

**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

**APPELLEES' OPPOSITION TO
MOTION FOR PARTIAL STAY PENDING APPEAL**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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 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

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Attorney General of Tennessee
Mark Brnovich
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Attorney General of Oklahoma
Jeff Landry
Attorney General of Louisiana
Sean Reyes
Attorney General of Utah
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Attorney General of Georgia

Defendants-Appellants:

United States of America
United States Department of Education
John B. King, 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 the 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
David Michaels, in his official capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration

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Congress did not intend to bar schools and employers from separating restrooms, locker rooms, and other intimate facilities by anatomical sex when it prohibited discrimination “on the basis of sex” in Titles VII and IX more than four decades ago. On the contrary, a longstanding Title IX regulation authorizes schools to “provide separate toilet, locker room, and shower facilities on the basis of sex,” as long as the separate facilities designated for the two sexes are comparable. 34 C.F.R. § 106.33. Defendants’ Guidelines¹ purport to substantively rewrite the text of those statutes by now including gender identity within the definition of “sex,” such that separate intimate facilities based on the original understanding of the term would no longer be permitted. The Guidelines also replace Defendants’ own longstanding implementing regulations without the notice-and-comment process required by the Administrative Procedure Act.

The Guidelines are thus facially invalid rules—either substantively or procedurally—that represent an unprecedented overreach by the federal Executive. In light of the district court’s conclusion that the Guidelines are

¹ The documents making up the Guidelines are described on page 3 and note 3 of the district court’s August 21, 2016 preliminary injunction order (ECF No. 58).

facially invalid, the court did not abuse its discretion in issuing a preliminary injunction that broadly enjoins Defendants' reliance on the Guidelines. As the Supreme Court clarified decades ago, "the scope of injunctive relief is dictated by the *extent of the violation established*, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added), quoted in *Lewis v. Casey*, 518 U.S. 343, 360 (1996).

Defendants now ask this Court to limit the scope of the preliminary injunction, via a stay pending appeal, so that they may continue enforcing their facially invalid Guidelines outside the plaintiff States. But their stay motion does not challenge the district court's finding that Plaintiffs are likely to prevail on the merits of their facial APA challenges. Nor do Defendants challenge the district court's authorities recognizing that APA § 706 expressly allows facially invalid rules to be set aside in their entirety, not merely enjoined as to particular plaintiffs. Because Defendants cannot show that they are likely to prevail on their argument that the scope of the injunction is an abuse of discretion, or that they will be irreparably injured absent a stay, their stay motion should be denied.

ARGUMENT

A stay is an “extraordinary remedy.” *Belcher v. Birmingham Trust Nat’l Bank*, 395 F.2d 685, 685 (5th Cir. 1968). In addressing a stay motion, the Court considers:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Texas v. United States, 787 F.3d 733, 746-47 (5th Cir. 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). Defendants satisfy none of these elements.

I. Defendants Are Not Entitled to a Stay Because Their Challenge to the Scope of the Preliminary Injunction Is Unlikely to Succeed.

To prevail on the likelihood-of-success factor, Defendants must show that the scope of the injunction is an abuse of discretion. *Id.* at 768-69.

Defendants do not come close to making that showing here.

A. Defendants’ motion does not challenge the district court’s holding that Plaintiffs are likely to prevail on their claim that the Guidelines are facially invalid under the APA.

Defendants’ stay motion does not challenge the district court’s finding that Plaintiffs have shown “a great likelihood of success” on the merits of their

facial challenges under the APA.² Nov. 20 Order 2 (ECF No. 100). Defendants' failure to challenge the district court's finding of facial invalidity significantly undermines their stay motion's challenge to the scope of the preliminary injunction. *Cf.* Defs.' Stay Mot. ("Mot.") 7 n.3. That is because courts routinely set aside and broadly enjoin facially invalid agency actions, as discussed in the next section. Thus, it was not an abuse of discretion for the district court to follow that established practice here.

B. Defendants do not dispute that the APA allows courts to set aside facially invalid rules, rather than merely enjoin their application to specific parties.

Even outside the APA context, the Supreme Court has recognized for decades that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."

