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

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

DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING THE COURT'S PRELIMINARY INJUNCTION

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INTRODUCTION

This Court ordered the parties to provide supplemental briefing on three issues regarding the scope of the Preliminary Injunction: (1) "whether the Defendants' Guidelines are enjoined in total or whether the principal of severability applies to them," (2) "whether the injunction implicates Title VII in any manner (and specifically where school employees and staff may share intimate facilities with students)," and (3) "whether [Occupational Safety and Health Administration (OSHA)] or [Department of Labor (DOL)] activity is implicated by the injunction." Order ("Clarification Order") at 7, ECF No. 86. On October 24, 2016, Plaintiffs filed their supplemental brief. *See* Pls.' Supp. Br. Regarding the Court's Prelim. Inj. ("Pls.' Supp. Br."), ECF No. 90. Remarkably, despite filling almost 24 pages, Plaintiffs' brief is almost entirely unresponsive to the questions raised by the Court and provides almost no legal analysis relevant to the resolution of those questions. Instead, Plaintiffs take the Court's request for a filing addressing three discrete issues as license to again argue their position on the merits as to Defendants' interpretation of Title IX and its implementing regulations. Rather than reargue their case, as Plaintiffs have done, Defendants will limit their briefing to the three questions posed by the Court and to the few points in Plaintiffs' brief that could arguably relate to these questions.

As explained below and in Defendants' briefs in support of their Motion for Clarification, the Preliminary Injunction does not "implicate Title VII" outside of the context of public educational institutions in the plaintiff states. The proceedings on Plaintiffs' request for preliminary injunctive relief focused almost exclusively on access by transgender students to sex-segregated facilities in public schools. This focus is reflected in the Court's opinion, which discusses Title IX at length and references Title VII only in passing, and the language of the Preliminary Injunction itself, which does not prohibit Title VII investigations and does not prohibit

Defendants from taking Title VII enforcement actions provided that they are not "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." Prelim. Inj. Order ("PI Order") at 37, ECF No. 58.[1] Nor have Plaintiffs explained how *they* are harmed by Defendants' interpretation of Title VII outside of the context of Plaintiffs' public educational institutions, or why an injunction encompassing Title VII is necessary to remedy *their* alleged injuries. A preliminary injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (same). Consistent with this fundamental principle, the Preliminary Injunction is properly understood to be limited to the context of access to sex-segregated facilities by transgender individuals in public schools, and should not extend to the enforcement of Title VII outside of this context, including against private employers. Indeed, Plaintiffs do not even have standing to represent the interests of private employers in their states.

Nor is OSHA or DOL activity implicated by the Preliminary Injunction. Again, the focus of the preliminary injunction proceedings was on whether Title IX and its implementing regulations require that transgender individuals be allowed to access sex-segregated facilities in public schools that match their gender identity—a realm in which OSHA plays no role. Plaintiffs have entirely failed to establish that they face injury or harm absent relief from any activity or program of OSHA or DOL; nor could they, given that OSHA, the only agency within DOL that Plaintiffs address, does not enforce laws prohibiting sex discrimination and has explicitly

[1] As the Court is well aware, the Court used the term "Guidelines" to refer collectively to six specific documents: (1) a 2010 Dear Colleague Letter issued by the Department of Education's (ED's) Office for Civil Rights (OCR) regarding harassment and bullying; (2) an April 2014 OCR Guidance Document regarding sexual violence; (3) a December 2014 memo issued by then Attorney General Eric Holder; (4) a June 2015 OSHA Best Practices guide; (5) a May 3, 2016 Equal Employment Opportunity Commission (EEOC) fact sheet; and (6) a May 13, 2016 Dear Colleague Letter on transgender students issued jointly by ED and the Department of Justice (DOJ). *See* Prelim. Inj. Order ("PI Order") at 3 n.4, ECF No. 58.

disclaimed any attempt to "enforce" the Best Practices guide identified by Plaintiffs. Finally, because the Preliminary Injunction "is limited to the issue of access to intimate facilities," Clarification Order at 6, it should extend only to those portions of the Guidelines that pertain to that subject, and no further. The numerous other matters addressed in the Guidelines are not before this Court and should not be subject to the Preliminary Injunction.

