

NO. 26-1821

In the United States Court of Appeals for the Second Circuit

Kerry Wachter, Danielle Ciampino,

Plaintiffs - Appellants,

Sarah Rouse, Issac Kuo,

Plaintiffs,

v.

Letitia James, in her official capacity as Attorney General for the State of New York, Betty A. Rosa, in her official capacity as Chancellor of the New York State Board of Regents, Lester W. Young, Jr., in his official capacity as Chancellor of the New York State Board of Regents, Judith Chin, in her official capacity as Vice Chancellor of the New York State Board of Regents, Roger Tilles, in their official capacity as a member of the New York State Board of Regents, Christine D. Cea, in their official capacity as a member of the New York State Board of Regents, Wade S. Norwood, in their official capacity as a member of the New York State Board of Regents, Susan W. Mittler, in their official capacity as a member of the New York State Board of Regents, Frances G. Wills, in their official capacity as a member of the New York State Board of Regents, Aramina Vega Ferrer, in their official capacity as a member of the New York State Board of Regents, Shino Tanikawa, in their official capacity as a member of the New York State Board of Regents, Roger P. Catania, in their official capacity as a member of the New York State Board of Regents, Adrian I. Hale, in their official capacity as a member of the New York State Board of Regents, Hasoni Pratts, in their official capacity as a member of the New York State Board of Regents, Patrick Mannion, in their official capacity as a member of the New York State Board of Regents, Seema Rivera, in their official capacity as a member of the New York State Board of Regents, Brian Krist, in their official capacity as a member of the New York State Board of Regents, Keith Wiley, in their official capacity as a member of the New York State Board of Regents, Felicia Thomas-Williams, in their official capacity as a member of the New York State Board of Regents,

Defendants - Appellees.

On Appeal From the United States District Court for the
Northern District of New York, No. 1:25-cv-1718 (AMN/CBF)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

Plaintiffs-Appellants Kerry Wachter and Danielle Ciampino are school board members in New York who believe students should use school facilities and play in sex-separated sports based on their sex, not their gender identity. They also use biological pronouns in speech and believe doing so conveys biological truth. They want to advocate for their beliefs and use biological pronouns at New York public school board meetings. They want to permit students, parents, and community members speaking at school board meetings to do the same.

The First Amendment protects this speech. But Defendants-Appellees—New York Attorney General Letitia James and New York Commissioner of Education Betty Rosa—issued a Guidance Letter threatening this speech. In the Guidance Letter, Defendants threaten to remove democratically elected school board members, like Plaintiffs, from office if they speak their side of the debate at school board meetings. And Defendants even instruct Plaintiffs that they *must* censor their constituents from making “comments” supporting sex-separated sports and facilities or “misgendering” students during school board meetings. These speech prohibitions at school board meetings cannot be found anywhere in New York statutory law.

Because of the threat posed by the Guidance Letter, Plaintiffs filed this lawsuit and moved for a preliminary injunction. The district court dismissed the Complaint

for lack of standing. In doing so, the district court held Plaintiffs did not face a credible threat of Defendants enforcing their own Guidance Letter.

The district court was wrong. Plaintiffs only had to allege “an actual and well-founded fear that the law will be enforced against” them to establish standing. *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988)). And they did so. No reasonable school board member would feel free to ignore the Guidance Letter. Commissioner Rosa, who is empowered under New York law to remove school board members from office, and Attorney General James, who has broad power to enforce state anti-discrimination laws, co-wrote the Guidance Letter. An email from the New York State Department of Education (NYSED) to school boards disseminating the Guidance Letter threatened “consequences for not meeting th[e] obligations” Defendants announced in the Guidance Letter. JA-53. Under this Court’s precedent in *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam), and *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991), Defendants’ actions threaten Plaintiffs’ speech and establish an Article III injury. This Court should reverse the district court’s order granting Defendants’ motion to dismiss.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this action arises under the First Amendment and 42 U.S.C. § 1983. JA-4. On June 8, 2026, the district court issued an order and a judgment granting Defendants’ motion to dismiss for lack of Article III standing and denying Plaintiffs’ motion for a preliminary injunction. JA-163–91.

This Court has jurisdiction under 28 U.S.C. §§ 1291, 1292, and 2106 because Plaintiffs timely filed their notice of appeal on July 7, 2026, from the district court’s denial of the preliminary injunction and its final judgment dismissing the action. JA-193; *see also* Fed. R. App. P. 4(a)(1)(A) (permitting party thirty days to file notice of appeal); *see also Do No Harm v. Pfizer Inc.*, 126 F.4th 109, 113 & n.1 (2d Cir. 2025) (per curiam) (taking appellate jurisdiction over appeal from denial of preliminary injunction and dismissal of complaint for lack of Article III standing).

STATEMENT OF ISSUES

1. Whether there is a credible threat of enforcement for purposes of Article III standing where Defendants-Appellees sent a Guidance Letter to all New York school board members, including Plaintiffs-Appellants, warning them that they can be removed from office by the Defendant-Appellee Commissioner of Education if they make or permit comments at school board meetings that oppose students using public school facilities and playing in interscholastic sports based on gender identity, or if they “misgender” students at school board meetings or allow parent- or community member-speakers at school board meetings to “misgender” students.

Cerame v. Slack, 123 F.4th 72 (2d Cir. 2024);

Vitagliano v. County of Westchester, 71 F.4th 130 (2d Cir. 2023);

Okwedy v. Molinari, 333 F.3d 339 (2d Cir. 2003) (per curiam);

Rattner v. Netburn, 930 F.2d 204 (2d Cir. 1991).

2. Whether the district court erred in granting Defendants-Appellees’ motion to dismiss.

See above.

3. Whether the district court erred in denying Plaintiffs-Appellants’ motion for a preliminary injunction.

See above;

Patton v. Dole, 806 F.2d 24 (2d Cir. 1986).

STATEMENT OF THE CASE

In May 2025, Defendants-Appellees—New York Attorney General Letitia James and New York Commissioner of Education Betty Rosa—published and disseminated a Joint Guidance on Harassment and Bullying at School Board Meetings (Guidance Letter) “remind[ing] school board members of their legal duties” and warning them of “the consequences for not meeting those obligations.” JA-53.¹ Defendants state in the Guidance Letter that those “duties” entail not making “comments” supporting traditional views on sex and gender or using biological pronouns at school board meetings open to the public. JA-42, 45. Defendants claim a school board member violates his duties by making or permitting such “comments” or the “misgendering” of a student. JA-45, 48. Defendants also warn board members they “may be removed from office when they willfully neglect their duty.” JA-44.

¹ Defendants updated the Guidance Letter on September 11, 2026. Letter from Letitia James and Betty Rosa to Boards of Education (September 11, 2026), <https://www.nysed.gov/sites/default/files/joint-guidance-on-harassment-and-bullying-at-school-board-meetings.pdf> (Updated Letter). In the update, Defendants removed a reference to *Fellers v. Kelley*, No. 24-cv-311, 2025 WL 1098271, 2025 LX 17316 (D.N.H. Apr. 14, 2025), in footnote 12 after the United States Court of Appeals for the First Circuit reversed and remanded that decision, *Fellers v. Kelley*, No. 25-1442, 2026 LX 462405, at *3 (1st Cir. Aug. 26, 2026). Updated Letter at 1 n.*. It appears Defendants did not retract or modify any other part of the Letter. Compare Updated Letter, with JA-42–50.

