

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BOARD OF EDUCATION OF THE)	
HIGHLAND LOCAL SCHOOL DISTRICT,)	
)	
PLAINTIFF,)	CASE NO. 2:16-CV-524
)	
vs.)	SEPTEMBER 20, 2016
)	
U.S. DEPARTMENT OF EDUCATION,)	
et al.,)	2:00 P.M.
)	
DEFENDANTS.)	
)	

TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE
COLUMBUS, OHIO

APPEARANCES:

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

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TUESDAY AFTERNOON SESSION
SEPTEMBER 20, 2016

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(The following proceedings was held in chambers.)

THE COURT: I typically don't have the functional equivalent of a final pretrial conference before oral argument. If some of you have done your research - and I know that all of you have - you know I do oral arguments quite frequently on all of my summary judgment motions and whenever else they're requested. But this is an unusual case, unusual in that it has commanded a great deal of attention. And you can just look at the number of attorneys in the room representing the three parties as significant of that fact.

So I want to go over some rules of engagement. And I'm particularly talking to the three of you who are going to argue the case. I'm one of the judges on this court who has objected to the use of cameras in the courtroom because this is a solemn proceeding and we need to be at our best. We need to be at our intellectual best. And our intellectual best is always undermined considerably when we play to the cameras, not so much to the audience because there's nothing like a good trial lawyer who can persuade a jury. So that's exempted from my remarks.

But I want to avoid the temptation to either play to the press or to the cameras, so to speak. We won't have cameras in

1 here today, but they'll be some interest in this case because
2 of the nature of it. And these are complex issues, they're
3 serious issues, and they're important issues particularly to
4 the litigants. So they deserve the best of us.

5 And I say all that as a predicate for one single axiom.
6 And that one single axiom is to answer my questions. If I ask
7 you a question, don't be evasive because my questions are
8 invitations to persuade. And I'm presuming that the three of
9 you are here to persuade me.

10 Am I right?

11 MR. WARDLOW: Yes, Your Honor.

12 MR. AMDUR: Yes.

13 MR. ORR: Yes, Your Honor.

14 THE COURT: Now we have that commitment, since you're
15 officers of the court, your word is indeed your bond.
16 Sometimes our Pavlovian response is, if I answer this question,
17 that's going to be a concession. Well, unless you're
18 clairvoyant or you can otherwise read my mind, that's not
19 necessarily true.

20 There was -- look at all this stuff here. I have a
21 66-page brief, or research memorandum; bench memorandum. So
22 it's -- these are complex issues. So I have questions. And
23 they aren't questions to box anybody in. Because if I wanted
24 to box you in, I'd just dispense with oral argument and write
25 it as I wish. I don't have to play those kinds of games. So I

1 want you to understand that my questions are legitimate
2 questions and I want legitimate answers.

3 There's nothing that is more unsettling to a district
4 judge than an evasive answer because it either tells me that
5 you don't know the answer or that you know the answer but
6 refuse to give it, each of which is fatal to your argument.

7 So answer my questions and then move on with your
8 argument. I'm going to give everyone an opportunity to make
9 his argument so you don't have to worry about whether I'm going
10 to get to that. And then if there's a point that you don't get
11 to, don't worry about it because since I'm the only decision
12 maker in the room, if I didn't think it was that important, it
13 probably wasn't for my decision-making purposes. Remember,
14 these were very well briefed issues so you've already briefed
15 it.

16 The purpose of oral argument is just to answer my
17 questions anyway. I don't need you to come in and read me an
18 outline of what you have written to me in many, many, many
19 pages. I don't need that. I just want you to come in and tell
20 me what you think. And let's be at our best as lawyers. The
21 Emmy's were a couple nights ago so you all probably missed that
22 anyway. Let's be our best as lawyers so you can help me make
23 the correct decision. Okay?

24 Any questions?

25 MR. WARDLOW: No, Your Honor.

1 MR. AMDUR: No questions, Your Honor.

2 MR. ORR: No, Your Honor.

3 THE COURT: And just to remind you -- what is your
4 name again?

5 MR. WARDLOW: Doug.

6 THE COURT: Last name?

7 MR. WARDLOW: Wardlow.

8 THE COURT: Mr. Wardlow, you have 40 minutes.

9 You --

10 MR. AMDUR: Spencer Amdur.

11 THE COURT: Mr. Amdur, you have 30.

12 MR. ORR: Asaf Orr.

13 THE COURT: And you have 30.

14 You're going to be first. You're going to be second.
15 You're going to be third. I think that's the way we're going
16 to do it.

17 MR. AMDUR: I think in the order you had me second.

18 THE COURT: Yeah, you're representing DOJ, aren't you?

19 MR. AMDUR: That's right.

20 THE COURT: First, second, third. And then you can
21 tell me when you get up to do your argument how much time you
22 wish to reserve for rebuttal.

23 Thank you very much, everyone.

24 (End of chambers discussion.)

25 (The following proceeding was held in open court.)

1 THE COURT: Good afternoon. Ms. Clark, would you
2 please call the case.

3 THE DEPUTY CLERK: 16-CV-524, Board of Education of
4 the Highland Local School District versus United States
5 Department of Education, et al., Jane Doe, a minor through her
6 legal guardians Joyce and John Doe versus Board of Education of
7 the Highland Local School District, et al.

8 THE COURT: Would counsel please identify themselves
9 for the record beginning with counsel for the plaintiff.

10 MR. WARDLOW: Yes, Your Honor. My name is Doug
11 Wardlow, Alliance Defending Freedom, appearing on behalf of
12 Board of Education of the Highland Local School District,
13 Superintendent Dodds and Principal Winkelfoos.

14 MS. HALLOCK: Jeanna Hallock, Alliance Defending
15 Freedom, for plaintiff, third-party defendant Board of
16 Education of the Highland Local School District.

17 MR. MCCALED: Gary McCaleb for the plaintiff and
18 third-party defendant Highland Local School District.

19 MR. O'BAN: Steve O'Ban also appearing for the
20 indicated parties.

21 MR. LANGDON: David Langdon for the plaintiffs as
22 well.

23 MR. MARKLING: Matthew Markling for the board, the
24 superintendent and the principal, Your Honor.

25 MR. VROBEL: Patrick Vrobel for the board, the

1 superintendent and the principal, Your Honor.

2 MR. BURTON: I'm Andrew Burton for the plaintiff, Your
3 Honor.

4 MR. KORAN: Sean Koran for third-party defendants, the
5 board, the principal and the superintendent.

6 THE COURT: Counsel for the defendant, United States
7 Department of Education.

8 MR. AMDUR: Spencer Amdur from the Department of
9 Justice appearing for the federal defendants.

10 THE COURT: And counsel for third-party Does.

11 MR. HARRISON: John Harrison with Hickman and Lowder,
12 Your Honor.

13 MR. ORR: Asaf Orr with the National Center for
14 Lesbian Rights.

15 MR. WEISSMAN: Joe Weissman from Debevoise and
16 Plimpton, on behalf of the Does.

17 MR. WIKSTROM: Derek Wikstrom, Debevoise and Plimpton,
18 on behalf of the Does.

19 MS. MINTZ: Jennifer Mintz, Debevoise and Plimpton, on
20 behalf of the Does.

21 MR. MINTER: Shannon Minter, National Center for
22 Lesbian Rights on behalf of Jane Doe.

23 THE COURT: Mr. Wardlow, this is in part your motion
24 for injunction relief. It is also in part the motion of
25 third-party Doe's motion for injunction relief.

1 You filed first. You will go first. You will have 40
2 minutes. Mr. Amdur will have 30 minutes on behalf of the
3 federal defendants and Mr. Orr will have 30 minutes on behalf
4 of the Does.

5 Mr. Wardlow, how much time do you wish to reserve for
6 rebuttal?

7 MR. WARDLOW: Ten minutes, Your Honor.

8 THE COURT: Ten minutes. All right. Please proceed.

9 MR. WARDLOW: Your Honor, may it please the Court. My
10 name is Doug Wardlow and I represent plaintiff and third-party
11 defendant Highland Local School Board, also appearing on behalf
12 Principal Winkelfoos and Superintendent Dodds.

13 My argument is common to both motions so I'll start by
14 addressing the likelihood of success on the merits with respect
15 to that. I'll then discuss Highland's spending clause claim,
16 move on to Doe's equal protection claim, and then irreparable
17 harm and the other preliminary injunction factors.

18 THE COURT: As a part of your likelihood of success on
19 the merits argument, are you going to address the issue of
20 jurisdiction that you raised?

21 MR. WARDLOW: Yes, Your Honor.

22 THE COURT: All right.

23 MR. WARDLOW: Your Honor, what we are witnessing here
24 is nothing less than an attempt, unlike the federal
25 bureaucrats, to undue critical civil rights legislation, Title

1 IX, and re-purpose it toward a different end: the affirmation
2 of persons who claim to be transgender instead of the
3 protection of female students and female students' privacy.
4 Now, Congress enacted Title IX to do one thing, to protect and
5 aid the advancement of female students. To that end, Title IX
6 prohibits discrimination on the basis of sex. But Title IX's
7 drafters did not intend to eradicate all differences between
8 the sexes, that is, Title IX expressly allows for schools to
9 separate students based on biological sex in certain facilities
10 where it matters: communal locker rooms, restrooms.

11 THE COURT: Does Title IX specifically reference
12 biological sex?

13 MR. WARDLOW: Title IX does not have a definition for
14 sex. It doesn't specifically reference biological sex.

15 THE COURT: So that's your reading of it?

16 MR. WARDLOW: So my reading of Title IX, our reading
17 of Title IX --

18 THE COURT: No. You ingrafted upon the statute
19 biological sex, the term biological sex. It's not in there, is
20 it?

21 MR. WARDLOW: That's correct, Your Honor. But it is
22 clear from the purpose of Title IX that the term sex means
23 biological sex.

24 THE COURT: What is it in the plain text of the
25 statute that leads you to conclude that it's biological sex?

1 MR. WARDLOW: The plain text of the statute in several
2 locations. First of all, the statute refers to members of one
3 sex and members of the other sex -- as compared to members of
4 the other sex, and it also refers to both sexes. It's clear
5 what Congress had in mind is the binary conception of sex.

6 THE COURT: Is there anything in the legislative
7 history that contemplates this binary conception of sex?

8 MR. WARDLOW: Yes, Your Honor. Senator Bayh, the
9 sponsor of Title IX, stated that differential treatment by sex
10 would be allowed in instances where personal privacy must be
11 preserved. He also stated that he does not read Title IX as
12 requiring integration of dormitories between the sexes. There
13 again he's referring to two sexes: male and female. So the
14 legislative history --

15 THE COURT: There's nothing in this lawsuit that
16 creates a third category of sex, is there? There's still males
17 and females except that Doe considers herself female. So it's
18 still male and female, right?

