IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellants.

No. 16-11534

DEFENDANTS-APPELLANTS' MOTION FOR PARTIAL STAY PENDING APPEAL

INTRODUCTION

Defendants-appellants respectfully ask this Court to stay, pending appeal, the preliminary injunction issued in this case insofar as it applies beyond plaintiffs.

The State of Texas—together with ten other States, the Governor of Maine, the Arizona Department of Education, and two school districts (collectively, "plaintiffs")—brought this suit under the Administrative Procedure Act against several federal agencies seeking to enjoin reliance on various guidance documents that reflect, *inter alia*, the agencies' interpretation of Title VII, Title IX, and the latter's implementing regulations. The district court issued a preliminary injunction on August 21, 2016, which it clarified on October 18, 2016. The court's sweeping preliminary injunction enjoins a broad swath of federal activities not only as to plaintiffs, but as to third parties "nationwide." There was no basis for entry of such an order, which violates the clearly established principle that an injunction should extend no further "than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

This request for a partial stay does not ask the Court to address the merits of the underlying issues in this case.[1] Nor does it ask this Court to disturb the

[1] Pursuant to Fed. R. App. P. 8(a)(1), the federal defendants moved in district court for a partial stay. The district court denied that motion on November 20, 2016.

Plaintiffs have indicated they intend to oppose this motion. Per 5th Cir. R. 27.4, we request that plaintiffs be directed to respond by December 2, 2016; that the

Continued on next page.

preliminary injunction to the extent that it provides temporary relief for alleged harms to plaintiffs themselves. Other issues regarding the scope and meaning of the preliminary injunction remain pending before the district court. And on October 28, 2016, the Supreme Court granted certiorari in *Gloucester County School Board v. G.G.*, No. 16-273 (S. Ct.), to address whether deference is owed to an unpublished 2015 letter reflecting the federal agencies' interpretation of the relevant Title IX regulation, and whether that interpretation should be given effect regardless of any deference.

Whether the district court's preliminary injunction appropriately applies beyond the plaintiffs in this case presents an issue separate from the merits of this dispute. As stated, a preliminary injunction should extend no further than needed to provide "complete relief" to the specific parties bringing suit. *Califano*, 442 U.S. at 702; *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011). That principle applies with particular force in this case, in which twelve non-plaintiff States and the District of Columbia (collectively, the "Amici States") participated as amici curiae to urge the district court not to extend any preliminary injunction to their jurisdictions. The Amici States explained that the activities that plaintiffs sought to have enjoined "overwhelmingly benefit the public," Amici States Br. at 4, and they noted that "[i]t would be absurd . . . to tell the Amici States that a policy those States have determined is beneficial is actually harming them," *id.* at 24. The Amici States urged the district

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federal defendants reply by December 9, 2016; and that this Court rule by December 23, 2016, before the start of the next school semester.

court to heed this Court's repeated admonitions that a preliminary injunction may not "'reach[] further than is necessary to serve [its] purpose.'" *Id.* (quoting *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam) (alteration in original)).

The district court disregarded this fundamental principle. The preliminary injunction forbids the federal defendants from interacting with non-plaintiff States and other entities in ways that those States and entities have not challenged, and indeed which many believe are beneficial to their students and employees. The Amici States' view that their interactions with the federal agencies "overwhelmingly benefit the public," Amici States Br. at 4, reflects the fact that States and schools frequently work harmoniously with the federal government to tackle self-identified problems involving access to sex-segregated facilities. Among the activities impaired by the district court's injunction, causing irreparable injury to defendants, are the Department of Education's "core activities," including "answering stakeholder inquiries," "responding to requests for information" from the public, and "providing technical assistance" related to preventing and remedying discrimination. Decl. of Catherine E. Lhamon (ECF No. 95-1) ("Lhamon Decl.") ¶¶ 6, 10. Technical assistance includes "presentations to educators, students, families, and other stakeholders, as well as answering individual questions about the law[]." *Id.* ¶ 10. The agency "continues to receive many requests for technical assistance from schools, state education agencies, students, and parents," but must now "decline[] to answer these requests, including hundreds of letters and emails, because of the uncertainty

created by the preliminary injunction." *Id.* ¶ 30. Thus, "even recipients who would be entirely willing to work with [the Department of Education's Office for Civil Rights ("OCR")] to find ways to accommodate the needs of their transgender students consistent with federal law are unable to obtain OCR's assistance." *Id.* ¶ 29.

