IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

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STATE OF TEXAS, *et al.*,

Plaintiffs,

CIVIL ACTION NO.
7:16-cv-00054-O

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants;

PUBLIC ADVOCATE OF NEW YORK CITY,
Letitia James,

Amicus Curiae.

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AMICUS CURIAE BRIEF OF THE PUBIC ADVOCATE FOR THE CITY OF NEW LETITIA JAMES IN OPPOSITION OF STATE-PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

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Counsel for Plaintiffs take no position with respect to the filing of this brief of amicus curiae, so long as it is done by the July 27, 2016 deadline and in accordance with all applicable Rules. Counsel for Defendants take no position with respect to the filing of this brief of amici curiae.[1]

INTEREST OF LETITIA JAMES, THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK

Letitia James is the duly elected Public Advocate for the City of New York. As Public Advocate, James is a citywide elected official, the immediate successor to the Mayor, and an ex-officio member of the New York City Council. New York City Charter §§ 24, 10, 24(e). She is charged with overseeing City agency operations, including those of the Department of Education. *Id.* at § 24. The Public Advocate is responsible for identifying systemic problems, recommending solutions, and publishing reports concerning her areas of inquiry. She has the power to introduce legislation and hold oversight hearings on legislative matters. *Id*. The Public Advocate has a long record of advocating on behalf of policies that protect vulnerable children from bullying and violence.

The New York City Department of Education (NYC DOE) is the largest school district in the nation. In 2014, NYC DOE introduced guidance that directed schools to permit children to use bathrooms and changing facilities consistent with their gender expression. New York City's experience in allowing children to use bathroom and changing facilities consistent with their gender expression has been overwhelmingly positive.

[1] Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or her counsel made a monetary contribution to its preparation or submission.

A nationwide preliminary injunction will have dire consequences for the transgender and gender nonconforming youth in New York City and beyond. The Public Advocate has a significant interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of sex discrimination. The State-Plaintiffs' request threatens that objective.

In New York City, as in municipalities across the country, transgender and gender nonconforming students face greater risk for discrimination, harassment, bullying, sexual assault, and other forms of violence every day. Without city, state, and nationwide policy protecting the basic rights of our transgender and gender nonconforming children, vulnerable youth pay the price. These children are subjected to daily indignities and risk of violence without adequate protection or recourse.

Fortunately, New York has made strides in the right direction by issuing guidelines to better address the needs of transgender and gender nonconforming students. But these strides have been influenced by the repeated iterations of the Office of Civil Rights (OCR) that Title IX does protect transgender students. Without this guidance and the OCR's ability to continue enforcing Title IX accordingly, New Yorkers—and transgender students across our nation—will be at risk once again. A broad injunction could undermine the hard-won rights of New York City schoolchildren.

ARGUMENT

The State-Plaintiffs ask that this Court permit the continued discrimination against vulnerable transgender and gender nonconforming youth across our nation. Their plea is rife with misunderstanding, and several Plaintiffs before this Court reside in jurisdictions with binding adverse rulings on the issues at hand. Granting the preliminary injunction will harm transgender and gender nonconforming children who face an increased risk of violence, sexual assault, and bullying. Ensuring that these children can use the bathroom and changing facilities consistent with their gender is an important step towards building a school environment that is safe and healthy for all children.

The "four prerequisites for the extraordinary relief of preliminary injunction" are: "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572-73 (5th Cir. 1974). The moving party has the burden of establishing these four prerequisites before the Court may issue a preliminary injunction. *Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986).

In considering State-Plaintiffs' application, "the court must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion." *Canal Authority*, 489 F.2d at 573; *see also Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (noting "a preliminary injunction is an 'extraordinary remedy' that should not be granted unless its proponent clearly shows" the four prerequisites). Only injuries "that cannot be redressed by the application of a judicial remedy after a hearing on the merits can properly justify a preliminary injunction." *Canal Authority*, 489

F.2d at 573. The Supreme Court has also instructed courts to "pay particular regard" to public interest considerations. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

The preliminary injunction that state-plaintiffs seek should not be granted because: (1) the balance of harms weigh strongly against placing our transgender and gender nonconforming students in grave risk; (2) any loss in funding due to State-Plaintiffs' refusal to comply with Title IX does not constitute irreparable harm; and (3) State-Plaintiffs' plea to continue discriminating against children based on "biological sex" will not prevail.

I. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH STRONGLY AGAINST THE PRELIMINARY INJUNCTION.

State-Plaintiffs bear the burden of proving both that "the threatened harm to [their interests] will outweigh any potential injury the injunction may cause the opposing party" and that "the injunction, if issued, will not be adverse to public interest." *Star Satellite*, 779 F.2d at 1079. These two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, the harm to the federal government and to the public interest caused by the proposed preliminary injunction far exceeds the injury claimed by State-Plaintiffs.

