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

STATE OF TEXAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 7:16-cv-54-O
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY REGARDING PENDING LITIGATION

INTRODUCTION

At the Court's instruction, Defendants filed "a pleading describing" the "litigation currently pending before other federal courts on this subject" so that "the Court can appropriately narrow the scope [of its Preliminary Injunction] if appropriate." Prelim. Inj. Order ("Order") at 37, ECF No. 58. Plaintiffs responded to that filing by inviting the Court to substantially broaden its Preliminary Injunction while the case is litigated. *See* Pls.' Notice of Pending Litigation ("Pls.' Notice"), ECF No. 64. Plaintiffs' understanding of how the Preliminary Injunction should apply to pending litigation is misguided in at least three important respects.

First, Plaintiffs would have this Court "unnecessarily interfere" with a range of pending cases—an outcome that the Court specifically sought to avoid. Order at 37. Plaintiffs ask this Court to prohibit Defendants from advancing certain legal arguments in other federal courts so long as this litigation is pending—even where the arguments do not rely on the Guidance Documents at issue in this lawsuit.[1] Such a prohibition would improperly interfere with the

[1] As the Court is aware, the Amended Complaint challenges several memoranda, fact sheets, and guidance documents reflecting Defendants' interpretation of the prohibition in Title VII and Title IX, and Title IX's implementing regulations, against discrimination "because of sex" or "on the basis of sex" as applied to discrimination against

Executive Branch's authority to conduct litigation and with other courts' ability to consider and resolve the issues before them. *Second*, while Plaintiffs acknowledge that the Preliminary Injunction should cover only cases involving "this subject"—which Plaintiffs describe as "whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities," Pls.' Notice at 1—Plaintiffs inexplicably seek to extend the Preliminary Injunction to cases that do not involve even their own understanding of the "subject" of the injunction. *Third*, Plaintiffs would extend this Court's Preliminary Injunction far beyond the reach of its authority, to extend to cases that do not involve the plaintiff states and where there has not even been an attempt to make any showing of injury or irreparable harm. The Court should reject Plaintiffs' attempt to dramatically expand the scope of the Preliminary Injunction and should clarify that Defendants are not prohibited from fully participating and raising any arguments they consider appropriate in any of the cases mentioned in the parties' notices of pending litigation.[2]

ARGUMENT

1. In its Preliminary Injunction, the Court prohibited defendants from "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated" after the Preliminary

transgender individuals because their gender identity is different from their sex assigned at birth. The Court used the term "Guidelines" to refer collectively to six specific documents: (1) a 2010 Dear Colleague Letter issued by the Office for Civil Rights (OCR) of the Department of Education (ED) regarding harassment and bullying; (2) an April 2014 ED OCR Guidance Document regarding sexual violence; (3) a December 2014 memo issued by then Attorney General Eric Holder; (4) a June 2015 Occupational Safety and Health Administration (OSHA) Best Practices guide; (5) a May 3, 2016 Equal Employment Opportunity Commission (EEOC) fact sheet; and (6) a May 13, 2016 Dear Colleague Letter on transgender students issued jointly by ED and the Department of Justice (DOJ) (hereinafter, referred to as the "Guidelines" or the "Guidance Documents"). *See* Order at 3 n.4. Those "Guidelines" also cover subjects that have nothing to do with this litigation, as discussed *infra* and in Defendants' Motion for Clarification.

[2] The one exception is the Department of Education (ED) matter regarding the Sumner County School District in Tennessee. *See* Pls.' Notice at 6-7. Plaintiffs erroneously include this matter on their list of pending litigation, when it is actually an ED investigation, which was initiated prior to the issuance of the injunction. In any event, as it involves access to restrooms and locker rooms by a transgender individual in a school district in a plaintiff state, ED has paused its investigation for the time being. However, Defendants have asked the Court to clarify that this and other similar investigations can continue as long as they do not rely on the Guidance Documents at issue in this lawsuit, which are the only even arguably final agency action that Plaintiffs have challenged. *See* Defs.' Mot. for Clarification at 11-12.

Injunction Order was issued. Order at 37. Plaintiffs now suggest that this Court should also bar their use in certain cases that were already pending at the time that the Preliminary Injunction was entered, effectively forbidding other federal judges from evaluating these documents for themselves. Plaintiffs also suggest that, in one case, this Court "should preclude Defendants' future participation, . . . both before the district court [in which Defendants have already filed a statement of interest] and the Sixth Circuit Court of Appeals," rather than allowing those courts to manage their own cases. Pls.' Notice at 12. And Plaintiffs ask this Court to involve itself in discovery disputes before another district court, determining what questions Defendants may ask in their depositions. *Id.* at 4-5. Although Plaintiffs concede that the Supreme Court should remain free to govern its own proceedings, *id.* at 12-13, they would nonetheless have this Court "unnecessarily interfere" with a range of cases before other federal courts.

