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

STATE OF TEXAS, et al, Plaintiffs, v. UNITED STATES OF AMERICA, et al, Defendants.	))))))))	7:16-CV-054 Hearing on Motion for Injunction August 12, 2016

BEFORE THE HONORABLE REED C. O'CONNOR
United States District Judge
In Fort Worth, Texas

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(August 12, 2016.)

THE COURT: I'll go ahead and the next case is the State of Texas versus United States. All right. I'm sorry for that delay. I really didn't expect that to take as long as it ended up taking.

This is case number 7:16-CV-054, the State of Texas versus the United States and others.

So who is here for the State?

MR. NIMOCKS: Good morning, Your Honor. Austin Nimocks for the State of Texas and Plaintiffs. I'm accompanied by my colleagues Michael Toth and Andrew Leony.

THE COURT: Okay. Thank you. And then who is here then for the Defendants?

MR. BERWICK: Good morning, Your Honor. My name is Ben Berwick on behalf of the Defendant and I'm joined by my colleague --

THE COURT: I didn't hear your last name.

MR. BERWICK: I'm sorry. James Bickford, B-I-C-K-F-O-R-D.

THE COURT: Thank you both for being here. Okay. All right. So you all have asked for the briefing schedule and for a hearing and you wanted this done in advance of, I guess, the rough advance of the school year, so -- I was in trial all last week, I will be in trial all next week, and so this has given me a little bit of time to read and digest your

arguments, but I know someone is going on vacation, so -- you're going on vacation?

MR. BERWICK: I appreciate you coming in to hear it today.

THE COURT: I set it today and so I'm ready to hear whatever evidence or information or argument you would like to present in support or in opposition to the motion. So, it's your motion, so you would have the burden, so you can go first.

MR. NIMOCKS: Thank you, Your Honor. Good morning and may it please the Court.

Again, my name is Austin Nimocks. I'm here on behalf of the State of Texas and the Plaintiffs in this case and I will advise the Court, in light of its comment about evidence, that we do not intend to call witnesses this morning. We will present argument and rely upon the briefing and the evidence that we submitted in the filings we've made with the Court to this point.

Your Honor, this is a case about authority. The new rules of the Defendants usurp the authority of local school districts. About 100,000 are more than nationwide as well as states to govern the education of children as well as the facilities in which they are educated.

And this is -- The same is true with regard to employers who, under Defendant's new rules, are forced to mix

the sections and intimate areas of the workplace foregoing any concerns about the privacy, dignity, or safety of employees and actually creating a hostile work environment.

In order to avoid the authority of this Court, Defendant's promulgated their new rules through a series of snowballing decrees, may be a good way to describe it, that did not go through notice and comment. And while the Defendants title these utterances as guidances, interpretations, letters and the like, it is ultimately the essence of those documents we contend and how they are treated by the defendants that control what they are here.

As the Plaintiffs have demonstrated to the Court in our briefing, we believe the defendants have enforced with the full measure of their authority their new rules across the country and in doing so they have usurped the authority that belongs to state and local entities, as I alluded to earlier, to control the education of children and the facilities in which they are educated.

Every state has laws governing the education of its children and those facilities and we have gone to great lengths to provide the Court with citations to the statutes in every state across the country that provides the state and local authorities with that prerogative.

While the Defendants claim in their brief before this Court that the rules are not enforceable and are not being

enforced as a way to insulate themselves from judicial review, their actions speak louder than their words, Your Honor. When Defendants filed a lawsuit against the State of North Carolina just three months ago attacking its policy that intimate facilities shall be separated on the basis of sex, the nation and the State of Texas awakened to what we see now the Defendants have been doing for years, purposefully and symptomatically enforcing their rules across the country.

Let me go through for the Court, the benefit of the Court, these enforcements which we outline, to some extent in our brief, but the defendants have engaged in for some time now we see.

The Equal Employment Opportunity Commission through what it does in terms of enforcing, and that's adjudicating disputes, has issued two decisions that we allude to in our brief, the *Macy* decision and the *Lusardi* decision, L-U-S-A-R-D-I, from April of 2015 is the most -- the latest decision for the *Lusardi* decision enforcing these rules in Illinois against the school district Palatine School District in the State of Illinois; against Ohio in the Highland local school district. In Virginia we would contend, and this is the dispute that ultimately made its way to the Fourth Circuit, and while that dispute did not originate by action of the defendants they did file a statement of interest in that case and it is the various forms of regulations about which we

complain in this case that the Fourth Circuit ultimately relied upon in that case as the basis for its ruling. And that ruling being -- and I would remind the Court this morning that the Supreme Court has recalled the mandate of the Fourth Circuit and stayed that case.

In California three separate school districts about which the Defendants articulate their enforcements against schools, the Downey Unified School District, Arcadia School District, and a third school district. These are articulated in the Joint Letter, as we call it, of May 13, 2016, which is Exhibit J to our Complaint and these enforcements are on page 7, footnotes 9 and 23, if the Court wants to look at it, and the endorsements -- I'm sorry, these references that I mentioned also link to the resolution agreements that the Defendants came into agreement with with the school districts after the what I would call arm twisting over their interpretation of Title IX resulted in compliance.

In the State of Minnesota, now this is one we did not mention in our briefing, but this is also mentioned by defendants in Exhibit J. There was an enforcement and, of course, the State of North Carolina, which I alluded to earlier.

I think what is significant most importantly to this Court, Your Honor, about the enforcement in the State of North Carolina, is this is not an enforcement that originated

because of a complaint of an individual student or circumstance. The state had a policy, the Defendants disagree with that policy, and so the full weight and measure of Defendants and their enforcement abilities, this time going straight to federal court, was brought upon the State of North Carolina. What -- and by so doing, the enforcement against the State of North Carolina is an enforcement on every state in this country because the principles that the Defendants are articulating and trying to enforce are, in their words and actions, universal. This is a rule. These are rules that they have articulated and they have no exceptions. They have no exceptions for geography. They have no exceptions for circumstance. They are universally implementing these from the west coast to the east coast to the south through enforcement mechanisms intervening, if I could use that word for what was happening in the Virginia case, and then instituting federal lawsuits as has happened in North Carolina.

And, of course, there's a new lawsuit that has been brought by an individual in the state of Wisconsin. The geography continues to grow and grow. This new lawsuit is alluded to in one of the amicus briefs ECF 38-1 at page 16 for the Court's reference.

So these enforcements, based on these interpretations and guidances which are really being enforced as rules, Your

Honor, are happening across the country and that is why they are an imminent threat and harm to the Plaintiffs herein.

Why do they call these rules? Beyond the fact, Your Honor, that the Defendants are enforcing these rules with impunity across the country, they are rules because they grant rights and impose significant obligations. That's a standard from the Supreme Court in the *Chrysler* case from 1979 that we cite in our brief. And these rules that the Defendants are now enforcing amend long-standing agency policy and practice. This, of course, goes to one of the regulations that is at the heart of this issue. And I'm alluding to 34 CFR Section 106.33. This is the regulation that expressly permits educational facilities to provide separate bathrooms and living facilities in other intimate areas on the basis of sex.

Now, the new rules that the Defendants are enforcing across the country amend this prior regulation. This prior regulation which provides that the sexes can be separated in intimate areas runs completely contrary to Defendant's new rules which say on that the sections must be mixed in intimate areas.

The new rules of Defendants basically obliterate and render useless any element of this regulation 106.33 for if a school was to exercise its authority and its ability under this regulation that separate the sections in intimate areas under Defendant's new rules that school is simultaneously

violating Title IX.

So there is a clear conflict between the new rules that the Defendants are enforcing across the country and, of course, the originally promulgated rule, that being one of them right there.

The Fifth Circuit has been very clear in multiple cases that notice and comment is required for any regulatory instrument that conflicts with existing rules. We see that in the *Phillips Petroleum* case that we cite in our brief from 1994. The *Davidson* case from 1999. And the *Babette* case from 2001, all of which we cite in our briefing, Your Honor. So, if there's a new regulation that conflicts with existing rules, adds a new condition to a rule, or represents a significant departure from established and consistent agency practice, those are all new legislative rules that must go through notice and comment. And, of course, all of the pieces of evidence of the new rules of Defendants about which we complain we attached to our Amended Complaint and articulate in our briefing. None of those went through any element of notice and comment.

Of course, these rules, as I've already mentioned, are, in fact, rules because they bind agencies and the entities that the agencies regulate. The D.C. Circuit has said this: That is an agency rule is legislative and therefore must go notice and comment if it appears on its face

to be binding or is applied by the agency in a way that indicates it is binding. And in the Joint Letter, this is Exhibit J again, on page 3 of the ECF, I want to quote for the Court one of the statements that's in that joint letter:

Quote: "Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex and the departments enforce Title IX accordingly."

With their own words, Your Honor, they have indicated that its new rules are enforceable and that they are enforcing them. So, if there was any ambiguity about what they are doing with their actions in the various enforcements across the country, they have come out and stated on May 13th of this year that they are enforcing it accordingly.

This of course all flies in the case of the multiple times in Defendants' briefing before this Court, ECF 40, that the new rules are not enforceable, that they hold no legal value, that they -- I don't know how else to describe it. It just can't be reconciled, Your Honor, and because they are enforcing it and they are enforcing it unilaterally against every state or local school district as a sovereign that they are encountering that conflicts with this, that binds itself to the original intent of Congress, there is an imminent and irreparable threat to the Plaintiffs before the Court.

Of course, these new rules are also contrary, Your

Honor, to the intent of Congress. We can go back not just to the regulations but to the original intent and text of Congress. When Congress used the term "sex" in Title VII and Title IX, it meant it very narrowly. And I would point this Court to many things that support that conclusion.

First and foremost, we cited in our reply brief, the Seventh Circuit, a case called *Hively* that they handed down just at the end of July, reaffirming a case from 1984 where it stated that the term "sex" is very narrow. And I would ask the Court, if it hasn't already, to review paragraphs 23 through 25 of our Amended Complaint where we articulate with specificity the Congressional history and the discussion amongst the law makers about if we put sex in Title IX what does that mean for intimate spaces and living facilities and there was demonstrated by that an understanding that this did not apply to intimate facilities where the needs of privacy, dignity, and safety were paramount.

To being very clear, in addition to Title IX, Congress enacted 20 U.S.C. 1686 which provides that notwithstanding anything to the contrary contained in this chapter nothing contained herein shall be construed to prohibit any educational institution receiving funds under this act from maintaining separate living facilities for the different sexes. So Congress in its own language specifically provided that it did not intend to invade with protections for

sex the privacy, safety, and dignity concerns associated with intimate spaces.