A. Supportive Transgender Policies, Such As The Policies Adopted By The New York City Department Of Education, Improve Lives.

Two years ago, the New York City Department of Education (NYC DOE) issued its first set of transgender student guidelines. NYC DEPARTMENT OF EDUCATION, Transgender Student Guidelines, http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm (last visited July 26, 2016). The NYC DOE Guidelines address privacy, names and pronouns, sports, and restroom and locker room accessibility. Under restroom and locker room accessibility, the NYC DOE Guidelines provide a clear, inclusive, and nondiscriminatory solution:

> The DOE aims to support transgender students while also ensuring the safety and comfort of all students. The use of restrooms and locker rooms by transgender students requires schools to consider numerous factors, including, but not limited

> to: the transgender student's preference; protecting student privacy; maximizing social integration of the transgender student; minimizing stigmatization of the student; ensuring equal opportunity to participate; the student's age; and protecting the safety of the students involved. A transgender student who expresses a need or desire for increased privacy should be provided with reasonable alternative arrangements. Reasonable alternative arrangements may include the use of a private area, or a separate changing schedule, or use of a single stall restroom. Any alternative arrangement should be provided in a way that protects the student's ability to keep his or her transgender status confidential. A transgender student should not be required to use a locker room or restroom that conflicts with the student's gender identity.

Id. Although New York City is responsible for the largest school district in the country and educates a diverse population, the NYC DOE is successfully implementing its Guidelines in schools across New York City without "seismic changes" to operations. *Cf.* ECF No. 1 at ¶ 38; ECF No. 6 at 49 (amending "seismic" to "significant"). And despite a tumultuous history of harassment of transgender and gender non-conforming children in New York City schools, students, parents, and teachers from varying cultural backgrounds, religious beliefs, native languages, and income levels are now learning about what it means to be transgender and how to treat transgender individuals with dignity.

Furthermore, transgender students utilize the NYC DOE Guidelines to advocate for themselves in the areas of harassment, privacy, and segregation, among others. As a result, the lives of transgender students in New York City are dramatically improving each day. Meanwhile, the NYC DOE has not needed to reconfigure its intimate facilities, nor has it experienced decreased safety for cisgender students. *Cf.* ECF No. 11 at 7-8 (claiming that "mandates would force the district to sanction unsafe spaces" and "reconfiguring all of its intimate facilities into 'single user' facilities is the only possible way to safely provide both sexes with simultaneous access to intimate facilities"). Notably, similar policies have been successfully implemented by school districts nationwide. Many of these success stories are referenced in the *Examples of Policies* document that accompanied the OCR's 2016 Guidance.

B. Without The NYC DOE Guidelines, Transgender Students In New York City Schools Suffered.

At the heart of this case are the transgender students who face discrimination and violence in our nation's schools each and every day. As the NYC DOE Guidelines were going into effect, two of New York City's own transgender students spoke to the City Council about their experiences in New York City schools to demonstrate the need for clear policy.

Rocky Sinobria[2] knew his gender identity before he ever stepped foot in a classroom. Hence, Rocky entered kindergarten with a gender identity different from his sex assigned at birth. While Rocky did not complain that his young classmates treated him any differently, the staff did not understand "why there was a [sic] girl dressing up as a boy and wanting to be referred to [sic] as a boy." In first grade, Rocky was placed into a developmental class for two years because he "had tomboy issues." When he was bullied, Rocky's elementary-school principal told him that the best way to resolve the situation was "to grow [his] hair out and try to ignore [his] feelings of being a boy." The faculty was aware of the bullying, but "the teachers would try to ignore it." Rocky's peers were permitted to harass him either with impunity or a "mere slap on the wrist." Rocky "felt threatened by their presence…in the hallways or at class or at lunch" and "was always in fear." When Rocky was not living in fear, he was excluded altogether. Rocky's attire for graduation was such a big issue for the faculty that he ended up not attending. He also did not attend prom because he "wasn't allowed" to present himself as a boy.

Luckily, Rocky's school experience dramatically improved when he moved on to a less discriminatory high school. His high school permitted him to use the male bathroom and the male locker room. Rocky could finally "just go [to school] as a boy." This time, when he was

[2] NEW YORK CITY COMMITTEE ON EDUCATION, *Oversight Hearing on the Treatment of LGBT Students, Family, and Staff in the NYC Public School System*, Hearing Transcript at 21-24 (Feb. 25, 2014), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1662181&GUID=54A1D095-F04B-400D-B65E-F303BF107A2F&Options=&Search=.

bullied for being transgender, Rocky's high school suspended the perpetrator. Rocky described the new environment as "comfortable" and he felt "so much stress off [his] shoulders."

