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' REPLY BRIEF

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INTRODUCTION

School boards across the country frequently discuss school policies related to sex, gender identity, and Title IX of the Education Amendments of 1972. Anyone who attends a school board meeting is likely to hear parents, community members, students, and school board members sharing their views on topics such as pronoun usage, biological boys using girls' locker rooms and bathrooms, and biological boys playing in girls' sports.

The reason why is not, as Appellees claim, to "mak[e] remarks about students' bodies" or to destroy an otherwise "safe and inclusive learning environment." Appellees' Br. 9. Rather, the "passionate political and social debate" taking place in America's schools, *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021), is where parents "raise sincere concerns" about the safety, privacy, and efficacy of their children's education, *West Virginia v. B.P.J.*, 146 S. Ct. 2356, 2380 (2026) (quotation omitted).

The "modern development" of "biological males" seeking "to play on women's or girls' sports teams," for example, has "triggered national and international concerns about safety and competitive fairness for female athletes." *Id.* at 2367. And until recently, it was "generally accept[ed] . . . that the protection of individual privacy will occasionally require some segregation between the sexes." *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 804 (11th Cir. 2022). Finally, in

the modern "pronoun debate," *Meriwether*, 992 F.3d at 509, "many believe that only two sexes (male and female) exist," *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 753 (6th Cir. 2025) (en banc) (*Olentangy*). These views "sometimes stem from 'sincerely held religious beliefs,'" *Id.* at 753, which "parents wish to instill in their children," instead of the "hotly contested view of sex and gender" promoted in many schools today, *Mahmoud v. Taylor*, 606 U.S. 522, 553 (2025).

It is inevitable that parents and community members will discuss facility usage policies and athletic policies that involve transgender students at school board meetings. And school board meetings are exactly where this discussion should occur. *See Moms for Liberty v. Brevard Pub. Sch.*, 118 F.4th 1324, 1328 (11th Cir. 2024) ("[S]chool board meetings are the front lines of the most meaningful part of local government . . . speaking at these meetings is the primary way parents interact with their local leaders or communicate with other community members."). Those elected to serve as school board members have a duty to engage with these "sincere concerns." *B.P.J.*, 146 S. Ct. at 2380.

Plaintiffs Kerry Wachter and Danielle Ciampino, elected school board members, want to fulfill that duty by giving voice to the privacy interests of young children in restrooms and the competitive fairness concerns of female athletes. JA-20–21, JA-23–24, JA-61–63, JA-81–82. But Defendants, through their vague and

viewpoint-discriminatory Guidance Letter, have "not just entered this policy debate. [They] ha[ve] taken a side." *Olentangy*, 158 F.4th at 754–55. Their Guidance Letter warns that speech on one side of the political debate is "harassment." And they warn that Defendant Rosa, as the New York State Commissioner of Education, may initiate removal proceedings against a school board member who fails to fall in line with the Guidance Letter. For these reasons, Plaintiffs have pled a cognizable injury and have Article III standing to proceed with their challenge to the Guidance Letter.

ARGUMENT

The starting place for analyzing alleged injuries for purposes of Article III standing is recognizing that First Amendment pre-enforcement challenges are judged under "somewhat relaxed standing and ripeness rules." *Cerame v. Slack*, 123 F.4th 72, 81 (2d Cir. 2024) (quoting *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013)). To establish an injury, a plaintiff need only demonstrate: "(1) 'an intention to engage in a course of conduct arguably affected with a constitutional interest'; (2) that the intended conduct is 'arguably proscribed by' the challenged regulation; and (3) that 'there exists a credible threat of prosecution

thereunder' that is 'sufficiently imminent.'" *Id.* (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 162 (2014)).[1]

Defendants, on the other hand, do not start with this "quite forgiving" test. *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 138 (2d Cir. 2023) (quoting *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016)). Instead, they attempt to conceal what the Guidance Letter actually says and confuse what this Court's precedents actually require.

First, despite contending that their Guidance Letter does not reach "general, political speech," Appellees' Br. 18, that is exactly what the Letter targets. In the Letter, Defendants define harassment and bullying through three examples of pure speech:

1. 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.
2. Speech that questions "the legitimacy of students' gender identity." JA-43.

[1] Defendants' assertion that cases involving self-censorship are completely "irrelevant" to this test is false. Appellees' Br. 17, n.7. This Court does not "divid[e] pre-enforcement First Amendment injuries into two distinct types." *Cerame*, 123 F.4th at 81. Rather, "the standing inquiry ultimately boils down to whether there is a credible threat of enforcement against a plaintiff," whether or not chill is alleged. *Id.* at 81, n.12.