Plaintiffs-Appellants Kerry Wachter and Danielle Ciampino are school board members.² They brought this First Amendment lawsuit and moved for a preliminary injunction to prevent enforcement of the Guidance Letter. Defendants filed a cross-motion to dismiss. The U.S. District Court for the Northern District of New York (Narducci, J.) dismissed the complaint for lack of Article III standing under Federal Rule of Civil Procedure 12(b)(1), denied Plaintiffs’ motion for a preliminary injunction, and entered judgment for Defendants. JA-163–91; *Wachter v. James*, No. 1:25-cv-01718 (AMN/CBF), 2026 LX 235484, 2026 WL 1649135 (N.D.N.Y. June 8, 2026). This appeal arises from that order and judgment. JA-193.

I. New York law empowers Defendants to remove school board members from office and prosecute them under the Human Rights Law.

New York law empowers Commissioner Rosa to remove elected school board members from office. N.Y. Educ. Law §§ 306(1), 1706. Grounds for removal include “[w]ilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or wilful violation or neglect of duty.” N.Y. Educ. Law § 1706. Defendants confirmed to the district court that Commissioner Rosa may unilaterally initiate removal proceedings against school board members like Plaintiffs. *See* N.Y. Educ. Law § 308; JA-142–43. New

² Two parent plaintiffs, Sarah Rouse and Issac Kuo, sued alongside Plaintiffs Wachter and Ciampino. JA-1. Rouse and Kuo are not parties to this appeal.

York law also empowers her to remove a school board member upon an application for removal made by any member of the public. *See* N.Y. Educ. Law § 310. School boards in New York understand the Commissioner’s power to issue controlling guidance and consider it “binding.”³ *See* JA-28, 30, 89, 96 (school district counsel describing the Rockville Centre Union Free School District’s perception that Commissioner Rosa’s guidance is “binding”).

Attorney General James has broad power to civilly and criminally prosecute alleged violations of the Human Rights Law and to issue subpoenas in pursuit of prosecution. N.Y. Exec. Law § 297. New York law further authorizes members of the public to file complaints alleging Human Rights Law violations with Attorney General James. *Id.* New York law also empowers Defendant James to enforce antidiscrimination laws. N.Y. Civ. Rts. Law §§ 40-c, 40-d.

II. Defendants informed New York school board members they would face “consequences” for not meeting the “obligations” stated in the Guidance Letter regarding refraining from and restricting speech.

Defendants Rosa and James published the Guidance Letter on May 8, 2025. JA-42–50. They did so jointly in their official capacities as New York Commissioner of Education and New York Attorney General, and on official letterhead. *Id.* The next week, the NYSED attached the Guidance Letter to an official email sent to

³ Although the Board of Regents have no direct enforcement power over Plaintiffs, they do possess oversight power over Commissioner Rosa. N.Y. Educ. Law § 207.

school boards across New York. JA-10–11, 52–53. Elected school board members, like Plaintiffs Wachter and Ciampino, received the email and the attached Guidance Letter. JA-21, 61, 81. Defendants’ email described the Guidance Letter as “remind[ing] school board members of *their legal duties* and responsibilities when conducting school board meetings.” JA-53 (emphasis added). Defendants further asserted board members face “*consequences* for not meeting th[e] *obligations*” stated in the Guidance Letter. *Id.* (emphasis added); *see also* JA-10–11.

III. In the Guidance Letter, Defendants warn that making “comments,” “remarks,” and “statements” supporting sex-separated facilities and athletics or using biological pronouns at school board meetings violates school board members’ legal duties and warrants removal from office.

In the Guidance Letter, Defendants define the “duty” of board members. JA-43, 44–46. They then identify speech they claim violates that duty if made or allowed at school board meetings. JA-46–47. Finally, Defendants link this “duty” and “breach” to punishment and their authority under New York Law: “Board members may be removed by the Commissioner of Education if they . . . willfully neglect their duties as public officers.” JA-47.

A. Defendants define harassment, bullying, and discrimination in the Guidance Letter only by reference to disfavored speech.

Defendants James and Rosa start by explaining they wrote the Guidance Letter because “some board members have made, and encouraged, *comments* during board meetings” about LGBTQ+ students. JA-42 (emphasis added). Throughout the

Letter, Defendants target “comments,” “remarks,” and “statements”—without identifying any attendant conduct. JA-42–45, 47–48. They claim public comments by students, parents, community members, and school board members about district policies may amount to “harassment” and “bullying” of transgender-identifying students.

Rather than relying on existing law, Defendants define “harassment” or “bullying” in the Guidance Letter using three examples of viewpoints New Yorkers have expressed at school board meetings:⁴

- First, speech opposing “transgender and gender-expansive students’ rights to use facilities, including restrooms and locker rooms, or participate on school athletic teams consistent with their gender identity.” JA-42.⁵
- Second, speech that questions “the legitimacy of students’ gender identity.”

JA-43; *see also* JA-45 (“Children should not have to endure the indignity of

⁴ At no point do Defendants cite New York law, such as the Dignity for All Students Act (DASA), defining “harassment” or “bullying.” *See* JA-42–50 (failing to cite section 11(7) of the New York Education Law, the provision of DASA that defines “harassment” and “bullying.”).

⁵ *See also* JA-43 (“[I]nflammatory remarks about . . . students’ equal access to educational facilities . . . serves no school-related purpose and may only make children feel unwelcome and excluded.”); JA-45–46 (“Board members who knowingly undermine the purpose of [DASA] by making or promoting discriminatory and harassing comments willfully neglect their duties to engage in constructive discussion and ensure effective functioning of board operations.” (quotation omitted)).

adults making remarks about their bodies or questioning the legitimacy of their identities and life experiences in public board meetings in their school districts.”).

- Third, speech that “misgenders” a district student who identifies as transgender by, for instance, using a biological pronoun to identify the student rather than the student’s “preferred” pronouns. *See* JA-45 (“Nor should boards allow individuals to intentionally misgender district students.”); *see also id.* (footnote 14 defining “misgendering” as “[a]ttributing a gender to someone that is incorrect or does not align with the person’s gender identity” (quotation omitted)). In other words, Defendants prohibit using pronouns or titles that correspond to a transgender-identifying student’s biological sex.

B. Defendants direct Plaintiffs to censor speech as part of their duties and oath of office.

Throughout the Guidance Letter, Defendants tie school board members’ oath of office and official duties to censoring these “comments.” They invoke board members’ “oath to . . . faithfully discharge their duties.” JA-44. On seven occasions in the eight-page Guidance Letter, Defendants direct school board members not to “entertain,” “permit,” or “allow” these disfavored “comments,” “remarks,” or “statements.” JA-42–48. And Defendants tell Plaintiffs their duty compels them not to “allow individuals to intentionally misgender district students.” JA-45. In all,

Defendants link board members’ “duty” or “duties” to restricting speech twenty times. JA-42–48.

Defendants further warn, “[b]oard members who . . . mak[e] or promot[e] discriminatory and harassing comments willfully neglect their duties to engage in constructive discussion and ensure effective functioning of board operations.” JA-45–46 (quotation omitted). Thus, based on the examples in the Guidance Letter of what constitutes “harassment,” school board members *must* silence comments by young female students who want to ask for privacy in the girls’ restrooms and locker rooms and express their fears about competing with or against biological males on their sports teams.

C. Defendants assert that making or allowing forbidden speech would meet the standard for removal of school board members from office, and they mobilize the public to file petitions for removal.

