPATH Symposium, Bangkok, Thailand, 2014; Argosy College, Chicago, Illinois, 2010; Cultural Impact Conference, Chicago, Illinois, 2005; Weiss Hospital, Department of Surgery, Chicago, Illinois, 2005; Resurrection Hospital Ethics Committee, Evanston, Illinois, 2005; Wisconsin Public Schools, Sheboygan, Wisconsin, 2004, 2006, 2009; Rush North Shore Hospital, Skokie, Illinois, 2004; Nine Circles Community Health Centre, University of Winnipeg, Winnipeg, Canada, 2003; James H. Quillen VA Medical Center, East Tennessee State University, Johnson City, Tennessee, 2002; Sixth European Federation of Sexology, Cyprus, 2002; Fifteenth World Congress of Sexology, Paris, France, 2001; Illinois School of Professional Psychology, Chicago, Illinois 2001; Lesbian Community Cancer Project, Chicago, Illinois 2000; Emory University Student Residence Hall, Atlanta, Georgia, 1999; Parents, Families and Friends of Lesbians and Gays National Convention, Chicago, Illinois, 1998; In the Family Psychotherapy Network National Convention, San Francisco, California, 1998; Evanston City Council, Evanston, Illinois 1997; Howard

Brown Community Center, Chicago, Illinois, 1995; YWCA Women's Shelter, Evanston, Illinois, 1995; Center for Addictive Problems, Chicago, 1994

Psychosocial Assessment of Risk and Intervention Strategies in Prenatal Patients- St. Francis Hospital, Center for Women's Health, Evanston, Illinois, 1984; Purdue University School of Nursing, West Layette, Indiana, 1980

Psychonueroimmunology and Cancer Treatment- St. Francis Hospital, Evanston, Illinois, 1984

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PROFESSIONAL AFFILIATIONS

University of Minnesota Medical School –Leadership Council
American College of Forensic Psychologists
World Professional Association for Transgender Health
Advisory Board, Literature for All of Us
American Psychological Association
American College of Forensic Examiners
Society for the Scientific Study of Sexuality
Screenwriters and Actors Guild
Board of Directors, Chiaravalle Montessori School
Phi Beta Kappa

AWARDS AND HONORS

Phi Beta Kappa, 1971
Indiana University Women's Honor Society, 1969-1972
Indiana University Honors Program, 1969-1972
Merit Scholarship Recipient, 1970-1972
Indiana University Department of Psychology Outstanding Undergraduate Award Recipient, 1970-1972
Representative, Student Governing Commission, Indiana University, 1970

LICENSE

Clinical Psychologist, State of Illinois, 1980

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No. 16A52

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.

REPLY IN SUPPORT OF PETITIONER'S APPLICATION FOR RECALL AND STAY OF THE 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**

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER, JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
Tel: (804) 747-5200
dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 714-9492
KDuncan@Schaerr-Duncan.com

Counsel for Petitioner Gloucester County School Board

July 29, 2016

Exhibit D

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INTRODUCTION

Respondent G.G. ("G.G.") opposes the stay application of the Gloucester County School Board ("Board") based largely on the argument that the Fourth Circuit's April 19 decision, and the resulting preliminary injunction, threaten no irreparable harm to the Board or to Gloucester High School's students and parents. Opp. at 1. But to anyone familiar with public schools in the real world, the irreparable harms flowing from the Fourth Circuit's decision are obvious.

First, as G.G. tacitly concedes (Opp. 21 n. 10), the Fourth Circuit's decision deprives the people of Gloucester County of their ability, acting through elected school board representatives, to establish a policy on one of the most sensitive matters imaginable—who may access single-sex student bathrooms. Indeed, the whole point of the decision below is to overturn the "commonplace and universally accepted" principle that such facilities may be separated by biological sex, App. B-57, and to replace it with principle that access should turn instead on a student's subjective "gender identity," App. B-6, a notion that even the panel majority found "novel" and "perhaps not … intuitive." App. B-24, B-23.

Second, if the recent past is any guide, the Fourth Circuit's decision is highly "likely to cause disruption both in the school and among the parents." App. G-5. Overturning long-settled expectations about who may access boys' and girls' restrooms understandably alarms parents and students alike. When this issue first arose at Gloucester High School, it provoked an immediate and vocal reaction. App. L. This should not be surprising since, as Judge Niemeyer put it, "parents … universally find it offensive to think of having their children's bodies exposed to

persons of the opposite biological sex." App. C-3. If the decision below is not stayed, there is every reason to expect a similar reaction as the new school year approaches.

Third, as Judge Niemeyer warned, the panel's "holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes." App. B-47. And the resulting injunction ensures that "male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents." App. G-5.

These consequences—both to the Board and to the students and parents the Board represents—flow directly from the Fourth Circuit's decision and the resulting injunction, and they belie any notion that the Board "has not identified any form of irreparable harm." Opp. 19. Furthermore, as explained below and in the Board's application, the remaining stay factors also counsel strongly in favor of staying the lower court decisions pending disposition of the Board's certiorari petition.

ARGUMENT

I. Respondent's arguments do not undermine the likelihood that four Justices will vote to grant review now.

First, G.G. has not undermined the Application's showing of a substantial likelihood that this Court will grant review. G.G. does not dispute that three sitting Justices have already indicated a desire to revisit and resolve a central question presented in this case, that is, whether 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)—should be overruled or modified. See App. 4. Instead, G.G. asserts "there is no reasonable probability that this Court will grant certiorari" because, according to G.G., (1) this case remains in an interlocutory posture; (2) the Court recently passed up an opportunity to revisit *Auer*; and (3) there are no circuit splits on the proper application of *Auer*. Opp. 24-27. On each point, G.G. is wrong.

1. Although 28 U.S.C. § 1254(1) expressly permits certiorari review of cases in the courts of appeals "before *or* after rendition of judgment," G.G. is of course correct that the Court often exercises its discretion to deny review when the case is "in an interlocutory posture." *Mount Soledad Mem'l Ass'n* v. *Trunk,* 132 S.Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of petition for certiorari). But for at least two reasons, that general practice likely will not prevent review here.

First, unlike the situation in *Mount Soledad* and other cases in which a lack of finality prevented review, here there is no doubt about the implications of the Fourth Circuit's April 19 decision for these proceedings. Indeed, it was based on that decision that the district court *immediately* granted an injunction in G.G.'s favor. See App. F-2. The posture of this case thus stands in sharp contrast to cases like *Mount Soledad,* in which at the time certiorari was sought "it remain[ed] unclear precisely what action the … Government will be required to take" as a result of the court of appeals' decision. 132 S.Ct. at 2536 (Alito, J., concurring). Here there is no doubt about the ultimate outcome in the district court—the injunction has already been entered—or in the subsequent Fourth Circuit appeal.

Second, in any event, the Board also intends to seek certiorari before judgment in the *pending* Fourth Circuit case (which challenges the district court's injunction) at the same time it seeks review of the Fourth Circuit's April 19 decision. Thus, if the Court feels a need to have the preliminary injunction before it when it addresses the Fourth Circuit's April 19 decision, the Court will have that option. And there is no question that the district court's preliminary injunction is a final order subject to appellate review.[1]

2. G.G. also makes much of the Court's recent denial of certiorari in *United Student Aid Funds, Inc.* v. *Bible,* 136 S.Ct. 1607 (2016), which involved regulations governing collection practices for student loans. However, as the brief in opposition there pointed out, that case did not squarely present the issue of the validity of *Auer* deference. Two of the three judges on the Seventh Circuit panel believed the pertinent agency regulation was unambiguous, and therefore did not find it necessary to determine whether *Auer* even applied. See *Bible* v. *United Student Aid Funds, Inc.*, 799 F.3d 633, 645 (7th Cir. 2015) (reaching *Auer* only as an alternative ground); *id.* at 674 (Manion, J., concurring in part and dissenting in part) (arguing *Auer* does not apply). Here, by contrast, both judges in the majority below concluded that the Department of Education regulation at issue here *is* ambiguous, and therefore

[1] See 28 U.S.C. § 1292(a) (noting that "courts of appeals shall have jurisdiction of appeals from [i]nterlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions."). Indeed, for reasons discussed in the Application and this reply brief, this case satisfies Rule 11's standard for certiorari before judgment as well as the usual standards for certiorari outlined in Rule 10. Given that the Fourth Circuit's April 19 decision immediately spawned a nationwide "transgender non-discrimination" policy imposed by the U.S. Departments of Justice and Education, this is undoubtedly a case of "imperative public importance." See App. 27-29.

unambiguously held that *Auer* deference applies. App. B-16-21. Accordingly, in this case this Court can easily reach and decide whether *Auer* remains good law and, if so, how it applies in cases such as this.

