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

STATE OF TEXAS, et al,)	7:16-CV-054
Plaintiffs,)	
)	
v.)	Hearing
)	(Corrected)
UNITED STATES OF AMERICA,)	
et al,)	
Defendants.)	September 30, 2016

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

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The above styled and numbered cause was reported by computerized stenography and produced by computer.

09:08

09:08 1 (September 30, 2016.)

09:12 2 **THE COURT:** Okay. We're here first in case number
09:19 3 7:16-CV-54, the State of Texas and others and the United
09:19 4 States of America and others. The Plaintiff is here.
09:19 5 Mr. Nimocks?

09:19 6 **MR. NIMOCKS:** Yes, sir. Good morning.

09:19 7 **THE COURT:** Thank you.

09:19 8 **MR. BERWICK:** Good morning, Your Honor. Ben Berwick
09:19 9 for the defendant.

09:19 10 **THE COURT:** Berwick. All right. Mr. Nimocks --
09:20 11 well, actually, Mr. Berwick, we will turn the floor over to
09:20 12 you, since it's your motion, and I will let you make your
09:20 13 presentation.

09:20 14 **MR. BERWICK:** Okay. Thank you, Your Honor. Good
09:20 15 morning.

09:20 16 So, Your Honor, we've asked the Court to clarify the
09:20 17 preliminary injunction in several respects and I want to be
09:20 18 clear that although we, of course, respectfully disagreed with
09:20 19 the Court's order and we are considering whether to appeal
09:20 20 that order, we are not seeking at this time to relitigate
09:20 21 those issues that have been decided by the Court.

09:20 22 Instead, we are simply asking for some clarity on the
09:20 23 scope of the injunction so that we can be certain that we're
09:20 24 in compliance with its terms and so that if we do decide to
09:20 25 appeal we know the precise contours of the order that we are

09:21 1 appealing.

09:21 2 Of course, we have a view about the appropriate scope
09:21 3 of the injunction and how it should be clarified, but even if
09:21 4 the Court were to disagree with our view, it seems apparent
09:21 5 that in some respects clarification is appropriate.

09:21 6 I think the facts, the scope of the order, is at
09:21 7 least somewhat uncertain is demonstrated by the fact that the
09:21 8 parties seem to have some disagreement about precisely what
09:21 9 conduct it does and does not prohibit.

09:21 10 In considering whether and how to clarify the
09:21 11 injunction, we would ask that the Court keep three principles
09:21 12 in mind:

09:21 13 The first is the injunction should not extend beyond
09:21 14 the subject of this case and we understand that subject to be
09:21 15 access to sex segregated facilities by transgender
09:21 16 individuals. I think Plaintiffs largely agree with the
09:21 17 description of the subject. I think Plaintiff describes it as
09:22 18 the intimate facilities. That's the only issue that was
09:22 19 raised by the Plaintiffs. That's the only issue that was
09:22 20 before this Court during the preliminary injunction
09:22 21 proceedings and therefore the injunction should be limited to
09:22 22 that subject.

09:22 23 Second, the scope of the injunction should be no
09:22 24 broader than necessary to provide complete relief to the
09:22 25 Plaintiffs in this case and should not encompass activities

09:22 1 that don't affect the Plaintiffs and where there's been no
09:22 2 showing or finding of injury or harm.

09:22 3 And, third, we would ask that the Court not interfere
09:22 4 with the ability of other courts to hear the full range of
09:22 5 arguments on this issue and come to their own conclusions.
09:22 6 While this Court, obviously, disagrees with the
09:22 7 Government's -- with the Federal Government's position in this
09:22 8 case, at least two courts have recently ruled in Defendants'
09:22 9 favor on the very questions that are before this Court and I'm
09:22 10 sure Your Honor is familiar with them, but it's the *Carcano*
09:23 11 case in the Middle District of North Carolina and the *Highland*
09:23 12 case that was decided I believe earlier this week in the
09:23 13 Southern District of Ohio.

09:23 14 So with those principles in mind, I'm happy to
09:23 15 briefly discuss some of the specific aspects of the injunction
09:23 16 on which we are seeking clarification. Of course, if Your
09:23 17 Honor has any questions, I welcome them.

09:23 18 So, first, I'll start with the issue that I think
09:23 19 should be the least controversial. I believe, although I
09:23 20 obviously won't speak for my colleague, I think Plaintiffs
09:23 21 largely agree with our position here and that is simply put
09:23 22 the injunction should be limited to only the issues that were
09:23 23 before the Court during the proceedings. Again, that's access
09:23 24 to sex segregated facilities by transgender individuals. The
09:23 25 injunction enjoins us from, the Government from, and I quote:

09:23 1 "Enforcing the guidelines against Plaintiffs" and their public
09:23 2 schools.

09:23 3 Based on a clean reading of that language, the
09:24 4 prohibition could be read to encompass aspects of the
09:24 5 guidelines that were just not at issue in this case or not the
09:24 6 subject of this case. For example, discrimination based on
09:24 7 race, national origin, or disability. Also, discriminatory
09:24 8 conduct which is harassment, bullying, sexual violence aimed
09:24 9 at both transgender individuals and non-transgender
09:24 10 individuals. We don't think that the Court intended to go
09:24 11 that far, but in an abundance of caution we are asking the
09:24 12 Court make it clear that the injunction doesn't extend beyond
09:24 13 the issues of access to sex segregated facilities by
09:24 14 transgender individuals. And again, although Plaintiffs
09:24 15 clearly oppose our Motion For Clarification, they seem to
09:24 16 agree that the subject of the preliminary injunction is
09:24 17 limited to access to sex segregated facilities.

09:24 18 Plaintiffs do in their response to our motion they
09:24 19 argue that, well, the Government can keep enforcing laws
09:24 20 related to the discriminatory conduct that's not specifically
09:25 21 at issue in this case. They think the guidelines should be
09:25 22 struck down in their entirety. That -- I just don't think
09:25 23 that's correct as a matter of law. That's really a
09:25 24 severability analysis and when talking about the severability
09:25 25 of agency regulations or agency guidance, it's totally a

09:25 1 question -- that is is a law makes it clear the question of
09:25 2 agency intent. In other words, the Court should only strike
09:25 3 down those portions of the guidelines that are challenged and
09:25 4 the unchallenged portions should remain unless there is,
09:25 5 quote, "substantial doubt" unquote -- that term is used in a
09:25 6 number of cases that we cited in our briefs -- as to whether
09:25 7 the agency would have wanted those other portions to fall with
09:25 8 the portions that are struck down. I think here there is no
09:25 9 question that the agencies would have wanted those portions of
09:25 10 the guidelines pertaining to, for example, harassment and
09:26 11 bullying, to survive, regardless of whether discrimination
09:26 12 based on gender identity is sex-based discrimination under
09:26 13 Title IX.

09:26 14 The second issue that we ask the Court for
09:26 15 clarification on is to clarify the injunction does not extend
09:26 16 to Defendants' activities in non-Plaintiffs states. So
09:26 17 there -- I think there is a bit of uncertainty about the
09:26 18 geographic scope of the investigation. The Court did find
09:26 19 that the injunction should apply nationwide but then the Court
09:26 20 also stated in its preliminary injunction that it, quote,
09:26 21 "only applies to those states whose laws direct separation,"
09:26 22 unquote, and the Court only enjoined Defendants from enforcing
09:26 23 the guidelines with respect to the Plaintiffs states and their
09:26 24 public educational institutions.

09:26 25 We believe that the injunction is properly limited to

09:26 1 the Plaintiffs states. And there are two basic principles at
09:27 2 play here. The first I mentioned before, is that injunctive
09:27 3 relief should be no broader than necessary to provide complete
09:27 4 relieve to the Plaintiffs and I would cite, for example, to
09:27 5 the Supreme Court case in *Califano v. Yamasaki*.

09:27 6 Relatedly, we think the Court lacks authority to
09:27 7 enter an injunction that exceeds the scope of injury or harm
09:27 8 established by the Plaintiffs and quite simply Plaintiffs have
09:27 9 no cognizable interest in the enforcement of the law in other
09:27 10 states and they certainly have not established that they
09:27 11 suffer any injury or harm when Defendants enforce the law in
09:27 12 any non-plaintiff states. In fact, twelve states and the
09:27 13 District of Columbia filed an amicus brief in this case
09:27 14 stating unequivocally that they are not harmed by enforcement
09:27 15 of a law in their state and it would be extraordinary for
09:27 16 Plaintiffs to claim that they are harmed by the enforcement of
09:28 17 law in other states when those states themselves disclaim any
09:28 18 harm. We think that would undermined the sovereignty of those
09:28 19 other states.

