UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA; STATE OF ARKANSAS, ARKANSAS DIVISION OF YOUTH SERVICES; STATE OF KANSAS; ATTORNEY GENERAL BILL SCHUETTE, for the people of the State of Michigan; STATE OF MONTANA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; and STATE OF WYOMING

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his Official Capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her Official Capacity as Attorney General of the United States; VANITA GUPTA, in her Official Capacity as Principal Deputy Assistant Attorney General; UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; JENNY R. YANG, in her Official Capacity as Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; and DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration,

Defendants.

Case No. 4:16-cv-3117-JMG-CRZ

DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants United States of America, United States Department of Education, Secretary John B. King, Jr., United States Department of Justice, Loretta E. Lynch, Vanita Gupta, United States Equal Employment Opportunity Commission, Jenny R. Yang, United States Department of Labor, Secretary Thomas E. Perez, and David Michaels respectfully move the Court to dismiss Plaintiffs' Complaint. Per Local Rule 7.1(a)(1)(A), this motion is accompanied by a brief containing a statement of points and authorities upon which Defendants rely in support of this motion.

Dated: September 30, 2016

Respectfully submitted,

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DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiffs bring this action against the U.S. Departments of Education ("ED"), Justice ("DOJ"), and Labor ("DOL"), as well as the Equal Employment Opportunity Commission ("EEOC") and various agency officials (collectively, "Defendants"), challenging their interpretations of Title VII of the Civil Rights Act of 1964 ("Title VII") and Title IX of the Education Amendments of 1972 ("Title IX") as prohibiting discrimination against transgender individuals and, in certain cases, requiring employers and schools to treat transgender individuals consistent with their gender identity for purposes of these statutes and their implementing regulations. Plaintiffs allege that ED and DOJ will commence proceedings to enforce these interpretations against them, thus raising the possibility that federal education funding they currently receive will be terminated. They therefore seek a declaration that ED and DOJ's interpretations violate the Administrative Procedure Act ("APA") and the Regulatory Flexibility Act ("RFA"), an injunction precluding ED and DOJ from enforcing their interpretations against them, and vacatur of certain guidance documents that contain ED and DOJ's interpretations. Plaintiffs cannot demonstrate, however, any entitlement to the extraordinary relief they seek.

As a threshold matter, Plaintiffs' suit fails because this Court lacks jurisdiction to hear it. In their rush to challenge ED and DOJ's interpretations of Title VII and Title IX, Plaintiffs fail to establish that they have suffered any injury-in-fact that would provide Article III standing to bring this pre-enforcement challenge. Indeed, Plaintiffs provide *no* allegations regarding their intended course of conduct or any credible threat that the federal government will take enforcement action against them, either under Title VII or Title IX. For similar reasons, Plaintiffs cannot carry their burden of demonstrating that the instant case is ripe for judicial review. With no suggestion that any enforcement proceedings have been initiated or that any

such action is certainly impending, Plaintiffs proffer nothing more than an abstract legal dispute with no concrete effects on the challenging parties. Plaintiffs also identify no hardship that they would incur as a result of withholding judicial consideration of this lawsuit.

In bringing this pre-enforcement action, Plaintiffs also ignore that Congress has enacted a statutory scheme for reviewing proceedings to terminate federal funding under Title IX, with judicial review available in a court of appeals after completion of administrative proceedings by ED or in district court if DOJ files a civil enforcement action. This divests the Court of jurisdiction to consider Plaintiffs' attempted end run around the statutory scheme established by Congress. Moreover, Plaintiffs' APA claims fail as a threshold matter because none of the challenged guidance documents constitutes final agency action. Rather, they merely set forth ED and DOJ's interpretations of the applicable statutes and regulations, and thus they impose no new legal obligations or consequences. Finally, their APA claims additionally fail because Plaintiffs have another adequate remedy in a court—namely, proceeding through the statutory scheme adopted by Congress, which provides for judicial review.

Even assuming *arguendo* that the Court has jurisdiction, Plaintiffs' claims still would fail on their merits. Plaintiffs assert that the guidance documents and the challenged interpretations of Title VII, Title IX, and its implementing regulations: (1) violate the APA because they are inconsistent with the authorizing statutes and regulations (Counts II, III & IV); (2) violate the APA because they constitute "new rules" that require notice-and-comment rulemaking (Count I); (3) are "contrary to constitutional right" because they violate the Spending Clause (Counts V & VI); and (4) violate the Regulatory Flexibility Act (Count VII).

All of these claims should be rejected. First, Plaintiffs' allegations are all predicated on the misguided notion that the protections against discrimination "on the basis of sex" and

"because of . . . sex" as used in Title IX and Title VII, respectively, unambiguously encompass protection against discrimination *only* on the basis of and because of "one's genes and anatomy." Compl. ¶ 31. But this position runs counter to case law from this circuit, as well as the First, Fourth, Sixth, Ninth, and Eleventh Circuits—all of which make clear that the term "sex" is, at the very least, ambiguous on this issue. Indeed, ED and DOJ's interpretations are the best and most reasonable constructions, and numerous courts—including the Eighth Circuit—have rejected a narrow interpretation of sex discrimination that would limit discrimination on the basis of "sex" to discrimination on the basis of genetic makeup or reproductive organs. Those courts recognize that discrimination based on an individual's gender identity is a form of sex discrimination. Thus, ED and DOJ's interpretations are fully consistent with the authorizing statutes and regulations, as well as the Spending Clause. Moreover, because the guidance documents merely interpret existing law (*i.e.*, Title VII, Title IX, and Title IX's implementing regulations), they do not constitute legislative rules, and thus are not subject to notice-and-comment rulemaking requirements. It thus follows that the Court lacks jurisdiction to consider Plaintiffs' RFA claim, because the RFA's requirements apply only to agency rules that require notice-and-comment rulemaking. And, in any event, because the individual plaintiff States are not small entities, Plaintiffs lack standing to pursue a claim under the RFA.

Finally, even if the Court were to conclude that it has jurisdiction and that Plaintiffs state cognizable claims, the case should nonetheless be dismissed as to DOL, EEOC, Secretary Perez, Assistant Secretary Michaels, and Chair Yang because Plaintiffs fail to offer any allegations whatsoever as to how or why the injuries of which they complain relate or are attributable to those parties.

BACKGROUND

Title VII makes it "an unlawful employment practice" for an employer to discriminate against any individual with respect to his "compensation, terms, conditions, or privileges of employment" or "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to . . . adversely affect [any individual's] status as an employee" because of the individual's sex. 42 U.S.C. § 2000e-2(a)(2). The EEOC and DOJ are tasked with enforcement of Title VII. *See generally* 42 U.S.C. §§ 2000e-5 & 2000e-6.[1]

Title IX, in turn, prohibits discrimination on the basis of sex in education programs and activities by recipients of federal financial assistance. 20 U.S.C. § 1681 *et seq*. DOJ and ED share primary responsibility for enforcing Title IX and its implementing regulations. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Under this authority, the Office for Civil Rights ("OCR") at ED investigates complaints and conducts compliance reviews, promulgates regulations, and issues guidance to clarify how it interprets applicable statutory and regulatory obligations. Consistent with the nondiscrimination mandate of the statute, ED's and DOJ's regulations prohibit federal funding recipients from providing "different aid, benefits, or services," or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31(b); 28 C.F.R. § 54.400(b). The regulations further explain that recipients may "provide separate toilet, locker room, and shower facilities on the basis of sex" without running afoul of Title IX, so long as the "facilities

[1] Although Congress granted EEOC express authority to promulgate procedural regulations to implement Title VII, the EEOC lacks authority to issue substantive rules and regulations under that statute and cannot file an enforcement action against a state employer directly. *See* 42 U.S.C. § 2000e-12(a); 42 U.S.C. § 2000e-5(f)(1); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), *superseded by statute as stated in Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

provided for students of one sex" are "comparable to [the] facilities provided for students of the other sex." 34 C.F.R. § 106.33; 28 C.F.R. § 54.410.

In response to requests for clarification from various federal funding recipients and others, ED and DOJ have issued guidance that provides their interpretation of Title IX and its implementing regulations, as well as Title VII, with respect to transgender individuals. The Complaint does not specify which guidance documents Plaintiffs are challenging here, and thus, it is not at all clear which ones they purport to put at issue in this case. However, Plaintiffs list four specific guidance documents in the background section of their Complaint as follows:[2]

(1) in April 2014, in response to requests for clarification from various federal funding recipients, OCR issued guidance explaining that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity," Questions and Answers on Title IX and Sexual Violence, Catherine E. Lhamon, Assistant Secretary for Civil Rights (Apr. 29, 2014) ("April 2014 Guidance");[3]

(2) in a December 2014 memorandum issued to United States Attorneys and heads of DOJ components, then Attorney General Eric Holder explained that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender

[2] Solely for the purposes this brief, unless otherwise specified, the term "guidance documents" collectively refers herein to these four items. This group definition is used to provide simplification and clarity with respect to some legal arguments, but should in no way be construed to suggest that the four guidance documents are equivalent as to their effect on the issues presented in this case and/or that any of them are properly challenged here. By way of example and not limitation, Plaintiffs have not alleged any injury at all with respect to the OSHA Guide—and, indeed, the Complaint does not discuss OSHA's 2015 guidance at all, except to list it in the background section. *See infra* Part IV.

[3] http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

identity, including transgender status," Memorandum from Attorney General Eric Holder (Dec. 15, 2014) ("Holder Memo");[4]

(3) in June 2015, the Occupational Safety and Health Administration ("OSHA") released a Best Practices guide explaining that "all employees should be permitted to use the facilities that correspond with their gender identity," A Guide to Restroom Access for Transgender Workers, Occupational Safety and Health Administration, Department of Labor (June 1, 2015) ("OSHA Guide");[5] and

(4) on May 13, 2016, ED and DOJ issued joint guidance in the form of a Dear Colleague Letter, explaining that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity," Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, and Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights (May 13, 2016) ("2016 DCL").[6]

Although some of these guidance documents serve as a focal point of Plaintiffs' claims, *see* Compl. ¶¶ 35, 38, 55, they are not legally binding and expose no one to new liabilities or legal requirements. Rather, they are merely expressions of the agencies' interpretations of what existing statutes and regulations already provide.[7] Guidance documents issued by ED "do not

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[4] https://www.justice.gov/file/188671/download.

[5] https://www.osha.gov/Publications/OSHA3795.pdf.

[6] http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[7] ED has issued guidance documents for decades, across multiple administrations, in order to notify schools and other federal fund recipients of how the agency interprets the law and how it views new and emerging issues. *See, e.g.*, U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html (describing the purpose of guidance documents and providing links to guidance documents back to 1975).

create or confer any rights for or on any person" and "do not impose any requirements beyond those required under applicable law and regulations." U.S. Dep't of Educ., Types of Guidance Documents, https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html. Indeed, the guidance documents at issue in this case are *explicit* that they do not carry the force of law. *See* 2016 DCL at 1 ("This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations."); April 2014 Guidance at 1 n.1 (same). Similarly, the Holder Memo merely clarifies that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status" and states explicitly that it "is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case." Holder Memo at 2.[8]

On July 8, 2016, Plaintiffs initiated this lawsuit, challenging ED and DOJ's interpretation of the term "sex" as used in Title IX and its implementing regulations, as well as in Title VII.