3. Speech that "intentionally misgender[s] district students." JA-45.

This is the very speech Plaintiffs pled they wish to advance and permit parents to advance. JA-20–21, JA-23–24, JA-61–63, JA-81–82. A reasonable person in Plaintiffs' position would read the Letter as threatening consequences for engaging in such speech.

Second, Defendants' legal arguments are entirely disconnected from the governing standard for establishing standing to bring a pre-enforcement challenge. Plaintiffs need only show their desired speech is "arguably proscribed," by the Guidance Letter. *Cerame*, 123 F.4th at 81. It plainly is. Plaintiffs want to let parents make "comments" about facility access in schools. JA-42; *see also* JA-21, JA-24. The Guidance Letter at least *arguably* calls such speech harassment and thus subjects Plaintiffs to prosecution through a removal hearing.

Moreover, Defendants misunderstand the third prong of the injury inquiry under *Vitagliano*. *Vitagliano* asks whether "there exists a credible threat of *prosecution*"—not a conviction. 71 F.4th at 136 (quoting *Susan B. Anthony List*, 573 U.S. at 159) (emphasis added). The proper inquiry is thus whether Plaintiffs *may* have to defend against a removal proceeding, not whether they *will* be removed, i.e., convicted.

Finally, Plaintiffs have easily demonstrated that the Guidance Letter directly threatens their speech under this Court's *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir.

2003) (per curiam), and *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991) decisions. Defendants' attempt to distinguish these cases is entirely unpersuasive.

For these reasons, this Court should reverse the district court's dismissal under Federal Rule of Civil Procedure 12(b)(1) and remand for further proceedings.

I. The Guidance Letter reaches, or at least arguably reaches, what Defendants call "general, political speech," and therefore exceeds existing New York harassment law.

A. The Guidance Letter targets core political speech.

Everyone now seems to agree that Plaintiffs want to engage in, and permit others to engage in, "general, political speech" or "policy-based speech."[2] Appellees' Br. 15, 18. Nevertheless, Defendants contend that Plaintiffs are free to make and permit this core political speech because the Letter does not reach it. This argument depends, however, on Defendants' apparent hope that this Court won't read the Letter in full.

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[2] Political speech "is at the 'core of the First Amendment.'" *Minn. Voters All. v. Ellison*, 188 F.4th 1067, 1077 (8th Cir. 2026) (quoting *Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (en banc)). And Defendants, through the Guidance Letter, engage in viewpoint discrimination against Plaintiffs' core political speech, Opening Br. 30–32, making the Letter per se unconstitutional. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) ("[R]estrictions . . . based on viewpoint are prohibited."). Therefore, Plaintiffs ask this Court to remand this case to the district court for reconsideration of the motion for a preliminary injunction. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (explaining that "harm is particularly irreparable, where . . . a plaintiff seeks to engage in political speech" (quotation omitted)). In the alternative, this Court can direct the district court to issue the preliminary injunction. Opening Br. 45.

Start at the beginning of the Letter. It was written, in Defendants' own words, in response to some "[u]nfortunate[] . . . *comments* during board meetings that demean and stigmatize LGBTQ+ students." JA-42 (emphasis added). The Letter goes on to "discuss[] board members' duty to ensure that board meetings are conducted in a manner that respects the dignity of all students." JA-43. And the Letter concludes with a not-so-friendly reminder of the consequences for "willful[] neglect" of that "duty." JA-44.[3]

These few lines raise serious First Amendment problems. Defendants cannot target speech based only on its emotive impact on a listener. *See Matal v. Tam*, 582 U.S. 218, 243 (2017) ("Giving offense is a viewpoint."); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J., authoring) (holding that government cannot restrict speech where "the speech is merely offensive to some listener"). Worse still, Defendants proceed, in the Letter, to define "harassment," "discrimination," and "bullying," JA-45–46, as three "sensitive topic[s] of public concern," *Meriwether*, 992 F.3d at 508. That is another First Amendment red flag.

[3] Defendants grossly misstate the nature of Plaintiffs' challenge by asserting that Plaintiffs "do not challenge" the first two sections of the Guidance Letter. Appellees' Br. 9. As Plaintiffs have consistently made clear, the *entire* Letter is problematic because the three sections *together* link Plaintiffs' desired speech to violations of a school board member's "duty" and "breach" of that duty to potential prosecution. Opening Br. 8, 44.

See Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658, 667 (8th Cir. 2023) ("A school district cannot avoid the strictures of the First Amendment simply by defining certain speech as 'bullying' or 'harassment.'").