The district court's refusal to require plaintiffs to "speak only for themselves, not the whole country," Amici States Br. at 24, irreparably harms the students that other States and school districts believe benefit from federal agencies' assistance—assistance that helps schools resolve discrimination in access to sex-segregated facilities and the "isolation," "ostracism," and "stigmatiz[ation]" that may result. Lhamon Decl. ¶ 22(b)-(c). To suspend the resolution of such problems throughout the school year or longer inflicts irreparable injury on the children involved.

Plaintiffs have at no point explained why a preliminary injunction that extends to non-plaintiffs—indeed, even to the Amici States and other entities who do not want it to apply to them—is necessary to prevent irreparable harm to plaintiffs, and the district court made no such finding. The preliminary injunction is improperly broad; issuance of the requested stay will cause no injury to plaintiffs; and a stay is required to prevent irreparable harm to defendants and children in non-plaintiff States who would benefit from the federal agencies' expertise and assistance.

STATEMENT

Plaintiffs brought this lawsuit against the United States, the Departments of Education, Justice, and Labor, and the Equal Employment Opportunity Commission.

Plaintiffs sought a preliminary injunction to bar these federal agencies, pending litigation on the merits, from relying upon six guidance documents reflecting, *inter alia*, the agencies' interpretation that Title IX's prohibition of "discrimination" "on the basis of sex" under an education activity receiving federal funding includes discrimination against persons whose gender identity differs from their sex assigned at birth.[2] 20 U.S.C. § 1681(a). Plaintiffs demanded that any preliminary injunction apply on a "nationwide" basis, such that the injunction would not simply redress the alleged harm to plaintiffs, but would extend far beyond the parties and affect the rights of third parties not before the court. Twelve non-plaintiff States and the District of Columbia participated as amici curiae to oppose such a preliminary injunction.

The district court entered a preliminary injunction on August 21, 2016. Although this is an APA action challenging alleged final agency action in the form of certain guidance documents, the district court enjoined the United States from taking a wide range of steps generally not subject to judicial review—including even the filing of briefs in court in certain circumstances. Going well beyond enjoining the

[2] Plaintiffs have also raised contentions regarding the agencies' interpretation of Title VII, which prohibits sex discrimination in employment, 42 U.S.C. § 2000e-2(a), and regarding OSHA and DOL activities. The district court requested supplemental briefing on whether the preliminary injunction properly covers those topics, *see* Clarif. Order (ECF No. 86), at 7 (ordering additional briefing on "whether the injunction implicates Title VII in any manner . . . and whether OSHA or DOL activity is implicated"), but has not yet ruled. Should the district court indicate that its order does cover either of those issues, defendants hereby request that this Court stay those aspects of the preliminary injunction to the same extent sought here, so that the preliminary injunction as a whole applies only to plaintiffs.

defendant agencies from "enforcing" the challenged guidance documents against plaintiffs, the preliminary injunction also bars defendants from "initiating, continuing, or concluding any investigation based on [their] interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex." PI Order (ECF No. 58), at 37. It also bars the defendant agencies from even "using" the challenged guidance documents in litigation with third parties. *Id.*

The district court issued an order clarifying its preliminary injunction on October 18, 2016. The order clarified that the preliminary injunction addresses the interpretation of Title IX only with respect to the use of what the court labeled "intimate facilities," meaning school restrooms and other sex-segregated facilities. Clarif. Order (ECF No. 86), at 1, 6. The court further declared that the preliminary injunction applies not just to plaintiffs, but "applies nationwide." *Id.* at 6. The court asserted that "the alleged violation extends nationwide" and that if the court "only limit[ed] the injunction to the plaintiff states who are a party to this cause of action, [it] risks a 'substantial likelihood that a geographically-limited injunction would be ineffective.'" *Id.* at 4 (quoting *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015)). The court did not explain why an injunction limited to plaintiffs would be ineffective in redressing their alleged harms.

