No. 16-4117

In the United States Court of Appeals for the Sixth Circuit

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *ET AL.*,
Defendants-Appellees.

JANE DOE, A MINOR, BY AND THROUGH HER LEGAL GUARDIANS JOYCE AND JOHN DOE,
Intervenor Third-Party Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF THE HIGHLAND LOCAL SCHOOL DISTRICT, *ET AL.*,
Third-Party Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, CIVIL CASE NO. 2:16-CV-524 (JUDGE ALGENON L. MARBLEY)

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-4117 Case Name: Bd. of Educ. v. U.S. Dep't of Educ.

Name of counsel: Lawrence J. Joseph

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makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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I certify that on April 26, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lawrence J. Joseph
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, files this brief with all parties' consent.[1] Founded in 1981, EFELDF has consistently defended federalism and supported autonomy in areas – such as education – of predominantly state and local concern. EFELDF has a longstanding interest in applying Title IX and the Fourteenth Amendment consistent with their anti-discrimination intent, without intruding any further into schools' educational missions. Accordingly, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

An elementary-school student ("Doe") with gender dysphoria seeks to live as a male, but remains biologically female. Spurred on by sub-regulatory guidance documents and non-final agency action by the federal Department of Education ("DOE"), Doe seeks to compel the Board of Education of the Highland Local School District ("Board") to provide access to boys' restrooms under Title IX's statutory prohibition against sex discrimination and the Equal Protection Clause. The District Court granted Doe's motion for a preliminary injunction, and the Board appeals. A

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

divided motions panel denied the Board's appellate motion to stay the preliminary injunction. *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016).

Although the implementing Title IX regulations merely *allow* sex-segregated restrooms – without *requiring* anything, 34 C.F.R. §106.33 ("recipient *may* provide separate toilet, locker room, and shower facilities on the basis of sex") (emphasis added) – and DOE lacks authority to expand Title IX's sex-based protections to include gender-identity issues, a divided Fourth Circuit panel ruled for a similarly situated student in deference to DOE's sub-regulatory guidance, *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), *stayed* 136 S.Ct. 2442 (2016), *vacated* 197 L.Ed.2d 460 (2017), which prompted DOE's tautological strengthening of its sub-regulatory guidance to cite the Fourth Circuit's new decision.

This February, however, the new administration withdrew DOE's guidance, recognizing that prior DOE guidance on this issue lacked "extensive legal analysis" and "any formal public process" and failed to "explain how [DOE's] position [was] consistent with the express language of Title IX." Board Br. at 14 (*quoting* DOE Letter, Ex. A at 2, Doc. 41-2). The new DOE action prompted the Supreme Court to vacate the Fourth Circuit decision. *Gloucester Cnty Sch. Bd. v. G.G.*, 197 L.Ed.2d 460 (2017). Like the District Court (Slip. Op. 24-29, 40), this Court's motions panel relied heavily on the now-vacated *Gloucester County* decision. *Dodds*, 845 F.3d at 221. Indeed, the District Court's decision also relied heavily on the now-withdrawn

DOE guidance. Slip Op. 21-22, 27-29. As in *Gloucester County*, these positions are now untenable, and the preliminary injunction should be vacated.

Constitutional Background

The Equal Protection Clause prohibits state and local government from "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, §1, cl. 4. Courts evaluate equal-protection injuries under three standards: strict scrutiny for classifications based on factors like race or national origin, intermediate scrutiny for classifications based on sex, and rational basis for everything else. *See U.S. v. Virginia*, 518 U.S. 515, 567-68 (1996) (Scalia, J., dissenting) (collecting cases).