19 MR. WARDLOW: Your Honor is correct.

20 THE COURT: Did Senator Bayh consider - what is it? -
21 intersex? Isn't there a third category? I-N-T-E-R-S-E-X.

22 MR. WARDLOW: I don't know whether Senator Bayh
23 considered intersex.

24 THE COURT: Is there anything in the legislative
25 history about intersex?

1 MR. WARDLOW: I'm not aware of anything.

2 THE COURT: Intersex is incongruous with your notion
3 of binary sex, isn't it?

4 MR. WARDLOW: No, it is not, Your Honor.

5 THE COURT: What is an intersex individual? Is he,
6 she or it male, female or other?

7 MR. WARDLOW: An intersex person suffers from a
8 disorder of sex development. A disorder of sex development is
9 a problem in the development of the sexual --

10 THE COURT: It's a medical malady, isn't it?

11 MR. WARDLOW: That's right. That is correct, Your
12 Honor.

13 THE COURT: Like gender dysphoria. That's a medical
14 malady too, isn't it?

15 MR. WARDLOW: Gender dysphoria is a medical malady
16 recognized in DSM-5. Intersex and gender dysphoria are not
17 necessarily related. An intersex person --

18 THE COURT: I know that. I just wanted to make sure
19 that the record was clear that it's not something that is
20 feigned or imagined. It's a legitimate medical malady.

21 But we were talking about intersex. Please continue.

22 MR. WARDLOW: An intersex individual is still either a
23 male or a female. But an intersex individual, it's hard to
24 discern sometimes whether they're male or female just by
25 looking at their phenotype, the external characteristics of the

1 sex. They still have chromosomes. The presence of a Y
2 chromosome would indicate that the individual is a male. So an
3 intersex person doesn't destroy the dichotomy between male and
4 female. That's what Congress --

5 THE COURT: Let me ask you this. What about an
6 individual born with XXY chromosomes? Would that be
7 incongruent with binary sex?

8 MR. WARDLOW: No, Your Honor. We would argue that
9 such individual should be classified as a male because of the
10 presence of the Y chromosome.

11 So, when Congress enacted Title IX's prohibition of
12 discrimination based on sex, they had in mind the ordinary
13 meaning of that term at the time. We cited two contemporary
14 dictionary definitions that state that sex is something that
15 flows from a person's reproductive system. It has to do with
16 one's immutable reproductive role. There are men and there are
17 women. That's why we have the term sex in the first place
18 because you need the man and the woman to come together to
19 create offspring. So it is inherently a binary concept and
20 something that's objectively verifiable based on genes and
21 based on biology. And so those are two things about sex that
22 Congress had in mind. And significantly --

23 THE COURT: Does someone who has had sex reassignment
24 surgery, are they male or female?

25 MR. WARDLOW: A person that has had sex reassignment

1 surgery has not changed their chromosomal sex. They have not
2 altered their XX or XY chromosome.

3 THE COURT: Let's take a male who has had reassignment
4 surgery. That person still has the chromosomes of a male,
5 right?

6 MR. WARDLOW: That is correct.

7 THE COURT: But no longer the genitalia of a male,
8 right?

9 MR. WARDLOW: Right.

10 THE COURT: Under your construction, would that person
11 be male or female?

12 MR. WARDLOW: That person would be a male biologically
13 and genetically.

14 THE COURT: But a person who hasn't had sex
15 reassignment surgery but has female genitalia is female, right?

16 MR. WARDLOW: Provided they don't suffer from any
17 disorder of sex development, yes.

18 THE COURT: But a person who has sex reassignment
19 surgery who was a male but now has female genitalia, that
20 person is still male under your construction?

21 MR. WARDLOW: That is correct, Your Honor. That
22 person cannot --

23 THE COURT: You can't change. That's what you're
24 telling me.

25 MR. WARDLOW: Basically, you can't change. That's

1 right, Your Honor. That's a good way to summarize it. It
2 relates to your chromosomes and your function in the scheme of
3 human reproduction, and it's something that's objectively
4 variable. Some people have the ability to reproduce, some
5 people don't, but they still belong to one of those two
6 categories. If there are no disorders of development and they
7 haven't done anything to alter their properly functioning
8 organs, then they would be able to produce, either donate
9 gametes or receive gametes, as the case may be, for males and
10 females respectively.

11 THE COURT: But those males and females who for
12 whatever reason cannot reproduce are still males and females?

13 MR. WARDLOW: That is correct.

14 THE COURT: So their gender identity is not determined
15 by their reproductive activity.

16 MR. WARDLOW: Not by their activity, no, Your Honor.

17 So this conception, this objectively variable conception
18 of sex as a binary trait is the only definition of sex that
19 allows Title IX to work because you cannot aid the advancement
20 of female students unless you can identify objectively what a
21 female student is.

22 Now, the Department of Education has issued guidance or,
23 in fact, a new legislative rule redefining sex to mean gender
24 identity. That concept is fluid and it's not objectively
25 variable. The department's guidance demands that school

1 districts admit students to communal facilities and overnight
2 accommodations based not on whether the student actually is a
3 male or female, but rather whether the student professes to be
4 a male or female. And that is nothing less, Your Honor, than a
5 hijacking of Title IX. Because if the department's position
6 were accepted, Title IX would no longer protect and aid female
7 students. Rather --

8 THE COURT: See, your argument rests on the notion
9 that there's only one definition of what constitutes male or
10 female, and that's a chromosomal definition because your
11 definition doesn't even include sex reassignment. So someone
12 can be totally transformed into a female and not be treated as
13 female because that person was born with a chromosome
14 configuration that would make that person male.

15 I'm still struggling with -- a little bit -- where that
16 argument finds support in the language of the history of the
17 statute. I searched high and low and I don't find a definition
18 for sex in the statute, which may lead us to our deference.

19 I don't want to get ahead of you, but maybe you can tell
20 me why. Because if I don't accept your premise, it seems that
21 your argument fails. So maybe you have an alternative because
22 I may not accept your premise if I, say, divine that I'm a
23 strict constructionist or something like that, so I'm going to
24 rely totally on the plain language of the statute. But the
25 other courts which have considered this precise question have

1 found that there is sufficient ambiguity in Title IX that they
2 will accord our deference to the justice department's, or the
3 Department of Education's Office of Civil Rights interpretation
4 of those guidelines, and those guidelines are incongruous with
5 your formulation of sex.

6 So take me back. Tell me where it's found in the
7 statute so that I don't have to give our deference to the
8 Department of Education's promulgated regulation.

9 MR. WARDLOW: Yes, Your Honor. There is no need for
10 our deference here because as Your Honor just stated, the
11 interpretation of the department here is actually completely
12 inconsistent with the meaning of the statutory term sex. What
13 we have to consider with respect to the statutory term sex,
14 because there is no definition, you need to look to, as Your
15 Honor knows, the original meaning of that term and other
16 indications in the text as to what that term means. And
17 clearly, because there are exemptions that refer to females and
18 males being separated in living accommodations, we know they're
19 talking about a binary conception of sex. And we also know
20 that they're talking about the biological term sex in the
21 biological sense because, at the time, the concept in 1972, the
22 concept of gender identity, was not even something that was --
23 it had been contemplated but it wasn't widely known and it's
24 highly unlikely that Congress had that in mind. It's
25 impossible that Congress had that in mind.

1 Gender identity disorder wasn't even added to the
2 Diagnostic and Statistical Manual, Third Edition, until 1980,
3 eight years after the passage of Title IX. It's implausible
4 that Congress could have intended for sex to include gender
5 identity. So we know that.

6 THE COURT: Was the whole concept of a transgender
7 person extant in 1979, 1980, 1972? It's not a new concept, is
8 it?

9 MR. WARDLOW: I can't give you a yes or no answer on
10 that question, but I would imagine that it was an extant issue
11 at the time. I think that transgender persons existed at the
12 time. It's just in the mind of society, the concept of gender
13 identity was not extant, and certainly Congress wasn't thinking
14 about gender identity when it put sex into Title IX. If you
15 look at the purposes of Title IX, what they're trying to do is
16 aid the advancement of female students.

17 THE COURT: Weren't they also trying to eliminate
18 discrimination on the basis of sex?

19 MR. WARDLOW: That's right. Your Honor is correct.
20 Of course, they were trying to eliminate discrimination on the
21 basis of sex. But of course the impetus for that was perceived
22 in actual obstacles to educational advancement in front of
23 female students in particular. So this key civil rights
24 legislation was passed and it was even-handed with respect to
25 treatment of males and females. But the point of the statute

1 is to aid in the advancement of female students and to equalize
2 things with respect to that by prohibiting discrimination on
3 the basis of sex.

4 Now, if you take gender identity and replace sex with
5 gender identity, you actually got the statute and its purpose
6 because you can no longer objectively identify what a male or a
7 female is.

8 With respect to sex stereotyping, a sex-stereotyping
9 claim is a claim that says, okay, we have either a man or a
10 woman and there's some force acting upon them that is
11 penalizing them because they don't act as a man or woman should
12 act according to sex stereotypes. For that kind of claim to
13 work, you need to have first the identification of the
14 individual as either a man or a woman. If you can't make that
15 initial identification, then you can't bring the
16 sex-stereotyping claim. So gender identity actually causes the
17 concept of sex stereotyping under *Price Waterhouse* to collapse
18 in on itself. There's no basis for any kind of claim like
19 that.

20 THE COURT: Your argument has been rejected both in
21 *Smith* in the Sixth Circuit and *Gloucester County* in the Fourth
22 Circuit.

23 I know that's not pronounced as the British would
24 pronounce it. That was a case that arose in Virginia.

25 MR. WARDLOW: In the *Smith* decision, what the *Smith*

1 decision actually did is it decided -- I'm sorry. In the *Smith*
2 decision, the Sixth Circuit declined to extend protection under
3 the Equal Protection Clause and Title VII to cover transgender
4 status as a protected class. We know that --

5 THE COURT: But what it expressly rejected was a view
6 of sex as a classification based purely on reproductive organs
7 or sex assigned at birth. That's the same thing that the
8 Fourth Circuit opinion did.

9 So other than your well thought out view of what
10 Congress meant when it talked about sex in Title IX, what is
11 the legal authority for this construction of binary sex that
12 you urge upon the Court today?

13 MR. WARDLOW: I would have the Court look to U.S. vs.
14 Virginia as well, the case where it was held that VMI had to
15 admit female students. They couldn't be excluded from the
16 school. But the principle of exclusion -- I'm sorry. The
17 principle of inclusion, rather, of female students to the
18 school stopped, the Court said, at -- it wasn't the exact
19 words, but the Court indicated stopped at the point where it
20 reached living conditions for the two sexes because the Supreme
21 Court in Virginia expressly found there were physical
22 differences between the sexes and that those physical
23 differences, in particular, justified separate living
24 accommodations. So they noted that including bringing in
25 female students would require the school to go ahead and alter

1 their living accommodations for male and female students to
2 make sure that the privacy of female students and male students
3 was respected.

4 So there you have the United States Supreme Court
5 indicating and stating a definition of sex that is based on
6 physiological differences, biological differences. And so I
7 point you there.

8 I also note that the decision in *Smith*, the Sixth
9 Circuit amended the original decision to delete a paragraph
10 that would have extended specific protection to transgender
11 individuals.

12 THE COURT: That was an argument that you raised in
13 your brief. But even after excising the language to which you
14 refer, Chief Judge Cole's opinion still expressly rejected a
15 view of sex as a classification based on solely reproductive
16 organs or sex assigned at birth.

17 Let's move on to the Fourth Circuit case. I don't know
18 what the opposite of being on all fours is, but it's the
19 opposite of what you're urging on the Court.

20 MR. WARDLOW: Your Honor, in G.G. vs. Gloucester
21 County -- I'm not sure --

22 THE COURT: I think it's Gloucester. It should be
23 pronounced Gloucester. But I live in a state where Leema
24 (phonetic) is pronounced Lima. And Bellefontaine is pronounced
25 Bellefontain (phonetic).