And it gets worse. First, Defendants explicitly target "comments" 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. Plaintiffs pled that they had voiced and wish to continue voicing opinions on, and permitting parents to voice opinions on, "what facilities students may use and what sports teams they may compete on." JA-21; *see also* JA-20, JA-23–24. But according to the Guidance Letter, Defendants consider this speech "harassment" and "bullying." JA-45. Indeed, in support of this assertion, the original version of the Guidance Letter cited a now-reversed decision from the District of New Hampshire, claiming that parents could be silenced for *speech* with "a demeaning, harassing, or bullying *effect* on a transgender student athlete." *Id.* (emphasis added) (footnote 12 citing *Fellers v. Kelley*, No. 24-cv-311, 2025 WL 1098271 (D.N.H. Apr. 14, 2025)). As the First Circuit has now recognized, contrary to Defendants' misleading citation, Appellees' Br. 18, the government cannot prohibit "exclusionary" messages on "an issue of prominent public concern," *Fellers v. Kelley*, No. 25-1442, 2026 U.S. App. LEXIS 26046, at *18–20 (1st Cir. Aug. 26,

2026).[4] But that is exactly what the Letter attempts to do. *See* JA-45 (declaring that school boards "should not entertain baseless allegations that transgender students' . . . presence in school spaces and participation in school activities is harmful to other students").

At bottom, a genuine reading of the Guidance Letter demonstrates that Defendants seek to prohibit speech from parents, students, and school board members "concerned [for] the safety of . . . children." *Fellers*, 2026 U.S. App. LEXIS 26046, at *20. This is obviously "speech on [a] matter[] of public concern"

[4] Undeterred by the First Circuit's rebuke, Defendants have reissued a nearly identical Guidance Letter, simply removing reliance on *Fellers*. Right before Plaintiffs filed their opening brief, Defendants updated the Guidance Letter (originally dated May 8, 2025, *see* JA-42) on September 11, 2026. *See* Joint Guidance on Harassment and Bullying at School Board Meetings (September 11, 2026), https://www.nysed.gov/sites/default/files/joint-guidance-on-harassment-and-bullying-at-school-board-meetings.pdf (Updated Letter). The Updated Letter can also be accessed at *The Dignity Act News*, NYSED.gov, https://www.nysed.gov/student-support-services/dignity-act-news. The update removes the reference to *Fellers v. Kelley* in footnote 12, *compare* JA-45, *with* Updated Letter at 4, and makes no other changes relevant to this appeal. Plaintiffs respectfully ask the Court to take judicial notice of the updated version under Federal Rule of Evidence 201(b)(2) as a government document published on an official government website whose authenticity cannot reasonably be questioned. *See Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 60 (2d Cir. 2016) (taking judicial notice of new FDA guidance document because it "is publicly available and its accuracy cannot reasonably be questioned"); *Cangemi v. United States*, 13 F.4th 115, 124 n.4 (2d Cir. 2021) (taking judicial notice of agency website reporting agency action that was finalized after the notice of appeal). The remainder of this brief will cite to the original Guidance Letter in the Joint Appendix filed with the appeal.

that "lies at the heartland of the First Amendment's protections." *Massimino v. Benoit*, 188 F.4th 120, 129 (2d Cir. 2026); *see also Stanalajczo v. Perry*, 174 F.4th 968, 974 (6th Cir. 2026) ("Speech involves a matter of public concern when it relates to issues of 'political, social, or other concern to the community' and is of 'public import.'" (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983))). Accordingly, where Defendants restrict speech promoting sex-separate facilities and sports teams against the backdrop of public debates on transgenderism, Defendants do restrict "general, political speech." And, in doing so, they deny Plaintiffs the ability to give voice to the privacy and fairness concerns of young students in their districts.

Second, Defendants restrict speech that questions "the legitimacy of students' gender identity" because, according to Defendants, "[c]hildren should not have to endure the indignity of adults making remarks . . . questioning the legitimacy of their identities and life experiences in public board meetings in their school districts." JA-43, JA-45. Plaintiffs pled that they believe sex and gender are immutable and that they wish to voice that opinion and permit parents to voice that opinion. JA-19–21, JA-22–24. A speaker who contends a person cannot change his or her sex and gender necessarily questions the legitimacy of the identity to which a transgender individual purports to subscribe. Again, such speech is not "harassment" or "bullying" merely because Defendants say so. *See Linn Mar Cmty. Sch. Dist.*, 83 F.4th at 667. And like speech about facility usage, this speech is part of an important political debate. *See,*

e.g., *Olentangy*, 158 F.4th at 753–55; *Meriwether*, 992 F.3d at 508 ("[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.'" (quoting *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001))); *State v. Cardona*, 743 F. Supp. 3d 1314, 1326 (W.D. Okla. 2024) ("The debate regarding the relationship between sex and gender identity is a motivating factor behind countless lawsuits, legislation, and political debates."). Accordingly, the Guidance Letter again restricts "general, political speech" protected by the First Amendment.

