

No. 16A52

In the
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Applicant,

v.

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

Respondent.

**RESPONSE TO APPLICATION TO
STAY PRELIMINARY INJUNCTION AND
RECALL AND STAY MANDATE PENDING A PETITION FOR CERTIORARI**

**Directed To The Honorable John G. Roberts, Jr.
Chief Justice Of The Supreme Court Of The United States And Circuit
Justice For The United States Court Of Appeals For The Fourth Circuit**

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

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

INTRODUCTION

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

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

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

Moreover, the Board's anticipated petition for certiorari has little prospect of being granted. This Court does not usually intervene without waiting for a final judgment¹ or a conflict among the Courts of Appeals. Even if this Court were to overlook those procedural obstacles, the Board's request for this Court to grant certiorari to reconsider *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), is unlikely to garner the support of

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

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

Finally, if the Court does grant certiorari, it is not likely to reverse the Fourth Circuit’s decision. The Fourth Circuit correctly determined that the term “sex” in Title IX and its implementing regulations encompasses all of the “morphological, physiological, and behavioral” components of an individual’s sex. Stay App’x B-22.² That conclusion is consistent with the dictionary definition of the term and with this Court’s landmark decisions in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). When a school singles out a transgender student and declares that he is so inherently gender non-conforming that he cannot use the common restrooms the school has established for everyone else, that student has unquestionably been “excluded from participation in” and “denied the benefits of” an “education program or activity” on the basis of sex. 20 U.S.C. § 1681(a).

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

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

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

STATEMENT

A. Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

With the permission of school administrators, G. used the boys' restrooms at school for seven weeks without incident. Stay App'x H-4.⁴ After some parents complained, however, the Board adopted a new policy that singles out transgender students for different treatment than all other students. Stay App'x L-2.⁵ The policy states that restrooms will be restricted to students based on their "biological gender" and that students with "gender identity issues" will be provided an "alternative appropriate private facility." *Id.*⁶

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

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

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

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

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

The new policy had no effect on other students because, for non-transgender students, assigning restrooms based on sex assigned at birth or gender identity is a distinction without a difference. The one and only result of the policy was that G. could no longer use the same restrooms as other boys and was relegated to single-stall, unisex restrooms that no other student is required to use. The separate restrooms physically and symbolically mark G. as "different," isolate G. from his peers, and brand him as unfit to share the same restrooms as other students. Stay App'x. H-5-6.⁷

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

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

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

B. Proceedings Below.

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

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

One of Title IX's implementing regulations authorizes schools to provide separate restrooms for boys and girls, but does not specifically address which restrooms transgender boys and transgender girls should use. The regulation states: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Department of Education issued an opinion letter clarifying that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." Stay App'x J-2.⁸ The opinion letter was consistent with the position the Department had previously taken in multiple enforcement actions since 2013. *Id.* It was also consistent with previous guidance the Department had issued with respect to the treatment of transgender students in sex-segregated programming. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

manifested as maleness or femaleness.” Stay App’x B-22.¹³ Those dictionary definitions indicate “that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive.” Stay App’x B-22-23. The dictionary definition of the term sex therefore “sheds little light on how exactly to determine the ‘character of being either male or female’” where the morphological, physiological, and behavioral indicators of sex “diverge.” Stay App’x B-23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

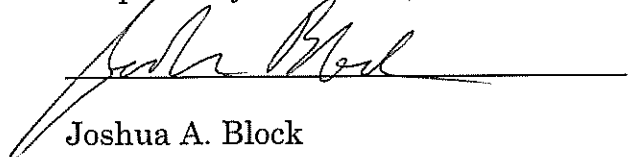
Moreover, the Board is in no position to argue that the Department's interpretation of the regulation resulted in "unfair surprise." Stay Application 25. The Board was well aware of the Department's position at the time it passed the new policy. Assertions of unfair surprise do not relieve parties of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

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

CONCLUSION

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

Respectfully submitted,



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Dated: July 26, 2016

APPENDIX A



COMMONWEALTH of VIRGINIA

Department of Motor Vehicles
2300 West Broad Street

Post Office Box 27412
Richmond, VA 23269-0001

Richard D. Holcomb
Commissioner

June 5, 2015

Dear _____

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

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

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

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

Sincerely,

A handwritten signature in cursive script that reads "R. Smalls".

R. Smalls
Medical Evaluator Senior
Medical Review Services

APPENDIX B

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

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

CORRECTED EXPERT DECLARATION OF RANDI ETTNER, Ph.D

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

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

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

GENDER IDENTITY AND GENDER DYSPHORIA

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

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

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

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

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

- A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by at least two of the following:
 - 1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated sex characteristics).
 - 2. A strong desire to be rid of one's primary/and or secondary sex characteristics because of a marked incongruence with one's experienced/ expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
 - 3. A strong desire for the primary and /or secondary sex characteristics of the other gender.
 - 4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
 - 5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
 - 6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).
- B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ASSESSMENT OF G.G.

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

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

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

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

Executed on June 2, 2015.

By: [ORIGINAL SIGNATURE UNDER SEAL]

Randi Ettner Ph.D.

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POSITIONS HELD

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

EDUCATION

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

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

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

1972 Moray College of Education
Edinburgh, Scotland
International Education Program

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

CLINICAL AND PROFESSIONAL EXPERIENCE

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

LECTURES AND HOSPITAL GRAND ROUNDS PRESENTATIONS

Gender reassignment surgery- Midwestern Association of Plastic Surgeons, 2015

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

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

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

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

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

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

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PROFESSIONAL AFFILIATIONS

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

AWARDS AND HONORS

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

LICENSE

Clinical Psychologist, State of Illinois, 1980

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