ARGUMENT

I. The Preliminary Injunction does not implicate Title VII outside the context of access to sex-segregated facilities by transgender individuals in public schools in the plaintiff states

The Court has clarified that the injunction does not cover enforcement of Title VII in matters not involving access to "intimate facilities" by transgender persons, and has asked the parties for further briefing on "whether the injunction implicates Title VII in any manner." Clarification Order at 7. It does not, except in the context of access to sex-segregated facilities by transgender individuals at public schools in the plaintiff states. Although Defendants respectfully disagree with the entry of preliminary injunctive relief in this case and have filed a Notice of Appeal, ECF No. 88, Defendants do not contest that the Preliminary Injunction applies to public school employees and staff—in other words, Defendants understand that, while the Preliminary Injunction is in effect, they cannot bring any new actions to enforce the Guidelines against public educational institutions in the plaintiff states to require them to allow transgender employees or staff to use restrooms, locker rooms, and similar facilities consistent with their gender identity. *Cf. N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982) (holding that "employment discrimination comes within the prohibition of Title IX").

However, the Preliminary Injunction should not be read to prevent Defendants from enforcing Title VII against private entities or outside of the context of public schools in the plaintiff

states. The overwhelming focus of the preliminary injunction proceedings and of the Court's opinion was on Title IX and its implementing regulations, and the issue of access to restrooms, locker rooms, and similar facilities by transgender individuals in schools. *See* Defs.' Mot. for Clarification at 10, ECF No. 65; Defs.' Reply in Support of Mot. for Clarification ("Defs.' Reply") at 5 n.4, ECF No. 74. This focus is reflected in the plain language of the Preliminary Injunction. The Preliminary Injunction prohibits enforcement of the Guidelines only "against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions"—and only based on their policies or activities regarding transgender students' access to restrooms, locker rooms, and the like—not against private parties. *See* Prelim. Inj. Order ("PI Order") at 37, ECF No. 58. The portion of the injunction broadly prohibiting Defendants "from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity" applies only to Title IX—not Title VII. *Id.* Thus, on its face, the injunction does not apply to any investigations under Title VII; it also does not apply to enforcement activities arising under Title VII, unless they concern access to sex-segregated facilities by transgender persons at public educational institutions in the plaintiff states. Plaintiffs have not moved for a modification of the injunction to expand its scope to encompass Title VII, and the Court should not grant relief that has not been requested.

Nor have Plaintiffs explained why the Preliminary Injunction would need to be extended to Title VII to remedy any injury to them. They have not identified a single injury or irreparable harm that they have suffered or will suffer as a result of Defendants' interpretation of Title VII outside of the context of public schools. *See* Defs.' Opp'n to Pls.' App. for Prelim. Inj. at 7-8, ECF No. 40. And the Court has not found any injury or harm related to Title VII outside the context of public schools. Instead, the Court's finding of injury and irreparable harm to Plaintiffs

rested on inconsistencies between certain state statutes regarding public educational institutions and Defendants' interpretation of the law as requiring schools to allow transgender students to use restrooms and similar facilities consistent with their gender identity, *see* PI Order at 10 & n.8 (finding standing based on "various state constitutional and statutory codes which permit Plaintiffs to exercise control of their educational premises and facilities"); *id.* at 33-35 (analysis of irreparable harm), further reinforcing the conclusion that the scope of the injunction is limited to the context of access to sex-segregated facilities by transgender individuals at public schools.