Statutory Background

Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, except that Title IX prohibits sex-based discrimination in federally funded education. *Compare* 42 U.S.C. §2000d *with* 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.*, action taken *because* of sex, not merely *in spite of* sex). *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001). Similarly, like Title VI, Title IX authorizes funding agencies to effectuate the statutory prohibition via rules, regulations, and orders of general applicability, which do not take effect until approved by the President, 20 U.S.C. §1682, which authority

has been delegated to Attorney General. 45 Fed. Reg. 72,995 (1980).[2]

Regulatory Background

The federal Department of Health, Education & Welfare ("HEW") issued the first Title IX regulations in 1975. *See* 40 Fed. Reg. 24,128 (1975). When it was formed from HEW, DOE copied HEW's regulations, with DOE substituted for HEW as needed. 45 Fed. Reg. 30,802 (1980). The rest of HEW became the federal Department of Health & Human Services ("HHS"). Both agencies retain their own rules for the recipients of their funding, as do all federal funding agencies, such as the U.S. Department of Agriculture ("USDA"). 7 C.F.R. pt. 15a. These rules all allow recipients to maintain sex-segregated restrooms: "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." *See* 45 C.F.R. §86.33 (HHS); 34 C.F.R. §106.33 (DOE); 7 C.F.R. §15a.33 (USDA).

Factual Background

EFELDF adopts the facts as stated in the Board's brief (at 4-12). In summary,

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[2] *See also* 46 Fed. Reg. 29,704 (1981) (partial sub-delegation by Attorney General); 28 C.F.R. §0.51(a) ("[t]his delegation does not include the function, vested in the Attorney General by sections 1-101 and 1-102 of the Executive order, of approving agency rules, regulations, and orders of general applicability issued under the Civil Rights Act of 1964 and section 902 of the Education Amendments of 1972").

neither the complaint nor Doe's litigation of this case challenges sex-segregated restrooms *per se*. Instead, Doe claims the right to use sex-segregated boys' restrooms under 20 U.S.C. §1681(a) and the Equal Protection Clause.

In addition, EFELDF notes that gender dysphoria's persistence rate over time is as low as 2.2% for males and 12% for females. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 455 (5th ed. 2013). Put differently, up to 88% of females and more than 97% of males with gender dysphoria might resolve to their biological sex. By intervening, DOE or a court may delay or derail these favorable results, thus exposing children to unnecessary "treatment" with dangerous hormonal and other therapies. Unfortunately, a "progressive" impulse can lead to pressing civil-rights claims blindly, even over the intended beneficiaries' physical and mental well-being. While they are not before this Court on the merits, these issues should inform the inappropriateness of federal agencies' or federal courts' imposing their views on the nation without public input.

STANDARD OF REVIEW

In reviewing a preliminary injunction, plaintiffs must show a likelihood of prevailing and irreparable harm, as well as that the balance of equities and the public interest favor the plaintiff. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Appellate courts review the grant or denial of preliminary relief for abuse of discretion, but a "court would necessarily abuse its discretion if it based

its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Legal issues raised here are reviewed *de novo*.

In addition, the motions-panel decision is not binding for at least two reasons, notwithstanding 6TH CIR. R. 32.1(b). First, the two proceedings have different burdens of proof because the proceedings have different movants. *Compare Winter*, 555 U.S. at 20 (plaintiff's burden) *with Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (applicant's burden). The differing burdens can produce apparently inconsistent results, *Cuozzo Speed Techs., LLC v. Lee*, 136 S.Ct. 2131, 2146 (2016); *One Lot Emerald Cut Stones v. U.S.*, 409 U.S. 232, 235-38 (1972), which is doubly true here, where the likelihood of prevailing is not the same as prevailing. *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). Second, an intervening Supreme Court decision breaks the binding nature of prior panel decisions, *Northeast Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720-21 (6th Cir. 2016), so the Supreme Court's *vacatur* of *Gloucester County* – to say nothing of the withdrawn guidance on which the District Court relied – renders the motions panel's decision infirm.

