9-2016

Section 5: Civil Rights and Liberties

Institute of Bill of Rights Law, William & Mary Law School

V. Civil Rights and Liberties

In This Section:

Wells Fargo & Co. v. City of Miami

15-1112

Ruling Below: *City of Miami v. Wells Fargo & Co.*, 801 F.3d 1258 (11th Cir. 2015)

The City of Miami filed suit against Wells Fargo, on the grounds that the company had engaged discriminatory lending practices (i.e. predatory loans, "redlining") which violated the Fair Housing Act and Florida law pertaining to unjust enrichment. The US District Court for the Southern District of Florida dismissed for failure to state a claim. Plaintiff appealed.

The Court of Appeals for the Eleventh Circuit held that the city had in fact adequately alleged injury from the allegedly discriminatory lending, that the city had adequately alleged a chain of causation from the allegedly discriminatory lending, and that the term "aggrieved person" in the Fair Housing Act can be construed as broadly as is allowed under Article III.

Question Presented: Whether the term "aggrieved" in the Fair Housing Act imposes a zone-of-interests requirement more stringent than the injury-in-fact requirement of Article III; and whether the City is an "aggrieved person" under the Fair Housing Act.

CITY OF MIAMI, a Florida municipal corporation, Plaintiff–Appellant,
v.
WELLS FARGO & CO., Wells Fargo Bank, N.A., Defendants–Appellees.

United States Court of Appeals, Eleventh Circuit

Decided on September 1, 2015

[Excerpt; some citations and footnotes omitted]

MARCUS, Circuit Judge:

On December 13, 2011, the City of Miami brought three separate fair housing lawsuits against Wells Fargo, Bank of America, and Citigroup. Each alleged that the bank in question had engaged in a decade-long pattern of discriminatory lending by targeting minorities for predatory loans. The complaints in each case were largely identical, each identifying the same pattern of behavior and supported by empirical data specific to each defendant. Moreover, each complaint contained the same two causes of action: one claim arising under the Fair Housing Act (FHA), as well as an attendant unjust enrichment claim under Florida law.

The three cases were heard by the same judge in the Southern District of Florida, and were resolved in the same way based on the district court's order in the Bank of America case. In this case, like the others, the district court dismissed the City's FHA claim with prejudice on three grounds: the City lacked statutory standing under the FHA because its

alleged injuries fell outside the statute's "zone of interests"; the City had not adequately pled that Wells Fargo's conduct proximately caused the harm sustained by the City; and, finally, the City had run afoul of the statute of limitations and could not employ the continuing violation doctrine. Each of the three cases was appealed separately.

After thorough review, we are constrained to disagree with the district court's legal conclusions about the City's FHA claims.

The most detailed account of our reasoning is set out in the companion case *City of Miami v. Bank of America Corp.*. The same conclusions of law apply here. As a preliminary matter, we find that the City has constitutional standing to pursue its FHA claims. Furthermore, under controlling Supreme Court precedent, the "zone of interests" for the Fair Housing Act extends as broadly as permitted under Article III of the Constitution, and therefore encompasses the City's claim. While we agree with the district court's conclusion that the FHA contains a proximate cause requirement, we find that the City has adequately alleged proximate cause. Finally, the "continuing violation doctrine" would apply to the City's claims, if they are adequately pled.

Because the district court imposed too stringent a zone of interests test and wrongly applied the proximate cause analysis, it erred in dismissing the City's federal *1261 claims with prejudice and in denying the City's motion for leave to amend on the grounds of futility. As for the state law claim, we affirm the dismissal because the benefits the City allegedly conferred on the defendants were not sufficiently direct to plead an unjust enrichment claim under Florida law.

I.

On December 13, 2013, the City of Miami brought this complex civil rights action in the United States District Court for the Southern District of Florida against Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively "Wells Fargo" or "the Bank") containing two claims. First, it alleged that the defendants violated sections 3604(b) and 3605(a) of the Fair Housing Act by engaging in discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and caused financial harm to the City. It also alleged that the Bank unjustly enriched itself by taking advantage of "benefits conferred by the City" while, at the same time, engaging in unlawful lending practices, which "denied the City revenues it had properly expected through property and other tax payments and ... cost[ ] the City additional monies for services it would not have had to provide ... absent [the Bank's] unlawful activities."

This complaint accused Wells Fargo of engaging in both "redlining" and "reverse redlining." Redlining is the practice of refusing to extend mortgage credit to minority borrowers on equal terms as to non-minority borrowers. Reverse redlining is the practice of extending mortgage credit on exploitative terms to minority borrowers. The City alleged that the bank engaged in a vicious cycle: first it "refused to extend credit to minority borrowers when compared to white borrowers," then "when the Bank did extend credit, it did so on predatory terms." When minority borrowers then attempted to refinance their predatory loans, they "discover[ed] that [the Bank] refused to extend credit at all, or on equal terms as refinancing similar loans issued to white borrowers."

The City claimed that this pattern of providing more onerous loans—i.e., those

containing more risk, carrying steeper fees, and having higher costs—to black and Latino borrowers (as compared to white borrowers of identical creditworthiness) manifested itself in the Bank's product placements and its wholesale mortgage broker fees. It also averred that the Bank's internal loan officer and broker compensation systems encouraged its employees to give out these types of loans even when they were not justified by the borrower's creditworthiness.

The City said that the Bank's conduct violated the Fair Housing Act in two ways. First, the Bank intentionally discriminated against minority borrowers by targeting them for loans with burdensome terms. And second, the Bank's conduct had a disparate impact on minority borrowers, resulting in a disproportionate number of foreclosures on minority-owned properties, and a disproportionate number of exploitative loans in minority neighborhoods.

The City employed statistical analyses to draw the alleged link between the race of the borrowers, the terms of the loans, and the subsequent foreclosure rate of the underlying properties. Drawing on data reported by the Bank about loans originating in Miami from 2004–2012, the City claimed that a Wells Fargo loan in a predominantly (greater than 90%) minority neighborhood of Miami was 6.975 times more likely to result in foreclosure than such a loan in a majority-white neighborhood. According to the City's regression analysis (which purported to control for objective risk characteristics such as credit history, loan-to-value ratio, and loan-to-income ratio), a black Wells Fargo borrower in Miami was 4.321 times more likely to receive a loan with "predatory" features3 than a white borrower, and a Latino borrower was 1.576 times more likely to receive such a loan. Moreover, black Wells Fargo borrowers with FICO scores over 660 (indicating good credit) in Miami were 2.572 times more likely to receive a predatory loan than white borrowers, while a Latino borrower was 1.875 times more likely to receive such a loan.

The City's data also suggested that from 2004–2012, 11.1% of loans made by Bank of America to black and Latino customers in Miami were high-cost, compared to just 3.2% of loans made to white customers. Data cited in the complaint showed significantly elevated rates of foreclosure for loans in minority neighborhoods. While 50.5% of Wells Fargo's Miami loan originations were in "census tracts" that are at least 75% black or Latino, 63.9% of loan originations that had entered foreclosure by June 2013 were from such census tracks. Likewise, 24.3% of Wells Fargo's loans in predominantly black or Latino neighborhoods resulted in foreclosure, compared to only 4.4% of its loans in non-minority (at least 50% white) neighborhoods.

The complaint also alleged that the bank's loans to minorities resulted in especially quick foreclosures. The average time to foreclosure for Wells Fargo's black and Latino borrowers was 2.996 years, while for white borrowers it was 3.266 years. The City also gathered data from various non-Miami-based studies (some nationwide, some based on case studies in other cities) to demonstrate the elevated prevalence of foreclosure, predatory loan practices, and higher interest rates among black and Latino borrowers, and the foreseeability of foreclosures arising from predatory lending practices and their attendant harm.

The City's charges were further amplified by the statements of several confidential witnesses who claimed that the Bank deliberately targeted black and Latino borrowers for predatory loans. For example, one former loan officer attested that Wells

Fargo management steered low- and middle-income borrowers away from less expensive Community Reinvestment Act loans and toward more expensive Fair Housing Act and Freddie Mac loans. Another claimed that the Bank targeted minority churches and their congregations for subprime loans. A third claimed that Hispanic borrowers' applications for refinancing were disproportionately denied: "a Rodriguez in the last name was treated differently than a Smith," he stated. The witness also claimed that loan officers would not fully inform low- and middle-income Hispanic customers of the financial repercussions of their mortgages, and would submit false documents that exaggerated the borrowers' incomes in order to place them in loans that they should not have qualified for. One witness also alleged that the Bank would change its paperwork to disguise which branches were originating loans to minorities in order to avoid federal scrutiny.

The City sought damages based on reduced property tax revenues. It claimed that the Bank's lending policies caused minority-owned property to fall into unnecessary or premature foreclosure. The foreclosed-upon properties lost substantial value and, in turn, decreased the value of the surrounding properties, thereby depriving the City of property tax revenue. The City alleged that "Hedonic regression" techniques could be used to quantify the losses the City suffered that were attributable to the Bank's conduct. The City also sought damages based on the cost of the increased municipal services it provided to deal with the problems attending the foreclosed and often vacant properties—including police, firefighters, building inspectors, debris collectors, and others. These increased services, the City claimed, would not have been necessary if the properties had not been foreclosed upon due to the Bank's discriminatory lending practices. The City also sought a declaratory judgment that the Bank's conduct violated the FHA, an injunction barring the Bank from engaging in similar conduct, and punitive damages, as well as attorneys' fees.

On July 9, 2014, the district court granted defendants' motion to dismiss, adopting and incorporating its order from the companion case between the City of Miami and Bank of America. First, the court found that the City of Miami lacked statutory standing to sue under the FHA. The court determined that, based on this Court's earlier opinion in *Nasser v. City of Homewood*, the City's claim fell outside the FHA's "zone of interests," and, therefore, the City lacked standing to sue. In particular, the trial court determined that the City had alleged "merely economic injuries" that were not "affected by a racial interest." Like the plaintiffs in *Nasser*, the court suggested, the City was seeking redress under the FHA for "an economic loss from a decrease in property values," and as with the plaintiffs in Nasser, this was insufficient. The City's goal went far beyond the purpose of the FHA, which is to "provide, within constitutional limitations, for fair housing throughout the United States."

The court also concluded that the FHA contains a proximate cause requirement, but that the City had not adequately pled proximate cause. The City had not sufficiently traced any lending disparities to the defendants' conduct, as opposed to confounding background variables such as "a historic drop in home prices and a global recession," and "the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers." The court also determined that the City had not shown that the Bank's mortgage practices caused the City any harm. It was unimpressed with the "statistics and studies" the City cited, noting

that some were not based on data from Miami, some were not limited to the defendants' practices, and others "d[id] not control for relevant credit factors that undoubtedly affect lending practices." Moreover, some of the harm to the City stemmed directly from "the actions of intervening actors such as squatters, vandals or criminals that damaged foreclosed properties."

The district court also concluded that the City's federal claim ran afoul of the statute of limitations. It noted that for the FHA, a plaintiff must bring his claim "not later than 2 years after the occurrence" of the discriminatory housing practice, and that for discriminatory loans the statute of limitations begins to run from the date of the loan closing. But the City had not alleged that any loans were made later than 2008, a full five years before its complaint was filed. The court was not persuaded by the City's invocation of the continuing violation doctrine—which can allow plaintiffs, under some circumstances, to sue on an otherwise time-barred claim—since the City had not alleged sufficient facts to support any claim that the specific practices continued into the statutory period. The district court dismissed the City's FHA claim with prejudice, reasoning that even if the statute of limitations deficiencies could be cured by an amended pleading, the City's lack of statutory standing could not be.

Finally, the district court rejected the City's unjust enrichment claim on several grounds. As a preliminary matter, the City had failed to draw the necessary causal connection between the Bank's alleged discriminatory practices and its receipt of undeserved municipal services. Moreover, the City had failed to allege basic elements of an unjust enrichment claim under Florida law. The court determined that any benefit the Bank received from municipal services was not direct but "derivative" and, therefore, insufficient to support an unjust enrichment claim. Moreover, the City had failed to allege that the Bank was not otherwise entitled to those services as a Miami property owner. Finally, the court rejected the City's argument that Miami was forced to pay for the Bank's externalities (the costs of the harm caused by its predatory lending), holding that paying for externalities cannot sustain an unjust enrichment claim. The unjust enrichment claim was dismissed without prejudice, leaving the City free to amend its complaint. The City chose not to proceed on its unjust enrichment claim alone "because the two claims are so intimately entwined and based on largely the same underlying misconduct." Instead, it moved for reconsideration and for leave to file an amended complaint, arguing that it had standing under the FHA and that the amended complaint would cure any statute of limitations deficiency. The proposed amended complaint alleged that the Bank's discriminatory lending practices "frustrate[ ] the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community," thereby "directly interfer[ing]" with one of the City's missions. It also made more detailed allegations about properties that had been foreclosed upon after being subject to discriminatory loans. Specifically, the proposed amended complaint identified ten foreclosed properties that corresponded to predatory loans that originated between 2004 and 2012. Notably, it also identified 11 properties that corresponded to predatory loans that the Bank had issued after December 13, 2011 (within two years of filing the suit) that had not yet been foreclosed upon but were likely to "eventually enter the foreclosure process," based on expert analysis.

The district court denied the City's motion for reconsideration and for leave to amend, as it did in each of the companion cases, relying upon its reasoning in the *Bank of America* case.

The City timely appealed the court's final order of dismissal.

II.

As explained, our reasoning is set forth in detail in the companion case *Bank of America Corp*. Our legal conclusions in that case apply equally here, and dictate the same results. We briefly summarize those conclusions.

A. Standard of Review

We review the district court's grant of a motion to dismiss with prejudice de novo, "accepting the [factual] allegations in the complaint as true and construing them in the light most favorable to the plaintiff." We generally review the district court's decision to deny leave to amend for an abuse of discretion, but we will review de novo an order denying leave to amend on the grounds of futility, because it is a conclusion of law that an amended complaint would necessarily fail. Finally, we review de novo whether plaintiffs have Article III standing.

B. Fair Housing Act Claim

1. Article III Standing

For the reasons we set forth in *Bank of America Corp.*, the City has constitutional standing to bring its FHA claim. Just as in that case, the City here claims injury on the basis of lost property tax revenue due to premature or unnecessary foreclosure resulting from predatory loans. In *Gladstone Realtors v. Village of Bellwood*, the Supreme Court held that a village had Article III standing to bring an FHA claim for discriminatory renting practices partly on the basis of "[a] significant reduction in property values," because such a reduction "directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." The City of Miami alleges the same kind of injury here. Thus, like the Village of Bellwood, the City of Miami had adequately alleged an injury in fact.

As for Article III causation, again, we find that at this stage in the proceeding the City's alleged chain of causation is perfectly plausible: taking the City's allegations as true, the Bank's extensive pattern of discriminatory lending led to substantially more defaults on its predatory loans, leading to a higher rate of foreclosure on minority-owned property and thereby reducing the City's tax base. Moreover, the complaint supports its allegations with regression analyses that link the Bank's treatment of minority borrowers to predatory loans, predatory loans to foreclosure, and foreclosure to reduced tax revenue. All told, the City has "allege[d] ... facts essential to show jurisdiction."

2. "Statutory Standing"

The district court dismissed the City's claim because it lacked what the court characterized as "statutory standing." It found that the City fell outside the FHA's "zone of interests," and that its harm was not proximately caused by the Bank's actions. Ultimately, for the reasons fully explained in *Bank of America Corp.*, we disagree with the district court's legal conclusions.

a. Zone of Interest

This case, too, requires us to define the breadth of the term "aggrieved person" as it is used in the FHA. As explained in detail in the companion case, we are bound by the Supreme Court's interpretation of the FHA in *Trafficante v. Metropolitan Life Insurance*, *Gladstone*, and *Havens Realty Corp. v. Coleman*: statutory standing "under [the FHA] ... is 'as broad as is permitted by Article III of the Constitution.' " Although the Supreme Court has suggested that it may be prepared to reconsider that holding, we must "follow the case which directly controls, leaving to the Supreme Court[ ] the prerogative of overruling its own decisions." Moreover, our circuit precedent in *Nasser* is not to the contrary; that case stands for the unremarkable proposition that a plaintiff has no cause of action under the FHA if he makes no allegation of discrimination (or disparate impact) on the basis of race (or one of the FHA's other protected characteristics: color, religion, sex, handicap, familial status, and national origin). In this case, however, the complaint explicitly alleged race-based discrimination in the Bank's predatory lending practices.

Thus, we agree with the City that the term "aggrieved person" in the FHA sweeps as broadly as allowed under Article III. To the extent a zone of interests analysis applies to the FHA, it encompasses the City's allegations in this case.

b. Proximate Cause

As we explained at some length in the companion case, we agree with the district court that a plaintiff bringing an action for damages under the Fair Housing Act must plead proximate cause between his injury and the defendant's unlawful conduct. The Supreme Court has instructed that such a claim is "in effect, a tort action," governed by general tort rules, and proximate cause is a classic element of a tort claim.

And we look to the law of torts to guide our proximate cause analysis, using foreseeability as our touchstone. Under this standard, we conclude again that the City has made an adequate showing. Proximate cause "is not ... the same thing as ... sole cause," and the fact that there are multiple plausible, foreseeable links in the alleged causal chain is not fatal to the City's claim.

3. Statute of Limitations and Remand

The district court dismissed the City's FHA claims with prejudice (and denied its motion for leave to amend) because it concluded that the City fell outside the statute's zone of interests and had not adequately pled proximate cause, and that these deficiencies were incurable. Resolving a plaintiff's motion to amend is "committed to the sound discretion of the district court," but that discretion "is strictly circumscribed" by Rule 15(a)(2) of the Federal Rules of Civil Procedure, which instructs that leave to amend should be "freely give[n] when justice so requires." Because the district court wrongly concluded that the City was outside the FHA's zone of interests and had not adequately pled proximate cause, its determination that any amended complaint would be futile was legal error and therefore an abuse of discretion. On remand, the City should be granted leave to amend its complaint.

In its original complaint, the City failed to allege that any of the offending loans closed within the limitations period (between December 13, 2011, and December 13, 2013). On appeal, the City does not contend that its original complaint was adequate; rather, it argues that it could readily cure the statute of limitations flaws if given the

opportunity. The City points to its proposed amended complaint for support, in which it identified five specific properties corresponding to predatory loans issued after December 13, 2011. On remand, the district court will have the opportunity to evaluate whether the City's new pleadings satisfy the statute of limitations, in a manner consistent with our explanation of the continuing violation doctrine in the companion case.

C. Unjust Enrichment Claim

As for the City's state law unjust enrichment claim, we agree with the district court and affirm its ruling for the reasons detailed in the companion case. We have not found—and the City has not provided—a single Florida case supporting an unjust enrichment claim in these circumstances, and the City's claims do not fit within an unjust enrichment framework. Missing tax revenue is in no way a benefit that the City has conferred on the Bank. Municipal expenditures, meanwhile, do not appear to be among the types of benefits that can be recovered in an unjust enrichment action under Florida law. They are also not a benefit directly conferred on the Bank, as is required for an unjust enrichment claim under Florida law. Finally, the City has provided no arguments and cited no Florida caselaw explaining why the Bank would not be entitled to such services like any other property owner.

The judgment of the district court is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for further proceedings consistent with this opinion.

Bank of America Corp. v. City of Miami

15-1111

Ruling Below: *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262 (11th Cir. 2015)

The City of Miami filed suit against Bank of America, on the grounds that the company had engaged discriminatory lending practices (i.e. predatory loans, "redlining") which caused economic harm to the city. The US District Court for the Southern District of Florida dismissed for failure to state a claim and denied reconsideration. Plaintiff appealed.

The Court of Appeals for the Eleventh Circuit held that the city had in fact adequately alleged injury from the allegedly discriminatory lending, that the city had adequately alleged a chain of causation from the allegedly discriminatory lending, that the term "aggrieved person" in the Fair Housing Act can be construed as broadly as is allowed under Article III, that the proper standard for proximate causation on a Fair Housing Act claim is based on foreseeability, that the city adequately alleged that the harm was reasonably foreseeable, and that the city failed to allege that the city had given a direct benefit to the lender to which the lender was not otherwise entitled.

Question Presented: Whether, by limiting suit to "aggrieved person[s]," Congress required that a Fair Housing Act plaintiff plead more than just Article III injury-in-fact; and whether proximate cause requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies.

CITY OF MIAMI, a Florida Municipal Corporation, Plaintiff–Appellant,
v.
BANK OF AMERICA CORPORATION, Bank of America, N.A., et al., Defendants–Appellees.

United States Court of Appeals, Eleventh Circuit

Decided on September 1, 2015

[Excerpt; some citations and footnotes omitted]

MARCUS, Circuit Judge:

The City of Miami has brought an ambitious fair housing lawsuit against Bank of America, alleging that it engaged in a decade-long pattern of discriminatory lending in the residential housing market that caused the City economic harm. The City claims that the bank targeted black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white

customers, and created internal incentive structures that encouraged employees to provide these types of loans. The predatory loans, as identified by the City, include: high-cost loans (i.e., those with an interest rate at least three percentage points above a federally established benchmark), subprime loans, interest-only loans, balloon payment loans, loans with prepayment penalties, negative amortization loans, no documentation loans, and adjustable rate mortgages with teaser rates (i.e., a lifetime maximum rate greater than the initial rate plus 6%). The City alleged that by steering minorities toward these predatory loans, Bank of America caused minority-owned properties throughout Miami to fall into unnecessary or premature foreclosure, depriving the City of tax revenue and forcing it to spend more on municipal services (such as police, firefighters, trash and debris removal, etc.) to combat the resulting blight. The City asserts one claim arising under the Fair Housing Act (FHA) as well as an attendant unjust enrichment claim under Florida law.

The district court dismissed the City's FHA claim with prejudice on three grounds: the City lacked statutory standing under the FHA because it fell outside the statute's "zone of interests"; the City had not adequately pled that Bank of America's conduct proximately caused the harm sustained by the City; and, finally, the City had run afoul of the statute of limitations and could not employ the continuing violation doctrine. We disagree with each of these conclusions.

As a preliminary matter, we find that the City has constitutional standing to pursue its FHA claims. We also conclude that under controlling Supreme Court precedent, the "zone of interests" for the Fair Housing Act extends as broadly as permitted under Article III of the Constitution, and therefore encompasses the City's claim. While we agree with the district court that the FHA contains a proximate cause requirement, we find that this analysis is based on principles drawn from the law of tort, and that the City has adequately alleged proximate cause. Finally, we conclude that the "continuing violation doctrine" can apply to the City's claims, if they are adequately pled.

Because the district court imposed too stringent a zone of interests test and wrongly applied the proximate cause analysis, we conclude that it erred in dismissing the City's federal claims with prejudice and in denying the City's motion for leave to amend on the grounds of futility. As for the state law claim, we affirm the dismissal because the benefits the City allegedly conferred on the defendants were not sufficiently direct to plead an unjust enrichment claim under Florida law.

I.

On December 13, 2013, the City of Miami brought this complex civil rights action in the United States District Court for the Southern District of Florida against Bank of America Corporation, Bank of America N.A., Countrywide Financial Corporation, Countrywide Home Loans, and Countrywide Bank, FSB (collectively "Bank of America" or "the Bank") containing two claims. First, it alleged that the defendants violated sections 3604(b) and 3605(a) of the Fair Housing Act by engaging in discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and caused financial harm to the City. It also alleged that the Bank unjustly enriched itself by taking advantage of "benefits conferred by the City" while, at the same time, engaging in unlawful lending practices, which "denied the City revenues it had properly expected through

property and other tax payments and ... cost[ ] the City additional monies for services it would not have had to provide ... absent [the Bank's] unlawful activities."

The complaint accused Bank of America of engaging in both "redlining" and "reverse redlining." Redlining is the practice of refusing to extend mortgage credit to minority borrowers on equal terms as to non-minority borrowers. Reverse redlining is the practice of extending mortgage credit on exploitative terms to minority borrowers. The City alleged that the Bank engaged in a vicious cycle: first it "refused to extend credit to minority borrowers when compared to white borrowers," then "when the bank did extend credit, it did so on predatory terms." When minority borrowers then attempted to refinance their predatory loans, they "discover[ed] that [the Bank] refused to extend credit at all, or on terms equal to those offered ... to white borrowers."

The City claimed that this pattern of providing more onerous loans—i.e., those containing more risk, carrying steeper fees, and having higher costs—to black and Latino borrowers (as compared to white borrowers of identical creditworthiness) manifested itself in the Bank's retail lending pricing, its wholesale lending broker fees, and its wholesale lending product placement. It also averred that the Bank's internal loan officer compensation system encouraged its employees to give out these types of loans even when they were not justified by the borrower's creditworthiness. The City claimed that Bank of America's practice of redlining and reverse redlining constituted a "continuing and unbroken pattern" that persists to this day.

The City said that the Bank's conduct violated the Fair Housing Act in two ways. First, the City alleged that the Bank intentionally discriminated against minority borrowers by targeting them for loans with burdensome terms. Second, the City claimed that the Bank's conduct had a disparate impact on minority borrowers, resulting in a disproportionate number of foreclosures on minority-owned properties, and a disproportionate number of exploitative loans in minority neighborhoods.

Among other things, the City employed statistical analyses to draw the alleged link between the race of the borrowers, the terms of the loans, and the subsequent foreclosure rate of the underlying properties. Drawing on data reported by the Bank about loans originating in Miami from 2004–2012, the City claimed that a Bank of America loan in a predominantly (greater than 90%) minority neighborhood of Miami was 5.857 times more likely to result in foreclosure than such a loan in a majority-white neighborhood. According to the City's regression analysis (which purported to control for objective risk characteristics such as credit history, loan-to-value ratio, and loan-to-income ratio), a black Bank of America borrower in Miami was 1.581 times more likely to receive a loan with "predatory" features than a white borrower, and a Latino borrower was 2.087 times more likely to receive such a loan. Moreover, black Bank of America borrowers with FICO scores over 660 (indicating good credit) in Miami were 1.533 times more likely to receive a predatory loan than white borrowers, while a Latino borrower was 2.137 times more likely to receive such a loan.

The City's data also suggested that from 2004–2012, 21.9% of loans made by Bank of America to black and Latino customers in Miami were high-cost, compared to just 8.9% of loans made to white customers. Data cited in the complaint showed significantly elevated rates of foreclosure for loans in

minority neighborhoods. While 53.3% of Bank of America's Miami loan originations were in "census tracts" that are at least 75% black or Latino, 95.7% of loan originations that had entered foreclosure by June 2013 were from such census tracks. And 32.8% of Bank of America's loans in predominantly black or Latino neighborhoods resulted in foreclosure, compared to only 7.7% of its loans in non-minority (at least 50% white) neighborhoods. Likewise, a Bank of America borrower in a predominantly black or Latino census tract was 1.585 times more likely to receive a predatory loan as a borrower with similar characteristics in a non-minority neighborhood.

The complaint also alleged that the bank's loans to minorities resulted in especially quick foreclosures. The average time to foreclosure for Bank of America's black and Latino borrowers was 3.144 years and 3.090 years, respectively, while for white borrowers it was 3.448 years. The allegations also gathered data from various non-Miami-based studies (some nationwide, some based on case studies in other cities) to demonstrate the elevated prevalence of foreclosure, predatory loan practices, and higher interest rates among black and Latino borrowers, and the foreseeability of foreclosures arising from predatory lending practices and their attendant harm.

The City's charges were further amplified by the statements of several confidential witnesses who claimed that the Bank deliberately targeted black and Latino borrowers for predatory loans. Thus, for example, one mortgage loan officer with Bank of America who worked on loans in the Miami area claimed that the bank targeted less savvy minorities for negative amortization loans. Another noted that Bank of America paid higher commissions to loan officers for Fair Housing Act loans as opposed to the allegedly more advantageous Community Reinvestment Act (CRA) loans, incentivizing officers to steer borrowers away from the CRA loans. Still another noted that back-end premiums (a premium earned by the loan officer equal to the difference between the borrower's loan rate and the rate the bank pays for it) on loans were not disclosed and "often eluded less educated, minority borrowers." One of the witnesses explained that from 2011–2013, Bank of America did not offer regular refinancing to persons with mortgages at over 80% of the value of the house (including many negative amortization loans), which disproportionately affected minorities in danger of losing their homes.

Notably, the City sought damages based on reduced property tax revenues. It claimed that the Bank's lending policies caused minority-owned property to fall into unnecessary or premature foreclosure. The foreclosed-upon properties lost substantial value and, in turn, decreased the value of the surrounding properties, thereby depriving the City of property tax revenue. The City alleged that "Hedonic regression" techniques could be used to quantify the losses the City suffered that were attributable to the Bank's conduct. The City also sought damages based on the cost of the increased municipal services it provided to deal with the problems attending the foreclosed and often vacant properties—including police, firefighters, building inspectors, debris collectors, and others. These increased services, the City claimed, would not have been necessary if the properties had not been foreclosed upon due to the Bank's discriminatory lending practices. The City also sought a declaratory judgment that the Bank's conduct violated the FHA, an injunction barring the Bank from engaging in similar conduct, and punitive damages, as well as attorneys' fees.

On July 9, 2014, the district court granted defendants' motion to dismiss. First, the court found that the City of Miami lacked statutory standing to sue under the FHA. The court determined that, based on this Court's earlier opinion in *Nasser v. City of Homewood*, the City's claim fell outside the FHA's "zone of interests," and therefore the City lacked standing to sue under this statute. In particular, the trial court determined that the City had alleged "merely economic injuries" that were not "affected by a racial interest." Like the plaintiffs in *Nasser*, the court suggested, the City was seeking redress under the FHA for "an economic loss from a decrease in property values," and as with the plaintiffs in *Nasser*, this was insufficient. The City's goal went far beyond the purpose of the FHA, which is to "provide, within constitutional limitations, for fair housing throughout the United States."

The court also concluded that the FHA contains a proximate cause requirement, but that the City had not adequately pled proximate cause. The City had not sufficiently traced any foreclosures to the defendants' conduct, as opposed to confounding background variables such as "a historic drop in home prices and a global recession," and "the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers." The court also determined that the City had not shown that the Bank's mortgage practices caused the City any harm. It was unimpressed with the "statistics and studies" the City cited, noting that some were not based on data from Miami, some were not limited to the defendants' practices, and others "d[id] not control for relevant credit factors that undoubtedly affect lending practices." Id. Moreover, some of the harm to the City stemmed directly from "the actions of intervening actors such as squatters, vandals or criminals that damaged foreclosed properties."