[8] The Holder Memo was issued in response to evolving case law on the topic of what constitutes sex discrimination under Title VII and, in particular, the conclusion of several courts that Title VII prohibits discrimination based on gender identity (including cases in which DOJ took the opposite position, which the court rejected). *See* Holder Memo at 2. In light of this emerging case law, the memo stated that DOJ would change its litigating position in cases in which a federal agency is being sued. By its own terms, the memo has no force or effect outside of that context. The OSHA Guide also has no binding legal effect. Rather, it simply offers advice for employers on best practices regarding restroom access for transgender workers. Indeed, as explained in the disclaimer on the last page of the Guide, it is "not a standard or [a] regulation, and it creates no new legal obligations." OSHA Guide at 4. It merely contains recommendations that "are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace." *Id.*

The Complaint asserts six claims under the APA and one claim under the RFA. Plaintiffs seek declaratory and injunctive relief, including a vacatur of the agencies' guidance documents.[9]

STANDARD OF REVIEW

Defendants move to dismiss Plaintiffs' claims for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). Where, as here, a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) is limited to a facial attack on the pleadings, it "is subject to the same standard as a motion brought under Rule 12(b)(6)." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003).

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Accordingly, allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 555. And "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction to Consider Plaintiffs' Challenges to the Guidance Documents

A. Plaintiffs Lack Standing to Bring This Action

Plaintiffs' suit fails as an initial matter because, in the absence of any allegation of a cognizable and concrete or imminent injury, they cannot establish standing. Standing to sue requires Plaintiffs to demonstrate that they "have suffered an 'injury in fact'—an invasion of a

[9] Some of the guidance documents also address issues other than the use of sex-segregated facilities by transgender individuals—*e.g.*, harassment and sexual violence. Nothing in the Complaint challenges those other aspects of the guidance documents, and thus those portions could not be the subject of any declaratory or injunctive relief.

legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Plaintiffs do not allege that they have *actually* suffered any injury-in-fact yet, but rather that they suffer the risk that DOJ or ED might initiate enforcement proceedings against them at some point in the future based on the agencies' interpretations of Title VII and Title IX, as contained in the Holder Memo and 2016 DCL, respectively.[10] Compl. ¶ 55 ("The United States Attorney General has indicated the Department of Justice will enforce the new obligations under Title VII and Title IX"); *id.* ¶ 59 ("ED and DOJ have informed Plaintiffs and their school districts that failure to conform to the executive branch's new mandate will bring adverse consequences, including a loss of federal education funding."). In such a circumstance, when a party seeks to bring a pre-enforcement challenge to agency action, "the threatened enforcement [must be] sufficiently imminent" in order to establish standing. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). Thus, to satisfy the injury-in-fact requirement here, Plaintiffs must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the agency action], and [that] there exists a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Plaintiffs cannot do so. First, Plaintiffs do not offer any allegation that they intend to engage in a course of conduct that violates either Title VII or Title IX. Indeed, in the context of

[10] Plaintiffs offer no allegation that the remaining two guidance documents mentioned in their Complaint—the April 2014 Guidance issued by ED or the 2015 OSHA Guide—would serve as a basis for any potential enforcement action. Regarding ED, Plaintiffs allege that ED sent the 2016 DCL (and not the 2014 Guidance) "to school districts nationwide" and threatened therein a "loss of federal funds." Compl. ¶¶ 39, 40. Regarding OSHA, Plaintiffs do not assert that OSHA or any other component of DOL seeks to bring any enforcement action on the basis of the 2015 OSHA Guide.

Title VII, Plaintiffs proffer no allegation whatsoever for how they intend to proceed following the issuance of the Holder Memo, much less any course of conduct that would violate the statute. This alone means that Plaintiffs cannot carry their burden of establishing standing to bring their Title VII claims. *See Bone Shirt v. Hazeltine*, 444 F. Supp. 2d 992, 996 (D.S.D. 2005) ("The State must have standing to seek relief on each particular issue; standing for the case as a whole is insufficient.").

The same is true for Plaintiffs' Title IX claims, as Plaintiffs do not allege that they or their school districts intend to preclude transgender students from using restrooms and other facilities consistent with their gender identity. Rather, the Complaint vaguely suggests that various Plaintiffs may "modify [their] behavior" to comply with Title IX. Compl. ¶ 60. Nebraska notes that under state law, educational institutions may "maintain[] separate toilet facilities, locker rooms, or living facilities for the different sexes." *Id*. ¶ 21 (quoting Neb. Rev. Stat. § 79-2,124). However, Nebraska offers no allegation that its state statute has been interpreted or will be applied in a manner that conflicts with Title IX in a situation where a student's birth-assigned sex does not align with the student's gender identity. In short, Nebraska merely identifies a potential conflict between state and federal law, but does not actually allege any intention to engage in a course of conduct proscribed by Title IX, as is necessary to establish standing.

Finally, Nebraska mentions three educational institutions—the Nebraska Correctional Youth Facility ("NCYF"), Geneva North School, and Kearney West School—that allegedly do not currently comply with Title IX, as interpreted by ED and DOJ. *See* Compl. ¶ 56. Plaintiffs' Complaint is utterly silent, however, as to whether those institutions intend to continue on a course of action proscribed by Title IX, or alternately, whether they intend to bring their conduct

into conformance with Title IX, as Nebraska law permits. *See id*. ¶ 22 ("Nebraska law provides school districts with the flexibility to fashion policies which weigh the dignity, privacy, and safety concerns of all students, while accommodating the legitimate interests of individuals who self-identify as having a gender that is the opposite of their sex."). Indeed, Plaintiffs do not even allege that any transgender students attend those schools and are barred, or will be barred, from using restrooms and other facilities consistent with their gender identity.

Plaintiffs also fail to establish standing because their Complaint provides no basis for concluding that they face "a credible threat of prosecution" under either Title VII or Title IX. *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298). Only a party whose alleged threat of prosecution is not "wholly speculative" can establish standing. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) (quoting *Babbitt*, 442 U.S. at 302). Regarding Title VII, Plaintiffs identify no basis on which a Title VII enforcement action could be brought. Indeed, Plaintiffs offer no information regarding any of their employment practices as they pertain to transgender individuals. As such, their Complaint lacks any support for the proposition that they face a credible threat of prosecution under Title VII.

As for Title IX, Plaintiffs attempt to establish a credible threat of prosecution by pointing to litigation initiated by DOJ in North Carolina and ED's work with a public elementary school in South Carolina. Compl. ¶¶ 37, 57, 58. Plaintiffs do not establish, however, that any of the circumstances that gave rise to proceedings in those instances are present here. In North Carolina, DOJ brought suit to challenge Section 1.3 of North Carolina Session Law 2016-3, commonly referred to as H.B.2, which mandates that "[p]ublic agencies . . . require multiple occupancy bathrooms or changing facilities . . . be designated for and only used by individuals

based on their biological sex." *Id*. sec. 1.3, § 142-760(b).[11] In South Carolina, ED entered into a resolution agreement with a school district after ED initiated an investigation based on claims of sex discrimination by a transgender student, and the district acknowledged that it had denied the transgender student access to restrooms consistent with her gender identity. Letter to Superintendent Joseph Pye from Alessandro Terenzoni (June 21, 2016);[12] *see also* Compl. ¶ 58.

Plaintiffs allege no similar circumstances here that would form the basis for enforcement proceedings. They identify no state law that precludes compliance with Title IX, as H.B.2 did. Indeed, the only state law discussed in Plaintiffs' Complaint largely tracks one of Title IX's implementing regulations. *Compare* Neb. Rev. Stat. § 79-2,124 ("The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes.") *with* 34 C.F.R. § 106.33 *and* 28 C.F.R. § 54.410 ("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."). Nor do Plaintiffs allege that any transgender students currently attend any of their schools and are being denied the right to use restrooms and other facilities consistent with their gender identity, as was the case in South Carolina. Thus, although it is true that "[w]hen a statute is challenged by a party who is a target or object of the statute's prohibitions, 'there is ordinarily little question that the [statute] has caused him injury,'" *Gaertner*, 439 F.3d at 485 (quoting *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir.1997)), Plaintiffs' Complaint establishes no

[11] H.B. 2 defines "public agencies" to include, among other entities, the state executive, judicial, and legislative branches, including the University of North Carolina system. N.C. Session Law 2016-03, sec. 1.3 § 143-760(a)(2) & (4).

[12] http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151348-a.pdf.

factual basis for any Title IX enforcement action by ED or DOJ. Any threat of prosecution is thus "wholly speculative." *St. Paul Area Chamber of Commerce*, 439 F.3d at 485 (quoting *Babbitt*, 442 U.S. at 302).

B. Plaintiffs' Action Is Not Ripe for Judicial Review

For similar reasons, this case is not ripe for review. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) (noting that "[t]he standing question . . . bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention"). The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

Ripeness considers "both the 'fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Neb. Pub. Power Dist. v. MidAm. Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000) (quoting *Abbott Labs.*, 387 U.S. at 149). A case is fit for judicial decision when it "poses a purely legal question [that] is not contingent on future possibilities." *Pub. Water Supply Dist. No. 10 of Cass Cty., Mo. v. City of Peculiar, Mo.*, 345 F.3d 570, 573 (8th Cir. 2003); *see also Texas v. United States*, 523 U.S. 296, 300 (1998) (noting that a party's claim "is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all'"). As for hardship, "[a]bstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." *Pub. Water Supply*, 345 F.3d at 573 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). In short,

"the injury must be certainly impending." *Id.* (quoting *Paraquad, Inc. v. St. Louis Hous. Auth.*, 259 F.3d 956, 958–59 (8th Cir. 2001)). As with standing, the burden of establishing ripeness rests with the party asking the Court to exercise jurisdiction. *See Dolls, Inc. v. City of Coralville*, 425 F. Supp. 2d 958, 970 (S.D. Iowa 2006).

In the absence of any actual or threatened enforcement proceedings, both prongs of the ripeness test favor dismissal. Plaintiffs argue that the guidance documents identified in their Complaint violate the APA and exceed statutory and constitutional authority. Accordingly, they request vacatur of those documents "as issued and applied to Plaintiffs." Compl. ¶ 136. However, Plaintiffs do not proffer any allegation that enforcement proceedings have been initiated against them, or that there exists any credible threat that such action is "certainly impending." *Parrish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (quoting *Babbitt*, 442 U.S. at 298). Indeed, Plaintiffs point to no initiation of any administrative investigation by ED—a prerequisite to any enforcement action. *See infra* Part I.C. Thus, Plaintiffs' Complaint raises nothing more than "abstract disagreements over administrative policies," which may not be heard until "an administrative decision has been formalized and its effects *felt in a concrete way* by the challenging parties." *Ohio Forestry Ass'n*, 523 U.S. at 732–33 (quoting *Abbott Labs.*, 387 U.S. at 148–49) (emphasis added).