And, of course, Congress didn't just do that. I mentioned one of the regulations earlier that a recipient may provide separate toilet, locker room, and shower facilities, but Department of Health, Education, & Welfare, which is the agency at the time that promulgated these regulations which subsequently became the Department of Health & Human Services, also said in 34 CFR 106.32 that schools may provide separate housing on the basis of sex so long as the housing is proportionate. So it went all the way from housing down to intimate facilities, clear regulations, mirroring the clear intent and language of Congress that intimate facilities still may be properly separated on the basis of sex.

The Fourth Circuit in its opinion that has been stayed by the Supreme Court agreed with Judge Niemeyer in his dissent that an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not involuntarily exposed recognizing this interest. And if the Court were to look at Judge Niemeyer's dissent in the Fourth Circuit case, he cites to several federal courts that have recognized this privacy into. Justice Ruth Bader Ginsburg, before she was on the Supreme Court, shortly after the educational amendments of 1972 were enacted

stated this:

"Separate places to disrobe, sleep, perform bodily functions are permitted in some situations required by regard for individual privacy."

Of course, she re-articulated that as a justice of the Supreme Court in the VMI case in 1996 when she acknowledged in footnote 19 that admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other in living arrangements.

The Tenth Circuit has also opined on this. We did not mention this case in our briefing Your Honor. This is the *Etsitty* case, E-T-S-I-T-T-Y, *against Utah*, 502 F.3d 1215. This is from 2007: "However far Pricewaterhouse reaches," the Court said, "this Court cannot conclude that it requires employers to allow biological males to use women's restrooms. The use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."

In 1977, shortly after the educational amendments were -- of 1972 were enacted and two years after the two regulations that I've cited were promulgated, the U.S. Commission On Civil Rights, on which Justice Ginsburg sat at the time articulated this:

"The personal privacy principle permits the maintenance of separate sleeping and bathroom facilities for women and men."

And, of course, in our Amended Complaint in paragraph 26, we touch on just a handful of the myriad legal scholars across the country, many esteemed, who articulated the need continuing to protect personal dignity and safety in intimate areas.

Your Honor, the intent of Congress and the regulators in 1975 was very clear and because it was very clear and intimate areas are separate and the sections may be separated, Defendants' new rules did not be reconciled with those principles. Therego, they are new rules. They are legislative in nature not only by how they are enforcing them, but by what they say, and they were required to go through notice and comment. They did not.

That take us to the Spending Clause claims that I will touch on briefly, Your Honor, that we also make as a basis for our motion here.

The clear notice principle of the Spending Clause requires that any conditions attached to federal monies be knowing and voluntary and the Supreme Court has made that very clear and very recently clear in an *NFIB against Sebelius,* S-E-B-E-L-I-U-S. The legitimacy of Congress's exercises spending power rests on whether the state knowingly and voluntarily accepts the terms of the contract. To know the terms of the contract it has been made very clear by the Supreme Court in 2006 that we must be able to clearly

understand from the text of Congress, the text of the actual law codified in the USC that those conditions were attached thereto. That's from the *Arlington Central School Board* case. I would note for the Court that in that case the Court adhered to the text of Congress even though the legislative history ran contrary to the text, so there was arguably an understanding in Congress in that case that conflicted with the text but the Court still adhered to the text. Here the legislative history, of course, mirrors the text and the subsequent regulations, so I think that our clear notice claim here that we did not voluntarily and knowingly accept the terms the Defendants are now foisting upon us is very strong from the text of what Congress enacted.

And, of course, these new conditions, these new rules that Defendants are imposing upon plaintiffs and, of course, other entities across the country, Your Honor, are coercive. They are coercive because they place into jeopardy a very substantial sum, on the average of 20% in the declarations that we have provided to the Court from some of our Plaintiff states of a state's education budget. And we did not articulate this in our briefing but I would ask the Court take judicial notice of this. This is no greater line item in any state budget than the amount a state spends on education. In the State of Texas, like most states, providing education is constitutionally required.

To threaten the percentage, even upwards of 5 or 10 percent of a state's budget, when it's operating under a constitutional mandate to educate it's citizenry is coercive, we would submit, as an as a matter of law. Because the state is not just engaging in a voluntary or administerial act. It's is one of the most significant and fundamental acts it engages in perhaps other than law enforcement with regard to its citizenry. So to hold a gun to the head, to use the Supreme Court's language, to any state or local school district for a substantial amount of federal funds is coercive, given the importance of the state interest and the importance of the money attached thereto.

Exhibit V articulates the interest of the State of Texas. Nearly 20% of our budget, educational budget, excuse me. Exhibit Q, for the state of Arizona, nearly 20 percent of the budget is at risk. State of Tennessee, Exhibit Tango, nearly 20% of their budget. Exhibit Sierra for the state of Kentucky, nearly 20%.

And then when you look at the individual school districts that are involved in the litigation, Your Honor, from Arizona, Exhibit R, more than 15% is at risk and Harrold ISD, Exhibit P, as in "Papa," nearly 10% of its budget are at substantial risk.

So not only is this -- these new rules not in the text of the wall provided by Congress and nothing that any

entity, state, or local school district would knowingly and voluntarily have accepted, these conditions are coercive because of not only the nature of the programs they impact and threaten, but the percentages.

Defendants address this in part, and I want to point out something from their briefing that I thought was significant. On page 25 of their brief, this is ECF No. 40, they say this, quote:

"In any event, there has never been a threat by the Department of Education or the Department of Justice to seek a repayment of any federal funds already provided," unquote.

Your Honor, that goes to the heart of what we are talking about here. By telling this Court that they don't intend to seek a repayment of funds, I believe they are implicitly telling this Court that they are looking prospectively of threatening future funds if states and local school districts do not comply with these enough rules and mandates. They could have said that they don't intend to threaten the funds of local school districts, but I think that their past actions with regard to other school districts speak clearly enough, and they can't say that.

Your Honor, for all the reasons that I have articulated, legal and otherwise, these are new rules that are being enforced and they are contrary to the text of Congress and therefore improper and we believe that injunctive relief

the appropriate. We believe that injunctive relief on a nationwide basis is appropriate. These are federal agencies that are regulating a uniformed system and interpreting, to use their words, Title VII and Title IX, federal laws enacted by Congress whose reach extends across the country to every jurisdiction without exception.

So, we are asking that the district court enter an injunction that prohibits the Defendants and declares, excuse me, that the various pieces of guidance, interpretations, letters, soft law, to use a term, or dark matter, as we refer to them in our brief, have no legal effect, that they are due know deference, that they may not be used by the federal government as the basis for an investigation, any administrative inquiry, or any other form of enforcement, quasi enforcement, or other action that would lead any reasonable person to conclude that the agency is acting under the informator of federal law. That we believe is an appropriate scope of an injunction here.

Of course, the Department of Justice and other agencies are free to argue cases in federal court like the other cases that are pending on this issue across the country, but what we are asking the Court to enjoin is the basis of arguments. They can't walk into a court or an administrative agency or an administrative proceeding and argue that Title IX means what they say it means because of this letter or this

guidance. They must rely upon, as they should, the text of Congress and the text of the regulations and what the intent of the regulators in Congress was at the time. By issuing all of these rules through these informal processes and procedures, as I mentioned earlier, Defendants are trying to insulate themselves from judicial review by being able to walk into this court and cite *Chevron* deference, *Auer* or *Seminole Rock*. *Auer*, excuse me, A-U-E-R, or *Seminole Rock* deference and thereby preclude this Court from truly opining on what is actually going on and the coercive nature and impact of what Defendants are able to do by so doing is clearly seen in the litany of enforcement actions that I have articulated for the Court.

And, of course, this Court has large discretion over any injunctive relief that it chooses to issue. And, of course, Your Honor, as you are well aware, I don't have to tell you this, you can alter or amend an injunction at a later time, if you so chose to do. If there was an adverse ruling to any ruling, if you were to agree with the State of Texas on the merits of this and another court issued an adverse ruling, you could amend or alter any injunction to make sure that it does not interfere with the prerogative of that court to the extent that it can be interpreted that way. There are many ways for this Court to alter, fashion, or subsequently amend injunctive relief that permits all the mechanisms

appropriately to move forward.

And I would end my initial argument here, Your Honor, by mentioning a couple of cases recently where nationwide injunctive relief was appropriate. Most recently on June 27 of this year Judge Cummings in Lubbock issued an injunction precluding the Department of Labor on a nationwide basis from enforcing its new interpretation of what's known as the Persuader Rule that impacts the ability of employers to obtain advice as it pertains to unionizing in union elections. I will not belabor the Court with the details. But because that was an agency action that had no geographic boundaries and applied nationwide an injunction precluding the Department of Labor from imposing that anywhere was appropriate.

And, of course, there was the injunction issued by Judge Higdon, in the Southern District, on February 26th of 2015, regarding the Department of Homeland Security's Deferred Action Rule that went to the Supreme Court -- Excuse me -- the Fifth Circuit, which affirmed his injunction and of course it was subsequently affirmed by an equally divided Supreme Court, so there is recent precedent and appropriate precedent for this.

We believe that this case is on all fours because of who the Defendants are, the scope of what they are doing, and its implications for every single state and school district across the country.

I, of course, will be happy to entertain any questions the Court may have.

THE COURT: Thank you.

MR. BERWICK: Good morning, Your Honor.

THE COURT: Good morning.

MR. BERWICK: Again, I'm Ben Berwick on behalf of the Defendants.

Your Honor, the Plaintiffs in this case are challenging guidance documents issued by the Defendant federal agencies which sets forth those agencies' understanding and interpretation of federal laws, and in particular Title VII and Title IX, as prohibiting discrimination based on an individual's gender identity, so prohibiting discrimination against transgender individuals. So, of course, we believe that the agency's interpretation is correct, that their understanding of the law is correct, and I -- and I hope to explain to the Court why that is.

But before I even get into that, I'd like to -- I'd like to raise four threshold problems with Plaintiff's Motion For Preliminary Injunction, which we identified in our briefs, and we believe that these problems should prevent the Court from even reaching the merits of this case and certainly should prevent the Court from granting the preliminary injunction. So, very briefly, I'm just going to tick the four off and then I will discuss them each in more detail.

The first is that the Plaintiffs have entirely failed to establish any current or imminent harm as a result -- that they suffer as a result of the agency's understanding of the law and therefore they cannot make the necessary showing of irreparable harm for the purposes of preliminary injunction.