The district court also concluded that the City's federal claim ran afoul of the statute of limitations. It noted that for the FHA, a plaintiff must bring his claim "not later than 2 years after the occurrence" of the discriminatory housing practice, and that for discriminatory loans the statute of limitations begins to run from the date of the loan closing. But the City had not alleged that any loans were made later than 2008, a full five years before its complaint was filed. The court was not persuaded by the City's invocation of the continuing violation doctrine—which can allow plaintiffs, under some circumstances, to sue on an otherwise time-barred claim—since the City had not alleged sufficient facts to support its allegation that the specific practices continued into the statutory period. The district court dismissed the City's FHA claim with prejudice, reasoning that even if the statute of limitations deficiencies could be cured by an amended pleading, the City's lack of statutory standing could not be.

Finally, the district court rejected the City's unjust enrichment claim on several grounds. As a preliminary matter, the City had failed to draw the necessary causal connection between the Bank's alleged discriminatory practices and its receipt of undeserved municipal services. Moreover, the court found that the City had failed to allege basic elements of an unjust enrichment claim under Florida law. It determined that any benefit the Bank received from municipal services was not direct but "derivative" and, therefore, insufficient to support an unjust enrichment claim. It also found that the City had failed to allege that the Bank was not otherwise entitled to those services as a Miami property owner. Finally, it rejected the City's argument that Miami was forced to pay for the Bank's

externalities (the costs of the harm caused by its mortgage lending), holding that paying for externalities cannot sustain an unjust enrichment claim. The district court dismissed the unjust enrichment claim without prejudice, leaving the City free to amend its complaint.

The City chose not to proceed on its unjust enrichment claim alone "because the two claims are so intimately entwined and based on largely the same underlying misconduct." Instead, it moved in the district court for reconsideration and for leave to file an amended complaint, arguing that it had standing under the FHA and that the amended complaint would cure any statute of limitations deficiency. The proposed amended complaint alleged that the Bank's discriminatory lending practices "frustrate[ ] the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community," thereby "directly interfer[ing]" with one of the City's missions. It also made more detailed allegations about properties that had been foreclosed upon after being subject to discriminatory loans. Specifically, the proposed amended complaint identified five foreclosed properties that corresponded to predatory loans that originated between 2008 and 2012, and three that originated between 2004 and 2008. It also identified seven properties that corresponded to predatory loans that the Bank had issued after December 13, 2011 (within two years of filing suit) that had not yet been foreclosed upon but were likely to "eventually enter the foreclosure process," based on expert analysis. The complaint continued to invoke the continuing violation doctrine and claimed that the statute of limitations had not run.

The district court denied the City's motion for reconsideration and for leave to amend. As for statutory standing, the court explained that "[a]rguing that this Court's reasoning was flawed is not enough for a motion for reconsideration."

And the court was unimpressed by the City's new argument that it "has a generalized non-economic interest ... in racial diversity," ruling that these were "claims [the City] never made and amendments it did not previously raise or offer despite ample opportunity," and were therefore "improperly raised as grounds for reconsideration." Finally, the court noted that these "generalized allegations [do not] appear to be connected in any meaningful way to the purported loss of tax revenue and increase in municipal expenses allegedly caused by Defendants' lending practices."

The City timely appealed the court's final order of dismissal.

II.

A. Standard of Review

We review the district court's grant of a motion to dismiss with prejudice de novo, "accepting the [factual] allegations in the complaint as true and construing them in the light most favorable to the plaintiff." We generally review the district court's decision to deny leave to amend for an abuse of discretion, but we will review de novo an order denying leave to amend on the grounds of futility, because it is a conclusion of law that an amended complaint would necessarily fail. Finally, we review de novo whether plaintiffs have Article III standing.

B. Fair Housing Act Claim

1. Article III Standing

We come then to the first essential question in the case: whether the City of Miami has

constitutional standing to bring its Fair Housing Act claim. Although the district court addressed only the issue of so-called "statutory standing," the Bank contests both Article III standing and statutory standing, and we address each in turn.

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." It is by now axiomatic that to establish constitutional standing at the pleading stage, the plaintiff must plausibly allege: (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) "a causal connection between the injury and the conduct complained of," such that the injury is "fairly traceable to the challenged action of the defendant"; and (3) that a favorable judicial decision will "likely" redress the injury. The "line of causation" between the alleged conduct and the injury must not be "too attenuated." The party invoking federal jurisdiction bears the burden of establishing these elements. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to demonstrate standing.

The district court did not address whether the City had Article III standing because it granted the Bank's motion to dismiss on other grounds. On appeal, the Bank argues that the City lacked Article III standing because it had not adequately alleged the causal connection—that is, the "traceability"—between its injury and the Bank's conduct. We are unpersuaded.

To recap, the City claims that the Bank's discriminatory lending practices caused minority-owned properties to fall into foreclosure when they otherwise would not have, or earlier than they otherwise would have. This, in turn, decreased the value of the foreclosed properties themselves and the neighboring properties, thereby depriving the City of property tax revenue, and created blight, thereby forcing the City to spend additional money on municipal services. We have little difficulty in finding, based on controlling Supreme Court caselaw, that the City has said enough to allege an injury in fact for constitutional standing purposes. Our analysis is guided by *Gladstone, Realtors v. Village of Bellwood*. In that case, the Village of Bellwood sued a real estate firm under the FHA for discriminatory renting practices that caused racial segregation. The Supreme Court held that the village had Article III standing to bring its claim partly on the basis of "[a] significant reduction in property values," because such a reduction "directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Like the Village of Bellwood, the City of Miami claims that an allegedly discriminatory policy has reduced local property values and diminished its tax base. Thus, like the Village of Bellwood, the City of Miami has adequately alleged an injury in fact.

As for Article III causation, the Bank claims that the City's harm is not fairly traceable to the Bank's conduct. Specifically, it suggests that a myriad of other factors cause foreclosure and blight—including the state of the housing market and the actions of third parties like other property owners, competing sellers, vandals, etc.—thereby breaking the causal chain. While we acknowledge the real possibility of confounding variables, at this stage in the proceeding the City's alleged chain of causation is perfectly plausible: taking the City's allegations as true, the Bank's extensive pattern of discriminatory lending led to substantially more defaults on its predatory loans, leading to a higher rate of foreclosure on minority-owned property and thereby reducing the City's tax base. Moreover, the complaint supports its

allegations with regression analyses that link the Bank's treatment of minority borrowers to predatory loans, predatory loans to foreclosure, and foreclosure to reduced tax revenue.

Of course, the City has limited its claim only to those damages arising from foreclosures caused by the Bank's lending practices. At a subsequent stage in the litigation it may well be difficult to prove which foreclosures resulted from discriminatory lending, how much tax revenue was actually lost as a result of the Bank's behavior, etc. But at this early stage, the claim is plausible and sufficient. The City has said enough to establish Article III standing.

2. "Statutory Standing"

The district court dismissed the City's claim, however, not on the basis of Article III standing, but because it lacked what the court characterized as "statutory standing." It found that the City fell outside the FHA's "zone of interests," and that its harm was not proximately caused by the Bank's actions. Ultimately, we disagree with the district court's legal conclusions. As for the zone of interests, we conclude that we are bound by Supreme Court precedent stating that so-called statutory standing under the FHA extends as broadly as Article III will permit, and find that this includes the City. As for proximate cause, we agree that it must be pled for a damages claim under the FHA, but find that the City has adequately done so here.

Notably, the Supreme Court recently clarified in *Lexmark International, Inc. v. Static Control Components, Inc.* that the longstanding doctrinal label of "statutory standing" (sometimes also called "prudential standing") is misleading. The proper inquiry is whether the plaintiff "has a cause of action under the statute." But that inquiry isn't a matter of standing, because "the absence of a valid ... cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." Instead, it is "a straightforward question of statutory interpretation."

This issue comes before the Court on a motion to dismiss for failure to state a claim, and the City's pleadings are evaluated for plausibility using the standard set forth in *Bell Atlantic Corp. v. Twombly*. "The complaint must contain enough facts to make a claim for relief plausible on its face; a party must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " Of course, in evaluating the plausibility of the claim we must take all of the plaintiff's factual allegations as true.

a. Zone of Interests

In general, a statutory cause of action "extends only to those plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.' " The Supreme Court has instructed us that this test "applies to all statutorily created causes of action," but its application is not uniform: "certain statutes ... protect a more-than-usually 'expansive' range of interests."

The FHA provides that:

> [a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice ... to obtain appropriate relief with respect

> to such discriminatory housing practice or breach.

It defines an "aggrieved person" as anyone who "claims to have been injured by a discriminatory housing practice," or "believes that such person will be injured by a discriminatory housing practice that is about to occur."

The Bank claims that the City is not an "aggrieved person," and, therefore, falls outside the statute's zone of interests and cannot state a cause of action under the FHA. The City argues, however, that "FHA statutory standing is as broad as the Constitution permits under Article III," and therefore it is within the statute's zone of interests. Older Supreme Court cases appear to support the City's view, while certain more recent cases—as well as an older decision of this Court—have cast some doubt on the viability of those holdings. The answer requires carefully parsing both Supreme Court and Eleventh Circuit precedent, and a review of the relevant cases is instructive.

i. Early Supreme Court cases

The first major FHA case explicated by the Supreme Court is *Trafficante v. Metropolitan Life Insurance*. Two tenants of an apartment complex—one black, one white—alleged that the landlord discriminated against minorities on the basis of race when renting units, in violation of the FHA. The Court held that standing under the Act was defined "as broadly as is permitted by Article III of the Constitution ... insofar as tenants of the same housing unit that is charged with discrimination are concerned." "The language of the Act is broad and inclusive," the Court wrote, and "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations."

Seven years later, in *Gladstone*, the Village of Bellwood brought suit under the FHA against two real estate firms for "steering" black and white homeowners into targeted, race-specific neighborhoods, thereby "manipulat[ing] the housing market," "affecting the village's racial composition," and causing "[a] significant reduction in property values." The Court concluded that the village had stated a cause of action under the FHA and reaffirmed, based on the legislative history and purpose of the statute, that statutory standing under the FHA "is as broad as is permitted by Article III of the Constitution."

Next came *Havens Realty Corp. v. Coleman*, in which—along with other plaintiffs—a nonprofit corporation whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area" brought an FHA claim against a realty firm for racial steering (i.e., fostering racial segregation by guiding prospective buyers towards or away from certain apartments based on the buyer's race). In the clearest and most unambiguous terms, the Supreme Court reiterated the holding of Gladstone: "Congress intended standing under [the FHA] to extend to the full limits of Art. III and ... the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [the FHA]." As the Court explained, "the sole requirement for standing to sue under [the FHA] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.' " The organization's allegation that the racial steering "perceptibly impaired [its] ability to provide counseling and referral services for low- and moderate-income homeseekers" was sufficient to

constitute injury in fact for purposes of Article III (and statutory) standing.

ii. Nasser

Less than a month after Havens, the Eleventh Circuit issued an opinion in *Nasser*, on which the district court and the Bank principally rely. In *Nasser*, property owners challenged a zoning ordinance that rezoned their property from multi-family residential to single-family residential, alleging, inter alia, that the ordinance violated the FHA. In 1976, the plaintiffs entered into an agreement with a developer for the construction of a multi-family housing complex on their property. The developer had looked into the possibility of making some units of this complex available for low- and moderate-income families via rent subsidies, and had inquired with the Department of Housing and Urban Development. But the development never materialized. A detailed affidavit from a member of the county planning commission stated that the plaintiffs had never suggested that their purpose "was to build a multi-family project for the use and benefit of low income or minority groups." Instead, the affidavit claimed that the plaintiffs had represented their project as "an exclusive-high rent apartment complex." The Court found that there was no "evidence that the 1976 project was in any way affected by or related to racial or other minority interests."

Three years later, the land was re-zoned. The plaintiffs claimed that the re-zoning had reduced the value of their property by more than 50% (from $285,000 to $135,000). A panel of this Court concluded that the plaintiffs lacked statutory standing under the FHA despite this purported economic injury. In making this determination, the Court considered *Trafficante* and *Gladstone*, and concluded: "There is no indication that the [Supreme] Court intended to extend standing, beyond the facts before it, to plaintiffs who show no more than an economic interest which is not somehow affected by a racial interest." The Nasser Court found that the property owners lacked an economic interest affected by a racial interest, and therefore lacked standing to sue under the FHA.

iii. Newer Supreme Court cases on statutory standing

Two recent Supreme Court cases have cast some doubt on the broad interpretation of FHA statutory standing in *Trafficante, Gladstone*, and *Havens*. In *Thompson v. North American Stainless, LP*, the Court considered whether an employee had a cause of action under Title VII, which uses nearly identical statutory language to the FHA. The Court rejected the argument that this language expanded statutory standing to the limits of Article III. Instead, it drew an analogy to the Administrative Procedure Act (which contains similar language) and held that plaintiffs must "fall[ ] within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."

The Court acknowledged that this analysis was in some tension with *Trafficante* and *Gladstone*. But in glossing *Trafficante,* the Thompson Court focused on language in the opinion that arguably limited the holding to its facts: the Trafficante Court stated that standing under the FHA was coextensive with Article III only "insofar as tenants of the same housing unit that is charged with discrimination are concerned." The Thompson Court acknowledged that later cases (such as *Gladstone*) reiterated that standing under the FHA "reaches as far as Article III permits" without any limiting language, but it stated that "the holdings of those cases are compatible with the 'zone of

interests' limitation" that the Court went on to read into Title VII.

Finally, the Supreme Court's recent opinion in *Lexmark* (interpreting the Lanham Act) discarded the labels "prudential standing" and "statutory standing," and clarified that the inquiry was really a question of statutory interpretation, and not standing at all. One aspect of this interpretation, the Court explained, was a zone of interests analysis, which "requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." The Court went on to say that this zone of interests test "applies to all statutorily created causes of action." Lexmark did not mention the FHA or any of the Court's FHA cases.

iv. Analysis

The scope and role of the zone of interests analysis in the FHA context is a difficult issue, and one that has sharply divided the courts that have considered it. Ultimately, we disagree with the district court, and hold that the phrase "aggrieved person" in the FHA extends as broadly as is constitutionally permissible under Article III.

Simply put, *Trafficante*, *Gladstone*, and *Havens* have never been overruled, and the law of those cases is clear as a bell: "[statutory] standing under [the FHA] extends 'as broadly as is permitted by Article III of the Constitution.' " While *Thompson* has gestured in the direction of rejecting that interpretation, a gesture is not enough. The rule governing these situations is clear: "if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court[ ] the prerogative of overruling its own decisions." In other words, "the Supreme Court has insisted on reserving to itself the task of burying its own decisions."

Notably, *Thompson* itself was a Title VII case, not a Fair Housing Act case. *Thompson* surveyed *Trafficante* and *Gladstone*, but did not explicitly overrule them—nor could it, given the different statutory context in which it arose. Instead, the Court held that any suggestion drawn from the FHA cases that Title VII's cause of action is similarly broad was "ill-considered" dictum. It's true that Title VII contains nearly identical statutory language to the FHA, and therefore the Thompson Court's interpretation of Title VII may signal that the Supreme Court is prepared to narrow its interpretation of the FHA in the future. (The dicta in Thompson indicating that its Title VII interpretation is "compatible" with the Court's previous FHA holdings suggests as much.) But that day has not yet arrived, and until it does, our role as an inferior court is to apply the law as it stands, not to read tea leaves. The still-undisturbed holding of the Supreme Court's FHA cases is that the definition of an "aggrieved person" under the FHA extends as broadly as permitted under Article III.

This Court's binding precedent in *Nasser* is not to the contrary. *Nasser* stands for the unremarkable proposition that a plaintiff has no cause of action under the FHA if he makes no allegation of discrimination (or disparate impact) on the basis of race (or one of the FHA's other protected characteristics: color, religion, sex, handicap, familial status, and national origin). The allegation of discrimination provides the "racial interest" Nasser requires to bring an economic injury within the scope of the statute. The *Nasser* plaintiffs' claim was unrelated to race (or any protected FHA characteristic) altogether; they simply objected to the rezoning of their

property because it cost them money. As the Nasser Court put it, the plaintiffs' "interest in [the] value of the property in no way implicate [d] [the] values protected by the Act."

Indeed, this is exactly how subsequent Eleventh Circuit caselaw has treated *Nasser*. In *Baytree of Inverrary Realty Partners v. City of Lauderhill*—the only case of this Court to revisit or reference *Nasser*'s treatment of the FHA—we held that a non-minority real estate developer, Baytree, stated a claim under the FHA when it challenged the city's decision to rezone its property, alleging that the decision was racially motivated and rendered the property worthless. We distinguished *Nasser* as a case "in which plaintiffs alleged only an economic injury unaffected by any racial interest," and found it inapposite because Baytree had properly alleged that its injury "result[ed] from racial animus." The same is true of the City of Miami's claim. Like Baytree, the City claims to have suffered an economic injury resulting from a racially discriminatory housing policy; in neither case does *Nasser* prevent the plaintiff from stating a claim under the FHA.

In sum, we agree with the City that the term "aggrieved person" in the FHA sweeps as broadly as allowed under Article III; thus, to the extent a zone of interests analysis applies to the FHA, it encompasses the City's allegations in this case. The City's claim does not suffer from the same flaw as the Nasser plaintiffs', because the City has specifically alleged that its injury is the result of a Bank policy either expressly motivated by racial discrimination or resulting in a disparate impact on minorities.

b. Proximate Cause

The district court also concluded that the City's pleadings did not sufficiently allege that the Bank's lending practices were a proximate cause of the City's injury. It determined that the City had not "allege[d] facts that isolate Defendants' practices as the cause of any alleged lending disparity" compared to the background factors of a cratering economy and the actions of independent actors such as "loan services, government entities, competing sellers, and uninterested buyers."

It also found that the City's statistical analyses indicating that foreclosures caused economic harm were "insufficient to support a causation claim," because some of the studies were not limited to Miami, some were not limited to the defendants' practices, and some did not control for relevant credit factors. The plaintiffs disagree, arguing that they need not plead proximate causation at all, only the lesser "traceability" required by Article III. In the alternative, they say that their pleadings were sufficient under either standard. Although we agree with the Bank and the district court that proximate cause is a required element of a damages claim under the FHA, we find that the City has pled it adequately.

In *Lexmark*, the Supreme Court illuminated the doctrine of proximate cause as it relates to statutory causes of action. "[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." This principle reflects "the reality that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing," as well as the Court's assumption that Congress is familiar with the traditional common-law rule and "does not mean to displace it sub silentio." The Court made clear that proximate causation is not a requirement of Article III, but rather an

element of the cause of action under a statute, and it "must be adequately alleged at the pleading stage in order for the case to proceed." The Supreme Court has read a variety of federal statutory causes of action to contain a proximate cause requirement.

Although proximate cause "is not easy to define," the basic inquiry is "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." The requirement is "more restrictive than a requirement of factual cause alone," and we have said that it demands "something [more]" than Article III traceability. But the nature of the proximate cause requirement differs statute by statute: it is "controlled by the nature of the statutory cause of action," so the scope of liability depends on the statutory context.

No case of the Supreme Court or this Court has ever dealt directly with the existence or application of a proximate cause requirement in the FHA context. But certain statements by the Supreme Court suggest that proximate cause must exist for a damages action brought under the FHA. First, the Lexmark Court characterized proximate cause as a "general[ ] presum[ption]" in statutory interpretation. Moreover, the Supreme Court has observed that an FHA damages claim is "in effect, a tort action," governed by general tort rules, and proximate cause is a classic element of a tort claim. If the City's claim is functionally a tort action, then presumably the City must adequately plead proximate cause, just like any other plaintiff raising any tort claim. At least two of our sister circuits appear to have reached the same conclusion.

The Bank argues that proximate cause creates a "directness requirement" within the FHA, and that the City's pleadings, therefore, fail because they do not allege that the Bank's actions directly harmed the City. The City does not accuse the Bank of discriminating against the City itself in its lending practices; instead, it claims that the Bank's discriminatory practices led the City to lose tax revenue and spend money combating the resulting blight. This harm, the Bank claims, is too indirect to have been proximately caused by the Bank's conduct.

We disagree. The Bank proposes to draw its proximate cause test from other statutory contexts, primarily from the Supreme Court's interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Holmes. In that case, the Court read a proximate cause requirement into RICO, reasoning that its statutory language mirrored language used in the antitrust statutes, which had long been interpreted to contain such a requirement. One of the "central elements" of proximate cause in the RICO and antitrust context, the Court explained, is "a demand for some direct relation between the injury asserted and the injurious conduct alleged." The Bank argues that proximate cause in the FHA context must be the same.

But the Supreme Court in *Lexmark* made clear that proximate cause is not a one-size-fits-all analysis: it can differ statute by statute. Thus, for example, *Lexmark* involved an allegation of false advertising under the Lanham Act brought by one company against a rival. As the Court noted, all such injuries "are derivative of those suffered by consumers who are deceived by the advertising." A claim based on such a derivative injury might not satisfy proximate cause under a statute that strictly requires a direct connection between the plaintiff's harm and the defendant's conduct. Nevertheless, the Court found that the claim satisfied proximate causation under the Lanham Act: because the statute authorized suit "only for commercial injuries," the derivative nature of the plaintiff's claim could not be "fatal" to the

plaintiff's cause of action. In other words, the statutory context shaped the proximate cause analysis. So, too, in this case.

The FHA's proximate cause requirement cannot take the shape of the strict directness requirement that the Bank now urges on us: indeed, such a restriction would run afoul of Supreme Court and Eleventh Circuit caselaw allowing entities who have suffered indirect injuries—that is, parties who have not themselves been directly discriminated against—to bring a claim under the FHA. Notably, the Village of Bellwood in *Gladstone* was permitted to bring an FHA claim even though it was not directly discriminated against. So, too, was the non-profit corporation in Havens, which alleged impairment of its organizational mission and a drain on its resources, not direct discrimination. And in our own Circuit, the same is true of the plaintiff in Baytree, a non-minority developer who challenged a city's zoning decision as racially discriminatory. Indeed, the Supreme Court in *Havens* instructed that the distinction between direct and indirect harms—or, as the Havens Court characterized it, the difference "between 'third-party' and 'first-party' standing"—was "of little significance in deciding" whether a plaintiff had a cause of action under the FHA.

In examining RICO and the antitrust statutes, the Supreme Court has looked to the statutory text and legislative history to determine the scope and meaning of the proximate cause requirement. Neither party has presented any argument based on these considerations. However, the Supreme Court has observed that the language of the FHA is "broad and inclusive," and must be given "a generous construction." What's more, while the Supreme Court has cautioned that "[t]he legislative history of the [the FHA] is not too helpful" in determining the scope of its cause of action, it observed that the FHA's proponents "emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." In short, nothing in the text or legislative history of the FHA supports the Bank's cramped interpretation.

As we've noted, damages claims arising under the FHA have long been analogized to tort claims. Thus, we look to the law of torts to guide our proximate cause analysis in this context. We agree with the City that the proper standard, drawing on the law of tort, is based on foreseeability.

Under this standard, the City has made an adequate showing. The complaint alleges that the Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices "and their attendant harm," such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues. The district court rejected the plaintiffs' claim partly because it failed to "allege facts that isolate Defendants' practices as the cause of any alleged lending disparity." But as we have said even in the more restrictive RICO context, proximate cause "is not ... the same thing as ... sole cause." Instead, a proximate cause is "a substantial factor in the sequence of responsible causation." The City has surely alleged that much: it claims that the Bank's discriminatory lending caused property owned by minorities to enter premature foreclosure, costing the City tax revenue and municipal expenditures. Although there are several links in that causal chain, none are unforeseeable. And, as we noted in the context of Article III traceability, the City has provided the results of regression analyses that purport to draw the connection between the Bank's conduct toward minority borrowers, foreclosure, and lost tax revenue.

This empirical data is sufficient to "raise the pleadings above the speculative level."

In the face of longstanding caselaw drawn from the Supreme Court and this Court permitting FHA claims by so-called third party plaintiffs who are injured by a defendant's discrimination against another person, it is clear that the harm the City claims to have suffered has "a sufficiently close connection to the conduct the statute prohibits." Of course, whether the City will be able to actually prove its causal claims is another matter altogether. At this stage, it is enough to say that the City has adequately pled proximate cause, as required by the FHA.

3. Statute of Limitations

The FHA also requires that claims be filed "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." The district court concluded, and the parties do not contest, that an FHA claim for issuing a discriminatory loan begins to run from the date that the loan closes.

This lawsuit was filed on December 13, 2013. Thus, in a traditional statute of limitations analysis, the complained-of loans must have closed after December 13, 2011. The City maintains that it has alleged a pattern and practice of discriminatory lending by the Bank, and its claims, therefore, qualify for the application of the "continuing violation doctrine." The district court disagreed, finding that the City had not alleged facts sufficient to support its allegation that the specific practices continued into the statutory period. We remain unpersuaded.

The complaint alleged that the City had identified 3,326 discriminatory loans issued by the Bank in Miami between 2004 and 2012 that had resulted in foreclosure. It then listed ten specific property addresses that it claimed "corresponded to these foreclosures," but provided no specific information (e.g., the *1284 type of loan, the characteristics that made it predatory or discriminatory, when the loan closed, when the property went into foreclosure, etc.) for each address. (The City also claimed that "with the benefit of discovery," it "anticipate[d] ... be[ing] able to identify more foreclosures resulting from the issuance of discriminatory loans.") As the district court noted, however, the City failed to allege that any of the loans closed within the limitations period (between December 13, 2011, and December 13, 2013).

On appeal, the City does not contend that its original complaint was adequate; rather, it argues that it could readily cure the statute of limitations flaws if given the opportunity. In support, the City points to the proposed amended complaint that it provided along with its motion for reconsideration and motion to amend. The district court acknowledged that the City might indeed be able to remedy its statute of limitations deficiencies with an amendment, but the court never considered whether the City's proposed amended complaint was sufficient, because it concluded that the City remained outside the statute's zone of interests and had not adequately pled proximate cause. Because the district court erred both as to the zone of interests and proximate cause, we are obliged to remand the cause of action in the first instance to determine whether or not the City could remedy any statute of limitations deficiency. We decline to evaluate the City's proposed amended complaint before the district court has had the opportunity to do so.

In order to provide guidance on remand, we offer this discussion of the application of the continuing violation doctrine to this case. In

addition to noting that the City never alleged that any particular loan closed within the limitations period (a deficiency that may well be cured in an amended pleading), the district court also seemingly held that the City's claim could not qualify for the application of the continuing violation doctrine because the complaint did not identify a singular and uniform practice of continuing conduct.

The continuing violation doctrine applies to "the continued enforcement of a discriminatory policy," and allows a plaintiff to "sue on otherwise time-barred claims as long as one act of discrimination has occurred ... during the statutory period." The governing law on the continuing violation doctrine in the FHA context is drawn from the Supreme Court's decision in Havens. In that case, three plaintiffs—a black individual looking to rent an apartment, a black "tester," and a white "tester"—brought FHA claims. Their lawsuit was filed on January 9, 1979. At the time, the limitations period under the FHA was 180 days. The plaintiffs identified five separate incidents of discrimination: on March 14, March 21, March 23, July 6, and July 13 of 1978. Only the incident on July 13 was within the limitations period.

On March 14, March 21, and March 23, the two testers asked Havens about available apartments. Each time, the black tester was told that nothing was available, while the white tester was told that there were vacancies. On July 6, the black tester made a further inquiry and was told that there were no vacancies, while another white tester (not a party to the suit) was told that there were openings. Finally, on July 13—the only incident within the limitations period—the black plaintiff who was genuinely looking to rent asked Havens about availability and was falsely told that there was nothing.

All three plaintiffs alleged that Havens's practices deprived them of the benefits of living in an integrated community. The Supreme Court held that the claims were not time-barred for any of the plaintiffs because they alleged a "continuing violation" of the FHA, despite the fact that only one discriminatory incident was within the limitations window, and that incident involved only one of the three plaintiffs. "[A] 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination," the Court explained. The Court reasoned that "[w]here the challenged violation is a continuing one," there is no concern about the staleness of the plaintiff's claims. Moreover, the Court emphasized "the broad remedial intent of Congress embodied in the [Fair Housing] Act" in rejecting the defendants' "wooden application" of the statute of limitations. Id. The Court concluded: "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period, starting at] the last asserted occurrence of that practice."

The case before us—if the City is able to identify FHA violations within the limitations period—is on all fours with Havens. The City has alleged "not just one incident ... but an unlawful practice that continues into the limitations period." The City alleges that the Bank has engaged in a longstanding practice of discriminatory lending in which it extends loans to minority borrowers only on more unfavorable terms than those offered to white borrowers. The predatory qualities of the loans have taken slightly different forms over time (e.g., higher interest rates, undisclosed back-end premiums, higher fees, etc.), but the essential discriminatory practice has remained the

same: predatory lending targeted at minorities in the City of Miami. The fact that the burdensome terms have not remained perfectly uniform does not make the allegedly unlawful practice any less "continuing." The various instances of discriminatory lending comprise the practice, which continues into the limitations period. At least at the pleading stage, this is enough to plausibly invoke the continuing violation doctrine.

4. Remand

Resolving a plaintiff's motion to amend is "committed to the sound discretion of the district court," but that discretion "is strictly circumscribed" by Rule 15(a)(2) of the Federal Rules of Civil Procedure, which instructs that leave to amend should be "freely give[n] when justice so requires."

As we have explained, we find that the City is within the FHA's zone of interests and has sufficiently alleged proximate causation between its injury and the Bank's conduct. The district court's refusal to allow the City to amend, and its conclusion that any amended complaint would be futile, was legal error and therefore an abuse of discretion. On remand, the City should be granted leave to amend its complaint.

We also note that while this appeal was pending, the Supreme Court handed down a decision that may materially affect the resolution of this case. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, a non-profit organization brought a Fair Housing Act claim against the Texas Department of Housing and Community Affairs, alleging that the Department's allocation of low-income housing tax credits caused racial segregation by "granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." The claim was brought on a disparate-impact theory, alleging not that the Department's practice was driven by a discriminatory intent, but rather that it had a " 'disproportionately adverse effect on minorities' and [was] otherwise unjustified by a legitimate rationale." The question before the Court was whether disparate-impact claims are cognizable under the FHA. The Court held that they are.