1 MR. WARDLOW: We can go with *G.G.*, I suppose. That
2 case is important. As Your Honor knows, the Supreme Court
3 stayed the injunction in the Fourth Circuit and recalled the
4 mandate. What the Supreme Court did, in effect, is it approved
5 of the status quo in *G.G.* And as Your Honor knows, that case
6 involved similar facts. What was the status quo there? The
7 status quo there was boy/girl separation of communal facilities
8 like locker rooms and restrooms.

9 THE COURT: But *G.G.* remains good law, and it did not
10 undermine the notion -- the analysis that the Fourth Circuit
11 undertook in reaching its conclusion which pretty much
12 summarily rejects your position. We don't know why the Supreme
13 Court did as it did, but it certainly could have said that this
14 is not good law and we're changing it, or we're going to
15 accept -- it didn't do any of those things that traditionally
16 would give us a signal that maybe this authority is
17 questionable. But *G.G.*'s authority, in the Court's view and
18 based on *stare decisis*, is good law.

19 MR. WARDLOW: Certainly it's good law in the Fourth
20 Circuit. We do know that the Supreme Court issued a stay, and
21 so the factors for issuing a stay resemble the factors for
22 preliminary injunction or injunctive relief. So we know the
23 Court looked at: Is the status quo going to cause irreparable
24 harm? What's the balance of harms?

25 The Court looked at those questions just like the Court

1 here is looking at those questions. And the Supreme Court must
2 have concluded that, no, there is not irreparable harm, or they
3 concluded that there was no likelihood of success on the merits
4 because they went ahead and issued the stay. We do know
5 something about what the Supreme Court did there, and I think
6 that indicates that the status -- ultimately, we know that the
7 status quo was approved going forward, that is, boy/girl
8 separation of communal facilities based on biological sex.

9 So we know from Title IX's text that sex must be binary.
10 And we know from contemporary dictionary definitions --

11 THE COURT: I want the record to be clear,
12 Mr. Wardlow. We don't know from Title IX that it must be
13 binary. It's just not there. That's your construction of it.
14 And you may say on the record in my court that that's your
15 view, but it's not beyond peradventure that that's the
16 prevailing view.

17 MR. WARDLOW: Thank you for clarifying. That's, of
18 course, correct. But Title IX does refer to both sexes and it
19 compares one sex to the other sex. From that, you can infer
20 binary.

21 THE COURT: If we both agree that there are intersex
22 individuals, that there are homosexual individuals, and that
23 there are transgender individuals, doesn't that itself beg the
24 question of whether there's ambiguity in the statute or whether
25 there's something left out?

1 Let's take for a moment the argument you just made to
2 the Court, that the Congress back in the early '70s could not
3 have contemplated all of these permutations. Then, just like
4 any other living document, does that not require some
5 construction or interpretation if we're going to leave it as it
6 is, or some amendments if we're going to leave it as is?
7 Doesn't that indicate there may be some ambiguity there?

8 MR. WARDLOW: No, Your Honor, it does not. In this
9 case, a person who is transgender, a person who is homosexual,
10 a person who has undergone gender reconstruction surgery, they
11 still remain either a male or a female. So the binary
12 conception of sex still covers them. They're still included
13 within it.

14 THE COURT: Here is what the Fourth Circuit said. It
15 said: Although the regulation may refer unambiguously to males
16 and females - which is the argument you just made - it is
17 silent as to how a school should determine whether a
18 transgender individual is a male or female for the purpose of
19 access to sex-segregated restrooms. We conclude that the
20 regulation is susceptible to more than one plausible reading
21 because it permits both the Board's reading - determining
22 maleness or femaleness with reference exclusively to
23 genitalia - and the department's interpretation - determining
24 maleness or femaleness with reference to gender identity.

25 So I am still looking for clarification.

1 MR. WARDLOW: Yes, Your Honor.

2 So what happens when you put gender identity in, say,
3 sex-inclusion gender identity? Actually, gender identity
4 supplants sex. Because if you say, as our opposition here
5 says, that gender identity includes sex, and Judge -- the
6 dissent in the *G.G.* case goes through the analysis. Either you
7 mean that sex means sex and gender identity, and if it means
8 sex and gender identity, that would mean that a school would
9 need to allow access to communal facilities based on both. But
10 you couldn't do that because the person who is transgender is
11 always either male or female nonetheless. You couldn't do
12 that. That would be unworkable. It can't be sex and gender
13 identity. If it was sex or gender identity, then what Highland
14 is doing here, separating based on biological sex, would be
15 entirely permissible because it's disjunctive: sex or gender
16 identity.

17 What the other side is urging is that sex means gender
18 identity, that is, gender identity determines sex. But that
19 can't be the case because if that were the case, then that
20 undermines the entire notion of sex separation in the first
21 instance because it allows access to communal facilities to
22 persons of the opposite biological sex, and you don't have
23 anything to separate in terms of sex and it impairs the
24 constitutional privacy rights of individual female and male
25 students to shield their clothed or partially clothed bodies.

1 THE COURT: Do you agree, Mr. Wardlow, that there is a
2 category of transgender individuals? They exist, don't they?

3 MR. WARDLOW: Yes, Your Honor, of course.

4 THE COURT: And they suffer from, by and large, a
5 condition called gender dysphoria, don't they?

6 MR. WARDLOW: I believe so, yes.

7 THE COURT: So we have a circumstance here where the
8 statute talks -- it hunts back to what the majority said in
9 *G.G.* We have a statute that talks about males and females.
10 Both sides agree to that, but one side doesn't exclude maleness
11 or femaleness based solely on genitalia. One includes what one
12 believes that he or she is: gender identity. There are no
13 cases which reject out of hand that it's incorrect ever to base
14 any policy or any decision based on gender identification. In
15 other words, you cannot lawfully identify yourself as a male if
16 you have the chromosome structure of a female. We both just
17 agreed that that's not the case because there are transgender
18 individuals.

19 MR. WARDLOW: A transgender individual is still either
20 a male or a female. It has gender dysphoria and therefore they
21 claim a gender identity that is different from their actual
22 sex. There are two traits: their gender identity is separate
23 from their sex, and gender identity does not determine sex.

24 THE COURT: You're arguing that the Court should
25 ignore that condition. You're arguing that the Court should

1 ignore gender identity, that the only test is drop your
2 trousers. It's the trouser test. But that's not the case
3 because someone could have the genitalia of a female but, in
4 every other respect, that person is male and the gender
5 dysphoria says to me that that person is male. It's kind of
6 like a spin on Descartes: I think, therefore I am. It's like
7 I am a male, therefore I'm a male. I think I am a male, hence
8 I'm a male. I suffer from gender dysphoria.

9 MR. WARDLOW: Yes, Your Honor. That's actually the
10 problem with the other side's argument. It's about perception
11 of one's sex and not one's actual sex.

12 THE COURT: It's more than that. It's not like you or
13 I declaring that tomorrow I'm female, because we don't suffer
14 from gender dysphoria. But if you suffer from gender
15 dysphoria, you are what you believe you are.

16 MR. WARDLOW: I think gender dysphoria is defined as
17 the trauma that goes along with having a disconnect between
18 one's actual sex and one's --

19 THE COURT: Trauma is part of it. But the salient
20 part of it is the belief that that's who you are, that's what
21 you are. Your whole life is structured around what you are.

22 MR. WARDLOW: That is correct. And what you are is
23 based on your genes and your chromosomes. If you have a false
24 belief about what you are, the law does not need to recognize
25 that. And Congress certainly didn't have any intent in 1972

1 when they put sex in the statute that it would be recognizing
2 false beliefs about what people are in terms of sex because
3 that would gut the purpose of the statute. And the statute was
4 meant to protect women. And that's also why we don't have our
5 deference with respect to 34 C.F.R. 106.33 which expressly
6 provides for separate facilities in restrooms and locker rooms
7 and the like for members of one sex and the other sex, as long
8 as those facilities are comparable.

9 And that regulation itself states one sex -- facilities
10 for one sex must be comparable to facilities for the other sex.
11 So again, we have the binary nature of sex coming into the
12 department's own regulation in implementing regulation of Title
13 IX. And so there is no ambiguity there because that regulation
14 covers the entire universe of human persons. Everyone is
15 either male or female whether they're transgender or not. A
16 person could be male and transgender or female and transgender
17 or male and cisgender or female and cisgender, but their
18 underlying sex is still male or female per Congress's
19 originally intended definition which is the one that's
20 operative because that's the only way you can identify
21 objectively what a female student is or a male student is in
22 order to make sure there's no discrimination.

23 So, if you're trying to -- what Congress was trying to
24 do was combat discrimination. You need to have that
25 objectively variable reference.

1 THE COURT: Does the fact that you have to lend your
2 interpretive skills to this argument in and of itself suggest
3 the presence of an ambiguity? Because on the face of the
4 argument, you're right; everybody is still either male or
5 female. The question is: How do you determine whether that
6 person is male or female? Your analysis ends at what you call
7 the biological test.

8 I would imagine that the Does, or the defendant,
9 Department of Education, could put on an expert who says that
10 females who suffer from gender dysphoria are still female. So
11 we're still in agreement that there -- we haven't created
12 another category of persons even though the intersex individual
13 remains on the periphery. You still haven't answered the
14 question as to whether that person is male or female or both.
15 But yours all boils down to whether I accept the biology test
16 which was rejected in *G.G.* and in *Smith* based on the chief
17 judge's opinion there.

18 I don't want to get bogged down in this. I think that
19 you're pretty much wedded to that concept, but the problem is
20 it could be fatal to your case if the Court -- because your
21 whole argument is based on that biological definition of sex
22 that has been rejected by all of the courts that have
23 considered this issue. But please continue.

24 MR. WARDLOW: Your Honor, I don't think it's been
25 rejected -- in this context, it's never been --

1 THE COURT: *G.G.* and *Smith* -- *G.G.* is a case that's on
2 all squares with this case and it's been rejected.

3 MR. WARDLOW: In that case it was, and we talked about
4 the Supreme Court in that case. I also point out that -- so
5 Your Honor is correct that our argument is very much about
6 one's actual and physiological sex. I'm not sure that it's
7 necessarily helpful to modify it using the term biological
8 because we would contend that a person's sex is the sum total
9 of their chromosomes and their biology. But it's something
10 that's innate and immutable and fixed that can be readily
11 discerned. It's not necessarily looking at your genitalia that
12 does it because --

13 THE COURT: Because the sex reassigned individual
14 would kind of skew that.

15 MR. WARDLOW: Yes, Your Honor. The person's birth
16 certificate in the state of Ohio is, we argue, a very good
17 proxy in 99.99 percent of cases for what the person's actual
18 sex is. We can rely on that. And Highland does keep records
19 for every student what their birth certificate is -- or has a
20 birth certificate on file and can determine their sex based on
21 that.

22 THE COURT: I'll give you an additional five minutes
23 for your other arguments because your time is otherwise up.

24 MR. WARDLOW: Thank you, Your Honor.

25 So, very quickly, we covered our deference. There's no

1 deference required because there's no ambiguity and because the
2 interpretation the department is putting forward is contrary to
3 law.

4 In addition, this is a final rule under the APA because
5 the May 13th, 2016 letter that was put out, the Dear Colleague
6 Letter, talks about how schools will be evaluated in terms of
7 compliance. It's definitive. It's a consummation of the
8 agency's decision-making process, and legal consequences
9 definitely flow from it because it clearly expects school
10 districts across the nation to conform their conduct to the
11 rule set forth in the letter or they will lose their federal
12 funding.