ARGUMENT

In determining whether to issue a stay pending appeal, this Court considers four factors: (1) whether, as to the grounds upon which the stay is requested, the

movant is likely to succeed on the merits; (2) whether the movant will suffer irreparable harm absent the requested stay; (3) whether a stay would substantially harm the other parties; and (4) whether a stay serves the public interest. *Planned Parenthood v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). The movant "need only present a substantial case on the merits when a serious legal question is involved" and "the balance of equities weighs heavily in favor of a stay." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). Those standards are easily satisfied here.

Because the only issue currently before the Court is whether the preliminary injunction should apply beyond plaintiffs, the federal defendants' likelihood of success on this stay motion is intertwined with the question whether a preliminary injunction regulating defendants' relationships with third parties (such as other States) is necessary to avoid alleged irreparable harm to the plaintiffs here.[3] If regulation of defendants' relationships with third parties is not necessary to avoid that alleged harm to plaintiffs, the preliminary injunction's application beyond plaintiffs is not a proper exercise of the court's equitable authority. It also raises constitutional questions regarding a court's jurisdiction to issue relief that is not designed to redress the alleged injuries that form the basis for the plaintiffs' Article III standing.

[3] In denying the federal government's stay request, the district court mistakenly addressed the likelihood of success of plaintiffs' underlying APA claims, rather than the likelihood of success on the grounds upon which the partial stay is sought. *See* Order (ECF No. 100), at 2-3.

The preliminary injunction's overbroad application results in other anomalies that only underscore why non-plaintiff relief is generally unavailable. The preliminary injunction inappropriately deprives sovereign States of federal assistance even where those States have made clear they desire it. It ties the federal defendants' hands even in jurisdictions where courts have already ruled in their favor. And it imposes arbitrary and unprecedented restrictions on the constitutional and statutory authority of the Executive Branch to attend to the United States' interests in pending litigation.

Point I below demonstrates that a preliminary injunction limited to plaintiffs fully addresses all of the harms they allege. Point II demonstrates that the requested stay of the preliminary injunction, to the extent it applies beyond plaintiffs, is necessary to avoid irreparable harm to other non-plaintiff States and entities; to the students whom they serve; and to the defendant agencies that otherwise are precluded from providing the assistance that those States, entities, and students seek.

I. A Partial Stay Is Necessary Because The Preliminary Injunction Enjoins Activities That Do Not Injure Plaintiffs.

A. A preliminary injunction is an equitable tool designed to preserve the status quo between the parties pending resolution of the merits of their respective claims. It is axiomatic that a preliminary injunction, like all equitable relief, "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702; *see* 5 U.S.C. § 705 (permitting preliminary relief in APA suits only "to the extent necessary to prevent irreparable injury"). Anything

"not . . . found to have harmed any plaintiff in th[e] lawsuit" is "not the proper object of th[e] District Court's remediation," and must be "eliminate[d] from the proper scope of th[e] injunction." *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

This Court has repeatedly recognized that injunctive relief should extend no further than required to afford relief to the moving party. *See, e.g.*, *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (holding that the district court abused its discretion by imposing an injunction that was "broader and more burdensome than necessary to afford [plaintiff] full relief"); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (modifying overbroad injunction to "apply to [plaintiff] only" where "[t]he breadth of the injunction issued by the trial judge . . . is not necessary to remedy the wrong suffered by [plaintiff]"); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam) (vacating preliminary injunction as overbroad because "[i]n this case, which is not a class action, the injunction against the School District from enforcing its regulation against anyone other than [plaintiff] reaches further than is necessary to serve [the] purpose" of preserving the status quo among the parties). Other courts adhere to the same principle. *See Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011) (affirming district court's stay of the non-plaintiff aspect of injunction, because "[i]njunctive relief generally should be limited to apply only to named plaintiffs when there is no class certification.") (quotation marks omitted); *Zepeda v. I.N.S.*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) (emphasizing that preliminary injunctions, which exist for the "'limited purpose' of maintaining the

status quo," must be "particularly" narrowly tailored and not extend beyond the plaintiffs); *see also Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 170 (3d Cir. 2011); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012).

