26-1821

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,

Defendants-Appellees.

(*caption continues inside front cover*)

On Appeal from the United States District Court for the Northern District of New York

BRIEF FOR APPELLEES

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PRELIMINARY STATEMENT

In May 2025, defendants New York's Attorney General and Commissioner of Education issued a "Dear Colleague" guidance letter to school board presidents, reminding school boards of their legal obligation to create and maintain a safe and harassment-free environment for all students, including transgender and nonbinary students. Seven months later, two individual members of local school boards filed this First Amendment lawsuit seeking injunctive and declaratory relief with respect to the guidance letter. The U.S. District Court for the Northern District of New York (Nardacci, J.) dismissed the complaint for lack of standing and denied plaintiffs' motion for a preliminary injunction as moot. This Court should affirm.

As the district court recognized, plaintiffs have not alleged that the guidance letter has chilled their speech; to the contrary, plaintiffs alleged that they intend to continue their desired speech regarding transgender and nonbinary students. And plaintiffs have failed to plead facts that support their only proffered theory of standing, which is a credible threat of enforcement based on the May 2025 guidance letter. The guidance letter merely reminds school boards of their obligations under long-standing

antidiscrimination laws, which have long prohibited bullying and harassment in educational settings. Plaintiffs do not allege that they intend to engage in such conduct or that defendants have threatened to use antidiscrimination law to penalize general, political speech.

If this Court disagrees with the district court's dismissal based on lack of standing, the proper remedy would be to remand to the district court to consider plaintiffs' request for a preliminary injunction in the first instance. Plaintiffs offer no reason why this Court should resolve the merits of the preliminary injunction motion in the first instance on this appeal.

ISSUES PRESENTED

1. Whether plaintiffs lack standing to raise a pre-enforcement First Amendment challenge to a guidance document that does not change existing state law, where plaintiffs do not credibly allege that the guidance or laws cited therein have ever been applied to remove local school board members from office.

2. If this Court reverses the dismissal of the complaint, whether it should remand to the district court to consider plaintiffs' motion for a preliminary injunction in the first instance.

STATEMENT OF THE CASE

A. Legal Background

1. New York laws governing school boards and removal of school board members

New York schools are typically operated by local boards of education, of which there are approximately 700 across the State.[1] The powers and duties of local school boards and their elected members[2] are enumerated by statute and include, among other things, calling district meetings; managing and maintaining school property and facilities; financing school operations; and determining the course of studies to be pursued and the textbooks to be used in the schools. *See* N.Y. Education Law §§ 1604 (common school districts), 1709 (union free school districts), 1804 (central school districts), 2503 (small city school districts), 2554 (large city school districts). School board members are elected state officials who take an oath to uphold the federal and state constitutions and faithfully discharge their duties. *See* N.Y. Const. art. XIII, § 1; N.Y. Public Officers Law § 10.

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[1] *See* N.Y. State Educ. Dep't, Graduation Data (n.d.) (noting number of school districts statewide).

[2] School board members are sometimes referred to as "trustees" in state law. For simplicity, this brief uses the term "school board member" or "board member."

The New York State Education Department has a supervisory role with respect to school boards. One of the remedial options available to the Commissioner of Education is the ability to remove a school board member from office when it is proven that the board member (i) has engaged in a willful violation or neglect of duty under the New York Education Law or (ii) has willfully disobeyed a decision, order, rule, or regulation of the Board of Regents or the Commissioner. Education Law § 306(1); *see Application of Schenk,* Decision No. 15,729, 47 Ed. Dep't Rep., 2008 WL 8715478, at *3 (Feb. 29, 2008). To be considered willful, the board member's actions must be intentional and with a wrongful purpose. *Schenk*, 2008 WL 8715478, at *3.

A removal proceeding against a board member may be instituted by a resident of the district, the school board, or the Commissioner herself, through a sworn, verified petition that must be served on the board member. Education Law §§ 306(1), 310; 8 N.Y.C.R.R. §§ 275.5(a), 277.1(b), 277.2. The petition must plead the violation with specificity and must be filed within thirty days of the act complained of. 8 N.Y.C.R.R. §§ 275.10, 275.16, 277.1. The school board member may seek judicial review of an adverse decision following a removal proceeding. *See, e.g.*, *Matter of*

Paladino v. Board of Educ. for Buffalo Pub. Sch. Dist., 183 A.D.3d 1043, 1044 (3d Dep't 2020); *see Matter of Bd. of Educ. of Rochester v. Nyquist*, 48 N.Y.2d 97, 103 (1979) ("[O]ur courts have not hesitated to exercise a reviewing function when, in their opinion, the commissioner had erroneously decided issues[.]").