09:28 20 Third, Your Honor, we would ask the Court to clarify
09:28 21 that the preliminary injunction does not dictate the conduct
09:28 22 of litigation or dictate what arguments the Defendants may
09:28 23 assert before other courts with the limited exception of
09:28 24 litigation involving the plaintiff states that was initiated
09:28 25 after the entry of the preliminary injunction. The plain

09:28 1 language of preliminary injunction limits its scope to, and I
09:28 2 quote here, "litigation initiated following the date of the
09:28 3 order." So with respect to litigation issued after that date
09:28 4 we would ask the Court to clarify the injunction as limited to
09:28 5 litigation in which at least one of the Plaintiffs is a party
09:28 6 and we ask for clarification on this point in part because we
09:28 7 think to read the injunction to extend further, that is to
09:28 8 prevent Defendants from raising certain arguments in other
09:28 9 courts in cases involving other parties would be, at least to
09:29 10 our knowledge, completely unprecedented. Even in those rare
09:29 11 cases where courts have entered nationwide injunctions, and it
09:29 12 does happen from time-to-time, those injunctions, to our
09:29 13 knowledge, have never prevented the government from litigating
09:29 14 the same issue in other courts and that makes sense, Your
09:29 15 Honor, because in *Mendoza* the Supreme Court explicitly
09:29 16 rejected the idea of non-mutual collateral estoppel against
09:29 17 the Government, so in other words, even when a court rules
09:29 18 against the Government on a particular issue, the Government
09:29 19 is generally permitted to litigate that same legal issue in
09:29 20 other fora against other parties. That's consistent with the
09:29 21 structure of our federal judicial system in which federal
09:29 22 district courts are co-equal and one cannot impose its view of
09:29 23 the law on others. There is just nothing unusual or improper
09:29 24 or aberrational about disagreements between district courts.
09:30 25 In fact, it allows for the development of competing views of

09:30 1 the law which can then be resolved by courts of appeals and
09:30 2 ultimately the Supreme Court.

09:30 3 And, finally, Your Honor -- Well, let me also add
09:30 4 that Plaintiffs don't suffer -- again, don't suffer any injury
09:30 5 or harm when Defendants litigate these issues in other courts
09:30 6 in cases to which they are not parties, at least not any
09:30 7 cognizable injury or harm.

09:30 8 Finally, as we noted in our briefs, we think it would
09:30 9 raise significant separation of powers concerns as it would
09:30 10 interfere with the Attorney General's authority to conduct
09:30 11 litigation on behalf of the United States.

09:30 12 I mention, Your Honor, that we filed a notice in this
09:30 13 court a few days ago about the *Privacy Matters* case in the
09:30 14 District of Minnesota and I think that's a good example of the
09:30 15 problem that we face here. That case doesn't involve the
09:30 16 Plaintiffs states. It was filed after the entry of the
09:31 17 Court's order and Plaintiffs recently filed a motion for
09:31 18 preliminary injunction and we believe, Your Honor, that there
09:31 19 is no basis for this Court to interfere with our ability to
09:31 20 defend ourselves in that case or, frankly, with the district
09:31 21 court's ability, the Minnesota district court's ability, to
09:31 22 consider all of the arguments in support of and against our
09:31 23 position and then if necessary to allow the Eighth Circuit to
09:31 24 consider those issues as well.

09:31 25 The fourth and I'll let Your Honor know, there are

09:31 1 five points I'm going to make. This is the fourth of five.

09:31 2 The fourth issue on which we ask for clarification is
09:31 3 that the injunction doesn't prevent enforcement of Title VII
09:31 4 against private parties. So just based on the plain language
09:31 5 of the injunction it would appear that Defendants are not
09:31 6 prohibited from investigating and enforcing Title VII except
09:32 7 perhaps against Plaintiffs and their public educational
09:32 8 institutions. The second prong of the injunction, the
09:32 9 investigation prong, applies only to Title IX explicitly, so
09:32 10 we understand that we are not precluded from investigating
09:32 11 alleged violations of Title VII and the first prong of the
09:32 12 injunction, the enforcement prong -- well, the enforcement
09:32 13 prong, is limited to Plaintiffs and their public educational
09:32 14 institutions, so it would not seem to prevent enforcement
09:32 15 against, for example, private parties. We think this is
09:32 16 consistent with other aspects of the Court's order. The
09:32 17 Court's order I think was overwhelmingly focused on Title IX
09:32 18 and access to sex segregated facilities in schools. The
09:32 19 Court's findings of injury and irreparable harm were based on
09:32 20 alleged inconsistencies between Defendants' interpretation of
09:32 21 Title IX and certain state laws regarding school premises and
09:32 22 facilities and the Court found a likelihood of success on the
09:33 23 merits based on its conclusion that Title IX's implementing
09:33 24 regulations are unambiguous. So we don't think there's
09:33 25 anything in the language of the injunction to suggest that it

09:33 1 would prohibit Defendants from enforcing Title VII against
09:33 2 parties and we don't think such a prohibition would be
09:33 3 appropriate. Again, there would be no injury or harm to the
09:33 4 Plaintiffs and it would not be necessary to afford Plaintiffs
09:33 5 with complete relief.

09:33 6 And I would just note that -- So, really, here what
09:33 7 we're just in abundance of caution asking the Court to clarify
09:33 8 that our understanding is, in fact, correct.

09:33 9 Plaintiffs, I would note -- while I don't think they
09:33 10 agree with us on this point entirely, they do agree that
09:33 11 certain activities of the EEOC should not -- are not and
09:33 12 should not be affected by the injunction as including
09:33 13 accepting charges of discrimination and other aspects of the
09:34 14 administrative process and I also don't understand Plaintiffs
09:34 15 to be contesting that the internal Executive Branch EEOC
09:34 16 process can continue despite the injunction.

09:34 17 And finally, Your Honor, I would just clarify -- ask
09:34 18 the Court to clarify that the injunction doesn't apply to OSHA
09:34 19 or the Department of Labor more broadly. We don't think the
09:34 20 Plaintiffs have shown and we don't think the Court has found
09:34 21 any injury or harm related to OSHA and the Department of
09:34 22 Labor. The only Department of Labor activity challenged by
09:34 23 the Plaintiffs was the OSHA Best Practices Guide which simply
09:34 24 suggests that employers allow transgender individuals to use
09:34 25 sex segregated facilities -- excuse me, Your Honor -- to use

09:34 1 sex segregated facilities consistent with their gender
09:34 2 identity as a workplace best practice, but Plaintiffs do not
09:34 3 face the prospect of any enforcement action by OSHA or DOL.
09:34 4 If they choose to disregard the advice in best practices guide
09:34 5 they will face no consequences from OSHA or the Department of
09:35 6 Labor.

09:35 7 Plaintiffs in their response to the motion have
09:35 8 suggested states that have adopted an OSHA approved state plan
09:35 9 might face consequences. That is just incorrect as a matter
09:35 10 of law. So to explain that in a little more detail, as a
09:35 11 general matter, the requirements of the Occupational, Safety,
09:35 12 and Health Act don't apply to state and local governments but
09:35 13 a state can opt in by adopting what's called a state plan and
09:35 14 states with state plans are required to adopt workplace safety
09:35 15 and health standards in their state and local government
09:35 16 workplaces that are, quote, "at least as effective," unquote,
09:35 17 as OSHA standards and my understanding is that at least some
09:35 18 of the Plaintiffs states in this case have indeed opted in.
09:35 19 But there's two things to note: One is that states, not OSHA,
09:35 20 enforce compliance with on their own state plan. And the
09:35 21 other is that the Best Practices Guide does not establish an
09:36 22 OSHA standard that a state would be required to adopt in a
09:36 23 state plan. So to put it simply, there's no OSHA or
09:36 24 Department of Labor requirement imposed on those states in
09:36 25 this case.

09:36 1 Your Honor, those are -- those are I think the five
09:36 2 primary issues on which we seek the Court's clarification and
09:36 3 if there are no questions from the Court at this time, that's
09:36 4 all I have.

09:36 5 **THE COURT:** Thank you. Mr. Nimocks.

09:36 6 **MR. NIMOCKS:** Good morning, Your Honor. May it
09:36 7 please the Court. Austin Nimocks on behalf of Texas and the
09:36 8 Plaintiffs.