However, in dicta, the Court announced the "proper[ ] limit[s]" on disparate impact liability under the FHA, needed both to avoid serious constitutional issues and to protect potential defendants from abusive disparate-impact claims. Specifically, the Court noted that defendants must be allowed to "explain the valid interest served by their [challenged] policies," and that courts should insist on a "robust causality requirement" at the "prima facie stage" linking the defendant's conduct to the racial disparity. The Court emphasized that disparate-impact claims must be aimed at "removing artificial, arbitrary, and unnecessary barriers," rather than "displac[ing] valid governmental and private priorities." Any newly pled complaint must take into account the evolving law on disparate impact in the FHA context. Without the new pleadings before us, we have no occasion to pass judgment on how Inclusive Communities will impact this case, but we flag the issue both for the parties and for the district court on remand.

C. Unjust Enrichment Claim

As for the City's state law unjust enrichment claim, we agree with the district court and affirm its ruling. In deciding this claim, we are obliged to apply Florida's substantive law. Where the highest state court has not provided the definitive answer to a question

of state law, "we must predict how the highest court would decide this case," looking to the decisions of the lower state courts for guidance. Under Florida law, the doctrine of unjust enrichment (sometimes called a "contract implied in law," "quasi-contract," and various other terms) governs the situation in which one party has conferred a valuable benefit on another in the absence of a contract, but "under circumstances that ma[ke] it unjust to retain it without giving compensation." There are three elements of an unjust enrichment claim under Florida law: first, the plaintiff has conferred a benefit on the defendant; second, the defendant voluntarily accepted and retained that benefit; and, finally, the circumstances are such that it would be inequitable for the defendants to retain the benefit without paying for it. As for the first element, the benefit must be conferred directly from the plaintiff to the defendant. "At the core of the law of restitution and unjust enrichment is the principle that a party who has been unjustly enriched at the expense of another is required to make restitution to the other."

The City alleged that the Bank "received and utilized benefits derived from a variety of municipal services, including police and fire protection, as well as zoning ordinances, tax laws, and other laws and services that have enabled [the Bank] to operate and profit within the City of Miami." It went on to allege that "[a]s a direct and proximate result of [the Bank's] predatory lending practices, [the Bank] ha[s] been enriched at the City's expense" by utilizing those benefits while denying the City tax revenue and costing it in additional municipal expenditures required to address foreclosed properties. The Bank "failed to remit those wrongfully obtained benefits," the complaint claimed. The City also alleged that it had paid for the Bank's externalities (the costs of the harm caused by the discriminatory lending patterns), that the Bank was aware of this benefit, and that its retention would be unjust.

The district court dismissed the claim without prejudice, in part because the City had not alleged that it had conferred a direct benefit onto the Bank to which they were not otherwise legally entitled, as required under Florida law. As for the denied tax revenues, the district court noted that such a denial is not a direct benefit conferred on the Bank by the City. As for the municipal services, the district court found that they did not create an unjust enrichment claim for two reasons. First, the municipal services were not benefits conferred directly on the Bank—the services were provided to the residents of Miami, not to the Bank, and any benefit the Bank received was merely derivative. Second, the City had not adequately alleged that the Bank, as a Miami property owner, was not legally entitled to those services. We agree.

The City maintains that its complaint states a cause of action under Florida law, but it has not cited to a single Florida case. The City relies primarily on *White v. Smith & Wesson Corp.*, where the mayor and City of Cleveland sued various gun manufacturers and dealers alleging, inter alia, unjust enrichment on the ground that the city had conferred a benefit on the defendants by paying for their "externalities": "the costs of the harm caused by Defendants' failure to incorporate safety devices into their handguns and negligent marketing practices." The Ohio law of unjust enrichment essentially tracks Florida law. ("In order to maintain a cause of action for unjust enrichment under Ohio law, a plaintiff must allege: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and, (3) retention of the benefit by the defendant under circumstances where it would be unjust to do

so without payment."). Without citing to a single Ohio state court case in its unjust enrichment analysis, the district court determined that plaintiffs had stated such a claim under Ohio law.

The City cites only two other cases, neither of which were from Florida. None of these cases, obviously, governs our application of Florida law.

We have not found any case—and the City has provided none—supporting an unjust enrichment claim of this type under Florida law. First, the City alleges that the Bank must pay the City for the tax revenue the City has been denied due to the Bank's unlawful lending practices. Although a deprivation of tax revenue may create an injury in fact under Article III, such an injury does not fit within the unjust enrichment framework. The missing tax revenue is in no way a benefit that the City has conferred on the Bank. The City has provided no explanation for this incongruity on appeal.

Instead, the City focuses on the municipal services—including police, firefighters, zoning ordinances, and tax laws—that it claims it would not have had to provide if not for the Bank's predatory lending. But this version of the unjust enrichment claim fares no better, for three independent reasons. For starters, it's not clear that municipal expenditures are among the types of benefits that can be recovered by unjust enrichment under Florida law. We have found no Florida case in which a municipality recovered its expenditures on an unjust enrichment theory. Indeed, at least one case suggests that a municipality cannot recover such expenditures without express statutory authorization, which the City has never alleged.

Moreover, the benefits provided by these municipal services were not directly conferred on the Bank, as is required for an unjust enrichment claim under Florida law. As the district court correctly noted, municipal police and fire services directly benefit the residents and owners of homes in the City of Miami, not the financial institution that holds the loans on those properties. And tax laws and zoning ordinances are quite clearly not direct benefits conferred on Bank of America: they are laws of general applicability that, indeed, apply to all residents of Miami. No Florida caselaw suggests that these benefits are direct enough to sustain an unjust enrichment claim. Finally, the City has failed to allege facts to show that circumstances are such that it would be inequitable for the Bank to retain such benefits without compensation. Even assuming that these municipal services did confer a cognizable benefit on the Bank as the owner of foreclosed property, the City does not challenge the district court's determination that the Bank was legally entitled to those services. The City has provided no arguments and cited no Florida caselaw explaining why the Bank would not be entitled to police and fire protection like any other property owner.

The Florida Supreme Court has not ruled on whether an unjust enrichment claim exists under these circumstances. But given the complete lack of supporting Florida caselaw, we decline to invent a novel basis for unjust enrichment under Florida law today. Accordingly, we affirm the district court's order dismissing the City's unjust enrichment claim.

III. Conclusion

Nothing we have said in this opinion should be taken to pass judgment on the ultimate success of the City's claims. We hold only

that the City has constitutional standing to bring its FHA claims, and that the district court erred in dismissing those claims with prejudice on the basis of a zone of interests analysis, a proximate cause analysis, or the inapplicability of the continuing violation doctrine.

The judgment of the district court is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for further proceedings consistent with this opinion.

“U.S. Supreme Court to weigh Miami predatory lending lawsuit”

Reuters

Lawrence Hurley

June 28, 2016

The U.S. Supreme Court on Tuesday agreed to decide whether Miami can pursue lawsuits accusing major banks of predatory mortgage lending to black and Hispanic home buyers resulting in loan defaults that drove down city tax revenues and property values.

The justices will hear appeals filed by Bank of America Corp and Wells Fargo & Co of a lower court's decision to permit the lawsuits by the Florida city against the banks. They were filed under the Fair Housing Act, a federal law outlawing discrimination in housing.

Bank of America spokesman Lawrence Grayson said that although the bank is committed to the aims of the Fair Housing Act, "We believe that a municipality seeking purely monetary recovery is not covered by the statute, and we welcome the Supreme Court's scrutiny and clarity."

Last September, the Atlanta-based 11th U.S. Circuit Court of Appeals overturned a lower court's decision to dismiss such lawsuits by the city against Bank of America, Wells Fargo and Citigroup Inc. Citigroup decided not to appeal to the Supreme Court.

Miami accused the banks of a decade of lending discrimination in its residential housing market. The city accused Wells Fargo, Bank of America and Citigroup of steering non-white borrowers into higher-cost loans they often could not afford, even if they had good credit.

It said the banks' conduct caused Miami to lose property tax revenues, drove down property values and required the city to pay the costs of repairing and maintaining properties that went into foreclosure due to discriminatory lending.

Several U.S. cities, including Baltimore, Chicago, Cleveland, Los Angeles and Memphis, have accused banks, with mixed success, of discriminatory mortgage lending that prolonged the nation's housing crisis.

San Francisco-based Wells Fargo is the largest U.S. mortgage lender and includes the former Wachovia. Bank of America, based in Charlotte, North Carolina, includes the former Countrywide Financial.

The Supreme Court ruled last year in a major Fair Housing Act case, upholding on a 5-4 vote a broad interpretation of discrimination claims allowed under the Fair Housing Act. That decision was in a Texas case and delivered a setback to lenders and insurers that sought to curtail such lawsuits.

Business interests have sought to narrow the scope of the law in a bid to fend off costly litigation.

The Supreme Court will hear oral arguments in the Miami litigation and issue a ruling in its next term, which begins in October and ends in June 2017. (Additional reporting by Jonathan Stempel)

“Supreme Court Could Cut Cities Out Of Fair Lending Fights”

Law360

Evan Weinburger

July 8, 2016

An upcoming battle before the U.S. Supreme Court between the city of Miami and two of the world’s largest banks could go a long way toward determining whether municipalities will be able to bring claims related to the financial crisis, experts say.

The Supreme Court in late June granted a petition from Bank of America Corp. and Wells Fargo & Co. to consider whether the Eleventh Circuit wrongly ruled in Miami’s favor when it revived a fair lending lawsuit the city filed under the Fair Housing Act.

Miami is just one of many cities to file similar claims against big banks in recent years alleging that their mortgage lending units doled out shoddy loans to black and Latino borrowers, leading to a wave of foreclosures that lowered municipal tax revenues even as the costs of maintaining and protecting those properties rose. If the banks are successful in overturning the Eleventh Circuit’s decision, cities around the country will see one of their only avenues for both recovering lost revenues and protecting their citizens cut off, said Lawrence Rosenthal, a former attorney for the city of Chicago who helped bring cases against tobacco, firearms and other companies.

“The industry would like to have to only deal with Congress and federal regulators. It’s much easier to capture those people who aren’t accountable to the residents of communities that are destabilized by these practices,” said Rosenthal, who is now a professor at Chapman University’s Dale E. Fowler School of Law.

Miami sued Bank of America, Wells Fargo and Citigroup Inc. in three separate complaints alleging that they engaged in a pattern of discriminatory mortgage lending in minority neighborhoods and to minority borrowers that wreaked havoc on neighborhoods in in the city. Miami had the highest foreclosure rate among the 20 largest metropolitan areas in the country at the time the complaints were filed.

Miami alleged that the banks’ actions resulted in a serious shortfall in tax revenues.

After seeing a federal district court judge dismiss its complaint, Miami appealed to the Eleventh Circuit, which in September 2015 ruled that the city had standing to bring its complaint and remanding the cases to the district court for further proceedings.

The two banking powerhouses argued in separate petitions for writs of certiorari that the Eleventh Circuit did not follow Supreme Court decisions from 2011 and 2014 when it revived Miami's FHA complaints.

Without the Supreme Court weighing in on the question, lower courts could feel compelled to rely on cases stretching back to the 1970s when determining standing questions in FHA-related cases, even though the high court has since made decisions that pared down the definition of aggrieved parties who have standing to bring a discrimination case, the banks said.

Miami argues that earlier rulings clearly set out that they have standing under the FHA to sue.

At the center of the case are two related questions. The first is whether cities meet the standard of "aggrieved person" under the Fair Housing Act, allowing them to sue over lost tax revenues. The second is whether the cities can sufficiently argue that a long chain of events beginning with bad mortgage loans to citizens led to the tax losses.

"This is not that the Supreme Court is ruling whether the cities can recover or not. They're really asking, are the allegations in the complaint sufficient to warrant being heard?" said Kathleen Engel, a professor at Suffolk University Law School.

Those questions are vital not just to Miami, but also to a host of other municipalities like Los Angeles, Baltimore and Birmingham, Alabama, which have filed similar complaints, as well as to the banks subject to those court actions.

The banks argue that the municipalities are stretching the reaches of the law with their arguments about how lending decisions led to increased costs for fire prevention and other protections for foreclosed properties as well as lower tax bases.

Those claims should be blocked because the cities themselves were not the direct victims of the alleged discriminatory lending practices and are thus not in a position to sue because the Fair Housing Act should be subject to the same standing limitations as other federal statutes, the banks argue.

"These plaintiff municipalities seek relief for no alleged victim of discrimination," said Valerie Hletko, a partner with BuckleySandler LLP, a firm that represents banks in cases similar to the one headed to the high court.

"Instead, they assert that alleged victims of discriminatory mortgage lending practices defaulted on their loans and went into foreclosure; and that their properties became vacant; and that these vacant properties attracted criminals and became blighted; and that this injured the plaintiff municipalities by increasing the costs of providing government services and decreasing property tax revenues," Hletko added.

Much of the fight between the banks and Miami has focused on three cases.

The banks argue that the most recent of those cases, the 2014 *Lexmark Inc. v. Static Control Components Inc.*, limited standing and the definition of direct harm, foreclosing the city's claims.

The city of Miami relies on older cases, including the Supreme Court's 1972 decision in *Trafficante v. Metropolitan Life Insurance Co.* and its 1979 ruling in *Gladstone, Realtors v. Village of Bellwood*. Both of those cases allow for broader standing interpretations under the FHA than the banks concede, the city says.

If the Supreme Court overturns the Eleventh Circuit and relies on the more recent rulings, "the bottom would fall out" of the remaining cases filed by municipalities, Hletko said.

And the damage may not be limited to the ability of cities and counties to sue.

Nonprofit housing groups may also face the challenge of proving direct harm if they want to sue on behalf of groups of homeowners who allege discriminatory lending practices, said Robert Peck of the Center for Constitutional Litigation, one of the attorneys representing Miami before the Supreme Court.

"You would limit FHA cases to the federal government, potentially to the states and to individual borrowers" who may not have the resources or knowledge to file such litigation, he said.

The current wave of litigation filed by cities and counties marks one of the last areas where municipalities can take action against corporations and other actors for harm allegedly perpetrated against citizens.

Congress has taken steps to stop municipalities from bringing litigation against the tobacco, firearms and other industries, rendering that level of government with few powers, Engel said.

"Cities are powerless because they can only act on their own behalf," she said.

If Miami prevails at the Supreme Court, it would still face the prospect of getting a third amended complaint to survive a motion to dismiss, a trial and then a seemingly inevitable appeal.

But at least the courthouse doors would remain open, Rosenthal said.

"What Miami has found is really a very creative and interesting piece of lawyering in my view. They found a rear-door to municipal activity in this field that the industry forgot to have Congress bolt shut," he said.

--Editing by Sarah Golin and Philip Shea.

“Miami mortgage lawsuits vs BofA, Citigroup, Wells Fargo are revived”

Reuters

Jonathan Stempel

September 1, 2015

A federal appeals court on Tuesday revived three lawsuits in which the City of Miami accused Wells Fargo & Co, Bank of America Corp and Citigroup Inc of predatory mortgage lending to black and Hispanic borrowers.

By a 3-0 vote, the 11th U.S. Circuit Court of Appeals said a lower court erred in dismissing the city's claims under the federal Fair Housing Act, over what Miami called a decade of lending discrimination in its residential housing market.

"It is clear that the harm the city claims to have suffered has a sufficiently close connection to the conduct the statute prohibits," Circuit Judge Stanley Marcus wrote.

U.S. cities including Baltimore, Chicago, Cleveland, Los Angeles and Memphis have with mixed success accused banks of biased mortgage lending that prolonged the nation's housing crisis.

Miami alleged that Wells Fargo, Bank of America and Citigroup steered non-white borrowers into higher-cost loans they often could not afford, even if they had good credit.

The city said this "reverse redlining" led to a large number of foreclosures, lower property tax collections and increased spending to combat urban blight.

In July 2014, U.S. District Judge William Dimitrouleas in Fort Lauderdale, Florida dismissed Miami's lawsuits. He said the city lacked standing to sue, and that the alleged harm was too remote from the banks' conduct.

But the appeals court said that standard was too stringent and that banks could have reasonably foreseen the "attendant harm" from their alleged discriminatory lending. The 11th Circuit did not rule on the merits.

Wells Fargo is the largest U.S. mortgage lender and includes the former Wachovia, while Bank of America includes the former Countrywide Financial.

Tom Goyda, a Wells Fargo spokesman, said the San Francisco-based bank is disappointed in the outcome and "prepared to present strong arguments in support of our long history of fair and responsible lending in Miami and across the country."

Bank of America spokesman Rick Simon said the Charlotte, North Carolina-based

bank is considering its options. "Our record demonstrates a firm commitment and strong record for fair and responsible lending and community revitalization," he said.

Mark Rodgers, a spokesman for New York-based Citigroup, declined to comment.

The Miami city attorney's office had no immediate comment.

In July, federal judges in Chicago and Los Angeles dismissed lawsuit accusing Wells Fargo of predatory lending in those cities. Los Angeles' similar lawsuit against Bank of America was dismissed in May.

The cases in the 11th U.S. Circuit Court of Appeals are *Miami v. Bank of America Corp et al*, No. 14-14543; *Miami v. Wells Fargo & Co, et al*, No. 14-14544; and *Miami v. Citigroup Inc et al*, No. 14-14706. (Reporting by Jonathan Stempel in New York; Editing by Bernard Orr, David Gregorio and Alan Crosby)

Fry v. Napoleon Community Schools

15-497

Ruling Below: *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622 (6th Cir. 2015)

E.F., daughter of Stacy and Brent Fry, was born with spastic quadriplegic cerebral palsy, and was prescribed a service dog. Her schools refused to allow her to bring her service dog into the school. Parents sued on behalf of their daughter on the grounds that this violated Title II of the Americans with Disabilities Act (ADA). The defendants filed a motion to dismiss, which was granted by the District Court for the Eastern District of Michigan. The plaintiffs appealed.

The Court of Appeals held that the claim required the plaintiffs to exhaust the procedures found in the Individuals with Disabilities Education Act before they could fil suit, though one judge dissented.

Question Presented: Whether the Handicapped Children's Protection Act of 1986 commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the Individuals with Disabilities Education Act.

Stacy FRY and Brent Fry, as next friends of minor E.F., Plaintiffs–Appellants,
v.
NAPOLEON COMMUNITY SCHOOLS; Pamela Barnes; Jackson County Intermediate School District, Defendants–Appellees.

United States Court of Appeals, Sixth Circuit

Decided on June 12, 2015

[Excerpt; some citations and footnotes omitted]

ROGERS, Circuit Judge.

The administrative exhaustion requirements of the Individuals with Disabilities Education Act (IDEA) must, under that act, be met even with respect to some claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The question on this appeal is whether the ADA and Rehabilitation Act claims in this case are such claims requiring IDEA exhaustion.

The Frys' daughter, E.F., suffers from cerebral palsy and was prescribed a service dog to assist her with everyday tasks. Her school, which provided her with a human aide as part of her Individualized Education Program (IEP) under the IDEA, refused to permit her to bring her service dog to school. The Frys sued the school, its principal, and the school district, alleging violations of the ADA and the Rehabilitation Act and state disability law. The district court granted the defendants' motion to dismiss under

Fed.R.Civ.P. 12(c) on the grounds that because the Frys' claims necessarily implicated E.F.'s IEP, the IDEA's exhaustion provision required the Frys to exhaust IDEA administrative procedures prior to bringing suit under the ADA and Rehabilitation Act. The Frys appeal, arguing that the IDEA exhaustion provision does not apply because they do not seek relief provided by IDEA procedures. But because the specific injuries the Frys allege are essentially educational, they are exactly the sort of injuries the IDEA aims to prevent, and therefore the IDEA's exhaustion requirement applies to the Frys' claims.

Because this is an appeal from a grant of a motion to dismiss based on the pleadings, we take as true the facts alleged in the Frys' complaint.

E.F., the daughter of Stacy and Brent Fry, was born with spastic quadriplegic cerebral palsy, which significantly impairs her motor skills and mobility. In 2008, E.F. was prescribed a service dog. Over the course of the next year, E.F. obtained and trained with a specially trained service dog, a hybrid goldendoodle named Wonder. Wonder assists E.F. by increasing her mobility and assisting with physical tasks such as using the toilet and retrieving dropped items. At the time this dispute arose, E.F. could not handle Wonder on her own, but at some point in the future she would be able to. In October 2009, when Wonder's training was complete, her school, Ezra Eby Elementary School, refused permission for Wonder to accompany E.F. at school. There was already an IEP in place for E.F. for the 2009–2010 school year that included a human aide providing one-on-one support. In a specially convened IEP meeting in January 2010, school administrators confirmed the decision to prohibit Wonder, reasoning in part that Wonder would not be able to provide any support the human aide could not provide. In April 2010, the school agreed to a trial period, to last until the end of the school year, during which E.F. could bring Wonder to school. During this trial period, however, Wonder was not at all times permitted to be with E.F. or to perform some functions for which he had been trained. At the end of the trial period, the school informed the Frys that Wonder would not be permitted to attend school with E.F. in the coming school year.

The Frys then began homeschooling E.F. and filed a complaint with the Office of Civil Rights at the Department of Education under the ADA and § 504 of the Rehabilitation Act. Two years later, in May 2012, the Office of Civil Rights found that the school's refusal to permit Wonder to attend with E.F. was a violation of the ADA. At that time, without accepting the factual or legal conclusions of the Office of Civil Rights, the school agreed to permit E.F. to attend school with Wonder starting in fall 2012. However, the Frys decided to enroll E.F. in a school in a different district where they encountered no opposition to Wonder's attending school with E.F.

The Frys filed suit on December 17, 2012, seeking damages for the school's refusal to accommodate Wonder between fall 2009 and spring 2012. The Frys alleged the following particular injuries: denial of equal access to school facilities, denial of the use of Wonder as a service dog, interference with E.F.'s ability to form a bond with Wonder, denial of the opportunity to interact with other students at Ezra Eby Elementary School, and psychological harm caused by the defendants' refusal to accommodate E.F. as a disabled person. The Frys sought relief under Title II of the ADA, § 504 of the Rehabilitation Act (which prohibits discrimination based on disability in "any program or activity receiving Federal

financial assistance"), and the Michigan Persons with Disabilities Civil Rights Act. The district court declined to exercise supplemental jurisdiction over the state law claim.

On January 10, 2014, the district court granted the defendants' motion to dismiss pursuant to Rule 12(c), finding that the IDEA's exhaustion requirements applied to the Frys' claims and dismissing them without prejudice. The court noted that although the Frys did not specifically allege any flaw in E.F.'s IEP, if she were permitted to attend school with Wonder, that document would almost certainly have to be modified in order to articulate the policies and practices that would apply to the dog. Therefore, the Frys' request for permission for E.F. to attend school with Wonder "would be best dealt with through the administrative process," and exhaustion was required. Because the Frys had not exhausted IDEA administrative remedies, the district court dismissed their suit without prejudice. The Frys timely appealed.

The IDEA exhaustion requirement applies to the Frys' claims. Under that statute, plaintiffs must exhaust IDEA procedures if they seek "relief that is also available" under IDEA, even if they do not include IDEA claims in their complaint. This language requires exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA. The core harms that the Frys allege arise from the school's refusal to permit E.F. to attend school with Wonder relate to the specific educational purpose of the IDEA. The Frys could have used IDEA procedures to remedy these harms. Therefore, the nature of the Frys' claims required them to exhaust IDEA procedures before filing suit under the ADA and the Rehabilitation Act.

The IDEA's exhaustion requirement ensures that complex factual disputes over the education of disabled children are resolved, or at least analyzed, through specialized local administrative procedures. The IDEA outlines standards and procedures for accommodations and services provided to disabled children whose disabilities cause them to need "special education and related services." One of its primary purposes is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." To this end, the IDEA requires that schools and school districts develop an IEP for each such child. The IEP outlines "the child's present levels of academic achievement and functional performance[,] ... measurable annual ... academic and functional goals," measurement criteria for meeting those goals, and the "special education and related services and supplementary aids and services ... and ... the program modifications or supports for school personnel that will be provided for the child" to make progress in achieving the goals.

The IDEA's procedures for creating and amending a child's IEP encourage participation by those directly involved in the child's care in education, application of expert analysis, and swift dispute resolution. There must be an IEP in effect for each disabled child by the start of each school year. The IEP is created by an IEP team, which includes the child's parents, at least one of the child's regular education teachers, at least one of the child's special education teachers, and a representative of the "local education agency" who is qualified in special education, knowledgeable about the general curriculum, and knowledgeable about the local education agency's resources. Any party

can present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," including disputes over the content of the child's IEP. Within 15 days of receiving notice of a child's parents' complaint, the local educational agency must hold a "preliminary meeting" with the parents and other members of the IEP team to give the local educational agency "the opportunity to resolve the complaint." If the local educational agency has not resolved the dispute within 30 days of receiving the complaint, the timeline for a "due process hearing" begins. This process must conclude—with the local or state educational agency issuing a written decision to the parties—within 45 days. If the local agency conducted the hearing, the decision can be appealed to the state educational agency, which conducts an impartial review and issues a decision within 30 days. These deadlines are of course not entirely set in stone, but in the abstract a dispute about an IEP should go through a resolution meeting, a local agency determination, and a state agency determination within 105 days of the initial complaint. Only at this point may either party take the dispute to court, and the court then receives "the records of the administrative proceedings." The statute and implementing regulations ensure that the parties have a chance to resolve the dispute without going to court and that local and state educational agencies have a chance to analyze and study it.

Requiring exhaustion of administrative procedures prior to filing suit under the IDEA has clear policy justifications: "States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the Act. Federal courts—generalists with no expertise in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose." The IDEA calls for highly fact-intensive analysis of a child's disability and her school's ability to accommodate her. The procedures outlined above ensure that the child's parents and educators, as well as local experts, are first in line to conduct this analysis.

The IDEA's substantive protections overlap significantly with other federal legislation and constitutional protections, and so this policy justification would be threatened if parties could evade IDEA procedures by bringing suit contesting educational accommodations under other causes of action. The IDEA contemplates and explicitly precludes this possibility:

> [B]efore the filing of a civil action under [the ADA, the Rehabilitation Act, or other Federal laws protecting the rights of children with disabilities] seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

The exhaustion requirement was intended "to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students." Accordingly, it makes sense to require IDEA exhaustion in order to preserve the primacy the IDEA gives to the expertise of state and local agencies.

We have held that exhaustion is not required when the injuries alleged by the plaintiffs do not "relate to the provision of a FAPE [free appropriate public education]" as defined by the IDEA, and when they cannot "be

remedied through the administrative process" created by that statute. When they do relate to the provision of the child's education and can be remedied through IDEA procedures, waiving the exhaustion requirement would prevent state and local educational agencies from addressing problems they specialize in addressing and require courts to evaluate claims about educational harms that may be difficult for them to analyze without the benefit of an administrative record. Under S.E. and F.H., exhaustion is required at a minimum when the claim explicitly seeks redress for a harm that IDEA procedures are designed to and are able to prevent—a harm with educational consequences that is caused by a policy or action that might be addressed in an IEP. Similarly, the Seventh Circuit required exhaustion when "[b]oth the genesis and the manifestations of the problem [were] educational." In such a situation, the participants in IDEA procedures will answer the same questions a court would ask, and they have a chance of solving the child's and the child's parents' problem before the parents and their child become plaintiffs.

The exhaustion requirement applies to the Frys' suit because the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. The Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education. In particular, they allege explicitly that the school hindered E.F. from learning how to work independently with Wonder, and implicitly that Wonder's absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents.

In the context of the accommodations the school already provided to E.F., the additional value of allowing Wonder to attend with E.F. was educational—the sort of interest the IDEA protects. E.F.'s IEP already included a human aide who, it appears, assisted E.F. with the tasks Wonder could perform. Thus the Frys' claim is not that the school failed to accommodate E.F.'s disability at all, but that the accommodation provided was not sufficient. Whether this claim amounts to alleging a denial of a free appropriate public education, or whether it could be resolved through IDEA procedures, depends on why the existing accommodation was not sufficient relative to what Wonder could provide.

If the human aide was not a sufficient accommodation, it was because he or she did not help E.F. learn to function independently as effectively as Wonder would have and perhaps because he or she was not as conducive to E.F.'s participating confidently in school activities as Wonder would have been. The complaint does not allege that the human aide was less effective than Wonder would have been in providing immediate physical assistance; thus the Frys do not appear to suggest that E.F. was directly denied physical access to public school facilities. Instead, having Wonder at school was important for E.F. to "form a bond" with the dog, a bond that would make Wonder a more effective service animal "outside of school." The Frys characterize Wonder's independent value to E.F. as assistance with specific physical tasks, enabling her "to develop independence and confidence," and helping her "to bridge social barriers." Thus if the human aide was not a sufficient accommodation relative to Wonder, that was because he or she did not increase E.F.'s

ability to perform physical tasks and function confidently and independently outside of school. One might also infer, though the Frys do not allege it directly, that relying on only a human aide without the additional presence of a service dog would inhibit E.F.'s sense of confidence and independence, as well as her ability to overcome social barriers, in school. The other harms that the Frys specifically identify—denial of access to school facilities, denial of the use of Wonder as a service dog at school, harms caused by having to leave the school, and emotional distress caused by the school's refusal to accommodate her—all depend on the assumption that the school's refusal to permit Wonder's attendance harmed E.F. in the ways identified above. For example, E.F. was denied access to school facilities in the sense that school facilities did not provide her with an accommodation (i.e., permission to use Wonder) she reasonably needed, but she needed Wonder in school only (it appears on the face of the complaint) to form a stronger bond with the dog and, perhaps, to feel more confident and independent. In sum, each of these secondary injuries exists only to the extent that Wonder's absence is harmful, or else (in the case of injuries resulting from switching schools, for instance) would be entirely avoidable if Wonder's absence were not harmful.