SUMMARY OF ARGUMENT

This Court should reject the sea change that Doe proposes to make to Title IX – and to state and local control over education – via sub-regulatory memoranda and private litigation. While EFELDF would prefer to avoid expanding Title IX, leaving these issues for state and local resolution, Congress has the power to amend

its Spending Clause statutes or to enact new ones via the Fourteenth Amendment, if Congress considers that course sound. The job that falls to this Court is to reign in federal agencies and lower courts to avoid trammeling constitutional norms for enacting statutes and promulgating rules. The substantive question of what schools should do with regard to transgender students is important, but the liberty interest that resides in our republican form of government – with separated powers and dual sovereigns – is infinitely more important.

Before deferring to non-final and untested agency interpretations *du jour*, courts should first evaluate rules or statutes to determine any legislatively defined limits, using all traditional tools of statutory construction. As applied here, the applicable canons include (a) requiring clear notice of Spending-Clause conditions (Section I.A.1.a), (b) presuming against preemption and significant alterations in the state-federal balance for traditional areas of traditional state and local concern (Section I.A.1.b) because Congress would not cavalierly overturn the state-federal balance or displace state sovereigns, (c) reserving to Congress and the courts issues of exceptional economic and political significance (Section I.A.1.d) for the same reasons, (d) precluding deference to multi-agency delegations like Title IX (Section I.A.1.c) because Congress has not delegated authority to one specially designated agency, and (e) requiring agencies to comply with procedural limits on their powers (Section I.A.2) because agencies operate under express exemptions from Article I's

requirement that Congress makes the laws and agencies must thus comply scrupulously with the constitutional exceptions under which they operate. In particular, DOE ignored §902 presidential-approval requirement – delegated to the Department of Justice – before any rule, regulation, or order of general applicability takes effect, 20 U.S.C. §1682, which the District Court improperly ignored (Section I.A.2.a-I.A.2.b-I.A.2.b).

On the statutory merits, privacy requires sex-segregated bathrooms, and Title IX did not displace privacy rights; Title IX concerns objective biological sex, not subjective gender identity (Section I.A.3). Similarly, in the constitutional merits, privacy is a valid governmental concern to balance against the Board's treatment of students with regard to sex-segregated bathrooms (Section I.B). Finally, the public-interest criterion converges with the merits, thus favoring *vacatur* (Section II).

ARGUMENT

I. DOE IS UNLIKELY TO PREVAIL ON THE MERITS.

Doe cannot meet the first preliminary-injunction criterion of being likely to prevail, either statutorily or constitutionally.

A. Title IX does not protect subjective gender identity.

Although DOE's then-novel transgender guidance provided the only basis for Doe's Title IX claims, that guidance is now withdrawn. As explained below, Congress cannot credibly be understood to have codified transgender rights in 1972 when enacting Title IX. Doe's Title IX claims are thus meritless.

1. The applicable canons of statutory construction require courts to interpret "sex" narrowly under Title IX.

The canons of construction support interpreting "sex" narrowly.

a. Spending Clause legislation requires clear notice to recipients before obligations are imposed.

Congress enacted Title IX under the Spending Clause, which courts analogize to contracts struck between the government and recipients, with the affected public as third-party beneficiaries. Because it remains unclear if Title IX covers subjective gender identity, there is not much of an argument that the Board was – or is – on notice of its liability to Doe on sex-discrimination grounds. As the Supreme Court recently clarified, the contract-law analogy is not an open-ended invitation to interpret Spending Clause agreements *broadly*, but rather – consistent with the clear-notice rule – applies "only as a potential *limitation* on liability." *Sossamon v. Texas*, 563 U.S. 277, 290 (2011) (emphasis in original). Given the abundant lack of clear authority establishing transgender rights under Title IX, this Court cannot find such rights consistently with the Spending Clause.

b. Federalism and the presumption against preemption counsel against an expansive interpretation of "sex" under Title IX.