² As the district court found, Plaintiffs are likely to succeed on their claim that Defendants' Guidelines facially "violate the [APA] by skirting the notice and comment process." Nov. 20 Order 5. The district court also found that Plaintiffs are likely to prevail on their claim that the Guidelines facially violate the APA because they "contradict the existing legislative and regulatory texts." *Id.* at 2. Titles VII and IX prohibit invidious discrimination on the basis of "sex." 42 U.S.C. § 2000e-2; 20 U.S.C. § 1681(a). Defendants do not dispute that when Congress passed Titles VII and IX, and when DOE authorized intimate facilities to be separated "on the basis of sex" in 34 C.F.R. § 106.33, "sex" was used to refer to "the biological and anatomical differences between male and female students as determined at their birth"—not to a person's perceived gender. Aug. 21 Order 31 (ECF No. 58). By declaring that "sex" now also includes gender identity, the Guidelines rewrite crucial provisions of Titles VII and IX and forbid what § 106.33 has long expressly allowed, thereby violating the APA. *See* 5 U.S.C. § 706(2)(A).

Califano, 442 U.S. at 702. But the APA itself expressly provides that facially unlawful agency action may be enjoined in its entirety. The APA authorizes courts to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), or “without observance of procedure required by law,” *id.* § 706(2)(D).

“When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”³ *Harmon v.*

³ The Supreme Court has indirectly affirmed this principle. In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), Justice Blackmun’s opinion for four Justices noted:

The [APA] permits suit to be brought by any person “adversely affected or aggrieved by agency action.” In some cases the “agency action” will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain “programmatically” relief that affects the rights of parties not before the court.

Id. at 913 (Blackmun, J., dissenting) (citation omitted). Although Justice Blackmun made the above point in dissent, the majority did not challenge it. To the contrary, the majority agreed that a successful APA challenge can affect the entire agency program. *Id.* at 890 n.2; see *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (Justice Blackmun was “apparently expressing the view of all nine Justices on this question”); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17-18 (D.D.C. 2004) (noting that the *Lujan* Court “implicitly agreed” with the proposition that an injunction can benefit parties other than the parties to the litigation).

Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see, e.g., Nat'l Mining Ass'n*, 145 F.3d at 1407-10 (invalidating agency action “nationwide” for “plaintiffs and non-parties alike”).⁴ Similarly, this Court has declined to stay a preliminary injunction granting nationwide relief from an executive order found facially invalid under the APA. *Texas*, 787 F.3d at 769. Even outside the APA context, the Court has recognized that injunctive relief may properly benefit non-parties. *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 374 (5th Cir. 1981).

Both Plaintiffs and the district court relied on *Harmon* and *National Mining Association* to support a broad preliminary injunction of the Guidelines. *See* Pls.’ Mot. for Prelim. Inj. 24 (ECF No. 11); Pls.’ Resp. to Defs.’ Mot. to Stay 7-8 (ECF No. 99); Nov. 20 Order 5. Defendants do not argue in their stay

⁴ “[U]nsupported agency action normally warrants vacatur.” *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). The D.C. Circuit has recognized a narrow exception permitting a remand without vacatur for the agency to fix its unlawful action, but that exception is based on needing to maintain the status quo. *See id.* (“The decision whether to vacate depends on the seriousness of the order’s deficiency . . . and the disruptive consequences of an interim change that may itself be changed.” (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)) (internal quotations omitted)). The narrow exception to vacatur thus cannot apply in a posture like this one, where the entire point of seeking and obtaining a preliminary injunction is to preserve the status quo pending a final judgment. Regardless, that exception has nothing to do with the proper geographical scope of an injunction.

motion that those cases were wrongly decided or are inapplicable here. They simply ignore them. Defendants' failure to address the key authorities supporting the nationwide injunction undermines their challenge to the breadth of that order, especially in light of the abuse-of-discretion standard.

Rather than grapple with this established practice to broadly enjoin facially unlawful agency actions, Defendants instead rely on the judicially-created general rule, for purposes of fashioning equitable remedies, that injunctive remedies should be no broader than necessary to provide relief to the plaintiff. But the APA's "hold unlawful and set aside" language in § 706 provides a statutory basis to award broader injunctive relief for unlawful agency action—particularly facially invalid agency action. And Congress's command in the APA trumps any judicially-created rule. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 313-16 (1981). Thus, courts frequently issue broad injunctions against facially unlawful agency actions without requiring proof that such a remedy was necessary to provide relief to the plaintiff. *See, e.g., supra* pp.4-6; *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2006) (upholding nationwide injunction of invalid agency rule), *aff'd in part and rev'd in part on other grounds by Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). In other words, after finding an action facially unlawful, courts do not

go out of their way to identify and sever every application of the action that could apply to parties besides the plaintiffs (and such applications would still be unlawful, in any event).