3. G.G. has also failed to undermine the Board's elucidation of existing circuit conflicts as to the *circumstances* in which *Auer* deference can apply. For example, on the first conflict—whether an agency's interpretation must appear in a format that carries the force of law—G.G. simply misrepresents the First Circuit's decision in *Sun Capital Partners III, LP* v. *New England Teamsters,* 724 F.3d 129 (1st Cir. 2013). That decision clearly held that an agency opinion was not entitled to *Auer* deference because it "was not the result of public notice and comment, and merely involved an *informal* adjudication resolving a dispute between a pension fund and the equity fund." *Id.* at 140 (emphasis added). G.G. says this part of the opinion was addressing *Chevron* and not *Auer* deference, but that is flatly wrong: *Chevron* deference wasn't even asserted, *Auer* deference was.[2]

On the second conflict—whether *Auer* applies when an interpretation is advanced for the first time in the specific litigation in which it is applied—G.G. does not even address the key Ninth and Federal Circuit decisions discussed in the

[2] See *id.* at 140 ("The [agency] does not assert that its 2007 letter is entitled to deference under [*Chevron*]. It does, however, claim entitlement to deference under [*Auer*]. We disagree. … The letter was not the result of public notice and comment."). G.G. also admits in a footnote (Opp. 26 n. 12) that the Sixth and Seventh Circuits will not defer to agency interpretations where the agencies themselves disclaim the interpretation is binding. But that is exactly why those decisions conflict with the Fourth Circuit's decision in this case: The agency interpretation here—to which the Fourth Circuit deferred—expressly disclaims any intent to bind anyone. See App J-2 (noting that "OCR refrains from offering opinions about specific facts, circumstances, or compliance with federal civil rights laws without first conducting an investigation.").

Application. See App. 24-25. Nor does G.G. dispute that those decisions squarely conflict with the decision of the Fourth Circuit here, and with similar decisions in the Sixth, Seventh, Tenth and Eleventh Circuits. *Id.* Instead, G.G. attempts to sidestep this conflict by focusing instead on a *different* limitation, one the Application did not invoke—that is, that the agency interpretation not be a mere "convenient litigation position" or "*post hoc* rationalizatio[n] … seeking to defend past agency action against attack." Opp. 26 (quoting *Auer,* 519 U.S. at 462). G.G.'s evasiveness merely confirms the Application's analysis of these circuit conflicts.

II. Respondent has failed to undermine the Board's showing of a fair prospect of reversal.

G.G. has likewise failed to undermine the Board's showing that it has a fair prospect of prevailing on the merits. Indeed, most of G.G.'s argument on this point is based on a false premise: G.G. assumes that, if the Court grants review, it will necessarily interpret Title IX and/or 34 C.F.R. § 106.33 *de novo*, and will do so *before* determining whether *Auer* should be overruled and, if not, whether the Fourth Circuit correctly invoked *Auer* given the circumstances. See Opp. 28-35. But that is not how this Court typically operates. If it grants review and decides that the Fourth Circuit incorrectly invoked *Auer* deference, the Court will likely vacate and remand to the Fourth Circuit to address in the first instance the remaining issues concerning the proper application of Title IX and §106.33. And that means the Board could win in this Court in any of three ways: (1) an outright overruling of *Auer*; *or* (2) a determination that *Auer* remains valid but that the Fourth Circuit transgressed a settled limitation on its application; *or* (3) a determination that the Fourth Circuit

and the Department simply misinterpreted Title IX and/or § 106.33. For reasons explained in the Application, the Board has a fair prospect of success in each of these scenarios individually, and it certainly has a fair prospect of success when those scenarios are viewed collectively.

1. G.G. does not dispute the numerous conceptual problems with *Auer* deference, that *Auer*'s own author and other Justices have advocated overturning the doctrine, or that it "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); see App. 29. In short, G.G. does not dispute that there is a fair prospect of this Court's deciding to overrule *Auer* entirely. And that alone establishes a fair prospect that the Fourth Circuit's decision to apply *Auer* will be reversed and the judgment vacated.

2. G.G. also does not dispute that, even if *Auer* survives (or if the Court fails to reach that question), there is a fair prospect this Court will hold that the Fourth Circuit transgressed an appropriate limitation on that doctrine. For example, as explained in the Application (at 21-25) and in the discussion above, several courts of appeals have held that *Auer* deference cannot be invoked when the agency interpretation was developed for the very litigation in which deference is sought or issued in circumstances in which the interpretation does not carry the force of law. Here again, although G.G. disputes that there is a circuit conflict on these issues, G.G. does *not* dispute that the Fourth Circuit's decision to invoke *Auer* deference can and should be reversed on either of these bases. And once again, that alone establishes a fair prospect that the Fourth Circuit's decision to apply *Auer* will be reversed and the judgment vacated.

3. As noted, G.G. devotes nearly all of the "merits" portion of the Opposition to defending the Fourth Circuit's and Department's interpretation of Title IX and § 106.33. See Opp. 28-37. Because most of G.G.'s arguments have already been rebutted in detail in Judge Niemeyer's dissent and in the Application, that analysis will not be repeated here. But three points are worth emphasizing.

First, G.G.'s statutory interpretation argument—like that of the Fourth Circuit—fails on its own terms. Like the Fourth Circuit, G.G. argues (purportedly on the basis of contemporaneous dictionary definitions) that the term "sex" is not limited to "chromosomes or genitals" (Opp. 30), but embraces "*all* the 'morphological, physiological and behavioral' components of an individual's sex." (Opp. 28). That understanding of "sex" is implausible for all the reasons explained in the Application and in Judge Niemeyer's dissent. See App. at 29-32; App. B-57-B-68. But even if "sex" could be construed so broadly, such an interpretation would still not justify the Department's inclusion of "gender *identity*" within that term.

By definition, gender identity is a subjective perception – as G.G. and the Fourth Circuit put it, "one's *sense of oneself* as belonging to a particular gender." Opp. 5 (emphasis added); see also App. B-6-B-7 (describing "incongruence between a person's gender identity and the person's birth-assigned sex.") By contrast, all of the "components" of an individual's sex identified in the definition cited by G.G. and the Fourth Circuit are *objective* characteristics, be they "morphological, physiological [or] behavioral." To be sure, a person's decision to "transition" from, say, a woman to a transgender man might result (with the help of hormone therapy and/or surgery) in the person's developing objective characteristics more commonly found in men. But

even then, the subjective *perception* of "identifying" with one sex or the other does not qualify as a "morphological, physiological or behavioral" characteristic—and therefore could not possibly be considered included in the term "sex."

In short, unlike arguments that fail because they prove too much, G.G.'s (and the Fourth Circuit's) central argument on the meaning of "sex" in Title IX and § 106.33 fails because it proves too little. On that basis alone, the Board has at least a fair prospect of establishing that both the Department and the Fourth Circuit have misconstrued Title IX and its implementing regulation, and on that basis obtaining a reversal of the decision below.

Second, for similar reasons, this Court's decisions in *Price Waterhouse* and *Oncale* do not help G.G. Again, like the Fourth Circuit, G.G. must defend a Department decision to include a person's *subjective* "gender identity" within the meaning of the statutory term "sex." But whatever else they may have done, *Price Waterhouse* and *Oncale* did not allow plaintiffs to assert claims under Title VII based on subjective, gender-related perceptions or "senses." *Price Waterhouse* allowed a claim based upon *observable* sex-related behavior—i.e., acting or dressing in ways that departed from the perceived "norm" for women. See *Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 232-37 (1989). Similarly, *Oncale* allowed a claim for *observable* sex-related conduct—harassment—towards another person. See *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77-78 (1998). Neither decision allowed a claim for discrimination based upon the victim's internal, subjective "sense of oneself." And neither decision suggested that such a subject characteristic was included in the statutory term "sex."