Despite multiple opportunities, Plaintiffs continue to be unable to identify any harm that they will suffer related to the enforcement of Title VII outside of public schools. Instead, in the absence of cognizable legal arguments, Plaintiffs repeatedly fall back on their views about "privacy, safety, and dignity," *see, e.g.*, Pls. Supp. Br. at 1, which are irrelevant to the questions that the Court has directed the parties to address.[2] For example, Plaintiffs state that "[e]mployees

[2] Although Plaintiffs' arguments about "privacy, safety, and dignity" are irrelevant to this Court's consideration of the issues to be addressed in supplemental briefing, Defendants also note that Plaintiffs mischaracterize Defendants' position in several respects. Defendants did not "ignore" concerns about "privacy, safety, and dignity," as Plaintiffs suggest. Pls.' Supp. Br. at 2. Indeed, it is clear on the face of the 2016 DCL that ED and DOJ conducted a reasoned analysis, including express consideration of privacy issues and a balancing of those issues 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"). ED adopted its interpretation after consulting with school districts, school administrators, educators, students, other federal agencies, and reviewing existing case law and scientific research. Based on its practical experience as well as this research, ED concluded that schools do not have to deny transgender students equal access to school facilities in order to protect the privacy of all students and prevent disruption. *See, e.g.*, Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf (describing how schools have successfully implemented practices that align with ED's interpretation). School administrators across the country have agreed. *See, e.g.*, Amicus Br. of Sch. Admins., *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-cv-524, ECF No. 91-1 (S.D. Ohio).

There are many ways that schools can accommodate, and have accommodated, students who desire additional privacy under Title IX. For example, schools may provide to such students "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use." 2016 DCL at 7 n.15; *see also Highland*, No. 2:16-cv-524, 2016 WL 5372349, at *17 (S.D. Ohio Sept. 26, 2016) (noting that school districts have successfully accommodated privacy concerns); Report & Recommendation, *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, ECF No. 134, slip op. at 8 (N.D. Ill. Oct. 18, 2016) (Gilbert, M.J.) (discussing a resolution agreement that provided the accommodations above, as well as installation of privacy curtains to create "private changing stations"). These accommodations may "entirely mitigate any potential risk of unwanted exposure" by students who desire additional privacy. *Students & Parents for*

are entitled to no less dignity, safety, and privacy than students, and the law protects the intimate areas that they use from Defendants' unlawful 'Guidelines'." *Id.* at 1. Plaintiffs also opine that "[a] sexually hostile work environment can arise in many ways, including exposing one's genitals to other workers," and that "[t]he open display of genitalia through pictures and pornography can have the same affect." *Id.* at 7-8. But these observations provide no support for Plaintiffs' argument that the Preliminary Injunction should be extended to encompass Title VII outside of the context of public schools.[3] Plaintiffs allege that they "employ millions of employees nationwide," *id.* at 5 n.1, but they have not identified a single action being taken against them as employers under Title VII. Nor have they identified a single way that their conduct has changed as a result of the agencies' interpretation of Title VII as embodied in the Guidelines.

Any claim of injury or harm is even more implausible in the context of enforcement of Title VII against private entities, which are not parties to this case. Plaintiffs cannot credibly allege that they are harmed when, for example, the Equal Employment Opportunity Commission (EEOC) enforces Title VII against a private employer. Furthermore, it is well established that states lack standing to invoke the interests of their citizens, including private employers, in challenging actions of the federal government. "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923), and

Privacy, slip op. at 58. Indeed, the Fourth Circuit recognized that Defendants' interpretation reflects the agencies' "fair and considered judgment" on policy formulation, not "merely a convenient litigating position," *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 722-23 (4th Cir. 2016), *mandate recalled and stayed*, *Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016), *petition for certiorari granted*, No. 16-273 (Oct. 28, 2016), and accords with "the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination 'on the basis of sex' in the context of analogous statutes," *id.* at 727 (Davis, J., concurring).

[3] In any event, Plaintiffs have not identified any Title VII or Title IX policy, interpretation, or guidance document that allows, much less supports, "exposing one's genitals to other workers" or "open display of genitalia through pictures and pornography."

Missouri v. Illinois, 180 U.S. 208, 241 (1901)). "It is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government. . . . [I]t is the United States, and not the state, which represents [citizens] as *parens patriae* when such representation becomes appropriate . . . ." *Mellon*, 262 U.S. at 485–86. Thus, while states may sue private entities on behalf of their citizens, they may not "institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Id.* at 485; *see also, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (explaining that *Mellon* prohibits "allowing a State" to file a lawsuit "'to protect her citizens from the operation of federal statutes'"); *Virginia. ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269, 271 (4th Cir. 2011) (Virginia could not bring suit against federal agency to protect its citizens from the operation of a federal health care statute).