Until an enforcement action is brought, Plaintiffs' speculation regarding a potential loss of funding under Title IX "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," *Texas*, 523 U.S. at 300, as no such termination of federal funding could occur until after the administrative process is completed, at which time, Plaintiffs may seek judicial review. Discussed further in detail below, if there is a finding of noncompliance after an investigation is completed and no voluntary resolution is reached, the process (which might

ultimately lead to a funding termination) can follow one of two routes. ED can initiate administrative proceedings to terminate federal funding, with multiple levels of review and opportunities for participation by the federal fund recipient, after which the recipient may obtain judicial review in a court of appeals. Alternatively, DOJ may seek an injunction in district court to restrain the recipient's Title IX violations, in which case, the recipient can defend itself in that lawsuit. In either case, a reviewing court would have the benefit of concrete facts to inform any decision regarding the statute and its application in a particular circumstance. For example, the court would likely have before it evidence regarding the extent to which a school has subjected a transgender student to allegedly discriminatory treatment, information regarding any privacy interests or concerns of other students, background on any accommodations offered or provided by a school, and the amount of funding actually threatened under 20 U.S.C. § 1682.[13] The Supreme Court has emphasized that assessing allegations of sex discrimination "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). The Court should therefore refrain from adjudicating Plaintiffs' pre-enforcement challenge to ED and DOJ's interpretations of Title VII and Title IX in the abstract. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1125 (9th Cir. 2009) ("[B]ecause no enforcement action against plaintiffs is concrete or imminent or even threatened, Appellees' claims . . . are not ripe for review."); *see also Com. of Va. v. United States*, 926 F. Supp. 537, 545 (E.D. Va. 1995) (finding the case not susceptible to adjudication where "administrative or judicial enforcement proceedings . . . have yet to be initiated").

[13] "[T]ermination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . ." 20 U.S.C. § 1682(1).

Furthermore, Plaintiffs identify no hardship they would incur if the Court were to withhold consideration. Though Plaintiffs offer vague suggestions regarding alleged modifications to their behavior and preparations for a potential loss of federal funding, Compl. ¶¶ 55, 60, 61, their Complaint is devoid of any indication that they "ha[ve] sustained or [are] immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct," much less any injury that is "certainly impending." *Pub. Water Supply*, 345 F.3d at 573 (quoting *O'Shea*, 414 U.S. at 494 and *Paraquad*, 259 F.3d at 958–59). Rather, their allegations amount to mere "[a]bstract injury," which is "not enough" to satisfy the hardship prong. *Id.* (quoting *O'Shea*, 414 U.S. at 494).

C. Congress Has Precluded District Court Review of Plaintiffs' Pre-Enforcement Challenge

This case also should be dismissed because, by setting forth a detailed administrative review scheme that culminates in judicial review, Congress has precluded district court jurisdiction over pre-enforcement Title IX actions like the one brought by Plaintiffs here. *See Board of Education of the Highland Local School District v. U.S. Department of Education*, No. 16-cv-524, 2016 WL 5372349, at *8 (S.D. Ohio Sept. 26, 2016) (concluding that it lacked jurisdiction over a district's Title IX claims in light of the statutory scheme enacted by Congress). Under this scheme, before any termination of federal funding could occur, ED would have to have (1) received a complaint and completed an investigation, or have conducted a compliance review, (2) concluded that discrimination exists, and (3) been unsuccessful in achieving voluntary compliance by the school district. *See* 34 C.F.R. § 100.7(b) (complaint filed); 34 C.F.R. § 100.7(c), (d) (investigation); 20 U.S.C. § 1682(2) (voluntary compliance); *id.*

§ 100.8(d) (voluntary compliance).[14] At that point, ED would either initiate administrative enforcement proceedings to withhold future funds or refer the matter to DOJ to file a civil action to enjoin further violations. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a).

Under the first option, ED would initiate its administrative process for terminating federal funding, which begins with a hearing before a neutral hearing officer, with a right to an administrative appeal and discretionary review by the Secretary of Education. *See* 20 U.S.C. § 1682(1); 34 C.F.R. § 100.10(a), (b), (e). If a federal funding recipient is found to be in violation of Title IX, the recipient can restore its funding by complying with the terms of the final administrative decision. *Id.* § 100.10(g). After any adverse, final administrative decision, the recipient is entitled to judicial review in the court of appeals for the circuit in which the recipient is located. *See* 20 U.S.C. § 1683.[15] ED cannot terminate any funding until thirty days after reporting the termination to both houses of Congress. *See* 20 U.S.C. § 1682; *see also N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 515 n.2 (1982) (summarizing this process).

ED's alternative procedure involves referral to DOJ. If after completion of a full investigation of a Title IX complaint, ED determines that a federal funding recipient is violating Title IX and voluntary compliance cannot be secured, ED may refer the case to DOJ, which is empowered by statute to seek an injunction in federal district court to restrain the violations. *See* 20 U.S.C. § 1682(2); 34 C.F.R. § 100.8(a)(1).

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[14] ED's Title IX regulation incorporates ED's Title VI procedural regulations, *see* 34 C.F.R. § 106.71, which are therefore cited in the text.

[15] *See Highland Local Sch. Dist.*, 2016 WL 5372349 at *7 ("[T]he judicial review provided 'for similar action' in § 1683 references the general provision for judicial review of funding termination decisions in 20 U.S.C. § 1234g(b), which provides that a recipient may seek judicial review in the appropriate court of appeals . . . ."); *see also Freeman v. Cavazos*, 923 F.2d 1434, 1436 n.7 (11th Cir. 1991) ("Most grant statutes administered by the Secretary that allow termination of funding incorporate by reference the judicial review provisions of the General Education Provision Act.").

Under the Supreme Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and related case law, this administrative enforcement scheme divests the Court of jurisdiction over Plaintiffs' pre-enforcement Title IX challenge. In *Thunder Basin*, a mine operator contested the Mine Safety and Health Administration's interpretation of the Federal Mine Safety and Health Amendments Act ("Mine Act"), which was about to form the basis for an enforcement action against the operator. *See id.* at 205. Holding that the district court lacked subject-matter jurisdiction over the operator's pre-enforcement challenge, the Supreme Court held that "[i]n cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernible in the statutory scheme.'" *Id*. at 207 (quoting *Block v. Cmty. Nutrition Inst*., 467 U.S. 340, 351 (1984)). The Supreme Court pointed out that the operator's "claims turn[ed] on a question of statutory interpretation that [could] be meaningfully reviewed under the Mine Act," with no indication that "Congress intended to allow mine operators to evade the statutory-review process [established in the Mine Act] by enjoining the Secretary from commencing enforcement proceedings." *Id*. at 216. Indeed, the Supreme Court specifically noted that "[t]o uphold the District Court's jurisdiction in these circumstances would be inimical to the structure and the purposes of the Mine Act." *Id*.

ED's administrative scheme for enforcing Title IX violations mirrors the Mine Act's enforcement scheme in all relevant aspects under *Thunder Basin*. First, the Mine Act "establishe[d] a detailed [administrative] structure for reviewing" citations issued by the agency. *Id*. at 207–08 (describing review before an ALJ followed by administrative appeal). The same is true for Title IX. *See* 20 U.S.C. § 1682 (requiring "an express finding on the record, after opportunity for hearing"); 34 C.F.R. § 100.10(b) (administrative appeal); *id*. § 100.10(e)

(possibility of Secretarial review); *id.* § 100.10(g) (right to be "restored to full eligibility" if the recipient complies with an adverse final decision). Second, the Mine Act allowed regulated parties to "challenge adverse [agency] decisions in the appropriate court of appeals." *Thunder Basin*, 510 U.S. at 208. Here, too. *See* 20 U.S.C. § 1683 (providing "such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds"); *see also supra* note 9. Third, the Mine Act "expressly authorize[d] district court jurisdiction" in other circumstances, including suits by "the Secretary to enjoin habitual violations of the statute"; by contrast, regulated parties "enjoy[ed] no corresponding right." *Thunder Basin*, 510 U.S. at 209. Both are true of the statutory scheme for enforcing Title IX. *See* 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a)(1) (referral to DOJ for civil action). And finally, the Mine Act's "comprehensive review process [did] not distinguish between preenforcement and postenforcement challenges, but applie[d] to all violations of the Act and its regulations." *Thunder Basin*, 510 U.S. at 208–09. The statutory scheme for enforcing Title IX similarly does not vary in application depending on whether a pre-enforcement or post-enforcement challenge is brought. *See* 20 U.S.C. § 1682 (requiring an "opportunity for hearing" whenever there has been an express finding on the record of a failure to comply with Title IX requirements); 34 C.F.R. § 100.10 (no distinctions between pre-enforcement and post-enforcement challenges).

On these bases, the Eighth Circuit has found district court review of other statutory claims precluded under *Thunder Basin*. In *Great Plains Coop v. Commodity Futures Trading Commission*, the Eighth Circuit considered a challenge to administrative enforcement proceedings by the Commodity Futures Tradition Commission ("CFTC") under the Commodity Exchange Act ("CEA"). 205 F.3d 353, 354 (8th Cir. 2000). The court held that "the circumstances of this case are identical in all relevant respects to those in *Thunder Basin*" for two

reasons. *Id*. at 355. First, "[l]ike the Mine Act, the CEA establishes a scheme of administrative review, followed by judicial review of final orders in the appropriate federal appeals court." *Id*. (citations omitted). Second, "[a]lso like the Mine Act, the CEA's review processes do not distinguish between 'pre-enforcement challenges' (*e.g*., the complaint for injunctive relief in this case) and 'post-enforcement challenges' (*e.g*., appeals from final orders of the agency)." *Id*. The Eighth Circuit thus concluded that "Congress intended for challenges to adverse administrative actions under the CEA to occur only after the issuance of final orders of the CFTC, and then only in the appropriate court of appeals," noting that the plaintiff's attempted "'end run' around the statutory scheme" would have "allow[ed] the plaintiff to short-circuit the administrative review process and the development of a detailed factual record by the agency." *Id*.

As for DOJ's ability to file a civil enforcement action in federal district court, this aspect of Title IX's statutory review scheme mirrors the scheme that governs the Securities and Exchange Commission ("SEC"), which provides the SEC with the option of either "bring[ing] a civil action against the alleged violator in federal district court, or . . . initiat[ing] an administrative enforcement proceeding." *Jarkesy v. S.E.C.*, 803 F.3d 9, 12 (D.C. Cir. 2015). Three appellate courts have concluded under *Thunder Basin* that Congress intended for this scheme to serve as the exclusive route for obtaining judicial review of final SEC orders. *See Tilton v. Sec. & Exch. Comm'n*, 824 F.3d 276, 291 (2d Cir. 2016); *Hill v. Sec. & Exch. Comm'n*, 825 F.3d 1236, 1252 (11th Cir. 2016); *Jarkesy*, 803 F.3d at 29 (D.C. Cir. 2015). As the D.C. Circuit explained, "it is of no moment that the securities laws provide for the possibility of civil enforcement both before the [SEC] *and* in federal district court" because even though Congress "gave the SEC the option to pursue violations in district court," it "did not thereby necessarily enable *respondents in administrative proceedings* to collaterally attack those proceedings in

court." *Jarkesy*, 803 F.3d at 17. In other words, even though Congress provided the SEC with the option of commencing enforcement proceedings in district court, it did not mean that Congress also intended to permit regulated entities to preemptively file suit in district court. Because "Congress granted the choice of forum to the [SEC] . . . that authority could be for naught if [regulated parties] could countermand the [SEC's] choice by filing a court action." *Id*. The same is true in the context of Title IX.