After stressing that board members have a duty to self-censor and prohibit others’ speech, Defendants dedicate the final section of the Guidance Letter to the removal of school board members for breach of duty. JA-47–49. Defendants state Commissioner Rosa may remove school board members who “willfully neglect their duty or engage in official misconduct.” JA-47. They advise that “[w]illfully permitting the harassment of students on the basis of . . . gender identity [or] gender expression . . . meets th[e] standard [for removal].” JA-48. Again, Defendants only

define such “harassment” through examples of impermissible speech. *See* JA-42–45.

Defendants also tell the public how to seek removal of a school board member from office for such speech. JA-48. They even provide convenient links for reporting alleged breaches of the duties they have described in the Letter. JA-49. They state: “Students and other community members who have experienced or witnessed harassment or discrimination on the basis of [gender identity or gender expression] may lodge a complaint with [the Office of the Attorney General] or seek assistance from other agencies, including [NYSED].” *Id.* While inviting these complaints, Defendants warn school board members not to engage in any speech that any member of the public might view as harassment because even unmeritorious complaints can hurt their local districts. *See* JA-48–49 (“[E]ven an unsuccessful application for removal may pose a financial burden to schools and an unwelcome distraction from school boards’ important work.”).

Finally, Defendants warn of enforcement actions and punishments beyond removal, such as civil and financial penalties. They state that claims for “emotional injuries” arising from what the Letter calls bullying or harassment “may expose districts to liability under [the Human Rights Law].” JA-47. And again, Attorney General James is empowered to enforce New York’s antidiscrimination laws. *E.g.*, N.Y. Exec. Law § 63; N.Y. Civ. Rts. Law §§ 40-c, 40-d.

IV. Plaintiffs want to tell their constituents they support sex-separated facilities and athletics, to use biological pronouns as part of their ordinary speech, and to allow all others to speak their perspectives.

Plaintiffs hold strong views on transgender and gender identity issues within the public-school setting. For instance, Plaintiffs believe “[s]ex is immutable” and people “cannot change . . . sex or gender.” JA-59, 79; *see also* JA-19, 22–23. They also believe students should use facilities and play in sports based on their sex, not their gender identity. JA-19, 23, 59–60, 79–80. They believe in using biological pronouns because using “preferred” pronouns falsely acknowledges that people can change gender. JA-19–20, 23; *see also* JA-60, 80.

Plaintiffs have spoken these views during school board meetings. JA-61–62, 81–82; *see also* JA-20–21, 24. In fact, Plaintiff Ciampino campaigned on her beliefs on gender identity and transgender issues when running for her school board seat. JA-23, 80. Plaintiffs intend to keep advocating for sex-separated facilities and athletics even though they fear being removed from office because of the Guidance Letter’s threats. JA-21, 24, 62–63, 82. They also intend to keep allowing parents and community members to speak freely on transgender and gender identity issues from all viewpoints, including views Defendants have instructed Plaintiffs to silence. JA-21, 24, 63, 82.

Plaintiffs intend to exclusively use biological pronouns to talk about third parties, no matter how they identify. JA-21, 24, 62, 82. Plaintiffs intend to keep

allowing parents and community members to do the same. *Id.* While they intend to take this course of action, Plaintiffs fear removal from office because of their speech and for not restricting the speech of others at school board meetings. JA-21–22, 24–25, 62–63, 82.

V. Plaintiffs credibly fear removal from office because of the Guidance Letter.

Plaintiffs credibly fear Commissioner Rosa or Attorney General James will prosecute them for violating the “duties” the Guidance Letter claims to exist. Their fear is rooted in the Guidance Letter’s language discussed above. But it is heightened because of the composition of their districts, events in their districts, threats by local activists, and how Commissioner Rosa and other educational bodies in New York have addressed speech-related allegations against board members.

Plaintiffs serve on school boards in districts where robust policy discussions related to sex and gender identity take place. JA-20, 23, 60–61, 80. Transgender-identifying students are enrolled in Plaintiffs’ districts and use school restrooms and have requested “preferred” pronouns according to their claimed gender identity rather than their biological sex. JA-20, 23, 60, 80. Thus, Plaintiffs and community members, including LGBTQ+ activists, have discussed school policies related to student gender identity issues at school board meetings. JA-20, 23, 61–62, 81, 83.

Discussions like these sometimes result in policy changes. In Plaintiff Wachter’s district, the school board passed a resolution requiring all students to use sex-separated restrooms in accord with their biological sex or to use gender-neutral restrooms. JA-20, 116. But community activists know how to use the system: soon after the resolution passed, a parent of a transgender-identifying student filed a petition with Commissioner Rosa challenging it and obtained a stay. JA-116.

Plaintiffs also know activists have filed speech-related complaints against school board members with Commissioner Rosa. JA-24–25. In Plaintiff Ciampino’s district, a local activist filed a petition to remove a board member after he made “remarks concerning posters advertising the middle[] school’s Genders and Sexualities Alliance.” *Application of T.L.*, 2024 N.Y. Educ. Dept. LEXIS 103, at *1, Decision No. 18,474 (Aug. 19, 2024)); *see also* JA-24–25, 80–81. Commissioner Rosa dismissed the petition as untimely but went out of her way to “admonish” the board member. *Application of T.L.*, 2024 N.Y. Educ. Dept. LEXIS 103, at *5.

That case is just one of several like examples. Commissioners of Education, including Rosa, have repeatedly entertained speech-related petitions for removal made possible by New York statutory law over the years. *See, e.g., Application of Patterson*, 2026 N.Y. Educ. Dept. LEXIS 16, at *5 n.4, Decision No. 18,683 (Feb. 17, 2026) (collecting cases, including *Application of Lyons-Birsner and Birsner*, 2017 N.Y. Educ. Dept. LEXIS 147, Decision No. 17,160 (Aug. 22, 2017);

Application of the Bd. of Educ. of the Lawrence Union Free Sch. Dist., 2000 N.Y. Educ. Dept. LEXIS 93, Decision No. 14,299 (Feb. 11, 2000); *Application of O'Mara*, 37 Educ. Dept. Rep. 122, Decision No. 13,819 (Aug. 18, 1997)). In fact, in February 2026, Commissioner Rosa used the procedure she outlined in the Guidance Letter to force a school board member to show cause why he should not be removed for using a slur during school board business. *Application of Patterson*, 2026 N.Y. Educ. Dept. LEXIS 16, at *5–6 (Appendix A). Likewise, another educational body in New York has removed a school board member from office based on allegedly discriminatory or harassing speech concerning political topics. *See Alexander v. Sutton*, 747 F. Supp. 3d 520, 557 (E.D.N.Y. 2024) (enjoining removal of Maud Maron by New York City Community Education Council).

What's past is prologue. Since Plaintiffs filed this action, multiple LGBTQ+ activists have targeted them for their advocacy. These activists have called for Plaintiffs' removal from office. JA-111–12, 115–16. One activist, who has attended multiple school board meetings in Plaintiff Wachter's district, posted a video stating: "I personally am going to be writing a letter to the Attorney General's Office and to the New York State Board of Education to look into Kerry Wachter's situation and that whole board's situation because they should be removed." JA-115.