13 THE COURT: That process, though, has not yet begun;
14 is that right?

15 MR. WARDLOW: The enforcement proceeding has not yet
16 begun; Your Honor is correct. And this lawsuit is a wholly
17 collateral attack on the rule itself because of the
18 deficiencies in the procedural --

19 THE COURT: On the rule or implementing regulations?

20 MR. WARDLOW: I'm sorry?

21 THE COURT: Is it on the rule or implementing
22 regulations? Or is that a distinction without a difference?

23 MR. WARDLOW: When I refer to the rule, I'm referring
24 to the Dear Colleague Letter and the guidance that's been put
25 forward stating that sex must include gender identity under

1 Title IX and that schools must admit students to sex-separated
2 facilities based on gender identity and not sex. This is a
3 rule under the APA. If you look at 5 U.S.C. 551, Section 4, it
4 has the definition of rules and that falls within the
5 definition of rules. It's a rule for purposes of review under
6 the APA and it's final agency action.

7 Likewise, it's a legislative rule, substantive rule,
8 because it makes a drastic policy shift. Up until this time,
9 there has been no contemplation that sex would include gender
10 identity. And this pronouncement by the Department of
11 Education and the Department of Justice is a drastic paradigm
12 shift in the way schools are required to treat students who
13 have gender identities different from their actual sex.

14 It needs to be set aside because it's *ultra vires*. It's
15 arbitrary and capricious. It exceeds statutory authority and
16 it also violates students' constitutionally protected rights.

17 We also have the spending clause argument. Highland is
18 likely to prevail on the spending clause argument. I'll rely
19 on the briefing for that since we're very low on time.

20 With respect to Doe's equal protection claim, Doe is
21 unlikely to succeed on the equal protection claim because we
22 have two very important interests. There's a substantial
23 relationship to those interests: privacy and student safety.
24 And Doe incorrectly --

25 THE COURT: On the student safety issue, there --

1 amici has supplied a number of affidavits of school districts
2 which have implemented the justice -- the Department of
3 Education's transgender bathroom policy and not a single
4 incident. So I suppose that there could be an incident at some
5 point, but the fact that none has occurred to this point
6 certainly would fly in the face that there is an imminent
7 danger.

8 MR. WARDLOW: Yes, Your Honor. This policy change is
9 so new --

10 THE COURT: It's almost like saying that we should
11 revisit some of the Second Amendment jurisprudence because
12 there's been school shootings.

13 MR. WARDLOW: Well, Your Honor, I think that here we
14 have a situation where there are two interests at issue. And
15 first we have constitutional right to privacy. If you look at
16 cases like Doe vs. Luzerne County where a female police officer
17 was in a delousing area and was partially naked, the Court
18 found she had a reasonable expectation of privacy, and
19 especially where there was a possibility of males, members of
20 the opposite sex, viewing her. We have a Fourteenth Amendment
21 substantive due process right to privacy here as implicated.

22 THE COURT: Let's narrow this case to this instance.
23 At a higher grade level, it's my understanding all of the girls
24 might or all of the males might shower together and might be
25 exposed. But at the level at which Jane Doe - what? - is there

1 a two- or three-foot space under it? So unless somebody kind
2 of got down on their knees and looked up under the stall,
3 chances are they wouldn't see Jane's genitalia or that Jane
4 wouldn't see their genitalia.

5 MR. WARDLOW: Two comments with respect to that. That
6 argument actually assumes there is a privacy risk of violation
7 in the first instance, otherwise, you wouldn't need stalls at
8 all.

9 THE COURT: That was a question that followed up your
10 argument, because I don't make arguments. But go ahead.

11 MR. WARDLOW: Yes, Your Honor. I'm sorry. Good
12 point. So the opposing side's argument along those lines.
13 Okay.

14 Then, secondly, it's important to remember I think that
15 what we're looking at is the success of likelihood on the
16 merits, and that means success on the likelihood of the merits
17 of the claims that Doe is putting forward and the relief that
18 Doe is requesting generally. And that relief is for
19 district-wide relief, district-wide injunction that would
20 require the school -- all of Highland students to be admitted
21 to sex-separated facilities based on gender identity and not on
22 their actual sex.

23 So you need to consider, on likelihood of success on the
24 merits, the wider relief. Because we're not talking about
25 likelihood of success on the preliminary injunction. We're

1 talking about likelihood of success on the merits of Doe's
2 larger claim.

3 THE COURT: All she wants to do is use the girls'
4 bathroom. That's what she's asking for in her papers. And
5 thus far we don't have a veritable floodgate of transgender
6 students from the Highland Local School District saying "me
7 too."

8 So let's not create additional facts. We're talking
9 about one person who wants to use the girls' bathroom.

10 MR. WARDLOW: If Your Honor looks at the requested
11 relief in Doe's third-party complaint, it does request
12 district-wide injunction that would hire people that would
13 create policies, that would enact district-wide access to
14 facilities based on gender identity. She's asking for
15 something much larger than just --

16 THE COURT: It's for her, I think. That will be a
17 question for Mr. Orr.

18 MR. WARDLOW: Very good. There are broader
19 implications here for student privacy.

20 THE COURT: One final thing and then I'm going to let
21 you sit down. The right that you're talking about, bodily
22 privacy, that's actually not a right contemplated by *Brannum*.
23 Actually, it still hunts back to the Fourth Amendment right
24 against unreasonable searches and seizures. Would you agree
25 with that?

1 MR. WARDLOW: Your Honor, in *Brannum*, I would agree
2 that the right is protected by the Fourth Amendment there, but
3 the constitutional right to privacy preexists, of course, the
4 constitutional amendments that protect it. And it's protected
5 by the Fourth Amendment in *Brannum*. In *Doe*, they protected a
6 similar right in Doe vs. Luzerne County. They actually cited
7 to *Brannum*. They said that the right that was protected in
8 *Brannum* is essentially the same right as the one they're
9 protecting in the Fourteenth Amendment in that case because
10 it's a preexisting right and it's protected from unreasonable
11 searches and seizures under the Fourth Amendment, and protected
12 more generally under the Fourteenth Amendment when it's
13 regarding notions of privacy that are deeply rooted in our
14 nation's history and traditions, which this right to privacy
15 is.

16 Finally, I would note that all the argument and evidence
17 put forward on the irreparable harm question by *Doe*, as counsel
18 has indicated, is largely not relevant. It's not relevant to
19 the question of irreparable harm in this case because *Doe*'s
20 likelihood of success on the merits determines *Doe*'s
21 irreparable injury. That is, if, as the counsel indicated in
22 arguments on whether to have an evidentiary hearing, if *Doe*
23 succeeds on the merits, then there is irreparable injury; if
24 not, there is not. And with that, I would sit down.

25 THE COURT: Thank you, Mr. Wardlow.

1 MR. WARDLOW: Thank you, Your Honor.

2 THE COURT: You'll have ten minutes for rebuttal.

3 Mr. Amdur.

4 MR. AMDUR: Good afternoon, Your Honor. Spencer Amdur
5 for the federal defendants.

6 Highland, in this case, seeks to enjoin an impeding
7 enforcement action against it by challenging the interpretation
8 of --

9 THE COURT: Mr. Amdur, tell me about this whole
10 conundrum of sex, whether it's -- whether I'm constricted to
11 biological indicia of sex or whether I can look at the other
12 issues that *G.G.* contemplated. Because Mr. Wardlow has
13 basically said his argument, his case, if you will, rests on
14 whether it's biological sex or some other rendition of it.

15 MR. AMDUR: I agree, Your Honor. I think Highland's
16 case on the Title IX issue rests on Section 106.33, the
17 regulation at issue, unambiguously dividing males and females
18 by, now, they're arguing chromosomes. I believe the policy
19 that was cited to Jane Doe originally was that it was based on
20 her birth certificate which is generally assigned based on the
21 genitalia observed at birth.

22 THE COURT: Because there's no evidence in this case
23 that they did a chromosomal study of Miss Doe at birth, is
24 there?

25 MR. AMDUR: That's right. I think there's really no

1 basis for saying that Title IX or its implementing regulations
2 unambiguously say how students are to be assigned to
3 sex-specific facilities. That's true for a number of reasons.
4 I think some have come out today, all the reasons identified in
5 *Gloucester*. It creates unresolvable ambiguities to point to
6 just one of the many components of sex. Also, the Fourth
7 Circuit recognized dictionaries both at the time of Title IX's
8 passage, and today, describe sex as the sum of a number of
9 factors, some of which are biological. And we think -- we cite
10 sources in Footnote 14 of our brief that even gender identity
11 has biological roots but also behavioral and social. I think
12 there's no question that Section 106.33 does not speak to how
13 to assign transgender students to male and female facilities
14 when the various indicators of sex diverge.

15 Now, in this circuit, I think that that's true as a
16 matter of law. In *Smith*, the Sixth Circuit, as you pointed out
17 earlier, rejected earlier cases - *Ulane* and *Holloway* - which
18 had said that for purposes of sex discrimination statutes, sex
19 is a cut-and-dry matter of birth sex. Instead, it deferred to
20 Judge Posner's view that Title VII, and by extension Title IX,
21 refers to, quote, Sexes as viewed as social rather than
22 biological classes.

23 It even went beyond that to hold that a transgender
24 plaintiff could state a Title VII claim based purely on
25 behavioral and social indicators. It said -- and I'm quoting:

1 Discrimination against a plaintiff who is a
2 transsexual and therefore fails to act and/or identify
3 with his or her gender, is no different from the
4 discrimination directed against Ann Hopkins in *Price*
5 *Waterhouse*.

6 So I think there's no way to square Highland's view that
7 Title IX and Section 106.33 unambiguously exclude behavioral
8 and social indicators of sex with the Sixth Circuit statement
9 in *Smith*.

10 Just to address a couple other arguments they make for
11 ambiguity because I really think this unambiguity argument is
12 their main argument against applying our deference as the
13 Fourth Circuit did in *Gloucester*. The fact that Section 106.33
14 is binary doesn't tell us anything about how to assign students
15 to sex-specific facilities. It simply says nothing at all
16 about that question.

17 THE COURT: Would the fact that the statute does not
18 contemplate intersex individuals *ipso facto* make it ambiguous?

19 MR. AMDUR: I think that does. I think the statute
20 also doesn't contemplate transgender individuals, frankly. It
21 doesn't speak to transgender individuals. That's actually the
22 other argument of Highland's I wanted to point out.

23 THE COURT: Intersex individuals are more intriguing.
24 Mr. Wardlow rests on genitalia, in effect, when he talks about
25 biological identification; so someone can be physically

1 identifiable as male or female. But with the intersex
2 individual, that's not always so. That's the hand that nature
3 dealt us. So, if it doesn't fit neatly into the category of
4 male or female based on the visual observation, where does that
5 leave us?

6 MR. AMDUR: It leaves schools and the Department of
7 Education with having to look to some indicator of sex. So I
8 think you're absolutely right. If you look to genitalia, all
9 of the situations the Fourth Circuit pointed out, including an
10 intersex individual, leave the regulation ambiguous. Even if
11 you look to chromosomes, as the Fourth Circuit said, some
12 individuals are born with more than two chromosomes. There
13 would still be irresolvable ambiguities. All we need to get
14 our deference is for the regulation to be ambiguous, which I
15 think it clearly is here.

