UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Board of Education of the Highland Local School District,

Plaintiff,

vs.

United States Department of Education; John B. King, Jr., in his official capacity as United States Secretary of Education; United States Department of Justice; Loretta E. Lynch, in her official capacity as United States Attorney General; and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General,

Defendants.

Jane Doe, a minor, by and through her legal guardians Joyce and John Doe,

Intervenor Third-Party Plaintiff,

vs.

Board of Education of the Highland Local School District; Highland Local School District; William Dodds, Superintendent of Highland Local School District; and Shawn Winkelfoos, Principal of Highland Elementary School,

Third-Party Defendants.

Case No: 2:16-cv-524

Judge Algenon L. Marbley
Magistrate Judge Kimberly A. Jolson

Memorandum of Law and Third-Party Defendants Board of Education of the Highland Local School District, William Dodds, and Shawn Winkelfoos in Support of Motion to Stay Preliminary Injunction Pending Appeal

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Third-Party Defendants and Appellants Board of Education of the Highland Local School District ("Highland"), Shawn Winkelfoos, and William Dodds (collectively, the "Highland Defendants") submit this memorandum in support of their motion for a stay of the order of preliminary injunction entered by this Court on September 26, 2016 (Doc. 95).

When deciding a motion for a stay pending appeal, the court considers "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citations omitted). Each of these factors weighs in favor of granting a stay. And when significant irreparable injury will occur absent a stay pending appeal, the party seeking the stay "need not always establish a high probability of success on the merits" but rather is required to show, at a minimum, "serious questions going to the merits."' *Griepentrog*, 945 F.2d at 153-54. That standard is easily met in this case.

ARGUMENT

I. Highland Defendants are Likely to Prevail on the Merits of Their Appeal.

A. The Preliminary Injunction Order Errs as a Matter of Law by Replacing "Sex" in Title IX with the Concept of Gender Identity

Highland Defendants are likely to prevail on the merits of their appeal because the Preliminary Injunction Order replaces the plain meaning of the statutory term "sex" with the novel—and entirely incompatible—concept of gender identity. Two things are clear about the meaning of "sex" in Title IX from the plain language of the statute alone. First, "sex" is a binary trait—that is, a person can either be a male or a female.[1] Second, "sex" is defined in relationship to

[1] The existence of intersex individuals (i.e., persons born with ambiguous or duplicative genitalia or with XXY chromosomes) or persons who have suffered traumatic loss of genitalia does not alter the proposition that sex is a binary characteristic normative to the human race. Being born with ambiguous genitalia simply reflects the reality that not every birth is perfect, and humans can develop abnormally in utero. Just as a child

reproductive role. That sex in Title IX is a binary trait is demonstrated in its references to "students of *one sex*" as compared to "students of the *other sex*." 20 U.S.C. § 1681(a)(8) (emphasis added).

The normative fact of two sexes in Title IX is also seen in its express exemption for "father-son or mother-daughter activities at an educational institution" from the reach of the statute's prohibition on sex discrimination. 20 U.S.C. § 1681(a)(8). This text recognizes that one sex is made up of mothers and daughters, and the other sex is made up of fathers and sons, directly linking the trait of "sex" to human reproduction.

In accord with the statutory language, Title IX's implementing regulations expressly provide for keeping the two sexes separate when privacy is at issue. Section 106.33, chapter 34, Code of Federal Regulations, provides that "[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*" (emphasis added).

Similarly, Title IX explicitly provides for sex-specific classes for pregnant students—34 C.F.R. § 106.40—where pregnancy is a condition applicable only to females and never to a person who is a male identifying as female. This recognizes that a person's "sex" under Title IX refers to the physiological characteristics unique to females and males with respect to each sex's reproductive role and not to sex as a psychological construct.

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who is born without a leg, or a person who later in life is tragically shorn of one, is no less a member of a bipedal species, an intersex or accidentally maimed individual is no less a member of a sexed species. It is also important to note that chromosomal abnormalities are extraordinarily rare. Two that are noted in the literature are 5-alpha-reductase deficiency, which is so rare that its incidence level is unknown, and androgen insensitivity syndrome, which is known to affect 2-5 persons per 100,000. U.S. National Library of Medicine, http://ghr.nlm.nih.gov/condition/5-alpha-reductase-deficiency (last visited August 9, 2016); U.S. National Library of Medicine, http://ghr.nlm.nih.gov/condition/androgen-insensitivity-syndrome (last visited August 9, 2016). Both represent aberrations of the normative binary male-female dichotomy and have nothing to do with the psychological construct of gender identity. The XXY chromosomal condition is known as Klinefelter's Syndrome, and those who suffer from the condition are considered to be male. U.S. National Library of Medicine, http://ghr.nlm.nih.gov/condition/klinefelter-syndrome (last visited August 9, 2016); U.S. National Library of Medicine, http://medlineplus.gov/ency/article/000382.htm (last visited August 9, 2016).