09:36 9 Let me be clear from the beginning, Judge, that the
09:36 10 Plaintiffs do not take issue with the Court's injunction. We
09:36 11 do not believe it's ambiguous, believe that it needs to be
09:36 12 clarified, and we are certainly not advocating that it be
09:36 13 broadened as Defendants have suggested. I think backdrop is
09:37 14 appropriate here, Your Honor. The Defendants, all of them,
09:37 15 collectively, have contrived through various pieces of what we
09:37 16 call regulatory dark matter to create a rule that is
09:37 17 systematic, multi-agency, and being imposed across the country
09:37 18 and now it's almost like the perfect scheme to avoid
09:37 19 accountability, Your Honor. This is not a circumstance --
09:37 20 what I would call a traditional agency circumstance where you
09:37 21 have an agency that does a rule, whether they do notice and
09:37 22 comment or not, and the Court can cut the head off the snake,
09:37 23 if it's an improper rule, and the rule dies. This has been
09:37 24 spread out across the federal government throughout multiple
09:37 25 agencies. And so what I see Defendants requesting here is

09:37 1 that you limit something over here so that on the other hand
09:37 2 matters can go forward and that is exactly what we do not read
09:37 3 in the Court's injunction.

09:38 4 They seek -- The Defendants have collectively sought
09:38 5 to avoid Congress and now with the request of this Court and
09:38 6 this motion they do seek to avoid the authority of this Court,
09:38 7 I believe.

09:38 8 There is an underlying rule afoot, Your Honor, and it
09:38 9 has been recognized by the Court and admitted by the
09:38 10 Defendants and the injunction as written we believe should be
09:38 11 enforced, much to Defendants' chagrin and the necessary impact
09:38 12 that it will have on their ongoing and particular litigation.

09:38 13 I will respond to Mr. Berwick's argument, if I can
09:38 14 here in order. First and foremost, although we use different
09:38 15 nomenclature to describe --

09:38 16 **THE COURT:** Hold on a second. Can you get that door
09:38 17 shut back there. Yes. Thank you. I apologize.

09:38 18 **MR. NIMOCKS:** No problem, Your Honor. Though we use
09:38 19 different nomenclature to describe the issue before the Court,
09:39 20 the substantive issue, with the language that the Court used
09:39 21 in the injunction as this subject, we do generally agree with
09:39 22 the Department of Justice that the subject matter was narrow.
09:39 23 It has to do where the intersection of these laws, Title IX
09:39 24 and Title VII, impact access to intimate facilities where
09:39 25 rights of privacy are important and intact. And so I do agree

09:39 1 with Mr. Berwick largely and I just make the caveat with
09:39 2 regard to nomenclature, I'm going to make an assumption that
09:39 3 even we are using different words we are talking about the
09:39 4 same thing, but the fact that we use different language to
09:39 5 describe it gives me a little bit of pause. But in the words
09:39 6 of the Plaintiffs where access to intimate facilities is
09:39 7 encountered, regardless whether an individual may describe
09:39 8 themselves as transgender, because that's not how the rule
09:39 9 turns, is the subject matter with which the Plaintiffs are
09:40 10 concerned.

09:40 11 Now, that gets into a corollary here that Mr. Berwick
09:40 12 has raised about the extent of the guidelines and the various
09:40 13 pieces of evidence of the rule that the Defendants have
09:40 14 promulgated. What is left, and I respectfully disagree with
09:40 15 my learned colleague that just because a portion of the
09:40 16 guidelines, to use the Court's term, may not be improper under
09:40 17 the law, that the guidelines themselves still live in some
09:40 18 capacity or can be used and I won't go into it here, Your
09:40 19 Honor, but I think we explained in our response the myriad
09:40 20 problems with allowing these guidelines to live. I mean,
09:40 21 first and foremost, that violates the APA principle that, you
09:40 22 know, when the rule is unlawful, the whole rule goes away and
09:40 23 that would necessarily include the evidence of the rule or the
09:41 24 unwritten rule, I would say, in this case. If you allow
09:41 25 Defendants to continue to promulgate, use, and disseminate all

09:41 1 the various guidelines, the end users at the end of this will
09:41 2 have no idea that the impetus for those guidelines, and in
09:41 3 large part, the substance has been enjoined by the Court.

09:41 4 And with these guidelines, Your Honor, you see the
09:41 5 fingerprints of all the Defendants on there. Exhibit C. The
09:41 6 Holder memo from the Department of Justice titled Transgender.
09:41 7 I mean, Mr. Berwick mentioned what is the intent of the
09:41 8 agency? Here is the intent. It's laid out in the title, not
09:41 9 just the substance. Exhibit D. The OSHA Guideline. Again,
09:41 10 titled as to the subject matter before the Court. The same
09:41 11 with Exhibit H, which is the memo from the EEOC and then
09:42 12 Exhibit J, which is the joint memo from the Department of
09:42 13 Education and the Department of Justice. So all of the
09:42 14 guidelines layout their intent at the outset. And it's all of
09:42 15 the Defendants. Every single one of them.

09:42 16 Your Honor, on the scope issue that Mr. Berwick has
09:42 17 raised, I would submit that this is Defendants trying to
09:42 18 relitigate an issue that the Court settled as far as the scope
09:42 19 is concerned. Mr. Berwick asked that it be limited to
09:42 20 Plaintiffs. The Court has made clear it is not limited to the
09:42 21 Plaintiffs. So that runs directly against what the Court has
09:42 22 made very clear.

09:42 23 As the Court is aware and stated in its order, it's
09:42 24 the nature of the violation, not the geographic extent of the
09:42 25 Plaintiffs that determines this particular relief. I would

09:42 1 remind the Court that the rule at issue here does not turn on
09:42 2 any specific fact pattern. There is no set of facts that can
09:43 3 be developed, contrived, or may exist anywhere in the country
09:43 4 that would change the application of the rule. The rule is
09:43 5 that you get to go into the intimate facility that you
09:43 6 identify with. End of story. And nothing -- nothing that any
09:43 7 particular state, school, or anybody else can do would change
09:43 8 that. So the geographic extent of the harm is nationwide.
09:43 9 There are no caveats with that.

09:43 10 As the Court properly noted, the twelve states and
09:43 11 others that filed an amicus brief opposing the preliminary
09:43 12 injunction are not harmed by this. They have the right to
09:43 13 make their own decision, they have made it, and they can
09:43 14 enforce those principles under their state law. Quite simply,
09:43 15 they don't need the help of the Department of Justice in order
09:43 16 to do that.

09:43 17 The third issue raised by Mr. Berwick has to do with
09:43 18 ongoing litigation and the arguments that the Department of
09:44 19 Justice may make moving forward. I'll confess this is a
09:44 20 difficult issue, Your Honor. But it is an issue made
09:44 21 difficult by the conduct of the Defendants. They are the ones
09:44 22 who have dug this hole and I don't think the fact that they
09:44 23 put several irons in the fire and have litigation going on all
09:44 24 over the country should allow them to avoid the consequences
09:44 25 of their action. The Defendants deliberately and willfully

09:44 1 contrived to promulgate a rule collectively citing each
09:44 2 other's decisions and dark matter as they continued to pump
09:44 3 out these guidelines going back-and-forth and now they're
09:44 4 coming to the Court saying, well, you can't -- you can't stop
09:44 5 us over here. We've got to be able to do our job. And you
09:44 6 can't stop us over here. We've got to be able to do our job.
09:44 7 They skirted the APA. They chose not to do notice and
09:45 8 comment, and I think that the consequences of that are now
09:45 9 brought to bear on the Defendants.

09:45 10 We in our notice of pending litigation, Your Honor,
09:45 11 which is ECF 64, addressed in detail I believe how the Court
09:45 12 should address not just ongoing matters and instances in
09:45 13 accordance with the Court's language but also future conduct.
09:45 14 And, yes, that means necessarily the Department of Justice
09:45 15 cannot walk into a courtroom under the guise of advocating or
09:45 16 defending the law and enforce the rule -- because that's what
09:45 17 they are doing, the rule that this Court has enjoined. I
09:45 18 think that's completely inconsistent. They're asking for a
09:45 19 permission slip basically to avoid the Court's injunction.

09:46 20 Now, the Plaintiffs have conceded that in certain
09:46 21 interests -- certain cases, excuse me, out of deference to the
09:46 22 principles of comity, there are certain judges in your
09:46 23 position, Your Honor, have expended great time and judicial
09:46 24 energy dealing with these cases, litigating these cases, in
09:46 25 some instances over a year, that it wasn't the Court's intent,

09:46 1 as we read your language, although you may clarify that for
09:46 2 us, to stop the presses on those particular cases, so to
09:46 3 speak, and we understand that. But on cases filed after your
09:46 4 injunction I think the Court's been pretty clear. In cases
09:46 5 that may have been filed before the injunction but nothing has
09:46 6 happened, Your Honor, respectfully, Your Honor, they're
09:46 7 interfering with the courts and the judicial process there at
09:46 8 all. As a matter of fact, I think that's where judicial
09:46 9 principles of judicial economy would kick in. So, I will not
09:47 10 expound on the details of all the individual cases at this
09:47 11 moment, Your Honor. But I think that the path that Plaintiffs
09:47 12 have laid out in our notice of pending litigation is a good
09:47 13 path forward.