The primary harms of not permitting Wonder to attend school with E.F.—inhibiting the development of E.F.'s bond with the dog and, perhaps, hurting her confidence and social experience at school—fall under the scope of factors considered under IDEA procedures. Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be. The goal falls squarely under the IDEA's purpose of "ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." Thus developing a working relationship with a service dog should have been one of the "educational needs that result from the child's disability" used to set goals in E.F.'s IEP. "Educational needs" is not limited to learning within a standard curriculum; the statute instructs the IEP team to take into account E.F.'s "academic, developmental, and functional needs," which means that the IEP should include what a student actually needs to learn in order to function effectively. "A request for a service dog to be permitted to escort a disabled student at school as an 'independent life tool' is hence not entirely beyond the bounds of the IDEA's educational scheme." The Frys' stated argument for why E.F. needed Wonder at school would have provided justification under the IDEA for allowing Wonder to accompany E.F.

To the extent that the Frys also allege that Wonder would have provided specific psychological and social assistance to E.F. at school, the value of this assistance is also crucially linked to E.F.'s education. Accommodations that help make a student feel more comfortable and confident at school should be included in an IEP, which lists "the program modifications or supports for school personnel that will be provided for the child ... to be educated and participate with other children with disabilities and nondisabled children in [educational activities]." Thus an IEP should take into account any potential accommodations that will make a disabled child feel more comfortable in the school environment, since such accommodations will help the child participate actively in school activities. The IDEA is designed to address precisely the

sorts of harms the Frys allege in their complaint; assuming their claims are correct, they should have been able to obtain relief under IDEA procedures, if followed properly.

In fact, the school did use IDEA procedures to attempt to resolve its dispute, and the injuries alleged by the Frys here could have been raised then. In a January 2010 IEP team meeting requested by the school, E.F.'s IEP team considered, among other questions, "[w]hat disability-related educational need ... the service animal [is] intended to address" and whether "the service animal [will] enhance or hinder [E.F.'s] ability to progress in the general curriculum[.]" The IEP team reached conclusions that pertain directly to the Frys' complaint: "[E.F.] was being successful in [the] school environment without the service animal, ... all of her needs were being met by the program and services in place, and ... adding the service animal would not be beneficial to [E.F.]." These statements either directly contradict the injuries alleged in the Frys' complaint or reflect an excessively narrow conception of educational success contradicted by the text of the IDEA. Either way, the Frys could have relied on the injuries alleged in the complaint here (or on the likelihood of those injuries arising in the future) to challenge the IEP team's conclusion under IDEA procedures.

Had the Frys pursued IDEA procedures at this point, they would have achieved one of two outcomes. Either they would have prevailed and effectively resolved their dispute without litigation, making it possible for E.F. to attend school with Wonder, or else they would have failed but in the process generated an administrative record that would have aided the district court in evaluating their complaint. The IDEA's purposes of giving state educational agencies the opportunity to ensure compliance with federal law and ensuring that local experts are able to analyze disputes before litigation begins are well served by requiring exhaustion here.

First, IDEA procedures would in fact have been capable of resolving the Frys' dispute. E.F.'s IEP already provided for a human aide to accompany her while at school; it could just as well have provided for her service animal. Further, as the Second Circuit in Cave has noted in similar circumstances, measures and policies designed to minimize the disruption caused by a service animal at school (a concern raised by school officials in refusing to permit Wonder to accompany E.F.) would also best be addressed through changes to an IEP. The Frys' complaint alleges a basis under the IDEA for E.F. to attend school with Wonder, and IDEA procedures would have allowed the Frys and school officials to work out exactly how the school should adapt to Wonder's presence.

Second, the record IDEA procedures would have created in this dispute would have been directly relevant to analysis of the Frys' complaint under the ADA and the Rehabilitation Act. In order to prevail in their ADA claim, the Frys would have to show that permitting Wonder at school is "necessary to avoid discrimination on the basis of disability." Under the allegations in their complaint, this can be the case only because of Wonder's contribution to and role in E.F.'s education—an issue that would be extensively analyzed in IDEA procedures. The Frys would have to make a similar showing under the Rehabilitation Act. Thus the IDEA exhaustion requirement's purpose of allowing courts to benefit from the development of an administrative record also suggests that exhaustion should be required.

Although the Frys seek money damages, a remedy unavailable under the IDEA, rather

than an injunction, this does not in itself excuse the exhaustion requirement. Otherwise, plaintiffs could evade the exhaustion requirement simply by "appending a claim for damages."

It is true that IDEA procedures, which could at best require Ezra Eby Elementary to permit Wonder to accompany E.F. at school, would not at present be effective in resolving the Frys' dispute. First, E.F. no longer attends Ezra Eby Elementary, and her current school and school district permit Wonder to accompany her. Second, before the Frys decided to transfer E.F., the defendants settled the Frys' ADA complaint before the Department of Education's Office of Civil Rights and agreed to permit Wonder to accompany E.F. at school; IDEA procedures could not have produced a substantially better outcome.

On appeal, the Frys do not argue that, under Covington, the above circumstances render exhaustion of IDEA procedures futile. Indeed, their argument does not rely on the procedural posture of their dispute at all. We therefore cannot decide whether the exhaustion requirement should be excused as futile. However, it is far from clear that the Frys' circumstances satisfy the requirements for futility under Covington. In the "unique circumstances" of that case, we distinguished precedent that required exhaustion when relief under IDEA was unavailable due to the plaintiff parents' "unilateral act" of removing their child from the defendant school. That is, plaintiffs cannot evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief. While that is not exactly the case here, the Frys' failed to use IDEA procedures at any point during the almost two-and-a-half year period in which the school refused permission for Wonder to accompany E.F. The plaintiff in Covington, in contrast, participated, albeit imperfectly, in the IDEA's appellate procedures prior to her son's graduating from the school where the dispute arose. The Frys may thus bear some responsibility for the present inapplicability of IDEA procedures, and the futility doctrine may be inapplicable.

In arguing that the exhaustion requirement does not apply to their claim, the Frys rely chiefly on a federal district court decision in California in which the court refused to require exhaustion for a wheelchair-bound student's request for a service dog at school. But applying that case's logic to this complaint would allow any ADA or Rehabilitation Act lawsuit to avoid the IDEA exhaustion requirement by not explicitly alleging a denial of a FAPE. The decision in Sullivan viewed a Rehabilitation Act claim as, in effect, asking questions distinct from those considered by IDEA procedures:

> "[O]nce plaintiff has made a threshold showing that her decision to use the service dog is reasonably related to her disability, the sole issue to be decided under section 504 [of the Rehabilitation Act] is whether defendants are capable of accommodating plaintiff's choice to use a service dog. The issue of whether the service dog enhances plaintiff's educational opportunities, which is central to the EHA [the IDEA's predecessor] inquiry, is completely irrelevant under section 504."

This logic does not hold, because, as explained above, having Wonder at school, in addition to a human aide, is "reasonably related" to E.F.'s disability only because Wonder "enhances [E.F.]'s educational opportunities." The analysis that would be necessary under the IDEA thus must be

incorporated into the ADA and Rehabilitation Act analysis for the Frys to prevail under the latter statutes. The Frys do not in so many words state that Wonder enhances E.F.'s educational opportunities, but if this is enough to avoid the exhaustion requirement, then any carefully pleaded claim under the ADA or Rehabilitation Act could evade the exhaustion requirement.1 But the text of the IDEA exhaustion requirement clearly anticipates that the requirement will apply to some ADA and Rehabilitation Act claims. Instead, at minimum, the exhaustion requirement must apply when the cause of action "arise[s] as a result of a denial of a [FAPE]"—that is, when the legal injury alleged is in essence a violation of IDEA standards.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting.

DISSENT

The majority proposes to affirm the district court's order dismissing this civil rights action alleging violation of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA), based on its conclusion that "the specific injuries the [plaintiffs] allege are essentially educational" and, therefore, subject to administrative exhaustion under an entirely separate statute, the Individuals with Disabilities Act (IDEA). Because I conclude to the contrary that the claim here is noneducational in nature and that the IDEA's exhaustion provision was improperly invoked by the district court, I respectfully dissent. Moreover, even if the accommodation sought could be considered "educational," the fact that school policy would permit a "guide dog" on campus, but not a certified "service dog," suggests why an attempt at exhaustion of administrative remedies would be futile in this case and should be excused.

The disability discrimination at issue is a text-book example of the harms that Section 504 and the ADA were designed to prevent, and the claims should not have been dismissed essentially because the victim of the discrimination was a school-aged child. Stacy and Brent Fry's daughter Ehlena, five years old when this dispute first arose in 2009, suffers from a severe form of cerebral palsy that is sufficiently disabling to qualify her under the IDEA for a "free appropriate public education" (FAPE) based on an individualized educational program (IEP)—one specifically "designed to meet [her] unique needs." Parents dissatisfied with a child's IEP are guaranteed "[a]n opportunity ... to present a complaint ... with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." If the complaint cannot be resolved, the parents are entitled to a due-process hearing and, if necessary, an appeal to the state's educational agency. Failing that, suit against the school district may be filed in federal district court pursuant to 20 U.S.C. § 1415(i)(2).

In this case, the Frys did not attempt to exhaust their administrative remedies under the IDEA because they were not dissatisfied with Ehlena's educational program. Instead, their complaint stemmed from the school district's refusal to allow Ehlena's certified service dog, Wonder, to accompany her to school. Armed with a prescription from Ehlena's physician, the Frys had secured the dog at considerable expense through various community fund-raising efforts even before she started kindergarten, with the understanding that Ehlena would be able to

have the service dog accompany her to school in the fall of 2009. In addition, the family had undergone ten days of specialized training at a service-animal training facility in Ohio. The ultimate objective was to form the child and the dog into a "team of two," with Wonder assisting Ehlena in myriad ways, including—but not limited to—"retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet." In short, the goal was to help Ehlena develop more independent motor skills, which is not the function of an academic program—put bluntly, basic mobility is not a subject taught in elementary school. After the Frys completed training, what remained was the task of getting Ehlena and Wonder to become closely attached to one another in order to make the dog a valuable resource for the child, especially during non-school hours. Based on the advice of experts, her parents maintained that for Ehlena to develop the confidence necessary to achieve independent mobility, she and Wonder needed to be together around the clock, including during school hours.

School district officials contended that Ehlena already had an aide provided under her IEP and, therefore, did not need the additional assistance of a service animal. Indeed, they threatened to eliminate the human aide from the child's IEP if her parents insisted on having Wonder accompany Ehlena in school. Even more astounding, the school district refused to recognize Wonder as a service dog despite his official certification, possibly because school policy explicitly allowed "guide dogs"—but not "service dogs"—on school premises, giving lie to the claim that Wonder was objectionable because he might cause allergic reactions in staff members and students or become a distraction to others.

When officials at Ehlena's school repeatedly refused to accommodate the dog's presence, the Frys filed suit as her next friends, alleging that the school district had violated the child's civil rights under Section 504 of the Rehabilitation Act; and the Michigan Persons with Disabilities Civil Rights Act applies to public entities and their programs, prohibiting exclusion from participation by and discrimination against qualified individuals with a disability "by reason of such disability." Moreover, ADA regulations require that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Similarly, the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding and requires reasonable accommodations to permit access to such recipient facilities and programs by disabled persons.

Depending upon a disabled child's circumstances, the two anti-discrimination laws and the IDEA could function as complements, but their focus and the obligations that they impose are independent of one another. The ADA and the Rehabilitation Act guard Ehlena's civil rights, ensuring that she, like her fellow citizens, has equal access to public facilities and publicly-funded programs. By contrast, the IDEA guarantees that her education will be appropriate for her individual situation. If, for example, the school district declined to permit Ehlena to come to school altogether, that action would violate both the ADA and the Rehabilitation Act, by denying her access to a public facility and its publicly-funded program, and it would also violate the IDEA, by depriving her of a "free appropriate public

education." On the other hand, if the school lacked ramps providing access to the building by someone using a wheelchair or walker, rectification of such an ADA violation would not likely be accomplished by modification of an IEP. In short, the ADA's focus is on ensuring access; the IDEA's focus is on providing individualized education. The point missed by both the district court and the majority is that for Ehlena, Wonder functions as an access ramp—not just in terms of the school building but, more significantly, in all aspects of her life.

This point was missed because the test applied below was impossibly broad. In granting the school district's motion to dismiss, the district court observed that "[it] fail[ed] to see how Wonder's presence would not—at least partially—implicate issues relating to E.F.'s IEP." But, this conclusion was based on nothing more than speculation, because the Frys' complaint was dismissed on the pleadings before any discovery could occur. Moreover, in terms of a school-age child, virtually any aspect of growth and development could be said to "partially implicate" issues relating to education. If flimsy, however, the district court's "implication" analysis was at least a test.

On appeal, the majority offers no useful yardstick at all. My colleagues appear to formulate something approaching a loose standard, observing that "having Wonder at school, in addition to a human aide, is 'reasonably related' to E.F.'s disability only because Wonder 'enhances [E.F.]' s educational opportunities.' " But the majority then quickly concedes that her parents "do not in so many words state that Wonder enhances E.F.'s educational opportunities."

Indeed, the Frys' complaint does not tie use of the service dog to Ehlena's academic program or seek to modify her IEP in any way. For this reason, the majority is also incorrect in asserting that "[t]he Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free and appropriate public education." The Frys did not allege the denial of a FAPE, only Ehlena's access to it. Moreover, given the total absence of discovery in this case, the contention that further accommodation through the service dog is unnecessary because Ehlena already has a "human aide" simply cannot be taken seriously. The aide provided under the IEP is not there to help Ehlena develop and maintain balance and mobility, but to ensure her ability to progress in her academic program. To equate that assistance with the function of the service dog, as the school district did and the majority appears to approve, is ludicrous, and it completely misconceives the purpose of providing an aide under an IEP. Such an aide, after all, would be equally available to assist a special-needs child with no mobility problems at all.

If "implication" and "relatedness" are vague and unhelpful as standards for determining whether a Section 504 claim under the Rehabilitation Act or a Title II claim under the ADA must first be exhausted under the IDEA's administrative procedures, what test should apply? Although the majority quotes statutes at length and cites very little case law, it does invoke the Ninth Circuit's opinion in *Payne v. Peninsula School District*, overruled on other grounds by *Albino v. Baca*, for the proposition that "at minimum, the exhaustion requirement must apply when the cause of action 'arise(s) as the result of the denial of a FAPE'—that is, when the legal injury alleged is in essence a violation of the IDEA standards." This proposition is, obviously, true. But it is immaterial, because the Frys neither alleged that Ehlena was denied a FAPE nor asked for

a modification of her IEP. Moreover, there is no proof in the record that what the Frys seek to redress is the functional equivalent of a deprivation under the IDEA.

Indeed, what is clear from the record—the complaint and attached exhibits—is that the request for a service dog would not require a modification of Ehlena's IEP, because that request could be honored simply by modifying the school policy allowing guide dogs to include service dogs. That wholly reasonable accommodation—accomplished by a few keystrokes of a computer—would have saved months of wrangling between Ehlena's parents and school district officials; it would have prevented her absence from public school during the two years she was home-schooled following the school's decision; it would have avoided the disruption of relocating the child and her service dog to another school district; and it would have mooted the question of exhaustion and eliminated the necessity of litigation that has ensued since this action was filed.

On the other hand, if litigation was inevitable, then perhaps the majority in this case should look to the Ninth Circuit's en banc opinion in Payne for more guidance than merely a restatement of the exhaustion provision found in 20 U.S.C. § 1415(l):

> "[T]he exhaustion requirement in § 1415(l) is not a check-the-box kind of exercise. As our cases demonstrate, determining what has and what has not been exhausted under the IDEA's procedures may prove an inexact science. In other words, the exhaustion requirement appears more flexible than a rigid jurisdictional limitation—questions about whether administrative proceedings would be futile, or whether dismissal of a suit would be consistent with the "general purposes" of exhaustion, are better addressed through a fact-specific assessment of the affirmative defense than through an inquiry about whether the court has the power to decide the case at all."

In summary, the Ninth Circuit held, "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA." In this vein, the court focused on Congress's intent as explicitly set out in the IDEA itself: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities...." This deliberate carve-out would have no meaning if any and every aspect of a child's development could be said to be "educational" and, therefore, related to a FAPE, requiring inclusion in an IEP, and imposing an extra impediment to the remediation of a disabled child's civil rights. As the Payne court noted, " § 1415 makes it clear that Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed—and perhaps could only be addressed—through a suit under § 1983 or other federal laws."

The majority here has told us that "[d]eveloping a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal" but has failed to tell us how it reached this conclusion. The omission is not entirely surprising, given that the Payne court identified the Sixth Circuit as one of the "courts [that] have not articulated a

comprehensive standard for determining when exactly the exhaustion requirement applies." In developing such a standard for itself, the Ninth Circuit abandoned an injury-centered approach, in which IDEA's exhaustion requirement would apply to any case in which the injuries alleged could be redressed to any degree by the IDEA's administrative procedures, in favor of a relief-centered approach requiring exhaustion in three situations: (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent"—for example, when "a disabled student files suit under the ADA and challenges the school district's failure to accommodate his special needs and seeks damages for the costs of a private school education;" (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student;" and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action...." Because the Frys do not seek to "alter an IEP" or to rectify "the denial of a FAPE," a court adopting the Payne approach would be left with this question: is their request for the service dog under the circumstances of this case "the functional equivalent of an IDEA remedy"?

The answer to this question involves the very purpose of the IDEA's exhaustion requirement, which "is designed to allow for the exercise of discretion and educational expertise by state and local agencies, [to] afford full exploration of technical educational issues, [to] further development of a complete factual record, and [to] promote judicial efficiency by giving agencies the first opportunity to correct shortcomings in their educational programs for disabled children." In short, the exhaustion provision in Section 1415(l) is intended to insure that education experts make the "expert determinations about the best way to educate disabled students."

Clearly, an "expert determination" about "technical educational issues" might well concern whether a handicapped student could be mainstreamed or would fare better in a special-education classroom. It might also concern whether speech therapy would help a child struggling with autism to communicate. And, it might concern whether an intellectually-challenged student could learn to read with the assistance of a reading specialist. But it would not concern whether a deaf child should be equipped with a cochlear implant or relegated to learning sign language; whether a blind child should be furnished with a guide dog or outfitted with a white cane; or whether a crippled child should be confined to a wheelchair or encouraged to use a walker assisted in balance and navigation by a service dog. The experts qualified to make the "technical decisions" for children in the latter group are obviously not trained educators but their physicians and physical therapists.

In fact, it was Ehlena's pediatrician who originally assessed her need for a service dog and wrote a prescription that allowed the Frys to provide Ehlena with Wonder. The school district's failure to allow Wonder to accompany Ehlena in school was no different from denying her the use of a wheelchair, if one were needed to enable her to achieve mobility.

Rather than ask a state agency to make that call, the Frys submitted their claim to federal authorities in July 2010, by filing a complaint with the United States Department of Education's Office for Civil Rights (OCR), the federal agency responsible for enforcing Section 504 of the Rehabilitation Act and

Title II of the ADA. The complaint was based on the school district's interference with Ehlena's access to its publicly-funded school program by refusing to allow her "trained service animal" to accompany her in school. In a report dated May 3, 2012, the Director of the Office for Civil Rights indicated that current Title II regulations require that "public entities must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." Moreover, the regulations in effect at the time defined "service animals" to include "any guide dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." The report also notes that a "public entity is required to permit an individual with a disability to be accompanied by the individual's service animal in all areas of a public entity's facilities where members of the public, participants in services, programs, or activities; or invitees, as relevant, are allowed to go."

Addressing Ehlena's situation specifically, the OCR Director summarized a letter from Ehlena's physical therapists:

> "[T]he therapists explained how the service animal [Wonder] had accompanied the Student to therapy since November of 2009 and had been incorporated into therapy in a number of ways. For example, the service animal assisted the Student with directional control of her walker, with ambulation, and with stabilizing herself while transitioning into and out of her walker from the floor. The Student used the service animal as a bridge for transitioning from her walker to a standing or seated position at a table. She also consistently used the service animal safely to improve her sitting balance by having the service animal provide posterior support as needed. The letter also described how the service animal was directed behind or to the side of the Student when she was standing at a supportive surface for improved safety. Additionally, the Therapists explained that the Student used the service animal to safely pick up dropped items. The letter stated that, although the Student still needed adult stand-by assistance for added safety, her independence with transitioning was improving."

Nevertheless, the OCR Director noted, Ehlena's school district "assert[ed] that the Student does not need her service animal for school, because they will provide her a human aide," but if they do, "it will violate the antidiscrimination provisions of Section 504 and Title II." The Director added:

> "[T]he decision to deny the Student the service animal in the school setting would have wider implications for the Student outside of the school day. Activities that the service animal performs for the Student during school, such as providing assistance with balance and support, retrieving dropped items, and taking off her coat, are the same types of activities for which the Student uses the service animal outside of the school.... Th[e] evidence suggests that refusing to allow the service animal to assist the Student at school, which she is required to attend for nine months a

> year, would result in a more prolonged and complete separation that would likely cause the Student's working relationship with the service animal to deteriorate."

When the school district refused to accept the factual findings and the legal conclusions in the OCR report, the Frys filed this action in district court.

It is difficult to fathom what could have been gained by requiring the Frys to undergo additional "exhaustion" before filing suit. The stupefying fact, as noted previously, is that the school district's policy would explicitly have permitted Ehlena to have a guide dog at school if she were blind, but was not interpreted to allow the use of a service dog as a reasonable accommodation for her mobility handicap—even in the face of federal regulations establishing that any distinction between a guide dog and a service dog is purely semantic. Moreover, the school district's recalcitrance suggests a possible reason for the Frys' decision to pass up the bureaucratic process involved in pursuing Section 1415(l) exhaustion as futile, given their repeated efforts to reach a favorable accommodation with the school district officials and their lack of success, even with the OCR report in hand. Of course, we cannot know why the Frys decided to file suit rather than seek a due-process hearing, because the district court dismissed the action on the pleadings, thereby short-circuiting the case before the complaint was answered and discovery could occur.

In my judgment, the district court's dismissal was inappropriately premature. When the court granted the school district's motion for judgment on the pleadings, the pleadings were closed, as required by Federal Rule of Civil Procedure 12(c), but discovery had not been undertaken. And yet, Sixth Circuit case law recognizes that "exhaustion is not required under the IDEA in certain circumstances ... [for example, where] it would be futile or inadequate to protect the plaintiff's rights." Although "the burden of demonstrating futility or inadequacy rests on the party seeking to bypass the administrative procedures," id., the necessity of making such a showing presumes that a plaintiff's civil-rights action setting out Section 504 and ADA claims will proceed at least to the summary judgment stage, as it did in Covington. It follows that the district court's order dismissing the Frys' complaint was inappropriate at best, arguably erroneous, and not worthy of affirmance.

At the very least, this case should be remanded to the district court to permit the Frys to attempt a showing that Section 1415(l) exhaustion was inapplicable to their case or that it would have been "futile or inadequate." From the majority's decision to affirm, I respectfully dissent.

“Supreme Court takes up case of girl's service dog”

CBS News

June 28, 2016

The Supreme Court is taking up an appeal from an 11-year-old Michigan girl with cerebral palsy who wasn't allowed to bring her service dog to school.

The justices said Tuesday they will consider whether Ehlena Fry's family can sue the school district for violations of federal disability laws.

Fry's family obtained a goldendoodle to help her open doors and retrieve items. Her school district initially refused to allow Wonder at school. Officials relented a bit in 2010, but they placed many restrictions on Wonder. Ehlena and her dog later transferred to another school.

Her family sued the school district for violations of federal disability laws. The case was dismissed after a judge said the Frys first had to seek an administrative hearing. An appeals court last year upheld that decision 2-1.

The American Civil Liberties Union, which is representing the family, says the case is important because school districts around the country have repeatedly denied children with disabilities their right to bring service dogs to school. These districts often claim the service animals are not necessary and that the schools can help the children through other means.

The ACLU wants the justices to declare that children prevented from using service animals at school can proceed directly to court without having to go through administrative hearings that can be costly, time consuming and burdensome.

The school argues that exhausting administrative remedies encourages parents and schools to work together to determine the best plan for each child and are a cheaper way to resolve educational disputes.

The Obama administration has backed the Fry family, saying the appeals court's decision was wrong and "leads to unsound results." The government said at the time the lawsuit was filed, Ehlena had already moved to a new school district and there was no ongoing dispute to compromise. Requiring her to go through administrative proceedings "would waste time a resources without offering any chance of resolving their actual dispute," the Justice Department said in a brief to the court.

The high court will hear the case, Fry v. Napoleon Community Schools, 15-497, when the new term begins in the fall.

“Girl with service dog wants US Supreme Court to take case”

Associated Press

Ed White

October 24, 2015

The U.S. Supreme Court is being asked to take an appeal from an 11-year-old Michigan girl with cerebral palsy who switched schools after her service dog wasn't welcomed in a district in Jackson County.

It's a long shot; the Supreme Court rejects thousands of cases each year. But the American Civil Liberties Union believes it's ripe for review because federal appeals courts have given different interpretations to laws protecting the rights of children with disabilities.

"To force a child to choose to between her independence and her education is not only illegal — it is heartless," said Michael Steinberg, legal director at the ACLU in Michigan.

In 2009, with support from families in the Napoleon area, Ehlena Fry's family obtained a service dog to help her open doors, retrieve items and use the bathroom. She was 5 at the time and suffered from mobility problems due to cerebral palsy, which affects the brain.

But the Napoleon district that fall refused to allow Wonder to accompany Ehlena at school, 75 miles southwest of Detroit. Officials relented somewhat by spring 2010, but many restrictions were placed on Wonder in the classroom. Ehlena was subsequently home-schooled.

The U.S. Education Department in 2012 said the girl's rights had been violated. The school district agreed to let Ehlena return with Wonder, but her parents, fearing difficulties, instead sent her to the Manchester district, which had no problem with the dog.

The Frys sued Napoleon, saying the district violated federal disabilities laws when it had refused to accommodate Wonder over a 2 ½-year period. The case was dismissed on very technical grounds: A judge said the Frys first had to exhaust a series of administrative hearings. An appeals court agreed, 2-1.

That's the issue at the Supreme Court. The ACLU wants the justices to declare that a quick, clear route to a courthouse is available. The petition was filed Oct. 15.

"It's important to set a precedent so other children's lives are not disrupted while school officials drag their feet and refuse to provide them their right to a service dog or other accommodation," Ehlena's mother, Stacy Fry, said Friday.

But an attorney for the Napoleon district, Tim Mullins, said the hearing process works well because families and schools can negotiate an education plan.

"I doubt very much the Supreme Court is going to say, 'Yeah, let's pick this up,'" Mullins said.

Ehlena's independence has improved and she now attends school without Wonder.

"Service Animals: Must Parent Exhaust IDEA Administrative Remedies"

Lusk Albertson

Kevin Sutton

June 18, 2015

Courts in different jurisdictions have disagreed whether requests for service animals at school are subject to IDEA administrative remedies or whether parents may proceed directly to court under the ADA or Section 504. The United States Circuit Court for the Sixth Circuit, which interprets federal law as it applies to Michigan school districts, recently came down on the side of exhaustion in *Fry v Napoleon Community Schools*, ___ F3d ___; 115 LRP 25804 (6th Cir, June 12, 2015).

The facts will seem familiar to anyone who has encountered a service animal request. The student, a five year old with cerebral palsy, had an IEP that included a 1:1 human paraprofessional. The parents requested that, in addition, the student be permitted to bring her service animal, a trained dog named Wonder. The district convened an IEP to consider the issue and concluded the service animal was not necessary to provide the student with FAPE because the human paraprofessional could do everything the dog could do (and, presumably, then some). The parents did not initiate their administrative remedies under IDEA – i.e., request a due process hearing. Instead, they withdrew their daughter from the district in favor of home schooling and filed a complaint with the United States Department of Education's Office for Civil Rights (OCR), which investigates alleged violations of ADA and Section 504. OCR concluded the district had, in fact, violated ADA by prohibiting the service animal. Later, the parents placed the student in another school district that agreed to permit Wonder to accompany the student. The parents then sued in federal district court alleging the first district had violated Section 504 and ADA. The district moved to dismiss on the grounds the parents had failed to exhaust their administrative remedies under IDEA. The district court agreed and dismissed the parents' complaint. The parents appealed.

The Sixth Circuit affirmed the district court's decision dismissing the parents' complaint. The Sixth Circuit reasoned that the specific injuries the parents alleged were "essentially educational" – how the student would learn and develop with or without the service animal – and, therefore, fell into an area of overlap between IDEA and Section 504 and ADA. The Sixth Circuit also noted that the provision of IDEA that requires exhaustion of administrative remedies applies not only to claims alleging IDEA violations, but also to

claims under other federal laws seeking relief that is also available under IDEA. Therefore, given the overlap, the parents were required to exhaust administrative remedies before seeking relief under Section 504 and ADA.

It is worth noting that *Fry* does not answer the question of whether ADA or Section 504 requires a school district to accommodate a parent's request for a service animal. The answer to that question requires an application of the specific facts of the case to the ADA's service animal requirements.

Fry does, however, prevent parents from taking service animal requests directly to court (at least in the Sixth Circuit) instead of exhausting IDEA administrative remedies.

Ivy v. Morath

15-486

Ruling Below: *Ivy v. Williams*, 781 F.3d 250 (5th Cir. 2015)

Deaf individuals brought a class action suit against the Texas Education Agency (TEA) head, requesting that the TEA be required to bring their driver education program into compliance with the Americans with Disabilities Act (ADA) and Rehabilitation Act. The defendants filed a motion to dismiss. The District Court for the Western District of Texas denied the motion, but allowed for immediate appeal.

The Court of Appeals held that the plaintiffs had standing to bring their claims, but that the TEA was not required to ensure the driver education program complied with the ADA and Rehabilitation Act because the program was not directly a service, program, or activity under the TEA. One judge filed a separate opinion which dissented in part and concurred in part.

Question Presented: Whether the Fifth Circuit erred in deciding that the relationship between public and private actors does not invoke dual obligations to accommodate disabilities in any context other than an express contractual relationship between a public entity and its private vendor.

Donnika IVY; Bernardo Gonzalez; Tyler Davis, as next friend of Juana Doe, a minor; Erasmo Gonzalez; Arthur Prosper, IV, Plaintiffs–Appellees
v.
Commissioner Michael WILLIAMS, in his official capacity as head of the Texas Education Agency, Defendant–Appellant.