The Court should thus reject Plaintiffs' attempt to bypass the Title IX administrative scheme enacted by Congress, as other courts have done. Indeed, just this week, a federal district court in the Southern District of Ohio held that under *Thunder Basin*, it lacked subject matter jurisdiction to consider a school district's request that it, *inter alia*, enjoin ED from terminating federal funding under Title IX. That case arose after ED received a complaint and completed an investigation of a school district, ultimately concluding that the school district had impermissibly discriminated against a transgender student by denying her access to restrooms consistent with her gender identity. *See Highland Local School District*, 2016 WL 5372349, at *4. Instead of completing the administrative process, the school district brought suit in district court, challenging ED's interpretation of Title IX and asking the court to enjoin ED from "taking any adverse action against the [district], including but not limited to steps to revoke its federal funding." *Id*. at *5. Because ED had already found noncompliance but had been unable to achieve voluntary compliance, a funding termination was far more likely in that case than for any state in this case. Nonetheless, the Court in *Highland* dismissed the action against the United States for lack of jurisdiction, concluding that *Thunder Basin* mandated this result. *See id*. at *7 (finding that "[t]he enforcement mechanisms of Title IX are . . . similar to that of the Mine Act, notably the administrative hearing and appeal process, judicial review in the court of appeals,

and express authorization of district court jurisdiction in suits by the Secretary but not the regulated parties"). *Id*. at *7. The Court should reach the same conclusion here.

D. Plaintiffs Cannot Bring Suit Under the APA Because They Do Not Challenge Any Final Agency Action

Plaintiffs' APA claims fail as a threshold matter because they do not challenge any "final agency action."[16] 5 U.S.C. § 704. To be final, an agency action must satisfy two requirements: (1) the decision must "mark the 'consummation' of the agency's decisionmaking process," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

Plaintiffs' APA challenge fails the second prong of this test because the guidance documents at issue themselves state that they merely set forth ED and DOJ's legal views that the prohibitions on discrimination "because of . . . sex" and "on the basis of sex" in Title VII and Title IX, respectively, are properly interpreted as including discrimination against persons whose gender identity does not match the sex assigned to them at birth. The Holder Memo is, by its terms, simply a "clarification of [DOJ's] position" that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status." Holder Memo at 2. It "[was] not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case." *Id.* Rather, the memorandum sought to "foster consistent treatment of

[16] There has been some inconsistency by the Eighth Circuit as to whether a party's failure to comply with § 704 constitutes a jurisdictional infirmity or a failure to state a valid cause of action. *Compare Defs. of Wildlife v. Adm'r, E.P.A.*, 882 F.2d 1294, 1302 (8th Cir. 1989) (concluding that "the district court had no jurisdiction to consider [a] claim[]" when the plaintiff had another adequate remedy in a court) *with Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) ("[T]he APA's requirements are part of a party's cause of action and are not jurisdictional."). Regardless of how the Court characterizes the requirements of § 704, however, the outcome here is the same: dismissal of Plaintiffs' APA claims is proper.

claimants throughout the government, in furtherance of [DOJ's] commitment to fair and impartial justice for all Americans." *Id*. Similarly, the 2016 DCL specifically noted that it "does not add requirements to applicable law, but [rather] provides information and examples to inform recipients about how [ED and DOJ] evaluate whether covered entities are complying with their legal obligations." 2016 DCL at 1. The same is true of the April 2014 Guidance. *See* April 2014 Guidance at 1 n.1. Finally, the OSHA Guide is also "not a standard or [a] regulation, and it creates no new legal obligations." OSHA Guide at 4. Rather, it simply offers recommendations for employers regarding best practices for restroom access for transgender workers that "are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace." *Id*.

Plaintiffs suggest, however, that the guidance documents constitute final agency action because they allegedly impose "new obligations" that require Plaintiffs to "modify [their] behavior" and "budget and reallocate resources . . . to prepare for the loss of future federal funding." *Id*. ¶¶ 55, 59, 60, 61. But Defendants have not required any plaintiff to modify behavior or reallocate resources. If Plaintiffs are correct that ED and DOJ's interpretations of Title VII, Title IX, and Title IX's implementing regulations are unlawful, they will not have to modify any behavior or reallocate anything. And even if Plaintiffs are found to have violated Title IX, they do not risk the loss of federal funds already provided if they come into compliance after judicial review.

By contrast, the Supreme Court in *Sackett* deemed a compliance order issued by the EPA to be final agency action because it imposed a "legal obligation to 'restore' [the plaintiffs'] property according to an agency-approved Restoration Work Plan" and "expose[d] the[m] to double penalties in a future enforcement proceeding" if they failed to do so. 132 S. Ct. at 1371–

72. Similarly, in *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Supreme Court found final agency action where the U.S. Army Corps of Engineers ("Corps") issued a jurisdictional determination that denied the plaintiffs a "five-year safe harbor from [civil enforcement] proceedings" by the Corps and EPA under the Clean Water Act. 136 S. Ct. at 1814.

None of the guidance documents Plaintiffs complain of here imposes any such legal obligations or consequences, and Plaintiffs' allegations that they have had to modify their behavior and prepare for a potential loss of federal funding do not suffice as an alternative. "The flaw in [Plaintiffs'] argument is that the 'consequences' to which they allude are practical, not legal." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 811 (D.C. Cir. 2006). Although guidance by an agency may be "voluntarily followed by [regulated parties,] . . . de facto compliance is not enough to establish that [agency guidance] [has] legal consequences." *Id*. Indeed, "while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall about what will be needed," no final agency action is found "where there has been no 'order compelling the regulated entity to do anything.'"[17] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (quoting *Indep. Equipment Dealers Assoc. v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004)).

[17] As the D.C. Circuit held, "interpretive rules or statements of policy generally do not qualify [as final agency action] because they are not 'finally determinative of the issues or rights to which they are addressed.'" *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (quoting Edwards, Elliott & Levy, Federal Standards of Review 157 (2d ed. 2013)); *see also id.* ("Like agency policy statements, interpretive rules that do not establish a binding norm are not subject to judicial review under the APA." (quoting Edwards, Elliott & Levy, Federal Standards of Review at 161)). As will be discussed in further detail below, the Holder Memo and the 2016 DCL constitute interpretive rules that are not required to undergo notice-and-comment rulemaking.

In any event, any legal consequences or obligations imposed on Plaintiffs would arise, if at all, from a finding that they violated Title VII, Title IX, or Title IX's implementing regulations, and not as a result of the guidance documents. *See Hadley-Mem'l Hosp. v. Kynard*, 981 F. Supp. 690, 693 (D.D.C. 1997) ("The 'new burdens' of which plaintiff complains were created not by DOD's notice, but by the statute, which DOD implemented."). Indeed, if an administrative investigation of a Title IX complaint had resulted in an administrative finding of non-compliance, ED or DOJ could have initiated civil enforcement actions based on the violation of Title IX *in the absence of the challenged guidance documents*. For example, in October 2011—five years prior to the issuance of the 2016 DCL—ED and DOJ initiated a joint investigation into the Arcadia Unified School District regarding allegations that the district was unlawfully discriminating against a student because he was transgender. *See* Letter from Anurima Bhargava and Arthur Zeidman to Dr. Joel Shawn (July 24, 2013).[18] During that investigation, both agencies expressed their view that "[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX." *Id*. ED and DOJ resolved the matter by entering into a resolution agreement with the district that committed the district to take specific actions, including agreement that the student would be allowed to use male-designated facilities at school and school-related activities. *Id*. Similarly, in November 2011, OCR opened an investigation of a complaint that Downey Unified School District was subjecting a transgender student to different treatment and harassment because of her gender identity and gender nonconformance. Letter from Arthur Zeidman to Dr. John Garcia (Oct. 14, 2014).[19] Affirming that "Title IX

[18] https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf.

[19] https://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf.

prohibits . . . gender-based harassment," OCR entered into a resolution agreement with the district that secured the student's use of female-designated facilities and the district's agreement to treat her "as a girl in all respects." *Id.* Although both of these matters were resolved through resolution agreements, if voluntary compliance had not been achieved, either ED or DOJ would have been able to commence enforcement proceedings—subject to judicial review—on the basis of the agencies' interpretation of Title IX, years before the 2016 DCL had even been issued. School districts faced at that time the same legal landscape that they face now. All the 2016 DCL did was make the agencies' preexisting legal positions more widely known.

Similarly, in the context of Title VII, DOJ could have initiated enforcement actions under Title VII—even in the absence of the Holder Memo—based on "Supreme Court case law interpreting [Title VII], and the developing jurisprudence in this area" holding that discrimination based on gender identity constitutes discrimination based on sex. Holder Memo at 1–2. Indeed, the EEOC concluded two years prior to the issuance of the Holder Memo that "Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex." *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *6 (Apr. 20, 2012).

E. Plaintiffs Cannot Bring Suit Under the APA Because They Have an Adequate Alternate Remedy

Plaintiffs' APA claims also fail as a threshold matter because they have another adequate remedy in a court, which is simply to defend themselves in any enforcement action taken against them, if any is. *See Johnson v. Vilsack*, No. 15-1796, 2016 WL 4394572, at *5 (8th Cir. Aug. 18, 2016) ("The APA authorizes judicial review of a final agency action, but only with respect to claims 'for which there is no other adequate remedy in a court.'" (quoting 5 U.S.C. § 704)

(citation omitted)). If DOJ filed suit in district court against any of the Plaintiffs based on its interpretation of Title VII or Title IX, the State would

> almost by definition [] have an adequate remedy in a court, that is, *the remedy of opposing the Attorney General's motions in the court in which [s]he files h[er] papers.* Not only would the filing of such an opposition there be a judicial remedy obviating the need for resort to the APA in this District, but it is a far more appropriate, far more logical remedy than a lawsuit here seeking injunctive relief.

NAACP v. Meese, 615 F. Supp. 200, 203 (D.D.C. 1985) (emphasis added). Alternatively, if ED were to commence administrative proceedings to terminate federal funding at some point in the future, the subject of that proceeding would have an opportunity for multiple layers of administrative review, *see* 34 C.F.R. § 100.8–.10, followed by judicial review in an appropriate court of appeals, *see id.* § 100.11; 20 U.S.C. § 1683.