In addition to the clear-notice rule for Spending Clause legislation, the traditional tools of statutory construction also include federalism-related canons that are relevant to DOE's and Congress's acting here in an area of traditional state and local concern. While the assertion of federal power over local education would be

troubling enough on general federalism grounds, *U.S. v. Morrison,* 529 U.S. 598, 618-19 (2000), it is even more troubling here because of the historic *local* police power that the federal power would displace. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"). The state and local presence in this field compels this Court to reject Doe's expansive interpretation of Title IX.

Specifically, in fields traditionally occupied by state and local government, courts apply a presumption *against* preemption under which courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). This presumption applies "because respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). Thus, this Court must consider whether Congress intended to prohibit discrimination based on gender identity along with the clear and manifest congressional intent to prohibit discrimination based on sex.

In doing so, courts must interpret Title IX to avoid preemption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). While it is fanciful to think that Congress in 1972 intended "sex" to include "gender identity," that is what Doe must establish as

clear and manifest in order for Title IX to regulate gender identity. Although the Board has not conceded that Doe's gender-identity reading *is* viable, that is not the test. Instead, Doe must show that the Board's sex-only reading *is not* viable.

The presumption against preemption applies to federal agencies as well as federal courts, especially when agencies ask courts to defer to administrative interpretations. Put another way, the presumption is one of the "traditional tools of statutory construction" used to determine congressional intent, which is "the final authority." *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984). If that analysis resolves the issue, there is no room for deference: "deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411-12 (1979) (internal quotations omitted). Like this Court's refusing to presume that Congress cavalierly overrides co-equal state sovereigns, this Court must reject the suggestion that federal agencies can override the states through deference. Quite the contrary, the presumption against preemption is a tool of statutory construction that an agency must (or a reviewing court will) use at "*Chevron* step one" to reject a preemptive reading of a federal statute over the no-preemption reading.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed in pertinent part by the majority, Justice Stevens called into question the entire enterprise of administrative preemption *vis-à-vis* presumptions against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, the *Watters* banking-law context is more preemptive than federal law generally. *Id.* at 12 (majority). Where they have addressed the issue, the circuits have adopted similar approaches against finding preemption in these circumstances.[3] Federal agencies – drawing delegated power from Congress – cannot have more authority than Congress itself.

c. Title IX did not delegate unique interpretive authority to DOE.

Although this Court has deferred to DOE athletic policies – at the collegiate and secondary levels – interpreting DOE regulations, *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994), this Court should direct the District Court on remand to refrain from deferring to future DOE policies outside the athletic context – indeed, outside the *collegiate athletics* context – because those decisions

[3] *Nat'l Ass'n of State Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Albany Eng'g Corp. v. F.E.R.C.*, 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996); *Massachusetts Ass'n of Health Maintenance Orgs. v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999).

rely on a purported statutory delegation unique to collegiate athletics. Specifically, these decisions rely on *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993), which in turn relies on the so-called Javits Amendment.[4]

By way of background, Title IX – like Title VI – delegates the same authority to each federal agency, 20 U.S.C. §1682 (agency rules "shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken"), no one agency can claim the special delegation from Congress that forms the basis for courts' deferring to agencies under *Chevron*. While it may well receive DOE funding, the Board also receives funds from other federal agencies, such as USDA under the National School Lunch Act. 42 U.S.C. §1752. With more than one agency involved, *Chevron* deference cannot apply. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (1986) (plurality); *Wachtel v. O.T.S.*, 982 F.2d 581, 585 (D.C. Cir. 1993). How could it?

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[4] In 1974, Sen. Tower introduced an amendment to exempt revenue-producing intercollegiate athletics from §901(a) and to require HEW to publish proposed Title IX regulations within 30 days. 120 CONG. REC. 15,322-23 (1974). The amendment passed the Senate, but was amended in conference (becoming known as the "Javits Amendment") to replace the revenue-sport exemption by requiring the proposed regulations to "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *Compare* H.R. 69, §536 (Tower), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) *with* PUB. L. NO. 93-380, §844, 88 Stat. 484, 612 (1974) (Javits).