2. New York antidiscrimination laws applicable to educational institutions

The New York Constitution protects the rights of all people, including transgender and nonbinary people, to be free from discrimination and harassment based on their sex, including their gender identity or expression. *See, e.g.*, N.Y. Const. art. I, § 11(a). State law extends these antidiscrimination protections to education. For example, the New York State Human Rights Law prohibits educational institutions, including school districts, from denying the use of their facilities to any qualified person on the basis of gender identity or expression, and prohibits educational institutions from permitting the harassment of any student or applicant by reason of gender identity or expression. N.Y. Executive Law § 296(4); *see id.* § 292(40). Likewise, the New York Civil Rights Law prohibits any agency or subdivision of the State from subjecting a person

to discrimination or harassment based on gender identity or expression. N.Y. Civil Rights Law § 40-c(2). And the New York Education Law prohibits discrimination on school property or at a school function based on a student's actual or perceived sex or gender. Education Law § 12(1). The Education Law also prohibits disqualification from state public and high school athletic teams by reason of sex, which includes gender identity. *See id.* § 3201-a.

In 2010, prompted by findings that students' ability to learn and schools' ability to educate their students were "compromised by incidents of discrimination or harassment including bullying, taunting or intimidation," New York enacted the Dignity for All Students Act (the "Dignity Act"). *Id.* § 10 et seq. The law prohibits school employees, including superintendents, as well as students, from harassing, bullying, or otherwise subjecting students to discrimination on school property or at school functions based on the student's identity, which includes the student's "actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex." *Id.* § 12. The law defines harassment and bullying to mean (i) "the creation of a hostile environment"; (ii) "by conduct or by threats, intimidation or abuse";

(iii) which causes or would reasonably be expected to cause educational disruption, loss of opportunities, physical injury, or emotional harm. *Id.* § 11(7).

The Commissioner and the Attorney General implement and enforce these antidiscrimination and antibullying laws in various ways. For example, the Commissioner is responsible for issuing regulations to implement the Dignity Act, *id.* § 14(3); *see* 8 N.Y.C.R.R. § 100.2(c), (jj), (kk); for ensuring that licensed educational professionals (such as classroom teachers, school psychologists, and administrators) receive antiharassment training, Education Law § 14(5); and for hearing appeals from school district and school board decisions with respect to the Dignity Act, *id.* § 310.[3] And the New York Attorney General investigates claims of education-related discrimination under state law where there is a pattern or practice of discrimi-

[3] For instance, the Commissioner may hear an appeal in which a parent has filed a complaint under the Dignity Act alleging that their child was bullied or harassed, and the district has determined that no violation occurred or has taken allegedly insufficient remedial action. *See, e.g.*, *Appeal of A.M.*, Decision No. 18,813, 65 Ed. Dep't Rep., 2026 WL 2391065, at *1 (Aug. 4, 2026). Because local policies may also permit parents to appeal an administrator's decision to the school board, the Commissioner may also hear appeals from school board decisions regarding Dignity Act complaints. *See, e.g.*, *Appeal of a Student with a Disability*, Decision No. 17,845, 59 Ed. Dep't Rep., 2020 WL 3300106, at *8 (June 3, 2020).

nation against students.[4] In addition, the Commissioner and Attorney General regularly issue "Dear Colleague" guidance letters to school boards and other educational institutions, including about schools' obligations under the State's antidiscrimination laws.[5]

B. The May 2025 "Dear Colleague" Guidance Letter

On May 8, 2025, Attorney General James and Commissioner Rosa published a "Dear Colleague" guidance letter directed at school boards and their members. (J.A. 42-50.) The guidance letter was issued to remind New York state school board members that, while school boards may elect to receive public comments during their meetings and may address controversial topics during those meetings, boards of education have an obligation to adhere to state laws and regulations that safeguard students from

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[4] *See, e.g.*, Off. of the N.Y. State Att'y Gen., Press Release, Attorney General James Secures Landmark Agreement to Reform Student Discipline Practices at Buffalo Public Schools (Feb. 12, 2026); Off. of the N.Y. State Att'y Gen., Press Release, Attorney General James Reaches Agreement to Address Discrimination, Bullying, and Harassment in Mamaroneck Schools (July 18, 2023).

[5] *See, e.g.*, Letter from Eric T. Schneiderman, New York Att'y Gen., & MaryEllen Elia, N.Y. Comm'r of Educ., to Colleagues (Nov. 18, 2016); Letter from Letitia James, N.Y. Att'y Gen., & Betty A. Rosa, N.Y. Comm'r of Educ., to Colleagues (Aug. 9, 2023).

harassment, bullying, and the disclosure of protected student information. (J.A. 42-43.)

The guidance letter was organized into three sections—the first two of which plaintiffs do not challenge. (*See* J.A. 129.) The first section discussed board members' duty to ensure that board meetings, which are held for the purpose of carrying out school boards' statutory functions (see *supra* at 3), are conducted in a manner that respects the dignity and rights of all students. (J.A. 43-46). The guidance letter noted that school board members have a duty to engage in constructive discussion, which typically entails refraining from discussing matters outside the scope of boards' legal authority, such as making remarks about students' bodies. (J.A. 44-45.) To that end, the guidance letter appended a list of resources published by the Office of the New York Attorney General and Education Department to assist board members in promoting and sustaining a safe and inclusive learning environment for LGBTQ+ students. (J.A. 50; *see* J.A. 46.)