Taken together, the plain language of Title IX and its implementing regulations make clear that "sex," as used in Title IX, refers to a trait that all human persons possess; for which there are only two normative descriptors, male or female; and which refer to reproductive function.

In contrast, the Preliminary Injunction Order defers to the view of the Department of Education (the "Department") that "sex" in Title IX is determined by a person's gender identity without regard to physical anatomy. Indeed, Doe's Counsel took the radical view at oral argument that it would be "inappropriate to label any part of [Doe's] body as male." Transcript of Oral Argument ("Tr.") at 61. But that view is incompatible with the meaning of the term "sex" that is evident from the plain language of the statute and implementing regulations.

Unlike sex, gender-identity theory says that a person may identify as "male" or "female," but may also identify as belonging to both, neither, or some mixture of the two genders, or another category entirely.[2] Unsurprisingly, then, gender identity has nothing to do with our human nature as a sexually reproducing species—a nature manifest in two sexes: "male" and "female." Indeed, it is not anchored in physiology but rather wholly in psychology. *See* Ehrensaft Decl. ¶ 19 ("Gender identity is a person's inner sense of belonging to a particular gender, such as male or female."). The inevitable consequence of adopting gender identity to determine sex under Title IX is the result of the challenged Preliminary Injunction: an anatomical male is being given access to private restroom facilities reserved to the use of females. This eviscerates the purpose of Section 106.33, obliterates the binary understanding of sex in Title IX, and puts the majority of Highland students at risk of privacy violations.

[2] *See* Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015) at 5 (describing gender and gender identity as falling on a "gender spectrum") and 7 (defining "gender identity" as "a personal, deeply-felt sense of being male, female, both or neither"), available at http://www.nclrights.org/wp-content/uploads/2015/08/Schools-in-Transition-2015-Online.pdf (last visited Sept. 29, 2016).

Such a result—forcing adolescent females to share intimate spaces with a male—is contrary to the clear purpose of Title IX as outlined by its Senate sponsor, Senator Bayh, who described Title IX as "a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . ." 118 Cong. Rec. 5806-07 (1972). While the text of Title IX is even-handed, protecting both males and females, there can be no doubt that the legislation was enacted in order to provide women with equal access to federally funded educational programs.

The Preliminary Injunction thwarts the purpose of Title IX—attaining equal access for women to educational programs—because it treats a male as a female based on a wholly subjective perception that cannot be proved or disproved by any objective criterion.[3] It is a psychological construct, and it is fluid. *See* Ehrensaft Decl. ¶ 19; Hruz Decl. ¶¶ 21-22 (summarizing evidence that gender identity is not fixed). Title IX would no longer aid women; it would aid anyone who *professes to be* a woman, including a biological male. The Court's and the Department's interpretation thus transforms Title IX from a tool to protect women and men from invidious sex discrimination into a vehicle to force school officials to affirm an individual's subjective perceptions of sexuality—something that Congress never intended and that the plain language of the statute does not permit.

Finally, Highland Defendants are likely to prevail on appeal because dictionary definitions of "sex" contemporary to Title IX's enactment all describe "sex" in the binary male/female reproductive sense. Doe tried to avoid this fact by pointing to dictionary definitions relied upon by the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), which defined "sex" as "the character of being either male or female"; "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished"; or

[3] Contra Doe's position at oral argument, correlation is not causation and what the record (and professional literature) reflects is no proof of a biological causation of gender identity, but rather correlations based upon "indications," which even Doe's counsel admits are "not fully understood." Tr. at 57.

"the sum of the morphological, physiological, and behavioral peculiarities of living being . . . typically manifested as maleness and femaleness." Doe PI Mem. at 25. The first two definitions supplied by Doe point to "male" and "female"—terms that derive their meaning from the activity of human reproduction but are irrelevant to gender-identity theory. Doe simply ignores this fact, then most tellingly redacts a crucial passage in the last definition quoted by the Fourth Circuit in *G.G.*, 822 F.3d at 721. Here is that final definition, with Doe's convenient redaction restored, per the italicized portion below:

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

Gloucester, 822 F.3d at 721, quoting *Webster's Third New International Dictionary* 2081 (1971) (emphasis added). The redacted language forcefully explains just what those "morphological, physiological, and behavioral peculiarities" *subserve*—that is, our binary, genetically determined reproductive nature as a species. Gender identity, by contrast, is not binary and has nothing to do with reproduction. It is therefore entirely incompatible with the plain meaning of "sex" as that term was commonly understood at the time of Title IX's enactment. The intent of Title IX is clear, and when "a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Congress meant sex in Title IX, not gender identity, and the Preliminary Injunction is thus contrary to congressional intent.