Third, for similar reasons, statutory law has always distinguished "sex" and "gender" from "gender identity."[3] And in briefing on the merits, Petitioner will demonstrate that scores of proposed bills at the federal and state levels have made this express distinction. Thus, legislators have always used a definition of "sex" that by its terms does *not* include "gender identity." It therefore makes no sense to now treat the word "sex" in Title IX as though it included that subjective concept.

For all these reasons, and those explained by Judge Niemeyer and in the Application, the Board has at least a fair prospect of reversal.

III. Respondent has failed to rebut the showing of irreparable injury to the School Board, its parents and students.

While blithely asserting that "the Board has not identified any form of irreparable harm," Opp. at 19, the Opposition leaves virtually unrebutted the Board's substantial showing on that very point. See App. 33-36.

1. For example, G.G. does not dispute that the Board and its constituents have suffered the very type of irreparable injury described in decisions such as *Maryland* v. *King*, 133 S.Ct. 1 (2012) (Roberts, C.J., in chambers). App. 33-34. *King* observed that "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Id.* at 3 (quoting *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Here, by requiring the Board to allow G.G. to

[3] *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, … sex, gender identity …, sexual orientation); 18 U.S.C. § 249(a)(2) (providing criminal penalties for "[o]ffenses involving actual or perceived religion, … gender, sexual orientation, gender identity, or disability").

use the boys' bathrooms, the decision below has clearly "enjoined" the Board "from effectuating" a policy "enacted by representatives of [the] people."

That is no doubt why G.G., besides ignoring *King* and burying the entire point in a footnote, offers only a factual distinction—namely, that the Board "is not a State and its restroom policy is not a statute." Opp. at 21 n. 10. But the Opposition identifies no *reason* why the principle articulated in *King* and *New Motor Vehicle* would not also apply to an elected school board writing school policies on sensitive issues. And there is none: Although the invalidation of a state statute may be a *broader* intrusion into the people's right to govern themselves, the nature of the intrusion is the same. It is a difference of degree, not of kind. And in either case, the injury is irreparable because, for however long the injunction lasts, the people will have been deprived of their ability to govern themselves.

2. G.G. also attempts to minimize the disruption caused by the decision below by erroneously suggesting that G.G. previously used the boys' restroom for seven weeks "without incident." Opp. at 9, 22. To the contrary, students and parents began protesting *the day after* the school let G.G. use the boys' restroom. See App. L-1-2. And the "disruption" caused was not solely to "the learning environment" (Opp. 22), but also to the relationship between the school and the parents and students who found this situation alarming.

This should surprise no one. The idea that public bathrooms are separated by biological sex has been a "commonplace and universally accepted" part of our customs and laws since time-out-of-mind, App. B-57, and, moreover, has been explicitly allowed by Title IX regulations for over four decades. Now that those basic

expectations have been overridden by a federal court, G.G. cannot credibly claim there is no irreparable harm to anyone—not to students, or to parents, or to the school system. See, *e.g.*, App. G-5 (Niemeyer, J., dissenting from denial of stay pending appeal) (explaining that enforcement of the injunction will "den[y] [students] bodily privacy when using the facilities, to the dismay of students and their parents").

3. G.G. also baldly asserts that the decision below "will not infringe upon other students' right to bodily privacy." Opp. 21. But G.G. makes no real effort to dispute Judge Niemeyer's showing that the decision creates irreparable harm by intruding upon students' "legitimate and important interest in bodily privacy." App. B-57. Indeed, instead of addressing Judge Niemeyer's analysis, G.G. attempts to put in Judge Niemeyer's mouth the concession that "the risks of privacy and safety are far reduced" in restrooms. But that was *G.G.*'s argument, not Judge Niemeyer's. See Opp. 17; App. B-60. To the contrary, in multiple dissenting opinions, Judge Niemeyer forcefully underscored the harms to student privacy caused by the Fourth Circuit's decision and the resulting injunction. For instance, Judge Niemeyer demonstrated:

- that sex-separated facilities, such as restrooms, respond to "the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes" (App. B-59);
- that "bodily privacy is historically one of the most basic elements of human dignity and individual freedom" and, consequently, "forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom" (App. C-3);
- and that, because of the injunction resulting from the decision below, "male students at Gloucester High School will be denied the separate facilities provided by the School Board on the basis of sex, as authorized by Congress, and thus will be denied bodily privacy when using the facilities, to the dismay of the students and their parents" (App. G-5).

G.G.'s proposed solution to the privacy problem created by the Fourth Circuit's decision is also not credible. G.G. suggests that any male student "uncomfortable using the same restroom" as G.G. may simply use a unisex bathroom. Opp. 21-22. Putting aside the capacity problems that solution creates (with only three unisex bathrooms), forcing boys who value their privacy to use *another* bathroom in order to avoid potentially exposing themselves to an anatomically female student constitutes irreparable harm in its own right. *See*, *e.g.*, *Doe* v. *Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing individual's "constitutionally protected privacy interest in his or her partially clothed body," "particularly while in the presence of members of the opposite sex").

4. Finally, G.G. essentially admits that the decision below may lead at least some parents to "remove their children from the [public] school system." App. 35. In a footnote, G.G. states that parents "have a fundamental right to decide *whether* to send their child to a public school …." Opp. 22 n. 11 (emphasis added). But that is exactly the point: Some (and perhaps many) parents, exercising their fundamental right to direct the upbringing and education of their children, may choose to *remove* their children from public schools in the face of the privacy and safety problems now caused by the Fourth Circuit's decision.

Their exit would likewise impose irreparable injury on the Board and its schools. The loss of those children—and the state and federal funding they bring with them—will irreparably injure the Board, its schools and the students left behind.

For all these reasons, the Board has clearly established that the decision below imposes the requisite risk of irreparable injury. And contrary to G.G.'s

mischaracterization, the Board's showing of irreparable injury is not at all based on the "expense and annoyance of litigation." Opp. 2 (citing *FTC* v. *Standard Oil*, 449 U.S. 232, 244 (1980)). That showing is based instead on real and irrefutable harms.

IV. Respondent does not dispute that the balance of equities and public interest support a stay.

Finally, G.G. does not even address the Board's showing that the balance of equities and the public interest strongly support a stay. See App. 36-40. That omission is hardly surprising, given the clarity of the public interest in preserving the traditional, well-established rule that biological males use the boys' room and biological females use the girls' room. A stay would serve the public interest not only by preserving the Board's ability to maintain that rule in its own schools, but also by facilitating the efforts of school boards throughout the Nation to preserve that rule in the face of the radical "access" agenda now being pushed on virtually every school in the Nation by the Departments of Justice and Education, in direct reliance on the decision below. See App. 3, 38-40.

The closest G.G. comes to analyzing the pertinent equities is the assertion (at 22) that "a stay would have irreparable consequences" for G.G. because G.G. "experiences painful urinary tract infections and daily psychological harm as a result of the Board's policy." While the Board does not minimize G.G.'s psychological pain, that pain is assuredly not the "result of the Board's policy." Any anatomical female wishing or attempting to live as a teenage boy is bound to face a variety of psychological challenges, whatever policy the Board adopts.

Moreover, the claim that G.G. suffers "urinary tract infections" *because* of G.G.'s exclusion from the boys' bathrooms is not plausible in light of the Board's installation of multiple single-user restrooms for any student's use, and the continued availability of the nurse's restroom, which G.G. has agreed to use in the past. There is simply no reason, attributable to the school, for G.G. to endure any pain resulting from the unavailability of single-sex boys' restrooms.