The second section discussed how actions of school board members could expose their districts to liability, including by private parties. Specifically, the guidance letter reminded school board members of the

protections afforded to all students under the New York Constitution and New York Civil Rights Law with respect to their right to an education free from discrimination based on sex, sexual orientation, gender identity, or gender expression. It further cautioned school boards regarding state law provisions and common law duties that prohibit school officials from failing to act, including under circumstances where school boards permit harassment of students based on their sex, sexual orientation, gender identity, or gender expression. (J.A. 46-47.)

The third section reminded board members that, pursuant to New York Education Law § 306, board members may be removed if they violate the Education Law or another law pertaining to public schools, willfully neglect their duties as public officers, or willfully disobey a decision, order, rule, or regulation of the Regents or the Commissioner. (J.A. 47-48.) The guidance letter also restated the settled rule that removal may be warranted when a board member engages in a pattern of conduct that interferes with the board's ability to function, including willingly permitting the harassment of individual students, or when a board member neglects their duty to set an example for the student body by condoning discriminatory or harassing comments. Last, the guidance letter restated

the rule that board members may be removed for disclosing confidential student information. (J.A. 48.)

In May 2025, the Education Department distributed the guidance letter in an email to school board presidents under the notation "FYI." (J.A. 52-54 (see eighth item).) The email stated that the guidance letter "reminds school board members of their legal duties and responsibilities when conducting school board meetings," and "provides information around obligations to adhere to state laws and regulations that safeguard students from harassment, bullying, and the disclosure of protected student information, and the consequences for not meeting those obligations." (J.A. 53.)

C. This Lawsuit

In December 2025, seven months after receiving the guidance letter, two members of local school boards, one in Nassau County and one in Schenectady County, filed this lawsuit challenging the guidance letter and seeking a preliminary injunction.[6]

Plaintiffs alleged that they feared prosecution pursuant to the guidance letter if they continued, during school board meetings, (i) to express their views that "students should not be permitted to use sex-separated restrooms and locker rooms or play sex-separated sports based on purported gender identity, as opposed to their biological sex" (J.A. 19, 21, 23-24; *see* J.A. 59, 79) and (ii) to advocate for and support Board resolutions consistent with those views (J.A. 20-21; *see* J.A. 62). Plaintiffs also alleged that they intended to, "[w]hen necessary," use "pronouns that correspond to third persons' biological sex." (J.A. 21, 24; *see* J.A. 62, 82.) Plaintiffs did not provide additional detail or explain under what circumstances they believed that using such pronouns might be "necessary."

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[6] Plaintiffs were joined by two additional plaintiffs who are parents (but not school board members) in their respective districts. The parent plaintiffs have not appealed from the district court's dismissal of their claims.

(*See* J.A. 60 (noting established practice that "members of the Board do not refer to any specific student during a Board meeting").) Plaintiffs alleged that the guidance letter violated the First Amendment's prohibitions against viewpoint discrimination (Counts I and II); vagueness and overbreadth (Count III); and compelled speech (Count IV). (J.A. 30-39.) Defendants cross-moved to dismiss, asserting that plaintiffs lacked standing because they failed to allege a credible future injury traceable to the guidance letter. (Mem. of Law in Opp'n. to Pls.' Mot. for a Prelim. Inj. and in Supp. of Defs.' Mot. to Dismiss at 1-2, 6-12 (Feb. 20, 2026), ECF No. 20-1.) Defendants also opposed plaintiffs' preliminary injunction motion on various grounds. (*Id.* at 12-25.)

Following briefing and oral argument, the district court (Nardacci, J.) granted defendants' cross-motion to dismiss. (J.A. 164.) The district court concluded that plaintiffs failed to establish standing because the guidance letter itself did not pose any threat of enforcement. (J.A. 176-177.) Instead, the letter merely restated existing antibullying and antidiscrimination law and reminded board members of the potential consequences of violating these existing provisions. (J.A. 177-179.) The district court also reasoned that, even assuming the guidance letter posed a threat of enforcement,

plaintiffs had failed to credibly allege a nonspeculative threat of enforcement. (J.A. 179.) Specifically, plaintiffs failed to plead that they or any other school board member had ever been threatened with removal under the guidance letter for speaking about controversial issues (J.A. 180-181), and failed to identify any other "concrete and specific adverse government action meant to punish or suppress [their] First Amendment protected speech" (J.A. 185). The district court then denied plaintiffs' motion for a preliminary injunction as moot. (J.A. 189-190.)