Highland Defendants are thus likely to prevail on appeal because Doe's construct of gender identity is incompatible with the meaning of "sex" in Title IX as established by the plain language of the statute and its implementing regulations, the purpose of the statute, and contemporary dictionary definitions of the term.

B. Highland Defendants are Likely to Prevail on the Merits of Their Appeal because the Court Erred in Deferring to the Department of Education's Litigating Position Pursuant to *Auer v. Robbins*.

Highland Defendants are also likely to succeed on the merits of their appeal because the Sixth Circuit is likely to reject the Court's deference under *Auer v. Robbins*, 519 U.S. 452 (1997) to the Department's interpretation of 34 C.F.R. § 106.33 to require schools to permit students to use restrooms and other facilities in accordance with their gender identity.

First, *Auer* may only be applied to defer to an agency's interpretation of an ambiguous regulation. *See, e.g., Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (explaining that "*Auer* deference is warranted only when the language of the regulation is ambiguous"). Here, however, the implementing regulation at issue—Section 106.33—unambiguously permits restrooms and locker rooms to be separated by "sex," which was understood at the time the regulation was adopted to mean male and female. Per *Chevron*, *supra,* that unambiguous definition is what governs this case and *Auer* deference does not apply.

Second, regardless whether Title IX or its implementing regulations are ambiguous, an agency acts contrary to the law when it supplants an established statutory term defining a protected class with a term defining a very different class of persons.

Moreover, if there were ambiguity in what Congress and the agencies meant by "sex," it would nonetheless be inappropriate to apply *Auer* because the Department's interpretation is novel and finds no support in the original understanding of the regulation. *See G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016) ("[T]he Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015. . . ."). *See also Tex. v. United States,* No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 *51 (N.D.Tex. Aug. 21, 2016) ("'[I]t may very well be that Congress did not intend the law to protect transgender individuals'") (quoting hearing transcript); Memorandum from the Attorney

General on Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014) (acknowledging that"[t]he federal government's approach to this issue has also evolved over time"). *Auer* does not allow an agency to avoid APA requirements and "create a *de facto* new regulation" by declaring an existing regulation ambiguous and then interpreting it in an entirely new way through guidance. *Christensen*, 529 U.S. at 588.

In addition, because the agency's interpretation here is plainly erroneous and inconsistent with the regulation it purports to interpret, it is not entitled to *Auer* deference. *See Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (holding that *Auer* deference is "undoubtedly inappropriate" when an interpretation is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer*, 519 U.S. at 461); *Kentucky Waterways All. v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008) (same). The Department's interpretation effectively nullifies the ability of schools to separate overnight accommodations, locker rooms, and restrooms based on sex, because it would allow "students of one sex" to enter "facilities provided for students of the other sex" by merely professing to be a member of the other sex, rendering Section 106.33 nonsensical.

Finally, there are "serious questions going to the merits" of Doe's Title IX claim, *Griepentrog*, 945 F.2d at 153-54, because *Auer* deference may be on its last leg. *See, e.g., Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring, joined by Alito, J.) (observing that it "may be appropriate to reconsider that principle [of *Auer* deference] in an appropriate case" where "the issue is properly raised and argued"); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (urging that *Auer* deference violates the Constitution because "[i]t represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches"); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) ("Any reader of this Court's opinions should think that the [*Auer*] doctrine

is on its last gasp."). Most recently, the Supreme Court recently recalled the mandate and stayed the injunction issued in *G.G. v. Gloucester County School Board,* where the Fourth Circuit relied on *Auer* to find a likelihood of success on the merits of G.G.'s Title IX claim and enjoined the school district to allow G.G. to use restrooms reserved for members of the opposite sex. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (mem.). The Supreme Court may well grant the petition for certiorari in *G.G.* and overturn or limit *Auer*. Even absent that, the Sixth Circuit may well follow the lead of the Supreme Court in *G.G.*, where the Court restored the *status quo ante litem* for the school district, allowing it to maintain sex-specific communal facilities while providing privacy for the professed transgender student via individual facilities—precisely the result Highland Defendants seek in this motion.