United States Court of Appeals, Fifth Circuit

Decided on March 24, 2015

[Excerpt; some citations and footnotes omitted]

EDITH BROWN CLEMENT, Circuit Judge:

Plaintiffs-appellees Donnika Ivy ("Ivy") and the other named plaintiffs (collectively, the "named plaintiffs") are deaf individuals who brought a putative class action against defendant-appellant Michael Williams in his official capacity as head of the Texas Education Agency (the "TEA"). They request injunctive and declaratory relief requiring the TEA to bring driver education into compliance with the Americans with Disabilities Act ("ADA") and Rehabilitation Act. The district court denied the TEA's motion to dismiss but certified its order for immediate appeal under 28 U.S.C. § 1292(b). We granted leave for the TEA to file an appeal, and we now REVERSE and RENDER judgment dismissing the case.

Facts and Proceedings

In Texas, individuals under the age of 25 cannot obtain driver's licenses unless they submit a driver education certificate to the Department of Public Safety ("DPS"). Driver education certificates, in turn, are only available from private driver education schools licensed by the TEA. The named plaintiffs are all deaf individuals who contacted a variety of TEA-licensed private driver education schools, all of which informed the named plaintiffs that the schools would not accommodate them.3 Because they cannot obtain driver education certificates, the named plaintiffs cannot obtain driver's licenses.

A Deafness Resource Specialist with the Texas Department of Assistive and Rehabilitative Services informed the TEA of the inability of deaf individuals like the named plaintiffs to receive driver education certificates. But the TEA declined to intervene, stating that it was not required to enforce the ADA and that it would not act against the private driver education schools unless the United States Department of Justice ("DOJ") found that the schools had violated the ADA. The Deafness Resource Specialist filed a complaint against the TEA with the DOJ, which the DOJ apparently dismissed.

Ivy filed a lawsuit in federal district court against the TEA and a private driver education school, requesting injunctive and declaratory relief against both parties under the ADA. She later dismissed the private driver education school from the lawsuit. After some additional procedural steps that are not relevant here, the lawsuit became a putative class action with multiple named plaintiffs and the TEA as the sole remaining defendant. The live pleading, the Fourth Amended Complaint, requests injunctive and declaratory relief requiring the TEA to bring driver education into compliance with the ADA. The TEA filed a motion to dismiss for want of jurisdiction and for failure to state a claim. The district court denied these motions, certified its order for interlocutory appeal, and stayed the case. We granted the TEA leave to file an interlocutory appeal.

Standard of Review

We review de novo the denial of a motion to dismiss for want of jurisdiction and for failure to state a claim.

Discussion

We first consider the TEA's argument that the named plaintiffs lack standing to bring their claims. Finding that they have standing, we next consider whether they adequately state a claim upon which relief can be granted. We conclude that they do not, so we dismiss the case.

A. Standing

There are three requirements for standing: (1) the plaintiff must have suffered an "injury in fact," (2) there must be "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party before the court," and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Here, the injury alleged is quite obvious—the named plaintiffs' inability to receive driver education certificates, which in turn prevents them from receiving driver's licenses. The TEA challenges the named plaintiffs' standing under the second and third prongs. The TEA argues that there is no causal

connection between the named plaintiffs' injury and the TEA's conduct because it is the driver education schools, not the TEA, that refuse to accommodate the named plaintiffs. This contention is meritless. While driver education schools' actions are one cause of the injury, it is equally clear that the named plaintiffs' alleged injuries are also "fairly traceable" to the TEA's failure to inform private driver education schools of their ADA obligations and its failure to deny licenses to driver education schools that violate the ADA.

The TEA next argues that a court order could not redress the plaintiffs' alleged injuries. It advances three main arguments in support of this contention. First, it argues that it does not have the statutory authority under Texas law to ensure private driver education schools' compliance with the ADA. We disagree; multiple provisions of Texas law empower the TEA to perform actions that would likely redress the named plaintiffs' injuries. For example, the TEA can issue a license to a driver education school only if the school "complies with all county, municipal, state, and federal regulations, including fire, building, and sanitation codes and assumed name registration." Thus, the TEA has the power to withhold licenses from driver education schools that fail to comply with the DOJ's ADA regulations. Further, Texas law provides that the TEA "has jurisdiction over and control of" driver education schools and is allowed to "adopt and enforce rules necessary to administer" the chapter on driver education. These provisions give the TEA the power to enact regulations relating to ADA compliance in driver education schools.

Second, the TEA argues that a federal court cannot order it to ensure that driver education schools comply with the ADA because the court would effectively be commandeering the state into implementing a federal program. This argument misses the mark. While the federal government cannot require states to implement a federal program, the federal government can require the states to comply with federal law. The named plaintiffs are arguing that driver education schools are a "service, program, or activity" of the TEA. If they are correct, requiring the TEA to comply with the ADA in providing driver education would only require the state itself to comply with federal law, so the anti-commandeering doctrine would not be implicated.

Third, the TEA argues that withholding or revoking licenses from driver education schools would only shut down schools, not improve their compliance with the ADA. Similarly, the TEA argues that any potential fines would not necessarily change the schools' behavior. But it seems highly unlikely that all driver education schools would choose to shut their doors or accept fines rather than comply with the ADA. Instead, it is likely that the TEA's action would help redress the named plaintiffs' injuries. Thus, the redressability requirement for standing is satisfied.

B. Failure to State a Claim

The named plaintiffs' lawsuit fails on the merits, however. They sued under both the Rehabilitation Act and Title II of the ADA. It is uncontested that the TEA receives federal funding, which is a prerequisite for Rehabilitation Act coverage. Besides this special prerequisite for the Rehabilitation Act, the ADA and Rehabilitation Act "are judged under the same legal standards, and the same remedies are available under both Acts." Further, "[t]he parties have not pointed to any reason why Title II and [the Rehabilitation Act] should be interpreted differently." Thus, "[a]lthough we focus

primarily on Title II, our analysis is informed by the Rehabilitation Act, and our holding applies to both statutes."

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." It is uncontested that the TEA is a public entity and that the named plaintiffs are qualified individuals with disabilities. The key question is whether the named plaintiffs have been "excluded from participation in or ... denied the benefits of the services, programs, or activities of [the TEA]." To answer that question, we must decide whether driver education is a service, program, or activity of the TEA. We hold that it is not, although this is a close question for which the statutes, regulations, and case law provide little concrete guidance.

Starting with the plain text of Title II of the ADA, the phrase "services, programs, or activities of a public entity" is undefined. The Supreme Court has interpreted the phrase with reference to what "services, programs, or activities" are provided by the public entity. Here, the TEA itself does not teach driver education, contract with driver education schools, or issue driver education certificates to individual students. Instead, the TEA licenses and regulates private driver education schools, which in turn teach driver education and issue certificates. Thus, the TEA's program provides the licensure and regulation of driving education schools, not driver education itself. Title II of the ADA therefore suggests that driver education is not a program, service, or activity of the TEA.

The Rehabilitation Act does define "program or activity," defining it as "all the operations of" a public entity. In the context of interpreting this definition, we have explained that "Webster's Dictionary broadly defines 'operations' as 'the whole process of planning for and operating a business or other organized unit,' and defines 'operation' as 'a doing or performing esp[ecially] of action." Here, as explained above, the TEA does not operate or perform driver education because it does not teach driver education or contract with the schools that do so. Thus, driver education seems to fall outside of the ambit of the Rehabilitation Act's definition of "program or activity."

Turning to the regulations, the ADA tasks the Attorney General with promulgating regulations that implement Title II. 42 U.S.C. § 12134(a). Unfortunately, these regulations do not further define what it means to be a service, program, or activity of a public entity.

The most relevant regulation is 28 C.F.R. § 35.130(b)(1)(v). Section 35.130(b)(1) provides that a public entity cannot discriminate against qualified individuals with disabilities "in providing any aid, benefit, or service," whether the state acts "directly or through contractual, licensing, or other arrangements." Subsection (v), which is not cited by the parties, provides that a state may not "[a]id or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program."

But the regulations simply beg the ultimate question here. Section 35.130(b)(1) does not allow a state to discriminate "in providing any aid, benefit, or service," but it does not define what it means for the state to "provid[e]" an "aid, benefit, or service." As

detailed above, the TEA does not provide driver education. Similarly, section 35.130(b)(1)(v) prohibits a state from aiding entities that discriminate against "beneficiaries of the public entity's program," but it does not define what it means for a program to be the "public entity's." It does not seem that a program of driver education belongs to the TEA.

Another regulation provides that "[t]he programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered." But we agree with the named plaintiffs that this statement does not automatically immunize licensed activities from the ADA's gamut, given that the regulations also provide that a public entity cannot discriminate "directly or through contractual, licensing, or other arrangements."

Looking further to the interpretative guidance provided by the DOJ, the DOJ has specifically stated that a public entity "is not accountable for discrimination in the employment or other practices of [a company licensed by the public entity], if those practices are not the result of requirements or policies established by the [public entity]." Here, any failure of the driver education schools to comply with the ADA or Rehabilitation Act cannot be said to be "the result of requirements or policies established by the" TEA. Instead, the named plaintiffs' claim is at most that the TEA's failure to establish requirements or policies has allowed private driver education schools to be inaccessible. Thus, the DOJ's interpretative guidance indicates that the TEA is not accountable for the driver education schools' inaccessibility because the TEA's requirements and policies have not caused it.

Finally, as to case law, the named plaintiffs cite two lottery cases as their primary authority for finding that driver education is a program of the TEA. In those state supreme court cases, each court held that the state lottery was a program of the state lottery commission, so the ADA required the commission to make the lottery program accessible. Thus, even though the inaccessible lottery agents were private parties, the commission could be held liable under the ADA because it ran a lottery program that was inaccessible as a whole.

But there are two important differences between these lottery cases and this case. First, there, it was clear that the lottery commissions were running lotteries, not just licensing lottery agents. After all, the lottery commissions themselves conducted the lotteries; the agents that sold the tickets were just one component of that entire program. Here, in contrast, the TEA just as clearly does not provide any portion of driver education; it merely licenses driver education schools. Second, in the lottery cases, the lottery commissions contracted with the lottery providers, which were paid commissions for acting as agents for the state. Here, there is no such agency or contractual relationship. These cases are therefore unpersuasive.

The only other cases that have held a public entity liable for a private actor's inaccessibility involved similar situations where the private actors had a contractual or agency relationship with the public entity. In the absence of such a contractual or agency relationship, courts have routinely held that a public entity is not liable for a licensed private actor's behavior.

The importance of a contractual or agency relationship is also demonstrated by the DOJ's interpretative guidance, which provides three examples of a private actor's

activities being covered by Title II because of the "close relationship" between the private actor and a public entity. All three examples involve some form of contractual or agency relationship: a restaurant with a "concession agreement with a State department of parks"; a "joint venture" between a city and a private corporation; and a nonprofit organization that runs group homes "under contract with a State agency." Thus, we conclude that the lack of a contractual or agency relationship between driver education schools and the TEA cuts strongly against holding that driver education is a program of the TEA.

The named plaintiffs essentially argue that the TEA's pervasive regulation and supervision of driver education schools transforms these schools into agents of the state. But we hold that the mere fact that the driver education schools are heavily regulated and supervised by the TEA does not make these schools a "service, program, or activity" of the TEA. Otherwise, states and localities would be required to ensure the ADA compliance of every heavily-regulated industry, a result that would raise substantial policy, economic, and federalism concerns. Nothing in the ADA or its regulations mandates or even implies this extreme result. Thus, we join the Second Circuit in holding that public entities are not responsible for ensuring the ADA compliance of even heavily-regulated industries. Beyond heavy regulation, the named plaintiffs allege only that the TEA provides sample course materials to driver education schools and sells blank driver education certificates to them. The provision of such sample course materials and blank certificates is simply not enough to turn the schools into proxies for the TEA.

Admittedly, this case is further complicated by the fact that the benefit provided by driver education schools—a driver education certificate—is necessary for obtaining an important governmental benefit—a driver's license. Given the broad remedial purposes of the ADA, it would be extremely troubling if deaf young adults were effectively deprived of driver's licenses simply because they could not obtain the private education that the State of Texas has mandated as a prerequisite for this important government benefit. But this concern does not transform driver education into a TEA program or service. Instead, it is partly resolved by the fact that the ADA regulations offer a potential avenue for relief against the DPS. That is, the DPS may well be required to give exemptions to certain deaf individuals who cannot obtain driver education certificates, given that using these certificates as an eligibility criteria allegedly "screen[s] out or tend[s] to screen out" deaf people and may not be "necessary for the provision of the" driver's license program. But the named plaintiffs have not sued the DPS, so we need not decide this issue.

We conclude that the TEA does not provide the program, service, or activity of driver education. Thus, it is not required to ensure that driver education complies with the ADA.

Conclusion

For the foregoing reasons, we REVERSE the district court's order denying the TEA's motion to dismiss and RENDER judgment that the case is dismissed with prejudice for failure to state a claim upon which relief can be granted.

…

WIENER, Circuit Judge, concurring in part and dissenting in part:

I concur in the panel majority's holding that the named plaintiffs have standing to bring their ADA claims. I respectfully dissent on

the merits, however, in the firm conviction that TEA's involvement in driver education in Texas does constitute a service, program, or activity under Title II of the ADA, which in turn requires TEA to ensure that its licensee driving schools accommodate the deaf. Convinced that the named plaintiffs have stated a claim for which relief may be granted, I would affirm the district court's judgment denying TEA's motion to dismiss and permitting the case to proceed on the merits.

1. Service, Program, or Activity

This case turns entirely on whether Texas, through TEA, conducts a service, program, or activity by licensing the driving schools that train all drivers between 17 and 25 years of age who seek driver's licenses. As the majority opinion acknowledges, neither the statutes and regulations nor the case law provide a precise definition of "services, programs, or activities." We differ, however, because the guidance to be derived from these sources inexorably leads me to the conclusion that the phrase is sufficiently broad and flexible to apply to TEA's licensing in this case. The indisputable truism that virtually every adult, including those between 17 and 25 years old, must have the opportunity to be licensed to drive a car (or, in Texas, a truck), given driving's unique and indispensable importance in their daily lives, confirms to me beyond cavil that TEA does in fact engage in the public "program" of driver education. That in turn warrants our mandating that TEA ensure that every driving school accommodates deaf students.

2. Contract; Agency; Licensing

The majority opinion rests its holding on its perceived distinction between contractual and agency relationships, on the one hand, and licensing relationships on the other. This to me is a classic distinction without a difference. First and foremost, no such dichotomy appears in the text of Title II. As for the implementing regulations, if the term "services, programs, or activities" hinged on the technical legal formalities of agency or contract and distinguished them based on the formalities of licensing, such a clear rule would surely be set out in the text, not relegated to subtext. The fact that 28 C.F.R. § 35.130 is couched in the language of standards, not rules, suggests that DOJ interprets Title II to encompass a greater set of public/private interactions than the majority opinion recognizes. Indeed, the regulations explicitly forbid public entities from engaging in discrimination through "contractual, licensing, or other arrangements." Not only does 28 C.F.R. § 35.130(b)(1) specifically include licensing regimes, but the breadth of the additional, catch-all phrase, "other arrangements," cuts against the majority's narrow construction that only contractual or agency relationships qualify as programs and that licensing does not. To me, it's not a matter of undefined labels but of the substance of each particular public/private relationship.

I also read DOJ's Technical Assistance Manual as supportive of a more expansive view of "services, programs, or activities." Surely, if the rule to be gleaned from the four examples in section II–1.3000 were that only contractual or agency relationships between public and private entities could invoke dual Title II and Title III obligations, but that licensing could not, the manual would have stated so plainly. Instead, the manual makes only the general point that, "[i]n many situations, however, public entities have a close relationship to private entities that are covered by title III, with the result that certain activities may be at least indirectly affected by both titles." "Close relationship" is not synonymous with or restricted to "contractual

or agency relationship," and I am reluctant to so narrow DOJ's language. Rather, I see the four illustrations that follow not as delineating the outer limits of what constitutes a "close relationship," but as presenting four non-exclusive, typical examples of public-private interactions-non-exclusive examples that occur often in the real world and thus are useful to include as illustrations. The driver education system at issue here, however, is sui generis—atypical if not unique—so it is unsurprising that the manual presents no close analogy. What the manual does do, however, is instruct us to focus on the closeness of the particular relationship—here, the one between TEA and private driving schools—not on the legalistic labeling of the relationship as licensing.

Finally, the panel majority's perceived distinction between contractual and agency relationships and licensing relationships is nowhere apparent in the limited case law on this issue. It may well be that a contractual or agency relationship is a sufficient condition to finding that a public entity's program encompasses a private entity's activities, but it is neither the only one nor a necessary one.5 The critical issue is not whether a contract exists, but (1) whether a private party services the beneficiaries of the public entity's program, and (2) how extensively the public entity is involved in the functions and operations of the private entity. If the private entity does so serve, and the public and private entities are closely intertwined, then under those particular circumstances, the private entity's activities might be fairly considered an integral and inseparable part of the public entity's program.

3. TEA and Driving Schools Are Inextricably Intertwined

The crux of the plaintiffs' case (and mine!) is that, even though the driving schools perform the actual day-to-day instruction, instruction is but one component of the broader program of driver education that is continually overseen and regulated in discrete detail by TEA. When Chapter 1001 of the Texas Education Code is considered as a whole, it reveals that TEA superintends a wide-ranging driver training program in support of Texas's overarching policy goal of ensuring safe roads for all. Chapter 1001 does not merely establish TEA's authority over driver education—and consequently, its role as gatekeeper to the uniquely pervasive and indispensable state function of licensing its drivers-but also the agency's role in ensuring driving safety. The named plaintiffs do not discuss driving safety schools, but it is notable that Chapter 1001 gives TEA oversight of both driver education and driving safety, under the general umbrella of driver training.

TEA plays a significant hands-on role in licensing drivers, but its role in driving safety is anything but remote or marginal. For example, Texans who receive specified minor traffic tickets may have those tickets dismissed if the drivers complete a driving safety course certified and licensed by TEA.8 The way that the state interfaces driver training and the receipt of state benefits indicates that its intimate participation at all levels of the private driving school industry is more than merely regulatory. Through TEA, the state employs and manages this industry to achieve its own public ends. Again, the fact that the state's active involvement in this industry is labeled licensing does not diminish, much less block, its qualifying as a program of the state for the purposes of the ADA.

4. TEA's Role

The powers granted to TEA in Chapter 1001 further support the view that private driving instruction forms one component of an overall state program. This is because TEA exerts more rigorous oversight of providers of driver education than would be expected in most run-of-the-mill licensing regimes. Every driving school's curriculum must be approved by TEA, and the agency "designate[s]" the textbooks that may be used. Furthermore, TEA's enforcement powers over driver education schools are broad and varied—its power to order a peer review, for example, suggests a greater degree of involvement in the driving schools' operations than is typical of a plain vanilla licensing arrangement. The requirement that driving school owners and staff be of "good reputation and character" signals a heightened level of concern for the reliability of these schools' services—a concern that is consistent with TEA as a public provider of a social services program. Similarly, the fact that each driver education school must post a significant bond, payable to TEA for its direct use in paying refunds to students, portrays a higher and more intimate level of agency involvement in these licensees' activities than would be expected if TEA were purely a hands-off licensing entity.13 And TEA has the right to inspect every school physically at least once a year as a condition of license renewal—more frequently if the school has a history of regulatory violations.

Beyond TEA's intertwined involvement with driver education schools, however, is the fact that through TEA the state also employs driver training to teach civic responsibility, including lessons having nothing to do with the mechanics of driving. Chapter 1001 requires TEA to ensure that information about litter prevention and organ donation is included in all driving courses certified by the agency. That the Texas Legislature has chosen to promote these important civic and community values through the vehicle of driver training is another indication that the private driving school industry participates in a public program of TEA.

All of this makes abundantly clear that driver education is not merely a passively licensed, private, for-profit industry, but constitutes a means by which TEA substantively and substantially effectuates the policy goals that the state has charged it with implementing and maintaining. The fact that driver education forms part of the academic curriculum in some public schools only reinforces the conclusion that this entire infrastructure is truly a "program" of the state of Texas.

As the panel majority acknowledges, 28 C.F.R. § 35.130(b)(1)(v) is the regulation that is most relevant to this case. It contemplates precisely the instant situation: A public entity may well discriminate indirectly by furnishing significant assistance to a private entity that discriminates directly by failing to provide the public entity's program to disabled beneficiaries. The regulation, in other words, covers a public entity that farms out the practical implementation of its program to private entities while retaining and exercising considerable oversight, regulation, and other substantive involvement. In this case, the driving school students are the direct beneficiaries of TEA's program, and TEA furnishes operating licenses and course completion certificates to private schools that in turn discriminate on the basis of disability. In my view, the plaintiffs have stated a viable cause of action: The State of Texas cannot legislatively mandate driver education, then evade ADA responsibility via a "flea-flicker" lateral from TEA to private licensees.

5. "Parade of Horribles" Is Inapt

TEA claims that affirming the district court in this case could lead to requiring the state to police ADA compliance by all heavily regulated, licensed industries, such as massage parlors and tattoo artists—a typical "parade of horribles" frequently advanced by desperate public defendants. That may well be, but the one and only issue before us today is the discrete driver education scheme mandated by the Texas legislature and created and administered by TEA. It is sufficiently distinct and distinguishable from all others that affirming the district court surely will not open those floodgates. There exist obviously meaningful differences between this particular public/private operation and virtually every other private operation that Texas licenses. TEA's role is not just about consumer protection, as is the focus of the several occupational codes cited by the state. I repeat here for emphasis that, in this day and age, the driving of private and personal vehicles is a uniquely important, pervasive, and indispensable entitlement, and driving responsibly is a civic duty that the state seeks to promote with this unique regulatory scheme that it entrusts to TEA. Nothing about this is changed by the fact that state-licensed driver education schools happen to be private enterprises.

To illustrate this distinction between driver education and essentially all other heavily regulated businesses and industries, consider a hypothetical world in which every driver education school in Texas shuts down, so that no person under the age of 25 could obtain a driver's license via private instruction. Texas would undoubtedly fill the void itself—perhaps by adding courses at community colleges and expanding the driver education programs that currently exist in its public schools. But if, by contrast, each and every massage therapist or tattoo artist school in Texas were to close, the state surely would not respond by entering the business of training massage therapists or tattoo artists. Unlike driver education schools, those industries do not serve as private mechanisms for achieving public ends and public policy. Viewing the case law from this perspective, the distinction becomes even more apparent. Liquor stores, buses to gambling and ski resorts, and taxi cabs are not services of the state. Like Kansas, Colorado, and New York, Texas might well regulate these industries, but it is not likely to replicate them. Again, the feature that sets driver education apart from all the rest is the pervasiveness of driving private vehicles in a state like Texas. States regulate other industries to prevent unlicensed operators from doing harm. In contrast, driver education alone is a positive good and an end unto itself. Texas has chosen to educate drivers via private driving schools, and it regulates this private industry not simply to protect consumers from unlicensed operators, but first and foremost to ensure that important training goals for this large segment of the state's adult population are met to the state's satisfaction. Texas has an inherent interest in driver education that it does not have in any of the other licensed endeavors, accounting for its extensive involvement through TEA.

Finally, I acknowledge the concern that requiring TEA to take a more active role in promoting handicap accessibility in driver education would unduly expand its role. True, it may well impose an unanticipated ADA burden on the agency. Yet Congress made the conscious calculation to impose this burden on public entities. In light of this nation's unseemly history of systematically excluding persons with disabilities from public life and public activities, Congress intentionally wrote the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination." It might not be convenient for TEA to require ADA compliance by its licensed driver

education schools, but the ADA's sweeping purpose is clear. And, after all, TEA may rely on the ADA's safety valve of reasonableness. Although TEA is obligated to make "reasonable modifications in policies, practices, or procedures," if it finds that such modifications are too strenuous, it may "demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity," and be excused from compliance. A public entity's obligations under Title II are broad, but they are not unlimited.

For the foregoing reasons, I respectfully dissent from the panel majority's reversal of the district court's denial of TEA's motion to dismiss.

“Supreme Court Takes Up Deaf Texans' Suit Against State”

Texas Tribune

Aneri Pattani

June 30, 2016

A group of deaf Texans fighting what they claim is discriminatory treatment is hoping the U.S. Supreme Court will step in and force the state to provide sign-language interpreters at classes young drivers must take to get licenses.

The high court on Tuesday agreed to hear the case, Ivy v. Morath, involving a group of deaf Texans who sued the state in 2011. The state requires first-time driver's license applicants under age 25 to take classes that are typically conducted by private companies. The suit argues that since Texas requires the classes, it should make sure there are interpreters for deaf students.

The private companies were regulated and licensed by the Texas Education Agency when the suit was filed, but the duties have since been transferred to the Texas Department of Licensing and Regulation. The state argues that since the TEA did not directly contract with the companies, the state isn't liable for their compliance with federal laws on access for the disabled.

Disability advocates hope the nation's high court will use the case to define when a state agency is responsible for discrimination against people with disabilities when that agency farms out public programs to private vendors.

The case shines a spotlight on issues that people with disabilities frequently face, said Wayne Krause Yang, legal director of the Texas Civil Rights Project, which is representing the five deaf plaintiffs.

“This has the potential to be a landmark decision for deaf rights, and indeed for all disability rights,” he said. “Folks with disabilities and the deaf community are often left in the shadows. The time has come for the Supreme Court to recognize loudly and clearly civil rights for folks with disabilities.”

The TEA referred all questions to the state attorney general’s office, which said it could not comment on ongoing litigation.

The plaintiffs, who hail from Austin, Dallas, Plano, Midland and Arlington, say their requests for sign-language interpreters from several Texas driver education schools were denied. They also asked the TEA to provide accommodations, but those efforts were unsuccessful. They argue that the Americans with Disabilities Act and the Rehabilitation Act requires Texas to ensure that a mandatory state program, such as driver education courses, is accessible to the disabled.

Title II of the ADA, which applies to public entities, mandates that “no qualified individual with a disability shall, by reason of

such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." Section 504 of the Rehabilitation Act includes similar language, prohibiting discrimination of the disabled in any "program or activity" receiving federal funding.

But the phrase "services, programs, or activities" is not precisely defined, and its meaning cuts to the heart of the deaf students' case.

U.S. District Judge Lee Yeakel ruled in favor of the plaintiffs in 2013, but the U.S. 5th Circuit Court of Appeals, in a 2-1 decision, dismissed the case in 2015, saying that driver education is not a service, program, or activity of the TEA.

"We hold that the mere fact that the driver education schools are heavily regulated and supervised by the TEA does not make these schools a 'service, program, or activity' of the TEA," the court's opinion said. "Otherwise, states and localities would be required to ensure the ADA compliance of every heavily regulated industry, a result that would raise substantial policy, economic, and federalism concerns."

The plaintiffs appealed, arguing to the Supreme Court that the circuit's ruling overlooked how intertwined the TEA and private driver education schools were. The TEA — and the licensing and regulation department after it — evaluate and license the schools, approve the course materials, certify the instructors and provide the school with unique course completion certificates for each student.

"The schools could not exist if not for the TEA," Krause Yang said, "and there would be no driver training that the TEA is responsible for doing if the driving schools didn't provide the classes. They work as a team."

Rather than suing each individual driving school, Krause Yang said the plaintiffs want to hold the state accountable for ensuring private entities it works with provide disability accommodations.

Lucy Wood, clinical professor of law at UT-Austin, said she believes this case could clarify what constitutes a "program, service, or activity" once and for all, eliminating potential loopholes in the ADA.

"This case is important because it, hopefully, will eliminate state's' ability to avoid Title II responsibility through various arrangements with private entities," she said.

“Supreme Court To Hear Deaf Texans' Drivers Ed Appeal”

Law 360

Michelle Casady

June 28, 2016

The U.S. Supreme Court on Tuesday agreed to review a lawsuit brought by a group of deaf Texas residents who allege the state's driver education requirements prevent them from receiving licenses, in violation of the Americans with Disabilities Act.

The high court on Tuesday granted certiorari in the case that the Fifth Circuit had dismissed with prejudice in March 2015 after finding that the class of deaf students — requesting that the TEA bring its driver education course in compliance with the ADA — had failed to state a claim upon which relief can be granted. The Texas Education Agency, the Fifth Circuit held, did not provide the driving instruction but only licensed the private schools that did, meaning it isn't required to ensure ADA compliance.

In July 2015 the Fifth Circuit denied named plaintiff Donnika Ivy's petition for an en banc rehearing of the case, and in October she filed her petition with the nation's high court.

The Fifth Circuit wrote in March 2015 that it would be “extremely troubling” if deaf residents were deprived of driver's licenses because the private education Texas has mandated as a prerequisite for the license is unavailable to them.

“But this concern does not transform driver education into a TEA program or service,” the court wrote.

The court noted that there's a possible avenue for relief via the ADA as it relates to the state's Department of Public Safety, as it may be required to give exemptions to deaf individuals in this situation.

“But the named plaintiffs have not sued the DPS, so we need not decide this issue,” the opinion reads. “We conclude that the TEA does not provide the program, service, or activity of driver education. Thus, it is not required to ensure that driver education complies with the ADA.”

The class of plaintiffs comprises deaf Texas residents between the ages of 16 and 25 who alleged they couldn't obtain a driver's license in the state. According to court documents, the plaintiffs contacted a number of driver-education schools and were refused accommodations, like an American Sign Language interpreter, that would have allowed them to complete the course. Additionally, before filing suit, Ivy and others contacted Heather Bise, a deaf-resource specialist, who also reached out to the TEA on their behalf without luck.

In its brief asking the Fifth Circuit to toss the case filed in May 2014, the state had argued that if the district court's interpretation of the ADA was allowed to stand, the TEA would be required to use its limited resources to police ADA compliance in private businesses.

“And all kinds of other private businesses licensed by state agencies might also be subject to previously unanticipated oversight by those agencies, which presumably also would be charged with adopting and enforcing their own regulations to ensure compliance with the ADA (and presumably other federal laws),” the brief reads.

In a reply brief from the class of hearing impaired individuals, they attacked the TEA's argument that the lower court's decision could lead to the TEA policing other entities, like barber shops and massage therapy schools.

“But not one of the statutes for the licensure of the businesses the TEA cites in its brief expressly conditions the receipt of a license on compliance with state and federal law,” the brief reads. “Unlike driver education, the state does not mandate that the state citizens patronize these businesses, and its involvement in those industries is limited to mere licensing.”