In short, whatever psychological harm G.G. may or may not suffer, it is not the result of the Board's policy. And any harm to G.G. is more than outweighed by society's compelling interest, as Judge Niemeyer put it, in preserving the bodily "privacy … inherent in the nature and dignity of humankind." App. B-58.

CONCLUSION

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

Respectfully submitted,

DAVID P. CORRIGAN
JEREMY D. CAPPS
M. SCOTT FISHER, JR.
HARMAN, CLAYTOR, CORRIGAN & WELLMAN
Post Office Box 70280
Richmond, VA 23255
Tel: (804) 747-5200
Email: dcorrigan@hccw.com

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Tel: (202) 714-9492
Email: KDuncan@Schaerr-Duncan.com

Counsel for Petitioner Gloucester County School Board

July 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I caused to be sent a copy by United States mail as well as an electronic copy of the foregoing to the following counsel of record:

JOSHUA A. BLOCK
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(202) 549-2500
jblock@aclu.org

_____
Gene C. Schaerr
Counsel for Petitioner

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, *et al.*, *Plaintiffs,* v. PATRICK MCCRORY, *et al.*, *Defendants,* and PHIL BERGER, *et al.*, *Intervenor-Defendants.*	No. 1:16-cv-00236-TDS-JEP

PLAINTIFFS' INITIAL DISCLOSURES AND IDENTIFICATION OF EXPERT WITNESSES

Pursuant to Rule 26(a) of the Federal Rules of Civil Procedure, Plaintiffs Joaquín Carcaño; Payton Grey McGarry; H.S., by her next friend and mother, Kathryn Schafer; Angela Gilmore; Kelly Trent; Beverly Newell; and American Civil Liberties Union of North Carolina (collectively, "Plaintiffs"), by their attorneys, hereby provide to Defendants and Intervenor-Defendants the following initial disclosures, based upon information currently known to Plaintiffs after a reasonable inquiry.

I. Rule 26(a)(1)(A)(i) – Persons Likely to Have Discoverable Information

The persons identified below are likely to have discoverable information that Plaintiffs may use to support their claims, in addition to Plaintiffs' expert witnesses.

Exhibit E

Pursuant to Rule 26(a)(1)(A)(i), Plaintiffs list the address and phone number for the individuals (unless represented by or accessible through counsel in this action), if known.

1. Patrick McCrory
   Governor of North Carolina
   c/o Counsel for Defendant McCrory
   Subjects: state interests in enacting House Bill 2; effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); Executive Order No. 93

2. Tim Moore
   Speaker, North Carolina House of Representatives
   c/o Counsel for Intervenor-Defendants
   Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

3. Phil Berger
   President Pro Tempore, North Carolina Senate
   c/o Counsel for Intervenor-Defendants
   Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

4. Sarah Lang
   Principal Clerk, North Carolina Senate
   16 W. Jones Street, Room 2020 LB; Raleigh, NC 27601
   (919) 733-7761
   Subjects: legislative history of House Bill 2; North Carolina legislative process

5. Denise G. Weeks
   Principal Clerk, North Carolina House of Representatives
   16 W. Jones Street, Room 2320 LB; Raleigh, NC 27601
   (919) 733-7760
   Subjects: legislative history of House Bill 2; North Carolina legislative process

6. Dan Blue
   Minority Leader, North Carolina Senate
   16 W. Jones Street, Room 1129; Raleigh, NC 27601
   (919) 733-5752

Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

7. Andrew C. Brock
Senator, North Carolina Senate
300 N. Salisbury Street, Room 523; Raleigh, NC 27603
(919) 715-0690
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

8. David L. Curtis
Senator, North Carolina Senate
300 N. Salisbury Street, Room 410; Raleigh, NC 27603
(919) 715-3038
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

9. Ralph Hise
16 W. Jones Street, Room 1026; Raleigh, NC 27601
(919) 733-3460
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

10. E.S. "Buck" Newton
Senator, North Carolina Senate
300 N. Salisbury Street, Room 621; Raleigh, NC 27603
(919) 715-3030
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

11. Bob Rucho
Senator, North Carolina Senate
300 N. Salisbury Street, Room 300-A; Raleigh, NC 27603
(919) 733-5655
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

12. Tom Apodaca
Former Senator (resigned effective July 15, 2016), North Carolina Senate
108 4th Ave. W; Hendersonville, NC 28739
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

13. Dean Arp
Deputy Majority Whip, North Carolina House of Representatives
300 N. Salisbury Street, Room 531; Raleigh, NC 27603
(919) 715-3007
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

14. Dan Bishop
Representative, North Carolina House of Representatives
300 N. Salisbury Street, Room 607; Raleigh, NC 27603
(919) 715-3009
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

15. John M. Blust
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 2208; Raleigh, NC 27601
(919) 733-5781
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

16. Mark Brody
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 2219; Raleigh, NC 27601
(919) 715-3029
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

17. Mike Hager
Majority Leader, North Carolina House of Representatives
300 N. Salisbury Street, Room 301F; Raleigh, NC 27603
(919) 733-5749
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

18. Larry D. Hall
Minority Leader, North Carolina House of Representatives
300 N. Salisbury Street, Room 506; Raleigh, NC 27603
(919) 733-5872
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

19. Pricey Harrison
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 1218; Raleigh, NC 27601
(919) 733-5771
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

20. D. Craig Horn
Representative, North Carolina House of Representatives
300 N. Salisbury Street, Room 305; Raleigh, NC 27603
(919) 733-2406
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

21. Darren Jackson
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 1013; Raleigh, NC 27601
(919) 733-5974
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

22. Charles Jeter
Former Conference Chair (resigned July 25, 2016), North Carolina House of Representatives
16024 Wynfield Creek Parkway; Huntersville, NC 28078
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

23. David R. Lewis
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 2301; Raleigh, NC 27601
(919) 715-3015
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

24. Chuck McGrady
Representative, North Carolina House of Representatives
300 N. Salisbury Street, Room 304; Raleigh, NC 27603
(919) 733-5956
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

25. Paul Stam
Speaker Pro Tempore, North Carolina House of Representatives
300 N. Salisbury Street, Room 612; Raleigh, NC 27603
(919) 733-2962
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

26. Rick Glazier
Executive Director, North Carolina Justice Center
224 S. Dawson St.; Raleigh, NC 27601
(919) 856-2570
Subjects: North Carolina legislative process; legislative history of House Bill 2

27. W. Louis Bissette, Jr.
Chairman, Board of Governors of the University of North Carolina
c/o Counsel for UNC Defendants
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

28. Margaret Spellings
President, University of North Carolina
c/o Counsel for UNC Defendants
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

29. Tom Shanahan
Vice President and General Counsel, University of North Carolina
c/o Counsel for UNC Defendants
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

30. Carol L. Folt
Chancellor, The University of North Carolina at Chapel Hill
Office of the Chancellor, 103 South Building, Chapel Hill, NC 27599
(919) 962-1365
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

31. Franklin D. Gilliam, Jr.
Chancellor, The University of North Carolina at Greensboro
Office of the Chancellor, 303 Mossman Building, Greensboro, NC 27402
(336) 334-5266
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

32. M. Lindsay Bierman
Chancellor, University of North Carolina School of the Arts
Office of the Chancellor, 1533 South Main Street, Winston-Salem, NC 27127
(336) 770-3200
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

33. Elaine Pruitt
Interim Headmaster & Dean of High School Academics, University of North Carolina School of the Arts
1533 South Main Street, Winston-Salem, NC 27127
(336) 631-1561
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

34. Nick Tennyson
Secretary, North Carolina Department of Transportation
Transportation Building; 1 S. Wilmington Street; Raleigh, NC 27601
(919) 707-2800
Subjects: effect and enforcement of House Bill 2 with respect to highway rest stops, the North Carolina Division of Motor Vehicles, and other services provided by the North Carolina Department of Transportation (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the North Carolina Department of Transportation and its subsidiary divisions with respect to transgender individuals

35. Kelly J. Thomas
North Carolina Commissioner of Motor Vehicles
c/o North Carolina Division of Motor Vehicles
1100 New Bern Avenue, Raleigh, NC 27697
(919) 861-3015
Subjects: effect and enforcement of House Bill 2 with respect to the North Carolina Division of Motor Vehicles (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the North Carolina Division of Motor Vehicles with respect to transgender individuals