C. Highland Defendants are Likely to Succeed on the Merits of Their Appeal with Respect to Equal Protection.

1. Heightened Scrutiny does not apply.

The Supreme Court's sex-discrimination equal-protection cases have found impermissible sex discrimination only when a law or policy treats members of one biological sex more favorably than members of the other sex. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 519 (1996) (excluding women from male military college); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982) (excluding men from attending female nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (allowing women to buy beer at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (imposing a higher burden on women than men to establish spousal dependency); *Reed v. Reed*, 404 U.S. 71, 71-74 (1971) (affording an automatic preference for men over women when administering estates). In order to succeed in a claim of sex discrimination, Doe, a biological male student, would have to show that female students were treated more favorably, but Doe cannot make that showing. First, Highland's policy of allowing access to sex-separated facilities based on biological sex treats male and female students identically and does not favor either sex. Second,

Highland has affirmatively provided additional privacy to all students in Doe's special-education class—regardless of their sex—by making an individual-user restroom available. Third, if anything, Doe has been treated more favorably than other students because Doe has been given access to male restrooms, as all other male students are, and has been affirmatively accommodated by Highland by being given access to five individual-user restrooms at the elementary school, including restrooms previously reserved only for staff members. Because Doe has been treated in all respects as favorably as—if not more favorably than—all female students, Doe cannot make out a case for sex discrimination under the Equal Protection Clause.

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004), does not change that conclusion. The *Smith* court did not conduct its own analysis under Equal Protection. Rather, having found sufficient facts to plead a Title VII violation, the Court explained that, with regard to "discrimination on the basis of sex in public employment," "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim." *Smith*, 378 F.3d at 577. The Court's equal-protection analysis is thus cabined to the public employment context. And even more importantly, whatever limitations surround the court's Title VII holding, those should mirror the limitations of the holding under the Equal Protection clause.

Although in *Smith*, a sex-discrimination claim brought by an individual who "considers himself a transsexual" survived a motion to dismiss under the sex-stereotyping theory of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Sixth Circuit amending its initial opinion is not insignificant here. By removing the statement "to the extent that Smith also alleges discrimination based solely on his identification as a transsexual, he has alleged a claim of sex stereotyping," *Smith v. City of Salem*, 369 F.3d 912, 921-22 (6th Cir. 2004), the Sixth Circuit rejected what this Court's opinion holds: that "transgender individuals are a quasi-suspect class because discrimination against them is [per se] discrimination on the basis of sex." Op. at 32. It is for this very reason that this

Court's reliance on *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) is also misplaced. That court said "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," *id.*, but that is the very principle that the Sixth Circuit's amended opinion rejected. In other words, the *Smith* court expressly refused to extend suspect-class status to transgender individuals under both Title VII and the Equal Protection clause.

Rather, *Smith* allowed an individual identifying as transgender to plead facts showing sex stereotyping under Title VII and the Equal Protection clause just as any male or female is allowed to do. Under *Smith* in order to "sufficiently plead[] . . . sex stereotyping," 378 F.3d at 572, a plaintiff must still allege that "he is a member of a protected class," *id.* at 570—a requirement that the court found satisfied because "[h]is complaint asserts that he is a male . . . and Title VII[] . . . protects men as well as women," *id.*—and that "his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions," *id.* at 572. Here, Doe cannot establish a likelihood of success based on sex stereotyping because, though Doe's biological sex is male, the school has supported Doe's gender expression as female, including how Doe dresses, looks, behaves, and presents at school. Compl. ¶ 70 ("Highland has . . . not interfer[ed] with [Doe's] current gender expression."); Decl. of Shawn Winkelfoos ¶ 12 (supporting Doe "wearing more pink to school"); Decl. of Shawn Winkelfoos ¶ 15 (accommodating request that Doe "not use the boys' bathrooms by making available individual-user facilities"); Decl. of Shawn Winkelfoos ¶ 16 ("all staff members have made a conscious effort to use the appropriate legal name and the pronouns that Joyce Doe has requested."). The only "feminine" behavior that Doe can assert that Highland has not supported is for Doe—a male who "would likely have a penis," Tr. at 62:2-5—to enter and use the female restroom with female students. Compl. ¶ 73. But the Supreme Court has cautioned against "[m]echanistic classification of all our differences as stereotypes." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001). Indeed, "[t]he distinction . . . here at issue"—Highland's refusal to

authorize a an unaltered male to enter and use communal female student restrooms—"is not marked by misconception and prejudice, nor does it show disrespect for [males or females]." *Id.* Because the Sixth Circuit has declined to recognize transgender status as a protected class and Doe cannot establish invidious sex discrimination—even under a sex stereotyping theory—this Court erred when it applied heightened scrutiny.