The parties did not immediately respond Tuesday to requests for comment.

The state is represented by Richard B. Farrer, Jonathan F. Mitchell and Daniel T. Hodge of the Texas Attorney General's Office.

The plainiffs are represented by Joe T. Sanders I and Olga Kobzar of Scott, Douglass & McConnico and James C. Harrington and Joseph P. Berra of the Texas Civil Rights Project.

The case is *Donnika Ivy et al. v. Mike Morath, in his official capacity as head of the Texas Education Agency*, case number 15-486, in the U.S. Supreme Court.

G.G. v. Gloucester

15-8049

Ruling Below: *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016)

G.G. brought action against the Gloucester County School Board under the Equal Protection Clause and Title IX. The plaintiff specifically challenged the school board's policy of requiring students to use the school's sex-segregated bathrooms in accordance with their birth sex, not their gender identity. The plaintiff moved for a preliminary injunction to be allowed to use the boys' restroom. The school board filed a motion to dismiss for failure to state a claim. The District Court for the Eastern District of Virginia dismissed the Title IX claim and denied the preliminary injunction. The student appealed. The Court of Appeals held that the Department of Education's instruction to treat student's according to their gender identity was entitled to deference. The school board applied for a grant of certiorari from the Supreme Court.

Question Presented: Whether, under Title IX, schools must treat students consistent with their gender identity with regards to sex-segregated bathrooms.

G.G., by his next friend and mother, Deirdre GRIMM, Plaintiff–Appellant,
v.
GLOUCESTER COUNTY SCHOOL BOARD, Defendant–Appellee.

United States Court of Appeals, Fourth Circuit

Decided on April 19, 2016

[Excerpt; some citations and footnotes omitted]

FLOYD, Circuit Judge:

G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for

further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The Department of Education's (the Department) regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity." Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery.

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom. G.G. used this restroom without incident for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." Hook proposed the following resolution (hereinafter the "transgender restroom policy" or "the policy"):

> Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its

> schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a "young lady." Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or "young lady." One speaker called G.G. a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. Following this second comment period, the Board voted 6–1 to adopt the proposed policy, thereby barring G.G. from using the boys' restroom at school.

G.G. alleges that he cannot use the girls' restroom because women and girls in those facilities "react[ ] negatively because they perceive[ ] G.G. to be a boy." Further, using the girls' restroom would "cause severe psychological distress" to G.G. and would be incompatible with his treatment for gender dysphoria. As a corollary to the policy, the Board announced a series of updates to the school's restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they "make him feel even more stigmatized .... Being required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different.' " G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences "severe and persistent emotional and social harms." G.G. avoids using the restroom while at school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys' restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution. On July 27, 2015, the district court held a hearing on G.G.'s motion for a preliminary injunction and on the Board's motion to dismiss G.G.'s lawsuit. At the hearing, the district court orally dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. The district court followed its ruling from the bench with a written order dated September

4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.'s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed that the regulations implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.'s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.'s request for an injunction, the district court found that G.G. had not made the required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.'s presence in the boys' restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court's dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court's rulings and also asks us to dismiss G.G.'s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an amicus brief supporting G.G.'s Title IX claim in order to defend the government's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

We turn first to the district court's dismissal of G.G.'s Title IX claim. We review de novo the district court's grant of a motion to dismiss. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

As noted earlier, Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm. We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." The Department's regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." The

Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) wrote: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity."

A.

G.G., and the United States as amicus curiae, ask us to give the Department's interpretation of its own regulation controlling weight pursuant to *Auer v. Robbins*. *Auer* requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, "reflect the agency's fair and considered judgment on the matter in question." An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded *Auer* deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a post hoc rationalization.

The district court declined to afford deference to the Department's interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because "[i]t clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone.

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls "without running afoul of Title IX." However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because "the regulation is silent on what the phrases 'students of one sex' and 'students of the other sex' mean in the context of transgender students." The United States contends that the interpretation contained in OCR's January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

We will not accord an agency's interpretation of an unambiguous regulation Auer deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to provide "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."

"[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine de novo." We determine ambiguity by analyzing the language under the three-part framework set forth in *Robinson v. Shell Oil Co*. The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole.

First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX ...." the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited." This repeated formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity. It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex- reassignment surgery use? What about an intersex individual? What about an individual born with X–X–Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

C.

Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to Auer deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. "Our review of the agency's interpretation in this context is therefore highly deferential." "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." An agency's view need only be reasonable to warrant deference.

Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished...." The second defines "sex" as:

> the sum of the morphological, physiological, and behavioral peculiarities of living beings that

> subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness ....

Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive. The dictionaries, therefore, used qualifiers such as reference to the "sum of" various factors, "typical dichotomous occurrence," and "typically manifested as maleness and femaleness." Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual "dichotomous occurrence" of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the "character of being either male or female" where those indicators diverge.

We conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation. The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, "the morphological, physiological, and behavioral peculiarities"—included in the term "sex."

D.

Finally, we consider whether the Department's interpretation of § 106.33 is the result of the agency's fair and considered judgment. Even a valid interpretation will not be accorded *Auer* deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a post hoc rationalization.

Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice. As the United States explains, the issue in this case "did not arise until recently," see id., because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities. The Department contends that "[i]t is to those 'newfound' policies that [the Department's] interpretation of the regulation responds." We see no reason to doubt this explanation.

Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014. Finally, this interpretation cannot properly be considered a post hoc rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that

corresponds with their gender identities. None of the *Christopher* grounds for withholding *Auer* deference are present in this case.

E.

We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to Auer deference and is to be accorded controlling weight in this case.9 We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that "sex" should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex. We agree that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed. It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys' restroom pursuant to the Department's interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court's guidance in *Chevron*, *Auer*, and *Christopher* and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns11—fundamentally questions of policy—is a task committed to the agency, not to the courts.

The Supreme Court's admonition in *Chevron* points to the balance courts must strike:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Not only may a subsequent administration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our Auer analysis complete, we leave policy formulation to the political branches.

III.

G.G. also asks us to reverse the district court's denial of the preliminary injunction he sought which would have allowed him to use the boys' restroom during the pendency of this lawsuit. "To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." We review a district court's denial of a preliminary injunction for abuse of discretion. "A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." "We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter de novo." Instead, "we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."

The district court analyzed G.G.'s request only with reference to the third factor—the balance of hardships—and found that the balance of hardships did not weigh in G.G.'s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions."

The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." Preliminary injunctions, however, are governed by less strict rules of evidence:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial.

Additionally, the district court completely excluded some of G.G.'s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to "weight, not preclusion" and have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when

deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.'s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was "guided by erroneous legal principles." We therefore conclude that the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence. We vacate the district court's denial of G.G.'s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein.

IV.

Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

G.G. argues that both the first and second *Guglielmi* factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." For example, the court accepted the Board's "mating" concern by noting:

> There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teen-age years. All of that is accepted by all medical science, as far as I can determine in reading information.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. The district court characterized gender dysphoria as a "mental disorder" and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. The district court also seemed to reject G.G.'s representation of what it meant to be transgender, repeatedly noting that G.G. "wants" to be a boy and not a girl, but that "he is biologically a female." The district court's memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound

contrary evidence. Further, although the district court has a distinct way of proceeding in court, the hearing record and the district court's written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the *Guglielmi* standard. We deny G.G.'s request for reassignment to a different district judge on remand.

V.

For the foregoing reasons, the judgment of the district court is

REVERSED IN PART, VACATED IN PART, AND REMANDED.

DAVIS, Senior Circuit Judge, concurring:

I concur in Judge Floyd's fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, this Court would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board's restroom policy discriminates against him "on the basis of sex" in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim.

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse's office. His affidavit also indicates that he has "repeatedly developed painful urinary tract infections" as a result of holding his urine in order to avoid using the restroom at school.

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.'s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is "inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child" and explains why access to a restroom appropriate to one's gender identity is important for transgender youth. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board's restroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing

lifelong psychological harm." In particular, Dr. Ettner opines that:

> "[a]s a result of the School Board's restroom policy, ... G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his 'otherness,' undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm."

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.'s or Dr. Ettner's affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.'s presentation in support of his claim of irreparable harm, such as "evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s'] restroom," evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner "differentiating between the distress that G.G. may suffer by not using the boy[s'] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12."

As to the alleged deficiency concerning Dr. Ettner's opinion, the Board's argument is belied by Dr. Ettner's affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing "[a]s a result of the School Board's restroom policy." With respect to the other purported inadequacies, the absence of such evidence does nothing to undermine the uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board's policy or Dr. Ettner's unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.'s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.

C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students' constitutional right to privacy will be imperiled by G.G.'s presence in the boys' restroom.

As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students' unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school's restrooms already undertaken by the Board. To the extent that a student simply objects to using the restroom in the presence of a transgender student even where there is no possibility that either student's genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall

restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.'s presence in the communal restroom thus does not tip the scale in the Board's favor. The balance of hardships weighs heavily toward G.G.

D.

Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest.

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.

II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us.

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year.

With these additional observations, I concur fully in Judge Floyd's thoughtful and thorough opinion for the panel.

…

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court's opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G's motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.'s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority's decision on those issues.

G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school's policy for assigning students to restrooms and locker rooms based on biological sex. The school's policy provides: (1) that the

girls' restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys' restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school's three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls' restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates against him because it denies him, as one who identifies as male, the use of the boys' restrooms, and he seeks an injunction compelling the high school to allow him to use the boys' restrooms.

The district court dismissed G.G.'s Title IX claim, explaining that the school complied with Title IX and its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex," so long as the facilities are "comparable."

Strikingly, the majority now reverses the district court's ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute's and regulations' use of the term "sex" means a person's gender identity, not the person's biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education's Office for Civil Rights to G.G., in which the Office for Civil Rights stated, "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally must treat transgender students consistent with their gender identity." Accepting that new definition of the statutory term "sex," the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls' restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys' restrooms and locker rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And, unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the "severe psychological distress" it would inflict on him and because female students had "reacted negatively" to his presence in girls' restrooms. Surely biological males who identify as females would encounter similar reactions in the girls' restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is not law but which is the only authority on which the majority relies,

states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]." This appears to approve the course that G.G.'s school followed when it created unisex restrooms in addition to the boys' and girls' restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes," provided that the facilities are "proportionate" and "comparable," and to provide "separate toilet, locker room, and shower facilities on the basis of sex," again provided that the facilities are "comparable." Because the school's policy that G.G. challenges in this action comports with Title IX and its regulations, I would affirm the district court's dismissal of G.G.'s Title IX claim.

I.

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but "did not feel like a girl" from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one's biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of his requests. Officials changed school records to reflect G.G.'s new male name; the guidance counselor supported G.G.'s sending an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical education requirement through a home-bound program, as he preferred not to use the school's locker rooms; and the school allowed G.G. to use a restroom in the nurse's office "because [he] was unsure how other students would react to [his] transition." G.G. was grateful for the school's "welcoming environment." As he stated, "no teachers, administrators, or staff at Gloucester High School expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns." And he was "pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy."

As the school year began, however, G.G. found it "stigmatizing" to continue using the nurse's restroom, and he requested to use the boys' restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving "numerous complaints from parents and students about [G.G.'s] use of the boys' restrooms." The School Board thus faced a dilemma. It recognized G.G.'s feelings, as he expressed them, that "[u]sing the girls' restroom[s][was] not possible" because of the "severe psychological distress" it would inflict on him and because female students had previously "reacted negatively" to his

presence in the girls' restrooms. It now also had to recognize that boys had similar feelings caused by G.G.'s use of the boys' restrooms, although G.G. stated that he continued using the boys' restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education's Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board's policy was discriminatory, in violation of the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972. He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction "requiring the School Board to allow [him] to use the boys' restrooms at school."

The district court dismissed G.G.'s Title IX claim because Title IX's implementing regulations permit schools to provide separate restrooms "on the basis of sex." The court also denied G.G.'s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it "will hear evidence" and "get a date set" for trial to better assess the claim.

From the district court's order denying G.G.'s motion for a preliminary injunction, G.G. filed this appeal, in which he also challenges the district court's Title IX ruling as inextricably intertwined with the district court's denial of the motion for a preliminary injunction.

II.

G.G. recognizes that persons who are born biologically female "typically" identify psychologically as female, and likewise, that persons who are born biologically male "typically" identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for "different and unequal treatment," "discriminat[ing] against him based on sex [by denying him use of the boys' restrooms], in violation of Title IX." He argues, "discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account." He concludes that the School Board's policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is "prevent[ed] ... from using the same restrooms as other students and relegat [ed] ... to separate, single-stall facilities."

As noted, the School Board's policy designates the use of restrooms and locker rooms based on the student's biological sex—biological females are assigned to the girls' restrooms and unisex restrooms; biological males are assigned to the boys' restrooms and unisex restrooms. G.G. is thus assigned to the girls' restrooms and the unisex restrooms, but is denied the use of the boys' restrooms. He asserts, however, that because neither he nor the girls would accept his use of the girls' restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

> The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

The Act, however, provides, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

Thus, although Title IX and its regulations provide generally that a school receiving federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on "sex," a term that must be construed uniformly throughout Title IX and its implementing regulations.

Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind.

Moreover, we have explained that separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women," which, as the Supreme Court explained, are "enduring" and render "the two sexes ... not fungible," not because of "one's sense of oneself as belonging to a particular gender," as G.G. and the government as amicus contend.

Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body

parts of students of the other biological sex. Indeed, the School Board cited these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote the privacy and safety of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an environment where children are still developing, both emotionally and physically."

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term "sex" were to encompass only a person's gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls' dorm or shower in a girls' shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower. G.G.'s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to "restroom access by transgender individuals." But this effort to restrict the effect of G.G.'s argument hardly matters when the term "sex" would have to be applied uniformly throughout the statute and regulations, as noted above and, indeed, as agreed to by the majority.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of enactment. Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions. Indeed, although the contemporaneous meaning controls our analysis, it is notable that, even today, the term "sex" continues to be defined based on the physiological distinctions between males and females. Any new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of "sex" as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term "sex" in Title IX and its regulations refers to a person's "gender identity" simply to accommodate G.G.'s wish to use the boys' restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term "sex" as used in Title IX and its regulations refers (1) to both biological sex and gender identity; (2) to either biological sex or gender identity; or (3) to only "gender identity." In his brief, G.G.

seems to take the position that the term "sex" at least includes a reference to gender identity. This is the position taken in his complaint when he alleges, "Under Title IX, discrimination 'on the basis of sex' encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity." The government seems to be taking the same position, contending that the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender [identity]." (Emphasis in original). The majority, however, seems to suggest that the term "sex" refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights' letter of January 7, 2015, which said, "When a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally must treat transgender students consistent with their gender identity." But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term "sex" as used in the statute and regulations refers to both biological sex and gender identity, then, while the School Board's policy is in compliance with respect to most students, whose biological sex aligns with their gender identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished consistent with the regulation because a transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools' ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms, a position that G.G. does not advocate.

If the position of G.G., the government, and the majority is that the term "sex" means either biological sex or gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys' restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that "sex" as used in Title IX and its regulations means only gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a separate use "on the basis of sex," and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom.

Yet, by interpreting Title IX and the regulations as "requiring schools to treat students consistent with their gender identity," and by disallowing schools from treating students based on their biological sex, the government's position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls' restrooms, G.G. states that "it makes no sense to place a transgender boy in the girls' restroom in the name of protecting student privacy" because "girls objected to his presence in the girls' restrooms because they perceived him as male." But the same argument applies to his use of the boys' restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex" if "sex" means gender identity. The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools "generally must treat transgender students consistent with their gender identity," whatever that means, and in the next sentence, it encourages schools to provide "gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High School, to provide unisex single-stall restrooms for any students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, on the basis of sex, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.'s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse's restroom. And, after both girls and boys objected to his using the girls' and boys' restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm

the district court's decision dismissing G.G.'s Title IX claim and therefore dissent.

I also dissent from the majority's decision to vacate the district court's denial of G.G.'s motion for a preliminary injunction. As the Supreme Court has consistently explained, "[a] preliminary injunction is an extraordinary remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," and " '[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.' " Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can "form a definite and firm conviction that the court below committed a clear error of judgment," particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

As noted, however, I concur in Part IV of the court's opinion.

“Supreme Court grants emergency order to block transgender male student in Virginia from using boys' restroom”

The Los Angeles Times

David G. Savage

August 3, 2016

The Supreme Court intervened for the first time Wednesday in the controversy over transgender rights and blocked a lower court ruling that would have allowed a transgender boy to use the high school restroom that fits his “gender identity.”

In an unusual 5-3 order, the justices granted an emergency appeal from a Virginia school board, which said it is fighting to “protect the basic expectations of bodily privacy of Gloucester County students.”

The school board was seeking to be exempted from the Obama administration’s position that schools nationwide are required to allow transgender students to use the bathroom they prefer.

Justice Stephen G. Breyer signaled he did not support the school board’s emergency appeal, but said he joined the court’s four conservatives as a “courtesy” to put the issue on hold until the justices can review the matter when they return in the fall.

“In light of the facts that four justices have voted to grant the application referred to the court by the chief justice, that we are currently on recess and that granting the stay will preserve the status quo,” he wrote, “I vote to grant the application as a courtesy.”

The issue began last year when a U.S. Department of Education lawyer advised school districts nationwide that a federal anti-discrimination law known as Title IX, which forbids sex discrimination in education, also protects the rights of transgender students to use restrooms and changing facilities that are “consistent with their gender identity.”

In April, the U.S. 4th Circuit Court of Appeals, in a 2-1 decision, upheld that policy and ruled for Gavin Grimm, a 17-year-old transgender boy who sued the school board.

The appeals court issued an order telling Gloucester school officials they must abide by the administration’s interpretation and allow Grimm to use the boys’ restrooms.

In Wednesday’s order, the high court said it had granted the school board’s emergency request to temporarily “stay the mandate” of the 4th Circuit until the school board can file an appeal when the court returns.

The court’s action, while not a ruling, signals at least four justices are skeptical of the Obama administration’s stance. While that’s enough to grant a petition to review the lower court ruling, it will take at least five votes to issue a ruling.

Since the court has been ideologically split since the February death of Justice Antonin Scalia, a 4-4 tie on the transgender case is likely and would result in the affirmation of the 4th Circuit's ruling.

Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan said they would have turned down the emergency appeal in the Gloucester case and allowed the lower court's ruling to take effect.

The request for an emergency stay was filed with Chief Justice John G. Roberts Jr., and Justices Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr. joined in granting it.

Lawyers for the American Civil Liberties Union had urged the court to turn down the request on the grounds that the school board would suffer "no irreparable harm" if the teen was permitted to use the boys' restroom.

"We are disappointed that the court has issued a stay and that Gavin will have to begin another school year isolated from his peers and stigmatized by the Gloucester County school board just because he's a boy who is transgender," said Joshua Block, a senior ACLU staff attorney. "We remain hopeful that Gavin will ultimately prevail."

Wednesday's order comes as a federal judge in North Carolina is weighing arguments on whether to put on hold the state's controversial measure known as House Bill 2. It says public restrooms and changing facilities, including in schools and colleges, must be segregated by sex, as defined by "the physical condition of being male or female which is stated on a person's birth certificate."

Lawyers for the ACLU and Lambda Legal urged U.S. District Judge Thomas Schroeder on Monday to block the state from enforcing the measure while both sides prepare for a trial on the issue in November. The judge said he would rule on the request shortly. But the high court's order may influence the judge's decision.

The appeal in the Gloucester case raises an issue that has long interested the conservative justices. Congress did not pass a new law to clarify the rights of transgender students, and the Education Department did not issue a new regulation.

Instead, its lawyers sent a "guidance" to school officials advising them that in the department's view, Title IX, adopted in 1972, means that excluding transgender students from facilities that fit their gender identity amounts to illegal sex discrimination.

In their appeal, lawyers for the Gloucester school board said the case had "nationwide importance." And they argued the high court should forbid federal executive agencies, including the Education Department, from issuing sweeping new interpretations of old regulations.

The school board said it intended to file an appeal petition by the end of this month that formally asks the high court to review the 4th Circuit's decision. If the justices agree to hear the case, which now seems likely, it would be one of the court's major cases of the coming term. If a 4-4 deadlock is averted, the case could yield the court's first ruling on the issue of transgender rights.

"Virginia School Board Asks Supreme Court to Block Order on Transgender Bathroom Use"

The Wall Street Journal

Jess Bravin

July 13, 2016

A Virginia school board asked the Supreme Court Wednesday to block a lower court order allowing a transgender student who identifies as male to use the boys' restroom.

The case is the first over transgender restroom use to reach the high court. It could provide the justices an opportunity to decide whether prohibitions of sex discrimination extend to gender identity—a position taken by some Obama administration agencies, but disputed by more than a dozen Republican-leaning states.

"For decades, our nation's schools have structured their facilities and programs around the sensible idea that in certain intimate settings men and women may be separated 'to afford members of each sex privacy from the other sex,'" the Gloucester County School Board said in its petition.

The board wants to temporarily halt implementation of an April decision by a three-judge panel of the Fourth U.S. Circuit Court of Appeals in Richmond, Va., which ruled in favor of high-school junior Gavin Grimm that the policy violated federal law barring discrimination based on sex.

Gavin was born female but has said that since age 12 he has identified as male. Gavin "has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex," the Fourth Circuit opinion said. He has undergone hormone therapy but not sex-reassignment surgery, the court said, and "lives all aspects of his life as a boy."

School officials were allowing him to use the boys' restroom, the appeals court said. He did so "without incident for about seven weeks," but word of this "excited the interest of others in the community," who complained to the school board. The board responded in December 2014 with a resolution limiting use of restrooms and locker rooms "to the corresponding biological genders," adding that "students with gender-identity issues shall be provided an alternative appropriate private facility."

Gavin, 17 years old, through his mother, sued to block the policy. A federal-district court in Newport News, Va., dismissed the suit, finding that the federal educational sex-equity law, known as Title IX, doesn't extend to sexual orientation, gender identity and other categories beyond biological sex.

Federal courts in the past typically have rejected arguments that prohibitions of sex-discrimination cover sexual orientation. The Fourth Circuit's April opinion, however, relied heavily on new guidance from the U.S. Education Department addressing transgender questions. A January 2015 opinion letter from the department's Office of Civil Rights advised that schools "generally must treat transgender students consistent with their gender identity."

"This case presents one of the most extreme examples of judicial deference to an administrative agency this court will ever see," the Gloucester school board said, noting that the Education Department's opinion letter "was generated in response to an inquiry about the school board's restroom policy in this very case."

The Gloucester board addressed its application to Chief Justice John Roberts, who apart from presiding over the Supreme Court oversees the Fourth Circuit. He can act on the request himself or refer it to the full court for action. No decision is expected before additional briefing by both sides in the case.

In May, the Obama administration provided detailed guidance on bathroom use by transgender students by telling educators around the country they should allow students to use the bathroom and locker facilities of their chosen gender, saying federal law bars discrimination against such students.

"Federal judge urges prompt appeal to Court on transgender rights"

SCOTUSblog

Lyle Denniston

June 1, 2016

Arguing that "time is of the essence," a federal appeals court judge on Tuesday called for a prompt appeal to the Supreme Court to sort out the rights of transgender students when they use restrooms at school. Circuit Judge Paul V. Niemeyer helped clear the way for an early appeal by withholding a demand that the U.S. Court of Appeals for the Fourth Circuit vote on rehearing a test case on the issue.

At issue in the case of *G.G. v. Gloucester County School Board* is the meaning of a 1972 federal civil rights law that outlaws discrimination "because of sex" in federally funded education. Specially at issue is whether that law — known as "Title IX" — provides protection to students who identify as having a gender other than what was assigned to them at birth.

There is a widespread, and rapidly growing controversy over that and other transgender rights issues, and the case of sixteen-year-old "G.G." could be the first to put the issue before the Supreme Court. In some ways, the rapid development of the controversy parallels that over same-sex marriage rights, leading to the Supreme Court decision recognizing equal rights of gays and lesbians to marry, across the nation.

In this case, G.G. is a sixteen-year-old student at Gloucester County High School in Gloucester Courthouse, Va., who was born a girl but now has the identity of a boy, and wishes to use the boys' restroom at school. He won a two-to-one decision by a three-judge panel of the Fourth Circuit on April 19, and the en banc Fourth Circuit on Tuesday turned down a plea by the school board to reconsider the controversy.

Judge Niemeyer had dissented from the panel ruling, and said on Tuesday that the panel should itself reconsider. But, he went on to say that he declined to call for a vote among his colleagues on the question of en banc review. When there was no request for such a poll, the school board's rehearing plea was denied.

In withholding such a request, the judge said that "the momentous nature of the issue deserves an open road to the Supreme Court to seek the Court's controlling construction of Title IX for national application." This case, he said, presented the legal issue clearly, without "the distraction of subservient issues."

Summarizing some of the arguments he had made as the dissenter on the panel, Judge Niemeyer concluded: "Time is of the

essence, and I can only urge the parties to seek Supreme Court review."

The county school board, in response to a lawsuit by G.G. and his mother, Deirdre Grimm, had sought to defend its policy of providing separate restrooms and locker rooms based upon a student's biological sex — that is, the sex noted on the birth certificate. Its policy also provided single-stall restrooms that any student, of either sex or of transgender identity, could use. G.G. and his mother contended that keeping him out of the boys' restroom and confining him to a single-stall alternative was a form of discrimination based upon his gender identity.

The Fourth Circuit panel majority did not itself rule on whether Title IX actually does provide protection against students based on their gender identity, in federally funded educational programs. Instead, the panel majority chose to defer to the view of the U.S. Department of Education that Title IX's reference to sex includes gender identity.

Technically, the panel majority had invoked what is called "Auer deference." That is a reference to a 1997 Supreme Court decision in the case of *Auer v. Robbins*, declaring that federal courts should give deference to federal agencies' interpretations of their own regulations, if those regulations are ambiguous. (While there are some members of the Supreme Court who in recent years have called for a reconsideration of the Auer decision, the Justices passed up a request to do that earlier this month, in denying review of *United Student Aid Funds v. Bible*; Justice Clarence Thomas dissented alone.)

After accepting the government's view of the reach of Title IX, the Fourth Circuit panel ordered a federal trial judge to reconsider his ruling against G.G.'s claim, saying he had used the wrong legal analysis. The majority opinion was written by Circuit Judge Henry F. Floyd, and joined by Senior Circuit Judge Andre M. Davis. In a separation opinion, Judge Davis said he would have gone ahead and ruled in favor of G.G. now instead if returning it to the trial judge. The panel did refuse G.G.'s request that the case be reassigned to a different trial judge on the premise that the judge who ruled against him was biased. Judge Niemeyer agreed with leaving the case with the same judge, but dissented on all of the remainder of the majority ruling.

While much of the nationwide controversy over transgender rights lately has focused on school students and on access to restrooms, the controversy also has included a dispute over whether transgender rights are also protected under Title VII of the 1964 Civil Rights Act, which outlaws discrimination based upon sex in the workplace. The U.S. Equal Employment Opportunity Commission has been active in promoting transgender workers' rights.

The Obama administration has taken a strong position in favor of transgender rights, and this month sent a nationwide letter to schools noting its position that Title IX does protect transgender students. The administration also has sued the state of North Carolina over the legality of a state law that restricts transgender rights of students and workers across the state. The administration also filed its views with the Fourth Circuit panel

in the *G.G.* case. Presumably, it would take part in that case if it now moves on to the Supreme Court.

Among a variety of newly filed lawsuits around the country on that issue, eleven states have sued the Obama administration in a federal district court in Texas to challenge its policy position.

“Federal appeals court sides with transgender teen, says bathroom case can go forward”

The Washington Post

Moriah Balingit

April 19, 2016

A federal appeals court in Richmond has ruled that a transgender high school student who was born as a female can sue his school board on discrimination grounds because it banned him from the boys’ bathroom.

In backing high school junior Gavin Grimm, the U.S. Court of Appeals for the 4th Circuit deferred to the U.S. Education Department’s position that transgender students should have access to the bathrooms that match their gender identities rather than being forced to use bathrooms that match their biological sex. The department has said that requiring transgender students to use a bathroom that corresponds with their biological sex amounts to a violation of Title IX, which prohibits sex discrimination at schools that receive federal funding.

“It’s a complete vindication for the Education Department’s interpretation of Title IX,” said Joshua Block, an American Civil Liberties Union lawyer who represents Grimm.

In a 2-to-1 decision, the 4th Circuit ordered a lower court to rehear the student’s claims that the Gloucester County, Va., school board’s bathroom policies — which restrict transgender students to using a separate unisex bathroom — violate federal law. The judges also ruled that the lower court should reconsider a request that would have allowed Grimm to use the boys’ bathroom at Gloucester High School while the case is pending.

The 4th Circuit is the highest court to weigh in on the question of whether bathroom restrictions constitute sex discrimination, and the decision could have widespread implications on how U.S. courts interpret the issue as civil rights activists and local politicians battle over bathrooms.

The question of which bathrooms transgender people can use has become a divisive political issue in several states, emerging as an emotional fight in South Dakota, Texas, Illinois, Mississippi and Virginia. In North Carolina, a law banning local protections for gay and transgender people — a measure centering on bathrooms — has sparked protests, boycotts and calls for an immediate repeal.

Public bathrooms have become the latest battleground in the fight for LGBT rights, with conservative activists and some state lawmakers pushing restrictions that prevent transgender people from using bathrooms in accordance with their gender identity.

Activists have used the bathroom debate as a venue for rolling back broader civil rights protections, arguing that allowing transgender people into the supposedly safe spaces of single-sex bathrooms creates dangerous scenarios and violates privacy and common sense.

The 4th Circuit judges wrote that interpretations of federal discrimination policies should be left to politicians, in this case the Obama administration's Education Department. The court ruled that Grimm has an argument that his school board violated his rights based on those interpretations, but the court did not decide whether transgender students faced discrimination in Gloucester, leaving that question to the lower court.

"At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity," the court's opinion said. "We conclude that the Department's interpretation of its own regulation . . . as it relates to restroom access by transgender individuals, is . . . to be accorded controlling weight in this case."