Second, for similar reasons, Plaintiffs don't have standing and their claims are not ripe for adjudication.

Third, because any enforcement action brought by the Defendant agencies would result in either -- would result in certainly judicial review and in some cases an elaborate administrative review process followed by judicial review, Plaintiffs have an adequate alternate remedy in a court and therefore they actually have no claim under the APA, under the Administrative Procedure Act.

And then fourth, and this is specifically with respect to the Title IX claim, Congress sets forth an administrative review process or established an administrative review process that culminates in review by Court of Appeals and under the Supreme Court's precedent in *Thunder Basin* that actually precludes district court review of this claim, of specifically again the Title IX claim.

So, again, I want to go into each of those in a bit more detail. But before I do that, I think it's worth saying that all of these shortcomings in Plaintiffs' case flow from I think the same underlying problem and that is that the agency

guidance that Plaintiffs challenge here have no immediate or imminent affect on them. If and when one of the agencies were to seek to enforce its interpretation of the law against Plaintiffs and -- we are not denying, as the Plaintiffs suggest, that is a possibility at some point, but that is entirely speculative. That Plaintiffs will have an ample opportunity at that point to challenge that interpretation and to raise their arguments in administrative proceedings and before a court and most importantly they will suffer no harm before that time. There is no -- there is no harm in the interim before they -- before administrative review and review by a court, so they cannot possibly therefore make the showing necessary for the extraordinary remedy of emergency relief.

And I think it's worth mentioning the -- describing in a bit of detail, very briefly, the guidance documents that Plaintiffs do challenge.

So, again briefly, the Department of Education, Plaintiffs mentioned three Department of Education guidance documents, a 2010 Dear Colleague Letter, an April 2014 guidance document, and at mostly a 2016 Dear Colleague Letter that was issued with the Department of Justice.

The Department of Education frequently issues guidance documents of this type in order to notify schools and other stakeholders about how it understands and interprets the law, but the documents themselves state explicitly that they

do not have the force of law and I think most importantly, in response to something Mr. Nimocks said, they would never be the basis for an enforcement proceeding. So, if -- if the agencies were to seek to enforce the law against Plaintiffs, they would do so based on Title IX or Title VII and based on the implementing regulations. They wouldn't say we are enforcing your colleague letter against you, yes, the Dear Colleague Letter sets forth their understanding of what the law requires, but even if that letter never existed the agencies would still be able to bring an enforcement action against Plaintiffs based on their understanding of the law. That's what agencies do all the time. The only thing that would be different is that plaintiffs and school districts and other stakeholders across the country would not have the benefit of the -- knowing the agency's understanding of the law.

Moving on to the Department of Justice. Aside from the joint Dear Colleague Letter with the Department of Education, the other Department of Justice guidance that the Plaintiffs mention is the memo that would have issued in December 2014 by then Attorney General Eric Holder. That memo explains, and I quote:

"The best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity including transgender status."

But the memo made clear that the applies only in cases in which a federal agency is being sued. It just said we will no longer assert in those cases where an agency is being sued in Title VII cases specifically as a defense that Title VII does not protect transgender individuals but it only applies in those circumstances.

I think it would be unprecedented, Your Honor, for a court to enjoin the Department of Justice to take a litigating position in particular cases, particularly in defensive cases that have no impact on the Plaintiffs.

The other two documents at issue that the Plaintiffs challenge are a best practices guide issued by OSHA that explained and I quote again:

"All employees should be permitted to use the facilities that corresponds with their gender identity," unquote, and that document on its face merely offers advice to employers. There are absolutely no enforcement consequences that flow from it.

And then finally a fact sheet issued by the EEOC in May 2016 which simply summarized the prior holdings of my colleague's, Mr. Nimocks, mentioned the cases *Lusardi* and *Macy*, I believe they are, in which EEOC through their normal adjudicative process concluded that Title VII protects transgender individuals.

So, Your Honor, with that background in mind, I would

like to turn to the threshold issues that I mentioned first, so -- and, again, I will try and run through these briefly.

But irreparable harm, I will start with, so I'm sure the Court is intimately familiar with the standard for a preliminary injunction and irreparable harm.

What's most relevant here, Plaintiffs seeking a preliminary injunction must show they will suffer real, immediate, substantial, or imminent injury in the absence of emergency relief.

Again, Your Honor, the guidance documents that Plaintiffs challenge are merely expressions of the agencies' view of what the laws require. They have no legally independent binding effect.

Plaintiffs have entirely failed to explain how they are injured merely because the agencies have articulated their views of the law. So specifically with respect to Title VII they have identified no action being taken against them, no threat of any action being taken against them, no change in conduct at all that is required by the agencies' understanding of Title VII. They just -- they've only asserted sort of a vague allegation that this interpretation threatens their -- and I'm going to quote here, "threatens plaintiffs' interest in establishing policies and managing their own work places."

With respect to Title IX they also -- the crux of their Title IX argument is that they face an imminent -- that

they potentially face a loss of federal funding.

So, again, it is of course possible the Department of Education could choose to bring an enforcement action against one of the Plaintiffs at some undefined future time, but that's -- it's speculative, it's uncertain, and that is not sufficient for the purposes of irreparable harm and for the purposes of a preliminary injunction.

Furthermore, if it were to happen, if an agency were to bring an enforcement action, it would trigger an administrative enforcement scheme before the loss of any funds and I won't go every step of that theme, but some notable features is that the Department of Education is required to seek voluntary compliance first if there is -- if the agency and the school district are unable to reach agreement. Again, it would then initiate a -- an administrative enforcement action in one of two ways. First, the Department of Education could refer the matter to the Department of Justice which would then decide whether to bring an enforcement action in district court to obtain an injunction. Or, second, the Department of Education could go through its own administrative process which includes an administrative hearing followed by administrative appeals process after which, if they did not prevail, the school could appeal to a court of appeals.

Furthermore, if at the end of the administrative

process the Department of Education sought to withdraw funds, the school would have at least thirty days notice that's required by the statute specifically so that the Department of Education can inform the Senate and the house about the proposed withdrawal of funds.

And, finally, the fund termination would be prospective only; that is, the Department of Education would only terminate funds from the date of the withdrawal or termination moving forward. They wouldn't seek to recoup round it's.

So, in short, even if Plaintiffs were faced with an enforcement action, which is again speculative and uncertain, they would have the opportunity to raise any arguments here that they are making here in the administrative process and to the Court. So, ultimately, regardless of the existence of these guidance documents, the Department of Education would have to convince a court to agree with its understanding of the law. Plaintiffs again suffer no harm in the interim.

Your Honor, our arguments with respect to standing enlightenments are largely the same, so for similar reasons we think Plaintiffs don't have standing, their claims are not ripe. So I think I will -- I will just -- just leave it at that, in order to move this along.

So, this third threshold issue is the question of an adequate alternate remedy. The -- So the APA does not provide

a cause of action where there is an adequate alternate -- I'm sorry, excuse me -- the language is, and I quote here, "adequate remedy in a court," and that's 5 U.S.C. Section 704. Here Plaintiffs unquestionably have an adequate alternate remedy in a court; that is, they can defend against any enforcement action in a court and the Fifth Circuit has said that that is an adequate remedy.

Furthermore, if DOJ brought a suit against any of the Plaintiffs based on its interpretation of the law -- Excuse me -- I said this already, but the state would be able to defend against that suit and would suffer no harm in the interim.

If the Department of Education initiated an enforcement action, as I previously stated, there would be multiple layers of administrative review followed by the opportunity to appeal to the court of appeals and that also is an adequate alternate remedy under the APA.

The fourth and final threshold issue that I want to identify is, as I mentioned, the preclusion of district court review based on the Supreme Court's decision in *Thunder Basin*. Again, this applies only to Title IX. So, in *Thunder Basin* the Supreme Court held that a statutory scheme of administrative adjudication followed by review in the court of appeals, quote, "precludes district court jurisdiction," unquote, over parallel free enforcement challenges. The

pre-enforcement challenge at issue in *Thunder Basin* was a challenge to the agency's interpretation of the Mine Act which contained an administrative review scheme and review by the court of appeals. The scheme there was strikingly similar to the one that we have here.

So because the pre-enforcement challenge to -- where Congress has established this scheme of administrative review followed by review in the court of appeals, *Thunder Basin* controls and this Court lacks jurisdiction.

Your Honor, let me turn now to the -- what I will call the merits of Plaintiffs' claims, so that's both their procedural APA claims and the substantive claims and the Spending Clause claims.

With respect to the question of whether these guidance documents should have gone through notice and comment. Your Honor, these guidance documents are paradigmatic, quintessential interpretive rules. As the Fifth Circuit said, interpretive rules are, quote, "Statements as to what the administrative officer thinks the statute or regulations mean." That is what these are. Those are interpretive rules. They are exempt from the APA's notice and comment requirements.

I think it's illustrated by the fact, as I alluded to before, Your Honor, that even if these guidance documents do not exist that the Department of Education or the Department

of Justice would still be able to bring an enforcement action based on their understanding of the law as prohibiting discrimination against transgender individuals. These guidance documents don't add anything to their authority to do so.

I believe, Your Honor, that Mr. Nimocks said that this is a -- that our position and specifically the Department of Education's position is a reversal of long-standing agency practice and he specifically cited to 34 CFR 106.33. We disagree with that characterization, Your Honor. As the Fourth Circuit found in *Gloster*, the Department of Education regulations simply do not speak as to how a transgender individual should be treated; that is, whether they should be treated as a transgender woman should be treated as a woman and a transgender man should be treated as a man and vice versa for the purpose of those regulations. This is an emerging issue which is why the departments have issued guidance on this over the last several years. There have been questions from stakeholders about how to -- how the law applies to transgender individuals and that's why the agencies have been issuing these guidance, but specifically with respect to the Department of Education and that regulation that Mr. Nimocks mentioned, it is not a change in the agency's interpretation.

Furthermore, Your Honor, even if it were, that

doesn't change the fact that it's interpreted -- that it's an interpretative rule. That the Supreme Court said as much explicit at the in *Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199, which we cited in our brief. It does not change the nature of a rule as -- from interpretative to legislative just because it's a change in the agency's position.

Your Honor, moving on to what I would call really the merits, which is the -- under what Title IX and Title VII mean, so Title IX and Title VII both prohibit discrimination based on sex. So the question is whether discrimination against transgender individuals, that is the failure to treat a transgender woman as a woman, a transgender man as man, is discrimination based on sex. And the agencies have answered that question in the affirmative. They've said that, yes, our understanding of the law is that that is discrimination based on sex. At the very least, Your Honor, that -- that interpretation is reasonable because the statute -- the statutes and the regulations don't speak to that question.