09:47 14 As to the *Mendoza* case and this question of the
09:47 15 non-mutual offensive collateral estoppel, that principle turns
09:47 16 on Your Honor whether there are different factual scenarios
09:47 17 that -- where like a blunt force instrument like an injunction
09:47 18 would do a injustice because different factual scenarios could
09:47 19 produce different outcomes. You don't have that before you.
09:47 20 So the application of that doctrine I don't think would --
09:47 21 applies here or impedes anything that the Court can do or what
09:47 22 the Court will rule specifically in terms of imposing
09:48 23 appropriately the nationwide injunction.

09:48 24 The fourth issue raised by Mr. Berwick has to do with
09:48 25 the application of Title VII. Title VII is inextricably

09:48 1 intertwined with the issue. The Court addresses Title VII in
09:48 2 its order and, again, I think that Defendants asking that
09:48 3 Title VII be now exempted from the Court's order is trying to
09:48 4 free the left hand even if the right hand is tied down, so the
09:48 5 same harm can be perpetuated, especially in the instance --
09:48 6 and a good example of this where Title VII is inextricably
09:48 7 intertwined is the Plaintiff Harrold Independent School
09:48 8 District where the intimate facilities are accessed by both
09:48 9 employees and the students and that just can't be separated
09:48 10 and that, of course, is not unique to -- to Harold Independent
09:49 11 School District.

09:49 12 Remember, Your Honor, it was the Defendants, not the
09:49 13 Plaintiffs, it was the Defendants who drug Title VII into
09:49 14 this. EEOC is complicit in promulgating this rule and
09:49 15 perpetuating it with its enforcement authority. Title IX and
09:49 16 Title VII have been legal cousins or siblings, if you will,
09:49 17 addressed so by the courts for a very long time and factually
09:49 18 it is unharmed. And what we do say, to be clear, is that
09:49 19 where EEOC is performing ministerial duties, receiving
09:49 20 complaints, processing complaints, things along those lines,
09:49 21 doing its fact gathering and fact checking, I don't read the
09:49 22 Court's injunction to shut down the EEOC. I do read the
09:49 23 Court's injunction to bind the hands of the EEOC where it
09:49 24 comes to this very narrow limited scope of topic and that has
09:50 25 to do with where Title VII and Title IX intersect with the

09:50 1 access to intimate facilities. That's not a burden on EEOC at
09:50 2 all as far as the -- We don't have statistics here, Your
09:50 3 Honor, but I would be willing to bet that those circumstances
09:50 4 comprise less than 1% of what the EEOC deals with
09:50 5 day-in-and-day-out.

09:50 6 And as to the last point, with regard to OSHA and the
09:50 7 Department of Labor, Your Honor. In the same way that EEOC is
09:50 8 complicit in the harm, so is OSHA and DOL. Mr. Berwick said
09:50 9 that their Best Practices Guide doesn't establish a standard.
09:50 10 Well, that is supposed to be true as to the other guidelines
09:50 11 that Defendants issued. The simple fact of the matter is just
09:50 12 because OSHA has not chosen yet, to our knowledge, to enforce
09:51 13 the rule evidenced by its guideline doesn't mean that it won't
09:51 14 and it can't and do we the Plaintiffs and the nation have to
09:51 15 wait until OSHA chooses to enforce? And, again, maybe they
09:51 16 have already, Your Honor, before the question is ripe for the
09:51 17 Court. It's the same rule, it's same principle, and it's the
09:51 18 same law. And so the Court is very clear using the word
09:51 19 "Defendants" constantly. Your Honor, you do not parse out
09:51 20 different liability for different Defendants. They are all in
09:51 21 this thing together. The Court's injunction is very clear.

09:51 22 And I will conclude my presentation with that, Your
09:51 23 Honor.

09:51 24 **THE COURT:** If you don't mind, Mr. Berwick, I will
09:51 25 give you the last word, but we are running out of time. I

09:51 1 have a full criminal docket I have to get to. So if I could
09:51 2 just go ahead and ask some questions now and then I will have
09:51 3 some of you but I promise to give you the final --

09:51 4 **MR. BERWICK:** I appreciate that, Your Honor. I
09:52 5 promise to be brief.

09:52 6 **THE COURT:** -- presentation. That's okay though. On
09:52 7 -- if I can just start there on the OSHA issue. One question
09:52 8 I have of you is that the joint Department of Justice/
09:52 9 Department of Education letter said affirmatively that you
09:52 10 will not be in compliance with Title IX unless you allow
09:52 11 students whose gender -- who identify as a certain gender use
09:52 12 the showers of their identified gender.

09:52 13 **MR. NIMOCKS:** Yes.

09:52 14 **THE COURT:** So you could not, for instance, you could
09:52 15 not have unisex -- a single shower for those students. That
09:53 16 would mean if you said in our school we have a student who was
09:53 17 born one sex that identifies with another when they are done
09:53 18 with their sporting practice, instead of going into that
09:53 19 shower they can go in -- we will make an accommodation. That
09:53 20 would violate Title IX and perhaps --

09:53 21 OSHA -- the OSHA and the Department of Labor
09:53 22 documents characterize it more as best practices. Do you not
09:53 23 see a difference in the effect of those two documents? There
09:53 24 are other documents at play. But I'm focusing just on this
09:53 25 Best Practices Guide to employers versus the definitive nature

09:53 1 of if you do this, even if you try to make this accommodation,
09:54 2 you are in violation of Title IX.

09:54 3 **MR. NIMOCKS:** Your Honor, there's a clear difference
09:54 4 in the express language the Court has noted, but I would note
09:54 5 for the Court that in the joint DOJ/DOE guideline there is
09:54 6 also language that says this doesn't carry force of law or any
09:54 7 legal effect, and so it really comes to a question of maybe
09:54 8 trust. Can you trust what they say, actions speak louder than
09:54 9 words, or as Mr. Berwick identified the standard, the intent
09:54 10 of the agency. And I think Plaintiffs have demonstrated or
09:54 11 actually I should say that Defendants have demonstrated
09:54 12 through their collective actions and enforcements the intent
09:54 13 of these documents. So -- and, again, they are all in this
09:54 14 together. That OSHA Guideline cites the EEOC decisions. And
09:55 15 I forget something else from another agency.

09:55 16 **THE COURT:** Well, the *BIA* decision seems to be the
09:55 17 genesis of all of this or an MSPB decision which some --
09:55 18 there's a case cited early on that Attorney General Holder
09:55 19 refers to --

09:55 20 **MR. NIMOCKS:** Right. Yes, sir.

09:55 21 **THE COURT:** -- that sort of kicks this off in terms
09:55 22 of legal precedence, this is what this now means.

09:55 23 **MR. NIMOCKS:** So I just -- The Plaintiff's position,
09:55 24 Your Honor, is that you can't take the language on its face
09:55 25 because, quite simply, the actions of the Defendants belie

09:55 1 that very language.

09:55 2 **THE COURT:** Mr. Berwick talked about and cites in his
09:55 3 pleadings the severability is the term -- I'm not sure if I am
09:55 4 characterizing it correctly or not -- but just in terms of
09:56 5 limiting the scope of the injunction to the area you all have
09:56 6 agreed on, access to intimate facilities. And I understand
09:56 7 your argument, your counter argument to that is if they
09:56 8 violated the APA and this promulgation is a violation of the
09:56 9 APA, then none of the promulgation should be enforced.

09:56 10 But what is your take on -- because I'm not sure I
09:56 11 saw it or perhaps I didn't grasp it or understand it -- what
09:56 12 is your take though on the cases that he cites as to how you
09:56 13 evaluate this issue, this severability issue? For instance,
09:56 14 and some of the cases say what -- he quoted some of the cases
09:57 15 that is you look at the agency's intent to the unchallenged
09:57 16 conduct and try to make a determination as to what you should
09:57 17 do, what is your legal response to that standard?