SUMMARY OF ARGUMENT

The district court correctly granted defendants' motion to dismiss this lawsuit for lack of standing. Plaintiffs have disclaimed a theory of injury based on a chilling effect; indeed, they have affirmatively represented in their complaint and in sworn declarations that they intend to continue to express their views about transgender and nonbinary persons. Plaintiffs have likewise failed to plead a credible threat of removal that is traceable to the guidance letter. Although plaintiffs string together disparate sections of the guidance letter in an effort to characterize it as prohibiting general speech on matters of public concern, the guidance letter does

no such thing. Instead, the guidance letter simply restates existing law, including provisions of law governing removal of school board members.

In addition, plaintiffs fail to plead a credible threat of imminent removal based on their professed intent to continue making general, policy-based criticisms of (and advocating for board resolutions rejecting) state antidiscrimination and public accommodations laws. In every example that plaintiffs cite, the Commissioner of Education has declined to remove board members for their speech. And a search of the Commissioner's decisions over the last thirty-five years reveals no instance in which the Commissioner has removed a board member for policy-based speech.

If this Court nevertheless concludes that plaintiffs have standing, it should decline plaintiffs' one-paragraph invitation to enter a preliminary injunction in their favor. The district court did not reach the merits of plaintiffs' preliminary injunction motion, which defendants opposed on various grounds other than standing. There is no reason to depart from this Court's ordinary practice of remanding such issues to the district court for consideration in the first instance. In any event, plaintiffs fail to meet the high burden necessary to obtain a preliminary injunction.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR LACK OF STANDING

To establish standing to bring this pre-enforcement challenge, plaintiffs must show that: (1) they intend "to engage in a course of conduct arguably affected with a constitutional interest"; (2) the intended future conduct is "arguably proscribed" by the challenged statute or regulation; and (3) "a credible threat of" of enforcement is "sufficiently imminent." *Cerame v. Slack*, 123 F.4th 72, 81 (2d Cir. 2024) (quotation marks omitted); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 160-64 (2014) (risk of harm must be "substantial"). To establish the third prong, plaintiffs must show a threat of enforcement that is "credible"—not "imaginary or speculative"—and is "sufficiently imminent." *Driehaus*, 573 U.S. at 159, 161, 165 (quotation marks omitted).

Here, the district court correctly concluded that plaintiffs lack standing to bring this action. Plaintiffs have affirmatively disclaimed a theory of standing based on chilled speech. (*See* Pls.' Combined Mem. of Law in Reply Supporting Mot. for a Prelim. Inj. and in Opp'n to Defs.' Mot. to Dismiss at 15 (Mar. 27, 2026), ECF No. 24 ("Plaintiffs, as masters of

their complaint, advance a credible threat case, not a self-censorship case.").) Such a theory would be unavailing in any event because plaintiffs expressly allege that they intend to continue to engage in their desired speech.[7] (J.A. 62-63, 82.) *See* Pls.-Appellants' Opening Br. (Br.) at 13-14. "Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech." *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001).

Accordingly, the only theory of standing plaintiffs have advanced is their purported fear of removal. *See* Br. at 14-16. The district court properly rejected this theory as well. (J.A. 176-186.) Contrary to plaintiffs' representations, the May 2025 guidance letter itself neither has the force of law, *see Salazar v. King*, 822 F.3d 61, 80 (2d Cir. 2016) ("Dear Colleague" letters are "informal agency guidance"), nor does it state that school board

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[7] Cases cited by plaintiffs and amici in which plaintiffs or other parties changed their speech or conduct in response to guidance documents or official actions are thus irrelevant to the standing analysis here. *See National Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 185 (2024); *Jensen v. Minnesota Bd. of Med. Prac.*, No. 25-1812, 2026 WL 2716496, at *3-4 (8th Cir. Sept. 15, 2026); *Cerame*, 123 F.4th at 80; *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-32 (7th Cir. 2015); *National Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 690 (2d Cir. 2013); *281 Care Comm. v. Arneson*, 638 F.3d 621, 626-31 (8th Cir. 2011).

members can be removed solely on the basis of general, political speech. To the contrary, the guidance letter merely restates existing and well-settled antidiscrimination law that has long been applicable to school boards and other educational institutions in New York.

For example, the guidance letter properly describes removal as a sanction that could be levied for "[w]illfully permitting the harassment of students on the basis of sex, sexual orientation, gender identity, [or] gender expression" or "condon[ing] discriminatory or harassing comments about LGBTQ+ students." (J.A. 48 (citing N.Y. Education Law §§ 10, 12, 3201-a; N.Y. Civil Rights Law § 40-c; N.Y. Executive Law § 296(4).) It is well established that, consistent with the First Amendment, schools may proscribe targeted bullying and harassment. *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180, 188 (2021) (noting schools' "significant" interest in regulating "serious or severe bullying or harassment targeting particular individuals"); *Fellers v. Kelley*, 189 F.4th 177, 183 & n.7 (1st Cir. 2026); *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 509 (1st Cir. 2021); *Norris A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 29-30 (1st Cir. 2020). Likewise, the guidance letter properly describes removal as a sanction that could be levied for disclosure of "confidential student information

learned in the course of their official duties." (J.A. 48.) And it is undisputed that federal and state law protect a student's confidential educational information, which can include medical information, from disclosure. *See* 20 U.S.C. § 1232g(b)(1); Education Law § 2-d.