Third, and finally, Defendants prohibit school board members from "allow[ing] individuals to intentionally misgender district students." JA-45. In other words, Defendants have declared that school board members, like Plaintiffs, have a duty not to—and to prevent others from—"[a]ttributing a gender to someone that is incorrect or does not align with the person's gender identity." JA-45 (footnote 14, defining "misgender"). Thus, if a speaker wants to discuss whether a biological boy who identifies as a girl should be permitted to use the girls' bathroom and identifies the biological boy as "a boy," "male," or uses "he," the speaker violates Defendants' Guidance Letter. But pronouns and terms that convey the biological sex of an individual "can and do convey a powerful message" in the political debate about sex and gender. *Meriwether*, 992 F.3d at 508; *see also Olentangy*, 158 F.4th at 753 (explaining school policy regulating pronoun usage was "part of the broader debate

over transgender rights" and part of a "passionate political and social debate" (quoting *Meriwether*, 992 F.3d at 508)). Meanwhile, Plaintiffs pled that they intend to let speakers use biological pronouns and continue using biological pronouns themselves. JA-21, JA-24. This is, thus, a third instance of Defendants restricting general, political speech protected by the First Amendment.

B. The vague Guidance Letter at least arguably proscribes Plaintiffs' desired speech.

Instead of directly confronting these three examples of "general, political speech" prohibited by the Guidance Letter, Defendants' brief attempts to rewrite the Letter. Even under Defendants' proposed revision, Appellees' Br. 8–10, 18–20, it is clear that Plaintiffs pled an intention to engage in speech that "is '*arguably* proscribed by' the challenged regulation." *Cerame*, 123 F.4th at 81 (emphasis added) (quoting *Susan B. Anthony List*, 573 U.S. at 159, 162). That is sufficient for reversal here.

Under Defendants' reading, the 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.'"

Appellees' Br. 18 (quoting JA-48).[5] This rewrite does nothing to erase the text of the Letter, as discussed above, that plainly casts "misgendering," JA-45, advocacy for sex-separate facilities and sports, JA-42, and statements that sex and gender are immutable, JA-43, JA-45, as harassment and discrimination. In other words, even though Defendants now admit that "in order to constitute bullying or harassment, speech must be targeted at particular individuals," Defendants declared in their Letter that harassment and discrimination can also be found in the "general expression of ideas." Appellees' Br. 19–20.

Moreover, Defendants' new gloss on the Letter still leaves Plaintiffs subject to vague dictates. "Terms like 'harassment,' . . . beg for clarification." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 332 (5th Cir. 2020). The Letter "fail[ed] to cabin the terms 'harassment,'" discrimination, and bullying to the meaning Defendants now attempt to give them. *Id.* at 334; *see* Appellees' Br. 19–20 (relying on Third Circuit precedent to now cabin the meaning of "bullying or harassment"). Indeed, a broad prohibition on speech with the "'effect' of . . . harassing" or bullying transgender-identifying students "could conceivably reach any speech related to" transgender

[5] Defendants also focus on the Guidance Letter's reminder "that board members may be removed for disclosing confidential student information." Appellees' Br. 10–11. To be clear, Plaintiffs have not pled any intention to disclose confidential information, nor do they challenge this small part of the Guidance Letter.

students in sports or restrooms. *Am. Encore v. Fontes*, 152 F.4th 1097, 1115 (9th Cir. 2025) (holding that prohibition on speech with the "'effect' of 'threatening[or] harassing . . . voters' could conceivably reach any speech related to elections and politics").

This Court has already held as much, in a case involving similar speech. In *Cerame*, the plaintiff wanted to "refer[] to transgender individuals by pronouns other than those with which they wish to be addressed." 123 F.4th at 83. It was "certainly arguable" that this speech could count as "harmful verbal . . . conduct," in violation of the relevant rule. *Id.* Defendants' broad prohibition on speech that could cause "harm," JA-45, "arguably proscribe[s]" Plaintiffs' desired speech, *Cerame*, 123 F.4th at 83; *see also Fenves*, 979 F.3d at 332 (holding that "pejoratives" like "harassment," and "rude" "arguably cover[ed] the plaintiffs' intended speech").