The Supreme Court's entry of a partial stay in *Department of Defense v. Meinhold*, 510 U.S. 939 (1993), illustrates these principles. There, the district court held that the Navy's discharge of the plaintiff, Petty Officer Meinhold, on the basis of his sexual orientation was unlawful and ordered his reinstatement. But it also went further, acting beyond the plaintiff before that court, and "permanently enjoined DOD from 'discharging, changing [the] enlistment status of or denying enlistment to any person,' . . . and from 'taking any actions' against gay or lesbian servicemembers based on sexual orientation." 34 F.3d 1469, 1480 (9th Cir. 1994) (quoting No. 92-cv-6044, 1993 WL 513209, at *1 (C.D. Cal. Sept. 30, 1993)). The Supreme Court granted a partial stay of the injunction "to the extent it conferred relief on persons other than Meinhold." *Id.* at 1473 (citing 510 U.S. 939). The Ninth Circuit subsequently vacated the injunction insofar as it applied beyond the plaintiff Meinhold. Noting that "[a]n injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs,'" *id.* at 1480 (9th Cir. 1994) (quoting *Califano*, 442 U.S. at 702), the court of appeals held that the injunction should go no further than providing "[e]ffective relief" to address plaintiff's injury, *id.*

B. A preliminary injunction that extends beyond the named plaintiffs in a lawsuit may be appropriate where an injunctive class action has been certified. *See* Fed. R. Civ. P. 23(b)(2); *Hollon*, 491 F.2d at 93. Such an injunction may also be appropriate where it is "necessary to remedy the wrong suffered by [plaintiff]." *Hernandez*, 91 F.3d at 781. This Court found such an interest in *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015), where it concluded that there was "a substantial likelihood that a partial injunction would be ineffective" in providing relief to the plaintiff States because of the ability of individual aliens to migrate across state lines.

Here, however, there has been no showing that non-plaintiff relief is required to protect plaintiffs' own interests. Instead, plaintiffs have repeatedly urged that a "nationwide" injunction is appropriate because they have asserted a challenge to federal law, which applies to the entire United States, and because they believe the validity of the challenged guidance documents does not turn on particular circumstances. *See, e.g.*, Pls.' Appl. for Prelim. Inj. (ECF No. 11), at 24-25 (arguing that successful facial challenges should automatically lead to injunctions that apply to all regulated parties); Reply in Support of Pls.' Appl. for Prelim. Inj. (ECF No. 52), at 13-15 (arguing that non-plaintiff States are "similarly situated"). These assertions reflect a fundamental misunderstanding of the proper inquiry in fashioning preliminary injunctive relief. The role of an injunction is not to "enjoin all possible breaches of the law," *Zepeda*, 753 F.2d at 728 n.1 (quotation marks omitted), but to "remedy the specific harms" allegedly suffered by the plaintiffs themselves, *id.*

Indeed, in a preliminary posture such as this one, the APA permits injunctive relief only "to the extent necessary to prevent irreparable injury" to the plaintiffs. 5 U.S.C. § 705.[4] A court must therefore ask whether the provisions of its preliminary injunction are necessary to remedy the asserted harms to the parties before the court.

The district court accepted plaintiffs' invitation to have its preliminary injunction apply well beyond what was necessary to address plaintiffs' alleged injuries. The court declared that defendants "are a group of agencies and administrators capable of enforcing their Guidelines nationwide, affecting numerous state and school district facilities across the country." Clarif. Order (ECF No. 86), at 4. But interactions between the defendant agencies and non-plaintiff "state and school district facilities across the country" are not injuries to plaintiffs, and enjoining those interactions provides plaintiffs no additional relief. *Id.* Similarly, the district court's reliance on the principle that the "'judicial Power of the United States . . . extends across the country,'" *id.* at 3, fundamentally confuses the question of a court's territorial jurisdiction with the appropriateness of non-plaintiff relief.[5]

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[4] The district court's reliance on cases involving final judgments was therefore mistaken. *Cf.* Order (ECF No. 100), at 5.

[5] Where a plaintiff operates throughout the United States, a "nationwide" preliminary injunction that prevents the defendant from harming the plaintiff throughout the United States may be appropriate, so long as the injunction is tailored to the plaintiff and does not extend to non-parties. Here, however, plaintiff States act only within their own territories, and they have no cognizable interest in the federal government's interactions with other States or entities. Article III thus does not authorize the non-plaintiff relief imposed by the district court here.