16 And arguments about what Congress may or may not have
17 had in mind in 1972 are squarely foreclosed by the Supreme
18 Court's decision in *Oncale* where it said that if the language
19 of the statute reaches -- can be fairly read to reach an issue,
20 it doesn't matter what was in the minds of any individual
21 legislator who, by the way, none of them spoke to this in 1972,
22 and their citations to the legislative history don't say
23 otherwise.

24 I do think it's important to underscore that the
25 Department of Education's interpretation of Section 106.33, its

1 own regulation, is not only a reasonable one, it's the most
2 reasonable interpretation of 106.33 because it's the
3 interpretation that accords with Title IX's broader concern for
4 equal access to educational opportunities. So the underlying
5 prohibition in the statute is Section 1681(a), which doesn't
6 only speak to discrimination but it says that no student can be
7 excluded from participation in or denied the benefits of any
8 educational program on the basis of a sex-based characteristic.

9 Now, normally, separating bathrooms by sex, as Section
10 106.33 does, doesn't deny any student an access to equal
11 education because it doesn't inherently demean or stigmatize or
12 isolate any student. But, for a student who, for instance,
13 lives her life as a girl and identifies as a girl and presents
14 to the outside world as a girl, for a school to say every day,
15 actually, you're not a girl and we're going to announce that to
16 everybody each time you go to the bathroom, that does two
17 things. Number one, it disrupts the student's education
18 broadly because it conveys to her and to the school that that
19 student's identity is less worthy of respect. And number two,
20 in a very concrete sense, it denies her access to school
21 facilities which the Supreme Court said in *Davis* is a
22 paradigmatic example of a Title IX violation.

23 THE COURT: But that's not the factual landscape here
24 because the school did provide Jane with a bathroom. It was in
25 the teachers' lounge. So she didn't have to go to a boys'

1 bathroom in front of all of her peers. She was able to use
2 that bathroom. I didn't find anything in the record which says
3 that she was ever prohibited from using that bathroom whenever
4 she needed to go. Then there were some instances where I think
5 maybe the school was locked or the teachers' lounge area was
6 locked, there was an after-school activity and she used the
7 girls' bathroom without any reprimand. So the school district
8 did, in fact, accommodate Jane Doe, didn't it?

9 MR. AMDUR: It allowed her to go to single user and
10 faculty restrooms but it didn't give her the right that all
11 students have, which is to go to the communal restroom. It
12 didn't make her in front of everybody walk to the boys'
13 restroom.

14 THE COURT: Is there anything intrinsically good about
15 the communal restroom?

16 MR. AMDUR: What's important for Title IX purposes,
17 for purposes of Section 1681, is that all other students have
18 access to it. And Jane Doe in this case is being denied access
19 to it based on a component of sex, a factor that is at the very
20 least intricately tied to a person's sex just like the
21 gender-based behavior or social conditions in *Price Waterhouse*
22 and *Smith*.

23 I would also say that Title IX is concerned with
24 students being able to access all components of an education on
25 an equal footing with other students. So the regulation at 34

1 C.F.R. 106.31 extends the basic prohibition to all services,
2 rights, privileges, opportunities, et cetera. And the fact is
3 that it remains stigmatizing and isolating to make Jane Doe, in
4 front of all the other students, walk to the faculty bathroom
5 every time she wants to go to the bathroom.

6 That's all just to say that the Court should apply our
7 deference because, for the reasons we discussed, the regulation
8 is obviously ambiguous. But I do think it's important to
9 underscore that the Department of Education has come to this
10 interpretation through a reasoned process that takes into
11 account the actual realities on the ground of a student's
12 education. It did so in consultation with school districts
13 across the country. And that's reflected both in the Dear
14 Colleagues Letter and in the simultaneously issued emerging
15 practices document.

16 And so even if deference were only under *Skidmore*,
17 *Skidmore* itself says that agency interpretations can, quote,
18 constitute a body of experience and inform judgment to which
19 courts and litigants may properly resort for guidance, at page
20 140. So I think that's important to underscore that that's
21 exactly what the Department of Education has done here in
22 coming to an interpretation of 106.33 that squares with Title
23 IX's underlying concern for equal access to educational
24 opportunities.

25 Now, if I could just briefly address some of the

1 threshold issues because we think --

2 THE COURT: The jurisdictional issues.

3 MR. AMDUR: That's right.

4 THE COURT: And that's a good segue, Mr. Amdur,
5 because regarding the jurisdictional issue, isn't this case
6 similar to Sackett vs. EPA where the Supreme Court rejected the
7 EPA's argument that the presumption of reviewability of all
8 agency actions did not apply?

9 MR. AMDUR: So that presumption is not at issue here
10 because there will be judicial review of whatever enforcement
11 action is ultimately taken against Highland. If the Department
12 of Justice files an enforcement lawsuit, there will obviously
13 be judicial review in the court where they file for injunction.
14 If the Department of Education initiated enforcement
15 proceedings administratively, Section 1234(g) of the statute
16 gives Highland the right to judicial review in the court of
17 appeals.

18 So in *Thunder Basin* where the Supreme Court held that
19 that type of review scheme, in fact, review scheme with all of
20 the exact same components as this one, precluded district court
21 review, the Court specifically addressed that question, whether
22 it implicated the presumption of reviewability. And the Court
23 said it didn't because there was judicial review at the end of
24 the process in the court of appeals, or at the beginning of the
25 process if the agency filed an enforcement lawsuit.

1 The other thing I would say about *Sackett*, which I think
2 Highland has also cited for the proposition that there's been
3 final agency action here, in *Sackett* there was an independent
4 penalty at issue that could be assessed for violating the EPA's
5 compliance order. So it wasn't just that the regulated party
6 could be liable for violating the statute that EPA was
7 interpreting, they could be liable for violating the terms of
8 that compliance order. This case is like *Sackett* without that
9 penalty for violating the administrative action. It's also
10 like *Rhea Lana*, which we cited, in which there was a
11 willfulness penalty attached to a Department of Labor letter.
12 The willfulness penalty couldn't be imposed without what
13 letter. That letter imposed a new consequence. This case is
14 like *Rhea Lana* without willfulness penalties.

15 In fact, the guidance that they're challenging, the 2016
16 Dear Colleagues Letter, just repeats an interpretation of Title
17 IX and its regulations that the agency had already been
18 asserting including against Highland. Remember, this
19 investigation, this enforcement action started before the
20 challenged guidance was issued. In fact, there had been a
21 settlement agreement with the Arcadia School District as early
22 as 2013. In addition, the Fourth Circuit had already given
23 deference to the agency's interpretation before that guidance
24 was ever issued.

25 So I think this just illustrates that there's no final

1 agency action here because all the guidance did was inform the
2 regulated community how the agency had already been
3 interpreting the statute. And I don't think anyone thinks it's
4 a good idea for agencies not to tell their regulated community
5 what they think about a statute.

6 I would say I think one of the easiest routes for
7 purposes of Highland's PI -- I recognize you'll probably have
8 to reach the Title IX issue for purposes of Jane Doe's PI, but
9 I think you don't have to reach the merits of any of Highland's
10 claims because they have barely contested our argument that
11 there's an adequate remedy here. The Sixth Circuit decided a
12 case calls *Haines*, which we cited in our brief, in which it
13 held that a virtually identical review scheme - this was one
14 enforced by the Department of Transportation; that's 49 U.S.C.
15 521(b)(9) - constituted an adequate remedy such that there was
16 no cause of action under APA Section 704. I don't read
17 Highland's reply brief to even attempt to distinguish *Haines*,
18 so we think that is sufficient to deny their preliminary
19 injunction motion.

20 It also, I think, points to similar reasons why they
21 can't show an irreparable harm. I recognize that these reasons
22 sort of overlap with the adequate remedy analysis. Like I said
23 at the beginning, they will either have full administrative
24 review followed by judicial review or they'll have judicial
25 review.

1 THE COURT: Let me shift gears for a moment and go
2 back to *G.G.* I think that the decision in *G.G.* remains good
3 law despite the Supreme Court's stay of the mandate. But the
4 school district argues that a stay signals the finding of
5 irreparable harm to the district and by extension to Highland
6 here. Why else would the Supreme Court stay the mandate?
7 Would you address that issue for the Court, please.

8 MR. AMDUR: Absolutely. So *G.G.* is actually a unique
9 case for these purposes because the fifth justice who voted to
10 grant a stay actually wrote to say why he voted to grant a
11 stay. It wasn't because of irreparable harm. It's was purely
12 as a courtesy to his four colleagues who had voted to grant a
13 stay. This is a very rare thing for a Supreme Court justice to
14 write separately in that situation. But he wrote to say that
15 it's only because he thinks that as a matter of decorum, when
16 four justices want to grant a stay pending a decision on
17 certiorari, a fifth justice, without even reviewing --

18 THE COURT: For all practical purposes, what does that
19 stay mean, Mr. Amdur?

20 MR. AMDUR: The stay means that the injunction that
21 had been issued on remand to the district court in that case is
22 stayed while briefing for and decision on certiorari take
23 place.

24 THE COURT: So the district court's decision is the
25 operative one under those circumstances?

1 MR. AMDUR: The Fourth Circuit's decision is still
2 good law in the Fourth Circuit. What I'd cite you to for that
3 is the district court's grant of a preliminary injunction to
4 the transgender plaintiffs in the *Carcano* case.

5 THE COURT: In other words, the *Carcano* case followed
6 *G.G.*?

7 MR. AMDUR: Followed the Supreme Court's stay, that's
8 right. The Court specifically asked the party for supplemental
9 briefing on whether, in the Fourth Circuit, the court of
10 appeals' decision in *Gloucester* was still controlling on him
11 and then he decided that it was. So he followed -- and
12 essentially followed the same analysis as *Gloucester County* in
13 granting a preliminary injunction under Title IX to plaintiffs
14 who are arguing based on the Fourth Circuit's decision and
15 based on our deference. So there are cases in the Sixth
16 Circuit as well that say that. I believe *McClellan* is the name
17 of it.

18 The point for our purposes is to emphasize that the
19 Fourth Circuit's decision is controlling within that circuit.
20 It's persuasive in every other circuit. I don't think you can
21 ever read much into a Supreme Court's stay pending certiorari.
22 You can't read much into a grant of certiorari. Here you can
23 read even less than normal because the fifth and necessary vote
24 wrote to say this isn't because of irreparable harm.

25 The last thing I would say about that situation is that

1 Highland has cited a lot of cases in which appeals courts have
2 cited the irreparable harm of an injunction in granting a stay
3 pending appeal. But those are cases in which an injunction has
4 already been entered. So where an injunction has already been
5 entered and the appeals court thinks that might have been in
6 error, then I suppose both factors - likelihood and harm - can
7 be met. But, in this case, there can be no injunction or
8 successful enforcement action against Highland unless they fail
9 to convince a court that they're correct on the merits. So we
10 think that that argument doesn't really apply to the
11 irreparable harm in this case at all.

12 The other ones that they have raised in their reply
13 brief so we haven't gotten a chance to address yet, they say,
14 number one, that Section 1234(g), which is of 20 U.S.C., that
15 is the review in the court of appeals' provision -- they say
16 that that review in the court of appeals won't allow them to
17 challenge the interpretation that they're now challenging.
18 They make this distinction between a rule and an order. They
19 say that review in the court of appeals is an order whereas
20 they're challenging a rule.

21 It doesn't matter because if they lose before the agency
22 and appeal to the court of appeals, they can assert all of the
23 same arguments they're currently asserting for why the
24 Department of Education's interpretation of 106.33 is wrong or
25 impermissible. There's simply no argument that they're

1 currently asserting that they can't equally assert then. If
2 they're successful, they'll receive the exact same relief they
3 seek now.