A final example drives the point home. According to Defendants, school board members, like Plaintiffs, are subject to "the settled rule that removal may be warranted . . . when a board member neglects their duty to set an example for the student body by condoning discriminatory or harassing comments." Appellees' Br. 10. But it is "inherent in the very nature of" speech about pronouns, sex-separate sports, and gender identity, that "Plaintiffs may not know" what comments "may become . . . offensive." *Am. Encore*, 152 F.4th at 1115. It is "inevitable" that some speech on these topics "will have the effect of being offensive to someone." *Id.* Are

Plaintiffs required under the Guidance Letter to loudly condemn, *see* Appellees' Br. 10, a parent who wants to read an excerpt of the Supreme Court's majority opinion in *West Virginia v. B.P.J.*? *See B.P.J.*, 146 S. Ct. at 2367 ("[I]n contact sports, forcing female athletes to compete against males can create significant safety risks. And in virtually all competitive sports, forcing female athletes to compete against males can undermine competitive fairness."). If no, does a reading of Justice Thomas's concurring opinion cross the line? *Id.* at 2382 (Thomas, J., concurring) ("Men and boys with gender dysphoria are not women or girls, even if they believe that they are.").

Here, because of the examples of speech Defendants put in the Guidance Letter, the Guidance Letter at least "arguably" prohibits the speech Plaintiffs intend to make and permit. The district court recognized this. JA-176 ("[T]he School Board Plaintiffs' . . . conclusion that such speech could be proscribed is arguable and reasonable enough to satisfy the second prong."). This Court should as well.

C. The dictates of the Guidance Letter go beyond the general anti-discrimination rules found in New York law.

Defendants also argue that the Guidance Letter only proscribes speech already restricted by state law. Plaintiffs already thoroughly rebutted this argument by discussing *every* statute cited in the Guidance Letter. *See* Opening Br. 33–39. The bottom line: there is no New York statute which prohibits the three above examples

of speech at school board meetings. Defendants' discussion of the Dignity for All Students Act (DASA) is unavailing. *See* Appellees' Br. at 6 (citing N.Y. Educ. Law § 10 *et seq.*).

DASA contains a definition of "harassment" and "bullying," albeit one Defendants never cite in their Guidance Letter. *See* N.Y. Educ. Law § 11(7). In pertinent part, that definition reads:

> "Harassment" and "bullying" shall mean the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that (a) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or (b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. Acts of harassment and bullying shall include, but not be limited to, those acts based on a person's actual or perceived . . . gender or sex. For the purposes of this definition the term "threats, intimidation or abuse" shall include verbal . . . actions.

Id. Nothing on the face of this definition reaches the three above-discussed examples of speech found in the Guidance Letter. Nor do Defendants identify any case law, or even a Commissioner decision, that holds any of the above three examples qualify as "harassment" or "bullying" under DASA.

Moreover, even if public comments about sex-separate facilities and athletics could qualify as harassment under DASA, the Guidance Letter is necessarily broader than DASA in two respects. First, the restrictions on speech imposed by Defendants through the Guidance Letter apply to school board meetings regardless of whether any students are present at the school board meeting. But DASA's definition of "harassment" and "bullying," implies that the conduct or speech at issue must be directed at, or at least spoken in the presence of, the individual harassed. *See* N.Y. Educ. Law § 12(1) ("No *student* shall be subjected to harassment or bullying . . . ." (emphasis added)). Thus, the Guidance Letter reaches a large subset of school board meetings—those where no students are present—not contemplated by DASA.

Second, DASA only prohibits "harassment or bullying by employees or students." *Id.* But parents and school board members are neither employees of the district nor students. *See Lewis v. Bd. of Educ.*, 258 N.Y. 117, 122–23 (N.Y. Ct. App. 1932) (a board of education "is a corporation created by the State Legislature" and "its members act as officers of the State"). Accordingly, DASA simply does not reach the speech Defendants prohibit, or arguably prohibit, in the Guidance Letter.

Possibly for this very reason, the New York General Assembly attempted to amend DASA to specifically reach school board meetings. Assembly Bill No. A7687--A, 2025-2026 Reg. Sess. (N.Y. Apr. 4, 2025). The bill, however, failed. And although Plaintiffs pointed out this flaw in Defendants' reliance on DASA, Opening

Br. at 25, 35, Defendants disregard this fact in their response. The question of what specific New York law prohibits the speech Defendants restrict in the Guidance Letter, therefore, remains unanswered.

In sum, Defendants restrict, or arguably restrict, at least three types of general, political speech that Plaintiffs pled they intend to make at board meetings and intend to let their constituents make at board meetings: speech opposing transgender students' use of same-sex facilities and participation in sex-separated athletics with the opposite sex, JA-42, speech that questions "the legitimacy of students' gender identity," JA-43, and speech that "intentionally misgender[s]," JA-45. These prohibitions are not simple restatements of New York law. Rather, they are new dictates that arguably proscribe Plaintiffs' desired political speech.

II. The pertinent inquiry for Article III injury is a credible threat of facing a removal proceeding, not a credible threat of being removed.

Defendants attempt to turn the "credible threat of *prosecution*" inquiry into a "credible threat of *conviction*" inquiry. They do so by focusing on whether Commissioner Rosa will actually remove Plaintiffs rather than whether Plaintiffs credibly fear having to defend against a removal proceeding. This ignores well-established Supreme Court and Second Circuit precedent.