In sum, Congress ensured that if DOJ or ED initiated proceedings to terminate federal funding, recipients would be able to challenge that action in court, either in federal district court if DOJ filed suit, or in a court of appeals following ED's administrative determination of noncompliance and withholding of federal funds. "[Section] 704 does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures,'" as is the case here. *Johnson*, 2016 WL 4394572 at *5 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). Plaintiffs cannot therefore seek recourse through the APA where another adequate remedy in a court would be available to them. *See id*. at *5 (concluding that decisions of the Office of the Assistant Secretary for Civil Rights in the Department of Agriculture are not reviewable under the APA "[b]ecause Congress has provided an adequate alternative remedy under" the Equal Credit Opportunity Act); *Defs. of Wildlife v. Adm'r, E.P.A.*, 882 F.2d 1294, 1302 (8th Cir. 1989) (holding that the APA did not permit review of claims under the APA for purported violations of the Bald and Golden Eagle Protection Act

and the Migratory Bird Treaty Act where the Federal Insecticide, Fungicide, and Rodenticide Act "provide[d] a framework for obtaining judicial review"); *see also supra* Part I.C (discussing opportunities for judicial review after ED initiates administrative proceedings or DOJ files suit in federal district court). Indeed, the court in *Highland Local School District* reached this exact conclusion when considering the plaintiff school district's request for pre-enforcement injunctive relief against a future Title IX administrative proceeding. *See Highland Local School District*, 2016 WL 5372349 at *9 n.2 (concluding that even if review were not barred under *Thunder Basin*, the plaintiff nonetheless could not bring an APA claim because it had another adequate remedy in a court—opposing any action by DOJ in federal district court or seeking appellate review if ED proceeded through the administrative hearing process, resulting in a withholding of federal funds).

II. Plaintiffs' APA Claims Should Be Dismissed for Failure to State a Claim upon Which Relief May Be Granted

Even if the Court were to conclude that it has subject matter jurisdiction, this case nonetheless should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs' entire case is predicated on the misguided notion that protection against discrimination "on the basis of sex" and "because of . . . sex" as used in Title IX and Title VII, respectively, *unambiguously* encompasses protection against discrimination on the basis of and because of "one's genes and anatomy" only, and no other attributes of "sex." Compl. ¶ 31. As explained below, Plaintiffs' absolutist view is belied by abundant authority to the contrary, including the Eighth, First, Fourth, Sixth, Ninth, and Eleventh Circuits, which have held that the term "sex" encompasses gender identity and/or that discrimination on the basis of or because of "sex" includes discrimination based on gender identity. In light of this authority, this Court should

recognize that the term "sex" or "sex discrimination" is, at the very least, ambiguous—and, further, that ED and DOJ's interpretation is the best and most reasonable one.

Relying on their faulty premise, Plaintiffs claim that Defendants' interpretations should be set aside because they: (1) are inconsistent with the language of Title VII, Title IX, and its implementing regulations; (2) required notice-and-comment rulemaking; and (3) violate the Spending Clause. As relevant here, the APA permits agency action to be set aside only if it is "in excess of statutory jurisdiction, authority or limitations, or short of statutory right," "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). However, ED and DOJ's interpretations and the challenged guidance documents meet none of these criteria.

A. Defendants' Interpretation Is Consistent with Title IX and its Implementing Regulations and with Title VII

Counts II, III, and IV of the Complaint rest wholly on Plaintiffs' claim that ED and DOJ's interpretations exceed congressional authority because they "redefine the unambiguous term 'sex' in Title VII and Title IX" (Counts II, III, and IV).[20] Compl. ¶ 77. This argument fails

[20] Counts II, III, and IV are all based on the same faulty theory that the term "sex" unambiguously is determined by genetics and anatomy alone. Count II contends that the guidance provided by ED and DOJ "exceeds congressional authorization" because it is inconsistent with the authorizing statutes. Count III argues that such guidance is "arbitrary and capricious" for the same reasons. Count IV (claiming the term "discrimination" is unambiguous) is functionally the same as Count II (claiming the term "sex" is unambiguous). The law is clear that "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term [in Title IX], Congress gave the statute a broad reach." *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 175 (2005); *see also id.* at 174 (reversing "[t]he Court of Appeals conclusion that Title IX does not prohibit retaliation because 'the statute makes no mention of retaliation, [because it] ignores the import of our repeated holdings construing 'discrimination' under Title IX broadly"). Thus, the only disputed question in Count IV is the lawful interpretation of the "protected characteristic" at issue—namely, sex. This is the same question raised in Count II and should be dismissed for the same reasons.

because the term "sex" is not defined in the relevant statutes or the Title IX regulation regarding single-sex facilities, and the weight of authority recognizes that the term "sex" is far broader than Plaintiffs' crabbed definition, encompassing gender identity. Defendants' interpretations are not just reasonable, they are the best construction of the relevant statutory and regulatory authority.

1. Plaintiffs' Narrow Interpretation of "Sex" Is Not Compelled by the Statutory Text

Title VII, Title IX, and Title IX's implementing regulations neither define the term "sex" nor address how to determine "sex" in the event of a conflict between genetic or anatomical makeup and gender identity. This absence of an applicable definition is central to the issues before the Court because Plaintiffs claim that the term "sex," as used in Title VII and Title IX, "unambiguously" refers to "one's genes and anatomy." Compl. ¶ 31.[21] Contrary to Plaintiffs' assertions, the Eighth Circuit has recognized that, in the context of Title VII,[22] discrimination because of "sex" includes gender discrimination. *See Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012) ("Gender stereotyping can violate Title VII when it influences employment decisions." (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)));[23] *see*

[21] Even interpreting Title VII and Title IX to refer exclusively to "one's genes and anatomy," Compl. ¶ 31, would not compel Plaintiffs' interpretation. As the Fourth Circuit noted, reducing "sex" solely to genitalia creates unresolvable ambiguities about how laws and regulations governing sex discrimination and the lawfulness of sex-segregated facilities would apply to "an intersex individual," "an individual born with X-X-Y chromosomes," and "an individual who lost external genitalia in an accident." *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720–21 (4th Cir. 2016), *mandate recalled and stayed, Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016).

[22] Courts look to case law interpreting Title VII for guidance in evaluating a claim brought under Title IX and vice versa. *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

[23] While the Eighth Circuit previously employed a narrower view of the term "sex" in Title VII, *see Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 740 (8th Cir. 1982), that decision predates *Price Waterhouse*, and therefore no longer is good law. *See Radtke v. Miscellaneous Drivers & Helpers Union Local No. 683 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (explaining that "the 'narrow view' of the term 'sex' in Title VII"

also Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) ("There is thus a congruence between discriminating against transgender and transsexual individuals and discriminating on the basis of gender-based behavioral norms."); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*.").[24]

Other circuits have also concluded that the term "sex" in Title IX and Title VII includes discrimination based on gender identity. Indeed, as Judge Davis recognized in *Gloucester*, the "weight of circuit authority" recognizes that "discrimination against transgender individuals constitutes discrimination 'on the basis of sex'" under Title IX and "analogous statutes," including Title VII. *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016) (Davis, J., concurring), *mandate recalled and stayed*, *Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016).[25] *See also Glenn*, 663 F.3d at 1316–19; *Smith*, 378 F.3d at 566; *Rosa v.*

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set forth in *Sommers* "'has been eviscerated by *Price Waterhouse*'" (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004))); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Plaintiff's transgender status is necessarily part of his 'sex' or 'gender' identity.").

[24] In *Price Waterhouse*, the Supreme Court held that an accounting firm violated Title VII when it denied a female senior manager partnership because she was considered "macho," "aggressive," and insufficiently "feminine[]." 490 U.S. at 235. In doing so, *Price Waterhouse* rejected the notion that sex discrimination occurs only in situations in which an employer prefers a man over a woman (or vice versa); rather, a prohibition on sex discrimination encompasses any differential treatment based on "sex-based considerations." *Id.* at 242. Thus, the core principle of *Price Waterhouse*—that sex discrimination encompasses more than just one's sex at birth—forecloses Plaintiffs' narrow reading of that term. *See, e.g.*, *Smith*, 378 F.3d at 573 (agreeing that "'sex' under Title VII encompasses *both* the anatomical difference between men and women *and* gender").

[25] The Fourth Circuit's decision in *Gloucester* remains good law in the Fourth Circuit despite the Supreme Court's stay pending a decision on certiorari. *See Carcaño v. McCrory*, --- F. Supp.3d, 2016 WL 4508192, at *13 (M.D.N.C. Aug. 26, 2016) ("[D]espite the stay and recall of the mandate, the Supreme Court did not vacate or reverse the Fourth Circuit's decision. Thus, . . . at present [*Gloucester*] remains the law in this circuit."); *Abukar v. Ashcroft*, No. 01-242,

Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008). Among other things, the Fourth Circuit explained that dictionary definitions contemporaneous with Title IX demonstrate "that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive" even at that time. *Id*. at 721; *see also Highland Local School District*, 2016 WL 5372349 at *11 (noting that "dictionaries from that era defined 'sex' in a myriad of ways" and rejecting the argument those dictionary definitions "reflect a uniform and unambiguous meaning of 'sex' as biological sex or sex assigned at birth"). Thus, the plain language of Title IX and its implementing regulations (and, by extension, Title VII) "shed[] little light on how exactly to determine the 'character of being either male or female'" in situations where the morphological, physiological, and behavioral indicators of sex "diverge."[26] *Gloucester Cnty.*, 822 F.3d at 722.

Plaintiffs cannot deny that numerous courts, including the Eighth Circuit, have rejected a narrow analysis of sex discrimination that would limit the term "sex" to genetic makeup or

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2004 WL 741759, at *2–3 (D. Minn. Mar. 17, 2004) (assuming that an Eighth Circuit opinion in a separate case retained its precedential value despite the Eighth Circuit's subsequent decision to recall and stay its own mandate in light of impending Supreme Court review").

[26] Even if the Court were to accept Plaintiffs' underlying premise that the term "sex" refers only to biological distinctions, it would not preclude a finding that sex encompasses gender identity. To the contrary, "numerous medical studies conducted in the past six years . . . 'point in the direction of hormonal and genetic causes for the in utero development'" of gender identity that is inconsistent with an individual's genitalia. Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch.16, at 16-72 to 16-74 & n.282 (Christine Michelle Duffy ed. Bloomberg BNA 2014))); *see also* E.S. Smith et al., *The Transexual Brain—A Review of Findings on the Neural Basis of Transsexualism*, 59 NEUROSCIENCE AND BIOBEHAVORIAL REVIEWS 251–66 (Dec. 2015) (citing numerous studies and concluding that "[t]he available data from structural and functional neuroimaging-studies promote the view of transsexualism as a condition that has biological underpinnings").

reproductive organs, and have instead embraced a definition that encompasses a variety of sex-based characteristics, including gender identity.[27] Rather, Plaintiffs' arguments regarding the purported "unambiguous" nature of the term "sex" boil down to three erroneous theories.[28]

First, it is not particularly relevant that the Congresses that enacted Title VII in 1964 and Title IX in 1972 may not have had transgender individuals in mind. *See* Compl. ¶¶ 30, 101. The Supreme Court has refused to restrict the meaning of Title VII (and, by extension, also Title IX)

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[27] One out-of-circuit district court has preliminarily concluded that Title IX and § 106.33 is not ambiguous. *See Texas v. United States*, 2016 WL 4426495, at *14–15 (N.D. Tex. Aug. 21, 2016). This Court should not follow that court's analysis. First, the court relied heavily on what it assumed was "the intent of the drafter," *id*. at *14, despite the Supreme Court's instruction that in determining the scope of protections under antidiscrimination laws, courts are not limited to "the principal concerns of our legislators." *Oncale v. Sundowner Offshore Svcs., Inc*., 523 U.S. 75, 79–80 (1998) ("[S]tatutory provisions often go beyond the principal evil to cover reasonably comparable evils."). Second, while acknowledging that "the use of dictionary definitions is appropriate in interpreting undefined statutory terms," *Texas*, 2016 WL 4426495, at *14, the court did not address the numerous dictionaries that defined sex to include behavioral and social factors like gender identity. *See Highland*, 2016 WL 5372349 at *11, *11 n.4. Third, the court did not address the many ambiguities created by defining sex based on anatomy or genetic makeup alone, or evidence that gender identity has biological roots. *See Gloucester Cnty.*, 822 F.3d at 720–21. Fourth, the court relied on the fact that § 106.33 is binary, *see Texas*, 2016 WL 4426495, at *15, without explaining how that fact alone could determine, unambiguously, how the regulation should operate in situations where the morphological, physiological, and behavioral indicators of "sex" diverge.