Therefore, the Court should confirm that the Preliminary Injunction does not apply to the enforcement of Title VII outside the context of access to sex-segregated facilities by transgender individuals in public schools.

II. OSHA and DOL activity is not implicated by the Preliminary Injunction

The Court has also asked "whether OSHA or DOL activity is implicated by the injunction." Clarification Order at 7. It is not. Again, the focus of the preliminary injunction proceedings and this Court's Order was on access to sex-segregated facilities by transgender students in public schools. This issue does not implicate OSHA, the only agency within DOL that Plaintiffs address, in any way, as OSHA does not enforce Title IX (or Title VII). The record is entirely devoid of any discussion or explanation of how any activities of OSHA or DOL are relevant to this case.

In particular, despite being given multiple opportunities to explain how they are injured or harmed by any activity of OSHA or DOL, Plaintiffs have failed to do so. The OSHA Best Practices Guide itself—the only DOL action that Plaintiffs have challenged—does not purport to interpret

any legal authority that prohibits sex discrimination. It offers no independent analysis of Title VII or Title IX. And it certainly is not a statement of what constitutes sex discrimination under the Occupational Safety and Health (OSH) Act, 29 U.S.C. §§ 651, *et seq.*—for good reason, as the Act does not prohibit sex discrimination. Instead, the Best Practices Guide merely offers advice to employers about how to protect employees from adverse health effects that can arise if access to restrooms is not readily available. *See* ECF No. 6-4 at 1 (citing OSHA's sanitation standards, 29 C.F.R. § 1910.141).

In their most recent filing, after an irrelevant discussion of the OSH Act—which is not at issue in this case and, again, does not prohibit sex discrimination—Plaintiffs concede that "[w]orkers at state and local government agencies are not covered by OSHA" and that "[a]s not every Plaintiff has a state plan, some may seem to fall outside DOL and OSHA's authority." Pls.' Supp Br. at 16-17. Indeed, as Defendants have previously explained, no state—not even a state that has adopted a State Plan pursuant to 29 U.S.C. § 667—is subject to OSHA or DOL enforcement for a failure to abide by OSHA's advice regarding access to restrooms by transgender individuals. *See* Defs.' Reply at 6. Plaintiffs, grasping at straws, note that "virtually every *private sector employer* falls within the ambit of OSHA's jurisdiction." Pls. Supp. Br. at 17 (emphasis added). But Plaintiffs fail to explain how *they* are injured by any OSHA enforcement against private sector employers and, as previously explained, they lack standing to represent the interests of such employers. Furthermore, because of its advisory nature and the fact that the OSH Act does not prohibit sex discrimination, not even a private sector employer would be subject to OSHA enforcement based on allegations of discrimination for failure to follow the advice offered in the Best Practices Guide.

Even were the Court to conclude that the Preliminary Injunction applies to OSHA—and it should not—the Court should clarify, at a minimum, that the preliminary injunction does not apply to other DOL programs. Plaintiffs have not identified any other DOL activities in response to the Court's order for supplemental briefing on the issue, or indeed anywhere in their filings with this Court. Again, Plaintiffs' only challenge to DOL's activities was based on the OSHA Best Practices Guide. In their Amended Complaint, Plaintiffs described DOL 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," ECF No. 6 ¶ 16, and described the Secretary of Labor as the individual "authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA," *id.* ¶ 17. Plaintiffs have discussed no other DOL activities or programs, and have not even attempted to establish injury or irreparable harm stemming from any DOL actions. Thus, any injunction against DOL activities other than those of OSHA would violate the basic precept that a preliminary injunction is only available upon "adequate notice and a fair opportunity to oppose it." *Harris Cnty., Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 326 (5th Cir. 1999) (internal quotation marks and citation omitted); *see also* Fed. R. Civ. Pro. 65(a)(1); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 433 n. 7 (1974).[4]