LGBT advocates celebrated Tuesday's court decision and were hopeful that it would help turn back the tide of efforts by state lawmakers to get bathroom restrictions on the books. The Human Rights Campaign, which tracks bills related to lesbian, gay, bisexual and transgender issues, counted 14 states that debated bills that would restrict bathroom usage for transgender students.

"I think this is going to be a wake-up call for legislators," said Peter Renn, an attorney for an LGBT advocacy group. He said he believes that lawmakers contemplating bathroom restrictions for transgender people are "essentially on a collision course with federal law and federal courts."

Lawyer Mat Staver of Liberty Counsel, which has backed efforts to roll back LGBT protections for students, took a more cautious view, noting that the judges opted to send the case back down to the district court. "I don't think this case has any definitive answer, and it's not a definitive ruling on what Title IX says," Staver said.

The issue has been at the center of state-level debates in recent months, most notably in North Carolina, where Gov. Pat McCrory (R) recently signed into law a ban on local government measures that protect gay and transgender people from discrimination; he focused specifically on the bathroom issue in arguing that the ban was necessary to prevent local governments from allowing "a man to use a woman's bathroom, shower or locker room." A transgender university student and employee already have sued to overturn the new law and the 4th Circuit's ruling could bolster their argument that bathroom restrictions are discriminatory, Renn said.

The North Carolina law has sparked protests and economic boycotts in the state. Duke University leaders this week publicly condemned "in the strongest possible terms" the North Carolina law and called for its repeal.

McCrory said in a video statement posted online Tuesday that he disagreed with the 4th Circuit's ruling, calling it a "bad precedent."

South Dakota Gov. Dennis Daugaard (R) vetoed a bill that would restrict transgender

public school students from using bathrooms in accordance with their gender identity, arguing that schools were best equipped to handle accommodations for transgender students.

Voters in Houston last year voted down a law that would have extended nondiscrimination protections to gay and transgender people, and a new law in Mississippi allows schools to require students to dress and use the bathroom in accordance with the gender on their birth certificate.

The case in Virginia centers on Grimm, now a junior at Gloucester High School. Grimm, who was born with female anatomy, came out as male to his classmates in high school and began using the boys' bathroom his sophomore year. Seven weeks later, angry parents raised concerns with the school board, prompting members to pass a policy that requires students to use school bathrooms corresponding with their "biological gender" and indicates that transgender students should use a separate, unisex bathroom.

Grimm sued the school board in federal court, arguing that the new rule violated Title IX, the federal law that bars gender discrimination in the nation's schools. He also asked for a preliminary injunction to allow him to use the boys' bathroom while his case proceeded.

Troy M. Andersen, chair of the Gloucester County School Board, and David Corrigan, the attorney representing the school board, did not respond to requests for comment Tuesday.

Transgender students say that using the bathroom that corresponds with their gender identity is important for them — and others — to feel comfortable. A transgender boy who appears male may generally raise alarms if he is forced to use the girls' bathroom.

Grimm has said that the debate made him the subject of ridicule within his community.

"Matters like identity and self-consciousness are something that most kids grapple with in this age range," Grimm said in January. "When you're a transgender teenager, these things are often very potent. I feel humiliated and dysphoric every time I'm forced to use a separate facility."

In a dissent, Judge Paul V. Niemeyer of the 4th Circuit said the ruling "completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes."

"This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect," Niemeyer wrote.

“Appeals Court Favors Transgender Student in Virginia Restroom Case”

The New York Times

Richard Fausset

April 19, 2016

Weeks after a new North Carolina law put transgender bathroom access at the heart of the nation’s culture wars, a federal appeals court in Richmond, Va., ruled on Tuesday in favor of a transgender student who was born female and wishes to use the boys’ restroom at his rural Virginia high school.

Advocates for lesbian, gay, bisexual and transgender people note that the ruling from the United States Court of Appeals for the Fourth Circuit applies to North Carolina, where the controversial law approved last month limits transgender people to bathrooms in government buildings, including public schools, that correspond with the gender listed on their birth certificates.

As a result of the ruling, those advocates say, that portion of the North Carolina law that applies to public schools now clearly violates Title IX — the federal law that prohibits gender discrimination in schools.

“Our expectation is that the North Carolina schools reverse course immediately, as in tomorrow,” Sarah Warbelow, the legal director for the Human Rights Campaign, an L.G.B.T. rights group, said Tuesday night.

The ruling in favor of Gavin Grimm, a junior at Gloucester High School in southeastern Virginia, does not immediately grant him the right to use the boys’ restrooms; rather, it directs a lower court that had ruled against him to re-evaluate Mr. Grimm’s request for a preliminary injunction to be able to use those restrooms.

But it is the first time that a federal appellate court has ruled that Title IX protects the rights of such students to use the bathroom that corresponds with their gender identity.

The ruling also comes as some school districts and state governments around the country are grappling with the question of whether transgender people should be allowed to go to the public facilities that correspond with their gender identity, or whether, as many conservatives believe, such access would infringe on the privacy rights of others.

Boycotts and protests have followed the passage of the North Carolina law, but Gov. Pat McCrory has essentially stood by it. On Tuesday, Joshua Block, a lawyer with the American Civil Liberties Union, which brought the case on Mr. Grimm’s behalf,

argued that such state and local legislation violated federal law.

“With this decision, we hope that schools and legislators will finally get the message that excluding transgender kids from the restrooms is unlawful sex discrimination,” he said in a statement.

The North Carolina law has prompted the Obama administration to consider whether the state would be ineligible for billions of dollars in federal funding for schools, housing and highways.

Mr. McCrory, a Republican who is seeking re-election in November, and other supporters of the law have played down suggestions that the Obama administration would rescind those billions. Mr. McCrory’s Democratic opponent, Roy Cooper, the state’s attorney general, has said in the past that the law may put the federal funding at risk and has refused to defend the state in a lawsuit challenging it.

In a statement Tuesday, Mr. McCrory said he strongly disagreed with President Obama and Mr. Cooper’s objective “to force our high schools to allow boys in girls’ restrooms, locker rooms or shower facilities,” but would evaluate the effect of Tuesday’s ruling on North Carolina law and policy.

The A.C.L.U. brought the case on behalf of Mr. Grimm, who was born female but identifies as a male, in June, seeking a preliminary injunction so that Mr. Grimm could use the boys’ restrooms at his school.

The school administration initially allowed him to do so, but the local school board later approved a policy that barred him from the boys’ restrooms; according to court documents, the policy also “required students with ‘gender identity issues’ to use an alternative private facility” to go to the bathroom.

Judge Robert G. Doumar of Federal District Court ruled against Mr. Grimm in September, dismissing his claim that the school board had violated Title IX, although the judge did allow his case to go forward under the equal protection clause of the 14th Amendment.

The ruling by a three-judge panel on Tuesday reversed the lower court’s dismissal of the Title IX claim, stating that the District Court “did not accord appropriate deference” to regulations issued by the Department of Education. The department’s current guidelines dictate that schools “generally must treat transgender students consistent with their gender identity.”

Roger Gannam, a lawyer with the conservative Liberty Counsel, which filed an amicus brief in the case on behalf of the defendant, the Gloucester County School Board, said Tuesday that the court had engaged in “blatant judicial legislation.”

“It’s very disappointing, and it’s frightening, in a sense,” he said.

Mr. Block of the A.C.L.U., in a phone interview, said he was confident that the District Court would rule in Mr. Grimm’s favor and allow him to use the restroom. And he noted that the five states covered by the Fourth Circuit — Virginia, North Carolina, Maryland, West Virginia and South Carolina — must now follow the federal Department of Education’s interpretation of Title IX on this issue.

The Obama administration has been aggressive in its efforts to ensure that transgender students can use the bathrooms in public schools that correspond with their gender identities. Some federal agencies have threatened to rescind funding to pressure some municipal governments in California and Illinois to change their policies and allow transgender students to do so. In June, the Justice Department filed a "statement of interest" in Mr. Grimm's case.

We are pleased with the Fourth Circuit's decision, which agreed with the position that the United States advocated in its brief," the Justice Department said in a statement Tuesday night.

In an email, a clerk for the Gloucester school system said the superintendent, Walter Clemons, "has no comment at this time."

In a statement released through the A.C.L.U., Mr. Grimm said: "I feel so relieved and vindicated by the court's ruling. Today's decision gives me hope that my fight will help other kids avoid discriminatory treatment at school.

“Federal Transgender Bathroom Access Guidelines Blocked by Judge”

The New York Times

Erick Eckholm and Alan Blinder

August 22, 2016

A federal judge has blocked the Obama administration from enforcing new guidelines that were intended to expand restroom access for transgender students across the country.

Judge Reed O’Connor of the Federal District Court for the Northern District of Texas said in a 38-page ruling, which he said should apply nationwide, that the government had not complied with federal law when it issued “directives which contradict the existing legislative and regulatory text.”

Judge O’Connor, whom President George W. Bush nominated to the federal bench, said that not granting an injunction would put states “in the position of either maintaining their current policies in the face of the federal government’s view that they are violating the law, or changing them to comply with the guidelines and cede their authority over this issue.”

The judge’s order on Sunday, in a case brought by officials from more than a dozen states, was a victory for social conservatives in the continuing legal battles over the restroom guidelines, which the federal government issued this year. The culture war over the rights of transgender people, and especially their right to use public bathrooms consistent with their gender identities, has emerged as an emotional cause among social conservatives.

The Obama administration’s assertion that the rights of transgender people in public schools and workplaces are protected under existing laws against sex discrimination has been condemned by social conservatives, who said the administration was illegally intruding into local affairs and promoting a policy that would jeopardize the privacy and safety of schoolchildren.

The ruling could deter the administration from bringing new legal action against school districts that do not allow transgender students to use bathrooms and locker rooms of their choice.

“We are pleased that the court ruled against the Obama administration’s latest illegal federal overreach,” Attorney General Ken Paxton of Texas said in a statement on Monday. “This president is attempting to rewrite the laws enacted by the elected representatives of the people and is threatening to take away federal funding from schools to force them to conform.”

A spokeswoman for the Justice Department, Dena W. Iverson, said the department was

disappointed with the decision and was reviewing its options.

In a statement, several civil rights organizations that had submitted a brief opposing the injunction called the ruling unfortunate and premature.

“A ruling by a single judge in one circuit cannot and does not undo the years of clear legal precedent nationwide establishing that transgender students have the right to go to school without being singled out for discrimination,” the groups — Lambda Legal; the American Civil Liberties Union and the A.C.L.U. of Texas; the National Center for Lesbian Rights; the Transgender Law Center; and G.L.B.T.Q. Legal Advocates & Defenders — said in their statement.

The ultimate impact of the Texas decision is unclear and is likely to be limited, legal experts said. For one thing, more senior courts in other regions have agreed with the administration that transgender students and workers are protected by existing laws against sex discrimination, and their decisions will not be altered by the Texas ruling.

Also, the decision will not necessarily affect the outcome of other current cases. In the most prominent one, a federal court in North Carolina is weighing almost identical issues in suits brought by civil rights groups and the Justice Department that seek to block a state law requiring people in government buildings, including public schools, to use bathrooms that correspond to the gender on their birth certificates.

Adding another major note of uncertainty, the United States Supreme Court has temporarily blocked a decision by the Fourth Circuit Court of Appeals that required a school district in Virginia to allow a transgender boy to use the boys’ bathrooms. The Supreme Court issued a temporary injunction until it decides, probably this fall, whether to hear the case.

If the Supreme Court does take the case and reaches a majority decision one way or another, then existing rulings by district and appeals courts could be superseded. If the Supreme Court takes the Virginia case but then is divided, four to four, on the issues, the Fourth Circuit’s existing decision in favor of transgender rights would take effect, although it would not be a nationally binding precedent.

The Texas lawsuit, filed by Mr. Paxton on behalf of officials in 13 states, argued that the Obama administration had overstepped its authority in a series of pronouncements in recent years holding that discrimination against transgender people is a violation of existing laws against sex discrimination, including Title IX in federal education laws and Title VII in federal civil rights laws governing the workplace.

In May, in the latest such statement, the federal Justice and Education Departments issued a letter to public schools stating that transgender people should be free to use bathrooms and locker rooms that match their gender identities, and that schools that refused could lose federal funds.

“A school may not require transgender students to use facilities inconsistent with

their gender identity or to use individual-user facilities when other students are not required to do so," the letter stated.

The letter was quickly condemned by social conservatives, leading numerous state governments and school districts around the country to file lawsuits seeking to prevent the administration from taking action.

The Obama administration, seeking to deflect the Texas lawsuit and another brought by 10 other states, argued that the directive was not a regulation or mandate but rather an explanation of how the administration interpreted existing sex-discrimination protections. But it carried a threat that the administration might sue noncompliant school districts and seek to cut off vital federal education aid.

The states argued not only that the administration was wrong as a matter of law, but also that it had failed to follow legal procedures for issuing what the states called a "new mandate" that "harms school districts from coast to coast by usurping lawful authority" and jeopardizing "billions of dollars in federal funding."

The Justice Department countered that the case was not suitable for litigation because the states had not shown evidence that they faced imminent harm, let alone a likelihood of success on the merits.

If the administration brought action against school districts, the government and groups supporting lesbian, gay, bisexual and transgender rights argued, the school districts or states could make their case in court.

"There is a multistep procedure before a state might lose federal funding," said Jon W. Davidson, the legal director of Lambda Legal. "The government would have to specifically challenge a state, the state could respond, the government could bring a lawsuit, and then litigation in the courts would decide whether the government's interpretation of the law is correct or not."

Trinity Lutheran Church of Columbia, Inc. v. Pauley

15-577

Ruling Below: *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015)

Trinity Lutheran Church, a church that operated preschool and daycare programs, filed federal and state constitutional claims against the Director of the Missouri Department of Natural Resources Solid Waste Management Program, on the grounds that denial of the church's application for grant for purchase of recycled tires to resurface the playground served as religious discrimination. The District Court for the Western District of Missouri dismissed the action. Trinity Lutheran appealed. The Court of Appeals for the Eight Circuit affirmed.

Question Presented: Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC., Plaintiff–Appellant
v.
Sara Parker PAULEY, in her official capacity, Defendant–Appellee
The Becket Fund for Religious Liberty, Amicus on Behalf of Appellant(s)
American Civil Liberties Union Foundation, et al., Amici on Behalf of Appellee(s).

United States Court of Appeals, Eighth Circuit

Filed on May 29, 2015

[Excerpt; some citations and footnotes omitted]

LOKEN, Circuit Judge.

Trinity Lutheran Church of Columbia, Inc. ("Trinity Church"), filed this action alleging that Sara Pauley, acting in her official capacity as Director of the Missouri Department of Natural Resources ("DNR"), violated Trinity Church's rights under the United States and Missouri Constitutions by denying its application for a grant of solid waste management funds to resurface a playground on church property. The district court1 dismissed the Complaint for failure to state a claim and denied Trinity Church's post-dismissal motion for leave to file an amended complaint. Trinity Church appeals both rulings. We affirm.

I. Background

Trinity Church operates on its church premises a licensed preschool and daycare called the Learning Center. Initially established as a non-profit corporation, the Learning Center merged into Trinity Church in 1985. The Learning Center has an open admissions policy. It is a ministry of Trinity Church that teaches a Christian world view

and incorporates daily religious instruction in its programs.

DNR offers Playground Scrap Tire Surface Material Grants, a solid waste management program. The grants provide DNR funds to qualifying organizations for the purchase of recycled tires to resurface playgrounds, a beneficial reuse of this solid waste. In 2012, Trinity Church applied for a grant to replace the Learning Center's playground surface, disclosing that the Learning Center was part of Trinity Church. On May 21, 2012, the Solid Waste Management Program Director wrote the Learning Center's Director, advising:

[A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion."

A Solid Waste Management Program planner subsequently advised the Solid Waste Management District Director that Trinity Church's application ranked fifth out of forty four applications in 2012, and that fourteen projects were funded.

Trinity Church commenced this action, asserting federal question jurisdiction over claims that the denial of its Scrap Tire application violated (i) the Equal Protection Clause of the Fourteenth Amendment, (ii) its First Amendment right to free exercise of religion, (iii) the First Amendment's Establishment Clause, and (iv) its First Amendment right of free speech. The Complaint invoked the district court's supplemental jurisdiction over a fifth cause of action, alleging that DNR's denial violated Article I, Section 7, of the Missouri Constitution. Trinity Church sought injunctive and declaratory relief against DNR "policies and actions in denying grants to applicants who are churches or connected to churches."

The district court granted Director Pauley's motion to dismiss the complaint for failure to state a claim. Trinity timely moved for reconsideration and for leave to amend its complaint to add a factual allegation that the DNR had previously given grants under the Scrap Tire Program to at least fifteen other religious organizations, including churches. The district court denied the motion to reconsider. It also denied leave to amend because Trinity Church "fail[ed] to provide any explanation for not amending its Complaint prior to the dismissal of this action." The court further noted that the amendment was "futile" because, while Trinity Church argued the newly alleged fact "undermines Missouri's purported interest" in denying the application, Trinity Church "failed to identify any valid legal theory under which Missouri would need to show the existence of a compelling interest."
Trinity Church appeals every aspect of the district court's rulings, except the dismissal of its First Amendment free speech claim. We review the dismissal of a complaint for failure to state a claim de novo. We review the denial of leave to amend for abuse of discretion, but we review de novo legal conclusions underlying a determination of futility.

II. The Federal Constitutional Claims

"Missouri has a long history of maintaining a very high wall between church and state." Two provisions in the Missouri Constitution "declaring that there shall be a separation of

church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." Those provisions, one of which is at the core of this dispute, were initially adopted in 1870 and 1875. As re-adopted in the Missouri Constitution of 1945, they now provide:

Art. I, § 7. That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.

Art. IX, § 8. Neither the general assembly, nor any county, city, town [etc.] shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school ... or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation ... ever be made by the state ... for any religious creed, church, or sectarian purpose whatever.

Trinity Church's Complaint alleged that, by denying its grant application solely because it is a church, DNR (i) violated the Free Exercise clause because it "target[ed] religion for disparate treatment" without a compelling government interest; (ii) violated the Establishment Clause because the denial "was hostile to religion" and required DNR "to determine what is religious enough" to justify denial; and (iii) violated the Equal Protection Clause by discriminating against religious learning centers and day care organizations without a compelling government interest. Although Trinity Church couched these claims as an attack on DNR's "customs, policies and practices," all its claims are plainly facial attacks on Article I, § 7, of the Missouri Constitution, which provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church," and which was cited by DNR as the sole basis for its denial.

Viewed in this light, it is apparent that Trinity Church seeks an unprecedented ruling—that a state constitution violates the First Amendment and the Equal Protection Clause if it bars the grant of public funds to a church. To prevail, Trinity Church must clear a formidable if not insurmountable hurdle, what appears to be controlling adverse precedent. In *Luetkemeyer*, a three-judge district court was convened in the Western District of Missouri to consider a claim that the First Amendment and the Equal Protection clause required Missouri to provide the same public transportation benefits for the pupils of church-related schools as were being provided to transport children to public schools. In denying plaintiffs injunctive and damage relief, the majority explained:

> "We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power' ... That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States."

The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question.

Plaintiffs appealed to the Supreme Court of the United States. The Court summarily affirmed. Two Justices dissented, arguing the Court should have noted probable jurisdiction and set the case for argument on two questions, whether the different treatment of public-school and parochial-school children violated equal protection principles, and whether the arbitrary denial of a general public service made the State an "adversary" of religion.

When the Supreme Court summarily affirms a lower federal court, its decision "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided," but the Court has affirmed only the judgment, not necessarily the rationale of the lower court. Here, while the parameters of the Supreme Court's summary affirmance in *Luetkemeyer* may not be free from doubt, given the issues addressed in the dissent from summary affirmance, we conclude that the Court necessarily decided that Article I, § 7, of the Missouri Constitution is not facially invalid. That conclusion is supported by the Court's prior summary affirmance in *Brusca v. State of Mo. ex rel. State Bd. of Educ*.

Trinity Church requests injunctive relief compelling Missouri to provide grants directly to churches, funding that is prohibited by a provision of the Missouri Constitution that has been a bedrock principle of state law for nearly 150 years. Without question, a state constitutional provision is invalid if it conflicts with either religion clause of the First Amendment, or with the Fourteenth Amendment's Equal Protection Clause. We also recognize that the Supreme Court's Establishment Clause jurisprudence has evolved rather dramatically in the forty years since *Luetkemeyer* was decided. For example, it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause. But the issue here is not what the State is constitutionally permitted to do, but whether the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause compel Missouri to provide public grant money directly to a church, contravening a long-standing state constitutional provision that is not unique to Missouri.

No Supreme Court case, before or after *Luetkemeyer*, has granted such relief. Indeed, in *Locke v. Davey*, the Court upheld State of Washington statutes and constitutional provisions that barred public scholarship aid to post-secondary students pursuing a degree in theology. The Court noted the "popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." In *Locke*, "the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients," prompting the Court to examine carefully the "relatively minor burden" the scholarship exclusion placed on students taking devotional theology courses. By contrast, in this case there is no break in the link. Trinity Church seeks to compel the direct grant of public funds to churches, another of the "hallmarks of an 'established' religion." Therefore, while there is active academic and judicial debate about the breadth of the decision, we conclude that Locke reinforces our decision that *Luetkemeyer* is controlling precedent

foreclosing Trinity Church's facial attack on Article I, § 7, of the Missouri Constitution.

Justice Scalia, dissenting for himself and Justice Thomas in *Locke*, articulated a contrary view of the First Amendment's religion clauses:

"When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax."

If the Court were to adopt this view, and if Justice Scalia's reference to withholding benefits to "individuals" were held to include direct public benefits to churches, then Article I, § 7, of the Missouri Constitution could not be validly applied to deny church participation in a host of publicly-funded programs. That may be a logical constitutional leap in the direction the Court recently seems to be going, but it is a leap of great magnitude from the Court's decisions in *Luetkemeyer* and in *Locke*. In our view, only the Supreme Court can make that leap. As the Court has often reminded us, a court of appeals "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." We therefore follow Luetkemeyer and the many Supreme Court of Missouri decisions concluding that Article I, § 7, of the Missouri Constitution does not conflict with the First Amendment or the Equal Protection Clause of the United States Constitution.

For these reasons, we conclude that the district court correctly dismissed Trinity Church's federal constitutional claims for failure to state a claim upon which relief could be granted.

III. The Missouri Constitutional Claim

Trinity Church's fifth cause of action alleged that the DNR's grant denial violated the second clause of Article I, § 7, which forbids "any discrimination made against any church," and that granting the application would not have violated the first clause because it would not have been "in aid of any church." Though pleaded last, this was the only claim argued at length by Trinity Church at the hearing on defendant's motion to dismiss, and it was the lead argument in its brief on appeal (seemingly an implicit acknowledgment the federal constitutional claims are weak). This inversion of the theories pleaded distracted the district court from a very serious issue—after dismissing the federal claims, should the court have declined to exercise its supplemental jurisdiction over a state law claim that is based on an important provision of the Missouri Constitution and turns on the proper interpretation of rather ambiguous Supreme Court of Missouri precedents? We think that question should have been answered affirmatively, but we will nonetheless review the district court's dismissal of this claim on the merits.

Under Missouri law, the district court had jurisdiction to decide the state law claim pleaded in the initial Complaint because whether Article I, § 7, permits DNR to deny Scrap Tire Program grants to all church applicants is an issue of law. Turning to the merits, we agree with the district court that the two clauses of Article I, § 7, must be interpreted in harmony. Therefore, if granting Trinity Church's application would have constituted "aid" to a church prohibited by the first clause of Article I, § 7, then denying the grant was not a discriminatory action prohibited by the second clause. So the district court properly focused on Trinity

Church's contention that a Scrap Tire Program grant is not "aid" within the meaning of the first clause of Article I, § 7, because it involves a quid pro quo, with the applicant undertaking obligations under the Scrap Tire Program in exchange for the granted funds. On appeal, Trinity Church argues the court erred in rejecting this interpretation of state law.

Trinity Church bases its contention on the reasoning in two Supreme Court of Missouri decisions, *Kintzele v. City of St. Louis*, which Trinity Church did not cite to the district court, and *Americans United v. Rogers*, which the district court described as "grossly misrepresented" by Trinity Church. Concluding that the quid pro quo exception to Article I, § 7's, prohibition was not supported by any Missouri case, the court instead relied on the many Supreme Court of Missouri decisions that "strictly interpreted [Article I] Section 7 to prohibit public funding of religious institutions" in order to maintain "the higher wall of separation between church and state present in the Missouri Constitution."

Based on these decisions, the district court concluded that Trinity Church's state law claim under the Missouri Constitution must be dismissed because its "own pleadings demonstrate that funds from [DNR] in the form of the Scrap Tire Program would aid the Church and its Ministry Learning Center within the meaning of Missouri law." We agree with this assessment of how the Supreme Court of Missouri would decide this claim. In *Kintzele*, plaintiffs alleged that a subsidized sale of land by the State to St. Louis University constituted an unconstitutional use of public funds in aid of a private sectarian school. The Court declined to invalidate the sale, concluding that, because Missouri law authorized "sale by negotiation at fair value," and the State tried competitive bidding and thereafter sold the land to SLU at nearly twice the highest bid, "plaintiffs' contention of illegal ... subsidy from public funds cannot be sustained." This decision in no way supports Trinity Church's claim that a Scrap Tire Program grant is not "aid."

In *Americans United*, the Supreme Court of Missouri upheld a statute providing tuition grants to students at approved public and private colleges. The statute was invalidated by the trial court, applying Article I, § 7, and Article IX, § 8. The State appealed. Noting that "[a]n act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision," the Court concluded it could not "with confidence declare that the statutory program" clearly contravened these constitutional provisions because "the parochial school cases with which the court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved." The defendants' quid pro quo argument was noted but not adopted.

Americans United demonstrates that Article I, § 7, will be difficult to apply in some cases, particularly when an expenditure authorized by state statute is challenged as beyond the State's constitutional authority. But that decision does not support Trinity Church's claim to affirmative relief in this case. In upholding the challenged program, the Court reaffirmed that the Missouri Constitution is "more restrictive than the First Amendment to the United States Constitution in prohibiting the expenditures of public funds in a manner tending to erode the absolute separation of church and state," and it noted that the program was "designed and implemented for the benefits of the students, not of the institutions, and that the awards are

made to the students, not to the institutions. The legislative purpose in no wise includes supporting aiding or sustaining either public or private educational institutions."

We affirm the district court's dismissal of the state law claim under the Missouri Constitution in Trinity Church's original Complaint.

IV. The Motion to Amend

Following the district court's dismissal order, Trinity Church filed a motion to reconsider that included a motion for leave to amend its Complaint. The proposed Amended Complaint added a fact paragraph alleging that the DNR had previously awarded Scrap Tire Program grants to at least fifteen other religious organizations. It also added a paragraph to the Equal Protection Clause cause of action alleging that DNR "has allowed other similarly-situated religious organizations to participate in the Scrap Tire Program." All other allegations in the ninety-seven-paragraph Complaint were unchanged. Trinity Church attached as an exhibit a document dated October 19, 2010, that listed "Prior Recipients of Scrap Tire Surface Material Grants." The district court denied the motion because Trinity Church failed to provide any explanation for failing to amend prior to dismissal of its action.

"Post-dismissal motions to amend are disfavored." While a post-dismissal motion may be granted if timely requested, "interests of finality dictate that leave to amend should be less freely available after a final order has been entered." Numerous cases have ruled that unexcused delay is sufficient to justify denial of post-dismissal leave to amend.

On appeal, Trinity Church for the most part ignores this well-established law, simply distinguishing the cases cited by the district court because Trinity Church was not "given any warning that it needed to amend its pleadings." The briefs on appeal assert that Trinity Church learned in discovery that other religious entities had received grants, but counsel admitted at oral argument that Trinity Church obtained the October 2010 listing attached to the proposed Amended Complaint from the DNR website, where it was doubtless available when Trinity Church filed its Complaint in January 2013. Thus, the district court did not abuse its discretion in concluding that Trinity Church failed to provide a valid reason for its failure to amend prior to dismissal.

The district court's alternative futility ruling is more problematic and warrants de novo consideration. The proposed amended pleading did not alter the allegations in the First Amendment causes of action based on the Free Exercise Clause and the Establishment Clause; it only alleged a different type of discrimination violating the Equal Protection Clause, discrimination between "similarly situated religious organizations." Thus, when Trinity Church argued to the district court that its newly discovered evidence supported the claim that DNR's grant application denial "lacks a compelling interest," the district court was right to observe that this added nothing to the original claims because, in the absence of a valid Free Exercise or Establishment Clause claim, the Equal Protection Clause claim was subject to rational basis review and no compelling interest need be shown.

There is a problem lurking here, one that was camouflaged by Trinity Church's primary contention that Article I, § 7, violates the federal and state constitutions by mandating that churches be excluded from the Scrap Tire Program. The problem is that these constitutional claims take on an entirely new complexion if DNR is awarding Scrap Tire

grants to some churches, but not to others. If intentional, that would be a clear violation of the First Amendment, and no doubt of the Missouri Constitution as well. If the proposed Amended Complaint plausibly pleaded this dramatically new theory, did the district court abuse its discretion in failing to grant leave to amend, even if Trinity Church failed to clearly articulate the theory? We conclude not, for two distinct but related reasons.

First, "a district court does not abuse its discretion in refusing to allow amendment of pleadings to change the theory of a case if the amendment is offered after summary judgment has been granted against the party, and no valid reason is shown for the failure to present the new theory at an earlier time." In *Littlefield*, we affirmed the denial of leave to amend a dismissed § 1983 due process action to assert a new equal protection claim. That is directly analogous to the situation here. The facts were at hand to assert this narrower theory in the initial Complaint, but Trinity Church chose not to do so. "The district court did not abuse its discretion in concluding [this] tactical choice did not demonstrate diligence or good cause."

Second, the new theory we have identified would significantly alter the lawsuit's procedural landscape. Under the new theory, both the federal and state constitutional claims would turn on the fact bases for DNR's allegedly discriminatory treatment of similarly situated religious organizations, not on a Constitution-driven "policy" of not making any grants to churches. For the federal claims, this raises a serious question of what is called Pullman abstension—"federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." Here, a state court would be in the best position to decide the "difficult and unsettled" question of how Article I, § 7, and other provisions of the Missouri Constitution and statutes apply to DNR's fact-based decisions whether to award Scrap Tire Program grants to particular church-related applicants. And state court resolution of that question would likely moot or resolve, and most certainly would affect, a federal court's resolution of the substantial, largely overlapping First Amendment and Equal Protection Clause issues.