Plaintiffs suggest that this Court erred when it distinguished between cases initiated after the issuance of its Preliminary Injunction and those filed before, barring Defendants "from using the Guidelines or asserting the Guidelines carry weight" only in cases begun after the injunction was issued. Order at 37. Plaintiffs argue that pending cases in which no responsive pleading had been filed are indistinguishable from cases post-dating the Preliminary Injunction. *See* Pls.' Notice at 9. Indeed, they assert that this Court should preempt numerous other federal courts with pending matters because Plaintiffs think that "principles of judicial economy" counsel a broader injunction, and indeed that "justice" would "be inhibited" by allowing other courts to exercise their own legally-bestowed authority to adjudicate various questions, including questions concerning subjects that Plaintiffs concede are *not* the "subject" of the Preliminary Injunction. *Id.* at 9, 10.

Plaintiffs' position suggests a skewed understanding of the relationships between federal courts, under which a complaint filed in one court can be construed as "functionally . . . a brief as

amici curiae in support of Plaintiffs" in another, rather than an independent invocation of federal court jurisdiction. *Id.* at 9 n.4. It is common for a particular question of federal law to be at issue before two or more district courts or courts of appeals. When that occurs, the district courts resolve their cases independently, as do their respective courts of appeals. When it becomes necessary, the Supreme Court will grant review to resolve disagreements between the lower courts. There is no principle of judicial economy that authorizes one district court to impose its view of the law upon another, and justice is not inhibited when district courts disagree. *See W. Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) ("The federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs."). Quite the contrary, such disagreements provide assistance to reviewing courts by airing competing legal positions. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984). This Court apparently had at least some of these concerns in mind when it distinguished between cases in which a complaint had been filed—cases that had already been assigned to district judges of authority equal to this Court's—and those in which such action was only contemplated. Plaintiffs offer no explanation for their contrary view that this Court can and should interject itself into similar cases pending before other courts.[3]

Plaintiffs also urge this Court to decide when other federal district courts and courts of appeals may hear argument from Defendants as interested parties or friends of the court. Under

[3] To be clear, it is Defendants' position that the Preliminary Injunction should not be read to interfere with litigation in which Plaintiffs are not parties in other courts, even if filed after the date that the injunction was issued, such as *Privacy Matters v. United States*, No. 16-cv-3015 (D. Minn. Sept. 7, 2016). Understood otherwise, the injunction would raise significant questions and concerns—both logistical and legal. Would plaintiffs in other cases be barred from asserting their legal rights against the government? Or would Defendants be barred from defending themselves? As explained below and in Defendants' Motion for Clarification, any reading of the injunction that would prevent the Attorney General from deciding what arguments should be made in defense of federal agencies in litigation—and from actually making such arguments—would be inappropriate. *See* Defs.' Mot. for Clarification at 12-15.

this Court's Preliminary Injunction, Defendants may offer their views to other courts so long as they do not "enforc[e] the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions" or "us[e] the Guidelines or assert[] the Guidelines carry weight in any litigation initiated following the date of this Order." Order at 37. Again, Plaintiffs object to the apparent meaning of the Preliminary Injunction. Plaintiffs argue that Defendants should be precluded "from involving themselves in private party litigation in any capacity, including participation as *amicus curiae* or the filing of a Statement of Interest." Pls.' Notice at 2; *see also id.* at 6, 11-12. But such activity—apart from being specifically authorized by statute, *see* 28 U.S.C. § 517, as discussed below—does not constitute enforcement of the Guidelines, and thus does not even arguably fall within the scope of this Court's Preliminary Injunction as long as Defendants do not assert that the Guidelines carry any weight.[4] Nowhere do Plaintiffs explain why they believe that the Preliminary Injunction should encompass amicus participation or statements of interest, and it should not.

Moreover, Plaintiffs concede that the Preliminary Injunction should not prohibit Defendants from participating as amici in the Supreme Court in *Gloucester County v. G.G.*, No. 16-273 (Aug. 29, 2016), because Supreme Court Rule 37(4) provides that "[n]o motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General." Pls.' Notice at 12-13. But the federal courts of appeals have the same rule. *See* Fed. R. App. P. 29(a) ("The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court."). And Congress provided for comparable authority of the Attorney General in federal district courts, providing explicitly that,

[4] As Defendants noted in their Motion for Clarification, there are separation of powers concerns even if the Preliminary Injunction is read only to prevent the government from arguing that the Guidance Documents are entitled to deference in litigation initiated after August 21, 2016. *See* Defs.' Mot. for Clarification at 13 n.4. Defendants respectfully disagree with this aspect of the Preliminary Injunction (among others).