III. The Guidelines should not be enjoined in their entirety

[4] While Plaintiffs have repeatedly used the term "dark matter" to describe an amorphous set of laws and policies, Federal Rule 65(d) and binding case law do not allow an injunction against such a vague concept. The Fifth Circuit's recent decision in *Scott v. Schedler*, 826 F.3d 207 (5th Cir. 2016), is instructive. There, the court vacated an injunction as overly vague where it enjoined a defendant as to undefined "policies, procedures, and directives," while also reminding the district court that an injunction may not "encompass more conduct than was requested or exceed the legal basis of the lawsuit." *Id.* at 214; *see also John Doe #1 v. Veneman*, 380 F.3d 807, 818-20 (5th Cir. 2004) (vacating injunction as vague and overbroad); *Church of Holy Light of Queen v. Holder*, 443 F. App'x 302, 303 (9th Cir. 2011) ("The injunction is therefore overly broad because it reaches beyond the scope of the complaint and enjoins government regulations that were explicitly never challenged or litigated.").

This Court has also requested "additional briefing on whether the Defendants' Guidelines are enjoined in total or whether the principal of severability applies to them." Clarification Order at 2. Because "[t]he parties have agreed . . . that the injunction is directed at the issue of access to intimate facilities" by transgender individuals, *id.* at 1, it would be inappropriate for the Court to enjoin those portions of the Guidelines (by far the larger part) that concern other issues. As this Court has said, under its Preliminary Injunction "Defendants are simply prevented from using the Guidelines to argue that the definition of 'sex' as it relates to intimate facilities includes gender identity." *Id.* at 5. There is no reason for the Court to enjoin portions of the Guidelines unrelated to that subject.

As an initial matter, Plaintiffs' position on severability is wholly inconsistent. Although Defendants have argued—and continue to believe—that the Guidelines are mere guidance documents that do not impose any independent legal requirements, Plaintiffs have contended—and this Court has agreed—that they are actually substantive rules that are subject to the APA's notice and comment requirement. Plaintiffs *now* argue that the Guidelines are not severable because "the doctrine of severability is the refuge of statutes and regulations." Pls.' Supp. Br. at 19. Plaintiffs cannot have it both ways. Either the Guidelines are interpretive rules, in which case the APA's requirements do not apply, or they are substantive rules, in which case they are severable.

In any event, a close look at the Guidelines reveals that the Court need not conduct a severability analysis. As the Court is aware, the Guidelines comprise six distinct documents. The first is an October 2010 letter from the Department of Education's (ED's) Office for Civil Rights (OCR) on the subject of bullying and harassment, informing school districts that they "may violate . . . civil rights statutes," including Title IX, "and the Department's implementing regulations when

peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees." ECF No. 6-1 at 1. In its discussion of gender-based harassment, the letter notes that "Title IX . . . prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target" and "protect[s] all students, including . . . transgender . . . students, from sex discrimination." *Id.* at 8. The letter does not discuss student or employee access to sex-segregated facilities. Indeed, the subject of this letter is a topic that the Court expressly left unaffected by its Preliminary Injunction, stating that "[t]his injunction also does not affect a school's obligation to investigate and remedy student complaints of sexual harassment, sex stereotyping, and bullying." Clarification Order at 5.

The second Guideline document is an April 2014 OCR publication entitled "Questions and Answers on Title IX and Sexual Violence." ECF No. 6-2. This 53-page document addresses a school's obligation under Title IX to respond to allegations of sexual violence, the procedures required by Title IX for the resolution of such allegations, the employees responsible for reporting incidents of possible sexual violence, and many related subjects. In its discussion of the students protected by Title IX, this document notes that "[a]ny student can experience sexual violence," including "transgender students," and explains that "the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations" to protect its students from sexual violence. *Id.* at 5. It also states 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. . . ." *Id.* This document also does not discuss student or employee access to sex-segregated facilities. And, like the first document, the subject of this document—

sexual harassment, which includes sexual violence—was expressly excluded from the scope of the Preliminary Injunction. *See* Clarification Order at 5.