Eduardo Flores[3] was not as lucky. While in high school, Eduardo was harassed and received death threats from his peers because of his "sexuality and gender expression." He skipped school, his grades suffered, and he became depressed. His school counselor responded by telling Eduardo he "had to come to school no matter what." Eduardo did not understand how he could "go to a place where every day they made fun of [him] and where even at one point, [he] received a written death threat—and the teachers did nothing." When a lack of viable alternative schools made it difficult for Eduardo to transfer, he decided to leave school altogether.

As Rocky and Eduardo demonstrate, school policies that proactively combat discrimination based on sex stereotypes can have a substantial impact on the safety of our transgender students.[4] The absence of such policies, however, is a direct contributor to transgender harassment and assault. Kosciw, at xvi-xviii (55.5% of LGBT students reported personally experiencing LGBT-related discriminatory policies or practices at school, 74.1% reported being harassed, and 61.6% reported that school staff did nothing after being notified). These unsafe, hostile environments lead to increased absences, lower grade point averages, higher depression rates, and lower self-esteem among LGBTQ students. *Id.* at xviii. They also contribute to higher suicide rates, homelessness rates, and dropout rates among transgender and

[3] NEW YORK CITY COMMITTEE ON EDUCATION, *Oversight Hearing on the Treatment of LGBT Students, Family, and Staff in the NYC Public School System*, Hearing Testimony at 25-26 (Feb. 25, 2014), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1662181&GUID=54A1D095-F04B-400D-B65E-F303BF107A2F&Options=&Search=.

[4] In the words of one student: "I am so glad to have teachers who are cool with students being LGBT. If it weren't for them, I know I would've dropped out of high school." Joseph G. Kosciw et al., *The 2013 National Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, at 72 (2014), http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf. The data shows that supportive school personnel and policies lead to increased safety, higher achievement and aspirations, more frequent and effective school intervention in harassment incidents, and fewer anti-LGBT remarks by students. *Id.* at 72-79.

gender nonconforming kids. These students are also at a greater risk of becoming victims of violent crime, murder, and harassment.

C. The OCR's guidance has played an indispensable role in New York's advancement towards less discriminatory school environments.

In New York, for example, of the 24,478 reported incidents of harassment and discrimination during the 2012-2013 school year, 4,756—or 19%—were incidents related to a student's perceived or actual sex, gender, or sexual orientation. NEW YORK CIVIL LIBERTIES UNION, DIGNITY FOR ALL?: DISCRIMINATION AGAINST TRANSGENDER AND GENDER NONCONFORMING STUDENTS IN NEW YORK STATE 11 (June 2015). One-third of schools failed to report harassment and discrimination data. *Id.* at 12. No other singular category of harassment or discrimination reached such a high percentage. *Id.* at 11.

In 2015, the New York State Education Department (NYSED) issued its own guidance on supportive transgender and gender nonconforming school policy. NEW YORK STATE EDUCATION DEPARTMENT, *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students* (July 2015), http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf. The NYSED Guidance recognizes that "gender-based policies, rules, and practices can have the effect of marginalizing, stigmatizing, stereotyping and excluding students, whether they are transgender or GNC or not." *Id.* at 9. The NYSED Guidance also acknowledges that "some environments may feel safe and inclusive, and other less so, challenging a person's ability to live consistently with one gender identity in all aspects of life." *Id.* at 5.

The NYSED issued the Guidance in part to "to help districts comply with local, state, and federal laws concerning bullying, harassment, discrimination, and student privacy, and meet schools' obligation to provide all students with a safe and inclusive environment." Press

Release, NEW YORK STATE EDUCATION DEPARTMENT, *Transgender and Gender Nonconforming Students Guidance Document Now Available for School Districts* (July 20, 2015), http://www.nysed.gov/Press/Transgender-and-Gender-Nonconforming-Students-Guidance-Document. Namely, the NYSED Guidance relied upon the OCR's December 2014 letter, which recognized "that Title IX protects transgender students against discrimination based on their gender identity." NYSED Guidance at 1 (citing U.S. DEP'T OF EDUC., Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* at 25 (Dec. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf. On the topic of restrooms, NYSED quoted the United States's Statement of Interest in *Grimm v. Gloucester County School Board* to explain that denying restroom access to transgender students is illegal:

> Under Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex. As such, *prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX*. There is a public interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of sex discrimination.

Id. at 9-10 (quoting Statement of Interest of the United States at 1, *Grimm v. Gloucester County School Board*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (Case 4:15-cv-00054-RGD-TEM) https://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/gloucestersoi.pdf).

Accordingly, the NYSED Guidance prohibits schools from forcing single, unisex bathrooms or private changing spaces upon students, or presenting them as the only option. *Id.* at 10. It does not proscribe a one-size-fits-all resolution. Instead, it endorses examples of schools responding appropriately to transgender students and found solutions without incident:

> In one elementary school, a transgender second-grader socially transitioned from female to male. After consultation with the student's family and in accordance with the student's wishes, the principal informed the staff: In order to foster an

> inclusive and supportive learning environment, the student will begin using male restrooms, in accordance with the student's male gender identity and expression.
>
> In one high school, a transgender female student was given access to the female changing facility, but the student was uncomfortable using the female changing facility with other female students because there were no private changing areas within the facility. The principal examined the changing facility and determined that curtains could easily be put up along one side of a row of benches near the group lockers, providing private changing areas for any students who wished to use them. After the school put up the curtains, the student was comfortable using the changing facility.