Your Honor, most of the courts of appeals who have considered this question have reached the same conclusions. So in the Title VI context courts have held that discrimination against transgender individuals is discrimination based on sex because gender is a sex-based characteristic and these Title VII cases are irrelevant to the Title IX context because courts look to Title VII for guidance

in interpreting Title IX. We've cited other cases where courts reached similar conclusions in other but related contexts and then in particular in the Title IX context there is the *Gloster* case where the Court found that the Department of Education's interpretation of its own regulations as prohibiting discrimination against transgender but against individuals in particular as requiring schools to allow transgender individuals to -- to use facilities consistent with their gender identity was a reasonable reading of the law.

Let me just say briefly, Your Honor, regarding *Gloster*. It is true that the *Gloster* -- that the Supreme Court stayed the mandate in *Gloster*. Nonetheless, the *Gloster* decision is still good law and binding in the Fourth Circuit. Of course, it is not binding in this circuit but it is still binding in the Fourth Circuit.

Mr. Nimocks argued that one of the reasons that the law cannot be understood the way the agencies claim it can be understood it is because that was not Congress's intent. Well, that may be the case. I don't know. But it may very well be that Congress did not intend the law to protect transgender individuals. Nonetheless, Your Honor, as the Supreme Court has made it absolutely clear in *Oncale*, the fact that Congress may have understood the term "sex" to mean anatomical sex at birth is largely irrelevant. As Justice

Scalia said there, writing for the majority, quote, "Statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils and it's ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed," unquote.

I would also add, Your Honor, that as a general matter, remedial statutes such as Title IX and Title VII should be construed broadly. And I point the Court -- I mean, there are many cases that stay this but I point the Court in particular to *U.S. v.* -- I may not be able to pronounce this but *Tangipahoa Parish School Board* at 816 F.3d 315. It's a very recent Fifth Circuit decision.

Your Honor, we move now to the Spending Clause section. So the Plaintiffs have alleged that the Spending Clause is violated because they did not have notice of the conditions attached to the federal funding and because the conditions are unconstitutional coercive. So both those arguments fail for different reasons. So let's start with the notice argument.

So Plaintiffs were unquestionably on notice they are subject to Title IX's antidiscrimination provisions. We cited a number of cases, Your Honor, that stand for the proposition that just because the exact precise contours of the -- of the antidiscrimination provision are not entirely clear or just because those contours may change somewhat over time does not

make them -- does not make it such that the Spending Clause is violated, so the school districts are well aware that they are bound by those antidiscrimination provisions.

Furthermore, Your Honor, as I said previously, were the school districts to lose funding, any loss of funding would be prospective only. So even if the Plaintiffs were previously not on notice about their Title IX obligations or what Title IX requires, they are now -- so this is not like a case where a school is liable for damages if they violate the law and that could lose funds retrospectively when they were not on notice. At the time that they would -- may be at risk of losing any federal funds they would be clearly on notice of what the -- what the agencies understand the law to require.

Finally, Your Honor, as to coercion, so the only case that Plaintiffs point to where a court found that a condition on funding was coercive was *NFIB*. There the Court explicitly stated, and I quote, "What Congress is not free to do is to penalize states that choose not to participate in a new program by taking away their existing funding." So they are -- in *NFIB* the Court found that what Congress has done -- what Congress had said was you must participate in this -- what the Court deemed the new program and if you don't we will take away your medicaid funding and the Court said that's unconstitutionally coercive, you can't do that.

What Plaintiffs are suggesting is that the conditions

on funding in Title IX are coercive simply because of the amount of funding at stake. But that -- I don't -- I'm not aware of any case that has found that and by that logic the federal government could not condition funding on -- on, say, a requirement that schools not discriminate based on race or religion, because if it's only the amount of funding that the funding that determines whether it's coercive, then that would be determinative in those cases.

So, finally, Your Honor, I want to discuss the scope of the injunction. So we think that nationwide injunctive relief is inappropriate for a number of reasons. First of all, as a general matter, relief should be no broader than necessary or the remedy should be no broader than necessary to provide relief to the parties. Here a nationwide injunction would be far broader than that.

I would also note, Your Honor, that an injunction should be no broader than to remedy the harms of -- the harms of the parties, the harms that have been established for the reasons I discussed earlier, we don't think they have shown any harm here. But even if the Court decides that they have shown some harm, they certainly have not shown and cannot establish harm to third parties. In particular, I point Your Honor to the amicus briefs filed by several states in which those states informed the Court they are in fact not harmed by the agencies understanding of the law.

Finally, Your Honor, a nationwide injunction in this case would violate principles of comedy. Many -- there are -- as Plaintiffs' counsel himself mentioned, these cases -- similar cases and these issues are percolating in several lower courts. As the Fifth Circuit said, and I apologize, Your Honor, this was not in our brief, but *West Gulf Maritime Association* v. *ILA Deep Sea Local 24*, that's 751 F.2d. 721 at 728. And this is a 1985 Fifth Circuit case. The Court said the federal courts have long recognized that the principles of -- principle of comedy requires federal district courts, courts of coordinate jurisdiction and equal rank, to exercise care to avoid interference with each other's affairs.

Your Honor, if this Court were to issue a nationwide injunction, that may very well have the impact of interfering with similar proceedings in other courts around the country. It might, for example, moot those other cases such that the -- the district courts there would not be able to actually reach the issue. It would hinder the development of the case law such that, you know, these cases would eventually percolate up to the courts of appeal and the Supreme Court. So, Your Honor, we think it would be inappropriate for the Court to issue a nationwide injunction here.

And with that, Your Honor, I am -- I'm more than happy to answer any questions.

THE COURT: Thank you.

MR. NIMOCKS: Thank you, Your Honor. In rebuttal, I will try to take my esteemed opponent's arguments in order here. First addressing the question of standing and ripeness. I think a significant theme of Mr. Berwick's argument that the State of Texas and Co-Plaintiffs do not have standing before the Court is that no action has been taken or instituted against us. That was true of the State of North Carolina who merely had a law and a policy, which I might add, is virtually identical to policy of the Harrold Independent School District, virtually identical to the law of the State of Arizona that its school districts the operate on, and I would contend probably very identical to either written policies or unwritten policies that have been long-standing of employers, governmental employers, and school districts across the country. So I don't think the Defendants can tell this Court that there is no threat, an immediate threat, to the Plaintiffs because there wasn't to the State of North Carolina, there was no action, and the Department of Justice sued them.

The writing is clearly on the wall, Your Honor. With the systematic enforcements that we have articulated across the country, sparing no particular geography, no particular circumstance, and the Department of Education and Justice, taking the same substantive stance in each particular instance means the harm that faces the Plaintiffs, and I would say all

states in all school districts, is imminent. And that is -- that is this:

That the Federal Defendants seek to dispossess the states and independent school districts of the authority to make the decision, and that's really at the heart of this issue, Your Honor, whether a school district or a set of states, as Mr. Berwick alluded to that filed an amicus brief, choose to mix the sexes in intimate areas or not, they do possess that inherent authority to do so. And the Federal Defendants now seek to dispossess, not just Plaintiffs, but every sovereign, school district, and state and sovereign and governmental employer across the country with the ability to make that decision. And because of that we don't have to wait. We don't have to wait until the federal government sues the State of Texas, as they did in North Carolina, until they bring an enforcement action against the Harrold Independent School District. We are similarly situated and I say "we" being all the Plaintiffs in this action to every other entity and sovereign against whom the Defendants have enforced these new rules and I would submit we do not have to be drug through the mud of an administrative proceeding and waste the time, the expenses, and the resources defending rules that we believe are so clearly contrary to the plain language and intent of Congress.

And I would like to refute one thing that Mr. Berwick

said, that the dark matter, to use our term, at issue is not being used as the basis for enforcements. Your Honor, it absolutely is. It has been used by the Defendants in the enforcement actions in both Virginia -- to the extent that you call that an enforcement action. Again, I want to be fair that the Federal Defendants filed a statement of interest in that case. But also in Ohio. And we reference this in our reply brief, ECF 52 at page 12, that that was the Joint Letter of May 13 of this year was something that the Federal Defendants specifically articulated as defining the Ohio school district's obligations.

Your Honor, as to the argument that what we are calling rules that the Federal Defendants are saying are not rules, one thing I did not mention but Mr. Berwick alluded to is that 34 CFR 106.33, I would say the primary regulation at issue, is not ambiguous. The Federal Defendants claim that it is. But we contend it is not for a very simple reason is that Congress we believe was very clear in its intent that the sexes could be segregated on the basis of biological differences. To use a term from the Supreme Court, the two sexes are not fungible. And that's particularly true when we are talking about questions of privacy and dignity and safety in intimate areas. 106.33 covers every human being, male or female. Those are the two sexes that the Supreme Court has alluded to and it covers everybody and it always has. It is a

biologically grounded regulation, so the argument that it is somehow ambiguous I just don't think stands.

Gender identity as a construct was never mentioned during the Congressional debate with regard to either Title VII or the educational amendments of 1972 which of course enacted Title IX. You have to look again at the simultaneous enactment of 20 U.S.C. 1686 where Congress itself expressly authorized the separate living facilities for the different sexes.

The Seventh Circuit. Congress had a narrow view of sex in mind when it passed the Civil Rights Act. As I mentioned earlier, the many quotes in our Amended Complaint, and then subsequently Congress has seen fit, as we also mention, to adopt gender identity as an express category next to sex in subsequent federal law clearly acknowledging that this is a separate category that was not part of the math.

Your Honor, to accept Defendants' new construct or rules, you know, leaves this question: What's the basis of separating the sexes if the law requires the sexes be mixed and it's just a question that we don't believe they can answer.

None of the interpretations, guidances, or things issued by the Federal Defendants have ever sought to address at all the privacy, dignity, and safety interests that Congress discussed that were articulated by multiple scholars

including Justice Ginsburg. They have not sought to address in any of the guidances and interpretations the obvious conflict that arises when you mix the sexes, how that could potentially create a hostile work environment which is expressly not permitted under Title VII or, for that matter, a hostile educational environment. There is a clear conflict with the requirements of Title VII as to the work and educational environments that are required that just conflict with Defendants' interpretations. These are rules because they -- they reverse course. They take something that was moving clearly in one direction for the better part of now forty years, Your Honor, and have completely reversed it the other direction. They cannot simply say that they are just clarifying an ambiguity.