09:57 18 **MR. NIMOCKS:** Your Honor, as to the question of
09:57 19 severability, there's no demonstrable expression of intent by
09:57 20 Defendants for the guidances at issue to be severable of which
09:57 21 I am aware is cause. This is a different situation where a
09:57 22 legislature passes a multifaceted law and throws a
09:57 23 severability clause in. That's just not part of the equation
09:57 24 here unless there was a portion of it that I missed. But I
09:57 25 think more significantly than severability is even if it was

09:57 1 severable, I think the enforcement dynamic associated with
09:57 2 that becomes unbearable both for the Plaintiffs and the Court.
09:57 3 I don't know how we monitor the conduct of Defendants if the
09:58 4 guidelines are allowed to live at some level. And so what
09:58 5 is -- Can I point through some of the factual scenarios. You
09:58 6 can order redaction. You can make them put a cover page on
09:58 7 it. You can order them to black it out. But I mean something
09:58 8 has to happen in my mind because nobody will ever know that
09:58 9 these things are unlawful or have been enjoined by you and
09:58 10 then the Defendants can continue to use and promulgate them,
09:58 11 even if they don't expressly mention the enjoined portion.
09:58 12 Implicitly, they will have an impact in the culture and so
09:58 13 that's just a very arduous task, I would say. And because,
09:58 14 Your Honor, that these are guidelines, they are not
09:58 15 promulgated rules, so to speak. If they need to push
09:59 16 something out on bullying, they can do that pretty easily. As
09:59 17 a matter of fact, Your Honor, they can cut and paste the
09:59 18 portions of the enjoined guidance in a brand new document and
09:59 19 push it out tomorrow with a new press release and new
09:59 20 publicity and probably have more effect than it does right
09:59 21 now. So it -- I think when the Court factors -- weighs all
09:59 22 the factors here, saying that all the guidances in their
09:59 23 entirety are off limits is not only proper judicially but
09:59 24 doesn't create a burden to the Defendants just because they
09:59 25 can replicate this and to the extent that the Court permits

09:59 1 them to continue in argumentation, they could make the
09:59 2 arguments if they the Court permits that. I hope I'm being
09:59 3 responsive to the Court's question, but that's how we see
09:59 4 that.

09:59 5 **THE COURT:** Yes. Thank you. Now, one or two more
09:59 6 questions, if I can. You mentioned in your response -- I'm
10:00 7 sorry. I'm not getting -- I thought I had a good flag on it
10:00 8 and I obviously do not. I didn't go far enough in the
10:01 9 document.

10:01 10 Okay. Explain for me your view on what the
10:01 11 Government can do when it is sued on this issue, either on the
10:01 12 title -- either in the Title VII case when they are dealing
10:01 13 with the issue of sex or in the Title IX context. I'm not
10:01 14 sure how it arises exactly, but the definition of "sex" in
10:01 15 Title IX. What can the Government do if they truly believe
10:01 16 after *Oncale* and these other cases that the definition of
10:01 17 "sex" should mean -- at a minimum, should mean gender
10:02 18 identity. I don't know if they also think it means the sex
10:02 19 you were assigned at your birth, but for sure gender identity.
10:02 20 If they believe that and they are sued, are they allowed to
10:02 21 file a response when they're a party, okay, set at side
10:02 22 amicus, statements of interest, that sort of thing, they are a
10:02 23 party, are they allowed to file a response that says this is
10:02 24 how we analyze this statute. Here's this case out of the
10:02 25 Supreme Court involving homosexuality in Title VII, here are

10:02 1 these other cases, and so we should win because the definition
10:02 2 of "sex" means gender identity.

10:02 3 On page 11 you talk about, you cite your notice, and
10:02 4 you talk about how they are permitted to engage in legitimate
10:03 5 judicial advocacy subject to Rule 11, and so I'm just trying
10:03 6 to understand better what your position is in that regard.
10:03 7 Because I also have a follow up question about these other
10:03 8 courts.

10:03 9 **MR. NIMOCKS:** Sure. And I -- First and foremost,
10:03 10 Your Honor, we are talking about the Plaintiff's only review
10:03 11 Defendants -- Excuse me. Plaintiffs only view Defendants to
10:03 12 be restricted in advocacy when the intimate area access issue
10:03 13 is afoot, number one. So when it is -- whether Title VII or
10:03 14 Title IX, can Defendants file a response? Absolutely. As a
10:03 15 matter of fact, I think they are duty bound to file a response
10:03 16 and engage in the litigation. You know, sitting on the
10:03 17 sidelines and letting things go to default is not what we are
10:04 18 advocating. It really has more to do with the content of the
10:04 19 response and I think that Defendants can argue what "sex"
10:04 20 means in Title VII and Title IX so long as the arguments are
10:04 21 what we would call proper arguments, not grounded in the
10:04 22 guidelines that the Court has enjoined, which was Defendants'
10:04 23 key to success and victory in the Fourth Circuit. That was
10:04 24 the only precedent that the Court had. And so -- and
10:04 25 presented to the Court what I would call a clean case of

10:04 1 interpretation. If Defendants claim that the word "sex" is
10:04 2 ambiguous, they need to make their case the right way. They
10:04 3 need to look at the statute, the statutory history, the
10:04 4 legislative history, the contemporary meaning applying the
10:05 5 Supreme Court precedent that statutes are construed at the
10:05 6 time that they are enacted, all of those arguments, and, you
10:05 7 know, they can even argue the *Oncale* case from the you Supreme
10:05 8 Court about where when Congress has one vision in mind with
10:05 9 the statute another vision may be within it's ambit type of
10:05 10 dynamic. All of those would be perfectly permissible
10:05 11 arguments and Defendants would be able to engage in litigation
10:05 12 and forthcoming from that is a more what I would characterize
10:05 13 honest judicial answer because it is not clouded by questions
10:05 14 of Auer deference or Seminal Rock deference that emanates from
10:05 15 the guidelines that the Court has enjoined. So that's how
10:05 16 we -- how, quite frankly, we view it.

10:06 17 And I will add one additional corollary to that and
10:06 18 that is as it pertains to litigation that the Plaintiffs
10:06 19 and/or their schools and school districts are involved in, per
10:06 20 the language of the Court's order, we view that that stuff has
10:06 21 to stop immediately in accordance with the Court's injunction.
10:06 22 So that's not a situation that involves the Plaintiffs and
10:06 23 their schools and school districts to use the Court's language
10:06 24 where the Defendants should be able to carry on that stuff as
10:06 25 we read the Court's injunction that has now enjoined.

10:06 1 **THE COURT:** So in the -- so let me just ask you this:
10:06 2 In the Nebraska case, they're not -- they haven't joined you
10:06 3 in this case. They have filed their own case, and I don't
10:06 4 recall the number of states involved.

10:06 5 **MR. NIMOCKS:** I think it's about ten, Judge.

10:06 6 **THE COURT:** Are they seeking the same relief you are
10:07 7 seeking or is it different?

10:07 8 **MR. NIMOCKS:** I did not check the docket last night
10:07 9 but the last time I did, which was a week or so ago, nothing
10:07 10 had happened --

10:07 11 **THE COURT:** Right.

10:07 12 **MR. NIMOCKS:** -- except the complaint being filed.

10:07 13 **THE COURT:** I just didn't know if they were seeking
10:07 14 the same general, if not preliminary, relief --

10:07 15 **MR. NIMOCKS:** Yes, Your Honor.

10:07 16 **THE COURT:** Seeking the clarities,
10:07 17 unconstitutional --

10:07 18 **MR. NIMOCKS:** We have in our case before the Court,
10:07 19 we have more causes of action than the Nebraska case but all
10:07 20 of the causes of action in the Nebraska case are in this case.

10:07 21 **THE COURT:** I see.

10:07 22 **MR. NIMOCKS:** So it is full on par.

10:07 23 **THE COURT:** All right. And so -- all right. So, in
10:07 24 the Nebraska case, if they -- they're the Defendants; right?
10:07 25 In the Nebraska case? Yes. Okay.

10:07 1 **MR. NIMOCKS:** Yes, sir. Although there may be fewer
10:07 2 Defendants in the Nebraska case, Your Honor. They may not
10:07 3 have sued --

10:07 4 **MR. BERWICK:** I think it exactly the same.

10:07 5 **MR. NIMOCKS:** Are they the same?

10:07 6 **THE COURT:** Okay. If they sue them and they move for
10:08 7 injunction or move for summary judgment or whatever, can the
10:08 8 defendants in that case say plaintiffs should lose because the
10:08 9 definition of "sex" under these titles means gender identity,
10:08 10 I'm citing this from the Court. All of the statutory analysis
10:08 11 that frankly go into these documents, can they do that in a
10:08 12 pleading there in which they are the Defendants. If I were to
10:08 13 grant you all of the relief you want, just whatever you say
10:08 14 goes --

10:08 15 **MR. NIMOCKS:** Well, all of the relief I want. So
10:08 16 I've asked you to enjoin the Defendants as to that case but if
10:08 17 they were compelled to file a response or defend that case, so
10:09 18 to speak --

10:09 19 **THE COURT:** But why would they not be compelled to
10:09 20 defend the case? I mean, it would be one thing if those
10:09 21 states said we non-suit this case and join Texas --

10:09 22 **MR. NIMOCKS:** Or if the Court were to stay it or hold
10:09 23 it in abeyance --

10:09 24 **THE COURT:** That court?

10:09 25 **MR. NIMOCKS:** Yes, sir. That court because of either

10:09 1 this Court's injunction or --

10:09 2 **THE COURT:** Yes.