"[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. Similarly, the EEOC has authority to conduct certain litigation on its own behalf and to file amicus briefs. *See* Defs.' Mot. for Clarification at 14-15. There is no basis for construing the Preliminary Injunction to avoid interference with the Supreme Court Rule, but to allow—or even require— interference with rules of other federal courts or, indeed, federal statutory authority. Indeed, there is no basis for interfering with Defendants' authority to participate as amicus in any forum.

Plaintiffs' interpretation would raise significant separation of powers concerns, as Defendants explained in their recently-filed Motion for Clarification. *See* Defs.' Mot. for Clarification at 12-16. The Attorney General's authority to conduct litigation, which extends to advocating for the interests of the United States in cases to which the United States is not a party, may be supervised only by the President. *See United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings . . . be faithfully executed."); U.S. Const. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed"); *The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief*, 14 Op. O.L.C. 13, 19 (1990) ("The filing of briefs in courts of law through [the President's] subordinates—particularly as such filings may bear on the legality of action taken by Executive departments or agencies—is integral to the discharge of his constitutional duty to see that the laws are faithfully executed."). This Court did not suggest that it was attempting to interfere with the exercise of

these constitutionally and statutorily-delegated authorities, and the Preliminary Injunction should not now be interpreted to do so.[5]

2. Plaintiffs acknowledge that the Preliminary Injunction should encompass only those cases that involve its "subject," which Plaintiffs describe as "whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities," Pls.' Notice at 1.[6] *See id.* ("The first filter or parameter of the injunction pertains to whether litigation or disputes involve 'this subject.'"). However, they then take a completely contrary position in arguing that the injunction should cover litigation that does not involve "this subject."

For example, with respect to *United States v. Southeastern Oklahoma State University*, No. 5:15-cv-324 (W.D. Okla.), in which DOJ has alleged that a university professor was denied a promotion because she is transgender, Plaintiffs admit that the "DOJ's complaint doesn't make 'this subject' a feature of the litigation," but argue that the injunction should nevertheless restrict DOJ's legal arguments in that litigation. Pls.' Notice at 3-6. But the United States has not asserted *any* claim in that case that the defendant University violated Title VII because it denied the professor access to any "intimate facilities." Thus, the "subject" of the Preliminary Injunction in the instant case is not a claim made by the government in the other case. Plaintiffs apparently object to a line of questioning that DOJ undertook in some depositions, questioning University administrators about conversations involving the professor's use of bathrooms, which is at issue in the professor's complaint in intervention. Plaintiffs suggest that this line of questioning could

[5] Defendants have also asked the Court to clarify that, even in litigation to which the Preliminary Injunction applies, it should not be read to preclude Defendants from asserting arguments regarding their interpretation of Title VII and Title IX as applied to transgender individuals. *See* Defs.' Mot. for Clarification at 12-15.

[6] Defendants do not agree that "the subject" of the injunction is even this broad, as, *inter alia*, it should not be understood to encompass Title VII. *See* Defs.' Mot. for Clarification at 10-11. Moreover, Defendants note that they do not contest that federal law permits entities to separate the sexes in intimate facilities. *See, e.g.*, 34 C.F.R. § 106.33. Rather, "the subject" of the injunction is that part of the Guidelines articulating that under Title IX, transgender men, like all men, may use men's facilities and that transgender women, like all women, may use women's facilities.

be understood as a surreptitious attempt to expand the DOJ complaint, which (as Plaintiffs admit) could occur only with the University's consent. Pls.' Notice at 4 n.1.[7] Simply stated, asking questions about a transgender employee's use of bathroom facilities in discovery—with its relaxed relevance standards—is not "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." Order at 37.

Similarly, *EEOC v. Bojangles Restaurants, Inc.*, No. 5:16-cv-00654 (E.D.N.C. July 6, 2016), and *Robinson v. Dignity Health*, No. 4:16-cv-3035 (N.D. Cal. June 6, 2016), do not involve the subject of the Preliminary Injunction.[8] *Bojangles Restaurant* is a case alleging sexual harassment and retaliation against a transgender individual, and *Robinson* involves a claim of discrimination related to health insurance benefits. Neither case involves access to sex-segregated facilities, and there is no plausible reason that the Preliminary Injunction should be extended to those cases, as Plaintiffs now suggest, *see* Pls.' Notice at 9, 11. Plaintiffs' position is even more confounding when considered in conjunction with their concession that certain cases—for example, *Broussard v. First Tower Loan, LLC*, No. 2:15-cv-1161 (E.D. La. Apr. 13, 2015); and *EEOC v. Help at Home, Inc.*, No. 2:16-mc-1188 (N.D. Ala. July 20, 2016)—fall outside the scope of the Preliminary Injunction precisely because they do not involve "this subject." *See* Pls.' Notice at 3. There is no reason to understand this limitation to apply to some cases but not to others.