36. Robert E. Hagemann
City Attorney, City of Charlotte
600 East Fourth Street; Charlotte, NC 28202
(704) 336-2254
Subjects: effect of House Bill 2 on local non-discrimination ordinances

37. Joaquín Carcaño
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in declaration submitted in support of motion for preliminary injunction

38. Payton Grey McGarry
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in declarations submitted in support of motion for preliminary injunction and in opposition to motion to stay

39. H.S., by her next friend Kathryn Schafer
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in declaration submitted in support of motion for preliminary injunction

40. Kathryn Schafer
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2)

41. Machenry Schafer II
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2)

42. Karen Anderson
Executive Director, American Civil Liberties Union of North Carolina
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); membership of ACLU of North Carolina

43. Sarah Preston
Policy Director (former Acting Executive Director), American Civil Liberties Union of North Carolina
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); membership of ACLU of North Carolina; issues addressed in declaration submitted in support of motion for preliminary injunction

44. Kevin Eason
Director of Operations, American Civil Liberties Union of North Carolina
c/o Counsel for Plaintiffs
Subjects: membership of ACLU of North Carolina

45. Stephen Clark
c/o Counsel for Plaintiffs

Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in paragraphs 13 to 23 of the declaration of Sarah Preston submitted in support of motion for preliminary injunction

46. Charlie Wright
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in paragraphs 24 to 28 of the declaration of Sarah Preston submitted in support of motion for preliminary injunction

47. Lisa Lawson
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in paragraphs 29 to 32 of the declaration of Sarah Preston submitted in support of motion for preliminary injunction

48. Angela Gilmore
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2)

49. Rebecca Chapin
Vice Chair, LGBT Center of Raleigh
324 South Harrington Street; Raleigh, NC 27603
(919) 832-4484
Subjects: use of single-sex facilities by transgender individuals prior to House Bill 2

50. Monica Walker
c/o Counsel for Plaintiffs
Subjects: use of single-sex facilities by transgender students in schools; issues addressed in declaration submitted in support of motion for preliminary injunction

51. Julie L. Hall-Panameno
Director, Educational Equity Compliance Office, Office of General Counsel, Los Angeles Unified School District
333 South Beaudry Ave., 20th Floor; Los Angeles, California 90017

(213) 241-7682
Subjects: use of single-sex facilities by transgender students in schools

52. Aran C. Mull
Assistant Chief of Police, New York State University Police
c/o Counsel for Plaintiffs;
Subjects: issues addressed in declaration submitted in support of motion for preliminary injunction

Plaintiffs expressly reserve their right to modify and supplement this list based upon investigation and discovery in this matter and to identify other persons likely to have discoverable information as necessary. Such persons may include any other witnesses identified or disclosed by Defendants, and any witnesses necessary to authenticate documents.

II. Rule 26(a)(1)(A)(ii) – Documents

The following documents in Plaintiffs' possession, custody or control, identified by category and location in accordance with Federal Rule of Civil Procedure 26(a)(1)(A)(ii), may be used by Plaintiffs to support their claims:

1. All declarations or exhibits in support thereof submitted in *Carcaño v. McCrory et al.* (1:16-cv-00236), including but not limited to:

    a. declarations and exhibits provided in support of Plaintiffs' Motion for a Preliminary Injunction (ECF Nos. 22-1 to 22-19, 23-1 to 23-44, 73-1 to 73-8);

    b. declarations and exhibits provided in support of UNC Defendants' Motion to Stay Proceedings (ECF Nos. 38-1 to 38-6);

    c. declarations and exhibits provided in support of UNC Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction (ECF Nos. 50-1 to 50-4); and

d. declarations and exhibits provided in support of Plaintiffs' Response in Opposition to Motion to Stay Proceedings Against UNC Defendants (ECF Nos. 67-1 to 67-11)

2. Birth certificate of Joaquín Carcaño
Location: Possession of Joaquín Carcaño

3. Communications from University of North Carolina or its employees to Joaquín Carcaño regarding compliance with House Bill 2
Location: Possession of Joaquín Carcaño

4. Birth certificate of Payton Grey McGarry
Location: Possession of Payton Grey McGarry

5. Communications from University of North Carolina or its employees to Payton Grey McGarry regarding compliance with House Bill 2
Location: Possession of Payton Grey McGarry

6. Birth certificate of H.S
Location: Possession of H.S. or her parents

Plaintiffs expressly reserve their right to modify and supplement this list based upon investigation and discovery in this matter and to provide other documents, electronically stored information, and/or tangible things as necessary.

III. Rule 26(a)(1)(A)(iii) – Damages

Plaintiffs do not presently seek damages in this action. Plaintiffs reserve the right to seek costs or attorney's fees pursuant to 42 U.S.C. § 1988 or any other statute, regulation, or source of law.

IV. Rule 26(a)(1)(A)(iv) – Insurance Agreement

Based on information currently known to Plaintiffs, Plaintiffs state that they have no knowledge of any insurance agreement that might be implicated by Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure.

V. Identification of Expert Witnesses

Pursuant to Paragraph 3 of the Pretrial Scheduling Order (1:16-cv-00236, ECF No. 96), Plaintiffs identify the following individuals as expert witnesses and the specific topic areas upon which it is anticipated that each expert may present evidence:

1. Deanna Adkins, M.D.

   Fellowship Program Director of Pediatric Endocrinology, Duke University School of Medicine
   Director, Duke Center for Child and Adolescent Gender Care

   Dr. Adkins is expected to present expert testimony on the following topics:

   - What it means to be transgender.
   - What it means to be intersex/have differences of sex development.
   - The immutability of gender identity.
   - Scientific research on the biological roots of gender identity.
   - That being transgender itself indicates no limitation on the ability to contribute to society.
   - Sex assignment or classification of individuals who are transgender or intersex/have differences of sex development.
   - Medical consequences of avoiding restroom use for long periods of time when transgender people are excluded from using restrooms that match their gender identity.

2. Aran C. Mull

   Assistant Chief of Police, New York State University Police

   Assistant Chief Mull is expected to present expert testimony on the following topics:

   - Law enforcement tools, techniques and practices.
   - The effect of non-discrimination laws on public safety.
   - Criminal activity in restrooms and other facilities, crimes committed against and by transgender individuals, and sexual assault.
   - Community policing.

Plaintiffs will also rely on the testimony and declarations provided by the expert witnesses designated by the United States in *United States v. State of North Carolina*, No. 1:16-cv-00425, and incorporate herein by reference its expert disclosure. Plaintiffs expressly reserve their right to modify and supplement this list based upon investigation and discovery in this matter, including to identify rebuttal experts as provided in Paragraph 3 of the Pretrial Scheduling Order.

* * *

Dated: August 5, 2016

Respectfully submitted,

/s/ Scott B. Wilkens

Scott B. Wilkens*
Paul M. Smith*
Luke C. Platzer*
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001-4412
Telephone: 202-639-6000
Facsimile: 202-639-6066
psmith@jenner.com
swilkens@jenner.com
lplatzer@jenner.com

Jon W. Davidson*
Tara L. Borelli*
Peter C. Renn*
Kyle A. Palazzolo*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 1070
Atlanta, GA 30308-1210
Telephone: 404-897-1880
Facsimile: 404-897-1884
jdavidson@lambdalegal.org
tborelli@lambdalegal.org
prenn@lambdalegal.org
kpalazzolo@lambdalegal.org

Christopher A. Brook
N.C. State Bar No. 33838
AMERICAN CIVIL LIBERTIES UNION FOR NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, North Carolina 27611
Telephone: 919-834-3466
Facsimile: 866-511-1344
cbrook@acluofnc.org

James D. Esseks*
Elizabeth O. Gill*
Chase B. Strangio*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
Telephone: 212-549-2627
Facsimile: 212-549-2650
jesseks@aclunc.org
egill@aclunc.org
cstrangio@aclu.org

Counsel for Plaintiffs

* Appearing by special appearance pursuant to L.R. 83.1(d).