The district court's order is particularly anomalous because the fundamental purpose of a preliminary injunction is "merely to preserve the relative positions *of the parties* until a trial on the merits can be held," not to regulate the rights of others. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added). The preliminary injunction here instead disrupts the status quo for persons nationwide, including a dozen States who have expressly disavowed any injury from the enjoined conduct.

The court's order not only disregards recognized limitations on the scope of its equitable authority, but also implicates constitutional problems. In issuing a preliminary injunction that applies far more broadly than "necessary to provide complete relief to the plaintiffs," *Califano*, 442 U.S. at 702, the district court purported to redress supposed injuries to other States and school districts that plaintiffs indisputably lack Article III standing to assert. *See Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 193 (2000) (explaining that Article III dictates that "federal courts should aim to ensure the framing of relief no broader than required by the precise facts" (quotation marks omitted)); *Lewis*, 518 U.S. at 357 (the scope of an injunction "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established"). The Supreme Court has admonished that "[t]he desire to obtain sweeping relief cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (alterations and quotation marks omitted).

In sum, application of the preliminary injunction beyond plaintiffs does not redress any alleged harm to them. Application of the injunction beyond plaintiffs was therefore improper, and, for the same reasons, plaintiffs will suffer no injury from the issuance of the partial stay sought by this motion.

II. A Partial Stay Is Necessary To Prevent Ongoing, Irreparable Harm To Defendants' Efforts To Address Discrimination Against Transgender Students And Others In Cooperation With Various States And Schools.

Because injunctions generally—and preliminary injunctions in particular—should extend no further than needed to provide "complete relief" to the specific parties bringing suit, *Califano*, 442 U.S. at 702, the scope of the preliminary injunction in this case would be improper even if non-party States and localities shared plaintiffs' view that preliminary injunctive relief was appropriate. The preliminary injunction here is particularly anomalous, however, because other States have participated in this litigation specifically to make clear that they oppose plaintiffs' demands for a "nationwide" injunction, which they explained would injure their own interests in preventing and remedying discrimination. A partial stay of the preliminary injunction to the extent it applies beyond plaintiffs is necessary to avoid that ongoing injury.

As noted, twelve states and the District of Columbia participated as amici curiae in district court to oppose entry of a preliminary injunction. These Amici States believe that their involvement with the defendant agencies in this area "overwhelmingly benefit[s] the public," Amici States Br. at 4, which reflects the fact that States and schools frequently work harmoniously with defendants to tackle self-

identified problems and combat discrimination. The Department of Education's "core activities" in this area include "answering stakeholder inquiries," "responding to requests for information" from the public, and "[p]roviding technical assistance" regarding schools' obligations to avoid discrimination in their programs and activities. Lhamon Decl. ¶¶ 6, 10. The agency "continues to receive many requests for technical assistance from schools, state education agencies, students, and parents." *Id.* ¶ 30.

As a result of "the uncertainty created by the preliminary injunction," however, the Department and its Office for Civil Rights must "decline[] to answer these requests, including hundreds of letters and emails," inasmuch as they relate to "investigation[s]" prohibited by the injunction. *Id.* Thus, "even recipients who would be entirely willing to work with OCR to find ways to accommodate the needs of their transgender students consistent with federal law are unable to obtain OCR's assistance." *Id.* ¶ 29. Defendants are precluded from providing resources and expertise to "achiev[e] these cooperative outcomes," *id.*, to the detriment of the defendant federal agencies and the States, localities, and schools who welcome those agencies' involvement in preventing and remedying instances of discrimination.

The Department of Education's declaration (ECF No. 95-1) offers various examples of the positive outcomes that are no longer possible because the district court's preliminary injunction extends beyond plaintiffs. For example, in 2013, OCR reached agreement with a California school district that previously required a transgender boy to use a private bathroom in the school health office across campus,