More fundamentally, plaintiffs do not allege that they intend to engage in speech that would rise to the level of targeted bullying and harassment, especially because they represent that, as a matter of practice, "members of the Board do not refer to any specific student during a Board meeting." (J.A. 60.) This case is thus distinguishable from examples cited by plaintiffs, where the challenged state action directly prohibited their speech. *See, e.g.*, *Vitagliano v. County of Westchester*, 71 F.4th 130, 139 (2d Cir. 2023) (per curiam); *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023); *Texas v. Cardona*, 743 F. Supp. 3d 824, 851 (N.D. Tex. 2024). Plaintiffs are also incorrect to argue that they may still bring their challenge because they subjectively fear (without basis) that their controversial or disfavored speech will be labeled bullying or harassment. Courts have held that, in order to constitute bullying or harassment, speech must be targeted at particular indivi-

duals, rather than reflect a general expression of ideas.[8] *See Greenberg v. Lehocky*, 81 F.4th 376, 383 (3d Cir. 2023). Further, New York law is clear that, to support removal under Education Law § 306, the board member's conduct must be willful—that is, "intentional and with a wrongful purpose." *Application of the Bd. of Educ. of the City Sch. Dist. of Buffalo*, Decision No. 17,147, 57 Ed. Dep't Rep., 2017 WL 3672303, at *10 (Aug. 17, 2017) (collecting authority); *see People ex rel. Light v. Skinner*, 37 A.D. 44, 46 (3d Dep't), *aff'd*, 159 N.Y. 162 (1899). This Court has recognized that an intentionality requirement can reinforce constitutionality by ensuring that an anti-harassment rule does not sweep in speakers "who may inadvertently offend their audience." *Cf. Cerame*, 123 F.4th at 84 & n.13 (explaining that attorney ethics rule was constitutionally problematic because it did not include such an intent requirement).

Plaintiffs also do not allege that the Commissioner has ever taken or threatened removal against them based on their speech. This case is

[8] Indeed, even amici agree that school board members' speech on political issues must take place "without disclosing confidential information or identifying individual students." Br. for the Buckeye Inst. et al. as Amici Curiae Supporting Appellants & Reversal at 3 (Sept. 25, 2026), CA2 ECF No. 29.

thus distinguishable from the cases on which plaintiffs and amici rely heavily, in which the speakers plausibly alleged that their speech had triggered credible enforcement threats. In *National Rifle Ass'n of America v. Vullo*, for example, a government regulator allegedly met with regulated parties who regularly did business with the speaker, identified legal infractions committed by the regulated parties, but promised to "look the other way" if the regulated parties ceased business relations with the speaker. 602 U.S. 175, 193 (2024) (quotation marks omitted). In *Okwedy v. Molinari*, a government official allegedly made repeated efforts to contact and fax plaintiff regarding a specific billboard that plaintiff had paid for, and described the billboard's message as "not welcome in our Borough." 333 F.3d 339, 341-42 (2d Cir. 2003) (per curiam) (quotation marks omitted). And in *Rattner v. Netburn*, a member of a government body targeted by the plaintiff's speech not only sent a sharply worded letter to the nonprofit publication that had aired the speaker's views—stating that the nonprofit "crossed the line" from a "supportive" organization to one with a "political agenda"—but also sought a list of the nonprofit's members. 930 F.2d 204, 206 (2d Cir. 1991) (quotation marks omitted); *see First Choice Women's Res. Centers, Inc. v. Davenport*, 608 U.S. 174, 189 (2026) (demand for donor or

member information "inevitably deters the exercise of First Amendment rights" (alteration and quotation marks omitted)). Here, by contrast, plaintiffs do not allege that defendants have made individualized communications, much less specific enforcement threats, to plaintiffs or their affiliates. *See, e.g.*, *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1059-60 (2d Cir. 1991) (no plausible allegations of credible threat); *see also McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016) (same).