Here, the district court found that Plaintiffs have a great likelihood of success on their facial challenge, and Defendants have not contested that finding here. Under these circumstances, the district court did not abuse its discretion by providing a broad injunctive remedy for these facially invalid rules.

C. Defendants' Cases Are Inapposite or Unpersuasive.

Defendants rely on several cases from the Supreme Court or this Court applying the general rule that injunctive relief should be limited to only what is necessary to provide relief to the movant. Mot. 8-9. But most importantly, *Califano*—one of the cases cited by Defendants—recognized that “the scope of injunctive relief is dictated by the *extent of the violation established*, not by the geographical extent of the plaintiff class.” 442 U.S. at 702 (emphasis added). In other words, a broad injunction is proper when agency action is facially

invalid, regardless of the plaintiff's location.⁵ And the resolution of the particular dispute in *Califano*, like Defendants' other cases, is inapposite because it did not involve nationwide injunctions issued pursuant to § 706.

In *Lion Health Services, Inc. v. Sebelius*, for example, this Court held that the district court properly enjoined as "unlawful" a rule that purported to implement a statute establishing, for Medicaid reimbursement purposes, how hospice-care providers account for patient stays that fall into multiple years. 635 F.3d 693, 695, 701 (5th Cir. 2011). The rule required providers to allocate multi-year patient stays into a single year, but the district court found (and this Court agreed) that the statute required multi-year stays to be allocated proportionally into each year. *Id.* at 699-700. In so holding, the Court recognized that "the APA provided the district court with the authority to hold the Regulation unlawful and set it aside," *id.* at 701 (citing 5 U.S.C. § 706), and rejected an argument "that the district court may not set aside such an invalid regulation," *id.* at 702—essentially what Defendants argue here.

⁵ There is no geographical limit on a court's equitable authority when a defendant is properly before the court. *See, e.g., Steel v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (a court "in exercising its equity powers may command [defendants] to cease or perform acts outside its territorial jurisdiction").

Significantly, the Court did *not* address whether the regulation’s application should be enjoined only as to Lion or extended to non-plaintiff providers. Instead, the issue was whether the district court properly ordered a refund of all Medicare monies that Lion had paid under the incorrect formula, or whether the court instead should have remanded for the agency to calculate the refund amount owed by Lion. The Court concluded that “the district court’s decision to order a full refund rather than remanding for recalculation of the refund amount was an abuse of discretion” because (1) “[e]ven using Lion’s proportional calculation method, it still owes a substantial amount of refund to the [agency],” and (2) “the determination of the amount of refund owed to Lion is a matter properly within the agency’s authority.” *Id.* at 703-04. *Lion Health’s* holding that an agency remand was appropriate under those circumstances does not support Defendants’ claim that the district court abused its discretion by broadly barring Defendants from applying facially invalid Guidelines.

Defendants’ reliance on *Hernandez v. Reno*, 91 F.3d 776 (5th Cir. 1996), is similarly misplaced. That case involved a resident alien’s challenge to an INS rule implementing a federal law that authorized certain aliens to receive work permits. The district court found that the rule conflicted with the statute

by requiring eligible aliens to apply separately for employment authorization and enjoined INS from “promulgating or enforcing any regulations or procedures that would require an alien with Family Unity status to apply separately for a work permit.” *Id.* at 781. It also denied Hernandez’s motion for class certification. *Id.*

On appeal, this Court affirmed that the rule’s requirement of separate applications and fees for work authorization violated the statute, and it remanded for the district court to determine the reasonableness of the combined application fee and reconsider class certification if it found the fee unreasonable. *Id.* at 780. The Court further held that class-wide relief was premature absent a class-certification ruling. *Id.* at 781. Accordingly, it modified the injunction to apply only to Hernandez, noting that “the breadth of the injunction may, in the trial court’s discretion, be revisited” if the district court certified a class on remand. *Id.*

Like *Lion Health*, *Hernandez* is a context-specific ruling that does not support Defendants’ argument that the district court abused its discretion in this case. This Court did not hold in either case that § 706 does not authorize nationwide injunctions, nor does it appear that either plaintiff invoked § 706. Most of Defendants’ other cases likewise did not involve nationwide

injunctions under § 706, and accordingly are inapposite. *See U.S. Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (constitutional challenge to military's "Don't Ask, Don't Tell" policy)⁶; *Casey*, 518 U.S. 343 (constitutional challenge to prison facilities); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974)(constitutional challenge to high school athletics rule). Some did not even involve the injunction of a rule. *See Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154 (3d Cir. 2011) (contract claims); *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003) (statutory claims); *Zepeda v. U.S. INS*, 753 F.2d 719 (9th Cir. 1983) (constitutional and statutory challenges to law-enforcement practices).