which led to missed class time and unwanted attention. Lhamon Decl. ¶ 19. With OCR's assistance, the school developed policies under which the student is permitted access to facilities consistent with his gender identity. *See also, e.g.*, *id.* ¶ 22(b) (assistance to Illinois high school with remedying discrimination and "protect[ing] the privacy of all its students" through use of privacy curtains); ¶ 22(a) (similar assistance to a North Carolina community college). OCR has also worked outside the context of particular disputes to disseminate best practices for access to sex-segregated facilities developed by various other States. *Id.* ¶ 25. And in the course of its assistance related to sex-segregated facilities, OCR has helped school districts develop policies to ensure that transgender students are not subjected to discrimination more generally. For instance, in working with a New York school district to resolve concerns with a transgender girl's restroom access, OCR reached an agreement in which the school district "voluntarily agreed to adopt and publish revised grievance procedures and notices of nondiscrimination in all relevant policies" and to "take steps that will prevent the recurrence of discrimination and harassment" against transgender students. *Id.* ¶ 22(c); *see also, e.g.*, *id.* ¶ 22(d) (assistance with South Carolina school district's adoption of anti-discrimination training modules).

Most fundamentally, the district court's refusal to require plaintiffs to "speak only for themselves, not the whole country," Amici States Br. at 24, irreparably harms the students that defendants and Amici States hope to protect from discrimination. The federal government works with schools to solve problems that arise out of

discrimination prohibited by Title IX, including sex stereotyping and hostile educational environment discrimination, which for transgender students and employees are often connected to issues surrounding access to restrooms and similar facilities. *See, e.g.*, Lhamon Decl. ¶ 22(b) (noting the ongoing "isolation and ostracism" a student felt after being denied access to sex-segregated facilities). Particularly in the life of a child, failure to address such harms for what could be a full school year or longer constitutes significant irreparable injury. Denial of restroom access, and attendant harms such as bullying and harassment, have the effect of preventing children from fully participating in their own education, thereby undercutting Title IX's guarantee that no person should, "on the basis of sex," be "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" federally funded programs and activities. 20 U.S.C. § 1681(a).[6]

The Amici States correctly argue that it is "absurd" for the district court to extend its preliminary injunction beyond plaintiffs, thereby restricting the ability of non-plaintiff States and educational entities to participate in "a policy [they] have determined is beneficial." Amici States Br. at 24. As a result of the preliminary

[6] In denying a partial stay, the district court asserted that the preliminary injunction does not "prevent Defendants from continuing their core mission of enforcing the federal civil rights laws," Order (ECF No. 100), at 4, but instead "only restricts Defendants from enforcing or relying on the Guidelines," *id.* at 3. Those assertions are inconsistent with the injunction as currently written, which not only enjoins defendants "from using the Guidelines," but "from initiating, continuing, or concluding any investigation based on Defendants' interpretation" of "Title IX's prohibition against discrimination on the basis of sex." PI Order (ECF No. 58), at 37.

injunction, the Department of Education has had to suspend the investigation and monitoring of thirty-five pending matters involving claims of discrimination. Lhamon Decl. ¶ 27. Twenty-five of these come from non-plaintiff States. *Id.* "Many of th[e] complaints allege harms similar" to those that have already been successfully remedied in other agreements. *Id.* ¶ 28.

The district court's declaration that other States can enact and enforce their own state laws if they so choose, *see* Clarif. Order (ECF No. 86), at 4 n.1, highlights the impropriety of the preliminary injunction's application beyond the plaintiff States. First, it disregards the fact that other States believe that defendants' expertise and assistance in addressing claims of sex discrimination is a significant benefit, and ignores that the injunction bars defendants from providing this desired assistance even where the States have enacted laws in line with the agencies' guidance. Second, it is patently inappropriate in any event for the district court to dictate to sovereign States that they must affirmatively "craft[] and enforc[e]" their own legislation in order to avoid the injury that will result from the district court's insistence on applying its preliminary injunction beyond the plaintiff States. Order (ECF No. 100), at 4.

The district court's disregard for the appropriate bounds of the judicial function is also apparent in the preliminary injunction's provisions restricting the Executive Branch's ability to represent the interests of the United States in future litigation. The preliminary injunction forbids defendants from "using" the challenged guidance documents in litigation, and also forbids defendants from offering their

views in amicus filings in other courts unless those courts affirmatively call upon the United States to participate, save only in those cases "substantially developed" by August 21, 2016. *See* PI Order (ECF No. 58), at 37-38; Clarif. Order (ECF No. 86), at 6-7. Those extraordinary provisions raise substantial separation-of-powers concerns, disregard the Attorney General's statutory authority to attend to the interests of the United States, *see* 28 U.S.C. §§ 516-519, and underscore the substantial harm that would be inflicted on the United States and the public interest if the preliminary injunction is allowed to apply beyond the plaintiffs to this litigation.