VI. Proceedings below.

Because Plaintiffs fear enforcement of the Guidance Letter against them, they filed this suit. JA-22, 25. Plaintiffs asserted the Guidance Letter is a chilling threat that unconstitutionally discriminates on viewpoint, compels speech, and is vague and overbroad in its proscriptions. JA-30–39. The district court denied Plaintiffs’ motion for a preliminary injunction and granted Defendants’ motion to dismiss the Complaint for lack of Article III standing. JA-163–90.

The district court applied the three-part test for standing in pre-enforcement First Amendment challenges. It held Plaintiffs satisfied the first two prongs: their speech involves “a course of conduct affected with a First Amendment interest,” JA-175, and the Guidance Letter “arguably proscribe[s]” the “Plaintiffs’ contemplated speech,” JA-175–76. But the court held Plaintiffs lacked Article III standing because they did not satisfy the third prong: a credible threat of enforcement. JA-176–86.

First, the court labeled the Guidance Letter “informal guidance” that merely served as a “restatement of existing anti-discrimination law.” JA-177–78. But the court never identified a provision of New York law that both (1) applies to school board meetings and (2) prohibits the speech Defendants describe in the Guidance Letter. *See id.*

Second, the court minimized Plaintiffs’ allegations that the Guidance Letter (1) links making or allowing “comments” to violations of board members’ duties,

see JA-166, and (2) lays out the process for removing a school board member, JA-181–82. The court acknowledged that members of the public have filed applications for removal with the Commissioner based only on speech, JA-184 n.4, and that the Plaintiffs serve in districts with local transgender activists, JA-182. But even though this action is a preenforcement challenge, the court relied on the absence of *actual* removal attempts. *See* JA-182, 186.

In sum, the district court concluded Plaintiffs lacked Article III standing because, and only because, they had not shown a credible threat of enforcement. JA-189–90. The court granted Defendants’ motion to dismiss and denied Plaintiffs’ motion for a preliminary injunction. *Id.* This appeal followed. JA-193.

SUMMARY OF THE ARGUMENT

Plaintiffs have standing to challenge the Guidance Letter, and the Court should enjoin its enforcement pending the outcome of this case.

The threshold for establishing credible-threat standing in a preenforcement First Amendment challenge is low. Plaintiffs meet that “quite forgiving” standard. A presumption of enforcement applies. The Guidance Letter was recently published and regulates speech beyond New York statutory law. Commissioner Rosa is empowered to remove school board members for speech and receives and adjudicates removal applications based on board-member speech. And the Defendants have not disavowed enforcement of the Letter. Additionally, the ability

of third parties to initiate removal proceedings and the blatant nature of the viewpoint discrimination Defendants espouse in the Guidance Letter enhances the threat.

The district court erred in holding otherwise. It incorrectly held the Guidance Letter merely restates New York law. The Guidance Letter cites no provision of New York statutory law that regulates pure speech at school board meetings. It is its own independent threat to Plaintiffs. The district court also failed to address this Court's on-point precedents holding that even informal government actions can establish credible-threat standing. And it failed to grapple with analogous recent Title IX precedents holding that guidance documents can be coercive and pose a credible threat of prosecution even if not formal rulemaking. Thus, Plaintiffs have standing.

ARGUMENT

I. Standard of review.

This appeal is from both a judgment dismissing the Complaint and the denial of a preliminary injunction. JA-193. This Court analyzes each in related, but different, fashion.

When a district court grants a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss a complaint for lack of Article III standing, this Court “review[s] *de novo* the district court’s conclusions of law, as well as findings that are based on undisputed facts evidenced in the record.” *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016). “For purposes of ruling on a motion to dismiss for want

of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975); accord *Cerame v. Slack*, 123 F.4th 72, 80 (2d Cir. 2024).

And when reviewing the denial of a motion for a preliminary injunction, this Court reviews “a district court’s legal rulings de novo and its ultimate denial of a preliminary injunction for abuse of discretion.” *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018). “A district court abuses its discretion when it . . . makes an error of law.” *Id.* (quoting *Almontaser v. N.Y.C. Dep’t of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008)). This Court may reverse and direct the district court to issue the preliminary injunction where the plaintiffs’ case has merit. *Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986).

II. Plaintiffs satisfy the “low threshold” for establishing a credible threat of enforcement and Article III standing in this First Amendment pre-enforcement challenge.

Plaintiffs challenging the constitutionality of government actions have standing where they allege an injury that is “concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Vitagliano v. County of Westchester*, 71 F.4th 130, 136 (2d Cir. 2023) (internal quotation marks omitted). Preenforcement First Amendment challenges involve future injuries, which satisfy Article III if there is a “substantial risk that the harm will occur.” *Id.* (internal quotation marks omitted).

To establish such an injury, plaintiffs must demonstrate: “(1) ‘an intention to engage in a course of conduct arguably affected with a constitutional interest’; (2) that the intended conduct is ‘proscribed by’ the challenged law; and (3) that ‘there exists a credible threat of prosecution thereunder.’” *Id.* (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (*SBA List*)).

The district court correctly held Plaintiffs satisfied the first two standing requirements. JA-175–76. The central question in this appeal is whether Plaintiffs satisfied the third requirement: Is there a credible threat of enforcement from the Guidance Letter Defendants drafted, published, and then disseminated to school boards all across New York State, including to Plaintiffs?

The “credible-threat standard ‘sets a *low threshold* and is *quite forgiving* to plaintiffs seeking . . . preenforcement review.” *Vitagliano*, 71 F.4th at 138 (emphasis added) (quoting *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016)). This is particularly true in the context of a First Amendment preenforcement challenge, where this Court applies “somewhat relaxed standing and ripeness rules,” *Cerame*, 123 F.4th at 81 (quoting *Nat’l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013)). And in First Amendment preenforcement challenges, “[t]he fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution.” *Vt. Right to Life Comm., Inc.*, 221 F.3d at 382.

A preenforcement First Amendment plaintiff also need not wait for the policy to be enforced against her before bringing suit. “[I]t is well established that a ‘plaintiff need not first expose [her]self to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced.’” *Vitagliano*, 71 F.4th at 136 (ellipsis omitted) (quoting *Picard v. Magliano*, 42 F.4th 89, 97 (2d Cir. 2022)).

At bottom, Plaintiffs satisfy the credible threat requirement when the application of the challenged Guidance Letter “is *not imaginary or wholly speculative*.” *Hedges v. Obama*, 742 F.3d 170, 196 (2d Cir. 2013) (emphasis added) (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 302 (1979)). The district court incorrectly held Plaintiffs did not meet this low standard. This Court should reverse and hold Plaintiffs have demonstrated a credible threat of enforcement.

A. The four *Cerame* factors demonstrate Defendants credibly threaten Plaintiffs through a Guidance Letter they drafted, published, and disseminated.

This Court has established a non-exhaustive four factor test for whether a government statute, law, or policy credibly threatens a Plaintiff’s protected activity. *Cerame*, 123 F.4th at 85. Whether government action meets the test depends on “the particular circumstances at issue.” *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015). The *Cerame* test requires a court to consider: (1) “the presumption that the government intends to enforce its laws,” (2) “the recency of the applicable

regulation,” (3) “the general extent of enforcement against similar conduct,” and (4) “whether there has been any specific disavowal of enforcement against a plaintiff or h[er] conduct.” 123 F.4th at 85.