[28] In addition to these three theories, Count III of the Complaint also claims that Defendants' guidance documents are "arbitrary and capricious" because they: (1) did not "articulate[] a satisfactory explanation . . . including a rational connection between the facts found and the choice made," and (2) failed to consider "dignity and privacy issues." Compl. ¶¶ 95, 99. Plaintiffs err on both points. First, it is clear on the face of the guidance documents that ED and DOJ conducted a reasoned analysis, including express consideration of privacy issues, and balanced them against the important need to protect transgender students from discrimination on the basis of sex. *See, e.g.*, 2016 DCL at 3 (providing that "[a] school may [] make individual-user options available to all students who voluntarily seek additional privacy"). Indeed, the Fourth Circuit recognized that ED and DOJ's interpretation reflects the agencies' "fair and considered judgment" on policy formulation, not "merely a convenient litigating position." *Gloucester Cnty.*, 822 F.3d at 722–23. Second, the documents at issue merely interpret existing legal requirements. Issuance of such interpretive guidance does not obligate an agency to proffer the type of policy explanation required in notice-and-comment rulemaking. *See infra* Part II.B.

to what was in the minds of the legislators who drafted those statutes over fifty years ago, stating that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79; *cf. Barr v. United States*, 324 U.S. 83, 90 (1945) ("[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."). For example, under Title IX, sexual harassment is discrimination on the basis of sex, even though "[w]hen Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting). Similarly, the Supreme Court has held that Title VII (like Title IX) protects against discrimination between members of the same sex, even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79.

Second, contrary to Plaintiffs' assertions, other congressional action does not "reinforce" their view. Compl. ¶ 119. Plaintiffs point to the 2013 amendments to the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13925(b)(13)(A), *id.*, but there is no evidence that Congress intended the explicit inclusion of "gender identity" in VAWA to imply that discrimination based on gender identity falls outside the meaning of discrimination "on the basis of . . . sex." Nor can any inference of intent be drawn from Congress' inaction on including the term "gender identity" in Title VII and Title IX. "Congress does not express its intent by a failure to legislate." *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (citing *United States v. Estate of Romani*, 523 U.S. 517, 534 (1998) (Scalia, J., concurring)); *see*

also Cent. Bank of Denver, N.A. v. First Interstate Bank, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cnt. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). Indeed, an amendment can be rejected for the simple reason that Congress believes the proposed change is not needed because its substance is already included in the statute. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"). In any event, those legislative efforts did not address the question raised here—namely, how to determine the sex of a transgender individual for purposes of access to sex-segregated facilities under Title VII or Title IX and its implementing regulations.

Finally, Plaintiffs charge that DOJ "revers[ed]" course on the meaning of "sex" in federal nondiscrimination law based on a motion to dismiss that DOJ filed in 2005 in the case of *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008). *See* Compl. ¶ 35. But DOJ's litigating position in an isolated case does not constitute the agency's definitive position on an issue for all purposes, nor does it somehow dictate the position of ED or other federal agencies.[29] In any event, agencies "are not bound by their own prior construction of a statute," *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), much less their litigating position in an isolated case. This is particularly true where, as in *Schroer*, the court *rejected* the agency's statutory construction argument. *See Schroer*, 577 F. Supp. 2d at 308 (holding that refusal to

[29] Plaintiffs do not suggest that ED, EEOC, or DOL have "reversed" their interpretations.

hire the plaintiff in response to her "decision to transition, legally, culturally and physically, from male to female . . . violated Title VII's prohibition on sex discrimination"). Moreover, even when they change a policy, agencies are not subject to any heightened standard of explanation. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 514 (2009); *see* Holder Memo at 2 (explaining DOJ's conclusion that Title VII protects transgender people).

Accordingly, because the language and history of Title VII and Title IX do not "unambiguously" dictate that discrimination because of "sex" refers only to discrimination based on "one's genes and anatomy," Compl. ¶ 31, Plaintiffs' claims—which rest entirely on this contention—must be dismissed.

2. Defendants' Interpretation of What Is Encompassed in "Sex" and Discrimination "On the Basis of Sex" Is More Reasonable than the Unduly Narrow View Urged by Plaintiffs

Counts II, III, and IV should also be dismissed because ED's interpretation of its regulations regarding single-sex facilities under Title IX is entitled to deference, and also because ED and DOJ's interpretation of what constitutes discrimination "on the basis of sex" and "because of . . . sex" is the best and most reasonable construction of the relevant statutes and regulations.

Title IX. Title IX prohibits sex discrimination in education programs or activities by recipients of federal financial assistance. *See* 20 U.S.C. § 1681; 34 C.F.R. pt. 106; 28 C.F.R. pt. 54. Title IX's prohibition against discrimination on the basis of sex must be interpreted in the context of the statute's other prohibitions and overall purpose. *See Davis ex rel. LaShonda D.*, 526 U.S. at 650. Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity receiving Federal financial assistance.'" *Id.* (quoting 20 U.S.C. § 1681(a)). In other words, "[t]he statute makes clear that, whatever else it prohibits, students

must not be denied access to educational benefits and opportunities on the basis of gender." *Id.*

DOJ and ED are the principal agencies tasked with implementing Title IX. Thus, in the absence of an express definition of the term "sex," ED's regulations and its interpretation of those regulations are owed substantial deference by this Court. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984) *and Auer v. Robbins*, 519 U.S. 452, 461 (1997), *respectively*. Indeed, under *Auer*, agencies' interpretations of their own regulations are "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Auer*, 519 U.S. at 461.

DOJ and ED's regulations implementing Title IX are consistent with the statute's provisions and purpose of ensuring equal educational opportunities. The regulations prohibit recipients from, *inter alia*, providing "different aid, benefits, or services," or "[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31; 28 C.F.R. § 54.400. The regulations also state that schools may "provide separate toilet, locker room, and shower facilities on the basis of sex," as well as "separate housing," without running afoul of Title IX, so long as the "facilities provided for students of the one sex" are "comparable to [the] facilities provided for the other sex." 34 C.F.R. §§ 106.32, 106.33; 28 C.F.R. § 54.410. As discussed above, neither the regulations nor the statute defines the term "sex," and certainly neither *unambiguously* defines "sex" as being limited to the sex assigned to a person at birth. *See Gloucester Cnty.*, 822 F.3d at 720–21 (holding that the regulation is "ambiguous as applied to transgender individuals"); *Highland Local School District*, 2016 WL 5372349 at *13 (finding that "the term 'sex' in Title IX and its implementing regulations regarding sex-segregated bathrooms and living facilities is ambiguous"). Under these circumstances, ED's interpretation of what constitutes discrimination on the basis of sex is entitled to deference. Indeed, ED's interpretation best comports with the

purposes of Title IX, because it is the only interpretation that protects transgender students from being excluded from educational activities and opportunities on the basis of sex-related characteristics. *See Carcaño*, 2016 WL 4508192 at *11 ("Access to bathrooms, showers, and other similar facilities qualifies as a 'right, privilege, advantage, or opportunity' for purposes of Title IX." (quoting *Gloucester Cnty.*, 822 F.3d at 718 n.4)).[30]

The Fourth Circuit is the only federal court of appeals to have considered ED's interpretation of Title IX's implementing regulations regarding single-sex facilities. *Gloucester Cnty.*, 822 F.3d at 715. After recognizing that the term "sex" was ambiguous, the *Gloucester* Court concluded that ED's interpretation offered a reasonable resolution of that ambiguity. *Id.* at 721–22;[31] *see also Highland Local School District*, 2016 WL 5372349 at *13 (concluding that ED's "interpretation [of Title IX and implementing regulations] is not clearly erroneous or inconsistent with Title IX implementing regulations," and thus is "presumptively entitled to *Auer* deference"). The Fourth Circuit's decision comports with foundational principles of administrative law, which instruct courts to give controlling weight to agencies' interpretations of their own regulations, unless those interpretations are plainly erroneous. *See Auer*, 519 U.S. at 461; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Gardebring v. Jenkins*, 485

[30] By contrast, Plaintiffs do not allege that any non-transgender student would be denied an opportunity to use educational facilities under ED's interpretation, nor could they, because under ED's interpretation, all students may opt to use the facilities that comport with their gender identity. At most, Plaintiffs raise privacy concerns for non-transgender students. *See* Compl. ¶ 99. But ED's interpretation expressly provides that schools may allow students to opt for single-user facilities, if that is their preference. *See* 2016 DCL at 3; *see also Cruzan v. Special Sch. Dist. # 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment).

[31] The Maine Supreme Court reached a similar conclusion when evaluating a state law requiring restrooms in school buildings to be "[s]eparated according to sex." Me. Rev. Stat. Ann. Tit. 20-a, § 6501(1)(B) (2013). In *Doe v. Regional School Unit 26*, that court determined that the statute "does not mandate, or even suggest, the manner in which transgender students should be permitted to use sex-segregated facilities." 86 A.3d 600, 605–06 (Me. 2014).