The third Guideline is a December 2014 memorandum from the Attorney General, which concludes that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status." ECF No. 6-3 at 2. The memorandum states that "the Department [of Justice] will no longer assert that Title VII's prohibition against discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination)." *Id.* It, too, does not discuss access to sex-segregated facilities.

These first three Guideline documents do not discuss the sole issue in these preliminary injunction proceedings—the use of sex-segregated facilities by transgender individuals. Although the Court prohibited Defendants "from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions" and "from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order," PI Order at 37, the Court has clarified that under these prohibitions, "Defendants are simply prevented from using the Guidelines to argue that the definition of 'sex' *as it relates to intimate facilities* includes gender identity," Clarification Order at 5 (emphasis added). Because none of the first three Guidelines discussed the issue of "intimate facilities," the injunction should extend no further than prohibiting Defendants from arguing that these Guideline documents support access to such facilities in circumstances in which the Preliminary Injunction applies. Aside from that restriction, there is no issue of "severability" with regard to these three documents, because there is no discussion of access to sex-segregated facilities that could be severed from them. They should not be enjoined to the extent that Defendants want to use them

for purposes that are beyond the scope of this litigation, such as explaining Defendants' interpretation of Title IX as applied to bullying, harassment, and sexual violence.

The remaining Guidelines do discuss that issue to some extent. The OSHA Best Practices Guide states that "[m]any companies have implemented written policies" which share the "core belief . . . that all employees should be permitted to use the facilities that correspond with their gender identity." ECF No. 6-4 at 2. Although this Guideline mentions OSHA's sanitation standard, 29 C.F.R. § 1910.141, which generally requires that "toilet facilities . . . be provided in all places of employment," *id.* § 1910.141(c)(1)(i), it does not interpret that standard to require access to restrooms or other sex-segregated facilities on the basis of gender identity. Indeed, it does not interpret that standard at all. And although the Guideline notes that the EEOC and the Department of Justice (DOJ) "have interpreted prohibitions on sex discrimination, including those contained in Title VII of the Civil Rights Act of 1964, to prohibit employment discrimination based on gender identity or transgender status," ECF No. 6-4 at 2, it does not make any independent assessment of those interpretations. Nor could it, as OSHA does not administer or enforce Title VII. Indeed, as previously discussed, the OSHA Best Practices guide does not interpret Title VII, Title IX, or the OSH Act, but merely informs the reader that some companies have written policies allowing their employees to use the sex-segregated facilities that correspond with their gender identity. There is no issue of severability with regard to this document, because it does not offer any legal interpretation that could be severed.

The fifth Guideline document is a two-page fact sheet published by the EEOC, summarizing its decisions in *Macy v. Department of Justice*, 2012 WL 1435995 (Apr. 12, 2012), and *Lusardi v. Department of the Army*, 2015 WL 1607756 (Mar. 27, 2015), each of which resolved allegations of sex discrimination by federal employees. ECF No. 6-8. *Macy* held that

"intentional discrimination against a transgender individual because that person is transgender" violated Title VII, 2012 WL 1435995 at *11, while *Lusardi* held that "denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination" in violation of Title VII, ECF No. 6-8 at 1. As Defendants have explained, this document has no legal effect independent of those Commission decisions, and the EEOC has no authority to enforce its interpretation of Title VII against the Plaintiff states or their public educational institutions. *See* 42 USC § 2000e-5(f)(1). Because the injunction does not apply to Title VII outside of the context of public schools, *see supra*, there is thus no reason to enjoin the use of the EEOC fact sheet at all. At the most, Defendants should simply be enjoined, in circumstances in which the Preliminary Injunction applies, from claiming that this fact sheet supports an argument that Plaintiffs and their public educational institutions must allow their employees access to the sex-segregated facilities that correspond to their gender identity.