Nothing precludes USDA's using its co-equal regulatory status to issue guidance directly opposite DOE's guidance.

Assuming *arguendo* that the Javits Amendment delegated any Title IX authority, the amendment's exclusive focus on *intercollegiate* athletics would have left HEW without deference for *interscholastic* athletics, much less bathrooms. For everything beyond athletics, agencies would need to rely on congressional delegations in the specific "statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. §1682. Title IX itself does not delegate any relevant authority uniquely to DOE.

d. Title IX did not delegate authority for agencies to answer questions of deep economic and political significance under *Chevron*.

Under *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) – which cites *Util. Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2444 (2014) ("*UARG*") – courts must "determine the correct reading" of statutes that raise "question[s] of deep economic and political significance" without regard to administrative deference. *King*, 135 S.Ct. at 2489 (interior quotations omitted). *King* involved a new statute where Congress failed to speak expressly of an expansive agency power, 135 S.Ct. at 2489, whereas *UARG* involved an old statute in which the agency purported to find vast new authority lurking. 134 S.Ct. at 2444. From a separation-of-powers perspective, each form of *sub silentio* agency self-aggrandizement is shocking in its own way,

but here DOE followed the *UARG* model.

Novel arguments might plausibly have their place under novel statutes, but to invent in Title IX a protection for transgenderism is simply implausible, unless agencies can amend statutes to fit an agency's view of the post-enactment societal changes:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

UARG, 134 S.Ct. at 2444 (interior quotations omitted). Indeed, while *UARG* concerned stationary-source emissions under the Clean Air Act, its cited authority concerned the far-more-trivial economic and political field of tobacco products. *Compare id. with FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("*B&WT*"). While the bathroom policies here might not rise to the level of all factories, plants, and refineries nationwide, the policies are easily more politically significant than smoking.

With DOE's policy now withdrawn, this Court easily can reject DOE's prior interpretation on the merits, but the point of this Section – and the point of *King*, *UARG*, and *B&WT* – is that federal courts must evaluate these significant economic and political issues without resort to *Chevron*. Absent evidence that Congress

attached fealty to DOE staff as a condition of federal funds, the policy questions raised here are ones that the People and the States reserved to themselves. *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1636-37 (2014). EFELDF respectfully submits that these same principles apply to agency interpretations that raise such economic and political issues, making deference on remand inappropriate.

2. The District Court erred in deferring to DOE's sub-regulatory guidance.

Under Circuit precedent including *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917, 923 (6th Cir. 1985), and *Ranjel v. City of Lansing*, 417 F.2d 321, 323 (6th Cir. 1969), the District Court should not have relied on DOE's now-withdrawn guidance because the guidance did not undergo the process for Title IX rules or generally applicable orders to take effect. 20 U.S.C. §1682. Although yesterday's guidance is now void, the District Court on remand should not rely on *any* guidance without the §902 approval process. This Court's order on remand should direct the District Court to follow Circuit precedent on this important issue of federalism and separation of powers.

Procedurally, when Congress delegates rulemaking authority, the agencies must follow all applicable requirements or act *ultra vires* the delegated authority. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that "an agency literally has no power to act… unless and until Congress confers power upon it"). Regardless of whether deference could apply to agency interpretations

generally, courts should withhold deference from interpretations that violate procedural requirements for agency action: "deference is not warranted where the regulation is 'procedurally defective' – that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). Thus, "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation." *Id.* Courts should withhold deference from all procedurally defective agency action.

a. DOE's guidance failed to take effect under §902's presidential-approval requirement.