First, a presumption applies that Defendants will enforce their own Guidance Letter. “When an individual is subject to [threatened enforcement], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.” *SBA List*, 573 U.S. at 158. Instead, “[w]here a statute specifically proscribes conduct, the law of standing does ‘not place the burden on the plaintiff to show an intent by the government to enforce the law against it.’” *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019) (quoting *Hedges*, 724 F.3d at 197). “Rather, [this Court] has presumed such intent in the absence of a disavowal by the government or another reason to conclude that no such intent existed.” *Id.* (brackets omitted) (quoting *Hedges*, 724 F.3d at 197). Courts are “willing to presume that the government will enforce” its enactments where the enactment “is ‘recent and not moribund.’” *Hedges*, 724 F.3d at 197 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

Here, a presumption of enforcement applies. Defendants spent time writing the Guidance Letter and then sending it to every school boards across New York. JA-52–53. Defendants put their contact information in the Guidance Letter and invited complaints. JA-48–49. One of the drafters of the Guidance Letter,

Commissioner Rosa, can remove Plaintiffs from their elected school board positions. At oral argument, counsel for Defendants implied that removal proceedings *could* be instituted for the speech described in the Guidance Letter. *See* JA-144–45. The other drafter, Attorney General James, can prosecute complaints alleging violations of New York’s Human Rights Law. And when disseminating the Guidance Letter, Defendants indicated school board members would face “consequences” for not adhering to the Letter. JA-53. Overall, the Guidance Letter appears official and is backed by threats of official action. Accordingly, Plaintiffs should not be forced to violate the Guidance Letter and see what happens; rather, the presumption of enforcement applies.

Second, the Guidance Letter is extremely recent. Defendants published the Guidance Letter barely seven months before Plaintiffs filed suit. This recency favors Plaintiffs’ credible fear. Moreover, there is “nothing in the limited history” of the Guidance Letter to “overcome[] the general presumption that the government will enforce the laws it enacts.” *Cerame*, 123 F.4th at 86.

Third, the “general extent of enforcement against *similar* conduct” supports standing. *Id.* at 85 (emphasis added). Here, the history leading to Defendants publishing the Guidance Letter makes its threat credible. So too does the Commissioner’s history of adjudicating removal applications based on speech.

Where a regulation is new, a court may consider “the history leading up to the enactment of” the regulation. *Id.* at 86. Before publication, the New York General Assembly rejected an attempt to amend state law to extend “harassment” and “bullying” prohibitions to school board meetings and school board members. Assembly Bill No. A7687--A, 2025–2026 Reg. Sess. (N.Y. Apr. 4, 2025) (unenacted) (adding “school board or trustee meeting” to the definition of school function and “school board members” to the list of regulated parties). Despite this defeat, a month later, Defendants published the Guidance Letter. *See* JA-42. Defendants did by executive fiat what the Assembly failed to do legislatively. Defendants’ end-around to the Assembly’s rejection of the bill heightens the likelihood they will enforce their own Guidance Letter.

Defendants also published the Guidance Letter on the heels of Commissioner Rosa adjudicating a petition for removal against one of Plaintiff Ciampino’s fellow school board members. *See Application of T.L.*, 2024 N.Y. Educ. Dept. LEXIS 103; *cf. 281 Care Comm v. Arneson*, 638 F.3d 621, 630 (8th Cir. 2011) (“The reasonableness of plaintiffs’ fear is also underscored by the fact that, in the past, plaintiffs’ speech has triggered threats and the filing of one complaint. . . .”). In adjudicating the matter, Commissioner Rosa went out of her way, in dicta, to admonish the school board member for making remarks about a LGBTQ+ student organization. *Application of T.L.*, 2024 N.Y. Educ. Dept. LEXIS 103, at *5. This

shows Defendant Rosa’s proclivity for restricting and punishing speech she perceives is critical of LGBTQ+ students. And Defendants seemingly reference *Application of T.L.* in the opening paragraph of the Guidance Letter, stating: “Unfortunately, some board members have made, and encouraged, comments during board meetings that demean and stigmatize LGBTQ+ students.”⁶ JA-42.

Legislative events and Commissioner Rosa’s pre- and post-publication actions concerning board member speech therefore show that Plaintiffs’ fear of enforcement is neither imaginary nor wholly speculative. Plaintiffs have alleged a credible threat of enforcement.

Fourth, and finally, Defendants have not specifically disavowed enforcement of their Guidance Letter. The closest Defendants come is a declaration from Daniel Morton-Bentley, Counsel & Deputy Commissioner for Legal Affairs for NYSED. JA-104–06. Mr. Morton-Bentley declares: “[a]gency guidance, such as the

⁶ Even after the Guidance Letter’s publication, in February 2026, Commissioner Rosa used the procedure she outlined in the Guidance Letter to force a school board member to show cause why he should not be removed for using a universally offensive racial slur during school board business. *Application of Patterson*, 2026 N.Y. Educ. Dept. LEXIS 16, at *5–7 (Commissioner’s Decision at Appendix A). The proceeding shows that the Commissioner will act against what she considers offensive speech. *See id.* She believes she has the power to remove a democratically elected board member because he offends people. *See id.* at *6 (collecting speech-related removal cases).

Guidance Letter, has no authority to alter the outcome of [removal] proceedings.”
JA-106.

But Mr. Morton-Bentley’s statement gives no comfort to board members who may have to defend a petition for removal filed by a member of the public. *Cf. SBA List*, 573 U.S. at 164 (discussing heightened threat of enforcement where members of the public can initiate enforcement). Mr. Morton-Bentley did not declare that Commissioner Rosa would immediately dismiss any petition for removal she receives that alleges a school board member made or permitted a “comment” described by the Guidance Letter without calling for a response from the accused school board member. *See* JA-104–06; *see also SBA List*, 573 U.S. at 165 (finding the threat of legal proceedings and the cost to defend them “may give rise to harm sufficient to justify pre-enforcement review”). The credible-threat test asks whether the plaintiff faces a credible threat of *facing an administrative enforcement action*, not *conviction or punishment*—i.e., will they face prosecution. *See Cerame*, 123 F.4th at 87 (“‘[A]dministrative action, like arrest or prosecution,’ moreover, even when discipline does not ensue, ‘may give rise to harm sufficient to justify pre-enforcement review.’” (quoting *SBA List*, 573 U.S. at 165))).

Far from disavowal, Defendants have fought this lawsuit by defending the Guidance Letter. The district court did not address the Defendants’ failure to disavow enforcement of the Guidance Letter. *Cf. Minn. Voters. All. v. Ellison*, No.

24-3094, 2026 WL 2443854, 2026 LX 439414, at *7 (8th Cir. Aug. 20, 2026) (citing *Chiles v. Salazar*, 607 U.S. 627, 638 n.* (2026)).

And finally, instead of disavowing the Guidance Letter, Defendants formally updated it on September 11, 2026. *See supra* note 1. Defendants removed reference to a District of New Hampshire case on which they had relied because the First Circuit reversed that decision. *See* Updated Letter at 1 n.*, 4 n.12; JA-45 (footnote 12 citing *Fellers*, 2025 LX 17316); *Fellers*, 2026 LX 462405, at *1. Defendants relied on that case for the premise that “[b]oards may also prohibit specific speech on a topic if such speech would have a discriminatory, harassing, or bullying effect.” JA-45 (footnote 12). The First Circuit rejected this premise, holding that “administrators cannot favor one side of a debate involving parental speech on an issue of prominent public concern, and which, in those parents’ views, concerned the safety of their children.” *Fellers*, 2026 LX 462405, at *19–20. Despite the First Circuit’s rejection of a central premise of the Guidance Letter, Defendants still have not disavowed it—instead, they reissued it.