Defendants further cite *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), but that case is also distinguishable. There, the district court broadly enjoined the agency from enforcing an unconstitutional rule governing corporate expenditures. *Id.* at 382. The Fourth Circuit narrowed the injunction to bar enforcement only as to the plaintiff organization. *Id.* at 393. Unlike in Defendants' other cases, the plaintiff did invoke § 706 on appeal to support the nationwide injunction. *Id.* The Fourth

⁶ The relevant background is discussed in *Meinhold v. U.S. Dep't of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993), *aff'd in part and vacated in part*, 34 F.3d 1469 (9th Cir. 1994).

Circuit rejected that argument, *id.* at 393-94, but its holding is neither binding nor persuasive here.

Significantly, the Fourth Circuit did not hold that § 706 does not authorize nationwide injunctions. Instead, it concluded that “[n]othing in the language of the APA . . . *requires* us to exercise such far-reaching power.” *Id.* at 394 (emphasis added). Because the Fourth Circuit concluded that the scope of injunctive relief is a discretionary matter, *id.* at 392, to acknowledge that a district court may not be *required* to grant broad injunctive relief under § 706 in certain circumstances does not support Defendants’ claim that the court here abused its discretion by choosing to enjoin facially invalid rules.

The Fourth Circuit’s other reasons for rejecting a nationwide injunction in that case are unpersuasive here. First, the court’s invocation of the general rule that an injunction should be no broader than necessary to afford full relief to the plaintiff, *id.* at 393, ignores that § 706 necessarily creates an exception to that general rule. Otherwise courts could almost never set aside facially invalid rules. As discussed above, that is not the case.

Moreover, the Fourth Circuit’s concern that “[t]he broad scope of the injunction has the effect of precluding other circuits from ruling on the constitutionality of [the challenged rule],” and thereby “deprive[s] the

Supreme Court of the benefit of decisions from several courts of appeals,” *id.* at 393, is inapplicable here. First, the district court already limited the injunction in this case by not applying it to cases in which the issue was substantially developed at the time of the preliminary injunction, Oct. 18 Order 6 n.2 (ECF No. 86), so other decisions are likely forthcoming. Moreover, “Defendants’ appeal to the importance of circuit splits” is “unpersuasive given the Supreme Court’s recent grant of certiorari in *G.G.*” Nov. 20 Order 6 (citing *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm v.* 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 2016 WL 4565643 (U.S. Oct. 28, 2016)). The fact that the Supreme Court is poised to address the validity of these very Guidelines makes any comity argument unconvincing in this context.⁷

⁷ *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011), relied on *Virginia Society for Human Life* to conclude that the district court abused its discretion by issuing a nationwide injunction against enforcement of a Medicare regulation, recited the arguments addressed above, and is inapposite for the same reasons. Moreover, it does not appear that the defendant in that case invoked § 706’s “set aside” language as a basis for the nationwide injunction. *Id.* at 664-65. Finally, the Ninth Circuit’s concerns that “a nationwide injunction would not be in the public interest because it would significantly disrupt the administration of the Medicare program,” and that “great uncertainty and confusion . . . would likely flow from a nationwide injunction,” *id.* at 665, are inapposite here, where it has long been understood that the prohibition against sex discrimination in Titles VII and IX does not bar segregation of intimate facilities based on anatomical sex.

II. Defendants Have Not Shown that They Are Irreparably Harmed by a Preliminary Injunction That Maintains the Longstanding Status Quo.

Defendants' inability to show irreparable injury is also fatal to their stay motion. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury" in the absence of a stay). Defendants must make a substantial showing of irreparable injury; "simply showing some 'possibility of irreparable injury,' fails to satisfy the second factor." *Nken*, 556 U.S. at 434-35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). Where the lower court has already performed the task of evaluating irreparable injury in ruling on a stay application, as it has here, "its decision is entitled to weight and should not lightly be disturbed." *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers).

Here, the preliminary injunction merely maintains the longstanding status quo, as exemplified by the Executive's existing regulations. *See* 34 C.F.R. § 106.33. It is not clear how requiring Defendants to abide by their own longstanding interpretations of Titles VII and IX during this litigation constitutes irreparable injury.