With regard to generally applicable rules and orders, Title IX's §902 mirrors Title VI's §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1, so §602's legislative history controls. That history makes clear that agencies must act via rules, regulations, and orders,[5] 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the President in the *Federal Register*. 42 U.S.C. §2000d-1; 110

[5] The House bill permissively authorized agencies to proceed by rule, regulation, or order, H.R. 7152, 88th Cong. §602 (1963) ("Such action *may* be taken by… rule regulation or order") (emphasis added), but Sen. Dirksen amended §602 to its current form. 110 CONG. REC. 11,926, 11,930 (1964). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

CONG. REC. 2499-00 (1964) (Rep. Lindsay). Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreach.[6]

As indicated, the Title VI House bill permissively authorized agencies to proceed by rule, regulation, or order, *see* note 5, *supra*, but Sen. Dirksen's substitute bill amended §602 to its current form to allay concerns about federal agencies' overreaching. *Id.* Because Sen. Dirksen needed that concession to break a filibuster, the revised "language was clearly the result of a compromise" to which courts must "give effect … as enacted." *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-20 (1980); *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 117 (1988) (Civil Rights Act's opponents feared "the steady and deeper intrusion of the Federal power"). Under §902, federal agencies' action require presidential approval in the *Federal Register* before taking effect.

Significantly, the circuits are split on the effect of this presidential-approval requirement, but this Circuit's precedent is crystal clear. *Compare*, *e.g.*, *Franklin*

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[6] 110 CONG. REC. 6562 (Sen. Kuchel); 110 CONG. REC. 7059 (Sen. Pastore); 110 CONG. REC. 5256 (Sen. Humphrey); 110 CONG. REC. 6544 (Sen. Humphrey); 110 CONG. REC. 6749 (Sen. Moss); 110 CONG. REC. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 CONG. REC. 7058 (Sen. Pastore); 110 CONG. REC. 7066 (Sen. Kuchel); 110 CONG. REC. 7067 (Sen. Kuchel); 110 CONG. REC. 7103 (Sen. Javits); 110 CONG. REC. 11,941 (Attorney General Kennedy's letter, inserted by Sen. Cooper); 110 CONG. REC. 12,716 (Sen. Humphrey); 110 CONG. REC. 13,334 (Sen. Pastore); 110 CONG. REC. 13,377 (Sen. Allott).

County Bd. of Educ., 766 F.2d at 923 (presidential approval "a prerequisite to [an agency memorandum's] validity as a binding general order"); *Ranjel*, 417 F.2d at 323 (agency guidance without presidential approval "does not rise to the dignity of federal law") *with Equity in Athletics v. Dep't of Educ.*, 639 F.3d 91, 106 (4th Cir. 2011) ("*EIA*").[7] In *Sch. Dist. v. H.E.W.*, 431 F.Supp. 147, 151 (E.D. Mich. 1977), HEW "assert[ed] that Title VI does not require Presidential approval of these regulations, as they are procedural only and do not define what constitutes discriminatory practices prohibited by Title VI." Adding gender-identity protections to a sex-discrimination statute is not merely procedural and, instead, clearly would "define what constitutes discriminatory practices." *Id.* Without the required approval, DOE's prior guidance never took effect and DOE's future guidance will not take effect. Absent §902 compliance, DOE guidance cannot give the notice required under the Spending Clause.

[7] Relying on a single district-court Title IX decision and one *APA* decision (to which §902 did not even apply), *EIA* found §902 inapplicable to guidelines, as distinct from rules or orders. 639 F.3d at 106. That is an administrative-law *non sequitur*: agencies can act only by rule or by order. 5 U.S.C. §551(4), (6); *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980). Issuing non-rule guidelines *is an order*. 5 U.S.C. §551(6). There is no middle ground. Whether as unapproved *rules* or unapproved *orders*, Title IX guidance cannot take effect until the agency complies with §902.

b. General statements of policy have no claim to deference in private suits.

Even beyond §902's unique presidential-approval requirement, courts should not defer to general statements of policy by federal agencies where the agency has not taken final action to apply the policy. An "agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." *Pacific Gas & Elec. Co. v. F.P.C.*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Thus, although DOE withdrew the specific guidance that spawned this litigation, on remand the District Court should disregard *any future DOE guidance* of a similar procedural pedigree.