Id. Although the NYSED cites to these and many other examples of transgender-supportive solutions, none resulted in unsafe spaces, "seismic" changes, or physical alteration of facilities.

While the NYSED Guidance is expected to reduce the almost 5,000 annual sex discrimination and harassment incidents across New York State, the proposed preliminary injunction places these students at risk once again. An injunction may render all of the OCR's guidance documents on this topic effectively inoperable, and it will strip the OCR of its ability to fully enforce Titles VII and IX. As a result, students, parents, teachers, and administrators will lose the ability to effectively advocate for themselves or the transgender students around them. Moreover, an injunction will impede the effectiveness of both the NYSED Guidance and NYC DOE Guidance by stripping students of their ability to seek additional help from the OCR. It may also render the NYSED Guidance and others like it unenforceable, placing transgender students at the mercy of school administrators once again.

D. State-Plaintiffs Have Shown No Possible Irreparable Injury That Can Outweigh These Serious Public Safety Issues.

Rather than explore similar simple solutions, State-Plaintiffs claim they will suffer irreparable harm if they implement the OCR Guidance for even one semester. But by adopting these simple, easily-reversible measures, State-Plaintiffs can easily avoid harm—and have an obligation to do so before rushing to court. *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676,

679 (7th Cir. 2012) (harms are not irreparable if readily avoidable or essentially self-inflicted if not avoided); *Blanco v. Burton*, No. 06-3813, 2006 U.S. Dist. LEXIS 56533, at *67-68 (E.D. La. Aug. 14, 2006) ("It is incumbent on one who fears irreparable harm to take such reasonable actions to avoid such harm before marching into Court."); *Safari Club Int'l v. Salazar*, 852 F. Supp. 2d 102, 123 (D.D.C. 2012) (no irreparable harm when plaintiffs could avoid harm).

Nonetheless, "without question, the irreparable harm element must be satisfied by independent proof, or no injunction may issue." *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989). "Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough." *Id.* (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Irreparable injuries "must be actual and imminent, not speculative or remote." *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 227 (S.D. Tex. 2011); *ADT, LLC v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 694 (N.D. Tex. 2015) (citing *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir.), *cert. denied*, 423 U.S. 930 (1975)) ("An injunction is appropriate only if the anticipated injury is imminent and irreparable."); *see also Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Additionally, under Fifth Circuit precedent, "the general rule is that there can be no irreparable injury where money damages would adequately compensate a plaintiff." *Leslie v. Lloyds of London*, No. 95-20085, 1996 U.S. App. LEXIS 43868, at *4 (5th Cir. May 7, 1996) (denying injunction even though movant "will suffer the immediate loss of money" because "monetary loss alone does not constitute irreparable harm sufficient to justify the issuance of a preliminary injunction"); *see also Anderson v. Jackson*, 556 F.3d 351, 355 (5th Cir. 2009) (affirming a preliminary injunction

because movant had adequate remedy at law, thus no irreparable harm); *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) ("In short, 'the key word . . . is *irreparable*,' and an 'injury is "irreparable" only if it cannot be undone through monetary remedies.'") (emphasis in original). The loss of federal funding is not irreparable harm. *United States v. Los Angeles*, 595 F.2d 1386, 1391 (9th Cir. 1979).

Applying these stringent standards to this case, State-Plaintiffs' application necessarily fails. None of their alleged harms justify the extraordinary remedy that is a preliminary injunction because they are either merely monetary, or are not actual and imminent. The OCR has maintained a transgender-supportive interpretation of Title IX and its implementing regulations since 2010. *See* ECF No. 11 at 4 (listing the various assertions by the federal government on this topic). Certainly, these are not "new rules" that have "unleashed uncertainty" upon the 2016-2017 school year. *See* ECF No. 11 at 25. For example, if State-Plaintiffs have not lost federal funding for the past six years, a rushed preliminary injunction on that basis is unnecessary. In actuality, this case is akin to *United States v. Los Angeles*, in which the Seventh Circuit rejected the federal-funding argument in a Title VII enforcement action:

> The record failed to demonstrate that LAPD would suffer any irreparable injury in the absence of an injunction. To be sure, the City faced prospective suspension of LEAA funding to the LAPD. As a matter of law, the loss of this funding cannot be deemed irreparable injury in the absence of a more convincing showing than that made by the City here. Congress deliberately imposed an automatic suspension of funding to achieve the purposes of the legislation by creating an additional incentive for compliance with the non-discrimination provisions of the Safe Streets Act. Actions undertaken by the Attorney General, as in this case, or by other administrative agencies charged with the responsibility to enforce the provisions of the Safe Streets Act, the Revenue Sharing Act, and Title VII cannot be enjoined simply because those actions may require recipients of congressional largesse to expend large amounts of time and taxpayers' resources.