This court also independently determined that transgender persons are a suspect class. This too was error. The Court's ruling relies on authority from other circuits that directly conflicts with binding Sixth Circuit precedent. The Court's opinion "agrees with the analysis of *Adkins* [*v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y 2015)] and largely incorporates it," Op. at 34, which the Court expressly notes relied on the Second Circuit's "holding that gay people were a quasi-suspect class in *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd* [*on other grounds*] *by United States v. Windsor*, 133 S. Ct. 2675 (2013)." Op. at 34 n. 13. But the Sixth Circuit in *Ondo v. City of Cleveland*, 795 F.3d 597, 607–09 (6th Cir. 2015), made clear that sexual orientation is not a suspect or quasi-suspect classification and thus applied rational basis review.

In so doing, the Sixth Circuit expressly affirmed its prior precedents, including *Davis v. Prison Health Servs.,* 679 F.3d 433, 438 (6th Cir. 2012), which held that sexual-orientation classifications should not receive heightened scrutiny. Indeed, reasoning that the U.S. Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), "was explicitly asked. . . to declare that homosexuals are a specially protected class" but declined to do so, the Sixth Circuit in *Ondo* explicitly held that "*Obergefell* did not abrogate [*Davis*, *Scarbrough v. Morgan County Board of Education,* 470 F.3d 250 (6th Cir. 2006), or *Stemler v. City of Florence,* 126 F.3d 856, 873 (6th Cir. 1997)]." *Ondo*, 795 F.3d at 609. Consequently, this Court erred when it concluded that, in light of *Obergefell*, "*Davis* is no longer good law."

Ondo also cautions courts against identifying new suspect classifications too readily, noting that "[t]he Supreme Court has not recognized any new constitutionally protected classes in over four

decades, and instead has repeatedly declined to do so." *Id.* at 609. And *Ondo* further affirms that this Court erred in its application of the four-factor test.

To satisfy heightened scrutiny under the Supreme Court's jurisprudence, a class must demonstrate that it: (1) has been historically "subjected to discrimination," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); (2) has a defining characteristic that "bears no relation to [its] . . . ability to participate in and contribute to society," *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); (3) exhibits "obvious, immutable, or distinguishing characteristics" *Lyng*, 477 U.S. at 638, that define it as a "discrete and insular group," *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313–14 (1976) (per curiam); and (4) is in need of "extraordinary protection from the majoritarian political process." *Id.* Individuals who identify as transgender do not constitute a discrete class, nor are they politically powerless, thus they cannot meet the requirements for heightened scrutiny.

Transgender status is not "obvious" or "immutable," nor is it a "distinguishing characteristic," and thus the group is neither "discrete" nor "insular." First, many people who identify as transgender strive to make their status non-obvious. *See*, *e.g.*, Jane Doe's Compl. ¶ 102 (asserting a right to privacy in "her being transgender."); *see also* LGBTQ+ Definitions, Trans Student Educational Resources, http://www.transstudent.org/definitions (defining "passing/blending/assimilating" as "[b]eing perceived by others as a particular identity . . . regardless how the individual . . . identifies" and explaining that "[t]his term has become controversial" because it "can imply that one is not genuinely what they are passing as."). Second, because gender identity is based on an individual's current subjective perceptions or "internal sense of gender," Dear Colleague Letter at 1; *see also* Ehrensaft Decl. ¶ 19, it is fluid and thus cannot constitute the basis for a discrete group. Josephson Decl. ¶ 19 ("children who identify as transgender in childhood more

often than not change their identities to match natal (genetic) sex by adulthood").[4] Third, the *Ondo* court rightly observed, "the Court has never defined a suspect or quasi-suspect class on anything other than a trait that is *definitively ascertainable at the moment of birth,*" 795 F.3d at 609 (emphasis added), but one's gender identity or transgender status is not ascertainable until at least the point where it can be expressed. Ehrensaft Decl. ¶ 23 ("Children typically become aware of their gender identity between the ages of two and four. Once aware . . . transgender children often begin to express their cross-gender identity"). For all these reasons, transgender status cannot meet the requirement of exhibiting "obvious, immutable, or distinguishing characteristics" *Lyng*, 477 U.S. at 638, that define it as a "discrete and insular group," *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. at 313–14.

Further, transgender status fails the test as a group in need of "extraordinary protection from the majoritarian political process." *Id.* As the Sixth Circuit explained in *Ondo*, this element really is the "rationale underlying" why "these factors" may justify "heightened scrutiny." 795 F.3d at 609. But transgender activists have captured the attention of policymakers, including powerful federal agencies, to impose their agenda via bureaucratic fiat, *see*, *e.g.*, Dear Colleague Letter; and they are actively enforcing those policies, *see* Letter of Impending Enforcement Action 15; and are advancing the same arguments in litigation defending those policies as advocacy organizations dedicated to "advancing the . . . rights of . . . transgender people." Mission & History, National Center for Lesbian Rights, http://www.nclrights.org/about-us/mission-history/ (last visited Sept. 30, 2016).[5]

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[4] *See also* Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 2 (3rd ed. 2014), http://bit.ly/1mZQCsH (explaining that some "[g]enderqueer" people "identify their gender as falling outside the binary constructs of 'male' and 'female,'" and indicating that other gender identities include "androgynous, multigendered, gender nonconforming, third gender, and two-spirit"); Asaf Orr, *supra*, at 5 (explaining that "gender is better understood as a spectrum").