Regardless, Defendants’ irreparable-injury arguments are both internally inconsistent and unpersuasive. After arguing below that Plaintiffs lack standing because the Guidelines are merely unenforceable “guidance documents,”⁸ Defendants have now completely changed their position by asserting irreparable injury from being unable to immediately enforce the Guidelines. And Defendants misunderstand the irreparable-injury prong in asserting that they themselves are injured due to purported harm to *non*-parties. These arguments do not establish irreparable injury suffered by Defendants.

A. Defendants are not irreparably harmed by being broadly enjoined from enforcing facially invalid rules that contradict their longstanding interpretations of Titles VII and IX.

In opposing the preliminary injunction below, Defendants argued that Plaintiffs lack standing because the Guidelines are merely Defendants’ “views as to what the law requires,” and are not legally binding.⁹ But Defendants now assert that the Guidelines are so vital that it will cause them *irreparable injury* if they cannot immediately enforce the Guidelines in some States. Even

⁸ Opp. Pls.’ App. Prelim. Inj. 4-5, 13-15 (ECF No. 40).

⁹ *Id.*

putting aside the contradictions in their arguments, Defendants are not entitled to a stay because they cannot show that they are injured.

Defendants have no legitimate interest in continuing to enforce what they have effectively conceded for present purposes are facially invalid rules. And the law is clear that complete vacatur is a proper remedy for unlawful agency action. 5 U.S.C. § 706(2); *see supra* Part I.B. Defendants cannot claim they are irreparably injured by not being allowed to continue violating the law. *See, e.g., Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 240 (5th Cir. 1964) (upholding injunctions that “subject the defendants to no penalty or hardship. They require no more than that the defendants comply with the law.”)

Defendants assert that they are injured by the scope of the injunction because they may no longer rely on the Guidelines in future litigation or amicus filings. But requiring Defendants to abide by congressional intent as expressed in statutory text (and Defendants’ own decades-old interpretation) does not cause them irreparable injury. Defendants also claim that they are irreparably injured because the scope of the injunction prevents other courts from weighing in on the same legal question presented here. But the injunction does no such thing. Not only does the injunction not cover certain pending litigation, other parties remain free to file new lawsuits—including actions

under the Declaratory Judgment Act. Furthermore, the usual benefit to more courts weighing in on an issue—the development of a circuit split and corresponding Supreme Court review—is irrelevant here because the Supreme Court has already granted certiorari on the issue in *G.G.*

Finally, Defendants assert that the injunction is improper because it overrides decisions in other jurisdictions adopting the Guidelines' view of sex discrimination and restricts Defendants' activities in those jurisdictions. Mot. 19-20. This argument is also meritless. Except for *G.G.*, all of the orders cited by Defendants¹⁰ were issued after the preliminary injunction in the present case, making their cited cases inapposite.¹¹ See *Georgia-Pac. Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 716 (4th Cir. 2015) (district court abused its discretion in extending injunction to circuits that had *already ruled* against

¹⁰ The Fourth Circuit issued its decision in *G.G.* several months before the preliminary injunction in this case, but *G.G.* did not involve an APA claim.

¹¹ The decisions listed by Defendants in footnote 7 of their motion were all issued *after* the preliminary injunction was issued in this case on August 21, 2016. See Mot. 19 n.7 (citing Report and Recommendation, *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945 (N.D. Ill. Oct. 18, 2016) ECF No. 134; *Highland Bd. of Educ. v. U.S. Dep't of Educ.*, No. 2:16-cv-524, 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. 32 (E.D. Wisc. Sept. 22, 2016) (no APA claim); *Carcaño v. McCrory*, No. 1:16-cv-236, 2016 WL 4508192, at *11-16 (M.D.N.C. Aug. 26, 2016) (no APA claim)).

the plaintiff on the *same* issue); *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770-74 (9th Cir. 2008) (same). Moreover, Defendants' cited cases were either specifically exempted from the scope of the injunction, or the injunction does not affect them, so they are not "overrid[den]" by the injunction at all.¹² And even in cases where Defendants are not a party, the injunction does not prevent them from providing textual analysis of the relevant statutes as amici, so long as they are not using the Guidelines (for example, to argue for agency deference): "Defendants are simply prevented from *using the Guidelines* to argue that the definition of 'sex' as it relates to intimate facilities includes gender identity."¹³

¹² See Oct. 18 Order 6 n.2; Pls.' Not. Pending Lit. 8, 10-13 (ECF No. 64).