To be clear, the third prong of the standing inquiry, which is the only prong the district court concluded Plaintiffs had not satisfied, is about a "credible threat of

prosecution." *Vitagliano*, 71 F.4th at 136 (quoting *Susan B. Anthony List*, 573 U.S. at 159) (emphasis added).[6] Put another way, when a plaintiff brings a pre-enforcement constitutional challenge "it is not necessary that [the plaintiff] first expose himself to actual *arrest or prosecution* to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Babbitt*, 442 U.S. at 298 (emphasis added) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

The "credible threat of *prosecution*" standard applies both in the context of criminal prosecution "and in the civil context as well." *Hedges*, 724 F.3d at 196–97 (citing *Medlmmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129–30 (2007)) (emphasis added). The standard "sets a 'low threshold' and is 'quite forgiving' to plaintiffs seeking . . . prenforcement review." *Id.* at 197 (quoting *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14–15 (1st Cir. 1996)). Indeed, "the possibility of civil litigation," is a sufficient penalty to give Plaintiffs standing, *Vt.*

[6] *See also Knight v. City of New York*, 164 F.4th 173, 178 (2d Cir. 2026) (considering whether "there exists a credible threat of *prosecution*" under the challenged statute (emphasis added) (quoting *Susan B. Anthony List*, 573 U.S. at 159)); *Picard v. Magliano*, 42 F.4th 89, 97 (2d Cir. 2022) (looking at whether "there exists a credible threat of *prosecution*" under the challenged statute (emphasis added)); *Cayuga Nation*, 824 F.3d at 331 (same); *Hedges v. Obama*, 724 F.3d 170, 196 (2d Cir. 2013) ("[P]laintiff has standing to make a preenforcement challenge 'when fear of criminal *prosecution* under an allegedly unconstitutional statute is not imaginary or wholly speculative.'" (emphasis added) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979))).

Right to Life Comm. v. Sorrell, 221 F.3d 376, 382 (2d Cir. 2000), as can be other forms of "[a]dministrative action," *Cerame*, 123 F.4th at 87 (quotation omitted).

In Plaintiffs' situation, the "prosecution" threatened is a removal proceeding. Thus, the proper inquiry is whether Plaintiffs' fear of facing a removal proceeding is "not imaginary or wholly speculative." *Hedges*, 724 F.3d at 196 (quoting *Babbitt*, 442 U.S. at 302). Ignoring these precedents, Defendants, without citing any contrary case law, center their argument on whether Commissioner Rosa will actually remove Plaintiffs. *See, e.g.*, Appellees' Br. 20 ("Plaintiffs also do not allege that the Commissioner has ever taken or threatened removal against them based on their speech."); *id.* at 22 ("[T]here are no cases in which the Commissioner has removed a board member for purely political speech."); *id.* at 26 ("The filing of a removal petition by a third party . . . says nothing about whether the Commissioner will actually grant that relief."). This is akin to asking whether a jury will convict a pre-enforcement plaintiff or a judge will impose a civil penalty against one; not whether that pre-enforcement plaintiff faces a credible threat of arrest or *prosecution*. Plaintiffs, for three reasons, have established a credible fear of facing a removal proceeding.

First, New York law permits any citizen to file a petition with the Commissioner of Education to remove a school board member. *See* N.Y. Educ. Law § 310. Once a citizen files a petition for removal, the Commissioner of Education is

"authorized and *required* to examine and decide the same" and "may also institute such proceedings as are authorized." *Id.* (emphasis added). Commissioner Rosa's and Attorney General James's decision to advise citizens on how to file a petition for removal in the Guidance Letter makes this threat real.[7] JA-47–48. One must ask why Defendants advised citizens of the process to petition for the removal of a school board member based on speech at school board meetings if they had no intention of seriously considering such a petition.

Second, the petitions for removal Defendants *do* cite demonstrate that Plaintiffs have good reasons to worry about such citizen complaints. Start with *Application of T.L.* At issue were remarks about "posters advertising the middle[] school's Genders and Sexualities Alliance." 2024 N.Y. Educ. Dept. LEXIS 103, Decision No. 18,474, at *1 (Aug. 19, 2024). Although the petition was ultimately denied as untimely, Commissioner Rosa "admonish[ed]" Plaintiff Ciampino's fellow school board member and called his remarks "unnecessarily inflammatory." *Id.* at *4–5. Worse still, Commissioner Rosa faulted the respondent for "prolong[ing] the instant controversy by defending his remarks" and suggesting that a failure to fall in line when investigated could be a violation of a school board member's duty.