10:09 3 **MR. NIMOCKS:** Or the Supreme Court granting cert on
10:09 4 the Fourth Circuit case, which hasn't happened, but it may.

10:09 5 **THE COURT:** Right.

10:09 6 **MR. NIMOCKS:** But barring that, that case challenges
10:09 7 the rule the way our case does, so I'll confess, Your Honor,
10:09 8 it would be difficult off the top of my head, if I were in
10:09 9 Mr. Berwick's shoes, to responded to the nature of the case
10:10 10 without mentioning whether there is or is not a rule which
10:10 11 necessarily implicates the guidelines. But that's not the
10:10 12 usual posture of a lot of these cases that are going on out
10:10 13 there. It is usually --

10:10 14 **THE COURT:** No, I understand. They are usually being
10:10 15 asked or inserting themselves on their own --

10:10 16 **MR. NIMOCKS:** Right. Or it's an individual complaint
10:10 17 with an individual circumstance so --

10:10 18 **THE COURT:** Because your -- your concern about
10:10 19 deference in some fashion, I understand what -- I'm having a
10:10 20 hard time understanding -- just coming to terms with it -- I
10:10 21 understand it. I just don't know what the right answer is.
10:10 22 Coming to the terms with the idea that if the Nebraska case,
10:10 23 which is the best example I think moves forward against them
10:10 24 as party Defendants and they believe that the proper
10:10 25 interpretation set that -- they believe that the proper

10:11 1 statutory interpretation is what they say it is, why would it
10:11 2 be proper for me to say you cannot -- I mean, I would, in
10:11 3 effect, be saying you cannot defend yourself in that case as
10:11 4 opposed to them weighing in with an amicus brief or statement
10:11 5 of interest in those circumstances. And, well, while you are
10:11 6 thinking of that, let me just take it one step further.

10:11 7 **MR. NIMOCKS:** Okay.

10:11 8 **THE COURT:** The -- because in your response and in
10:11 9 your other notice you say that if the Supreme Court asks them
10:11 10 for their view they -- they should be able to give their view.

10:11 11 **MR. NIMOCKS:** Yes, sir.

10:11 12 **THE COURT:** What if the Eighth Circuit asks for their
10:12 13 view or the Fifth Circuit? I don't know if there are other
10:12 14 cases, but other circuits ask for the S.G.'s view, which they
10:12 15 do on occasion. What should happen in that instance? Forget
10:12 16 about another district court, but a court in the hierarchy of
10:12 17 our system of government superior in hierarchy to me, although
10:12 18 I'm controlled by the Fifth Circuit.

10:12 19 **MR. NIMOCKS:** I certainly don't intend -- Plaintiffs
10:12 20 don't construe the injunction, Your Honor, to preclude -- to
10:12 21 tie the hands of the circuit courts. It ties the hands of the
10:12 22 Defendants. So what the Defendants are -- but the Defendants
10:12 23 are subject to the courts and so if -- notwithstanding the
10:12 24 fact that the Court has tied the Defendants' hands, as we read
10:12 25 the injunction, if the Eighth Circuit were to order or ask the

10:13 1 Defendants to weigh in, even though we're not sitting in the
10:13 2 Eighth Circuit, I think principles of comity would certainly
10:13 3 kick in and say, okay, they need to be responsive, "they"
10:13 4 being the Defendants, to the Court's request or admonition in
10:13 5 that regard and that's within your discretion, and I can
10:13 6 certainly understand the Court looking at it that way, going
10:13 7 just beyond questions of the Fifth Circuit and so we
10:13 8 understand that.

10:13 9 What we are trying to distinguish as between the
10:13 10 Supreme Court and the appellate courts was the Supreme Court's
10:13 11 express rule that says -- and in practice that allows the
10:13 12 Solicitor General to basically show up whenever they want to,
10:13 13 which is different from the right to file an amicus brief in
10:13 14 the circuit court. The Solicitor General, as the Court is
10:13 15 aware, becomes an advocate, an oral advocate, and a functional
10:13 16 party often times in Supreme Court litigation, so --

10:14 17 **THE COURT:** Okay. Very good. Thank you.

10:14 18 **MR. NIMOCKS:** Thank you, Judge.

10:14 19 **THE COURT:** Mr. Berwick, I just have a few questions
10:14 20 for you and then I will give you leave to make any final
10:14 21 presentation, hopefully uninterrupted, that you would like.

10:14 22 On the idea that enjoining the guidelines that it
10:14 23 could affect the Defendants' ability to police discrimination
10:14 24 based on race, color, national origin, disability a, how does
10:14 25 that affect your ability? What reading of the injunction

10:14 1 would affect your ability to -- of your clients to police race
10:15 2 discrimination, for instance?

10:15 3 **MR. BERWICK:** Well, I think it would be the -- the
10:15 4 prohibition on enforcement of the guidelines and the reason
10:15 5 they have left us with some uncertainty is because the
10:15 6 guidelines, as I think Your Honor is aware, are actually -- or
10:15 7 at least some of the guideline documents are quite broad, in
10:15 8 particular the two earlier notices or the two earlier
10:15 9 guidelines from the Department of Education which are
10:15 10 addressed toward bullying, harassment, and sexual violence.

10:15 11 **THE COURT:** Here you say it affects your ability to
10:15 12 police race discrimination. I'm wondering --

10:15 13 **MR. BERWICK:** Right. So those documents do talk
10:15 14 about -- I'm sorry. I didn't mean to interrupt you, Your
10:15 15 Honor.

10:15 16 **THE COURT:** No. They talk about -- they put the list
10:15 17 in there that's common place.

10:15 18 **MR. BERWICK:** Right.

10:15 19 **THE COURT:** But how does this injunction affect any
10:16 20 of your client's ability to police race discrimination?

10:16 21 **MR. BERWICK:** Well, I'm hoping that it doesn't, Your
10:16 22 Honor.

10:16 23 **THE COURT:** But how do you read it? How do you read
10:16 24 the preliminary injunction impeding your client's ability to
10:16 25 stop race discrimination?

10:16 1 **MR. BERWICK:** Right. We want to make sure when the
10:16 2 Court says we are enjoined from enforcing the guidelines, that
10:16 3 doesn't mean that we are enjoined from enforcing every aspect
10:16 4 of the guidelines; that is, everything that the guidelines
10:16 5 discusses such as bullying and harassment based on
10:16 6 potentially -- based on race or bullying and harassment based
10:16 7 on national origin or bullying and harassment based on even
10:16 8 gender identity, as long it doesn't pertain to intimate
10:16 9 facilities.

10:16 10 **THE COURT:** If the Harrold Independent School
10:16 11 District had a policy in place that condones bullying of
10:17 12 transgender students is there -- and I say you are enjoined
10:17 13 from enforcing these guidance documents and there identify, do
10:17 14 you have any authority to take action against the Harrold
10:17 15 Independent School District?

10:17 16 **MR. BERWICK:** Well, we would hope so, Your Honor.
10:17 17 Yes.

10:17 18 **THE COURT:** Tell me what it is.

10:17 19 **MR. BERWICK:** No, we -- So, again, we -- we believe
10:17 20 that the source of our authority doesn't come from -- doesn't
10:17 21 flow from the guidelines, it flows from Title IX. So, yes, I
10:17 22 think it -- although we would hope that it would be the
10:17 23 Court's understanding that we could still enforce Title IX
10:17 24 against the Harrold County School District for violations of
10:17 25 Title IX regardless of whether the guidelines exist or not.

10:17 1 But, of course, that is our -- that was our position in this
10:17 2 case with respect to even enforcement with regard to
10:18 3 transgender individuals and the use of intimate facilities.
10:18 4 The Court appears to have rejected that position, so we just
10:18 5 want to be certain and perhaps we're being somewhat
10:18 6 overcautious here, but we want to be certain that the Court
10:18 7 would not view our enforcement of the law against any school
10:18 8 in the country including schools here in Texas and the
10:18 9 plaintiff states as a violation of the injunction.

10:18 10 **THE COURT:** Now, let me ask you about the Plaintiffs
10:18 11 states and the nationwide effect of this.

10:18 12 **MR. BERWICK:** Yes.

10:18 13 **THE COURT:** I have all of your pleadings and this
10:18 14 list of all the cases. I don't have the order printed out and
10:18 15 I didn't study the order and I need to because I wrote it and
10:18 16 I know what it says and I apologize in advance if I've been
10:18 17 imprecise in any way and so after today's hearing I will be
10:18 18 studying that in light of your oral presentation and these
10:19 19 written documents to better understand these cautions. My
10:19 20 memory though of the analysis is, to some degree,
10:19 21 considering -- when I was considering the balance of harms
10:19 22 between the parties and the balance of harms between what the
10:19 23 Plaintiffs requests and the public in general was that those
10:19 24 states that had laws in place -- Well, take the District of
10:19 25 Columbia, that's the easiest one, because I think they also --

10:19 1 the city government there is also in charge of their schools,
10:19 2 to my memory.