On the only *Oncale* decision, O-N-C-A-L-E, I may be mispronouncing that, that's the 1998 Supreme Court decision, it's true the Supreme Court said statutory prohibitions often go beyond the primary evils being addressed by Congress. But in that decision, and the *Oncale* progeny, the Supreme Court was looking at the scope of the word "discrimination." What is -- does it mean to be "illegal discrimination." And, we know from the case lawyer that sexual harassment has been deemed by the courts to be within the province of the term "discrimination," which is what is employed by Congress. *Oncale* and its progeny serve sought to address the question of

what the scope of the term "sex" is at all. So I just -- I don't think that they can take the *Oncale* decision and its line of cases and just kind of quid pro quo that to the term "sex," especially in light of the extensive amount of history as to what that term means and meant, of course, at the time of enactment. The contours of the law do not change over time, Your Honor. We have to interpret what exactly the law meant at the time it was taken. The Supreme Court was very clear about this in the Thomas Jefferson case in 1994 that we sit that an agency interpretation must be consistent with the given meaning of a term when official action was taken. These new rules are not consistent.

Of course, that addresses part of the argument that Mr. Berwick made on the Spending Clause claim as to that the Plaintiffs have been under notice from the beginning that we are subject to the antidiscrimination provisions of Title IX. That's true. But we have not been under clear notice that the antidiscrimination provisions of Title IX have anything to do with gender identity and that argument just simply doesn't hold.

As to the question of coercion. There do not have to be -- the case law does not require, Your Honor, whether you look at *South Dakota against Dole*, *NIFB against Sebelius*, two different federal programs at play where the federal government is playing one program off of the other. That's

simply not the requirement. While that was the case as a matter of fact in one of those cases, that is not a requirement of coercion per se. The requirement is quite simple and the Supreme Court has been very clear, that pressure turns to compulsion. When pressure turns to compulsion, to use the words of the Supreme Court in *NFIB*, the legislation runs contrary to our system of federalism. When conditions on the receipt of funds quote, "Take the form of threats to terminate other significant independent grants, the conditions are proper reviewed as a means of pressuring the states to accept policy changes," unquote. That's for *South Dakota against Dole*.

So the fact that the change in course is within just the scope of Title IX certainly I don't think makes the coercion claim defective. Even if -- even if it required, Your Honor, different grants that the Defendants are playing one off the other, Title IX grants are usually renewed -- excuse me -- the money is usually disseminated through Title I with conditions subject to Title IX. But those grants are not perpetual, they are renewed, so there is always a new grant coming, and so to the extent that multiple funding streams from the federal government would be required under the case law, which I think is a strained reading, it's certainly reasonable here because of the renewing nature constantly of those funds.

Your Honor, as to the scope of any injunction that this Court may choose to issue if it agrees with the Plaintiffs in this matter, I will say this: Mr. Berwick has mentioned the prospective for hindering the development of case law. One thing that is very clear and uniform throughout all the enforcements that the Defendants have engaged in is that there is only one reasonable solution in their minds and that is every intimate facility be open to everybody who proclaims an identity of that particular sex. There has been no set of independent facts in any given circumstance that has allowed one school district or one entity to reach a particular unique conclusion as opposed to another. This is a quid pro quo. This is a one size fits all and the Defendants are expecting nothing short of their particular view of the world. In fact, if you look at the *Gloster* decision of the Fourth Circuit, the position that was taken by Defendants in that particular case was that anybody who has a problem with the mixing of the sexes and is concerned for their own privacy or safety, you can go use your own independent single user stall. That is the solution the Defendants are foisting upon not just Plaintiffs but the nation. And so when we are talking about if you issue a nationwide injunction does that prohibit other tribunals and courts from really developing the facts and circumstances to reach various adjudications and allow this to percolate? There are there none, Your Honor.

There are no other set of facts out there. The Defendants have a new policy. They have promulgated it through rules and it is a one size fits all for the nation which is why we think the relief we have requested is appropriate. Thank you.

THE COURT: Okay. Thank you. So that will close the presentation. So let me follow up with you on a few questions.

The Defense contends that the injunctive relief should be denied in part because you, the Plaintiffs, have delayed in seeking this request. What is your response to that?

MR. NIMOCKS: Is it -- If I can ask the Court a clarifying question. Delay in terms of bringing the lawsuit?

THE COURT: Yes. And seeking the injunctive relief. It's on page -- and they cite a couple of cases of mine to this effect that I have written in the past, I should have said.

MR. NIMOCKS: Your Honor, until --

THE COURT: It's page 22 of ECF 40 which is page 11 of their pleading.

MR. NIMOCKS: Yes, sir. So I will address both in terms of the timing of the lawsuit and the timing of the preliminary injunction. In terms of the timing of the lawsuit, as I think is clear from the various enforcements that we've articulated, they all arose through the -- through

a particular individual complaining in a particular instance, I will call the traditional fashion, that that litigation would have arose. The game changed dramatically when the Department of Justice sued the State of North Carolina over no particular individual dispute. There was no individual that was being denied access to anything. There was a policy. There was a law. They disagreed with it. And so when they chose to ramp up their enforcement in that regard, that if you have a statement of public policy that we disagree with we are going to sue you, I think that really ripened the concern of the Plaintiffs and is congruent with the timing of when we filed the action.

Of course, at the time -- I'm trying to refresh my memory on the date of our lawsuit. June 15th, Your Honor.

THE COURT: Yes.

MR. NIMOCKS: And school in the State of Texas was dismissed. It was coming close to being dismissed in some of the other Plaintiffs states and then it was less than three weeks later that our preliminary injunction was filed.

I will say that we would have liked to have filed the lawsuit a little bit earlier, but as the Court can perhaps appreciate, a multistate coalition can be a burdensome thing and there's a lot of effort and communication that goes into that. There were a lot of states that were interested and a lot of discussion and so I think the gravamen of my answer, I

hope I'm being responsive to the Court --

THE COURT: Yes.

MR. NIMOCKS: -- is that the lawsuit against North Carolina changed everything.

THE COURT: Okay. I understand. Now, you also cite -- I'm sorry. Let me back up. The Defendants -- the Federal Defendants contend you are not irreparably harmed for various reasons. In response or I guess affirmatively in your affirmative papers you say it is requiring the states, these -- the state Defendants and the school districts to change their policies or violate their laws and that Justice Rehnquist in an in chambers opinion, the Fifth Circuit in *Texas v. United States* and a Northern District judge found that requiring states to violate their law, in essence, is irreparable harm.

Walk me through that at least as it relates to Texas. I have gone through it so I see in footnote number 9, for instance, of your application you provide that under Alabama's law Alabama authorizes state, county, and city boards of education to control school buildings and property, and so that control now would be ceded or they would have to change how they control it because of the Department of Education and justice and others' --

MR. NIMOCKS: Right.

THE COURT: -- views on who can go where. How does

that apply to Texas? Walk me through that. I see in footnote 8 you cite the Constitution, the Education Code, but explain to me as it relates to Texas how the reasoning from Justice Rehnquist in his in chambers opinion would apply.

MR. NIMOCKS: It applies in this way in that, of course, as I alluded to earlier, Texas is required to provide by its Constitution a system of public education for the citizenry and so that responsibility first goes to the state. The state legislature has subsequently provided more local mechanisms so-to-speak and that's how we have our Independent School Districts in the state and I would direct the Court to Exhibit Victor that we attached to our reply, the Declaration of Cara Belew, C-A-R-A B-E-L-E-W, of the Texas Education Agency, and in the second to last paragraph, paragraph 15, she articulates the understanding of the state agency that the regulation and administration of physical buildings and facilities within the Texas public schools is generally the province of individual school districts and the TEA and that superintendents of school districts and their school boards and then the TEA does have some authority specifically in the Texas Education Code that does relate to facilities. And I can, when I sit down, Your Honor, I will grab those citations --

THE COURT: Okay. That's all I'm asking.

MR. NIMOCKS: I do not have them on the top of my

brain. You want those citations?

THE COURT: Yes, sir.

MR. NIMOCKS: Okay. I can get those for you.

THE COURT: Very good. Because I can do it with Alabama and these other states but I was trying to understand it better in advance as it relates to this state.

Let me ask you this then: The Federal Defendants say that there is a protocol, an exhaustive procedure in place such that a case like *Thunder Basin* and then the *Elgin* case that Justice Thomas wrote involving the CSRA, they have in place a comprehensive scheme by which litigants or claimants must follow before they are allowed to proceed in court, if they are allowed to even come to district court. What is your response to those two cases and that argument?

MR. NIMOCKS: Well, in this particular posture, Your Honor, those administrative processes are not available to the Plaintiffs because there hasn't been anything instituted by the Federal Defendants that would allow us to take advantage of them, so what we do have now --

THE COURT: Which means had they gone through the notice of comments -- Let's assume they had promulgated this as a formal rule, published in it the Federal Register and invited notice -- provided notice and invited comment, how -- how would you have -- and then they had taken that all into account and then decided to implement those as formal

regulations, would that change your argument as it relates to this issue?

MR. NIMOCKS: I think we'd still be here. I mean, we wouldn't have a notice and comment claim, Your Honor. Obviously, if they had followed that procedure there would clearly be no argument that it's a rule and the Federal Defendants would not be able to argue that it is not binding and so then I think the issues before the Court would be distilled to questions of whether it is a proper rule or, excuse me, whether it is unlawful or arbitrary and capricious under the APA. So I think that's the only way, I'm thinking as hard as I can, that might change the circumstances. We still believe in that instance and as we stand here today that the rule is arbitrary and capricious and unlawful for the myriad reasons that I've articulated and we briefed and, again, I hope I'm being responsive, Your Honor.

THE COURT: Let me ask you this. In terms of your request for preliminary -- a preliminary injunction, is the basis for your request focused on their directives or rules or -- whatever it is, however we come to that, as it relates to Title IX as opposed to Title VII, in terms of this preliminary relief? I'm not asking you to waive any Title VII claims, but in terms of what you have briefed for me to evaluate, if I get to the substance, I'm going to talk to them in a minute about standing and ripeness and whatnot, but if I

get to the substance, is that the focus of your preliminary relief?

MR. NIMOCKS: Yes. Only as to the Spending Clause claims because, obviously, those are attached exclusively to Title IX. But I would say no as it pertains to the Plaintiffs as employers, Your Honor, and the imposition of the new rules as we call them does create we believe an imminent threat an employer will be forced to permit a hostile work environment and be caught in-between the Defendants' new rules and the otherwise long-standing mandates of Title VII and an employee -- as we sit here right now, of the state could be filing a complaint because --

THE COURT: Under Title VII.