595 F.2d at 1391. For these reasons, this Court should elect to protect transgender students rather than to protect State-Plaintiffs from possible threats to their funding, policy, or authority in the future.

E. The OCR Guidance Protects Transgender And Gender Nonconforming Students From Harm; It Does Not Cause Harm To Cis Gendered Students.

To the extent State-Plaintiffs insinuate that supportive transgender policy would "sanction unsafe spaces," that fear is unwarranted. ECF No. 11 at 7. Several states, school districts, and corporations have adopted policies affirming the rights of transgender and gender nonconforming individuals to use the restroom corresponding with their gender identity. At least 17 of the largest school districts operating under such policies have reported zero incidents of harassment or inappropriate behavior related to these changes. Katy Steinmetz, *Everything You Need to Know About the Debate Over Transgender People and Bathrooms*, TIME MAGAZINE (July 28, 2015), http://time.com/3974186/transgender-bathroom-debate/. New York City—responsible for the largest school district in the nation—has also implemented supportive transgender policy peacefully.

Not surprisingly, however, transgender individuals are at a heightened risk of experiencing violence in gender-segregated restrooms. In at least one study, nine percent of transgender individuals surveyed reported "experiencing at least one instance of physical assault in gender-segregated public restrooms." Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 73 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf. Transgender individuals have reported being physically removed from the facility, hit or kicked, physically intimidated or cornered, slapped, and sexually assaulted. *Id.* And as has been well-documented,

the physical attacks of transgender individuals are not limited to the restroom. These horrific facts cannot be cast aside in favor of assuaging the unfounded, speculative fears of others.[5]

II. STATE-PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS BECAUSE TITLES VII AND IX PROHIBIT DISCRIMINATION BASED ON SEX, INCLUDING GENDER IDENTITY, TRANSGENDER STATUS, AND NONCONFORMITY TO SEX STEREOTYPES.

A. Titles VII And IX Protect Transgender And Gender Nonconforming Individuals From Both Sex Stereotyping As Well As Per Se Sex Discrimination.

i. Discriminating against transgender individuals for their failure to comport in a manner consistent with their "biological sex" is sex stereotyping, which is prohibited by Titles VII and IX.

At the heart of this conflict is a fundamental misunderstanding of transgender and gender nonconforming individuals. State-Plaintiffs repeatedly reference an age-old sex stereotype: that sex is determined solely by an individual's "biological sex," assigned at birth in accordance with genitalia.[6] But transgender individuals defy this stereotype, adopting the clothing, names, pronouns, hormones, and the body associated with the "opposite" sex. Put simply, when a trans

[5] In any event, just as customer preferences cannot justify sex discrimination, unfounded prejudices or discomfort of parents or students are not justifications on the basis of sex stereotypes. *See Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) ("[T]he fact that customers prefer [women stewardesses] cannot justify sex discrimination."). In fact, courts have rejected similar claims. *See, e.g.*, *Crosby v. Reynolds*, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting claim that placing transgender person in jail cell with non-transgender person violated clearly established right to privacy).

[6] "Instances in which courts are asked to determine the sex of a transsexual person most often arise in three circumstances: disputes related to the validity of a marriage involving a transsexual, arguments for changing birth certificates to reflect a transsexual's asserted sex, and cases of alleged discrimination. There are essentially two schools of thought implemented by courts in such cases. One school of thought deals with the definition of sex as a matter of pure biology or medicine and treats it as a *question of law*. The other line of thought combines considerations of medicine and biology with the individual's psychological and social identity, treating sex as a *question of fact*… Neither of the major schools of thought advanced in the case law dealing with designating the legal sex of transsexuals fully addresses the complexities and subtleties of sex identity. Both schools, to varying degrees, are thus inadequate… A new, personal-identity-focused analysis is necessary, using much of the evidence gathered in these cases already, in order to more comprehensively address the true complexities of sex identity… Ideally, what is needed in addition to the creation of a new mode for analysis is a fundamental change in attitudes, on the part of the courts, toward transsexuals and sex identity in general… It is the responsibility of the courts to keep pace with evolving notions of sex identity, and even to stay a step or two ahead of them. Instead, they have remained firmly planted in what are becoming ***outmoded assumptions and prejudices***. A new test for analyzing legal sex determinations that forces courts to consider many factors together will be one step in the right direction." Karly A. Grossman, *Transsexuals and the Legal Determination of Sex*, 39 FAM. L.Q. 821, 823-24, 827 (2005) (emphasis added).

female presents herself as a woman in all aspects of her life, requiring that she act as though she is a man is discrimination based on sex.