U.S. 415, 429–30 (1988). Interpretative rules construing ambiguous statutes are likewise "entitled to respect." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under either standard, Plaintiffs' APA claims challenging ED's interpretation of Title IX and its implementing regulations must be dismissed.[32]

Title VII. Plaintiffs' claims fare no better in the context of Title VII. In challenging DOJ's interpretation of Title VII, Plaintiffs again rest their case on the misapprehension that "Title VII's use of the word 'sex' is just as unambiguous as Title IX's use of the word." Compl. ¶ 88. For all the reasons discussed above, the term "sex" does not unambiguously justify Plaintiffs' view of either statute. *See supra* Part II.A.1. Like Title IX, the plain text of Title VII makes clear that employers are required to provide access to sex-segregated bathrooms and changing facilities in a way that does not "deprive[employees] of opportunities" or "adversely affect[] [them]." 42 U.S.C. § 2000e-2(a)(2). DOJ's interpretation comports with this purpose. By ensuring that transgender employees are not deprived of the opportunity to access facilities based on a myopic view of their "sex" (*i.e.*, based on their genital anatomy or genetic makeup), it

[32] As the Fourth Circuit held in *Gloucester*, *Auer* deference is appropriate when interpreting the single-sex facility regulation at issue here. *See Gloucester Cnty.*, 822 F.3d at 721. But even if this Court were to disagree, *Skidmore* warrants the same conclusion as to the reasonableness of ED and DOJ's statutory and regulatory interpretations. Under *Skidmore*, courts should afford greater deference to an agency interpretation when it arises out of "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140. Here, ED is a federal agency that regularly interacts with school districts, and it developed its guidance in close collaboration with school districts across the country. *See generally* U.S. Dep't of Ed., Examples of Policies and Emerging Practices for Supporting Transgender Students (May 2016), http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf. Through that collaboration, ED reasonably determined that its current interpretation was necessary to preserve transgender students' equal access to educational opportunities, while accommodating schools' interests in preserving privacy and preventing disruptions. *See id*. (describing how schools have successfully implemented ED's interpretation).

protects those individuals from discrimination (and stigmatization) founded on a judgment that they are not male or female enough to use the restroom consistent with their gender identity.

Indeed, since the Supreme Court's decision in *Price Waterhouse*, it is well-established that discrimination "because of . . . sex" is not limited to preferring males over females (or vice-versa), but includes differential treatment based on "sex-based considerations." 490 U.S. at 242; *see also Schwenk*, 204 F.3d at 1202 (holding that a prohibition on sex discrimination encompasses any differential treatment based on a consideration "related to the sex of" the individual). DOJ's interpretation of Title VII ensures that transgender employees are not subject to differential treatment, including access to facilities, because of such sex-based considerations—namely, their transgender status. Such a practice would "literally discriminat[e] 'because of . . . sex,'" *Schroer*, 577 F. Supp. 2d at 308, whether viewed as discrimination based on a divergence between gender identity and one's sex assigned at birth or as discrimination because of an individual's gender transition. As the *Schroer* court aptly analogized, firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion,'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts,'" as "[n]o court would take seriously the notion that 'converts' are not covered" by a prohibition against religious discrimination. *Id.* at 306. By the same logic, discrimination against people because they have "changed" their sex—*i.e.*, persons living as a different sex than the one assigned at birth—is a "clear case" of discrimination because of sex. *Id.*

By contrast, Plaintiffs' proposed construction reflects the same limited understanding of the phrase "discriminate . . . because of . . . sex" that was rejected in *Price Waterhouse*, in which the Supreme Court held that Title VII did not permit an employer to penalize a female employee

who refused to conform to sex-based stereotypes about how women should walk, talk, dress, and act. *See* 490 U.S. at 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Plaintiffs, by insisting that they may treat employees unequally based on any consideration other than "anatomy and genes," make the same error. Plaintiffs' view would mean, for example, that an employer could legally fire its transgender female employee because her sex assigned at birth does not match her internal identification or presentation of gender to the outside (*i.e.*, because she wears women's clothing, has a woman's hairstyle, has developed breasts or other bodily features through hormone therapy, among other things). On Plaintiffs' reading of the statute, she still could be adversely treated based on her employer's notion that she is "not woman enough." Discrimination by an employer on the basis of such "sex-based considerations" is clearly proscribed by *Price Waterhouse*. *Id*. at 242.

Accordingly, denying transgender employees access to sex-segregated facilities consistent with their gender identity violates Title VII, both because it discriminates with respect to a term, condition, or privilege of employment, *see* 42 U.S.C. § 2000e-2(a)(1), and because it limits, segregates, or stigmatizes employees in a way that deprives them of opportunities and adversely affects them, *id.* § 2000e-2(a)(2). The challenged interpretation does no more than articulate this legal principle, and thus Plaintiffs' APA challenge should be dismissed.

B. The Guidance Documents Are Interpretive Rules Exempt from Notice-and-Comment Rulemaking

Plaintiffs allege that Defendants violated the APA by "promulgat[ing] new rules, regulations, and guidance unilaterally declaring that Title IX's term, 'sex,' means, or includes, 'gender identity'" without first conducting notice-and-comment rulemaking. Compl. ¶¶ 62–72 (Count I). While Plaintiffs do not clearly specify which "rules, regulations, and guidance" they

mean to challenge, their Complaint identifies four guidance documents at Paragraph 35. However, each of the guidance documents, and the interpretations discussed within them, at most constitute interpretive rules that do not require notice-and-comment rulemaking. Therefore, Plaintiffs' procedural APA claim fails on its face.

The APA does not require agencies to follow notice-and-comment procedures in all situations, or even for all "rules." Rather, the statute specifically excludes interpretive rules and statements of agency policy from these procedures. 5 U.S.C. § 553(b)(3)(A); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). The Supreme Court has explained that the "critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 135 S. Ct. at 1204; *see also McKenzie v. Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986) ("Interpretive rules may include an administrative construction of a statutory provision on a question of law reviewable in the courts.").

Interpretive rules encourage predictability in the administrative process because they "clarif[y] or explain[] existing law or regulations." *McKenzie*, 787 F.2d at 1222. An agency that enforces "less than crystalline" statutes and regulations must interpret them, "and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement, which the [APA] assimilates to an interpretive rule." *Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996). Courts should not "discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities." *Id.* Here, by announcing their interpretations of Title VII as well as Title IX and its regulations, ED and DOJ have informed the public about their understanding of the law—and no more. The challenged guidance documents are not binding on courts, do not

have the force and effect of law, and do not add substantively to existing laws, but simply "advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). The guidance documents and the interpretations they contain are therefore examples of paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA. *Id.*

Plaintiffs incorrectly conclude that the guidance documents are substantive "rules" under the APA, contending that "Defendants have given these rules the full force of law" and that the guidance documents "impose new obligations on Plaintiffs." Compl. ¶¶ 64-67. That is simply not so. First, unlike the statutes and regulations on which they are premised, the interpretations themselves do not carry the force of law. Rather, as explained above, they merely explain what ED and DOJ think Title VII, Title IX, and its implementing regulations *already* require. Although ED and DOJ's interpretations of the law are entitled to some deference, courts will not enforce them if they believe the agencies' "interpretation of the meaning" of the statutes or regulations is inconsistent with the statutes or regulations themselves. *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1290 (D.C. Cir. 1974), *vacated for lack of standing*, 426 U.S. 26 (1976); *see also Perez*, 135 S. Ct. at 1208 n.4 (explaining that *Auer* deference does not transform an interpretive rule into a legislative rule). Valid interpretations of binding authorities necessarily implicate rights and obligations—which derive from underlying statutes and rules—but the binding nature of an interpreted statute or regulation does not transform an agency's explication into a legislative rule. If that were so, "every interpretive rule would become legislative." *Dismsas Charities*, 401 F.3d at 681.

Second, the guidance documents do not impose new obligations on Plaintiffs. To the contrary, they simply provide an interpretation of the applicable statutes and regulations for a

context that perhaps had not arisen previously. As the Fourth Circuit explained, for most of their existence, Title IX's regulations were understood simply to mean that a school may provide sex-segregated facilities. *See Gloucester Cnty.*, 822 F.3d at 722. In recent years, as schools have confronted the reality that some students' gender identities do not align with their birth-assigned sex, schools have begun to look to ED for guidance as to how its regulations apply to transgender students—*i.e.*, how Title IX's prohibition on discrimination on the basis of sex operates in the context of providing sex-segregated facilities in schools for transgender students. *Id.* at 720. It was also only recently that schools started citing Title IX's regulations as the basis for excluding transgender students from facilities consistent with their gender identity. *Id*. The 2016 DCL thus simply applies preexisting rules to new circumstances.[33]

In sum, the guidance documents merely supply "crisper and more detailed lines than the authority being interpreted." *Iowa League of Cities v. EPA*, 711 F.3d 844, 875 (8th Cir. 2013); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Accordingly, the guidance documents set forth interpretive rules only, which are not subject to notice-and-comment requirements.

C. The Spending Clause Is Not Violated by Title IX, the Guidance Documents, or the Interpretations Contained in the Guidance Documents

Plaintiffs contend that the challenged interpretations of Title IX and Title VII violate the Spending Clause, U.S. Const., art. I, § 8, cl. 1, either by: (1) failing to provide clear notice of the conditions on which federal funding was predicated (Count V), or (2) unconstitutionally coercing

[33] Although the Holder Memo revised DOJ's defensive litigating position on the scope of Title VII, as previously explained, this change was made in response to adverse court decisions rejecting DOJ's previous litigating position, as well as evolving case law. *See supra* note 8. In any event, a changed interpretation is no more subject to notice-and-comment requirements than an agency's initial interpretation. *See Perez*, 135 S. Ct. at 1206.

the states that receive Title IX funding to comply with ED's interpretation of the statute (Count VI). Plaintiffs err on both points.

First, the Constitution vests Congress with the power to "fix the terms under which it disburses federal money to the States." *Suter v. Artist M*, 503 U.S. 347, 356 (1992). "The Supreme Court has explained that so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)). For example, in *Davis*, the Supreme Court held that Title IX's prohibition on sex discrimination in schools provided adequate notice that severe student-on-student sexual harassment was actionable, even though "the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships.'" 526 U.S. at 651 (quoting *Oncale*, 523 U.S. at 82); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) ("[T]he [School] Board should have been put on notice by the fact that our cases . . . have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination.").[34] Recipients of federal funds are clearly on notice that they must comply with the antidiscrimination provisions of Title IX, and "the possibility that application of [the condition] might be unclear in [some] contexts" does not render it unenforceable under the Spending Clause. *Bennett v. Ky.*

[34] In light of these well-settled principles, no weight should be given to Plaintiffs' contention that "any interpretation of a federal law tied to State funding should be based on its meaning at the time the States opted into the spending program." Compl. ¶ 118. Indeed, the only case Plaintiffs cite for this proposition, *Bennett v. New Jersey*, 470 U.S. 632 (1985), has no bearing here. *Bennett* addressed the retroactive application of statutory amendments to requirements for federal grant programs. *See id.* at 638. By contrast, ED and DOJ's guidance documents merely interpret already existing statutory or regulatory obligations, and any consequence of violating these pre-existing obligations would be prospective only.

Dep't of Educ., 470 U.S. 656, 665–66, 673 (1985) (where statute makes clear that conditions apply to receipt of federal funds, Congress need not "specifically identif[y] and proscribe[]" each action that will violate its terms). In any event, even if an enforcement action were to be initiated sometime in the future, ED would not seek penalties or the return of federal funds already provided based on any prior conduct that was inconsistent with the statute. Rather, if ED sought to withhold or terminate any funds at all, it would only seek to do so *prospectively*, and only until compliance is achieved. *See* 34 C.F.R. § 100.8 (c).