MR. NIMOCKS: Yes, sir. Under Title VII. So I think the imminence is very much alive as to Title VII.

THE COURT: Because your agencies have not changed the bathroom designations.

MR. NIMOCKS: That's correct, Your Honor. That's correct.

THE COURT: Okay. And then in terms of the Spending Clause.

MR. NIMOCKS: Yes, sir.

THE COURT: It is your contention that the *NIFB v. Sebelius* case does not require a new program, as Mr. Berwick argued --

MR. NIMOCKS: That is correct.

THE COURT: -- or it is a change in the substance of the conditions --

MR. NIMOCKS: That's correct.

THE COURT: -- without notice.

MR. NIMOCKS: Well, and I will say this, Your Honor. I think a change in the substance of the conditions as a matter of law could become a new program for purposes of the Supreme Court jurisprudence, so it really depends on the nature of the change and here we are adding -- I say we are adding -- the Defendants have added a new category under the non-discrimination provisions we contend. I think the Court could reasonably say that's a new program. So to the extent that that would be required I do think we've fulfilled that from a factual standpoint.

THE COURT: Okay. Very good. Thank you.

MR. NIMOCKS: Thank you, Judge.

THE COURT: Mr. Berwick, if I could follow up with you now on just a few questions as well.

MR. BERWICK: Of course, Your Honor.

THE COURT: In terms of the standing arguments does the Fifth Circuit's 2 to 1 decision involving the EEOC provide standing in this case?

MR. BERWICK: So -- Yeah. *Texas v. EEOC*. So let me say at the outset, Your Honor, as I think we said in our

brief, that the Government disagrees from that decision. Yesterday the Government actually sought en banc review. Of course, it's still binding on this Court for now. So that aside, we also think that *Texas v. EEOC* is distinguishable for a couple of reasons. So -- I'm sorry. Did you -- Excuse me, Your Honor.

So we think *Texas v. EEOC* is distinguishable for a couple of reasons. First, the -- in that case, that case involved a challenge to an EEOC guidance document that sets forth the agency's views on the application of Title VII to employer's use of criminal history records and employment decisions.

The Fifth Circuit noted that it was voluminous, it was over 50 pages. It set forth what the Fifth Circuit called, quote, "an exhaustive procedural framework for EEOC officials to follow" and also said, and I quote again, "it imposed a blanket policy that the EEOC has committed itself to applying with respect to virtually all public and private employers" and as, quote, "mandating investigations across the entire regulated community."

The guidance also contained a safe harbor provision --

THE COURT: If I can just stop you for a moment.

MR. BERWICK: Yes, of course.

THE COURT: In terms of the length of the document,

that document and that issue dealt with the disparate impact theory which is by necessity a far more complicated theory because you're not saying that this one decision is discriminatory, you are saying this decision has that impact, it involves statistics, it involves a whole host of proof matters, whereas here your -- the guidance documents are targeting the definition of the word "sex" and whether gender identity is included in that or not and how school districts and employees/employers, can use bathroom facilities. So, by necessity it's not going to be a --

MR. BERWICK: Yeah, and of course, Your Honor, I'm not suggesting that the length of the document is dispositive in one way or the other but I do think it's informative that the Fifth Circuit sort of discussed and at least in the Court's view and in the majority view, that it was this blanket policy that the EEOC was -- they sort of are bound to apply it to all public and private employers and it mandated investigations across the entire community.

THE COURT: So let me ask you this, who -- what -- what employers will the EEOC not apply this definition of "sex" to?

MR. BERWICK: What -- you are now talking about -- in this case. So the EEOC, first of all, doesn't have enforcement authority as to state and local government entities, so it only has enforcement authority as to

private employers, so of course the Plaintiffs in this case are all --

THE COURT: Let me ask you this, what -- what employer will the Department of Justice not apply this definition of "sex" to?

MR. BERWICK: Well, the -- both the department -- this is the Department of Justice and the Department of Education's understanding of the law, so I think, you know, if the Department --

THE COURT: Is there a employee/er that they will not apply that understanding of the law to?

MR. BERWICK: No employer is exempt from that understanding of the law. By that I mean, you know, whenever an agency sets forth its understanding of the law, of course, in all likelihood, that understanding of the law is going to be the agency's understanding in any proceeding with which it is dealing with that provision of the law. So in that case it's -- in that respect this case is not unusual at all.

THE COURT: Let me ask you this: In the EEOC case, the Fifth Circuit majority said that if a particular entity, an employer or governmental agency or whatever, is the object of the rule, then they have likely satisfied standing.

MR. BERWICK: So the -- so -- I agree that the majority has identified as an important factor that they -- that they were -- they -- there Texas was the object of the

rule. What I will say is I think there are other factors at play, too, and what I -- the one I started to mention, Your Honor --

THE COURT: Let me just stop you there, because I've got the case here.

MR. BERWICK: Yes. See, I don't have it in front of me so I defer to your reading of it, of course.

THE COURT: Well, you say it's an important factor or a factor or something, but essentially what the Fifth Circuit said is if a plaintiff can establish that it is an object of the agency regulation at issue, there is ordinarily little question that the action causes injury, is traceable, and redressable. So it's more than a factor, it seems to me. If they are the object, there is little question that they have standing. And, remember, it said, and caution don't confuse standing the APA final agency regulation. I'm just asking you only about standing. I'm not asking you about ripeness yet. Just standing.

MR. BERWICK: So if the Fifth Circuit's decision is understood as saying that whenever an entity is the object of regulation that creates standing, I -- I would say that, well, that would be binding on this Court, we would -- we would vehemently disagree with that. I think ordinarily when there is a pre-enforcement challenge to a rule, the entity bringing the pre-enforcement challenge has to show some harm other than

just we are subject to this rule or we are potentially subject to this rule to show standing. So I -- I think if it's -- if it's read that -- that literally, it would conflict with Supreme Court precedent about standing, so I don't think it can be read to me in that -- that is absolutely dispositive, that whenever an agency is, excuse me, an entity is the target of a rule there is standing.

THE COURT: Okay. In this case, in the EEOC case, the majority says that they clearly were the object of this EEO guidance because the had -- and they had this --

MR. BERWICK: Sure.

THE COURT: -- they wouldn't hire felons to teach class and do certain things and that that bulletin or that guidance, whatever -- I don't want to use an inflammatory word to you, but let just say rule, and we mean it just -- guidance, that guidance required the state to reevaluate its policies and in some cases potentially to make affirmative changes in what they would do and that that was sufficient to provide standing, to provide an injury, a concrete injury when they had to do -- when they had to make those agency by agency comparisons that that provided standing. Do you disagree with that, with what the majority held?

MR. BERWICK: What I would say here, Your Honor, is -- this is -- so, as I -- as I -- as I previously, the -- the guidance documents don't require anything of Plaintiffs

right now. They don't have to --

THE COURT: Do the guidance documents -- I mean what -- If you are saying that these are only guidance and interpretative documents and so we've put them out there so that --

MR. BERWICK: Yes.

THE COURT: -- all the world knows this is what we think the law is and if the EEOC and the Department of Education and the Department of Justice is saying this is the definition of sex, do you not expect schools and employee/ers to read those documents and look at their policies and then consider maybe we need to change these policies?

MR. BERWICK: Of course, we -- we would prefer that school districts and other stakeholders comply with our understanding of the law, but that being said, if Plaintiffs are, you know, believe that our understanding is incorrect, they suffer no harm at this time or there is nothing forcing them to proceed as they have been proceeding, wait for -- wait for an enforcement action and at that time say, no, our understanding of the law is -- is correct and the -- and the Government's understanding or the federal government's understanding of the law is incorrect. And, furthermore, waiting for that opportunity in the context of enforcement action doesn't actually harm them in any way --

THE COURT: But, see, you are confusing harm --

MR. BERWICK: No --

THE COURT: You are conflating the terms again and that -- at least the majority in that opinion said don't do that.

MR. BERWICK: You are saying I am conflating irreparable harm and the harm for purposes of standing?

THE COURT: But there's got to be an injury though. There has to be a concrete injury. And they are saying that when the federal government issues -- whatever the federal government -- was the guidance documents -- do you contend that the guidance documents in the *EEOC v. Texas case*, or whatever the name of it is, that the characterization of those documents are the same or similar characterization of the documents at issue in this case?

MR. BERWICK: I think it is. They are similar to the extent the EEOC called it a guidance, yes.

THE COURT: Okay. And so the Fifth Circuit is telling the district judge in that case, and presumably all district judges that those documents, those kinds of documents are causing employers, not just state employers, all employers to evaluate their policies and in some cases change their employment policies and whether or not they can win in a lawsuit on it is another matter, but the fact that they have to do it is a concrete injury because they are the object of that guidance.

MR. BERWICK: Well, I think there may be an important distinction here, and I'm not sure this directly answers Your Honor's question, but as I remember, the *Texas v. EEOC*, Texas identified a direct conflict with state law, so Texas alleged that we did not comply with both this state law and the federal -- the federal agencies' understanding of the law. I don't think we have that here. I don't believe the State or the Plaintiffs have identified any direct conflict of state law and federal law. So I'm not sure that directly answers your question but I think that is an important distinction between this case and the EEOC case.

THE COURT: Okay. Thank you. Let me ask you though now about ripeness. The Ripeness Doctrine should apply particularly when there are further factual issues that need to be addressed that would bear on making the decision and in -- do you agree with that? I'm sorry.

MR. BERWICK: I agree that is one element of the Ripeness Doctrine. Whether it's a purely legal question is an element the Court considers, yes.

THE COURT: The three elements. The challenge to an administrative regulation. Judge Jones has written this in *Texas versus U.S.* which -- there's a lot of Texas versus U.S. cases --

MR. BERWICK: There really are.

THE COURT: This is one in the 90s when Texas sued

involving gaming issues and indian reservations. It's 497 F.3d 491. Anyway, she set out the test -- I believe it's still a good test -- in the Fifth Circuit for ripeness when she said a challenge to an administrative regulation, so this is a challenge to a reg, is fit to review if, one, the questions are purely legal, which you mentioned; two, the challenged regulations constitute final agency action, which we will get to a minute; and three, further factual development would not significantly advance the Court's ability to deal with the legal issues.