Finally, the sixth Guideline is the May 2016 letter issued by DOJ and ED OCR regarding transgender students. ECF No. 6-10. In addition to the issue of access to sex-segregated facilities that would be considered "intimate" under the Court's Order, this letter discusses schools' obligations to provide a safe and non-discriminatory environment; identification documents, names, and pronouns; sex-segregated activities; and privacy and education records. Defendants understand that they are enjoined "from using th[is] Guideline[] to argue that the definition of 'sex' as it relates to intimate facilities includes gender identity." Clarification Order at 5. But the Court's injunction should not extend to the other issues discussed in this letter.

The Court has found that this letter is, in effect, a legislative rule (a conclusion with which Defendants respectfully disagree). *See* PI Order at 27. As Defendants have explained, *see* ECF No. 74 at 3 n.2, the question of "[w]hether an administrative agency's [rule] is severable,

permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent." *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (Scalia, J.); *accord Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). Unchallenged portions of a rule may be invalidated only "[w]here there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted." *North Carolina*, 730 F.2d at 796; accord *Davis Cnty.*, 108 F.3d at 1459; *Bell Atl. Tel. Co. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994). Here, there is no doubt that ED and DOJ would have intended the portions of the letter discussing schools' obligations with respect to providing a safe and nondiscriminatory environment; identification documents, names and pronouns; sex-segregated activities; and privacy and education records to remain in effect even if its application to transgender students' use of sex-segregated facilities that would be considered "intimate" under the Court's Order was invalidated. Plaintiffs have failed to create any doubt on this score, let alone "substantial doubt." Had the discussions of the varied subjects contained in this document been instead addressed in separate documents, they would never have been brought to this Court's attention because they are irrelevant to Plaintiffs' claims. Their argument that one invalid portion of a rule "forever taints" the remainder, Pls.' Supp. Br. at 28, is, quite simply, not the law.

If this Court addresses the question of severability, it should find that any discussion of access to "intimate" sex-segregated facilities by transgender individuals is severable from the remainder of the Guidelines, because there is no "substantial doubt that the agency would have adopted the same disposition regarding" the remainder of the Guidelines "if the challenged portion were subtracted." *North Carolina*, 730 F.2d at 796. Alternatively, this Court could achieve the same effect without any formal severability analysis by reaffirming that, under its Preliminary Injunction, "Defendants are simply prevented from using the Guidelines to argue that the definition

of 'sex' as it relates to intimate facilities includes gender identity," Clarification Order at 5, and are not prevented from relying on them for any other purpose.[5]

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court clarify that the Preliminary Injunction does not encompass Title VII outside of the context of access to sex-segregated facilities by transgender individuals in public schools, does not enjoin any activities of OSHA or DOL, and does not apply to any portion of the Guidelines that does not involve access to "intimate facilities" by transgender individuals.

Dated: October 28, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK (MA Bar No. 679207)
JAMES BICKFORD (NY Bar No. 5163498)
Trial Attorneys, U.S. Department of Justice
Civil Division, Federal Programs Branch
1 Courthouse Way, Suite 9200
Boston, MA 02210
Telephone: (617) 748-3129
Facsimile: (617) 748-3965
Email: Benjamin.L.Berwick@usdoj.gov

Counsel for Defendants

[5] Plaintiffs' argument that severability would "create[] a significant burden on the Court, the parties, and the public," Pls.' Supp. Br. at 21, misses the mark in at least two respects. First, "burden" is not a relevant factor in a severability analysis, which is presumably why Plaintiffs fail to cite a single case in support of their argument. Nor do Plaintiffs cite any authority for the proposition that a Court should do a line-by-line redaction of a partially enjoined document. Second, there is no need for the Court to redact any enjoined portions of the Guidelines to ensure compliance with the Preliminary Injunction, as Plaintiffs suggest. *See id.* at 22. It is Defendants' responsibility to ensure that they do not use or rely on the Guidelines in the manner prohibited by the Court. Defendants have complied with the Preliminary Injunction since it was issued, and will continue to do so.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2016, a copy of the foregoing Supplemental Brief Regarding the Court's Preliminary Injunction was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
Benjamin L. Berwick