10:19 3 **MR. BERWICK:** I think that's right, Your Honor.

10:19 4 **THE COURT:** That's the best one. So, if the District
10:19 5 of Columbia believes that the definition of "sex" in Title IX
10:20 6 or Title VII includes gender identity, then they can pass a
10:20 7 law that says students of the District of Columbia schools
10:20 8 when they get through with their workouts can go into the
10:20 9 shower of their choice, and so this injunction then would not
10:20 10 harm the District of Columbia in any way because they would
10:20 11 get to make that choice, in contrast to the State of Texas or
10:20 12 the State of Arizona or those school districts where they said
10:20 13 our law and policy is showers are limited to the sex you were
10:20 14 assigned at birth.

10:20 15 **MR. BERWICK:** So I think I have two responses to
10:20 16 that, Your Honor. The first is I think your -- with all due
10:20 17 respect -- you are flipping the question on its head a little
10:21 18 bit. In order for this Court to issue an injunction -- Let me
10:21 19 say, the breadth or scope of the injunction should be limited
10:21 20 to the harm to the Plaintiffs. So I would sort of
10:21 21 rhetorically at least -- I'm not actually asking Your Honor
10:21 22 the question -- but rhetorically I would say what is the harm
10:21 23 to the Plaintiffs if the Government enforces the law in the
10:21 24 District of Columbia and respectfully I don't think they have
10:21 25 pointed to a single harm and I don't think they could point to

10:21 1 a single harm, so I just don't think it's appropriate for this
10:21 2 Court to enjoin our -- any activities of the Government in the
10:21 3 District of Columbia because it doesn't affect the Plaintiffs
10:21 4 in this case.

10:21 5 I recall also -- I think I --

10:21 6 **THE COURT:** So the balance of harms is -- it's
10:21 7 different from the balance of harms.

10:21 8 **MR. BERWICK:** Yeah. It not a question of the balance
10:21 9 of harms. It's a question of -- I think the Supreme Court and
10:21 10 the Fifth Circuit have been very clear that the scope of
10:21 11 injunction should be limited to the scope necessary to remedy
10:22 12 any injury or harm to the Plaintiffs to provide Plaintiffs
10:22 13 with complete relief. I just don't think there has been any
10:22 14 showing or there isn't even any plausible argument of injury
10:22 15 or harm to the Plaintiffs when the Government enforces the
10:22 16 law, for example, in the District of Columbia because the
10:22 17 District of Columbia is not a Plaintiffs in this case and this
10:22 18 is not a class action.

10:22 19 The second response I give Your Honor is I don't
10:22 20 think it's quite true to say that those other states, District
10:22 21 of Columbia, or other non-plaintiff states are not harmed
10:22 22 because they can simply enforce, you know, pass whatever laws
10:22 23 they want or enforce their own laws. I think those states
10:22 24 would say, not that I can speak for them, but there is value
10:22 25 to them in having the federal government come in and enforce

10:22 1 those laws.

10:22 2 **THE COURT:** In their state?

10:22 3 **MR. BERWICK:** In their state.

10:22 4 **THE COURT:** Even if the law of their state is --
10:22 5 aligns with the federal government?

10:22 6 **MR. BERWICK:** Yeah, I think so. Because, first of
10:22 7 all, if -- a lot I think rely on, maybe not exclusively, but
10:23 8 rely on federal government enforcement. I don't think they do
10:23 9 all the enforcement work themselves. I mean, certainly, the
10:23 10 Government enforces Title IX routinely in states where what
10:23 11 the Government is enforcing is perfectly aligned with state
10:23 12 laws, so I don't -- I think -- and, again, obviously, I can't
10:23 13 speak for those states, but I think that those states -- I
10:23 14 imagine those states would say that they support, they like
10:23 15 and they like having the federal government there to enforce
10:23 16 the law and they would be in some way harmed if the federal
10:23 17 government were not there to enforce the law.

10:23 18 **THE COURT:** I'm sorry. I'm not following you. Their
10:23 19 law says do it this way and the federal government says --
10:23 20 believes the same way --

10:23 21 **MR. BERWICK:** Yes.

10:23 22 **THE COURT:** -- and some school in their district is
10:23 23 not doing it that way.

10:24 24 **MR. BERWICK:** Right.

10:24 25 **THE COURT:** I'm not following you. I mean, why do

10:24 1 they not then take their governmental action --

10:24 2 **MR. BERWICK:** Yeah. I -- I understand what Your
10:24 3 Honor is saying. I think they certainly could if they have a
10:24 4 state law, but I think as a matter of practice it's often the
10:24 5 federal government that comes in and enforces federal law
10:24 6 rather than the state coming in and enforcing state law, so I
10:24 7 think at the very least those states would then be required to
10:24 8 increase their own enforcement activity.

10:24 9 **THE COURT:** All right. Let me ask you this. As it
10:24 10 relates to these other issues, why not -- instead of asking
10:24 11 delay your answer and motions to dismiss and motions for
10:24 12 summary judgment, why not brief this up and let me just
10:24 13 rule -- Are there fact issues that need to be developed in
10:24 14 this case, whatever -- whether I reconsider standing some day
10:25 15 or not? Are there fact issues that need to be developed in
10:25 16 the case? Why don't we brief it up, let me rule, and you take
10:25 17 all of this up to the Fifth Circuit and let the Fifth Circuit
10:25 18 decide this or the Supreme Court decide --

10:25 19 **MR. BERWICK:** You mean brief summary judgment.

10:25 20 **THE COURT:** All of it.

10:25 21 **MR. BERWICK:** So --

10:25 22 **THE COURT:** All of the claims.

10:25 23 **MR. BERWICK:** Your Honor, the Solicitor General's
10:25 24 office makes the decision about whether to appeal a decision
10:25 25 or not so that -- the Department of Justice, in particular,

10:25 1 the Solicitor General, is now considering whether to appeal
10:25 2 this Court's preliminary injunction order. If we were --
10:25 3 that's not my decision. If we were to appeal though --

10:25 4 **THE COURT:** I'm not asking you not to appeal that.
10:25 5 What I'm saying is whatever they're decide. Everybody assumes
10:25 6 it's going to be appealed. So even if it is appealed in the
10:25 7 next week or two, why not finish the case and while that is
10:26 8 already up there I work hard to get the case finish so that
10:26 9 however I rule the whole thing gets up there at the same time.

10:26 10 **MR. BERWICK:** I think the concern would be, Your
10:26 11 Honor, that if the -- there would be a substantial overlapping
10:26 12 of issues that the Fifth Circuit is considering and this Court
10:26 13 is considering.

10:26 14 **THE COURT:** But is that true?

10:26 15 **MR. BERWICK:** Simultaneously.

10:26 16 **THE COURT:** Because there are those Title VII cases,
10:26 17 you have the Seventh Circuit case and Tenth Circuit case in
10:26 18 like the 90s or whenever dealing with the transgender power
10:26 19 where the Seventh Circuit and the Ten Circuit -- I'm
10:26 20 truncating what they said -- but in essence they said if you
10:26 21 wanted to apply this way Congress has to change the definition
10:26 22 and then there are other cases after that and maybe even after
10:26 23 *Oncale*, I don't have the timeline exactly in my head that
10:27 24 said, look, a man wearing a dress is an indicia of sex and sex
10:27 25 is the key term indeed and so you follow the *McDonald Douglas*

10:27 1 test with that understanding and you make a ruling and so --
10:27 2 and so is it -- is it true that if they look at just the
10:27 3 preliminary injunction issue that it would resolve the Title
10:27 4 VII application of the definition of "sex" in non-access
10:27 5 intimate facilities.

10:27 6 **MR. BERWICK:** I'm not sure I totally follow Your
10:27 7 Honor's question. What I will say is that I think the Fifth
10:27 8 Circuit -- yes, this would be a preliminary injunction
10:27 9 posture. But I think the Fifth Circuit would -- I mean, it's
10:27 10 possible the Fifth Circuit would decide this case based on
10:27 11 some of the threshold issues.

10:27 12 **THE COURT:** Right. Like harm. They just reversed a
10:27 13 preliminary injunction who harm or on --

10:28 14 **MR. BERWICK:** Right. But it could also decide
10:28 15 there's no standing, it's not -- I wouldn't predict what the
10:28 16 Fifth Circuit would do. But if it's decided that way I think
10:28 17 it would be dispositive of all of the -- this case would go
10:28 18 away and it would go away in the district court as well, even
10:28 19 though it's a preliminary junction posture. I think it
10:28 20 potentially is wasteful of the party's time and this Court's
10:28 21 time for the Court to decide this on summary judgment while
10:28 22 some of these issues are before the Fifth Circuit.