[7] Again, the United States has not raised any claim in the *Southeastern Oklahoma State University* case turning on the professor's access to restrooms or similar facilities. Nor has the United States sought discovery related to the professor's access to women's restrooms for purposes of expanding the complaint to make such a claim. Nor is the United States requesting a change to the current facilities access policies that the Regional University System of Oklahoma has presented in the case. Instead, the discovery mentioned by Plaintiffs is relevant to witness credibility and motive, among other aspects of the case. For example, since the professor and some of the defendants' witnesses disagree on what those witnesses told the professor regarding her access to women's restrooms, that factual dispute is relevant to the credibility of the professor and those witnesses.

[8] In *Robinson*, the district court granted the EEOC's motion to file an amicus brief and deemed the brief filed. The Court also accepted the defendant's brief in response to the EEOC amicus brief and ordered the EEOC to file a reply, which it did on September 8.

Plaintiffs also seem to suggest that the Preliminary Injunction should apply with respect to the entirety of the Guidelines "notwithstanding the circumstances presented in any given litigation" and even where the litigation does not involve the "subject" of the Preliminary Injunction. Pls.' Notice at 8. Again, this argument cannot be reconciled with Plaintiffs' admission that the scope of the Preliminary Injunction is properly limited to its "subject." As Defendants explained in their Motion for Clarification, the Guidelines address issues far beyond the issue of the use of sex-segregated facilities by transgender individuals in educational settings. These issues include harassment, bullying, and sexual violence—not limited to transgender individuals—and discrimination based on race, color, national origin, disability, and sex discrimination that does not involve transgender individuals. *See* Defs.' Mot. for Clarification at 6-8. There is simply no basis to think that the Court intended to enjoin these aspects of the Guidelines, which have not been challenged by Plaintiffs and were not the subject of the Preliminary Injunction proceedings. Such a broad interpretation of the injunction would be inappropriate because, among other reasons, there has been no showing—indeed, no allegation—and no finding by the Court of injury or irreparable harm with respect to these other forms of discrimination.

Plaintiffs also suggest that the Preliminary Injunction extends to any "disputes within [their] borders." Pls.' Notice at 2. Plaintiffs offer no explanation for their broad reading of the Preliminary Injunction, to somehow extend to matters involving private parties within the plaintiff states. Indeed, *Bojangles Restaurants* and *Robinson* are cases that involve private parties *outside* of the borders of the plaintiff states. There is no basis for such an expansion of the Preliminary Injunction as, *inter alia*, Plaintiffs do not have standing to litigate the rights of private parties and have made no showing of injury or harm with respect to private parties.

3. Finally, Plaintiffs would have the Court exceed its authority by enjoining Defendants from participating in litigation and raising certain arguments even where the matter does not involve any of the plaintiff states—specifically, the aforementioned *Bojangles Restaurants* and *Robinson* matters, as well as *Privacy Matters v. United States*, No. 16-cv-3015 (D. Minn. Sept. 7, 2016); *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb. July 8, 2016); *Women's Liberation Front v. U.S. Department of Justice*, No. 1:16-cv-915 (D.N.M. Aug. 11, 2016); and *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich. Sept. 5, 2014).[9] As explained in Defendants' Motion for Clarification, this position is problematic in at least two respects. First, such an injunction would be far broader than necessary to provide Plaintiffs with complete relief. *See* Defs.' Mot. for Clarification at 17-18. Second, and relatedly, it would exceed the scope of any plausible showing of injury or irreparable harm. *See id.* at 18-19. In short, Plaintiffs cannot plausibly allege that they suffer any harm when Defendants participate in litigation that does not involve their states. Nor has the Court made any finding of such harm, which would be necessary to justify the entry of preliminary injunctive relief.

CONCLUSION

Plaintiffs' attempts to expand this Court's Preliminary Injunction are unpersuasive. As explained in their Notice of Pending Litigation, Defendants do not believe that this Court's injunction interferes with any litigation that is currently pending (although clarification is required as to many other matters, as discussed in Defendants' Motion for Clarification). Defendants respectfully ask that this Court make clear that the Preliminary Injunction does not prohibit Defendants from fully participating in all of the pending litigation identified by the parties.

[9] Plaintiffs also suggests that Defendants should be precluded from raising the "subject" of the Preliminary Injunction in matters that were pending at the time that the injunction was issued, in which "this subject" is not currently as issue, and that do not involve the plaintiff states. *See* Pls.' Notice at 11. But the Preliminary Injunction does not impose such a prohibition, and Plaintiffs fail to explain why it should.

Dated: September 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2016, a copy of the foregoing Reply Regarding Pending Litigation was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
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