4 The other reason is that they at present have to defend
5 against Jane Doe's preliminary injunction motion. But nothing
6 is stopping them from doing that right now. Their preliminary
7 injunction motion against the federal government doesn't
8 somehow seek to forestall a third-party's motion against them.
9 The whole point is that if they are successful in defending
10 against Jane Doe's motion, they face no irreparable harm from
11 the federal government without ample opportunities to defend
12 themselves.

13 And the Sixth Circuit in *Griepentrog*, the district court
14 in *Contech*, they both said two things. One is that the
15 ability -- the existence of alternative mechanisms for
16 defending yourself against a purported harm, it militates
17 against a finding of irreparable harm; and, two -- and this
18 references the Supreme Court's holding in *Winter*, the harm
19 needs to be certain and immediate. It needs to be likely. It
20 can't be speculative and distant which it clearly is in this
21 case.

22 THE COURT: Thank you, Mr. Amdur.

23 MR. AMDUR: Thank you, Your Honor.

24 THE COURT: Mr. Orr.

25 MR. ORR: Good afternoon, Your Honor. May it please

1 the Court. Asaf Orr, attorney for the intervenor third-party
2 plaintiff Jane Doe.

3 THE COURT: Mr. Orr, the school district provided
4 Ms. Doe with access to facilities. They were the facilities in
5 a teachers' lounge. She was never denied an opportunity to use
6 those facilities. So all of her -- those biological needs were
7 met. In instances where the teachers' lounge was locked or
8 otherwise unavailable, she used the girls' bathroom. What is
9 the harm here since she's never been declined the use of a
10 bathroom?

11 MR. ORR: Your Honor, the harm is multi-prong. First,
12 she's being denied access to the girls' restroom. She is a
13 girl. All of the other girls in school are allowed to use the
14 communal girls' restroom that she's denied the use of. That
15 denial puts her in a position where she has to go to a separate
16 genderless restroom. She is the only one that's required to
17 use it. It sends a message to her and her peers that she's not
18 worthy of using the communal restroom like everybody else.

19 It also creates additional harms in the sense of loss of
20 educational opportunity for the additional time it takes to get
21 to that restroom. It interferes with socialization.

22 THE COURT: Do you have any evidence that because she
23 walked to the restroom in the teachers' lounge, as opposed to
24 using the girls' restroom that may have been nearer, she missed
25 out on an educational opportunity whether it was a lecture or a

1 test or a demonstration, whatever?

2 MR. ORR: Your Honor, it's class time and it also --
3 it plays into her calculus whether or not to even use the
4 restroom on a day-to-day basis.

5 THE COURT: If she was going to use the girls'
6 restroom, what about the instance in which the girls' restroom
7 is further than the teachers' lounge? When you got to go, you
8 got to go. It's going to be the same regardless, isn't it?

9 MR. ORR: In terms of the time, Your Honor, but
10 also --

11 THE COURT: Yes.

12 MR. ORR: But with regards to psychological harm,
13 that's significant. And that's something that because of her
14 particular vulnerability stays with her all day long and
15 affects her ability to --

16 THE COURT: Has the psychologist opined that she
17 suffered harm because she used -- not because anybody harassed
18 her or anything like that, but just because of the fact that
19 she used the restroom in the teachers' lounge as opposed to the
20 girls' restroom on a regular basis?

21 MR. ORR: Your Honor, the psychologist opined that
22 she's being harmed because the school district refuses to treat
23 her as a girl like they do all other girls.

24 THE COURT: So, in other words, the psychologist
25 didn't address my more narrow issue?

1 MR. ORR: She did not address specifically in terms of
2 the bathroom, although from her own declaration, Jane Doe talks
3 about the harm it's causing her. When she - for example, in I
4 believe it was the second grade - would be in line, all the
5 kids would go to the bathroom at the same time. The teacher
6 would take them all out, and there would be a boys line and a
7 girls line. Then she would have to leave those lines and go to
8 the office. And kids would ask her, "Why are you going to that
9 restroom?" And some of them would mock her for having to use
10 that separate restroom.

11 THE COURT: Mr. Orr, is there any evidence that the
12 fact that -- the statute references binary sex: male, female.
13 Is there any evidence that the framers or the drafters of the
14 statute contemplated and rejected either transgender
15 individuals or intersex individuals?

16 MR. ORR: No, there's no evidence that they
17 contemplated or considered either transgender or intersex
18 individuals. But, as the Supreme Court has consistently held,
19 Title IX is a broad remedial statute that is intended to ensure
20 equal access to educational opportunity, and consistent with
21 that broad remedial purpose have interpreted Title IX to have a
22 private cause of action, to include claims for retaliation,
23 among other things. And so really the interpretation of sex as
24 put forth by our papers, as well as the interpretation put
25 forth by the federal government in its guidance in May 2016, is

1 consistent with Title IX.

2 THE COURT: Okay. Please continue.

3 MR. ORR: Thank you, Your Honor.

4 Jay Doe is an 11-year-old transgender girl. Nearly
5 everywhere in her life she's treated as a girl. When she is in
6 public, she uses the girls' or women's restroom. When people
7 refer to her, they use her female name and female pronouns. In
8 all these situations, she's being treated consistent with her
9 gender identity. The one exception is at school.

10 Highland has impermissibly changed social convention.
11 In those scenarios, she's required to go to a separate restroom
12 than all of her peers. This discriminatory conduct denies her
13 the basic dignity and respect that all students need to come to
14 school ready to learn, feel safe and welcome. Because of that
15 conduct, as I indicated earlier, Jane is faced with the dilemma
16 either she uses the restroom and experiences the psychological
17 distress of being ostracized; but if she doesn't, she also
18 risks harms to her physical and mental health as well. What
19 Jane is losing are the very educational opportunities that
20 Title IX is there to protect.

21 As outlined in our motion, in our reply brief, Jane
22 meets each of the standards or the elements of preliminary
23 injunction. I'd like to address those in turn.

24 With regards to Title IX, regardless of whether or not
25 this Court grants the May 2016 guidance, our deference, Jane

1 still has a strong likelihood of success on the merits. As I
2 said previously, Jane is a girl, yet Highland is treating her
3 differently than all other girls based on assumptions because
4 she does not comport to stereotypical notions of what a girl
5 should be. She's being discriminated against on that basis,
6 and that applies to both our Title IX claim as well as equal
7 protection.

8 The Supreme Court, as I indicated, has said that Title
9 IX must be interpreted broadly, that it has a broad sweep and
10 therefore must be really interpreted broadly to ensure it
11 achieves its purpose.

12 THE COURT: If I accept Mr. Wardlow's definition of
13 sex and how sex is determined, however, wouldn't you agree that
14 Jane has virtually no likelihood of success on the merits?

15 MR. ORR: No, Your Honor.

16 THE COURT: All right.

17 MR. ORR: First of all, there isn't a legal definition
18 of biological sex. As the medical community has demonstrated
19 and social -- and science has shown, the concept of biological
20 sex is far more complex than we use in the vernacular, that a
21 person's biological sex not only includes the external
22 reproductive organs but also internal organs, chromosomes,
23 genes and also gender identity. For most people, all those
24 characteristics align. When you're talking about, for example,
25 intersex people or transgender people, all those

1 characteristics do not align. In those scenarios, the standard
2 of care is to use gender identity. Gender identity is the
3 determinative factor of a person's sex.

4 THE COURT: Well, Mr. Wardlow bases it on biology.
5 You base it on identification. Does gender identification as a
6 determinant of sex depend on a concomitant medical diagnosis of
7 gender dysphoria?

8 MR. ORR: No. I would also point out that gender
9 identity does have biological roots.

10 THE COURT: Tell me the biological roots of it.

11 MR. ORR: Sure. There is a lot of studies currently
12 that demonstrate a strong correlation between siblings, that if
13 one siblings, for example, is gender dysphoric, that the other
14 sibling has a higher likelihood of being gender dysphoric as
15 well and being transgender. There are also indications that
16 there are differences in the brain scans of transgender people
17 versus their non-transgender peers such that the brain scan of
18 a transgender girl would be much more consistent with a
19 non-transgender girl than it would be with a non-transgender
20 male. Although not fully understood, there is a lot of
21 indication that there's a strong biological connection to
22 gender identity.

23 I don't know that I answered the second part of your
24 question. I apologize.

25 THE COURT: Please continue.

1 MR. ORR: What was the second part of that question?

2 THE COURT: I think that you answered.

3 MR. ORR: Okay. Thank you, Your Honor.

4 THE COURT: To my satisfaction at least.

5 MR. ORR: Okay.

6 And also to pick up on *Oncale* which the federal
7 government mentioned, in that case, the Supreme Court noted
8 that statutory prohibitions often go beyond the principal evil
9 they were intended to cover to include reasonably comparable
10 evils. And excluding transgender students from the restroom is
11 one such reasonably comparable evil.

12 THE COURT: Mr. Orr, what standard should I use -- I'm
13 skipping ahead to Jane's equal protection claim. Should I use
14 rational basis review, as Mr. Wardlow urged, or should I use
15 heightened scrutiny?

16 MR. ORR: Your Honor, you should apply, at a minimum,
17 heightened scrutiny. As the Sixth Circuit has held in both
18 *Smith* and *Barnes*, discrimination against a transgender person
19 is sex discrimination and therefore would fall under the
20 heightened scrutiny.

21 THE COURT: Would that be gender-based, sex-based
22 discrimination regardless of how I define sex?

23 MR. ORR: That would be -- in *Smith* and *Barnes*, they
24 were focused on the plaintiff's gender transition. So it's
25 based on sex stereotypes, as the Sixth Circuit has held in

1 those cases.

2 But if the Court -- the other part of this, too, is Your
3 Honor could also apply strict scrutiny. Transgender people
4 meet the four-factor test identified by the Supreme Court in
5 determining whether or not strict scrutiny would apply.
6 Transgender people have faced a history of discrimination.
7 They are a politically powerless group. They have a
8 characteristic that does not affect their ability to contribute
9 to society and that characteristic makes them an easily
10 discernible minority.

11 THE COURT: Is *Davis* still good law in light of
12 *Obergefell*?

13 MR. ORR: Davis v. Monroe, Your Honor?

14 THE COURT: Yes.

15 MR. ORR: Yes, absolutely.

16 In going to the equal protection, I think regardless of
17 which standard this Court applies, Highland's purported
18 policy --

19 THE COURT: I'm sorry. It was Davis vs. Prison Health
20 Services out of the Sixth Circuit which held that sexual
21 orientation classification should not receive heightened
22 scrutiny.

23 MR. ORR: Your Honor, I think that the two are
24 different, that although some courts of appeal have incorrectly
25 held that sexual orientation is not covered under sex

1 discrimination, that does not cover gender identity which is
2 entirely separate.

3 THE COURT: All right.

4 MR. ORR: Regardless of which level of scrutiny the
5 Court applies, Highland's purported policy fails.

6 Under rational basis, what Mr. Wardlow indicated is that
7 the purpose of the policy, or the purported policy, is to
8 ensure that boys don't enter into girls' restrooms. And I
9 think it's important when you're looking at the privacy
10 interest, as they talk about it, they've actually incorrectly
11 framed the question. The question is not whether a girl has a
12 reasonable expectation of privacy that a boy will not enter the
13 restroom, but it's whether or not a girl has a reasonable
14 expectation of privacy that a transgender girl will not use
15 that same restroom.