[7] Defendants also chose to advise citizens of the ability to file a complaint alleging a violation of the New York Human Rights law with the Office of the Attorney General, which is headed by Defendant James, the state's chief prosecutor. JA-49.

Id. at *5. Certainly, Commissioner Rosa's admonishment is far from a statement defending the rights of school board members to engage in "general, political speech" on gender identity and transgender issues.

To be sure, "[t]he Commissioner has, on numerous occasions, declined to remove board members for a single instance of intemperate or inappropriate speech." *Application of J.J.*, 2026 N.Y. Educ. Dept. LEXIS 179, Decision No. 18,845, at *2 (Sept. 10, 2026) (quotation omitted). But Commissioner Rosa has done so while "admonish[ing] respondent . . . to avoid such digressions in the future." *Id.* at *3 (quoting *Application of T.L.*). The dismissal of a complaint for a one-off statement does nothing to alleviate Plaintiffs' reasonable fear that they could face removal for repeated violations. *See, e.g.*, *Application of Gill & Burnett*, 2002 N.Y. Educ. Dept. LEXIS 122, Decision No. 14,785, at *17 (Aug. 22, 2002) ("[W]here a trustee engages in a pattern of inappropriate, antagonistic and offensive conduct that interferes with the board's ability to function, removal is warranted."); *Application of the Bd. of Educ. of the Lawrence Union Free Sch. Dist.*, 2000 N.Y. Educ. Dept. LEXIS 93, Decision No. 14,299, at *10 (Feb. 11, 2000) ("I strongly urge respondent to refrain from such behavior in the future and warn respondent that continuing instances of such conduct may constitute sufficient grounds for removal.").

Moreover, in many decisions cited by Defendants, Appellees' Br. 23–24, the Commissioner noted that the petition contained "a lack of evidence." *Application of*

Gill & Burnett, 2002 N.Y. Educ. Dept. LEXIS 122, at *14–15; *see also Application of Lyons-Birsner & Birsner*, 2017 N.Y. Educ. Dept. LEXIS 147, Decision No. 17,160, at *9 (Aug. 22, 2017) (explaining respondent denied the characterization of his statements, which was "supported by affidavits"). Thus, at the very least, the Commissioner has broad authority to order removal proceedings even without evidence. That is enough to establish a credible threat sufficient for standing. *See Cerame*, 123 F.4th at 87 (explaining that respondents to grievance complaints "may be forced to divert time and resources" to responding to a complaint "even if their speech is ultimately deemed protected by the First Amendment").

Third, citizens have threatened to seek removal of both Plaintiff Wachter and Plaintiff Ciampino. JA-111–12, JA-115–16. These threats have been accompanied by statements that arguably referred to language found in the Guidance Letter. *Compare* JA-111–12 (discussing emails Plaintiff Ciampino's school board had received calling for her removal or resignation and questioning whether the school board had used meeting time to discuss transgender-identifying students using bathrooms and locker rooms and questioning whether board members were adhering to their oath of office), *with* JA-42, JA-44, JA-46 (placing duty on school board members to refrain from making comments opposing "transgender and gender-expansive students' rights to use facilities, including restrooms and locker rooms").

Finally, a citizen threatened to file complaints against Plaintiff Wachter with both Commissioner Rosa and Attorney General James. JA-115.

These active calls for Plaintiffs' removal, which contain apparent references to the Guidance Letter, make Plaintiffs' fear of having to defend against a removal proceeding entirely reasonable. It is certainly not "imaginary or wholly speculative." *Cerame*, 123 F.4th at 87 (quoting *Babbitt*, 442 U.S. at 302). And reissuing the Letter after commencement of litigation without substantive revision solidifies Defendants' intent to threaten Plaintiffs with defending against a removal proceeding.[8] Accordingly, when one combines the proper relaxed and forgiving "credible threat of *prosecution*" standard with Commissioner Rosa's recent admonishment of a school board member for pure speech, together with active threats by citizens to file a petition for removal, Plaintiffs have demonstrated a sufficient Article III injury.

III. Defendants' attempt to distinguish Second Circuit precedent in *Okwedy* and *Rattner* fails.

A pair of precedential Second Circuit cases, *Okwedy* and *Rattner*, guide when threatening letters from government officials support a likelihood of prosecution and an Article III injury. As this Court has explained, in evaluating such letters, "[w]hat

[8] *See supra* note 4.

matters is the distinction between attempts to convince and attempts to coerce." *Okwedy*, 333 F.3d at 344.