Here, moreover, any such allegation would not be plausible in any event, because, to the best of our knowledge, there are no cases in which the Commissioner has removed a board member for purely political speech,[9] and only two cases in which the Commissioner has upheld a local school board's decision to remove a fellow board member even in part for their

[9] In fact, the Commissioner has expressly *denied* removal petitions based on purely political speech. *See, e.g.*, *Application of J.J.*, Decision No. 18,845, 66 Ed. Dep't Rep., 2026 WL 2909580, at *1 (Sept. 10, 2026) (denying petition to remove board member for Facebook video "congratulating the residents of New York City for 'doing their part in the Islamic takeover of western society'"); *Application of Zamparelli*, Decision No. 18,526, 64 Ed. Dep't Rep., 2024 WL 5086236, at *1 (Nov. 25, 2024) (denying petition to remove board member for demonstrating in support of ceasefire in Gaza); *Appeal of Ciaccia & Albert*, Decision No. 8,358, 11 Ed. Dep't. Rep. 95, 95-96 (Sept. 27, 1971) (denying petition to remove board members for passing resolution opposing Vietnam War) (attached as addendum).

speech. *See Vitagliano*, 71 F.4th at 139 (plaintiff must show particularized risk of enforcement in relation to proposed speech or conduct). Neither case remotely resembles the circumstances here. In one case, the school board member owned a public-facing website where he published confidential information from executive sessions of board meetings (including an investigation into a district employee's drug addiction and treatment) and labeled the superintendent a "child abuser," among other things. *Appeal of Hoefer*, Decision No. 15,263, 45 Ed. Dep't Rep., 2005 WL 6742542, at *5 (July 29, 2005). In the other case, the board member engaged in a pattern of "personal attacks, racial slurs and antagonistic behavior toward his fellow board members and a taxpayer," including calling other board members the n-word, "thugs," and "gangsters." *Appeals of Gill & Burnett*, Decision No. 14,785, 42 Ed. Dep't Rep., 2002 WL 34702304, at *5-6 (Aug. 22, 2002). These two examples both illustrate the high bar for removal and belie that there is any history of the Commissioner removing board members for untargeted general, political speech.[10]

[10] These examples are distinguishable for the additional reason that, in both cases, the local school boards (not the Commissioner) took the initial action to remove the board members, *see* Education Law § 1709(18),

(*continued on the next page*)

Plaintiffs' and amici's examples are not to the contrary: In each instance cited by plaintiffs and amici, the Commissioner *declined* to remove the school board member for their speech.[11] *See* Br. at 15-16; Br. for the Buckeye Inst. et al. as Amici Curiae Supporting Appellants & Reversal at 23 (Sept. 25, 2026), CA2 ECF No. 29. And plaintiffs' sole example of removal concerns—as they concede—a decision by the New York City Schools Chancellor, not the State Commissioner of Education

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and the board members subsequently appealed the local removal decision to the Commissioner, *see id.* § 310. Here, neither plaintiff has alleged that they fear removal by fellow board members.

[11] *See Application of Patterson*, Decision No. 18,683, 65 Ed. Dep't Rep., 2026 WL 1383642, at *2 (Feb. 17, 2026) (denying petition to remove board member for use of racial epithet); *Application of T.L.*, Decision No. 18,474, 64 Ed. Dep't Rep., 2024 WL 4039758, at *2 (Aug. 19, 2024) (denying petition to remove board member for comparing school's Genders and Sexualities Alliance to pedophilia advocacy organization at school board meeting); *Application of Lyons-Birsner & Birsner*, Decision No. 17,160, 57 Ed. Dep't Rep., 2017 WL 3913183, at *4 (Aug. 22, 2017) (denying petition to remove board members who made disparaging remarks to petitioner in the presence of her daughter); *Application of the Bd. of Educ. of the Lawrence Union Free Sch. Dist.*, Decision No. 14,299, 39 Ed. Dep't Rep., 2000 WL 35921443, at *1 (Feb. 11, 2000) (denying petition to remove board member who made "obscene, graphic verbal statement and gestures" to other members); *Application of O'Mara*, Decision No. 13,819, 37 Ed. Dep't Rep., 1997 WL 34846789, at *1 (Aug. 18, 1997) (denying petition to remove board member who called fellow board member "crude name" and said "bimbo" in comment to district employee). These cases would not be relevant in any event because plaintiffs allege no intent to speak racial slurs, make obscene gestures, or call others crude names.

or any other defendant here. *See* Br. at 16. There, moreover, the Chancellor removed the board member pursuant to a different statutory provision, Education Law § 2590-*l*, containing a different legal standard.[12] *See Alexander v. Sutton*, 747 F. Supp. 3d 520, 540 (E.D.N.Y. 2024). That single, inapposite example falls well short of establishing a "history of past prosecution or enforcement under the challenged statute," *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210 (9th Cir. 2022) (quotation marks omitted), or "an actual and well-founded fear that the law will be enforced against" plaintiffs, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). And, in fact, the Commissioner has previously dismissed applications for removal of board members for alleged violations of the Chancellor's regulations. *Appeal of Wolf,* Decision No. 13,270, 34 Ed. Dep't Rep., 1994 WL 16854703, at *1 (Sept. 30, 1994).