All four *Cerame* factors support Plaintiffs’ credible fear of enforcement under the Guidance Letter. This is particularly true where (1) courts presume governments will enforce their own regulations, (2) the credible threat threshold is “low” and “quite forgiving,” and (3) courts apply a somewhat-relaxed standard to First Amendment claims. At a minimum, Plaintiffs satisfy the credible threat of

enforcement standard because their fear is “not imaginary or wholly speculative.” *Hedges*, 742 F.3d at 196 (quoting *Babbitt*, 442 U.S. at 302).

B. Two other considerations support Plaintiffs’ credible threat showing.

The four factors this Court advanced in *Cerame* are non-exhaustive. *See* 123 F.4th at 85 (“In evaluating whether this is so, we consider, *among other factors*. . . .” (emphasis added)). Two other factors—the ability of third parties to initiate removal proceedings and the blatant viewpoint discrimination Defendants espouse on an ongoing topic of public debate through the Guidance Letter—support Plaintiffs’ credible threat argument.

1. Third parties can initiate removal proceedings.

Defendants explicitly empower third parties to bring removal proceedings, instructing them on the process for filing a petition for removal with Commissioner Rosa and providing them information on how to contact the Office of the Attorney General. JA-48–49. Where third parties have the power to hale speakers into an administrative proceeding because of their speech, “[t]he credibility of [a] threat is bolstered by the fact that authority to file a complaint . . . is not limited to a prosecutor or an agency.” *SBA List*, 573 U.S. at 164. “Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example,

political opponents.” *Id.*; *see also Cerame*, 123 F.4th at 87 (favorably quoting *SBA List* and considering ability of third parties to file complaint in credible threat analysis); *Jensen v. Minn Bd. of Med. Prac.*, No. 25-1812, 2026 WL 2716496, 2026 LX 585631, at *12 (8th Cir. Sept. 15, 2026) (considering “the fact that anyone can file a complaint” as part of credible threat analysis).

The ability of third parties to file petitions for removal heighten Plaintiffs’ fear of facing an enforcement action. This is particularly true where (1) just two years ago, a third party filed a petition to remove a board member for speech critical of an LGBTQ+ student organization, *see Application of T.L.*, 2024 N.Y. Educ. Dept. LEXIS 103; and (2) an activist who has attended multiple school board meetings in Plaintiff Wachter’s district has posted a video threatening to write a letter to Commissioner Rosa seeking Ms. Wachter’s removal, JA-115. *See 281 Care Comm.*, 638 F.3d at 630 (“The reasonableness of plaintiffs’ fear is also underscored by the fact that, in the past, plaintiffs’ speech has triggered threats and the filing of one complaint. . . .”).

2. Through the Guidance Letter, Defendants espouse blatant viewpoint discrimination on an ongoing topic of public debate.

There is an ongoing public “debate over transgender rights,” including specifically within the context of sex-separated facility usage and sex-separated athletics in the public-school setting. *Defending Educ. v. Olentangy Loc. Sch. Dist.*

Bd. of Educ., 158 F.4th 732, 753 (6th Cir. 2025) (en banc) (*Olentangy*); *see also Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021) (“[T]hat one’s sex cannot be changed, a topic which has been in the news on many occasions and has become an issue of contentious political . . . debate.” (internal quotation marks omitted)). As part of this debate, the pronouns a speaker uses “can and do convey a powerful message.” *Meriwether*, 992 F.3d at 508. Where a government “bars [speakers] from referring to transgender and nonbinary [persons] using the pronouns that match their biological sex if the [persons] prefer to go by different pronouns,” it “raises the most serious red flags under the First Amendment.” *Olentangy*, 158 F.4th at 738, 755. “Viewpoint discrimination obviously exists when the government allows speech conveying one point of view . . . but prohibits speech conveying the opposite point of view” *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 499 (6th Cir. 2020) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

Defendants, through their Guidance Letter, engage in two forms of viewpoint discrimination. First, Defendants prohibit speakers at school board meetings, including school board members, from “intentionally misgender[ing] district students.” JA-45. A school board member must use pronouns acknowledging that students can change gender and cannot use pronouns signaling the belief that gender is immutable, on pain of removal from office. Given the meaning ascribed to pronouns in the ongoing debate and the ubiquitousness of pronouns in everyday

speech, *see Olentangy*, 158 F.4th at 758 (acknowledging the use of biological pronouns “[f]or centuries” and that “it would be all but ‘impossible’ to train oneself not to use pronouns when referring to others”), Defendants’ prohibition on misgendering is clear-cut viewpoint discrimination.

Second, Defendants restrict comments “on transgender and gender-expansive students’ rights to use facilities, including restrooms and locker rooms, or participate on school athletic teams consistent with their gender identity.” JA-42. They further restrict “allegations that transgender students’ identities and experiences are illegitimate.” JA-45. But Defendants do not restrict speakers from saying biological males identifying as transgender *should* be permitted to use the girl’s restroom or compete against girls in sports. Likewise, school board members and speakers may voice opinions legitimizing a student’s ability to change genders. Defendants thus engage in classic viewpoint discrimination: they permit speech advancing one position in an ongoing public debate while restricting speech advancing the opposing position. *E.g.*, *R.A.V.*, 505 U.S. at 388.

The blatant nature of the viewpoint discrimination reveals Defendants’ intent. If Defendants were not looking to target a viewpoint that is part of an ongoing public debate, why draft the Guidance Letter as they did? And why dedicate a section of that letter to removal proceedings, giving third parties direction on how to turn often-

spoken comments on just one side of transgender issues in schools into grounds for filing a petition to remove a school board member?

III. The district court incorrectly concluded the Guidance Letter restated New York law and failed to address controlling Second Circuit precedent holding that government letters can create credible threats.

Rather than applying *Cerame*'s four credible-threat factors, the district court largely found no credible threat to Plaintiffs based on two erroneous premises: (1) the Guidance Letter merely restated existing New York law; and (2) because the Letter is informal rather than the product of formal rulemaking, it could not create a credible threat of enforcement. The court erred on both points.

A. Defendants extend New York law to punish pure speech made by and to elected officials at school board meetings.

Defendants, in their Guidance Letter, cite many state statutory provisions. But none of these provisions do what the Guidance Letter does: extend state harassment or bullying laws to pure speech on matters of public concern at school board meetings. Of the laws Defendants cite, DASA comes the closest to regulating the speech Defendants prohibit in the Guidance Letter. But DASA's text and the New York State Assembly's recent refusal to extend DASA to school board members and meetings shows it cannot apply to Plaintiffs' speech. The remainder of the New York laws Defendants cite are inapposite here.

1. DASA does not reach pure speech on matters of public concern at school board meetings.

DASA prohibits “harassment” and “bullying” of students based on gender identity and gender expression. N.Y. Educ. Law § 12(1). But DASA defines these terms to stop short of pure speech protected under the First Amendment. In pertinent part, DASA defines “harassment” and “bullying” as “verbal . . . action[]” based on “gender” that creates “a hostile environment by conduct or by threats, intimidation or abuse.” N.Y. Educ. Law § 11(7).