Such policy statements are not entitled to deference until an agency relies on them to resolve a future substantive question because, logically, the future action (not the initial statement) is the final agency action. *Id.*; *accord Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3d Cir. 1969); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1178 (10th Cir. 1985); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013-14 (9th Cir. 1987). Thus, as an alternative to considering notice-and-comment issues under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), courts could simply consider guidance to be mere "general statements of policy" not entitled to deference. Either way, the guidance would not warrant deference, either because it came into existence in violation of APA and Title IX procedural requirements or because it would not sufficiently come into existence until such time as DOE – not

Doe – applies its guidance in a final agency action.

Indeed, the new administration's withdrawal of the prior administration's guidance simply demonstrates why courts should not defer to general statements of policy, which an agency can withdraw at any time and which the agency does not actually adopt until the agency formally applies the policy in a final agency action. It violates both federalism and separation of powers for mere federal *agencies* to set national education policy by winks and nods, rather than through legislation or rules issued via the legislatively mandated processes.

3. Title IX does not apply to gender identity.

Given the many bases for interpreting Title IX narrowly here, this Court must hold that Title IX prohibits only what Congress enacted: discrimination "on the basis of sex." 20 U.S.C. §1681(a).[8] But the Board does not discriminate on the basis of sex when its bathroom policy applies equally to biological females seeking to use boys' restrooms and biological males seeking to use girls' restrooms. Because Doe does not challenge sex-segregated restrooms *per se*, the discrimination, if any, is against students whose subjective gender identity differs from their objective sex. Differential treatment based on a sex-versus-gender-identity mismatch is not what

[8] Even it failed to meet the regulation's safe harbor *allowing* sex-segregated bathrooms, 34 C.F.R. §106.33, the Board cannot *violate* Title IX unless §901(a) prohibits denying access to boys' bathrooms (*i.e.*, unless "sex" *statutorily* includes gender identity).

Title IX prohibits. *See* 20 U.S.C. §1681(a). Because sex is a biological characteristic, and gender identity is not, Doe cannot prevail on a statutory claim.

When Congress enacted Title IX in 1972 and extended the statutory reach in 1988, the judicial understanding of the word "sex" did not include Doe's proposed expansion to include gender identity. For example, the Supreme Court recognized that the term "sex" referred to "an immutable characteristic determined solely by the accident of birth" "like race and national origin." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).[9] Even without the canons of construction favoring the Board, Section I.A.1, *supra*, courts should regard the sex-versus-gender issue as decided by the Congress that enacted Title IX, consistent with the then-controlling judicial constructions from the Supreme Court and the unanimous courts of appeals. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). As the Board notes, Board Br. at 24-25. Congress's subsequently adding gender identity to other statutes and failing to add it here bolsters that conclusion. In short, sex means sex; it does not mean gender.[10]

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[9] *Accord Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980); *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977).

[10] Although *Davis ex rel. LaShonda D., v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999), uses "gender" loosely to argue that Title IX prohibits discrimination "on the basis of gender," the opinion uses "sex" and "gender" interchangeably and

Doe's – and the motions panel's – reliance on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny is misplaced. *See* Board Br. at 30-34. These "stereotype" cases concern females' exhibiting masculine traits or males' exhibiting feminine traits.

> After [*Hopkins*], an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that 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.

Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004). For purposes of her doing her job, it did not matter whether Ms. Hopkins wore dresses or men's suits. However she dressed, she still used the women's restroom. Indeed, it would have been sex discrimination to require a mannishly dressed Ms. Hopkins to use the men's restroom, when all other women could use the women's restroom.