The extraordinary nature of the preliminary injunction is only further underscored by its extension to jurisdictions where courts have upheld the same legal interpretations at issue in this litigation. To date, a majority of courts that have considered some or all of the issues raised in this case have adopted the federal agencies' interpretation of Title IX and its regulations.[7] Yet the preliminary injunction here effectively overrides those decisions by restraining the federal agencies' actions even in jurisdictions where their interpretations have been upheld. Such an injunction is improper. *See, e.g.*, *Georgia-Pac. Consumer Prod. LP v. von Drehle Corp.*, 781 F.3d 710,

[7] *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *cert. granted in part*, No. 16-273 (U.S. Oct. 28, 2016); *Students & Parents for Privacy v. U.S. Dep't. of Educ.*, No. 16-cv-4945, ECF No. 134 (N.D. Ill. Oct. 18, 2016) (Report and Recommendation); *Highland Bd. of Ed. v. U.S. Dep't of Educ.*, __ F. Supp. 3d __, 2016 WL 5372349, at *11 (S.D. Ohio Sept. 26, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-cv-943, ECF No. 28 (E.D. Wisc. Sept. 22, 2016); *Carcaño v. McCrory*, __ F. Supp. 3d __, 2016 WL 4508192, at *11-16 (M.D.N.C. Aug. 26, 2016).

716 (4th Cir. 2015) (holding that district court "abused its discretion in extending [its] injunction" to circuits that had already ruled against the plaintiff on the same issue); *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770-74 (9th Cir. 2008) (similar).

As noted, the Supreme Court has granted certiorari in *Gloucester County*, and if it so chooses, it may rule upon the meaning of Title IX and its implementing regulations and thereby resolve that legal question on a nationwide basis. (It may also resolve that case on grounds of administrative deference, remand the case, or resolve it in some other manner.) Until the Supreme Court imposes a nationwide resolution, however, other federal courts must be permitted to pass upon the same questions, and the federal defendants must be free to offer their views accordingly. *See United States v. Mendoza*, 464 U.S. 154 (1984) (holding that the United States is not precluded from litigating the same legal issue in successive cases involving different parties).

CONCLUSION

For the foregoing reasons, the preliminary injunction should be stayed insofar as it applies beyond plaintiffs.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
MARLEIGH D. DOVER
/s/ Jeffrey E. Sandberg
JEFFREY E. SANDBERG
THAIS-LYN TRAYER
Attorneys, Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7214
Washington, DC 20530
(202) 532-4453

Counsel for the United States of America, et al.

November 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2016, I electronically filed the foregoing motion with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey E. Sandberg
Jeffrey E. Sandberg
Attorney, U.S. Department of Justice
Civil Division, Appellate Staff

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.2.1, I hereby certify as follows:

(1) This case is *State of Texas, et al. v. United States of America, et al.*, No. 16-11534 (5th Cir.).

(2) The undersigned counsel of record hereby certifies that the following persons and entities, including those described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case:

Defendants-Appellants:

United States of America
U.S. Department of Education
John B. King, in his official capacity as U.S. Secretary of Education
U.S. Department of Justice
Loretta Lynch, in her official capacity as Attorney General
Vanita Gupta, in her official capacity as Principal Deputy Attorney General
U.S. Equal Employment Opportunity Commission
Jenny R. Yang, in her official capacity as Chair of the U.S. Equal Employment Opportunity Commission
U.S. Department of Labor
Thomas E. Perez, in his official capacity as U.S. Secretary of Labor
David Michaels, in his official capacity as U.S. Assistant Secretary of Labor for Occupational Safety and Health Administration

Plaintiffs-Appellees:

State of Texas
Harrold Independent School District (TX)
State of Alabama
State of Wisconsin
State of Tennessee
Arizona Department of Education
Heber-Overgaard Unified School District (AZ)
Paul LePage, Governor of the State of Maine

State of Oklahoma
State of Louisiana
State of Utah
State of Georgia
State of West Virginia
State of Mississippi, by and through Governor Phil Bryant
Commonwealth of Kentucky, by and through Governor Matthew G. Bevin