CERTIFICATE OF SERVICE

I, Scott B. Wilkens, hereby certify that on August 5, 2016, I caused a copy of PLAINTIFFS' INITIAL DISCLOSURES AND IDENTIFICATION OF EXPERT WITNESSES to be distributed via electronic mail to all parties of record in case numbers 1:16-cv-00236, 1:16-cv-00425, and 1:16-cv-00845.

/s/ Scott B. Wilkens
Scott B. Wilkens

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants.	)	1:16-CV-00425-TDS-JEP

PLAINTIFF UNITED STATES' INITIAL DISCLOSURES

Pursuant to Fed. R. Civ. P. 26(a)(1) and the Rule 16 scheduling order entered in this case, Plaintiff United States of America ("United States") makes the following initial disclosures. These disclosures do not waive any privilege or work-product protection, and are made without prejudice to any other issue or argument. The United States reserves the right to supplement and/or revise these disclosures, including as discovery progresses or as additional information becomes available.

I. Individuals Likely to Have Discoverable Information to Support Plaintiff United States' Claims or Defenses.

The following individuals are likely to have discoverable information that the United States may use to support its claims and defenses in this matter. The United States retains the right to supplement these disclosures as discovery progresses. In addition, the United States

reserves the right to call at trial any necessary records custodians; any witness disclosed in the initial disclosures or discovery responses of any party in this case, *Carcaño v. McCrory*, Case No. 1:16-cv-00236-TDS-JEP, or *North Carolinians for Privacy v. U.S. Dep't of Justice*, Case No. 1:16-cv-00845-TDS-JEP; and/or any individual identified as a witness for trial by any party; and/or any witness necessary for rebuttal or impeachment.

A. **Transgender Students at Public Universities in North Carolina**

These individuals have knowledge concerning the United States' claims and defenses. More specifically, and without limitation, the information may relate to: (1) the harm that H.B. 2 causes transgender students at UNC campuses; (2) incidents of discrimination experienced by transgender individuals on UNC campuses, including as it relates to single-sex facilities; (3) the policies and practices of UNC related to single-sex facilities, including bathroom and changing room facility access for transgender individuals; and (4) compliance with and enforcement of H.B. 2. This list of individuals includes:

1. H.K.
   Name and contact information will be provided subject to a protective order once it has been entered by the Court.

   The declaration of H.K., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-45], sets forth the areas of knowledge held by H.K. relating to the claims in this litigation.

2. A.T.
   Name and contact information will be provided subject to a protective order once it has been entered by the Court.

   The declaration of A.T., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-40], sets forth the areas of knowledge held by A.T. relating to the claims in this litigation.

3. C.W.
   Name and contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of C.W., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-39], sets forth the areas of knowledge held by C.W. relating to the claims in this litigation.

B. **Transgender Employees in the State of North Carolina**

These individuals have knowledge concerning the United States' claims and defenses. More specifically, and without limitation, the information may relate to: (1) the harm that H.B. 2 causes transgender employees; (2) incidents of discrimination experienced by transgender individuals employed within the state of North Carolina, including as it relates to single-sex facilities; (3) the policies and practices of employers in North Carolina related to single-sex facilities, including bathroom and changing room facility access for transgender individuals; and (4) compliance with and enforcement of H.B. 2. This list of individuals includes:

1. D.B.
   Name and contact information will be provided subject to a protective order once it has been entered by the Court.

   The declaration of D.B., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-44], sets forth the areas of knowledge held by D.B. relating to the claims in this litigation.

2. A.N.
   Name and contact information will be provided subject to a protective order once it has been entered by the Court.

   The declaration of A.N., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-41], sets forth the areas of knowledge held by A.N relating to the claims in this litigation.

3. Paige Dula
   Contact information will be provided subject to a protective order once it has been entered by the Court.

   The declaration of Paige Dula, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-32], sets forth the areas of knowledge held by Paige Dula relating to the claims in this litigation.

4. Alaina Kupec
Contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of Alaina Kupec, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-34], sets forth the areas of knowledge held by Alaina Kupec relating to the claims in this litigation.

C. Defendants and Intervenor-Defendants and Their Employees, Managers, and Supervisors

Defendants and Intervenor-Defendants and their employees, managers, and supervisors who have worked for Defendants and Intervenor-Defendants both prior to and after H.B. 2 was signed into law, may have discoverable information relating to: (1) the United States' claims that H.B 2 violates Title VII, Title IX, and VAWA; (2) the harm that H.B. 2 causes transgender individuals; (3) the policies and practices of employers and agencies in North Carolina related to single-sex facilities, including bathroom and changing facility access for transgender individuals prior to and after H.B. 2; and (4) compliance with and enforcement of H.B. 2. This list of individuals includes:

1. Governor Patrick McCrory

Represented by:

Karl S. Bowers, Jr.
Bowers Law Office LLC
P.O. Box 50549
Columbia, SC 29250
803-260-4124

2. Senator Phil Berger

Represented by:

S. Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
202-714-9492

3. Rep. Tim Moore

Represented by:

S. Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
202-714-9492

4. Margaret Spellings

Represented by:

Noel J. Francisco
Jones Day
51 Louisiana Ave., N.W.
Washington, DC 20001
202-879-5485

5. Secretary of the Department of Public Safety, Frank L. Perry

Represented by:

Karl S. Bowers, Jr.
Bowers Law Office LLC
P.O. Box 50549
Columbia, SC 29250
803-260-4124

II. Description of Documents, Electronically Stored Information, and Tangible Things In the United States' Possession, Custody, or Control It May Use to Support Its Claims and Defenses.

The United States may rely upon the following documents to support its claims and defenses in this case:

1. Andrew R. Flores, et al., Williams Institute: How many adults identify as transgender in the US? (2016)

2. Memorandum from Margaret Spellings, President, Univ. of N.C., to Chancellors 1 (Apr. 5, 2016)

3. Letter from Margaret Spellings, President, Univ. of N.C., to Shaheena Ahmad Simons, Acting Chief, U.S. Dep't of Justice, Civil Rights Div., Educ. Opportunities Section 3 (Apr. 13, 2016)

4. Blake Hodge, *UNC President Margaret Spellings Clarifies Stance on HB2*, CHAPELBORO (Apr. 8, 2016, 3:34 PM), *available at* http://chapelboro.com/featured/unc-president-margaret-spellings-clarifies-stance-on-hb2.

5. Jess Clark, *UNC Board Members Concerned About HB2*, WUNC (Apr. 16, 2016), *available at* http://wunc.org/post/unc-board-members-concerned-about-hb2#stream/0.

6. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, MESSAGE FROM UNIVERSITY LEADERS: UPDATE ON HOUSE BILL 2 (Apr. 8, 2016), *available at* http://www.unc.edu/campus-updates/message-university-leaders-update-house-bill-2/.

7. APPALACHIAN STATE UNIVERSITY, AN UPDATE ON PUBLIC FACILITIES PRIVACY & SECURITY ACT (HB2) DEMONSTRATIONS (Apr. 12, 2016), *available at* http://chancellor.appstate.edu/messages/id/86.

8. Bradley Lucore, THE WESTERN CAROLINA JOURNALIST, *HB2 creates "chilling effect" on higher education* (Apr. 15, 2016), *available at* http://www.thewesterncarolinajournalist.com/2016/04/15/hb2-creates-chilling-effect-on-higher-education/.

9. NORTH CAROLINA STATE UNIVERSITY, HB2 UPDATE: IMPACTS ON NC STATE, *available at* https://leadership.ncsu.edu/about/chancellor/letters/hb2-update-impacts-on-nc-state/.