Moreover, the Supreme Court has flat-out rejected limiting the term "sex" only to "biological sex." It is well-settled that discrimination on the basis of gender stereotypes is also "sex discrimination." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989); *EEOC v. Boh Bros. Constr. Co., L.C.C.*, 731 F.3d 444, 454 (5th Cir. 2013) (citing *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994)) ("[A] plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes."). The most basic prerequisite to any sex stereotyping case is a dichotomy between one's "biological sex" or "sex assigned at birth" and how an individual chooses to present herself. A student's "biological sex," defined by State-Plaintiffs as "the sex noted on their birth certificate" (ECF No. 1 at ¶ 29), is only half of the equation. The "failure to conform to traditional gender stereotypes" associated with that "biological sex" is equally vital to claims of sex stereotyping. Neither rationale is an acceptable defense to sex discrimination.

Applying this principle to transgender and gender non-conforming individuals, there can be no doubt that discriminating against our transgender youth is, by definition, discrimination on the basis of sex. "The very acts that define transgender people as transgender are those that contradict the stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007). Undeniably, there is an innate congruence between discriminating against transgender or gender nonconforming students and discriminating on the basis of sex stereotypes. Such discrimination directly violates the principles set forth by the Supreme Court in *Price Waterhouse*. Consequently, State-Plaintiffs' attempt to restrict the term "sex" in Titles VII and IX will fail.

ii. "Gender" is "sex": State-Plaintiffs improperly rely on semantics to circumvent what is per se sex discrimination under Titles VII and IX.

Despite State-Plaintiffs claims to the contrary, the terms gender and sex have remained linked quite inextricably throughout our history. In the context of Title IX, courts have used the terms "gender" and "sex" interchangeably. *See, e.g.*, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) ("[Title IX] makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender"); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 748 (1979) ("Congress already has created a mechanism for enforcing the mandate found in Title IX against gender-based discrimination."); *Pederson v. La. State Univ.*, 213 F.3d 858, 877 (5th Cir. 2000) ("Title IX proscribes gender discrimination in education programs or other activities receiving federal financial assistance"); *Beal v. Midlothian Indep. Sch. Dist.*, Civil Action No. 3:01-CV-0746-L, 2002 U.S. Dist. LEXIS 8937, at *3 (N.D. Tex. May 21, 2002) ("Title IX proscribes gender based discrimination in education programs or other activities receiving federal financial assistance"); *Lowrey v. Tex. A&M Univ. Sys.*, 11 F. Supp. 2d 895, 912 (S.D. Tex. 1998) ("Title IX prohibits gender discrimination in educational programs"); *Doe v. Waldrop*, NO. A 95 CA 126 SS, 1995 U.S. Dist. LEXIS 21946, at *8 (W.D. Tex. Nov. 28, 1995) ("Title IX prohibits intentional discrimination on the basis of gender in connection with educational programs receiving federal funds").

Similar instances abound across all laws related to sex or gender. *See, e.g.*, *White v. Dall. Indep. Sch. Dist.*, 581 F.2d 556, 559, 559 n.1 (5th Cir. 1978) (discussing a Texas statute that prohibited discrimination "because of…sex," stating that it "prohibits certain acts of gender-based discrimination by public officials or employees, including refusal to hire because of sex and discharge because of sex").

Correspondingly, courts have recognized that whether discrimination is described as on the basis of sex or gender is irrelevant to a determination of "sex discrimination." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."). And a change in sex—or gender—is entitled to equal protection. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008). As one judge aptly analogized, to rule otherwise is akin to ruling for the discrimination of religious converts:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

Id. Similarly, this Court should uphold the OCR's 2016 Guidance as reinforcing Title IX's statutory language.

In fact, State-Plaintiffs' own advocacy for a "biological sex" definition further reinforces the conclusion that prohibiting transgender children from using the bathroom that corresponds to their identity violates the per se discrimination doctrine. Discrimination related to a student's status as transgender would not occur but for that student's "biological sex," as defined by State-Plaintiffs. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (holding that under *Price Waterhouse*, "employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex"). By definition, transgender students achieve their transgender status only when their gender identity does not align with their

"biological sex." For this reason, discriminating against students on the basis of their transgender status will always be per se sex discrimination.

iii. Absent an explicit exemption from these well-settled proscriptions, State-Plaintiffs will necessarily fail.

State-Plaintiffs urge this Court to restrict "sex" as it is used in Titles VII and IX to a narrow view of "biological sex" in order to make the case that § 1686, which is an exception to Title IX's general rule, is equally narrow and permits states to discriminate on the basis of "biological sex" and nothing else in the context of restrooms. But they disregard existing, binding case law prohibiting discrimination based on sex stereotypes, and they misunderstand per se sex discrimination. Without an exception to Title IX's prohibition of both per se sex discrimination and discrimination based on sex stereotypes, State-Plaintiffs' lawsuit will necessarily fail.