[12] Specifically, while Education Law § 2590-*l* empowers the Chancellor to remove a school board member for violations of the board's own bylaws, it is well settled that Education Law § 306 does *not* empower the Commissioner to remove a school board member solely for violations of the board's bylaws or policies. *See Application of Simmons*, Decision No. 16,596, 53 Ed. Dep't Rep., 2014 WL 1246859, at *3 (Mar. 12, 2014) (collecting cases).

Plaintiffs also miss the mark in arguing that purported calls for their removal by unnamed third-party "activists" are sufficient to establish standing to bring this case against the defendants. *See* Br. at 15-18. The filing of a removal petition by a third party (which has undisputedly not occurred here, and of which plaintiffs undisputedly would have received notice) says nothing about whether the Commissioner will actually grant that relief.

In addition, there is no indication that the Attorney General will enforce the State Human Rights Law, *see* Executive Law § 296(4), against plaintiffs for the speech they intend to keep making. The amendments adding protections for gender identity and gender expression were enacted nearly eight years ago, in January 2019, *see* Ch. 8, § 10, 2019 N.Y. Laws 25, 28-29 (McKinney), and plaintiffs do not point to (nor, to the best of our knowledge, is there) a single example of the Attorney General using the amendments to enforce state law against school board members based on general, political speech.

Finally, to the extent plaintiffs vaguely allege that they wish to engage in speech that might conceivably be part of bullying or harassment, any dispute involving that speech is not a ripe controversy—especially

where plaintiffs plead that they do not intend to bully or harass students. (*See* J.A. 21, 24, 62-63, 82.) To be clear, the guidance letter does not state—nor is it defendants' position—that school board members *must* use preferred pronouns or that failing to do so constitutes bullying or harassment. As plaintiffs correctly recognize, they need not use pronouns at all and can instead use words like "the speaker" when addressing individuals whose pronouns they do not wish to use. (J.A. 20-21.) *See, e.g.*, *West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026) (majority opinion avoiding pronoun usage). Moreover, in the context of the First Amendment, when a complaint does not allege specific speech that a plaintiff wishes to make, "it is extremely difficult for the court to conduct a [First Amendment] analysis," *Nutritional Health All. v. Shalala*, 144 F.3d 220, 225 (2d Cir. 1998), because a court would be forced to pronounce on the validity of numerous possible situations, "all highly fact-specific and, as of yet, hypothetical," *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 478 (2d Cir. 1999). Here, where "it is easy to imagine a variety of circumstances that would fall within the challenged hypothetical application of the directive, some of which may be regulated constitutionally and others of which may not," *id.* at 478, such a claim is quintessentially unripe. *See,*

e.g., *Fellers*, 189 F.4th at 182-83 (question of whether parents could wear wristbands with "XX" symbol in hypothetical future scenarios, without running afoul of anti-harassment policy, was not ripe).

POINT II

IF THIS COURT REVERSES, IT SHOULD REMAND FOR THE DISTRICT COURT TO CONSIDER PLAINTIFFS' PRELIMINARY INJUNCTION MOTION IN THE FIRST INSTANCE

Because the district court found that plaintiffs lacked standing, it denied plaintiffs' motion for a preliminary injunction as moot. (J.A. 189-190.) Ordinarily, when the district court has not reached an issue, this Court's "preferred" and "usual" practice "is to allow the district court to address arguments in the first instance." *See New York ex rel. James v. Niagara-Wheatfield Cent. Sch. Dist.*, 119 F.4th 270, 284 (2d Cir. 2024) (alteration and quotation marks omitted). Thus, if the Court finds that plaintiffs have standing, then it should remand to the district court to evaluate the motion for preliminary injunction in the first instance. *See, e.g.*, *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 114 (2d Cir. 2024). Plaintiffs' request that this Court grant preliminary relief in the first instance is unsupported, particularly where plaintiffs make this request

in only a single, conclusory paragraph and do not attempt to show that they satisfy the four-factor test for preliminary relief. *See* Br. at 45.

If this Court considers plaintiffs' request for a preliminary injunction on the merits, it should deny such relief. *First*, plaintiffs will not be irreparably harmed in the absence of a preliminary injunction, especially where they waited seven months to challenge the guidance letter.[13] *See Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir. 1985) (nine-month delay suggested no irreparable injury). Further, any harm to plaintiffs' speech is not irreparable because, as defendants have explained, plaintiffs retain the right to speak on matters of public concern at school board meetings so long as their speech does not constitute targeted harassment. Further, it is completely undisputed that plaintiffs are free to keep speaking "on their personal time," *Application of Tang*, Decision No. 15,932, 48 Ed. Dep't Rep., 2009 WL 8521894, at *4 (June 23, 2009) (collecting decisions),

[13] This case is not one "clearly demanding" preliminary relief, *see Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986) (quotation marks omitted). In plaintiffs' cited examples, the harm was imminent and clear. *Cf. New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 158 (2d Cir. 2020) (movant would be required to shutter operations absent preliminary relief); *Patton*, 806 F.2d at 26 (movant would be involuntarily inducted into military duty absent preliminary relief).

and are "entitled to express their views about issues concerning the district and engage in partisan activity, provided school district funds are not used," *Application of Eisenkraft*, Decision No. 14,092, 38 Ed. Dep't Rep., 1999 WL 35132715, at *4 (Mar. 19, 1999). Plaintiffs are also free to speak on these matters in any public forum or in any other appropriate limited public forum. See *infra* at 31 n.14. Thus, plaintiffs have ample opportunities to speak or express their message.