Putative Intervenor-Defendant:

Dr. Rachel Jona Tudor

Amici Curiae:

American Civil Liberties Union Foundation
American Civil Liberties Union of Texas
C.L. "Butch" Otter, Governor of the State of Idaho
Eagle Forum Education & Legal Defense Fund
GLBTQ Legal Advocates & Defenders
Lambda Legal Defense & Education Fund, Inc.
Letitia James, Public Advocate for the City of New York
National Center for Lesbian Rights
States in Opposition to Plaintiffs' Application for Preliminary Injunction (Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Vermont, the District of Columbia)
Transgender Law Center

Counsel:

For Defendants-Appellants:

Spencer Amdur, U.S. Department of Justice
Benjamin L. Berwick, U.S. Department of Justice
James Bickford, U.S. Department of Justice
Beth C. Brinkmann, U.S. Department of Justice
Megan A. Crowley, U.S. Department of Justice
Marleigh D. Dover, U.S. Department of Justice
Sheila M. Lieber, U.S. Department of Justice
Benjamin C. Mizer, U.S. Department of Justice

Jennifer D. Ricketts, U.S. Department of Justice
Jeffrey E. Sandberg, U.S. Department of Justice
Mark B. Stern, U.S. Department of Justice
Thais-Lyn Trayer, U.S. Department of Justice

For Plaintiffs-Appellees:

Mark Brnovich, Attorney General of Arizona
Joseph David Hughes, Assistant Solicitor General of Texas
Scott A. Keller, Solicitor General of Texas
Jeff Landry, Attorney General of Louisiana
Andrew D. Leonie, Office of the Attorney General of Texas
Jeffrey C. Mateer, First Assistant Attorney General of Texas
Patrick Morrisey, Attorney General of West Virginia
David Austin R. Nimocks, Office of the Attorney General of Texas
Sam Olens, Attorney General of Georgia
Ken Paxton, Attorney General of Texas
Scott Pruitt, Attorney General of Oklahoma
Sean Reyes, Attorney General of Utah
Brad D. Schimel, Attorney General of Wisconsin
Prerak Shah, Office of the Attorney General of Texas
Herbert Slatery III, Attorney General of Tennessee
Brantley D. Starr, Office of the Attorney General of Texas
Joel Stonedale, Office of the Attorney General of Texas
Luther Strange, Attorney General of Alabama
Michael C. Toth, Office of the Attorney General of Texas

For putative Intervenor-Defendant Dr. Rachel Jona Tudor:

Marie Eisela Galindo
Ezra Ishmael Young, Transgender Legal Defense & Education Fund, Inc.

For Amicus Curiae American Civil Liberties Union Foundation, American Civil Liberties Union of Texas, GLBTQ Legal Advocates & Defenders, Lambda Legal Defense & Education Fund, Inc., National Center for Lesbian Rights, Transgender Law Center:

Paul David Castillo, Lambda Legal Defense & Education Fund
Kenneth D. Upton Jr., Lambda Legal Defense & Education Fund

For Amicus Curiae C.L. "Butch" Otter, Governor of the State of Idaho:

Cally Younger, Office of Governor C.L. "Butch" Otter

For Amicus Curiae Eagle Forum Education & Legal Defense Fund:

Karen Bryant Tripp

For Amicus Curiae Letitia James, Public Advocate for the City of New York:

Molly Thomas-Jensen, Office of the Public Advocate for the City of New York

For Amicus Curiae States in Opposition to Plaintiffs' Application for Preliminary Injunction (Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Vermont, the District of Columbia):

Alan D. Copsey, Deputy Solicitor General of Washington
Anisha S. Dasgupta, Deputy Solicitor General of New York
Robert W. Ferguson, Attorney General of Washington
Colleen M. Melody, Assistant Attorney General of Washington
Clause S. Platton, Office of the Solicitor General of New York
Noah G. Purcell, Solicitor General of Washington
Eric T. Schneiderman, Attorney General of New York
Holly A. Thomas, Office of the Solicitor General of New York
Barbara D. Underwood, Solicitor General of New York

/s/ Jeffrey E. Sandberg
Attorney, U.S. Department of Justice
Civil Division, Appellate Staff

Counsel for United States of America, et al.