[5] *See also Carter Announces New Defense Department Transgender Policy*, http://www.defense.gov/Video?videoid=474877 (last visited Sept. 30, 2016) ("a policy change that enables transgender service members to serve openly"); Nondiscrimination in Health Programs and Activities Proposed Rule, http://www.hhs.gov/civil-rights/for-individuals/section-1557/nondiscrimination-health-programs-and-activities-proposed-rule/index.html (last visited Sept. 30, 2016) (the proposed Affordable Care Act rule "makes clear that sex discrimination includes discrimination based on gender identity."); What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, U.S. Equal Employment

Unquestionably, people who identify as transgender have formidable political power and do not need the "extraordinary protection from the majoritarian political process" that "heightened scrutiny" would provide. *Ondo*, 795 F.3d at 609. Because transgender status cannot meet the four-factor test for a suspect or quasi-suspect classification, only rational basis review is appropriate.

2. Highland's policy easily survives rational basis review.

When a policy does not differentiate based on a suspect classification or impact a fundamental right, the Constitution's guarantee of equal protection allows "only rational basis review." *Ondo*, 795 F.3d at 608. That highly deferential form of review is "a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). It places the burden "on the challenger to show that the government's action is not rationally related to any legitimate public interest." *Ondo*, 795 F.3d at 609 (citing *Heller v. Doe,* 509 U.S. 312, 319 (1993)). "Under rational-basis review, the government's actions enjoy a 'strong presumption of validity.'" *Id.* Indeed, "if there is any reasonable conceivable state of facts" that could support the government's asserted interest(s), its policies must be upheld. *Heller*, 509 U.S. at 320.

For Doe to prevail on appeal, the Sixth Circuit would have to agree that Highland's policy of separating restrooms and other intimate facilities based on sex is not rationally related to any conceivable legitimate interest. That is most unlikely, as this Court rightly recognizes that "Highland most certainly has a legitimate interest in the privacy and safety of its students" Op. at 40, and Highland's parents already expressed concern for the privacy of their children if any student is authorized to access opposite-sex facilities. *See* Decl. of Parent H. ¶¶ 4-5; Decl. of Parent S. ¶ 9. Nor is that concern ill-founded, given that on the first school day following the Preliminary Injunction

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Opportunity Commission, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Sept. 30, 2016) ("EEOC . . . enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity . . . regardless of any contrary state or local laws."). And one of the current Presidential candidates lists "Protect Transgender Rights" as one of their issues. LGBT Rights and Equality, Hillary for America, https://www.hillaryclinton.com/issues/lgbt-equality/ (last visited Sept. 30, 2016).

order, Principal Shawn Winkelfoos personally received inquiries from over 20 parents of elementary school students, all of whom stressed their concern for students' privacy rights and disapproval of the court's order. Winkelfoos Supp. Decl. ¶ 3. Actions also followed the words: one student was kept home entirely from school, *id.*, ¶ 4, and the elementary school was compelled to accommodate requests for more than 20 students to use single-user restrooms, *id.*, ¶ 5.

Further, rational basis review is not an empirical inquiry, so the Court's reliance on an amicus brief filed by school administrators who have no obligation for Highland's students is wholly misplaced. *See* Op. at 36. Amici are not the ones scrambling to accommodate worried children and irate parents.

Moreover, under rational basis review the government has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. Instead, it is sufficient to provide "rational speculation." *Id.* When the issue at hand is merely "arguable," that will "immuniz[e] the [policy] choice from constitutional challenge." *Beach Commc'ns*, 508 U.S. at 320 (internal quotation marks omitted). Highland easily meets these standards, as the legitimate concerns expressed before the Court's order are manifest in empirical evidence on campus as students plead with officials to secure their privacy.

Indeed, Highland's sex-specific classification even meets the Supreme Court's more stringent standard of heightened scrutiny "that the action is substantially related to achieving an important public interest." *Ondo*, 795 F.3d at 608 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). *See* Highland's Opp. to Doe's MPI at 16-24. In particular, in *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), the Supreme Court expressly contemplated and found it appropriate to separate the sexes in living accommodations to protect privacy.