¹³ See Oct. 18 Order 5 (emphasis added). A subsequent provision in the Order reiterates that "Defendants are enjoined from relying on the Guidelines," but it further provides that Defendants "may offer textual analyses of Title IX and Title VII in cases where the Government and its agencies are defendants or where the United States Supreme Court or any Circuit Court request that Defendants file amicus curiae briefing on this issue." *Id.* at 6-7. The former clause explains what Defendants are prohibited from doing, while the latter clause gives a non-exhaustive, specific example of something Defendants are permitted to do and contains no prohibitive language. Under the former clause, Defendants cannot affirmatively enforce either the Guidelines or their interpretation of Titles VII and IX. But, contrary to Defendants' argument, Mot. 18-19, the latter clause does not limit Defendants' ability to file an amicus brief without a court's invitation. Even absent such an invitation, Defendants may file amicus briefs that do not rely on the Guidelines.

B. Defendants’ arguments about potential harm to non-parties are misplaced and cannot satisfy their burden of showing irreparable injury for purposes of a stay.

The stay factors that pertain to injury are focused on the parties to the litigation: whether the movant will suffer irreparable injury without a stay, and whether the other parties will suffer injury if a stay is issued. *Nken*, 556 U.S. at 434. If the stay’s effect on non-parties is relevant at all, it would only be in considering the fourth factor—the public interest—which is not as “critical” as first two factors. *Id.* at 434. And here, Defendants’ inability to show irreparable injury to themselves should end the inquiry.

In any event, the alleged injuries of the non-parties raised by Defendants do not amount to irreparable injury. Defendants assert that the Amici States are injured because they approve of the Guidelines and want the federal government’s help in enforcing them. But nothing in the injunction prevents States from creating their own laws or regulations or interpreting their own authorities consistent with the Guidelines’ definition of sex discrimination. Just because some States agree with the policies underlying a facially unlawful federal agency action, that does not mean that the federal Executive has a judicially cognizable irreparable injury. It merely establishes a policy disagreement.

In a similar vein, Defendants argue that individual students in some States will be harmed by the injunction because Defendants can no longer enforce the Guidelines there. But Defendants are still free to continue “their core mission of enforcing the federal civil rights laws enacted by Congress.” Nov. 20 Order 4. And the injunction does not prevent individual schools, school districts, or States from accommodating all of their students’ needs in a compassionate, respectful way, as it ““does not affect a school’s obligation to investigate and remedy student complaints of sexual harassment, sex stereotyping, and bullying.”” *Id.* (quoting Oct. 18 Order 5). Congress, of course, remains free to consider whether it should amend Title VII, Title IX, or any other relevant statute to reflect Defendants’ novel interpretation of sex discrimination. The lower court’s injunction just prevents the Executive from improperly usurping Congress’s legislative authority and requires Defendants to follow the proper channels for rulemaking. Defendants cannot be allowed to persist in violating the law simply because some individuals and States agree with the results of their actions. The means that Defendants used to obtain those results are unlawful, and the violation of the law is not diminished even if Defendants believe it is good policy.

III. The Public Interest Does Not Favor A Stay.

It is clear that the public interest favors maintaining the district court's broad injunction. Courts act within the "broad public interest[]" when they "maintain" the "proper balance" of "the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). Defendants' Guidelines represent a sea change, occasioned by unilateral unlawful agency action rather than legislative enactment, in what qualifies as sex discrimination. The Guidelines represent a major reinterpretation of Titles VII and IX, which explicitly contemplate sex-separated intimate facilities. This change, if allowed to take effect, will require employers and school districts to expend significant amounts of money to modify their facilities. There is no reason to permit the Guidelines to effect such sweeping changes—pending appeal—when the district court has found them facially invalid and Defendants have not challenged that finding here.

The Supreme Court's grant of certiorari in *G.G.* and stay of the mandate¹⁴ in that case further confirms that preserving the longstanding understanding of sex discrimination pending the Court's review is the proper course of action. It makes little sense to allow Defendants to enforce certain

¹⁴ *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016).

applications of their unlawful Guidelines in some States when the Supreme Court has stayed the Fourth Circuit's ruling deferring to the Guidelines and is poised to resolve the issue of their validity on a nationwide basis.

CONCLUSION

Defendants' Motion for Partial Stay should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On December 5, 2016, this response was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This response complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5178 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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