In *Okwedy*, a borough president informed a billboard owner, via letter, that a message on two billboards regarding homosexuality was "not welcome in [the] Borough." *Id.* at 342. The letter noted that the billboard owner had "a number of billboards" in the borough and "derive[d] substantial economic benefits from them." *Id.* The letter never directly threatened any punishment, identified no municipal ordinance regulating or restricting billboards, and did not threaten any criminal or civil action. *See id.*

Similarly, in *Rattner*, a village trustee sent a letter to the local chamber of commerce expressing "concern about the negative and political nature" of its publication and alleging that the chamber had "crossed the line between being a supportive, nonpartisan, and nonpolitical local organization to one that has a political agenda and purpose." 930 F.2d at 206. A few weeks later, during a debate between village trustee candidates, the village trustee said, "he had made a list of approximately 40 local businesses at which he regularly shopped" in order "threaten[] boycott or other retaliatory action." *Id.*

In both cases, this Court concluded the subtle threats in the letters—mentioning the substantial economic benefit and a list of businesses, respectively—was sufficient to permit a trier of fact to conclude that a "form of punishment or

adverse regulatory action would follow" if the speaker did not accede to the government's preference. *Rattner*, 930 F.2d at 208 (quoting *Hammerhead Enters. v. Brezenoff*, 707 F.3d 33, 39 (2d Cir. 1983)); *see also Okwedy*, 333 F.3d at 344 (the "letter could be found to contain an implicit threat of retaliation if [the billboard owner] failed to accede to [the borough president's] requests").

Defendants, in the Guidance Letter, threaten Plaintiffs with removal from elected office. JA-47–48. Even now, Defendants assert that removal is warranted if Plaintiffs fail to stop parents and students from voicing legitimate concerns about student privacy and safety on school grounds. Appellees' Br. 10. These threats are far more direct than those in *Okwedy* and *Ratner*. Thus, if those threats permitted a plaintiff to allege an Article III injury capable of reaching trial, Plaintiffs most certainly can survive a motion to dismiss.

Defendants spend all of three sentences attempting to feebly distinguish *Okwedy* and *Rattner*. Appellees' Br. 21–22. First, Defendants contend *Okwedy* and *Rattner* are distinguishable because "[P]laintiffs do not allege that defendants have made individualized communications, much less specific enforcement threats, to plaintiffs or their affiliates." *Id.* at 22. Plaintiffs, though, clearly alleged that the New York Board of Education sent an email to local school boards, with the Guidance Letter attached. JA-10–11. Plaintiffs even submitted evidence that Defendants sent the Guidance Letter directly to Plaintiff Wachter. JA-61. The only difference

between the letters in *Okwedy* and *Rattner* and the Guidance Letter is that the former two letters targeted a single entity while the latter targeted a large group of school board members. All three letters, though, were sent to the party the government aimed to censor. And going even further than *Okwedy* and *Rattner*, the Guidance Letter is signed by an individual—Commissioner Rosa—with the authority to act on the implied threat of removal. *See NRA of Am. v. Vullo*, 602 U.S. 175, 191–92 (2024) ("Generally speaking, the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official."). Again, Defendants' threat is more than sufficient to support a "credible threat of prosecution," and cause an Article III injury.

CONCLUSION

Plaintiffs, as elected school board members, are trying to do the job they were elected to do. Part of that job is listening to and engaging in public debate with constituents at school board meetings—"the primary [place] parents interact with their local leaders." *Moms for Liberty*, 118 F.4th at 1328. In summary, "school board meetings are the front lines of the most meaningful part of local government." *Id.* And these meetings are also the place where a "passionate political and social debate" is taking place. *Olentangy*, 158 F.4th at 753 (quoting *Meriwether*, 992 F.3d at 508). Defendants' position is a "hotly contested view of sex and gender," *Mahmoud*, 606 U.S. at 553, and their Guidance Letter seeks to silence "concerns

about safety and competitive fairness . . . as well as related worries about preserving equal opportunity for women and girls," *B.P.J.*, 146 S. Ct. at 2367.

Defendants, through their Guidance Letter, restrict "general, political speech," on some of the most pressing issues facing public schools today. The identification of off-limits speech in the Letter, combined with the ability of third parties to petition for removal, creates a "credible threat of prosecution" under the "relaxed" and "forgiving" Article III injury inquiry that applies to First Amendment pre-enforcement challenges. For these reasons, as well as the reasons stated in Plaintiffs' opening brief, the Court should reverse the district court's order and remand for reconsideration of Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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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 6,668 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), using Microsoft Word 365 Version 2610. 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/ *Alexandra K. Johnson*
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CERTIFICATE OF SERVICE

I hereby certify that on, November 5, 2026, a copy of the foregoing was filed electronically with the Clerk of Court for the United Sates Court of Appeals for the Second Circuit using the ACMS system, which will send notification of such filing to all parties. Parties may access the filing through the Court's electronic filing system.

/s/ *Alexandra K. Johnson*
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