10. Public Statement from Margaret Spellings, President, Univ. of N.C (May 9, 2016)

11. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Pat McCrory, Governor, State of N.C. (May 4, 2016)

12. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Margaret Spellings et al., President, Univ. of N.C. (May 4, 2016)

13. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Department of Justice, Civil Rights Div., to Frank L. Perry, Secretary, Dep't of Pub. Safety, State of N.C. (May 4, 2016)

14. Dear Colleague Letter, U.S. Departments of Justice and Education (May 13, 2016)

15. Letter from James A. Ferg-Cadima, OCR Acting Deputy Assistant Secretary of Policy (Jan. 7, 2015)

16. Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division 3 (July 24, 2013)

17. U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (Dec. 1, 2014)

18. U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 5 (Apr. 29, 2014)

19. Jaime M. Grant et al., Injustice At Every Turn: A Report of the National Transgender Discrimination Survey, National Center for Transgender Equality and National Gay and Lesbian Task Force (NCTE Study), at 154 (2011)

20. Memorandum to Regional Administrators and State Designees from John B. Miles, Jr., Director of Compliance Programs, Regarding OSHA's Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998)

21. HUD, Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities at 3 (Feb. 20, 2015)

22. OPM, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace

23. OPM and Merit Systems Protection Board, Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities (June 2015)

24. Equal Employment Opportunity Commission, Order 560.008 Question and Answers (June 22, 2016) at 5-6

25. Equal Employment Opportunity Commission, Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964

26. OSHA, A Guide to Restroom Access for Transgender Workers, at 2 (June 1, 2015)

27. DOJ- OCR, Justice Programs, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013 (April 9, 2014)

28. N.C. Exec. Order 93 § 3

29. Human Rights Campaign, Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity, available at http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender

30. National Center for Transgender Equality, Know Your Rights: Public Accommodations, available at http://www.transequality.org/know-your-rights/public-accommodations

31. United States Department of Education, Examples of Policies and Emerging Practices for Supporting Transgender Students (May 2016), available at www2.ed.gov/oese/oshs/emergingpractices.pdf.

32. Fox News Sunday, Gov. McCrory on Showdown Over NC's Transgender Bathroom Law (May 8, 2016), available at http://video.foxnews.com/v/4884240153001/gov-mccrory-on-showdown-over-ncs-transgender-bathroom-law/?#sp=show-clips.

33. Directive: Job Corps Program Instruction Notice NO. 14-31, Dept. of Labor Job Corps

34. GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to Prison Pipeline among LGBTQ Youth* (2016), available at http://www.glsen.org/sites/default/files/Educational%20Exclusion_Report_6-28-16_v4_WEB_READY_PDF.pdf.

35. *Harassment of Transgender People in Bathrooms and Effects of Avoiding Bathrooms: Preliminary Findings from the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 2016), available at http://www.ustranssurvey.org/preliminary-findings.

36. Public statements made by government officials in North Carolina regarding H.B. 2.

37. Documents related to Office of Justice Programs grants awarded to educational institutions and public agencies in North Carolina.

38. Documents related to Office on Violence Against Women grants awarded to educational institutions and public agencies in North Carolina.

As this case progresses, the United States will continue searching for additional documents, including electronically stored information, and tangible things that the United States may use to support its claims. The United States may rely upon any documents produced or filed

in a court proceeding by any party in this litigation and/or which relates to bathroom or changing facility access by transgender individuals.

III. Computation of Damages by the United States

The United States is not seeking damages in this matter.

IV. Insurance Agreements for Judgment

The United States is not in possession of any insurance agreement applicable to this action that falls within the scope of Federal Rule of Civil Procedure 26(a)(1)(A)(iv).

Respectfully submitted, this 5th day of August, 2016.

RIPLEY RAND
United States Attorney
Middle District of North Carolina
United States Department of Justice
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401
Telephone: (336) 333-5351
E-mail: ripley.rand@usdoj.gov

VANITA GUPTA
Principal Deputy Assistant Attorney General, Civil Rights Division

SHAHEENA SIMONS
Chief, Educational Opportunities Section

DELORA L. KENNEBREW
Chief, Employment Section

COREY L. STOUGHTON
Senior Counsel

LORI B. KISCH
WHITNEY PELLEGRINO
Special Litigation Counsel

DWAYNE J. BENSING
TOREY B. CUMMINGS
SEAN R. KEVENEY
ALYSSA C. LAREAU
JONATHAN D. NEWTON
CANDYCE PHOENIX
ARIA S. VAUGHAN
TARYN WILGUS NULL
Trial Attorneys
United States Department of Justice
Civil Rights Division

/s/ *Taryn Wilgus Null*
Taryn Wilgus Null
DC Bar Number: 985724
Trial Attorney
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 616-3874
taryn.null@usdoj.gov

Counsel for the Plaintiff United States

CERTIFICATE OF SERVICE

I certify that on August 5, 2016, I served a copy of the United States' Initial Disclosures by email on the following counsel:

Karl S. Bowers, Jr.
Bowers Law Office LLC
P.O. Box 50549
Columbia, SC 29250
butch@butchbowers.com

Robert C. Stephens
Office of the General Counsel
Office of the Governor
116 W. Jones Street
Raleigh, NC 27699
bob.stephens@nc.gov

William Woodley Stewart, Jr.
(bstewart@mgsattorneys.com)
Brennan Tyler Brooks
(tbrooks@mgsattorneys.com)
Frank J. Gordon
(fgordon@mgsattorneys.com)
Millberg Gordon & Stewart, P.L.L.C.
1101 Haynes St., Ste. 104
Raleigh, NC 27604

Robert N. Driscoll
McGlinchey Stafford, PLLC
1275 Pennsylvania Ave., NW, Ste. 420
Washington, DC 20004
rdriscoll@mcglinchey.com

Amar Majmundar (amajmundar@ncdoj.gov)
Olga E. Vysotskaya De Brito
(ovysotskaya@ncdoj.gov)
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Noel J. Francisco
(njfrancisco@jonesday.com)
John M. Gore (jmgore@jonesday.com)
Glen D. Nager (gdnager@jonesday.com)
James M. Burnham
(jmburnham@jonesday.com)
Jones Day
51 Louisiana Ave., N.W.
Washington, DC 20001

Carolyn C. Pratt
(ccpratt@northcarolina.edu)
Thomas J. Ziko (thomasjziko@gmail.com)
University of North Carolina
P.O. Box 2688
Chapel Hill, NC 27517-2688

S. Kyle Duncan (kduncan@schaerr-duncan.com)
Gene C. Schaerr (gschaerr@schaerr-duncan.com)
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
rdpotter@rdpotterlaw.com

David A. Cortman
(dcortman@alliancedefendingfreedom.org)
John Matthew Sharp (msharp@adflegal.org)
Alliance Defending Freedom
1000 Hurricane Shoals Road, D-1100
Lawrenceville, GA 30043

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
debcpalaw@earthlink.net

James A. Campbell
(jcampbell@adflegal.org)
Jeremy D. Tedesco (jtedesco@telladf.org)
Jonathan Caleb Dalton
(cdalton@adflegal.org)
Joseph E. Larue (jlarue@adflegal.org)
Kenneth J. Connelly
(kconnelly@adflegal.org)
Kristen K. Waggoner
(kwaggoner@adflegal.org)
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 85260

Christopher A. Brook
ACLU FOR NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, North Carolina 27611
cbrook@acluofnc.org

James D. Esseks (jesseks@aclunc.org)
Elizabeth O. Gill (egill@aclunc.org)
Chase B. Strangio (cstrangio@aclu.org)
ACLU FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004

Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
prenn@lambdalegal.org

Jon W. Davidson
(jdavidson@lambdalegal.org)
Tara L. Borelli (tborelli@lambdalegal.org)
Kyle A. Palazzolo
(kpalazzolo@lambdalegal.org)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 1070
Atlanta, GA 30308-1210

Paul M. Smith (psmith@jenner.com)
Scott B. Wilkens (swilkens@jenner.com)
Luke C. Platzer (lplatzer@jenner.com)
JENNER & BLOCK LLP
1099 New York Avenue, NW Suite 900
Washington, D.C. 20001-4412

Benjamin L. Berwick
U.S. Department of Justice
Civil Division Federal Programs Branch
1 Courthouse Way
Suite 9200
Boston, MA 02210
Benjamin.L.Berwick@usdoj.gov

Michael James
310 New Bern Ave. Suite 800
Raleigh, NC 27601
Mike.James@usdoj.gov

James O. Bickford
(James.Bickford@usdoj.gov)
Joshua E. Gardner
(Joshua.E.Gardner@usdoj.gov)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Ste. 6122
Washington, DC 20001

/s/ Taryn Wilgus Null
Taryn Wilgus Null

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants.	)	1:16-CV-00425-TDS-JEP

PLAINTIFF UNITED STATES' 26(a)(2) DISCLOSURES OF EXPERT TESTIMONY

Pursuant to Fed. R. Civ. P. 26(a)(2), Plaintiff United States of America ("United States") makes the following disclosures of expert testimony. These disclosures do not waive any privilege or work-product protection, and are made without prejudice to any other issue or argument. The United States reserves the right to identify rebuttal experts pursuant to the Court's July 25, 2016 Order. *See* ECF No. 108 at 4 ¶ 3. The United States will also rely on the testimony and reports provided by the expert witness(es) designated by the plaintiffs in *Carcaño v. McCrory*, Case No. 1:16-cv-00236-TDS-JEP, and incorporate by reference their expert disclosures.