For the state law claim, the new theory appears to raise serious jurisdiction and venue issues under the Missouri Administrative Procedure Act. These issues would best be resolved by a state court, further supporting *Pullman* abstention. In these circumstances, even if the proposed Amended Complaint pleaded a new theory of relief that was not entirely futile, the district court did not abuse its discretion in denying an untimely request to fundamentally alter the litigation.

The judgment of the district court is affirmed.

…

GRUENDER, Circuit Judge, concurring in part and dissenting in part.

Trinity Lutheran Church ("Trinity Lutheran") applied for a grant through the Learning Center, a daycare and preschool that Trinity Lutheran runs. This grant would allow the Learning Center to make its playground safer by swapping the gravel that covers it for a rubber surface made from recycled tires. The Missouri Department of Natural Resources ("the Department"), which administers this grant program, accepted Trinity Lutheran's application and ranked it fifth out of the forty-four applications from that year. The Department approved fourteen grant applications, but

Trinity Lutheran's was not among them. Relying solely on the Missouri Constitution's prohibition on using public funds to aid a church, Mo. Const. art. I, § 7, the Department denied Trinity Lutheran's grant application. Thus, but for the fact that the Learning Center was run by a church, it would have received a playground-surfacing grant. Where, as here, generally available funds are withheld solely on the basis of religion, the Supreme Court's decision in *Locke v. Davey* governs claims brought under the Free Exercise Clause of the First Amendment. Applying the careful balance struck by *Locke*, I would conclude that Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause.

The court attempts to impose a barrier to full consideration of *Locke*. Trinity Lutheran, the court concludes, challenges the facial validity of Article I, § 7 of the Missouri Constitution by requesting a ruling that "a state constitution violates the First Amendment and the Equal Protection Clause if it bars the grant of public funds to a church." Ante at 5. By framing Trinity Lutheran's claim this broadly, the court avoids fully grappling with *Locke* by merely pointing to an instance in which this state constitutional provision has been upheld. The court concludes that the Supreme Court's summary affirmance in *Luetkemeyer v. Kaufmann*, a case that concerned the separate issue of busing is one such application.

But Trinity Lutheran does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to bring an as-applied challenge; the complaint says so numerous times. However, determining whether a constitutional challenge is purely as-applied, purely facial, or somewhere in between turns on whether the plaintiff's "claim and the relief that would follow ... reach beyond the particular circumstances of the[ ] plaintiff [ ]." If they do, the claim is facial but only "to the extent of that reach." When analyzing a claim and the relief that would follow, a court should "construe a plaintiff's challenge, if possible, to be as-applied." Trinity Lutheran, as the court acknowledges, frames its challenge as an attack on the Department's "customs, policies, and practices." And Trinity Lutheran specifically requests a declaration that the Department's denial of its grant application was unconstitutional. Trinity Lutheran also specifically requests injunctive relief prohibiting the Department from discriminating against it in future grant applications. This claim and relief only implicate Trinity Lutheran. Consequently, Trinity Lutheran does not contend that Article I, § 7 of the Missouri Constitution is unconstitutional in all of its applications.

This brings me to *Locke*. In the face of a Free Exercise challenge, the Court upheld a college scholarship program that prevented students from using the scholarship to pursue a degree in devotional theology, a course of study that the court characterized as "akin to a religious calling as well as an academic pursuit." The Court began with the proposition that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Because the "State's disfavor of religion (if it can be called that)" in prohibiting recipients from using the scholarship to major in devotional theology "is of a far milder kind," the Court concluded that the scholarship program was not presumptively unconstitutional. In upholding the program, the Court found that it "goes a long way toward including religion in its benefits"—for example, by allowing recipients to attend pervasively religious schools that are accredited and to take devotional-theology courses. To the Court, this "relatively minor

burden" was justified by a "historic and substantial state interest" of not funding "an essentially religious endeavor." This interest, the Court explained, was rooted in our nation's history of "popular uprisings against procuring taxpayer funds to support church leaders" as well as the founding-era decisions of many states to "place[ ] in their constitutions formal prohibitions against using tax funds to support the ministry." Considering this "historic and substantial state interest" alongside the "relatively minor burden," the Court found no violation of the Free Exercise Clause.

Locke did not leave states with unfettered discretion to exclude the religious from generally available public benefits. To the contrary, Chief Justice Rehnquist's opinion for seven members of the Court was careful to acknowledge its parameters. "The [*Locke*] opinion thus suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Locke* "suggests the need for balancing interests: its holding that 'minor burden[s]' and 'milder' forms of 'disfavor' are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." Simply put, the *Locke* Court "indicated that the State's latitude with respect to funding decisions has limits."

Applying the balancing of interests contemplated by *Locke*, I conclude that Trinity Lutheran has sufficiently pled a Free Exercise violation. The disfavor of religion here is more pronounced than in Locke. The student in Locke could use his scholarship to attend a pervasively religious school that was accredited and to take courses in devotional theology there. And a pervasively religious school that received scholarship money even could require its students to take devotional-theology classes. The program, as the Court put it, went "a long way toward including religion in its benefits." The same cannot be said here. Trinity Lutheran has pled that the Department categorically prohibited the Learning Center from receiving a playground-surfacing grant because it is run by a church. This blanket prohibition is different in kind from the disfavor of religion that was present in *Locke*. Whereas the *Locke* program excluded religious study while also including it, the Department has entirely excluded the Learning Center from receiving a playground-surfacing grant. Much like the Tenth Circuit, I read *Locke* to impose some bounds on such a "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support."

The Department's reason for singling out the Learning Center differs from the historic and substantial state interest in *Locke*, where the state sought to avoid paying for the training of clergy, "an essentially religious endeavor." The sheer religiosity of this activity led the court to remark that "we can think of few areas in which a State's antiestablishment interests come more into play." It is true that the Department's interest in enforcing Article I, § 7 of the Missouri Constitution is historic in the sense that this provision is longstanding. But the state's interest in *Locke* traced to concerns that were specific to paying for training the clergy. The Court was unequivocal about this point: "[T]he only interest at issue here is the State's interest in not funding the religious training of clergy." Here, by contrast, the Department seeks to enforce a general prohibition on aid to a church that is in no way specific to the

playground-surfacing grant program. This case therefore lacks the correspondence between the past and the Department's present interest that the Court found significant in *Locke*.

Perhaps more importantly, the substantial antiestablishment interest identified in *Locke* is not present here. Unlike a student preparing for the ministry, which is "an essentially religious endeavor," schoolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion. If giving the Learning Center a playground-surfacing grant raises a substantial antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be. When the *Locke* Court spoke of a substantial antiestablishment concern, I seriously doubt it was contemplating a state's interest in not rubberizing a playground surface with recycled tires.

In light of the Department's negligible antiestablishment interest, I conclude that the court overstates the significance of the Department's concern about giving a grant directly to the Learning Center, rather than having the money filtered through the independent choice of private individuals. "Although private choice is one way to break the link between government and religion, it is not the only way." Indeed, even though the playground-surfacing program involves a direct transfer of funds to the Learning Center, the court concludes that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire program without violating the Establishment Clause." I agree. And I, of course, agree with the court that, in many cases, a concern about giving money directly to a church-run school may amount to a historic and substantial state interest. Indeed, were it to be uncovered during discovery that the Learning Center regularly uses its playground for religious activities, my Free Exercise concern would be less acute. However, at this stage of the litigation, I cannot conclude that the Department's concern about direct funding for a rubber playground surface translates into a historic and substantial antiestablishment concern.

In concluding that Trinity Lutheran has stated a claim under the Free Exercise Clause, I acknowledge that "[t]he precise bounds of the Locke holding ... are far from clear." However, the best reading of *Locke*, in my view, is that in the absence of a historic and substantial interest, the Department's "latitude to discriminate against religion ... does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." I therefore respectfully dissent from the court's affirmance of the dismissal of Trinity Lutheran's Free Exercise claim. Because this claim is linked to Trinity Lutheran's Equal Protection claim, I dissent from the court's disposition of this claim as well. Moreover, because I would reverse the district court's dismissal of Trinity Lutheran's complaint, I need not reach the separate question of whether the district court abused its discretion by denying Trinity Lutheran's motion to amend that complaint. I otherwise concur in the court's opinion.

“Supreme Court agrees to hear case over separation of church and state”

The Washington Post

Robert Barnes

January 15, 2016

The Supreme Court on Friday agreed to hear another legal battle over the separation of church and state, and will determine whether Missouri improperly excluded a church playground from a state program that provided safer play surfaces.

Trinity Lutheran Church in Columbia applied to be part of a state initiative that recycles tires so that it could replace the pea gravel in its day-care center’s playground with a bouncier surface. Although the church’s application ranked high in the state’s 2012 Playground Scrap Tire Surface Material Grant Program, it was ultimately turned down.

A letter from the Missouri Department of Natural Resources said including the church would violate a section of the Missouri constitution that says “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion.”

A judge agreed with the state, and the entire U.S. Court of Appeals for the 8th Circuit split on the question.

The conservative Alliance for Defending Freedom brought the case to the Supreme Court and said constitutional protections against the establishment of religion could not be invoked to deny the church’s application for a playground surface.

“Trinity does not seek funding for an essentially religious endeavor where the state’s anti-establishment concerns may be heightened,” the church said in its petition to the court.

“Trinity seeks a grant for a rubber pour-in-place playground surface where its children and those from the community play. Seeking to protect children from harm while they play tag and go down the slide is about as far from an ‘essentially religious endeavor’ as one can get.”

ADF Senior Counsel Erik Stanley said in a statement that the case is about “religious hostility.”

“This case has huge implications for state constitutional provisions across the nation that treat religious Americans and organizations as inferiors solely because of their religious identity,” he said.

The state responded that its actions did not raise the kind of issues the court needed to settle.

The question in the case is “not whether a state can exclude churches and other religious institutions from a program that

otherwise provides benefits to everyone," wrote Missouri Attorney General Chris Koster (D). "Rather, it is whether states are required by the U.S. Constitution to violate their own constitutions and choose a church to receive a grant when that means turning down nonchurch applicants."

Both sides say the case will require justices to reexamine a 2004 Supreme Court ruling that said states that offer college scholarships can deny them to students majoring in theology.

The Missouri case is the latest reflecting the court's recent interest in religious rights. It already has accepted cases that ask whether religious groups are protected from having to comply with the Affordable Care Act's requirement that employees receive contraceptive services.

The new case is *Trinity Lutheran Church v. Pauley*.

“Playground spat looms as key church-state separation case”

The Washington Times

Valerie Richardson

January 20, 2016

A playground spat over surfacing made out of scrap tires is looming as a pivotal church-state separation case, one that religious freedom advocates say could provide relief from what they see as government hostility toward faith.

The U.S. Supreme Court teed up the battle when it agreed last week to consider *Trinity Lutheran Church v. Pauley*, a 2013 lawsuit filed by the church after the state of Missouri rejected its application for a grant to replace its preschool’s playground pebbles with repurposed rubber from old tires.

State officials said the preschool was ineligible because it was run by a church, citing an 1875 Missouri constitutional amendment — known as the Blaine Amendment — prohibiting public funds from being used “in aid of any church.”

Three dozen states have similar amendments, but they “shouldn’t be applied in a way that would treat churches and religious organizations worse than everybody else simply because they’re a church,” said Erik Stanley, Alliance Defending Freedom senior counsel.

The 8th Circuit Court of Appeals upheld last year the trial court’s ruling against Trinity Lutheran, but if that decision is allowed to stand, “it could spell disaster for all kinds of participation by churches and other religious groups in what are evenhanded government programs,” he said.

“Taken to the extreme, it could even mean that a state could justify not providing fire protection to a church,” Mr. Stanley said. “They could say, ‘That’s aid to a church. And so we’re not going to do that under our state constitutional provision.’”

The church said in its appeal to the high court that though the preschool itself may be part of its ministry, the grant — and the playground — were meant for purely secular purposes.

“Seeking to protect children from harm while they play tag and go down the slide is about as far from an ‘essentially religious endeavor’ as one can get,” the church argued.

That the Supreme Court has agreed to hear the case has groups that promote a strict separation of church and state on high alert. The fear is that the court could loosen a 2004 decision that held that Washington state could exclude a college student seeking a divinity degree from its tuition-aid program.

“We were surprised that the Supreme Court took this case, and we are definitely concerned that the Supreme Court has taken

this case," said Alex Luchenitser, associate legal director for Americans United for Separation of Church and State. "It is possible that this case could erode state constitutional restrictions on the public funding of religious institutions."

The case is also being watched by constitutional scholars.

"Regardless of outcome, the case will be one for the history books," said Noah Feldman, Harvard professor of constitutional and international law, in a column for Bloomberg View.

When states began passing their own Blaine amendments in the late 1800s, a key issue was whether Catholic schools could receive public funds. More recently, courts have wrestled with whether the amendments forbid state tax dollars from being used for everything from church-run halfway houses to soup kitchens.

Blaine amendments

It's possible that the high court could examine the constitutionality of Blaine amendments, which go beyond the U.S. Constitution's prohibition against the establishment of a state religion. Critics contend the provisions, named after James Blaine, a House speaker and senator from Maine who ran unsuccessfully for president in 1884, are rooted in anti-Catholic animus.

Eric Rassbach, deputy general counsel for The Becket Fund for Religious Liberty, said, "I would be surprised if the court simply passes the history by."

"It's a bit like if they were adjudicating a Jim Crow statute and they didn't mention anything about Jim Crow," Mr. Rassbach said. "This is Jim Crow for Catholics. You don't have to look too deeply into the second half of the century in the United States to see where these provisions were coming from. 'Rum, Romanism and rebellion' — that's the kind of stuff that was going on during that time period when these state Blaine amendments were enacted."

But Mr. Luchenitser disputes that interpretation of the amendments' history, arguing that state legislators had plenty of other reasons for adding the provisions to their constitutions, including a healthy regard for the separation of church and state.

"That's what the groups like the Alliance Defending Freedom and the Becket Fund charge, but that's a very questionable reading of history," he said. "It's true that there were some people who made anti-Catholic statements, but what was going on in the 19th century was the Catholic Church was the leading group that was seeking funding for private religious schools."

Mr. Luchenitser added that "there's a lot of debate and controversy about this."

Supporters of Trinity Lutheran's effort to win state dollars for the playground say they don't expect the court to go so far as to strike down the Blaine amendments, but they want to see the court give churches more leeway in accessing public funds, especially when the purpose is clearly religion-neutral.

"A good outcome would be if the Supreme Court said, 'No, you cannot enforce these Blaine amendments to exclude religious institutions from equally distributed grant programs or contracting programs or what

have you just because they're religious. That's an exclusion that just doesn't make sense,'" said Mr. Rassbach.

Mr. Stanley, who represents Trinity Lutheran, said his client's appeal to the Supreme Court is "much more narrow and focused."

"The best outcome for Trinity Lutheran would be to apply these amendments, even if they remain, in an evenhanded and neutral fashion that treats religious groups on the same terms as everyone else," Mr. Stanley said.

Ten states filed a brief in support of Trinity Lutheran's request for a high court hearing, saying that previous judicial rulings "arguably push 'no aid' into the realm of discrimination against religion."

In his brief, Missouri Attorney General Chris Koster, a Democrat, argued that the question is not "whether a state can exclude churches and other religious institutions from a program that otherwise provides benefits to everyone."

"Rather, it is whether states are required by the U.S. Constitution to violate their own constitutions and choose a church to receive a grant when that means turning down nonchurch applicants," he said.

Mr. Luchenitser said he could foresee a ruling in which the court identifies "circumstances where the funding does not actually support a religious facility or a religious activity or religious teachings," and that "only in those circumstances the states cannot treat religious and nonreligious institutions differently in deciding who can get public funds."

"We wouldn't support such a ruling; we'd be disappointed," he said. "But it would be better than a more expansive ruling that erodes the state constitutional provisions to a greater extent."

"The Case Against Separating Church and State"

Bloomberg

Noah Feldman

January 19, 2016

Is the separation of church and state unconstitutional?

You read that right. The U.S. Supreme Court said Friday that it would consider whether Missouri's constitution, which bars state aid to religious groups, violates the U.S. Constitution by discriminating against religion.

This claim sounds crazy, and to those who wrote the Missouri constitutional provision in the 1870s, it would've been. But the claim, in fact, isn't utterly absurd -- if you consider the historical circumstances in which the provision was drafted. And although it's a long shot to change existing church-state law, the case has the potential to be a landmark.

Start with the very simple facts: Trinity Lutheran Church of Columbia, Missouri, applied for state funds to improve its playground. Under the U.S. Constitution as interpreted by the Supreme Court, a church may get generally available funds from the government. But under Missouri's constitution, the church isn't eligible for the funds, so it can't get the money.

The relevant state provision -- Article 1, Section 7 -- says "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion … and that no preference shall be given to nor any discrimination made against any church, sect, or creed."

As written, this provision is framed more strongly than the Establishment Clause of the federal constitution, which never mentions money but says Congress may not enact an establishment of religion.

In a 2004 case, *Locke v. Davey*, the U.S. Supreme Court said that it was permissible for Washington state's constitution to bar state funding of religion to a greater extent than the Establishment Clause requires. Under that precedent, Trinity Lutheran would seem to have no case. Missouri can do what Washington does: Protect the separation of church and state without violating the religious liberty of religious funding applicants.

Here's where things get complicated. The Missouri provision was adopted in 1875, in the wake of a national effort to pass a federal constitutional amendment that would have similarly enacted a ban on state funding of religious institutions. That effort was spearheaded by Maine Republican presidential candidate James G. Blaine, and the national amendment was nicknamed for him.

The Blaine Amendment was deeply politicized. At the time, it was understood by everyone to be targeted at Catholic institutions. The word "sectarian" was code for Catholic.

Republicans hoped to force Democrats into the tough political position of either supporting the amendment and alienating Catholic voters, or opposing it and letting themselves be criticized for opposing the separation of church and state. Republicans had gotten the idea from Ohio, where a brutal denominational fight over state funding of Catholic institutions had helped elect Governor Rutherford B. Hayes.

In congressional debates, concern for the separation of church and state was interspersed with blatant anti-Catholicism from Republicans. The federal amendment failed, but it arguably helped the Republicans reach a tie in the general election, which then led to the political deal that made Hayes president.

But numerous versions of the Blaine Amendment, or "baby Blaines," passed in other states. Missouri's provision is typical of them. In historic terms, the amendments played a meaningful role in strengthening the separation of church and state as an American ideal. They had little immediate effect in practice, since states already weren't funding Catholic institutions.

Historians of church-state relations, myself included, have pointed out the anti-Catholic origins of the state Blaine amendments. The crucial question for the U.S. Supreme Court is whether this aspect of the history should be used to render the state amendments inoperative as violations of free religious exercise of the equal protection of the law.

In *Locke v. Davey*, the court ducked the issue, saying it hadn't been shown that Washington state's constitutional provision, enacted more than 25 years after Missouri's, was a state Blaine.

The court could conceivably duck the issue again. Trinity Lutheran will argue that its case isn't covered by the Locke precedent because its playground-resurfacing project is different from the money at issue in that case, which prevented students from using scholarship money to major in theology. The court would then have room to say that where there isn't a strong connection to religion, states must give funding to religious institutions on equal terms with nonreligious ones. But the distinction with Locke is highly tenuous, since the court said in that case that the scholarship funding wouldn't have violated the Establishment Clause.

For Trinity Lutheran to win, it probably needs the court to go into the seedy history of the Blaine Amendment and say that state Blaine amendments violate federal equal protection laws because of the bias inherent in their adoption. Their best precedent is *Romer v. Evans*, a 1996 case in which the court struck down a Colorado state constitutional amendment that was inspired by anti-gay animus.

In my view, that outcome would be defensible but probably wrong. The Blaine history is certainly replete with nasty anti-Catholic bias reminiscent of today's Islamophobia. But the animus was at all times intertwined with a legitimate

constitutional aim -- namely, separation of church and state. And strong separation remains a plausible constitutional vision, even though the court no longer embraces it -- for example, by allowing state funding of religious schools through vouchers.

Regardless of outcome, the case will be one for the history books.

"Symposium: Confronting a nativist past; protecting school-choice's future"

SCOTUSblog

Rick Garnett

August 10, 2015

Trinity Lutheran Child Learning Center is, its website reports, a "ministry of Trinity Lutheran Church" that "provides opportunities for children to grow spiritually, physically, socially, and cognitively." As one would expect at a pre-kindergarten, one place this growth happens is on the swings and slides that are spread around the Learning Center's colorful and inviting playground.

The Learning Center is – again, as one would expect – committed and attentive to its students' safety. So, a few years ago, the school's staff decided that rubber surfaces made from recycled scrap tires were better for kids' knees and elbows than pebbles, mulch, rocks, or pavement. As it happens, Missouri's Department of Natural Resources has a program that distributes Playground Scrap Tire Surface Material Grants – that is, money – to qualifying entities so they can buy recycled tires for precisely this purpose. Recycling, solid-waste disposal, kids' safety and growth . . . everybody wins.

But Trinity Church's application was denied, and for one reason only: It is a church. In other respects, the Learning Center is a qualifying institution and its application was strong (ranked fifth out of the forty-four that were submitted). Nevertheless, the director of the scrap-tire-grants program informed the school that the department was "unable to provide this financial assistance directly to the church" because the funding would violate a provision of the Missouri Constitution that states "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion."

The Church challenged this denial as a violation of the Constitution of the United States, but the federal trial court, and then the U.S. Court of Appeals for the Eighth Circuit, sided with the Department. In the latter court's view, the First and Fourteenth Amendments to the Constitution permit Missouri to discriminate in this way, in keeping with what the court called the state's "long history of maintain a very high wall between church and state." Last January, the Supreme Court agreed to take the case and answer the question "[w]hether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern."

Less than one month later, Justice Antonin Scalia died. As a result, some of the last

year's most closely watched, high-profile cases turned out differently than, probably, they would have had he lived. Given that Justice Scalia's dissenting opinion in the Court's last major aid-to-religion case, *Locke v. Davey*, provides strong and clear support for Trinity Church's argument that Missouri's discriminatory policy is unconstitutional, many wonder whether, once again, his absence will – as his presence and votes so often did in the religious-freedom context – drive the result in Trinity Lutheran.

The Eighth Circuit panel appeared to regard Trinity Church's claim as having been already decided, and rejected, by the Supreme Court. As the panel noted, the Court had summarily affirmed, in *Luetkemeyer v. Kaufmann*, a federal district court's ruling that the "no aid" provision in Missouri's constitution did not violate the Equal Protection Clause and served a "compelling state interest" in "maintaining a very high wall between church and state.'" (Two Justices dissented.) And, in *Locke v. Davey*, Chief Justice William Rehnquist wrote for a seven-Justice majority that the state of Washington could, in keeping with its own no-aid provision, deny scholarship funds to an otherwise eligible student who chose to pursue a degree in "devotional theology."

The Supreme Court may and should read *Locke* more narrowly, as some other lower courts have done. That case was about the specific and special issue of public funding for the training of clergy and shouldn't determine the outcome in a case about recycled scrap tires being used to upgrade a pre-school playground. The decision's recognition that there is some "play in the joints" between what the Constitution requires and what it permits can and should be regarded not as providing a blank check to states seeking to discriminate, in the name of extra-strict "separation," against religious beneficiaries and activities. The Justices should take account of the fact that Luetkemeyer reflected a way of thinking about aid to religious schools that they have, for good reasons, abandoned. In recent decades, the doctrine and precedents having to do with this matter have emphasized neutrality, not strict separation, and have asked whether a program is even-handed, not whether it might, somehow, "advance" religion.

In this way, the law has reconnected with a foundational point that was the basis for its first decision in the area, *Everson v. Board of Education*, in which Justice Hugo Black (who was certainly not a proponent of aid to parochial schools) insisted that public officials may not exclude citizens "of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." Similarly, in the Court's landmark (and still controversial) decision in *Employment Division v. Smith*, the Justices noted that the First Amendment forbids governments from "impos[ing] special disabilities on the basis of religious views or religious status." A dozen years earlier, in his concurring opinion in *McDaniel v. Paty*, Justice William Brennan had forcefully made the same point: Generally speaking, "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."

But again: Justice Scalia is no longer on the Court. Even if Justice Anthony Kennedy, who voted with the majority in *Locke* but whose record in nearly thirty years' worth of aid-to-religion cases is consistent with Trinity Church's nondiscrimination

argument, sides with the school, joining the three remaining Republican appointees, we could see not a helpful clarification but instead a confusion-prolonging tie.

Church-state aficionados should, in addition to speculating about vote-counts or compromises aimed at avoiding yet another "affirmed by an equally divided Court," be listening and watching for hints regarding, or answers to, at least three questions.

First, will the Justices acknowledge, and perhaps even engage, the actual history and purpose of no-aid provisions like the one invoked by Missouri in this case? The Eighth Circuit did not mention the term "Blaine Amendments" and instead gestured vaguely to, again, a "long history of maintaining a very high wall between church and state" and to Missouri's embrace of a "more restrictive" version of separation. In fact, though – as Philip Hamburger, John McGreevy, Joseph Viteritti, Lloyd Jorgenson, and many others have shown – provisions like Missouri's were adopted by states (and sometimes required by the federal government) not to implement an abstraction like "separation" but rather to marginalize and undermine Roman Catholicism in America. These provisions' origins, regardless of how the laws are justified or described today, are not easily disentangled from nineteenth-century America's pervasive anti-Catholicism and nativism or from a broader ideological, nationalist project of using state-mandated public schooling to inculcate "American" values and loyalties. Justice Thomas discussed this history in his 2000 opinion in *Mitchell v. Helms* and Chief Justice Rehnquist mentioned it in a footnote in Locke. Will the Justices, in *Trinity Lutheran*, deal with the elephant in the room?

Second, will the Democratic appointees – and especially Justices Stephen Breyer and Ruth Bader Ginsburg, who dissented in *Zelman v. Simmons-Harris*, the Court's landmark, five-to-four school-voucher ruling – agree with the Eighth Circuit panel that "Establishment Clause jurisprudence has evolved rather dramatically" and that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause"? In other words, will an eight-member Court, which is for now split fairly evenly on many hot-button topics but which will almost certainly change significantly, and move to the left, in the next few years, signal to judges, legislators, and activists that *Zelman* is and will remain settled law? Or, will there be hints from the Democratic appointees that *Zelman* – like, many liberal academics and observers hope, *Heller v. District of Columbia*, *Citizens United v. Federal Election Commission*, *Parents Involved in Community Schools v. Seattle School District No. 1*, etc. – could be revisited, revised, or narrowed, that choice-based reforms are again suspect, and that the school-voucher question is again up for grabs?

Third, and related: Will any of the Justices examine or embrace the claim, advanced in the amicus brief filed by the Lambda Legal Defense and Education Fund that the Constitution should be read to disallow government from cooperating, even through neutral programs, with religious organizations that "discriminate on the basis of religion and other grounds"? I have argued in academic writing that it is a mistaken oversimplification to equate invidious and irrational "discrimination" by governments with religious organizations' efforts to operate in keeping with their religious

teachings, character, and mission. The government, of course, may and should not discriminate on the basis of religion. However, there is not (or, at least, there should not be) anything objectionable about a religious school or social-welfare agency hiring for mission. Nor does the latter become objectionable, let alone unconstitutional, simply because the religious actor is cooperating with the government to do good works like feeding the hungry, caring for the sick, or educating the young. Unfortunately, some seem determined to wage an aggressive culture-war campaign that conflates religious commitments with "bigotry." Will the Court resist, or enlist in, this effort?

"Separation of church and state" is an important idea. Correctly understood and reasonably implemented, it is a limit on government that protects religious freedom by preventing the government from corrupting religion or interfering in religious groups' affairs. It does not require, though, and the Constitution's neutrality principle should not permit, the pointless discrimination at issue in Trinity Lutheran Church.

“Catholic bishops urge Supreme Court on playground funding”

The Washington Times

April 28, 2016

The denial of a playground resurfacing grant to a Lutheran school empowers religious discrimination, not constitutional principles, the U.S. Catholic bishops said in a Supreme Court brief.

“Missouri’s religious discrimination not only contravenes the First Amendment, it is profoundly demeaning to people of faith,” the U.S. bishops said in their April 21 amicus curiae brief.

The brief backs Trinity Lutheran Church of Columbia, Mo. in its suit against the Missouri government.

The church’s learning center had sought a state grant for playground resurfacing with scrap tire material to improve playground safety at its preschool and daycare center. The grant could have totaled $30,000 in aid to the school. The Missouri Department of Natural Resources rejected the grant application.

The Catholic bishops’ brief argued that constitutional law does not authorize a blanket exclusion from public programs that provide “religiously neutral benefits” for secular purposes.

“Otherwise the government could exclude religious institutions from basic public services like police and fire protection.”

The Catholic bishops said the religious school was otherwise eligible, but the State of Missouri denied it solely due to its religious affiliation.

Since 1875, the Missouri state constitution has barred public money for the direct or indirect aid of any church or any minister or teacher.

The bishops’ brief rejected the claim that such a grant would violate the Establishment Clause of the U.S. Constitution. This claim could be used as “a pretext for penalizing religious groups whose beliefs or practices diverge from government-prescribed orthodoxy,” they said.

“Official discrimination based on religion is no less invidious or stigmatizing than discrimination based on other protected traits,” the brief said. “It sends a message that religious people and their institutions are second-class citizens who deserve special disabilities and are not entitled to participate on equal terms in government programs.”

In 2015 the 8th Circuit Court of Appeals upheld a district court ruling against the school, on the grounds the U.S. constitution permits the provisions of the Missouri constitution. The Supreme Court could hear the case in its late 2016 session.

Other signatories to the Catholic bishops' brief include the Church of Jesus Christ of Latter-day Saints, the National Catholic Educational Association, the Salvation Army and the General Synod of the Reformed Church in America.

Many groups have filed separate briefs in favor of the Lutheran Church. These include a brief from eighteen mostly Republican-run states, The Oklahoman reports.