16 When you look at it from that perspective, our society
17 has recognized that transgender people exist. Transgender
18 people are a part of our community. They can get access to
19 medical care, they can get access to legal supports and
20 services, and they use the restrooms based on gender identity
21 like everybody else. In light of that context, girls do not
22 have a reasonable expectation of privacy that they're not going
23 to use a restroom with a transgender girl.

24 In that case, as the experience of school administrators
25 have shown that this speculative fear about a boy claiming to

1 be a girl in order to access those facilities, one has not
2 materialized, but that those administrators have been able to
3 implement those policies in a way that ensures the dignity and
4 privacy of all students in school.

5 THE COURT: Well, there have been affidavits submitted
6 by parents. And the parents theoretically, at least, are
7 reflecting some of the concerns of their students. In this
8 calculus, where do I place the concerns of other girls who
9 don't want to be viewed or share a bathroom with someone who,
10 under Mr. Wardlow's definition, is biologically a boy, a person
11 who has male genitalia? What deference should the Court give
12 to those interests of those students?

13 MR. ORR: First, Your Honor, I would not say that Jane
14 has male genitalia. But secondly, school districts have shown
15 that --

16 THE COURT: Jane doesn't have male genitalia?

17 MR. ORR: No. As I indicated, gender and sex are much
18 more complex than that. I think it would be inappropriate to
19 label any part of her body as male.

20 THE COURT: How do you label, then, the means through
21 which she excretes liquid waste?

22 MR. ORR: Your Honor, having not ever seen her body, I
23 don't know. But I think it's important --

24 THE COURT: Has she had sex reassignment surgery?

25 MR. ORR: No. That would be inconsistent with

1 standard --

2 THE COURT: So unless she's an intersex individual -
3 and I don't think that the record reflects that she is - she
4 would likely have a penis. Wouldn't you agree?

5 MR. ORR: Likely, Your Honor.

6 THE COURT: That's typically associated with male
7 genitalia. You would agree with that?

8 MR. ORR: Our society has defined that as male
9 genitalia, yes.

10 THE COURT: And it's generally accepted that that's
11 one physical indicia of being male, correct?

12 MR. ORR: Yes, but I think it can be an inaccurate
13 one.

14 THE COURT: Well, this case is proof positive that it
15 can be an inaccurate one. But if the individual with the penis
16 doesn't suffer from gender dysphoria, typically that individual
17 is considered male.

18 MR. ORR: That is typically a good proxy for their
19 gender identity.

20 THE COURT: All right.

21 MR. ORR: With regards to --

22 THE COURT: Going back now that we have -- let's
23 assume, then, for the purpose of my argument that Jane Doe has
24 a penis. What about those students who are possessed of what
25 we would consider female genitalia, what about those students

1 who don't want to share a bathroom with someone with a penis?

2 MR. ORR: Yes, Your Honor. So, in those situations,
3 first of all, as we anticipate, when you enforce
4 nondiscrimination provisions, it tends to -- it can make people
5 uncomfortable, as seen by the parents who submitted those
6 declarations and likely their students. But in those
7 situations, they are not entitled to exclude a transgender
8 person from those facilities if they feel for their -- in order
9 to feel their privacy is fully protected. They can use the
10 many private areas that the school district has provided either
11 in a single-user restroom --

12 THE COURT: Would it afford Jane relief if the
13 Highland School District created transgender bathrooms?

14 MR. ORR: No, Your Honor, it would not because Jane is
15 a girl. And going to the girls' restroom is part of ensuring
16 that -- part of her health and well-being and ensuring that she
17 can function in school and have equal access to the educational
18 program being offered by Highland.

19 THE COURT: If there was a transgender bathroom, would
20 you argue against a transgender female sharing that bathroom
21 with a transgender male?

22 MR. ORR: So it's a communal restroom, Your Honor?

23 THE COURT: No. It's a transgender -- you have a male
24 bathroom, a female bathroom, and a transgender bathroom. And
25 would you make -- let's say you're continuing to represent Jane

1 Doe, and then there is John Doe who has female genitalia but
2 identifies as male. So would you argue on behalf of Jane Doe
3 against John Doe sharing the transgender bathroom not
4 simultaneously, necessarily, but using the transgender bathroom
5 that John Doe uses?

6 MR. ORR: Well, Your Honor, if John Doe wanted to use
7 a separate restroom because of his own concerns around privacy
8 and safety, he would absolutely be entitled to do that. And
9 that's in fact -- as the school administrators indicate in
10 their amicus brief, that's in fact what they do in those
11 scenarios.

12 THE COURT: I understand that. But my question was on
13 behalf of Jane Doe, not on behalf of John Doe. Would you
14 object to Jane Doe using a transgender bathroom that is also
15 used by John Doe, himself a transgender male?

16 MR. ORR: Yes, because Title IX requires a school
17 district to provide Jane Doe with access to the girls' restroom
18 on the same conditions as all other girls.

19 THE COURT: Fair enough. Please continue.

20 MR. ORR: I'd like to move on to -- given that Jane
21 Doe has shown a strong likelihood of success on the merits,
22 that there is a -- to talk about the presumptions of harm. As
23 all parties agree, when there is a constitutional violation
24 that irreparable harm is presumed. And just as in the case of
25 a violation of Title IX, a finding of irreparable harm can be

1 presumed because of the lost opportunities and other things
2 that cannot be monetized, cannot be compensated with
3 monetary --

4 THE COURT: I want to go back just one moment. There
5 was one additional question that I had with respect to the
6 other students. Mr. Wardlow has made an argument about the
7 privacy interest of the other students. Do the other students
8 have a privacy interest in not having to share a bathroom with
9 someone who has the genitalia of the opposite sex?

10 MR. ORR: Your Honor, we believe that they don't have
11 a right to privacy. But what the stalls do in those restrooms
12 is provide people with privacy, not that there's a right. But
13 the difference is, Your Honor -- and I don't -- is that when
14 Jane Doe or a transgender girl with a penis has access to a
15 female facility, she's not a boy walking in that facility as
16 Mr. Wardlow has indicated. She is a girl walking into that
17 facility.

18 So I think the critical question is not necessarily
19 what's in between their legs but what is their gender identity.
20 That is really controlling, as medical science has indicated.

21 THE COURT: At some point -- let me ask you this, if
22 you know. For the high school, in the girls' locker room, are
23 there communal showers that don't have partitions that ensure
24 some level of privacy? Do you know?

25 MR. ORR: Your Honor, based on the photos submitted in

1 the record -- and I'll let Mr. Wardlow confirm my recollection,
2 but that the showers are actually stalls with --

3 THE COURT: With a shower curtain?

4 MR. ORR: Yes, Your Honor. And there are also, if I
5 remember correctly, in those locker rooms there's also bathroom
6 stalls as well.

7 THE COURT: So there are no circumstances, at least on
8 the women's side or on the girls' side, where the girl would be
9 totally exposed to other girls?

10 MR. ORR: That's correct, Your Honor. And girls --
11 and I believe the boys setup is identical. They could use
12 those separate -- those parts of those facilities in order to
13 ensure that they weren't viewed by others if that was a concern
14 to them as well.

15 THE COURT: All right. Please continue.

16 MR. ORR: One other thing that came up, too, with
17 regards to the balance of harms is the idea that were the Court
18 to issue an injunction in this case requiring the school
19 district to allow Jane to use the girls' restroom, that would
20 somehow interfere with the school district's ability to protect
21 and safeguard their students in the restrooms. That is
22 patently incorrect.

23 All the court order would do -- all the court order we
24 seek would do is allow Jane to use those restrooms. It would
25 apply to no other student, no other school. Certainly, if the

1 school district felt there was something they needed to do in
2 order to safeguard the privacy of other students, as well as
3 Jane's, they could do that as long as it doesn't stigmatize or
4 otherwise discriminate against Jane. So this issue of local
5 control that was raised is really a nonissue.

6 The other point about the relief sought in our
7 complaint, that is true that is the relief we seek in our
8 complaint, but the relief we seek here today is a court order
9 requiring the school district to treat Jane as a girl in all
10 respects, to allow her to use the girls' restroom, to use her
11 female name, as well as use female pronouns. All those
12 issues -- the broader relief that we seek will be before the
13 Court after a full trial on the merits.

14 THE COURT: Thank you, Mr. Orr.

15 MR. ORR: That's all I have. Thank you, Your Honor.

16 THE COURT: Mr. Wardlow, rebuttal.

17 MR. WARDLOW: Thank you, Your Honor.

18 I'll start off by addressing the points on the
19 jurisdictional issues that were raised. First of all, the
20 *Sackett* case, that case, as you know, involved a compliance
21 under the Clean Water Act. That order was not self-executing.
22 Even so, even so, the Court found that it was a final order.
23 It was ripe for agency review. And the Court noted that what
24 was going on there was a wholly collateral attack upon the
25 rule-making process and upon the substance of the larger rule

1 generally. That's exactly what's happening here. This is a
2 collateral attack on the rule-making process. It's not an
3 appeal in an enforcement proceeding. An enforcement proceeding
4 is an entirely different kind of thing where the issue
5 usually --

6 THE COURT: How is this an appeal under the
7 rule-making process when the rule to which you object has
8 already been promulgated?

9 MR. WARDLOW: Yes, Your Honor. The rule has been
10 promulgated but it was improperly promulgated because it didn't
11 go through the notice in common procedure. And because the
12 rule is *ultra vires* and arbitrary and capricious, it's a final
13 agency action that this Court can review now and, therefore,
14 our attack is collateral. It's not just an enforcement
15 proceeding.

16 Appeal: That would be something different because an
17 enforcement proceeding, of course, focuses mostly on whether or
18 not there has been compliance, not other issues --

19 THE COURT: But if you were appealing or attacking any
20 rule or regulation promulgated by the Department of Education,
21 is your first recourse in the district court?

22 MR. WARDLOW: When you're attacking a rule for its
23 substance and because it must be set aside under the
24 Administrative Procedure Act, Section 706 -- 704 and 706, then
25 district court is your recourse. There is no other avenue for

1 review available here because there is immediate harm and
2 there's no -- Highland should not be forced --

3 THE COURT: Won't you have recourse in the court of
4 appeals if the Department of Education institutes an action
5 against you?

6 MR. WARDLOW: There will be recourse in the court of
7 appeals after the enforcement action concludes. And funding
8 can be cut off prior to that time, 30 days' notice to Congress;
9 so there would be interim harm. And also there's interim harm
10 similar --

11 THE COURT: Not in every instance. And won't you have
12 a recourse here if I find I don't have jurisdiction over your
13 case in this court but I do have jurisdiction over Jane Doe's
14 case? So you would have recourse in this court as a defendant
15 as opposed to a plaintiff, but you would have recourse
16 nonetheless. The same arguments that you raise as a plaintiff
17 you could raise as a defendant. Isn't that right?

18 MR. WARDLOW: But not the spending clause arguments
19 wouldn't necessarily be the same. The arguments would be
20 somewhat different.

21 THE COURT: But the essence of the argument would be
22 the same. You could still argue as a defendant that there's a
23 violation of the spending clause in the event that your funds
24 are cut off, couldn't you?

25 MR. WARDLOW: Yes, we could argue that and we would

1 argue that. And I think either way --

2 THE COURT: There's nothing about the rules of
3 procedure that would preclude you from making any arguments as
4 a defendant that you are making as a plaintiff in this case; is
5 that right?