Fed. R. Civ. P. 26(a)(2)(B) Expert Witnesses

The United States will rely on the testimony of the following expert witnesses pursuant to Fed. R. Civ. P. 26(a)(2)(B):

1. George Brown
   549 Miller Hollow Road
   Bluff City, TN 37618
   423-676-5291

The United States designates Dr. Brown's declaration and accompanying exhibits, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-35], as his expert report, as expressly allowed by the Court's July 25, 2016 Order. *See* ECF No. 108 at 4 ¶ 3.

2. Lin Fraser
   2538 California Street
   San Francisco, CA 94115
   415-922-9240

The United States designates Dr. Fraser's declaration and accompanying exhibits, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-36], as her expert report, as expressly allowed by the Court's July 25, 2016 Order. *See* ECF No. 108 at 4 ¶ 3.

3. Scott Leibowitz
   4150 N. Kenmore Ave.
   Apt. 405
   Chicago, IL 60613-5971
   631-864-5295

The United States designates Dr. Leibowitz's declaration and accompanying exhibits, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-37], as his expert report, as expressly allowed by the Court's July 25, 2016 Order. *See* ECF No. 108 at 4 ¶ 3.

Fed. R. Civ. P. 26(a)(2)(C) Expert Witnesses

The United States will rely on the testimony of the following expert witnesses pursuant to Fed. R. Civ. P. 26(a)(2)(C):

1. Janice Adams
   1775 Ellie Court
   Benicia, CA 94510
   707-747-1434

The declaration of Ms. Adams, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-38], sets forth the subject matter and a summary of the facts and opinions about which she is expected to testify.

2. Helen Carroll
   870 Market Street Suit 370
   San Francisco, CA 94102
   415-595-2123

The declaration of Ms. Carroll, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-42], sets forth the subject matter and a summary of the facts and opinions about which she is expected to testify.

Respectfully submitted, this 5th day of August, 2016.

RIPLEY RAND
United States Attorney
Middle District of North Carolina
United States Department of Justice
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401
Telephone: (336) 333-5351
E-mail: ripley.rand@usdoj.gov

VANITA GUPTA
Principal Deputy Assistant Attorney General, Civil Rights Division

SHAHEENA SIMONS
Chief, Educational Opportunities Section

DELORA L. KENNEBREW
Chief, Employment Section

COREY L. STOUGHTON
Senior Counsel

LORI B. KISCH
WHITNEY PELLEGRINO
Special Litigation Counsel

DWAYNE J. BENSING
TOREY B. CUMMINGS
SEAN R. KEVENEY

ALYSSA C. LAREAU
JONATHAN D. NEWTON
CANDYCE PHOENIX
ARIA S. VAUGHAN
TARYN WILGUS NULL
Trial Attorneys
United States Department of Justice
Civil Rights Division

/s/ *Taryn Wilgus Null*
Taryn Wilgus Null
DC Bar Number: 985724
Trial Attorney
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 616-3874
taryn.null@usdoj.gov

Counsel for the Plaintiff United States

CERTIFICATE OF SERVICE

I certify that on August 5, 2016, I served a copy of the United States' 26(a)(2) Disclosures of Expert Testimony by email on the following counsel:

Karl S. Bowers, Jr.
Bowers Law Office LLC
P.O. Box 50549
Columbia, SC 29250
butch@butchbowers.com

Robert C. Stephens
Office of the General Counsel
Office of the Governor
116 W. Jones Street
Raleigh, NC 27699
bob.stephens@nc.gov

William Woodley Stewart, Jr.
(bstewart@mgsattorneys.com)
Brennan Tyler Brooks
(tbrooks@mgsattorneys.com)
Frank J. Gordon
(fgordon@mgsattorneys.com)
Millberg Gordon & Stewart, P.L.L.C.
1101 Haynes St., Ste. 104
Raleigh, NC 27604

Robert N. Driscoll
McGlinchey Stafford, PLLC
1275 Pennsylvania Ave., NW, Ste. 420
Washington, DC 20004
rdriscoll@mcglinchey.com

Amar Majmundar (amajmundar@ncdoj.gov)
Olga E. Vysotskaya De Brito
(ovysotskaya@ncdoj.gov)
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Noel J. Francisco
(njfrancisco@jonesday.com)
John M. Gore (jmgore@jonesday.com)
Glen D. Nager (gdnager@jonesday.com)
James M. Burnham
(jmburnham@jonesday.com)
Jones Day
51 Louisiana Ave., N.W.
Washington, DC 20001

Carolyn C. Pratt
(ccpratt@northcarolina.edu)
Thomas J. Ziko (thomasjziko@gmail.com)
University of North Carolina
P.O. Box 2688
Chapel Hill, NC 27517-2688

S. Kyle Duncan (kduncan@schaerr-duncan.com)
Gene C. Schaerr (gschaerr@schaerr-duncan.com)
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
rdpotter@rdpotterlaw.com

David A. Cortman
(dcortman@alliancedefendingfreedom.org)
John Matthew Sharp (msharp@adflegal.org)
Alliance Defending Freedom
1000 Hurricane Shoals Road, D-1100
Lawrenceville, GA 30043

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
debcpalaw@earthlink.net

James A. Campbell
(jcampbell@adflegal.org)
Jeremy D. Tedesco (jtedesco@telladf.org)
Jonathan Caleb Dalton
(cdalton@adflegal.org)
Joseph E. Larue (jlarue@adflegal.org)
Kenneth J. Connelly
(kconnelly@adflegal.org)
Kristen K. Waggoner
(kwaggoner@adflegal.org)
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 85260

Christopher A. Brook
ACLU FOR NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, North Carolina 27611
cbrook@acluofnc.org

James D. Esseks (jesseks@aclunc.org)
Elizabeth O. Gill (egill@aclunc.org)
Chase B. Strangio (cstrangio@aclu.org)
ACLU FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004

Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
prenn@lambdalegal.org

Jon W. Davidson
(jdavidson@lambdalegal.org)
Tara L. Borelli (tborelli@lambdalegal.org)
Kyle A. Palazzolo
(kpalazzolo@lambdalegal.org)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 1070
Atlanta, GA 30308-1210

Paul M. Smith (psmith@jenner.com)
Scott B. Wilkens (swilkens@jenner.com)
Luke C. Platzer (lplatzer@jenner.com)
JENNER & BLOCK LLP
1099 New York Avenue, NW Suite 900
Washington, D.C. 20001-4412

Benjamin L. Berwick
U.S. Department of Justice
Civil Division Federal Programs Branch
1 Courthouse Way
Suite 9200
Boston, MA 02210
Benjamin.L.Berwick@usdoj.gov

Michael James
310 New Bern Ave. Suite 800
Raleigh, NC 27601
Mike.James@usdoj.gov

James O. Bickford
(James.Bickford@usdoj.gov)
Joshua E. Gardner
(Joshua.E.Gardner@usdoj.gov)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Ste. 6122
Washington, DC 20001

/s/ Taryn Wilgus Null
Taryn Wilgus Null