DASA does not reach speech by students, parents, or school board members advocating for protecting girls’ privacy by separating restrooms and locker rooms by sex. These speakers are not making “threats” or engaging in “intimidation or abuse.” Neither do they create a “hostile environment” by expressing this opinion at a single school board meeting (or even successive meetings). DASA also does not reach students, parents, and school board members using biological pronouns when discussing school policies. It is common for adults in the United States to express opinions like these and use biological pronouns, which reflect widely-held traditional beliefs. *See Olentangy*, 158 F.4th at 757 (“Throughout most of our country’s history, our society viewed biological pronouns as a proper (perhaps the only proper) way to refer to others.”). It would surprise no one, including transgender-identifying students, that some community members believe sex is

immutable and should control usage of sex-separated facilities, competition in sex-separated sports, and pronoun usage.

Even if such speech somehow fell within DASA’s definition of “harassment” and “bullying”—a definition Defendants never cite in the Guidance Letter—DASA does not apply to school board meetings. DASA prohibits the “harassment or bullying *by employees or students* on school property or at a school function.” N.Y. Educ. Law § 12(1) (emphasis added).

Tellingly, as discussed earlier, just before Defendants published the Guidance Letter, the New York State Assembly rejected an attempt to amend DASA to extend “harassment” and “bullying” prohibitions to school board meetings and school board members. Assembly Bill No. A7687--A, 2025–2026 Reg. Sess. (N.Y. Apr. 4, 2025) (unenacted) (adding “school board or trustee meeting” to the definition of school function and “school board members” to the list of regulated parties). If the Guidance Letter merely restated existing New York law, the Assembly’s amendment would have been superfluous. The failed amendment to DASA puts an exclamation point on Plaintiffs’ contention that Defendants, through the Letter, impose obligations beyond existing state law.

2. The other New York laws Defendants cite in the Guidance Letter do not address pure speech at school board meetings.

Beyond DASA, Defendants, in their Guidance Letter, cite sixteen other New York statutory provisions. These citations are more flash than substance. The district court accepted it at face value, remarking at the hearing that the Guidance Letter is “replete with footnotes.” JA-159. The court even concluded in its order that the Letter “serves as a restatement of existing anti-discrimination law.” JA-178. But nothing in Defendants’ series of inapposite string citations pertains to pure speech at school board meetings.

Six of Defendants’ sixteen other statutory provisions discuss facility access and discrimination based on gender identity and gender expression in the educational setting. *See* JA-42 (footnote 2 citing N.Y. Exec. Law §§ 296(4), 292(35); N.Y. Educ. Law § 3201-a); JA-46 (footnote 21 citing N.Y. Exec. Law § 291(2)); JA-47 (footnote 22 citing N.Y. Civ. Rts. Law § 40-c); JA-47 (footnote 24 citing N.Y. Exec. Law § 300). None of these provisions regulate speech at school board meetings. The Human Rights Law ensures students the “opportunity to obtain education [and] the use of places of public accommodation . . . without discrimination because of . . . gender identity or expression.” N.Y. Exec. Law § 291(2); *see also* N.Y. Exec. Law § 292(35) (defining “gender identity or expression”). It also makes it “an unlawful discriminatory practice for an educational institution to deny the use of its facilities

to any person . . . or to permit the harassment of any student . . . by reason of . . . gender identity or expression.” N.Y. Exec. Law § 296(4). Meanwhile, the Civil Rights Law ensures equal protection of the laws and bars discrimination related to gender identity or expression. N.Y. Civ. Rts. Law § 40-c.

Regulating facility access and sports participation, and prohibiting discrimination and harassment in schools, is not the same as regulating speech at school board meetings. Though such a challenge may be valid, this suit does not challenge New York laws that require school districts to permit transgender-identifying students to use facilities and play in sports based on their gender identity. It challenges Defendants’ prohibition of speech by Plaintiffs and others opposing those laws. JA-30–39. That right—to engage in speech opposing existing law—is at the zenith of the First Amendment’s protections. *See United States v. Shugarman*, 596 F. Supp. 186, 190 (E.D. Va. 1984) (“It is settled beyond dispute that the [F]irst [A]mendment protects an individual’s right to disagree with the law and to advocate the violation of a law.” (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969))).

Defendants cite eight other statutes that are background law not specific to issues involving transgender-identifying students. Three statutes relate to power and duties of school districts and boards. *See* JA-42, 44 (footnotes 1 and 6 citing N.Y. Educ. Law §§ 1604, 1709, 1804). Another provision requires school board members to take an “oath to uphold the state and federal constitutions to faithfully discharge

their duties.” JA-44 (footnote 5 citing N.Y. Pub. Off. Law § 10). But a school board member can faithfully uphold her oath while also voicing disagreement with New York law and certainly while allowing students, parents, and community members to voice disagreement.⁷

Finally—ironically—Defendants cite two open meetings statutes. JA-42 (footnote 1 citing N.Y. Pub. Off. Law §§ 100, 103). In one, the legislature declares, in part: “The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.” N.Y. Pub. Off. Law § 100.⁸ Defendants, through their Guidance Letter, actually work against the purpose of this law.

In sum, the statutes Defendants cite in the Guidance Letter do not regulate viewpoints expressed at public school board meetings. And Defendants have never identified what specific law or laws they believe do so. New York law simply does

⁷ Four more provisions relate to Commissioner Rosa’s power to remove a school board member, the process for initiating a petition to remove a school board member, and grounds for removal. JA-48 (footnotes 28, 29, and 35, citing N.Y. Educ. Law §§ 2-d, 306(1), 310; N.Y. Gen. Mun. Law § 805-a(1)(b)). None of these provisions place restrictions on the speech of board members, students, parents, or community members at school board meetings. *See id.*

⁸ The other provision is an operative provision requiring school boards to hold open meetings. *See* N.Y. Pub. Off. Law § 103.

not prohibit “comments” advocating for sex-separated facilities and athletics at school board meetings or using biological pronouns. If the district court were correct that the Guidance Letter merely “serves as a restatement of existing anti-discrimination law,” Defendants would have no difficulty identifying such a law.

B. The district court failed to apply controlling Second Circuit precedent, directly cited by Plaintiffs below, that guidance and letters issued by public officials can and do present credible threats.

A guidance document issued by an agency or government official with enforcement powers sheds great light on how the official will enforce the law. “People do not lightly disregard public officers’ thinly veiled threats. . . .” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963). Courts, including this Court, have therefore recognized the force guidance letters may carry. Courts repeatedly permit parties who are the object of guidance letters to challenge them.

Below, the district court held the Guidance Letter “lacks the force of law,” and thus did not pose a credible threat. JA-177–78. Inexplicably, the district court failed to address this Court’s precedent—cited to the district court by Plaintiffs—establishing that informal government actions even less threatening than the Guidance Letter pose a threat actionable under the First Amendment. *See, e.g., Okwedy v. Molinari*, 333 F.3d 339, 342–44 (2d Cir. 2003) (per curiam) (government letter criticizing message on billboard and reminding owner that he derived “substantial economic benefits” from the billboards constituted credible threat);

Rattner v. Netburn, 930 F.2d 204 (2d Cir. 1991) (village trustee criticizing chamber of commerce and saying he made a list of businesses associated with chamber constituted credible threat).