Setting dress codes for boys and girls (*e.g.*, clothing, jewelry, hair length) differs fundamentally from segregating restrooms by sex. Whatever the respective merits of dress codes versus sex-segregated restrooms, the *Hopkins* line of cases concerns only the former, not the latter. Whatever impact *Hopkins* has on employers'

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does not hinge on sex-versus-gender issues. *Davis* merely uses "gender" to mean "sex," without holding "sex" to mean "gender."

ability to require masculinity in men or femininity in women, male employees remain male, and female employees remain female. The *Hopkins* line of sex-stereotype cases says nothing about which bathroom we use. Consequently, the motions panel necessarily relied on *Gloucester County*, which bridged from mere sex-based *stereotypes* to redefining sex *types*, finding transgender students within the "sex" to which they identify. As the Supreme Court recognized in vacating it, however, *Gloucester County* was undone by DOE's withdrawing its guidance.

B. Transgender students do not have a constitutional right to use the restrooms segregated for the opposite biological sex in violation of other students' rights of privacy.

Doe's alternate argument under the Equal Protection Clause fares no better. Under the Clause, state and local government cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1, cl. 4. Because all parties agree that sex-segregated restrooms are lawful, the equal-protection question is whether society may exclude females with male gender identity from male restrooms, and vice versa. Because the Board's policy applies equally on the basis of biological sex to transgender males and transgender females, there is no sex-based discrimination. Consequently, the discrimination – if any – is on the basis of a misalignment between a person's gender identity and that person's sex. Neither Circuit precedent nor the Constitution protects that class.

Importantly, "an individual's right to equal protection of the laws does not

deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original); *cf. Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (to state an equal-protection claim *vis-à-vis* the government's treatment of another class, the two classes must be "in all relevant respects alike"). Put another way, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001) (interior quotations omitted).[11] Here, Doe would have this Court compare a class of biological males versus a class of biological females with male gender identities, and vice versa, but those classes are not comparable for equal-protection purposes.

In any event, because gender dysphoria is not a protected class, plaintiffs claiming an equal-protection violation on the basis of gender-identity misalignment must establish that the government action does not "further[] a legitimate state interest" and lacks any "plausible policy reason for the classification." *Nordlinger*, 505 U.S. at 11-12. The privacy interest of other students easily satisfies this test.

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[11] "[A] legislative choice [like a local school's restroom policy or a comparable state law] is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 626 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Virginia*, 518 U.S. at 550 n.19. Moreover, unlike heightened scrutiny, rational-basis review does not require narrowly tailoring policies to legitimate purposes: "[rational basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *Beach*, 508 U.S. at 313, and a policy "does not offend the Constitution simply because the classification is not made with mathematical nicety or because *in practice it results in some inequality*." *Id.* at 316 n.7 (interior quotations omitted, emphasis added). Indeed, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds *wholly irrelevant* to the achievement of the State's objective." *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 462-63 (1988) (interior quotations omitted, emphasis added). Here, the Board has a legitimate interest in students' privacy in restrooms, thus easily satisfying the rational-basis test and denying Doe a claim under the Equal Protection Clause.

II. THE PUBLIC INTEREST FAVORS THE BOARD.

EFELDF defers to the Board's discussion of the second and third preliminary-injunction criteria, Board Br. at 52-56, but comments only on the fourth criterion: the public interest. This final criterion favors the Board both because Doe is unlikely to prevail on the merits – which nullifies Doe's claim to a public interest – and

because the relief sought would intrude on public rights that the Board has the governmental authority to balance. For these reasons, this Court should reverse the preliminary injunction, even if Doe could establish irreparable harm.

In litigation challenging government action, this last criterion collapses into the merits, 11A WRIGHT & MILLER, FED. PRAC. & PROC. Civ.2d §2948.4, because there is a "greater public interest in having governmental agencies abide by [applicable] laws that govern their … operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). If the Court supports the Board on the merits, the public interest will tilt decidedly toward the Board: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). In such public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Accordingly, the public-interest component can deny plaintiffs relief that otherwise might issue in purely private litigation.

CONCLUSION

This Court should vacate the preliminary injunction.

Dated: April 26, 2017

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,498 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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