Fortunately, nothing in § 1686 prohibits the maintenance of separate living facilities on the basis of conformity with sex stereotypes. *See* 20 U.S.C. § 1686 ("Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."). Likewise, the existing regulation on this topic is equally silent. 34 C.F.R. § 106.33 ("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."). Certainly, schools may maintain separate restrooms for males and females under § 1686, and nothing in the OCR's 2016 Guidance states otherwise. But what § 1686 does not exempt from Title IX's prohibition of sex discrimination is banning members of one sex—whether that sex can be determined by "biological sex" alone or not—from utilizing the restroom that corresponds with that sex. And

given the ambiguity in § 1686 and § 106.33 as to transgender students, the OCR, as the agency tasked with implementing these rules and regulations, is responsible for resolving this disputes.

Accordingly, this Court should not permit State-Plaintiffs to use § 1686 or § 106.33 to shackle transgender students to their "biological sex." Such an outcome is not only contrary to our nation's laws and the precedent that is binding on this Court, but it is also an exceptional intrusion of privacy. It further endangers an already vulnerable class of students and violates their dignity. And it sends the message that our institutions are not willing to protect this minority.

B. Legislative History Will Not Save State-Plaintiffs' Claims.

Much of State-Plaintiffs' claims depend on the assumption that sex discrimination laws were all premised on the understanding that "sex" related only to one's biological sex as male or female. Yet, none of the legislative history cited by State-Plaintiffs supports that assumption. First, none of the legislative history explains what was meant by "sex." Second, the legislative history does not discuss biological sex or the physiological distinctions between females and males. Instead, State-Plaintiffs also cite to dictionaries, unenacted bills, and a carefully-crafted list of secondary sources—all while maintaining that Congress's intent was "unambiguous." ECF No. 11 at 16.

In actuality, State-Plaintiffs' proposed definitions of "sex" and "gender" require that this Court turn back the clock to a time when courts applied "sex discrimination" to nothing more than discrimination against a woman as compared to a man, or vice versa. *See, e.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076. It was a time when judges refused to bar

discrimination against pregnant women,[7] married women,[8] women who had pre-school aged children,[9] or women who had children out of wedlock.[10] It was a time when judges held Title VII did not apply to sexual harassment.[11] A time when courts permitted the payment of higher wages to married men because they were "breadwinners."[12] It was also a time when courts did not see transgender individuals as at all protected by Title VII or Title IX.

But it is a time that is long gone. These early decisions were largely based on a misplaced reliance on legislative history that, as evidenced by State-Plaintiffs' brief, still persists today. But the Supreme Court of the United States has thrown out such notions. Instead, courts now look only to the plain language and give the statutory text its full, actual meaning. As Justice Antonin Scalia aptly observed, "statutory 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." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998). And as the Supreme Court explained in *Price*

[7] *See, e.g., id.* ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification…"); *AT&T Corp. v. Hulteen*, 556 U.S. 701, 701 (2009) (a program that gave less retirement credit for pregnancy than medical leave generally did not violate pre-Pregnancy Discrimination Act Title VII); *Cheatwood v. S. Cent. Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 759 (M.D. Ala. 1969) ("Employer can have a rule against pregnant women being considered for this position…").

[8] *See, e.g., Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 783 (E.D. La. 1967) (noting that "Delta's experience shows that 'single women' are better stewardesses than 'married women' for various reasons *viz.*: better passenger acceptance, change flight schedules easier, less likelihood of pregnancy" and holding that "Delta has a right to employ single females and to refuse to employ married females, and this discretion is in no way limited by the Civil Rights Law from a plain reading").

[9] *See, e.g., Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542, 544 (1971) (declining to apply Title VII to company policy prohibiting that female applicants with preschool-age children would not be considered for certain employment, while similarly-situated male applicants would be, because "a perusal of the record in Congress will reveal that the word 'sex' was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress").

[10] *See, e.g., Grayson v. Wickes Corp.*, 607 F.2d 1194, 1196-97 (7th Cir. 1979) (finding no Title VII violation in part because female-plaintiff did not show that "unmarried male employees who father out-of-wedlock children would be treated differently by the employer").

[11] *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977) ("[T]here is nothing in the Act which could reasonably be construed to have it apply to 'verbal and physical sexual advances' by another employee, even though he be in a supervisory capacity where such complained of acts or conduct had no relationship to the nature of the employment.").

[12] *Jubilee Mfg. Co. and United Steelworkers of America*, 202 N.L.R.B. 272, 279 (1973); *affirmed without opinion*, 504 F.2d 271 (D.C. Cir. 1974) (finding evidence of sex discrimination was inadequate despite proof that employer paid men an incentive because "it felt the 'men' were the 'breadwinners' in the family").