Based on the foregoing, Doe is unlikely to prevail on the equal-protection claim.

II. Without a Stay, Highland Defendants Will Suffer Irreparable Harm.

The District Court's order strips Highland of its authority to enact policies that promote the privacy and safety of all students. *See*, *e.g.*, *Bd. of Educ. Of Ind. Sch. Dist. No. 92 of Pottawatomie Cty. 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. No. 403 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"). With respect to Doe, Highland has been forced to abandon its policy of permitting access to sex-separated communal facilities—even though that policy is expressly permitted by 34 C.F.R. § 106.33. And because Highland has a duty to safeguard the privacy rights of all of its students, Highland has been forced to craft a new, ad hoc policy allowing students concerned about their privacy to access single-user restrooms upon request. This abrogation of Highland's policymaking prerogatives with respect to the education and welfare of Highland's students alone constitutes irreparable harm justifying a stay of the preliminary injunction. *See 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 the 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)).[6]

Compliance with the preliminary injunction is also disrupting school operations at Highland: on the first day following the Preliminary Injunction Order Principal Winkelfoos personally received inquiries from over 20 parents of elementary school students, all of whom stressed their concern for

[6] Highland is a political subdivision of the State of Ohio and is vested with "the management and control of all of the public schools of whatever name or character that it operates in its respective district." Ohio Rev. Code § 3313.47. *See also* Ohio Rev. Code § 3313.20 ("The board of education of a school district . . . shall make any rules that are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises"). Abrogating Highland's ability to make policy with respect to the schools it operates is no different from enjoining the enforcement of a state statute.

students' privacy rights and disapproval of the court's order. Winkelfoos Supp. Decl. ¶ 3. One student's mother decided to keep the child home from school entirely. *Id.*, ¶ 4. And, on the first day operating under the Court's injunction alone, the elementary school was compelled to accommodate requests for more than 20 students to use single-user restrooms. *Id.*, ¶ 5. There is every reason to expect that this disruption will continue or increase as long as the Preliminary Injunction Order remains in effect. This 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").

Moreover, absent expensive, time-consuming remodeling to provide sufficient single-user restroom facilities, it will be impracticable to accommodate all student requests for single-user restrooms properly. Declaration of William P. Dodds in Support of Plaintiffs Motion for Preliminary Injuction ¶ 41. This in turn puts Highland at risk of student lawsuits for invasion of bodily privacy. *See, e.g.*, *Doe v. Luzerne Cty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing a "constitutionally protected privacy interest in . . . [one's] partially clothed body" and acknowledging that a "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex[]"); *Kohler v. City of Wapakoneta,* 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005) (finding a privacy violation when a male made audio recording of females using stall-enclosed toilets in the women's room, holding that plaintiff "reasonably expected her activities to be secluded from perception by men"). Similarly, the Preliminary Injunction Order deprives parents of their ability to control whether their children should be exposed to members of the opposite sex in intimate settings, impairing parents' fundamental right to direct the upbringing and education of their children. *See generally Troxel v. Granville*, 530 U.S. 57, 66 (2000) (collecting cases and concluding 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"). This, too, raises a

significant liability risk for Highland and constitutes irreparable harm. *Cf. Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (2007) (observing that the use of female public restrooms by a biological male could result in liability for an employer).

III. A Stay of the Preliminary Injunction Will Not Harm Other Parties.

A stay will not violate Doe's rights under any federal law; as the school treats Doe exactly the same in respect to accessing girls' restrooms as all other students whose sex is listed as male on their birth certificates. Doe's challenging panoply of psychological problems certainly merits the solicitude—and Highland has readily provided safety plans, counseling, adult monitoring, and other support, but Doe's psychological state has no legal relevance to the question of a male accessing girls' private facilities. Nor does the evidence establish that denying Doe access to communal restrooms reserved for females is the causal agent of Doe's psychological trauma. On the contrary, there is credible evidence that Doe may suffer psychological stress as a result of having multiple psychological conditions apart from Doe's gender dysphoria. Hill Decl. ¶¶ 8-10; Josephson Decl. ¶¶ 30-33. Moreover, Doe's risk of self-harm decreased significantly prior to the issuance of the preliminary injunction, so much so that the safety plans no long require constant adult oversight. Winkelfoos Decl. ¶ 22.

And again, with respect to Doe's entire special-education class, all students have access to a single-user bathroom near their classroom, so Doe is treated indistinguishably from other students. That does not stigmatize or isolate Doe and does not disaffirm Doe's perceived gender identity. Winkelfoos Decl. ¶¶ 18-19. No evidence indicates that this accommodation creates any risk of harm or is otherwise insufficient to meet Doe's needs.