Second, Plaintiff's coercion claim also is not viable. The Supreme Court has explained "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *see also Nat'l Fed. of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2606 (2012). For example, coercion may occur when Congress leverages eligibility for funding under an old and large program to force participation in a new one. *See NFIB*, 132 S. Ct. at 2607 ("What Congress is not free to do is to penalize States that choose not to participate in [a] new program by taking away their existing . . . funding."). But there is no coercion where, as here, what is challenged is the interpretation of a longstanding condition on federal funding of education. Title IX has always prohibited sex discrimination in federally funded educational activities. *See id.* at 2603–04 (reaffirming Congress's authority to place "restrictions on the use of [federal] funds"). No court has ever suggested that coercion might occur when an existing statutory condition is interpreted in a new context. This Court should not be the first. *See, e.g.*, *Jim C. v. United States.*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (rejecting claim that

analogous federal statute prohibiting discrimination by federal fund recipients against individuals with disabilities is unduly coercive).[35]

III. The Court Lacks Jurisdiction Over Plaintiffs' Regulatory Flexibility Act Claim

Plaintiffs claim, in Count VII of their Complaint, that Defendants violated the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612, by failing to prepare an initial and final regulatory flexibility analysis, or to certify that such an analysis was unnecessary. *See* Compl. ¶ 130. The Court should dismiss this claim for lack of jurisdiction because the RFA does not authorize judicial review under the circumstances presented in this case and because Plaintiffs lack standing to bring suit under the RFA.

The RFA requires agencies to identify the potential impact of proposed and final rules on small entities. Section 603 provides that whenever an agency is required by the APA or any other law to publish for comment a proposed rule, it must prepare and make available for public comment an initial regulatory flexibility analysis describing the "impact of the proposed rule on

[35] Plaintiffs also allege, in cursory fashion, that Defendants "violate constitutional standards of clear notice" (Count V) with respect to Title VII, which was passed pursuant to Section 5 of the Fourteenth Amendment. Compl. ¶ 121. Plaintiffs argue that "*Congress* may only 'enforce—not redefine—constitutional protections when acting pursuant to Section 5 of the Fourteenth Amendment," and then make the leap that Defendants therefore, "run afoul of" the Fourteenth Amendment "by redefining 'sex' in Title VII." *Id*. (emphasis added). As an initial matter, Defendants are several federal agencies and high-ranking agency officials—not Congress—and Defendants did not pass Title VII. More fundamentally, as detailed *supra* in Part II.A.2, DOJ cannot, and did not, rewrite Title VII—rather, it merely provided interpretive guidance about what it thinks Title VII *already* means based on its existing language. In other words, the guidance documents do not "redefine" the term "sex," but rather interpret the term "sex" as applied to new circumstances. Finally, Plaintiffs' substantive premise also fails. Plaintiffs concede that "the Equal Protection Clause of the Fourteenth Amendment has long been understood to prohibit discrimination on the basis of 'sex." Compl. ¶ 121. But once again, they insist that discrimination based on "sex" refers only to "disparate treatment of the sexes based on 'inherent' 'physiological differences between male and female individuals." *Id*. (emphasis omitted). As detailed *supra* in Part II.A, that argument has been rejected by numerous federal courts, including the Eighth Circuit.

small entities." 5 U.S.C. § 603(a). Section 604 similarly requires an agency, after considering the comments received, to prepare a final regulatory flexibility analysis when promulgating the final rule. *Id.* § 604. The statute contains a narrowly drafted judicial review provision that affords "small entit[ies]" that have been "adversely affected or aggrieved by final agency action" an opportunity to obtain "judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610" of the RFA. *Id.* § 611(a)(1). This provision is the exclusive means of obtaining judicial review of an agency's compliance with the RFA. *See id.* § 611(c) ("Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.").

As an initial matter, the RFA's requirements apply only to agency rules that are subject to notice and comment under the APA. *See id.* § 603(a) (requiring an initial regulatory flexibility analysis "[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule"); *id.* § 604(a) (same for final regulatory flexibility analysis). Thus, Plaintiffs' RFA claim is duplicative of their procedural APA claim in Count I of their Complaint. If Plaintiffs are correct that DOJ and ED should have engaged in notice-and-comment rulemaking, then the requirements of the RFA would also apply. If, however, Defendants are correct that notice-and-comment procedures were not required, then a regulatory flexibility analysis also was not required and Plaintiffs' RFA claim must fail.

But regardless of how the Court rules on Count I, the Court lacks jurisdiction over Plaintiffs' RFA claim. "Federal courts are courts of limited jurisdiction," possessing authority to exercise only the jurisdiction provided to them by statute or by the Constitution. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Section 611(a)(1) of the RFA identifies

"small entit[ies]" as the sole type of party that may bring an action to enforce the RFA. 5 U.S.C. § 611(a)(1).[36] The term "small entity" includes small governments, but does not include states such as Plaintiffs. *See id.* § 601(5)-(6) (defining "small governmental jurisdiction" as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand"). Accordingly, the Court lacks jurisdiction over Plaintiffs' RFA claim. *See Navajo Ref. Co. v. United States*, 58 Fed. Cl. 200, 206 n.7 (2003) (declining to address claim brought pursuant to the RFA because the plaintiff was not a small business).[37]

Even if judicial review of Plaintiffs' RFA claim were authorized by statute—and it is not—the Court should dismiss the claim because Plaintiffs lack standing to assert it. To establish Article III standing, a plaintiff must show that its alleged injury will likely be redressed by a favorable ruling. *Lujan*, 504 U.S. at 561. Plaintiffs' alleged injury is having to comply with ED and DOJ's interpretations of Title VII, Title IX, and its implementing regulations, which, Plaintiffs claim, are contrary to law. This alleged injury will not be redressed by a finding that DOJ and ED violated the RFA by failing to prepare and publish an initial or final regulatory

[36] Section 611(a)(2) addresses *where* an action to enforce the RFA may be brought, not who may bring the action. *See* 5 U.S.C. § 611(a)(2) ("Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7.").

[37] The Court lacks jurisdiction to adjudicate Plaintiffs' § 603 claim for an additional reason. Section 611(a) identifies the only provisions of the RFA that are judicially enforceable. *See* 5 U.S.C. § 611(a). Section 603, which requires preparation of an initial regulatory flexibility analysis, is not among the enumerated provisions. *See id.* Thus, the Court lacks jurisdiction over any alleged violation of § 603 of the RFA. *See Allied Local and Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000) (concluding that the court was without jurisdiction to consider challenge to initial regulatory flexibility analysis under § 603 because "[s]ection 611(a) specifically lists the sections of the RFA subject to judicial review, and section 603 is not on the list").

flexibility analysis. The remedy for a violation of the RFA is to remand the challenged rule to the agency for preparation of a regulatory flexibility analysis or to defer enforcement of the rule against small entities. *See* 5 U.S.C. § 611(a)(4). Neither of these remedies will relieve Plaintiffs of the hardship they claim to suffer because, as explained, Plaintiffs are not small entities.

Plaintiffs also cannot satisfy the prudential requirements of standing as to their RFA claim. *See Warth*, 422 U.S. at 498. The prudential standing test limits justiciable cases and controversies to those in which "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). The purpose of the RFA is to require agencies to consider whether regulations can be tailored to reduce the burden on small entities. S. Rep. 96-878, Pub. L. No. 96-354, § 2, 94 Stat. 1164-65. Because Plaintiffs are not small entities, they lie outside the RFA's zone of interests and thus lack standing to bring a claim under the RFA.

IV. Plaintiffs Fail to State a Claim Against the United States Department of Labor, the United States Equal Employment Opportunity Commission, Secretary Thomas E. Perez, Assistant Secretary David Michaels, and Chair Jenny R. Yang

Finally, even if this case were to proceed despite the reasons set forth above, it still should be dismissed as to Defendants DOL, EEOC, Secretary Perez, Assistant Secretary Michaels, and Chair Yang. Since Plaintiffs fail to proffer any allegations that DOL, EEOC, Secretary Perez, Assistant Secretary Michaels, or Chair Yang have injured or will injure them in any way, Plaintiffs' claims against those parties must be dismissed for failure to state a claim upon which relief can be granted. Three of those defendants are named based on their relation to OSHA. Specifically, Plaintiffs identified DOL as a defendant because it serves as "the federal agency responsible for supervising the formulation, issuance, and enforcement of rules, regulations, policies, and forms by the Occupational Safety and Health Administration

('OSHA')." Compl. ¶ 15. Plaintiffs also named Secretary Perez as a defendant because "he is authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA," and they brought suit against Assistant Secretary Michaels in his official capacity as the Assistant Secretary of Labor for OSHA. *Id*. ¶¶ 16, 17. Plaintiffs also named two parties based on their work interpreting and administering Title VII—EEOC, an independent federal agency that "administers, interprets, and enforces certain laws, including Title VII," and Chair Jenny Yang as the Chair of the EEOC. *Id*. ¶¶ 13, 14.

The Complaint contains no allegations, however, that any of these parties has contributed—or is related in any way—to Plaintiffs' alleged grievances. With regard to OSHA, Plaintiffs mention that agency only once in their factual allegations when discussing the OSHA Guide, which is a guidance document that simply offers advice on "best practices regarding restroom access for transgender workers." OSHA Guide at 1; *see also* Compl. ¶ 35. This document neither is legally binding nor does it create any new legal obligations, and Plaintiffs do not allege otherwise. Indeed, nowhere do Plaintiffs suggest that the OSHA Guide imposes *any* obligations or forms the basis for *any* potential enforcement action, and it does not. Rather, Plaintiffs simply cite the document as an example of an alleged "*progression* leading to the new obligations Defendants are imposing under Title VII and Title IX." Compl. ¶ 35 (emphasis added).

Indeed, nowhere do Plaintiffs allege that DOL, EEOC, or any of the individuals named in their official capacities at those agencies have commenced or will shortly commence enforcement proceedings on the basis of the statutory interpretations challenged by Plaintiffs. Rather, Plaintiffs allege only that *DOJ and ED* may initiate proceedings to enforce the purported "new obligations under Title VII and Title IX." *Id*. ¶¶ 55, 59. In the absence of any allegation

explaining how or why the behavior of which Plaintiffs complain is attributable to DOL, EEOC, Secretary Perez, Assistant Secretary Michaels, or Chair Yang, the Court should dismiss the claims brought against them for failure to state a claim upon which relief can be granted. *See, e.g.*, *Clark v. Nebraska*, No. 4:14CV3192, 2014 WL 7147060, at *2 (D. Neb. Dec. 15, 2014) (holding that because "Plaintiff's Complaint raises no claims and makes no allegations against any Defendant . . . [it] fails to state a claim upon which relief may be granted"); *see also Dunn v. Bethel*, No. 616CV06006SOHBAB, 2016 WL 4870560, at *4 (W.D. Ark. Aug. 24, 2016), *report and recommendation adopted*, No. 6:16-CV-6006, 2016 WL 4775460 (W.D. Ark. Sept. 13, 2016) ("Merely listing a Defendant in a case caption is insufficient to support a claim against the Defendant.").

CONCLUSION

For the reasons stated, Defendants respectfully request that the Court dismiss all of Plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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