Waterhouse, the Civil Rights Act was a "simple but momentous announcement" that sex discrimination—in all of its forms—is prohibited. 490 U.S. at 239 (holding that "sex discrimination" was not limited to discrimination based on the physiological distinctions between females and males but that it included discrimination based on sex stereotypes as well).

When coupled with a more complete understanding of sex and gender, it is plain that Title VII and Title IX—by their actual statutory text—protect transgender and gender nonconforming individuals from discrimination based on their transgender status.

III. IN ANY EVENT, A NATIONWIDE INJUNCTION WOULD BE OVERBROAD; THE INJUNCTION SHOULD BE LIMITED TO THE PARTIES, LIMITED IN DURATION, AND LIMITED IN SCOPE.

In deference to courts that have upheld the OCR's interpretation of Titles VII and IX, this Court should decline State-Plaintiffs' request to issue a nationwide injunction. Furthermore, 37 States, the District of Columbia, and the U.S. territories are not parties to this action. Many of those States—such as New York—and the school districts within them have comported with the OCR's interpretation. Barring implementation of the OCR's policies in States that do not oppose those policies would constitute an abuse of discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"); *Dep't of Def. v. Meinhold*, 510 U.S. 939, 939 (1993) (staying nationwide injunction insofar as it "grants relief to persons other than" named plaintiff); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (modifying an otherwise-lawful nationwide injunction against the United States because the scope was not necessary to remedy the wrong suffered by the particular plaintiff and no class had been certified).

Moreover, *United States v. Mendoza* and its progeny may prohibit nationwide relief in this case. 464 U.S. 154, 155 (1984) (holding the United States "may not" be collaterally estopped from litigating the same legal issue in more than one court); *see also Califano*, 442 U.S.

at 702 (noting that nationwide injunctions "have a detrimental effect by foreclosing adjudication by a number of different courts and judges"); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (applying *Mendoza* to an "overbroad" nationwide injunction against the government). The Court explained that where the government is involved in litigation, a court should not "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Mendoza*, 464 U.S. at 160. This is because "allowing only one final adjudication would deprive [the Supreme Court] of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *Id.* Such a result is so contrary to our judicial system that it would require the Court "to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari." *Id*; *see also Va. Soc'y*, 263 F.3d at 393 (this result "conflicts with the principle that a federal court of appeals's decision is only binding within its circuit").

Where other circuit courts have already ruled in accordance with the United States's interpretation, these considerations carry more weight. For example, the Fourth Circuit—in which State-Plaintiff West Virginia resides—has upheld and adopted the United States's interpretation. *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (applying the 2016 OCR guidance at issue in this case). The Eleventh Circuit—in which State-Plaintiffs Alabama and Georgia reside—has also adopted this interpretation. *Glenn v. Brumby*, 663 F.3d at 1317 ("discrimination against a transgender individual because of her gender-nonconformity is sex discrimination"). The Ninth Circuit—in which State-Plaintiffs Arizona Department of Education and Heber-Overgaard Unified School District as well as amicus curiae Idaho Governor C.L. "Butch" Otter reside—has recognized that sex stereotyping includes transgender

discrimination. *Latta v. Otter*, 771 F.3d 456, 495 (9th Cir. 2014). The First Circuit—in which State-Plaintiff Maine Governor Paul LePage resides—ruled that discrimination against a transgender woman based on her attire constituted sex discrimination. *Rosa v. West Bank & Trust Co*, 214 F.3d 213, 215-16 (1st Cir. 2000). The Sixth Circuit—in which State-Plaintiffs Tennessee and Kentucky reside—explicitly held that discrimination of a transgender man for his gender nonconformity was sex discrimination. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). The Seventh Circuit—in which State-Plaintiff Wisconsin resides—has also prohibited sex stereotyping. *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998) ("a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"). <u>These parties cannot use this Court to circumvent binding precedent at home.</u>

Accordingly, if this Court elects to issue injunctive relief, this Court should limit any injunction to the particular plaintiffs in this lawsuit that are not subject to binding, contradictory precedent at home. Further, given that the State-Plaintiffs' grievance stems exclusively from the restroom-related portions of OCR's 2016 Guidance, the injunction should be limited to enforcement of those provisions only. At the very minimum, any injunction issued should be expressly limited to Title IX, not Title VII. And considering both the grave adverse impact an injunction would have on our students each year—in New York and across the country—and the unknowns implicated by this case, any injunction issued should be limited in duration. Instead, State-Plaintiffs should be required to renew their application each year as new information develops.

CONCLUSION

State-Plaintiffs have not established a likelihood of success on the merits. They will not suffer irreparable harm if the United States continues to enforce its anti-sex-discrimination policies. Even the alleged harms could not outweigh the harm to others, to the public interest, to non-party States, and to the federal government. These groups can be protected only if this Court denies the application for a nationwide preliminary injunctive.

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New York, New York

Respectfully Submitted,

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