IV. The Public Interest Favors a Stay.

The public has a strong interest in ensuring that all children can attend schools that provide a safe environment for learning and provide adequate protection for students' constitutionally

protected privacy rights. Here, as previously discussed, the Preliminary Injunction Order jeopardizes the privacy rights of students attending the elementary school as well as the right of parents to direct the upbringing of their children. Because it is in the public interest to prevent violations of constitutional rights, *see G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994), the public interest favors a stay.

Again, the recall of the mandate in *G.G. v. Gloucester County School Board* is instructive. While the Court's Preliminary Injunction Order properly looks to the current posture of *G.G.,* the Court erred by wrongly issuing an injunction with the same effect as the injunction that was *dissolved* by the Supreme Court when it recalled the Fourth Circuit's mandate in that case. *G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (mem.). Importantly, the *G.G.* Defendants specifically argued that failing to stay the Fourth Circuit's injunction would threaten the constitutional and Title IX rights of other students to access facilities reserved for their biological sex, and further argued that, absent a stay, parents' rights to control the exposure of their children to the opposite sex in intimate settings would be violated.[7] The same is true of Highland students and parents here. The Court should thus follow the lead of the Supreme Court when it returned Gloucester to the status quo, which is virtually identical to the *status quo ante litem* in this case: Doe has access to fully private facilities for Doe's personal needs while other students are assured that that they may use their single-sex communal facilities without the risk of an opposite-sex student being present in those facilities.

CONCLUSION

For all of the foregoing reasons, Highland Defendants respectfully request that the Court stay its order granting Jane Doe's Motion for Preliminary Injunction pending appeal.

[7] Petitioners' Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari at 33-36, *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636 (August 3, 2016) (Ex. 1).

Date: September 30, 2016

Respectfully submitted,

s/ David Langdon

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, I filed the foregoing document, entitled Memorandum of Law of Third-Party Defendants Board of Education of the Highland Local School District, William Dodds, and Shawn Winkelfoos in Support of Motion to Stay Preliminary Injunction Pending Appeal**,** through the Court's ECF system.

s/ David Langdon
David Langdon

EXHIBIT 1

No. A16-_____

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,

v.

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

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

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

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July 13, 2016

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

QUESTIONS PRESENTED

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

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

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

BACKGROUND

A. Facts

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

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

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

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

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

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

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

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

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

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

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

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

B. District Court proceedings

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

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

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

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

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

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

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

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

C. Fourth Circuit proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

App. G-5 to G-6.

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

JURISDICTION

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

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

REASONS FOR GRANTING A RECALL AND STAY OF THE MANDATE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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July 13, 2016

CERTIFICATE OF SERVICE

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

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_____
S. Kyle Duncan
Counsel for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Board of Education of the Highland Local School District,

Plaintiff,

vs.

United States Department of Education; John B. King, Jr., in his official capacity as United States Secretary of Education; United States Department of Justice; Loretta E. Lynch, in her official capacity as United States Attorney General; and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General,

Defendants.

Jane Doe, a minor, by and through her legal guardians Joyce and John Doe,

Intervenor Third-Party Plaintiff,

vs.

Board of Education of the Highland Local School District; Highland Local School District; William Dodds, Superintendent of Highland Local School District; and Shawn Winkelfoos, Principal of Highland Elementary School,

Third-Party Defendants.

Case No: 2:16-cv-524

Judge Algenon L. Marbley
Magistrate Judge Kimberly A. Jolson

Supplemental Declaration of M. Shawn Winkelfoos in Support of Third-Party Defendants' Motion to Stay Preliminary Injunction Pending Appeal

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I, Michael Shawn Winkelfoos, hereby declare the following:

1. I make this declaration based on my personal knowledge.

2. I am currently the Principal of Highland Elementary School and I have been since employed as an elementary school Principal for Highland Local School District since 2003.
3. On the first day following the issuance of the court's preliminary injunction order, I personally received inquiries from over 20 parents of elementary school students, all of whom stressed their concern for students' privacy rights and disapproval of the court's order. William Dodds, the Superintendent, spent most of the morning at the elementary school and I am aware that he also spoke with concerned parents.
4. One student's mother decided to take the child home from school entirely on the first day following the court's order. Subsequently, when the child returned to school the mother requested that her student use a single-user restroom.
5. On the first day operating under the Court's injunction alone, the elementary school accommodated requests for more than 20 students to use single-user restrooms.
6. I and my staff have continued to receive additional requests for students to use single-user restrooms. In addition, I have continued to receive contacts from parents expressing their concern for student privacy and disapproval of the court's order.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on September 30, 2016.

M. Shawn Winkelfoos