So, let's just assume that this is final agency action. I'm not asking you to concede that, but just for purposes of this ripeness discussion let's assume element number two is met. Do you contend that element number one is not met? That is that part of the claim that these Plaintiffs want is for me to decide legally does Title VII and Title IX, when it refers to sex, does the term "sex" include gender identity.

MR. BERWICK: So if I understand your question, Your Honor, I think I agree with the Court that it is exclusive really or at least primarily legal issues that are at issue in the case. I don't think that that is the only inquiry for ripeness purposes. I also think that whether -- and the Supreme Court in an *Abbott Labs* said harm from delay is also a factor and what we have explained is that there is no harm to

delay in this case.

THE COURT: Okay. But doesn't the Supreme Court say that it's not ripe because there is no reason to decide it now because the additional time or delay or litigation will develop facts --

MR. BERWICK: Yes.

THE COURT: -- that are important to allow us to reach an informed decision on a particular case?

MR. BERWICK: Right. But it's not just factual development in that -- in that sense, Your Honor. I think it's also allowing the agency to have the a chance to deal with the issue in the context of a specific proceeding, to bring the agency's expertise to that proceeding and then courts can review the -- courts can review the record, the agency's record in the context of the specific proceeding to see how the agency applies the law. So I think that was at issue in either *Abbott Labs* or *Toilet* -- I can't remember.

THE COURT: But *Abbot Labs* found that there was -- that a pre-enforcement litigation, a lawsuit against a regulation was ripe.

MR. BERWICK: So I think that pre-enforcement -- there are certainly circumstances where pre-enforcement challenges are ripe but those typically involve instances where there is real harm to the entity from delaying review, so harm in the fact -- harm such as the accrual of civil

penalties or criminal penalties or something along those lines. So I think in *Abbott Labs*, as I'm remembering *Abbott Labs* correctly, there was civil penalties that the entity, the plaintiffs there, would have accrued but they didn't get review --

THE COURT: But doesn't --

MR. BERWICK: -- and didn't comply with the law.

THE COURT: But the other -- one of the big focuses of the Supreme Court in *Abbott Lab* was that the pharmaceutical companies were going to have to get rid of all their stock.

MR. BERWICK: Yep.

THE COURT: They are going to have to create new stock.

MR. BERWICK: Yep.

THE COURT: And label the drugs in a certain way or identify them in a certain --

MR. BERWICK: Yep. That's a another example of harm that comes out of pre-enforcement --

THE COURT: And so these guys are saying I'm going to have to change by bathrooms, I am going to have to get new signs, I'm going to have change my policies, I'm going to have to get rid of old policies, implement new policies --

MR. BERWICK: So that's where I think this case differs, Your Honor, because -- because those guidance documents don't -- they are there not forced to do any of that

now. Now, of course --

THE COURT: They are not -- What did you say?

MR. BERWICK: They are not forced to do any of that at the moment. Now, of course, the Government would like them to comply with the law but the fact is, if they so choose, if they believe their interpretation of the law is correct they can wait for initiation of an enforcement action and then make their argument in context of the enforcement action and they lose nothing. They are not harmed in the interim.

And let me just add to that briefly, Your Honor. I think Mr. Nimocks said at some point, Well, like North Carlina we may be subject to a suit. I suppose that's possible or a school district might be subject to an enforcement action, but that's not irreparable harm. I know we are talking about ripeness right now, but that's not irreparable harm and the Supreme Court has said that in FDC v --

THE COURT: Right. Then don't -- again, I think the Fifth Circuit was very clear when they said don't conflate these issues and that's why I'm trying to break them down so that we are not conflating them.

But let me just say this about the *Abbott Lab* because the -- part of the Supreme Court's reasoning in permitting that case to go forward and finding that it was ripe was the risk of the consequences, the risk of criminal penalties, risk of civil penalties, and they are saying their risk of losing

federal funding is significant.

MR. BERWICK: Well, so -- I think there's a major difference there. One is if -- in *Abbott Lab* if the pharmaceutical company hadn't decided we're not going to comply with the law, we are going to wait to see what happens. Starting from that point they would have been accruing the possibility of civil penalties. So if they had waited and then they had been -- an enforcement action had been brought against them and they had lost, they would have been subject to penalties dating back to prior to enforcement. That's not the case here. So, if the Plaintiffs wait, they keep doing what they are doing, they wait to see if an enforcement action is brought, again at that time they can make all of their arguments and the Department of Education or whoever brings the enforcement action isn't going to reach back and be able to, you know, impose civil penalties for the period of non-compliance or withdraw funds for the period of non-compliance. It would only be perspective, so that's a major difference from the situation of the Plaintiffs in *Abbott Labs*.

THE COURT: Let me ask you this because when I read through the *Abbott Labs* case this language in there struck me and so I thought about what if we just changed the name of the parties from *Abbott Labs*, the drug entities in that case and the school district -- the school district in Wichita Falls,

the Department of Education in these states, and tell me what you think about that. The Supreme Court says, quote, "It is relevant at this juncture to recognize that petitioners deal in a sensitive industry in which public confidence in their drug product," let's change that into "their care of children" --

MR. BERWICK: Uh-huh.

THE COURT: "Their education of our children, is especially important. To require them to challenge these regulations only as a defense to an action brought by the government might harm them severely and unnecessarily where the legal issues -- where the legal issue is presented is fit for judicial resolution and where a regulation requires an immediate and significant change in the Plaintiffs' conduct of the affairs of -- of their affairs with serious penalties attached to noncompliance, access to the courts under the APA, and the Declaratory Judgment Act must be permitted."

Why would that not be the case here? That is they are dealing with the pharmaceutical industry, an industry in which we need to have supreme confidence in as a society and given the mandate of public education in Texas and in all of these places and the federal government has agreed with this, why wouldn't we -- why wouldn't the same sensitivity apply to education as it does to pharmaceuticals?

MR. BERWICK: I don't mean to be redundant but I

think the passage included reference to serious personalities for non-compliance and the harm to the pharmaceutical company at that time and so, just to repeat myself, I think the real difference here is that Plaintiffs don't face any harm right now. Thing don't -- they don't face any risk from non-compliance right now, aside from the risk they one day may be subject to enforcement action which they could then defend at that time.

THE COURT: The May 13th Joint Letter says that this letter summarizes the school's Title IX obligations and this is what we will use to evaluate a school's compliance with these obligations. And so why is this not -- why is this not similar? That is these departments, Justice and Education, are going to use these definitions to evaluate your compliance?

MR. BERWICK: Well, it may be similar in that it is an agency setting forth its understanding of the law but the consequences for the Plaintiffs in non-compliance are quite different.

THE COURT: What is the consequence for noncompliance with Title IX for the Plaintiffs? Let's take the Wichita Falls school district. What is the consequence to the Wichita Falls school district, Harrold Independent School District, for not complying with Title IX? Forget bathrooms.

MR. BERWICK: Yeah. Yeah.

THE COURT: They have no female sports. They are going to abolish them all. What are the consequences?

MR. BERWICK: Yeah. So -- so, basically, until -- there are no consequences until an enforcement action is brought so that may be triggered by -- I think in most cases it would be triggered by one of the athletes in the Wichita Falls school district, one of the female athletes bringing a complaint to the office of civil rights of the Department of Education. At that point the Office of Civil Rights would initiate an investigation. If they determined that the school district was or in their view the school district was not complying with Title IX, they are first obligated by the statue to engage in a negotiation with the school district to try and obtain voluntary compliance. If that doesn't work they can then initiate an enforcement action and that takes one of two forms. Either they can refer it to the department of -- there are several steps in this process but I'm just highlighting the major features. So either they can refer it to the Department of Justice and at that point the Department of Justice would then decide, do we think this is a Title IX violation. If the DOJ does think it is they have the option of bringing a case to federal court and basically seeking an injunction to require the school to comply with the law.

Alternatively, the Department of Education can keep -- hold onto the case or the matter, it would go through

the Department of Education's administrative process, which includes an administrative hearing, administrative appeal, the possibility of an appeal to the Secretary of Education, and then that process -- the culmination of that process, if the Department of Education believes that the school district is not complying with the law, could be the -- I don't think the department is required to, but it could withhold federal funds prospectively until the school district complies. And then that decision, as I mentioned before, the school can -- the school district could appeal to the court of appeals for the relevant geographic area, in this case it would be the Fifth Circuit in Wichita Falls.

THE COURT: Okay. Thank you.

MR. BERWICK: Sure.

THE COURT: Let me ask you this. You dispute that these are final agency rules.

MR. BERWICK: Yes.

THE COURT: These documents.

MR. BERWICK: Yeah.

THE COURT: Do -- how -- In terms of the Fifth Circuit's decision in the EEOC case, on what prong or do you contend on both prongs that these documents are not final agency --

MR. BERWICK: You may have to remind me of the --

THE COURT: Okay.

MR. BERWICK: It's the culmination of agencies' decision-making process --

THE COURT: This is one.

MR. BERWICK: Yes.

THE COURT: Number two, the action must be one which sets the rights and obligations as they have been determined for legal consequences will flow.

MR. BERWICK: So I think it is the second prong. I mean --

THE COURT: That legal consequences will flow --

MR. BERWICK: Yes. That legal consequences don't flow as a result of these documents, of these guidance documents. They flow from Title IX and Title VII from the Department of Education's implementing regulations, but not from these guidance documents, so another way to put it, which I think I said before, is that these guidance documents cease to exist, we would be in virtually -- precisely the same position. The agencies could still, you know, this would be their interpretation of the law and they could still seek to enforce that law, their understanding of the law against Plaintiffs, and eventually a court would determine if the agencies are right or if the Plaintiffs are right.

THE COURT: If these documents ceased to exist would either district courts or circuit or the Supreme Court, would they rely on the -- on the government's opinion as to the law

in deciding cases in litigation?

MR. BERWICK: So I think the answer is yes, Your Honor. In other words -- so the Court has said, and I apologize, Your Honor, I do not -- what the Supreme Court has said -- and I do not remember the case, Your Honor -- but I am confident -- I think it's *MetLife* perhaps but -- anyway, the Court has said that at least for the purposes of our deference, an agency's position is articulated and a brief is entitled to our deference. So I think if -- say these guidance documents didn't exist and then they brought an enforcement -- the agency brought an enforcement proceeding and -- again the guidance documents don't exist and the agency argues, well, here is our understanding of the law. We think the statue means X, the regs mean X and that's our interpretation. That -- that interpretation of the regs, of the regulations, would still be entitled to our deference even though it had never been set forth elsewhere. I believe that's correct, Your Honor.