Whether through formal rulemaking or an informal letter, threats by the government against citizen speech on matters of public concern create concrete First Amendment harm. *Okwedy*, 333 F.3d at 342–44. Several courts have held that past United States Department of Education guidance on gender identity and transgender issues, which resembled the Guidance Letter, caused Article III injury to those it targeted. *See Texas v. Cardona*, No. 4:23-cv-00604-O, 2024 U.S. Dist. LX 103452, at *27–28 (N.D. Tex. June 11, 2024) (collecting cases holding that defendant’s decision to label a document “guidance” is irrelevant where it has the actual effect of changing behavior); *Tennessee v. U.S. Dep’t of Educ.*, 615 F. Supp. 3d 807, 823 (E.D. Ten. 2022) (holding that a guidance document that forces a plaintiff into the Hobson’s choice between modifying behavior or facing legal consequences is “sufficient to constitute an injury”); *Texas v. United States*, 201 F. Supp. 3d 810, 822–23 (N.D. Tex. 2016) (plaintiff-object of guidance document suffers Article III injury where guidance attempts to coerce the plaintiff to change its conduct).

Here, Plaintiffs are the object of Defendants’ Guidance Letter. They must, as some school board members across New York have already recognized, take seriously Commissioner Rosa and Attorney General James’ warnings published on

government letterhead. *See* JA-28, 30, 89, 96 (school district counsel describing the Rockville Centre Union Free School District’s perception that Commissioner Rosa’s guidance on gender identity matters is binding).

Outside the education context, this Court has twice held that informal government action threatening speech can create a credible threat of enforcement and Article III injury. *See Okwedy*, 333 F.3d 339; *Rattner*, 930 F.2d 204. First, in *Rattner*, a village trustee wrote a letter criticizing the local chamber of commerce’s publication of a paid advertisement. 930 F.2d at 205–06. The trustee later commented that he had “made a list” of forty businesses associated with the chamber. *Id.* at 206. Members of the chamber sued. They alleged the trustee violated the First Amendment because he threatened a boycott of businesses in retaliation for the publication. *Id.* at 207. The trustee prevailed in the district court, which held that the trustee’s speech contained no threat. *Id.*

This Court reversed. It held that “where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official’s request, a valid claim for violation of First Amendment rights can be stated.” *Id.* at 208 (brackets omitted) (quoting *Hammerhead Enters. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983)). Viewing the facts in the light most favorable to plaintiffs, the trustee’s speech

suggested a possible boycott and retaliation, which gave rise to an Article III injury. *Id.* at 209–10.

If a village trustee’s public comments about making a list of businesses constitutes a credible threat, so too does the Guidance Letter. In fact, it is more direct: the email attaching the Guidance Letter warns of “*consequences* for not meeting th[e] obligations” stated in the Letter. JA-53 (emphasis added). Consistently, Defendants feature Commissioner Rosa’s removal power in the Guidance Letter. JA-47–49. Hanging removal from elected office over a school board member’s head is at least as implicitly threatening as a boycott.

Second, in *Okwedy*, the plaintiff paid for billboards to feature a message calling for repentance from a homosexual lifestyle. 333 F.3d at 341. The defendant, a borough president, sent a letter to the owner of billboards opposing the advertisements. *Id.* at 341–42. The letter noted that the billboard owner “derive[d] substantial economic benefits from” the billboards and requested that the billboard owner contact the borough president’s legal counsel and chair of its anti-bias task force. *Id.* at 342. The district court concluded the letter did not reasonably convey a threat and dismissed the plaintiff’s First Amendment claims. *Id.* at 343.

Again, this Court reversed. After discussing *Rattner*, this Court concluded a government official “who threatens to employ coercive state power to stifle protected speech violates a plaintiff’s First Amendment rights, regardless of whether

the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form." *Id.* at 344. This Court noted the borough president's mention of the "substantial economic benefits" the billboard owner "derived from its billboards in Staten Island." *Id.* The Court thus held the letter "could be found to contain an implicit threat of retaliation if [the billboard owner] failed to accede to Molinari's requests." *Id.*

As in *Rattner*, the letter supporting plaintiffs' credible threat showing in *Okwedy* falls far short of formal rulemaking. And the Guidance Letter here has even more hallmarks of official government action. Two major New York agencies produced the Guidance Letter through deliberate, coordinated action. The seals of the State of New York Office of the Attorney General and the New York State Education Department appear at the top of the Guidance Letter. JA-42. And Commissioner Rosa, one of the signatories to the Guidance Letter, has the power to remove a school board member for violating the Guidance Letter. *See NRA of Am. v. Vullo*, 602 U.S. 175, 191–92 (2024) ("[T]he greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official."). Defendants explain this removal power openly in the Guidance Letter, a far more direct threat to Plaintiffs than *Rattner*'s list of businesses or *Okwedy*'s reference to economic benefits.

This Court is not alone in its understanding of credible threat. The Supreme Court and out-of-circuit authority have cited *Okwedy* with approval. *See, e.g., Vullo*, 602 U.S. at 190; *Backpage.com, L.L.C. v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) (“The First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands.”). These cases confirm that informal action by government officials with power over their targets that suggest punishment can establish a credible threat of enforcement sufficient to confer Article III standing. Defendants do exactly that in the Guidance Letter. They link self-censorship and censorship of others to school board members’ duties and then discuss removing school board members for not upholding those duties. To top it all off, Defendants did so in a letter co-authored by an official with the power to remove school board members. *See Vullo*, 602 U.S. at 191 (“The power that a government official wields, while certainly not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official’s communication as coercive.”).

In sum, Plaintiffs have adequately alleged that Defendants are hanging a “Sword of Damocles” over their heads that gives rise to an Article III injury. *See First Choice Women’s Res. Ctrs., Inc. v. Davenport*, 146 S. Ct. 1114, 1127 (2026).

IV. Plaintiffs are entitled to a preliminary injunction or remand for consideration of the merits of their motion in the first instance.

If the Court reverses the district court’s “dismissal of all [the plaintiffs’] claims,” the district court’s “denial of [a] preliminary injunction motion as moot rests on an error of law.” *New Hope Family Servs. v. Poole*, 966 F.3d 145, 180 (2d Cir. 2020). In such cases, this Court may direct the district court to issue the preliminary injunction where the plaintiffs’ case has merit. *Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986). The Court may also remand to the district court for consideration of the motion. *New Hope Family Servs.*, 966 F.3d at 180. Plaintiffs ask the Court to direct the district court to enter a preliminary injunction in their favor because their case has merit and no further factual development is needed.

CONCLUSION

Defendants, through their Guidance Letter, credibly threaten Plaintiffs with removal from office proceedings for saying at school board meetings that students should use facilities and play in sports based on sex, not gender identity, or for using biological pronouns instead of “preferred” pronouns. Defendants make the same threat if Plaintiffs fail to shut down speech from students, parents, and community members expressing the same viewpoints. For this reason, the district court erred in holding that Plaintiffs lack Article III standing. Plaintiffs ask the Court to reverse the district court’s grant of Defendants’ motion to dismiss and direct the district court to

enter a preliminary injunction preventing Defendants from enforcing the Guidance Letter.

Dated: September 18, 2026

/s/ Jordan R. Miller

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CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(g)(1), this is to certify the foregoing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and L.R. 32.1(a)(4)(A) because it contains 10347 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), using Microsoft Word 365. The foregoing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared on a computer using Times New Roman font (14 point).

/s/ Jordan R. Miller
Jordan R. Miller

CERTIFICATE OF SERVICE

I hereby certify that on, September 18, 2026, a copy of the foregoing was filed electronically with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system, which will send notification of such filing to all parties. Parties may access the filing through the Court's electronic filing system.

/s/ Jordan R. Miller
Jordan R. Miller