6 MR. WARDLOW: Right. But there is -- we shouldn't be
7 forced to wait for the eventuality of what happened here as an
8 intervention by a third-party plaintiff.

9 THE COURT: But my point is the third-party plaintiff
10 has intervened. So everybody's in court who needs to be in
11 court, and you can make whatever arguments under -- as a matter
12 of course under Rule 8 that you wish to make. Isn't that true?

13 MR. WARDLOW: Yes, we can make any arguments we want
14 to make because they have done that. But our APA claim should
15 not be -- the Court still has jurisdiction over that separately
16 from Doe intervening because there is no adequate remedy for
17 relief when you consider the interim harm to the school
18 district consisting of disruption in the planning and budgeting
19 process and putting it to the choice of having either to change
20 its policies or --

21 THE COURT: If the Department of Education commenced
22 an action to terminate the financial support it provides, you
23 still have an opportunity to challenge that action before the
24 administrative agency, don't you?

25 MR. WARDLOW: Right. But the administrative agency

1 wouldn't be considering constitutional questions. The
2 administrative agency would be considering compliance. It
3 would be a different kind of thing.

4 THE COURT: That's true, but you would still have the
5 opportunity to advocate against them terminating your funds.
6 And if you're successful, the funds would not be terminated.
7 Is that right?

8 MR. WARDLOW: That is correct, but the fund
9 termination could happen before we have a complete judicial
10 review, and there would be the interim harm to the budget and
11 planning process. I also point to the Sixth Circuit case
12 Franklin Federal Savings Bank vs. Office of Thrift Supervision.
13 That involved a Thrift bulletin put out by OTS where they
14 issued new capital requirements for certain financial
15 institutions. And they stated in that case that:

16 "Once the agency publicly articulates an unequivocal
17 decision and expects regulated entities to alter their
18 primary conduct to conform to that position, the
19 agency has voluntarily relinquished the benefit of
20 postponed judicial review."

21 That's exactly what's going on here. They have waived
22 the benefit of postponed judicial review, that is, judicial
23 review after the enforcement action, by putting forward an
24 unequivocal decision and a final agency action in the form of a
25 guidance letter.

1 And then to distinguish *Thunder Basin*, that decision
2 relied in large part on the fact that under the Mine Act, there
3 was no other avenue for judicial review available apart from
4 the specific ones that the act allow. Here we have 20 U.S.C.
5 1683 which allows specifically for other avenues for review,
6 and also Cannon vs. University of Chicago in which the court
7 held there was an implied right of action for -- cause of
8 action for damages.

9 Now, turning to the central arguments in the case. Our
10 case rests on Title IX's use of the word sex. Sex may be the
11 sum of factors, as counsel stated, but it is determined based
12 on reproductive role. And that is immutable. It's always
13 immutable. So whatever sex is, it cannot include gender
14 identity because gender identity is fluid and it's subjective.
15 That is something that cannot include. Now, sex reassignment
16 surgery, that doesn't change one's sex. The new, if you will,
17 genitalia has no reproductive capacity whatsoever. It's just
18 cosmetics, if you will.

19 THE COURT: Maybe that's consistent with your earlier
20 argument because your earlier argument for the sex reassigned
21 individual was that you would look at that person's chromosome
22 pattern or what sex the person was assigned at birth to
23 determine that person's sex.

24 MR. WARDLOW: Yes, Your Honor, that's right. And we
25 would argue that the birth certificate in Ohio is a very good

1 proxy for one's actual sex, and that's what Highland relies on.

2 Now --

3 THE COURT: With the exception of the intersex
4 individual.

5 MR. WARDLOW: Even for intersex --

6 THE COURT: Do you know how an intersex individual is
7 handled in Ohio by way of the birth certificate?

8 MR. WARDLOW: I do know that an intersex individual is
9 given a birth certificate and they are assigned either male or
10 female. The Sixth Circuit's holding in *Smith* regarding
11 sex-stereotyping claims, we don't have sex-stereotyping claims
12 here. What we have here is a school district recognizing
13 actual biological and physical, physiological realities about a
14 student's sex. That's not sex stereotyping.

15 THE COURT: How do I interpret the fact, though,
16 Mr. Wardlow, that the school district provided to Jane Doe a
17 separate bathroom? If the school district in fact thought she
18 was a male, then why didn't they just make her go to the male's
19 bathroom?

20 MR. WARDLOW: Yes, Your Honor. So, in this case, the
21 school has supported Jane Doe every step of the way. They have
22 accommodated her in every way possible. They have required
23 people to use female pronouns with her. But when --

24 THE COURT: Because they recognize her gender
25 dysphoria?

1 MR. WARDLOW: No, because she made the request and
2 because they're trying to be supportive in deferring to Jane
3 Doe's legal guardian.

4 THE COURT: Do they reject her gender dysphoria?

5 MR. WARDLOW: I don't think the school takes a
6 position on her diagnoses.

7 THE COURT: The school has to do -- the school has to
8 look at it one way or the other. They either have to look at
9 and determine that she's a boy or a girl and treat her
10 accordingly. They can't treat her in some third category.

11 MR. WARDLOW: That's right, they can't. So the school
12 would say this is a male student, per the birth certificate,
13 that has gender dysphoria.

14 THE COURT: And they then treat her as female.

15 MR. WARDLOW: She treat her as male.

16 THE COURT: They don't require her to go to the male
17 bathroom. They created a separate bathroom for her. She uses
18 the same bathroom as the faculty. And then when that -- when
19 the faculty lounge is locked, she uses the female restroom. So
20 why can't Jane Doe argue estoppel here, that you have treated
21 her thus far as a female once she advised you of gender
22 dysphoria, but now they're trying to flip the switch and treat
23 her once again as male?

24 MR. WARDLOW: Yes, Your Honor. The school has treated
25 her according to her requests up until the point at which her

1 requests contradict other students' rights, specifically their
2 constitutional privacy rights, up until the point where the
3 school's policy interest in promoting student safety and
4 privacy are implicated. At that point, the school said no
5 further. They treat Jane Doe as if -- according to her
6 request, until that point, until the school has a separate duty
7 and important interest to protect the constitutional rights of
8 other students. And that's the difference there.

9 THE COURT: Actually, they didn't treat her per her
10 request because she requested certain things that the school
11 district did not do. But I'm really trying to figure out how
12 the school is handling this. I know that objectively they have
13 allowed her to use a different restroom. But it's almost like
14 a third restroom, not the boys' room or the girls' restroom,
15 even though on occasion they've allowed her to use the girls'
16 restroom. They've not directed her since she was diagnosed
17 with gender dysphoria -- they haven't required her to use the
18 male restroom, have they?

19 MR. WARDLOW: She's allowed to use the single-user
20 restroom that is near her classroom that's available. That has
21 been made available during school hours. That is a reasonable
22 accommodation. When you're talking about access to facilities,
23 you're talking about other students' rights. That's a
24 reasonable accommodation that the school offered in order to
25 protect other students' rights and protect and to afford some

1 accommodation to Jane Doe and her request.

2 THE COURT: I understand. And that's a good answer to
3 one part of my question. But the other part of my question
4 that maybe was lost in the verbiage was whether since the
5 school district has been aware of her gender dysphoria, they
6 haven't required her to use a male restroom, have they?

7 MR. WARDLOW: Well, the school has required outside of
8 the public accommodation -- I'm sorry, outside the
9 accommodation of the single-user restroom, that Doe use the
10 restroom that matches her biological sex, her birth certificate
11 sex, that is, male. There may have been incidents where Jane
12 Doe walked into the female restroom. But as far as we're
13 aware, the record doesn't indicate that that --

14 THE COURT: And that's really what my question is
15 getting to. It was kind of a yes or no question, and I don't
16 know that I understand your answer. So the third time is a
17 charm.

18 Did the school district, since they learned of Jane's
19 gender dysphoria, require her to use a male restroom?

20 MR. WARDLOW: Yes.

21 THE COURT: All right. Please wrap up.

22 MR. WARDLOW: Just finally, so there's no sex
23 stereotyping. Mr. Orr's comments about male genitalia are very
24 revealing. What the other side is trying to do here is
25 eradicate all differences between the sexes and basically say

1 there is no difference between male and female genitalia or you
2 can't label it as such. That shows that what's going on here
3 is a reinterpretation of Title IX that would eradicate the sex
4 differences that are expressly recognized in Title IX in its
5 implementing regulations and by the U.S. Supreme Court in cases
6 like U.S. vs. Virginia and other cases like Doe vs. Luzerne
7 County. So there is a Fourteenth Amendment privacy right to
8 bodily privacy, to shield one's naked or partially naked body
9 from members of the opposite sex. That is not disputed.

10 THE COURT: But what I still have no clarity on is
11 what facts do you have to support this argument made on behalf
12 of other students that they would be exposed to Jane Doe's eyes
13 or Jane Doe's penis in the first place.

14 MR. WARDLOW: This goes beyond just Jane Doe because
15 when you're looking at likelihood of success --

16 THE COURT: Let's start with Jane and then work out.

17 MR. WARDLOW: Starting with Jane, there is a right for
18 a biological -- for any person to be shielded from view from
19 members of the opposite sex. Also the right to privacy starts
20 at the door to the facility. I'd point to the Northern
21 District of Ohio case of *Kohler* for that proposition. And if
22 you don't accept that proposition, that the right to privacy
23 starts at the door, then it collapses the right to privacy
24 entirely. That's why we have historically separated males and
25 females in restrooms is because of the nature of sex and

1 because it has to do with traits that stem from human
2 reproduction, and that is the biological reality of things.
3 They cannot deny biological reality.

4 In noticing biological reality and recognizing it is not
5 sex stereotyping. It's just recognizing biological reality
6 that there are males and females and that there are differences
7 between the sexes and that's entirely lawful under the
8 Constitution, under Title IX. And their interpretation of
9 Title IX would turn the statute upside down.

10 THE COURT: I'm not so sure of that, but I suppose
11 that both sides can make the same argument. And I certainly
12 won't castigate you for making that argument on behalf of your
13 side, because if Jane Doe sees herself and perceives herself
14 and regards herself as female, she acts female, she looks
15 female -- have you seen pictures of Jane Doe?

16 MR. WARDLOW: Yes, Your Honor.

17 THE COURT: She looks female, or at least my view of
18 females.

19 If Title IX was enacted to protect females, as you
20 claim, then this is maybe one of the females that they were to
21 protect as well. So it will be an interesting process
22 resolving this rather complex but fascinating legal conundrum.
23 But with the aid of all of your briefing and your arguments, I
24 think that the Court will be able to do just that.

25 Thank you very much, Mr. Wardlow.

1 MR. WARDLOW: Thank you, Your Honor.

2 THE COURT: And thank you, Mr. Amdur and Mr. Orr, for
3 your arguments clarifying certain issues that the Court had,
4 and addressing the questions. And of course you too,
5 Mr. Wardlow.

6 The Court will issue an order certainly within the next
7 week, hopefully as soon as possible, though, because I
8 understand the exigency of the circumstance and the need for
9 both sides to gain some resolution of this issue.

10 So again, I appreciate it. Further briefing will not be
11 necessary. I don't think that any of the parties cited to any
12 additional authority that had not been previously cited in the
13 briefs. So I'm entering a directive that supplemental
14 authority will also not be necessary.

15 (Proceedings concluded at 3:53 p.m.)

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans
Shawna J. Evans, RMR
Official Federal Court Reporter

September 26, 2016

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