THE COURT: If you had promulgated this as a formal rule and such that it's published in the CFR, what deference would, if any, or what weight would a district court or a circuit court or a Supreme Court give to that interpretation?

MR. BERWICK: Well, if we -- if we had interpret -- if we had interpreted through a formal rule making, if you are asking about the interpretation of the statue as embodied in

the regulations I think that would be the entitled to Chevron deference. Your Honor, we have not argued for Chevron deference with regard to the interpretation of the statute in this case largely because these are not formal rules.

THE COURT: Right. Okay. Now, the -- Let me ask you this: Using -- using the Fourth Circuit facts here, if -- could a school district require G.G. to choose only one bathroom facility?

MR. BERWICK: Do you mean could the school district say you either have to use the men's facilities or the women's facilities, you cannot go back-and-forth?

THE COURT: Yes.

MR. BERWICK: I do not think that would violate Title IX. So, yes, I think the school district could do that.

THE COURT: Why would it not violate Title IX?

MR. BERWICK: I just don't think that the department's understanding --

THE COURT: Or Title VII.

MR. BERWICK: Well, yeah. In this case it would be Title IX.

THE COURT: I'm sorry.

MR. BERWICK: That's fine. I don't know -- I do not understand the department to be saying that, you know, you -- the Department of Education's understanding of the law to be that you have to allow a student to, you know, switch

day-to-day which -- which bathroom they -- they use. And let me also say that my understanding, and I will admit that it is limited, but my understanding of transgender status and transgender identity, is that it's not -- it's not a fluid thing.

THE COURT: I'm not suggesting that it is.

MR. BERWICK: Yeah. Yeah. So I don't think there is a scenario where G.G. would say I want to use the mens or any transgender individual would say I want to use the men's restroom on day one, the women's restroom on day two, and the men's restroom again on day three.

THE COURT: I'm not saying they would do it by -- for frivolous reasons but just say one bathroom was broken or packed, got to wait in this long line. I'm going to go in this bathroom. If the school had a policy that says if you use the wrong bathroom you would be suspended, would they be okay with suspending G.G.?

MR. BERWICK: I mean, I think the policy says schools should allow -- should allow students to use bathrooms consistent with their gender identity. They have one gender identity, so that would be one bathroom, not both.

THE COURT: Okay. And so if -- Let me just ask you this. If the Harrold Independent School District retains their current policy, do you believe that they are in compliance with Title IX or not in compliance with Title IX?

MR. BERWICK: I do not believe that they would be. I think it's likely that it would not be in compliance with Title IX. I mean, I don't know all the details but that would be my --

THE COURT: What detail that might exist that might change your position on that?

MR. BERWICK: Well, let me put it this way: Based on the information that I have I believe they would not be in compliance with Title IX. But whether there are any consequences that flow from that is a different question.

THE COURT: I understand. Okay. Is there anything else that I've asked that you've felt like I didn't give you a chance to complete?

MR. BERWICK: Nothing else you've asked, Your Honor, no.

THE COURT: Or -- Have I cut you off in any way and given you --

MR. BERWICK: No. No. There are a couple of issues I would address that you have not asked about that you asked Mr. Nimocks, if the Court is willing.

THE COURT: Yes. I'm just trying not to cut anyone off.

MR. BERWICK: Yeah. No. No. I appreciate that. I don't think you have cut me off. Thank you, Your Honor.

A couple of things. One is -- I think Mr. Nimocks

said something like well -- in discussing *Thunder Basin* this is a pre-enforcement challenge and the department hasn't taken any action against us so we have no -- we can't go through this administrative scheme. But that's precisely the point, Your Honor, they have to wait until some enforcement action has been taken against them and I would note that in *Thunder Basin* it was a pre-enforcement challenge. The plaintiff there was challenging an interpretation of the Mine Act and there had been no enforcement provision -- no enforcement brought against them yet and the Supreme Court said that doesn't matter, there's this -- Congress set up an administrative review scheme and reviewed by the court of appeals. You can't circumvent that. You can't circumvent the exclusive jurisdiction in a court of appeals by just bringing a pre-enforcement challenge in the district court. That would completely negate Congress' purpose.

THE COURT: Very good. Thank you.

MR. BERWICK: Thank you very much, Your Honor.

THE COURT: Hold on one second.

(Off-the-record between Court and law clerk.)

THE COURT: Mr. Nimocks, anything else? I'll give you the last word.

MR. BERWICK: Thank you, Your Honor.

MR. NIMOCKS: Thank you, Your Honor. I'd like to first be responsive to the Court's query from earlier about

the statutory authority --

THE COURT: Hold on. Let me get to that place in my notes. Yes. Okay.

MR. NIMOCKS: If I can -- There it is. Oh, there it is. The digression of the hearing causes me to lose some notes here. All right. I will -- I will recite these for you in the record, Your Honor.

THE COURT: Thank you.

MR. NIMOCKS: Texas Constitution Article 7, Section 1. And then the following provisions of the Texas Education Code: Section 4.001(b) as in "bravo"; Section 11.051. Section 11.201; and Section 46.008. And the first set -- the last section, Section 46.008, references the state level authority of the Texas Education Agency. And I can get into some of the language of the statutes, Your Honor. I -- not to imply that you can't read them yourself. I don't know if you want to have a discussion about them. But these are referenced and cited in our brief -- opening brief, ECF 11 at ECF pages 18 and 19 and 21. And I think that those statutes and what they provide clearly respond to Mr. Berwick's assertion that we have not identified any direct conflict with state law, I believe. We have identified direct conflicts with every state in the country as to the authority that's inherently possessed of states and sub-sovereigns like school districts to control facilities.

And I would also ask that the Court consider taking judicial notice that when it comes to intimate facilities not all of the policies are going to be codified. These are standards, Your Honor. And, of course, when it comes to governmental entities not all policies are always codified and case law is clear that some policies may not exist in writing but exist in reality. So just because there may not be a statute surrounded with red lights that says men use the mens facilities and women use the women's facilities doesn't mean in some stark sense of constitutional jurisprudence that a policy and standard does not exist. But notwithstanding that, the authority, which is what we are really challenging of states and sub-sovereigns to make these decisions, is codified and we believe we've articulated to the Court in detail with regard to not just the Plaintiffs but every sovereign across the country.

I'll make a couple of closing comments, if the Court would permit me, responding to the colloquy you just had with Mr. Berwick and I would say that we -- I think there is clearly standing here because the rules that Defendants are enforcing do, in fact, set rights and obligations and they say as much in their May 13 letter, Exhibit J, when they say this is the standard by which we will enforce these things and it does reflect a culmination of the agency process, to use the terminology from the case law and I think you can see that

with the stark consistency of all the Federal Defendants over a long period of time dating back to 2010 and what this means and how they're interpreting it and how they are enforcing it. There is no deviation. And we, the Plaintiffs states, are the object of the rule, clearly, as is delineated in *Texas against EEOC*. There is no question whatsoever. And if you looked, Your Honor, depending on how curious you get, if you pull up some of these resolution agreements of some of these school districts that are linked in Exhibit J under footnotes 9 and 23 you will see the striking uniformity in the conditions that have been imposed on all of these various school districts. Looking at the Downy Resolution agreement. Treat the student the same as other female students in all respects including access to sex designated facilities.

In the Arcadia agreement. Provide the student access to sex specific facilities designated for male students at school consistent with his gender identity.

If you look at the *Lusardi* case from the EEOC, an employer must provide restroom access corresponding to one's internal sense of being male or female. And even in the preliminary injunction motion that is not cited in our briefing and the Court can look at that the Defendants filed against the State of North Carolina in that lawsuit, they come out and say that the holding of the Fourth Circuit, which was about bathrooms specifically in that, applies to changing

facilities with equal force.

There is remarkable consistency and I would even say identical representation of what the law is and who is subject to it by the Defendants and I think that that removes any cloud of question regarding standing and ripeness as to the Court's discussions with Mr. Berwick.

THE COURT: So in the North Carolina preliminary injunction case the Government is saying even in changing facilities, so not just bathrooms, changing facilities, gender identity controls and you can't prevent someone who aligns differently or claims differently than their biological sex, you can't prevent them from changing with people whose -- whose identity and sex align.

MR. NIMOCKS: Exactly. That is what the Department of Justice represented in their preliminary injunction motion briefing in the North Carolina case.

THE COURT: And in your reply you talked about curtains. They are examining curtains? Explain that to me.

MR. NIMOCKS: That relates to I believe the disputed investigation in Illinois as it pertains to the construction by the school district of curtains to provide private changing facilities that again, consistent with Defendants' new rules, are there for anybody who becomes uncomfortable with being in the presence or naked in the presence of the opposite sex or we can send you to the private area and so that -- that I

think -- my understanding of the facts, Your Honor, was that there was an inspection of the curtains to make sure they were sufficient or adequate from looking into that case.

THE COURT: I'm sorry to have interrupted you.

MR. NIMOCKS: No, Your Honor. And that's consistent with what happened in Virginia where, again, the school district had -- constructed several single user bathroom facilities but those were not a reasonable response, in Defendants' opinion, to the complaint that it brought forth, so --

The consistency is remarkable. We are clearly the object of this and Defendants seek to usurp the authority of every state and every sub-sovereign, including the school districts, as to the ability to control their facilities as well as employers, Your Honor. We ask for the injunction we have requested.

Thank you.

THE COURT: Okay. Well, thank you all for being here. I appreciate your professionalism in the briefs and in your presentation. Lots of procedural issues I've been wrestling with, so I'm going to continue to work on that and reflect on what you all have presented and I will get a ruling out directly. But the immediacy of the hearing was because you needed a ruling by a certain date. What date are you talking about?

MR. NIMOCKS: Your Honor, in the opinion of Plaintiffs, if the Court were to agree with us and issue an injunction, we can't have one soon enough. School started this week in one of the Plaintiffs states. It starts generally in Texas around August 22nd and I'm sure that in other Plaintiffs states it has already started or starting next week and so in order to get the clarity we sought it can't come soon enough, if the Court is incline to agree with us.

THE COURT: Okay. Very good. I'm working on it and will continue to work on it. I'm balancing various priorities but rest assured I'm working on it.

MR. NIMOCKS: We appreciate the Court's attention.

THE COURT: Thank you.

I, **DENVER B. RODEN**, United States Court Reporter for the United States District Court in and for the Northern District of Texas, Fort Worth Division, hereby certify that the above and foregoing contains a true and correct transcription of the proceedings in the above entitled and numbered cause.

WITNESS MY HAND on this 24th day of August, 2016.

/s/ Denver B. Roden

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