Second, plaintiffs are unlikely to succeed on the merits of their claim. As explained (*supra* at 18-20), the guidance letter contemplates enforcement only for bullying and harassment, which require willful conduct targeted at a particular individual and are highly unlikely to sweep in untargeted general, political speech. Nor does the guidance letter compel any speech, including the use of preferred pronouns, which plaintiffs have recognized they have means to avoid. See *supra* at 27. And because existing state and federal laws prohibit plaintiffs from remaining deliberately indifferent to harassment committed by others, plaintiffs are not being compelled to speak any particular message but instead are

being reminded of their duty to stop active violations of state and federal law, using any words that they choose.[14]

Finally, plaintiffs cannot demonstrate that the equities or public interest favor an injunction. To the contrary, the equities and public interest strongly favor the State here, where plaintiffs are adults who have many available fora to express their views, while the children who are the subject of their speech are particularly vulnerable to the significant harms posed by discrimination and harassment in school settings. *See* Education Law § 10.

[14] Insofar as the guidance letter addresses the proper scope of school board meetings, such guidance appropriately takes into account the nature of such meetings as a limited public forum where the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for . . . the discussion of certain topics." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of dismissal.

Dated: New York, New York
October 23, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Cynthia, an employee in the Office of the New York State Attorney General, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,412 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ Cynthia Yue

Addendum

EDUCATION DEPARTMENT REPORTS

JUDICIAL DECISIONS
OF THE
COMMISSIONER OF EDUCATION

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its residents has long been recognized by the Legislature and the courts. Two examples are evaluation and registration of professional and other schools located outside of New York State and the power of the State to contract for the education of certain handicapped pupils outside the State, as provided in Education Law §4407. In the latter section, the Legislature has expressly provided for payment directly by this Department and indirectly by the local district toward the cost of out-of-State education.

Payment of local funds and State aid for transportation under §3635 which is partly outside the State is an analogous situation. The pupil is a New York State and school district resident. The contract or other arrangements for the transportation will be made in this State. The mere fact that one terminus and part of the route is in Connecticut does not deprive petitioner's son of the transportation to which he is entitled under the clear terms of §3635.

Respondent's allegation that the school in question does not offer a course of instruction substantially equivalent to that required in New York is based upon the failure of the Connecticut school to include instruction on the New York State Constitution and Bill of Rights, as required by Education Law §801, and on New York State history, as required by §3204. The school does offer instruction on the Connecticut Constitution and Bill of Rights and on Connecticut history, and has offered to set up separate courses for the New York State residents to meet respondent's objection. Since respondent has indicated that the other aspects of the school's program meet the requirements of the Education Law, the establishment of such courses would overcome this objection.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

In the Matter of the appeal of FRANK V. CIACCIA and JOSEPH C. ALBERT seeking the removal of WYOMA I. BEST, DAVID BRANCH, AND THOMAS FREY from the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF ROCHESTER.

Decision No. 8358

(September 27, 1971)

June Weisberger, Esq., attorney for respondents

NYQUIST, Commissioner.—The petitioners seek the removal of Wyoma I. Best, David Branch and Thomas Frey from the Rochester Board of Education due to alleged misfeasance in the performance of their duties.

On May 6, 1971, at a regularly scheduled board meeting, the respondents introduced and passed a resolution which is the sole basis for this appeal. This resolution in part stated that the City School District of the City of Rochester faced many problems due to the lack of sufficient funds and that this lack of funds was a result of the national investment in the war in Indochina. The resolution concluded by stating the board's opposition to the war in Indochina and its support of efforts to release prisoners of war and to assist returning veterans in the acquisition of employment. Petitioners claim that the adoption of the resolution was beyond the powers granted to boards of education by Education Law §1709 and for so acting beyond their power, the respondents should be removed from office.

While the right of each citizen to express his individual views on matters of public concern is beyond question, boards of education, when acting collectively and in their official capacity, should avoid statements and actions which may tend to politicize the educational system.

However, the resolution in question in this case does not warrant the removal of respondents from office.

THE APPEAL IS DISMISSED.

In the Matter of the application of PEARLIE DOTTIN *et al.* for the removal of DR. HUGH MCDOUGALL as SUPERINTENDENT OF SCHOOLS and MR. MILTON STRONG as DIRECTOR OF THE COMMUNITY EDUCATION CENTER OF COMMUNITY SCHOOL DISTRICT 28 OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK.