

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

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| STATE OF TEXAS, <i>et al.</i> , |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Civil Action No. 7:16-cv-00054-O |
| |) | |
| UNITED STATES OF AMERICA, <i>et al.</i> , |) | |
| |) | |
| Defendants; |) | |
| |) | |
| C.L. "BUTCH" OTTER, Governor of the |) | |
| State of Idaho, |) | |
| |) | |
| Movant. |) | |
| |) | |

**BRIEF IN SUPPORT OF GOVERNOR C.L "BUTCH" OTTER'S MOTION FOR
LEAVE TO FILE AMICUS CURIAE BRIEF**

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INTRODUCTION

Plaintiffs in this case challenge policy statements and guidance published by Defendant federal agencies which expand the definition of “sex” under Title IX of the 1972 Education Amendments and impose new requirements on local school districts to receive federal funds. Pursuant to Local Rule 7, Governor C.L. “Butch” Otter requests leave to file the accompanying *amicus curae* brief in support of the Plaintiff’s motion for preliminary injunction. The Plaintiffs consent to the motion.

ARGUMENT

As fellow *Amicus* Eagle Forum Education and Legal Defense fund articulated in their brief in support of their motion for leave to file an *amicus* brief, Appellate Rule of Federal Procedure 29(b) provides an analogy for prospective *amicus curae* to bring their motions for leave to file an *amicus* brief. ECF No. 15 Under Rule 29(b) must explain the movant’s interest and the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the case. *Amicus* briefs can provide value to a case by bringing relevant matters to the court’s attention that is not already brought by the parties. *Id.*

Governor Otter sets forth below his identity and interests in the litigation and the value that his *amicus* brief would add.

1. Governor C.L. “Butch” Otter is the Governor for the State of Idaho. The Idaho Constitution requires the Governor to faithfully execute the laws of the state. Idaho Const. art. IV, § 5. As such, he has authority over some of the police powers left to the States by the Constitution. Governor Otter appoints the members of the Idaho Board of

Education, who carry out education policy in the state. Idaho Code § 33-101 (2016).

Further, though not a party in this case, Governor Otter recognizes that the policies and guidance proposed by Defendants have nationwide impacts. It is important to show how Defendants' actions will impact even non-parties.

2. Governor Otter's proffered *amicus* brief asks this court to grant Plaintiff's request for a preliminary injunction and for the injunction to apply nationwide. Governor Otter's brief demonstrates that district courts have the authority to issue injunctions of this scope. The Constitution vests districts courts with "the judicial Power of the United States." U.S. Const. art. III, § 1. *See also Texas v. United States*, No. 15-40238, 69 (5th Cir. 2015). A court may vacate an agency action when it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Administrative Procedure Act, 5 U.S.C. § 706 (2012).
3. Further, a nationwide injunction is appropriate when an agency develops a rule in violation of notice and comment procedures. *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015). Plaintiffs argue in their application for a preliminary injunction that Defendants drafted a legislative rule in violation of required Administrative Procedure Act ("APA") notice and comment procedures. ECF No. 11, pg 12. If this court finds in Plaintiffs' favor, the entire rule would be void, which would apply nationwide.
4. Plaintiffs demonstrate in their application for a preliminary injunction that the balance of harms tips in plaintiffs' favor. This balance of harms extends to non-parties, including Governor Otter. ECF No. 11, pg 23. Expanding the definition of "sex" to include "gender identity" places new and immediate obligations on employers, public schools and students. If this Court grants a nationwide injunction, it upholds the status quo, which

provides certainty for all states and local school districts fearing the loss of existing federal funding if their policies fail to measure up to Defendants' new guidance and policies. In contrast, Defendants are not injured by this Court requiring they follow the law by abiding by the Constitution and APA requirements.

5. Governor Otter also reiterates Plaintiffs' argument that Congress has explicitly declined to either expand the definition of "sex" under Title IX of the 1972 Education Amendments or expressly add protections based on "gender identity." Congress has, however, extended protections based on "gender identity" in other federal anti-discrimination statutes. ECF No. 11, pg 4.
6. And Congress may not improperly coerce states to act in a way that Congress could not do so directly. *Nat'l Fed'n of Indep. Buss. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012)(hereinafter "*NFIB*"). If Congress wishes to exercise its authority under the Spending Clause, it must give states a true choice whether to accept the funds. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17 (1984). Defendants have tied new requirements to all existing federal education funds. This does not give states or local school districts a true choice whether to comply with the new policies and guidance.
7. Governor Otter's proffered *amicus* also discusses the limits of Congressional authority and the balance between federal and state authority. As Governor Otter demonstrates, Congress may only exercise powers specifically enumerated to it in the Constitution. U.S. Const. Amend. X. *See also NFIB*, at 2577. All other regulatory authority, including those collectively known as the "police powers" are left to the states. Education and running public schools are included in the scope of these police powers. *Id.* at 2578.

8. Local School Districts in Idaho and across the nation are equipped to handle this sensitive matter without federal interference. In his *amicus* brief, Governor Otter provides numerous examples of Idaho school districts working through how best to accommodate transgender students. While most school districts in Idaho have not faced this issue at all, many are taking a proactive approach. Notably, one school district held an open school board meeting and invited public comment and will publish a final policy this summer. Kevin Richert, *Blaine County Hears Divided Testimony on Transgender Policy*, Idaho Ed News (July 15, 2016) <http://www.idahoednews.org/kevins-blog/blaine-county-hears-divided-testimony-transgender-policy/>.
9. And agencies may only exercise the authority delegated to it by Congress. The APA states that agencies may not act “contrary to constitutional right, power, privilege, or immunity” or “in excess of statutory jurisdiction, authority or limitations, or short of statutory right.” U.S.C. § 706(2)(B)-(C) (2012). If Congress does not have the authority to coerce States by holding existing funds hostage, then agencies does not have it either.
10. Governor Otter proffers a brief argument on the history of sex discrimination and the intent behind Title IX. Title IX is not equipped to address discrimination based on gender identity because it was drafted specifically to ensure that *women* would be treated fairly educational institutions and would have equal access to educational *opportunities*. 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh). Those whose “internal sense of gender” is different than their biological sex are not presently denied educational opportunities based on sex. And in fact, the new guidance does not require schools to allow students to try out for athletic programs based on their gender identity.

11. Consistent with Fed. R. App. P 29(c)(5), counsel for Governor Otter authored the accompanying brief in whole; no party authored the brief in any respect; and no person or entity-other than Governor Otter and his counsel-contributed monetarily to its preparation or submission.
12. Consistent with Fed. R. App. P 29(e), Governor Otter has sought this Court's leave to file an amicus within the seven-day period provided for appellate *amicus* briefs and on the deadline requested by Defendants, which is July 17, 2016.
13. Governor Otter respectfully submits that these issues addressed in the proffered *amicus* brief will aid the Court in resolving the issues presented in this litigation and will not prejudice the parties.

CONCLUSION

For the foregoing reasons, this motion for leave to file an *amicus* brief should be granted.

Dated: July 17, 2016

Respectfully submitted,

s/ Cally Younger
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