10:28 23 **THE COURT:** What do you say to that?

10:28 24 **MR. NIMOCKS:** Your Honor, I would tend to agree with
10:28 25 Mr. Berwick with the caveat that I didn't think about that or

10:28 1 prepare for the Court's question and I would just follow it up
10:28 2 with this fact. The Court granted our injunction request as
10:28 3 to our APA claims. But if I recall correctly, we have ten
10:29 4 causes of action.

10:29 5 **THE COURT:** Yes. Equal protection. Sovereignty --

10:29 6 **MR. NIMOCKS:** And the Court did, if I recall
10:29 7 correctly as well, dropped a footnote about our spending
10:29 8 clause claims and I'm going to try to remember well, but
10:29 9 something along the lines the Court had -- I don't remember
10:29 10 what you said, I don't remember what you said, if you said you
10:29 11 didn't needed to get to them or there were some facts that you
10:29 12 needed to see, but I remember there being a footnote about the
10:29 13 spending clause --

10:29 14 **THE COURT:** Well, we were in a time constraint.

10:29 15 **MR. NIMOCKS:** Right. Okay. So, I mean there are
10:29 16 other causes of action that are out there but I think they all
10:29 17 kind of turn on, in many respects, the merits that the Court
10:29 18 has addressed in your -- with the exception of the spending
10:29 19 clause claims.

10:29 20 **THE COURT:** Okay. Well, you all -- I'm sorry to rush
10:29 21 you.

10:29 22 **MR. NIMOCKS:** We can -- we can think about it.

10:29 23 **THE COURT:** You should think about. I hate to just
10:29 24 delay -- I hate to stay the case when a circuit may reverse on
10:30 25 something that's not central, harms -- balance of harm or

10:30 1 scope of harm, and then we're just right back where we are.
10:30 2 But maybe the Supreme Court will rule on this in the interim.
10:30 3 I don't know. You all think about that. I really have to go.

10:30 4 **MR. NIMOCKS:** Okay.

10:30 5 **THE COURT:** I'm going to give Mr. Berwick a last
10:30 6 chance to make any argument he would like to make.

10:30 7 **MR. NIMOCKS:** Before I've leave the podium, Your
10:30 8 Honor, let me ask you, are you asking us to get back to -- to
10:30 9 talk to us --

10:30 10 **THE COURT:** ECF 71 is the document. It's the motion
10:30 11 to delay the answer date which I haven't ruled on. But no one
10:30 12 is seeking default so I'm not that concerned about it, but
10:30 13 that's why I haven't ruled on it, because I'm wondering why
10:30 14 should we do that, so if you all could think about it.

10:30 15 **MR. BERWICK:** We will be happy to discuss that.

10:30 16 **MR. NIMOCKS:** We will be happy to do that.

10:30 17 **MR. BERWICK:** And, of course, if this Court orders us
10:30 18 to proceed with summary judgment or something we will --

10:30 19 **THE COURT:** Yeah. I don't want to -- if you both are
10:31 20 in agreement that you shouldn't, I don't know that I would.
10:31 21 But that's my thinking is why not get it all wrapped up and
10:31 22 get it all appealed, at least to the Fifth Circuit, at one
10:31 23 time.

10:31 24 **MR. BERWICK:** Okay. Of course, the decision hasn't
10:31 25 been made yet whether to appeal or not.

10:31 1 **THE COURT:** True.

10:31 2 **MR. BERWICK:** It's still possible that we won't
10:31 3 appeal in which case, obviously, this Court should proceed.

10:31 4 **THE COURT:** Yes. True. Anyway, I'm sorry.

10:31 5 **MR. BERWICK:** Thank you, Your Honor. I know you're
10:31 6 under time constraints. I will be as quick as I can.

10:31 7 So just responding to some of the arguments my
10:31 8 colleague made, I did not hear any -- going back to sort of
10:31 9 the first principles that -- that an injunction should be no
10:31 10 broader than necessary to remedy the harm and the -- the harm
10:31 11 to the plaintiff and the Court, really that's the limit of the
10:31 12 Court's authority, to render an injunction that remedies harm
10:31 13 or injury to plaintiff. I did not hear any argument from my
10:31 14 colleague about why the injunction needs to be as broad as
10:32 15 they say it does to remedy harm to them. For example,
10:32 16 extending the injunction to non-plaintiff states or from
10:32 17 making certain arguments in court where -- where Plaintiffs
10:32 18 are not a party. And so I think on that basis alone the Court
10:32 19 should clarify that the injunction doesn't extend that far.

10:32 20 I have to say that I find this argument that where --
10:32 21 that -- this Court or the Plaintiffs dictate the content of
10:32 22 our -- what we say in other courts where -- I just think
10:32 23 that's unprecedented. I've never seen that before. I've
10:32 24 never heard that before.

10:32 25 Mr. Nimocks said something like we can make any

10:32 1 proper arguments as long as they are not grounded in the
10:32 2 guidelines, but I'm not sure in what way it's improper for us
10:33 3 to make whatever arguments we feel that are -- are reasonable
10:33 4 under Rule 11. Obviously, this Court has disagreed with some
10:33 5 of our arguments but other courts have agreed and there is
10:33 6 nothing improper about arguing in a different court that we
10:33 7 are right about the law even where this Court disagrees with
10:33 8 us. That's standard. That's absolutely standard. I just
10:33 9 don't think Plaintiffs can tell us what arguments we can or
10:33 10 can't make before another court. I mean, I suppose if they --
10:33 11 they want to review our brief before we file them? I don't
10:33 12 think they actually want that, but I mean that's sort of where
10:33 13 we are headed with this.

10:33 14 As to -- as to the Nebraska litigation, that
10:33 15 litigation was filed before this litigation so under the terms
10:33 16 of the injunction I don't think we can be prevented from
10:33 17 making any arguments there and I would note that our response
10:33 18 to the complaint in that case is actually due today and we are
10:34 19 intending to move to dismiss in that case and we do not
10:34 20 understand the injunction should restrict what arguments we
10:34 21 can make in moving to dismiss that case. And again,
10:34 22 Plaintiffs are in no way harmed by our participation in that
10:34 23 case.

10:34 24 The Court raised the issue of amicus briefs and
10:34 25 statements of interest, and I think the concerns we've raised

10:34 1 apply equally to amicus briefs and statements of interest.
10:34 2 The Attorney General and actually the EEOC have explicit
10:34 3 statutory authority to weigh in with amicus briefs and
10:34 4 statements of interest where the interests of the United
10:34 5 States are at stake. The Court noted the Supreme Court allows
10:34 6 the Solicitor General to file an amicus brief in any case at
10:34 7 any time as the courts of appeal have precisely the same rule
10:34 8 and I don't see any reason to draw a distinction.

10:34 9 Just a couple of other -- a couple of other notes.
10:34 10 On the nationwide scope. We don't think -- the Court did say
10:35 11 that the injunction is nationwide but as I mentioned in other
10:35 12 respects it's not -- it's not quite clear.

10:35 13 But Plaintiffs -- Plaintiffs counsel spoke -- talked
10:35 14 about the geographic extent of the harm being nationwide.
10:35 15 That's not accurate. The question is -- the purpose of the
10:35 16 scope of the injunction is again the harm to the Plaintiffs
10:35 17 and again I think there are states that would say they are
10:35 18 not -- have said and would say that they are not harmed by
10:35 19 Defendants' activities.

10:35 20 I want to make sure I mention everything. The two --
10:35 21 two quick things. One on the EEOC. Plaintiffs tend to argue
10:35 22 that the EEOC should stop their activity with respect to
10:35 23 private parties and the enforcement of Title VII. They've
10:36 24 said it's only a tiny part of what the EEOC does. I don't see
10:36 25 why even if it is a small portion of what the EEOC does, that

10:36 1 is enforce its understanding of Title VII in cases involving
10:36 2 to transgender access to restrooms or similar facilities, that
10:36 3 may be a small part of what EEOC does, but that's not the
10:36 4 question. The question is why would it be proper -- what is
10:36 5 the harm to Plaintiffs when the EEOC enforces its
10:36 6 understanding of the law -- understanding of Title VII against
10:36 7 private parties.

10:36 8 And then finally with respect to OSHA, Plaintiffs
10:36 9 seems to suggest that OSHA hasn't -- to their knowledge OSHA
10:36 10 hasn't enforced the law, but that's just OSHA's choice, so why
10:36 11 should we ask the Court to trust that OSHA is not going to
10:36 12 enforce the law. It's not a matter of choice or of trust.
10:36 13 OSHA does not have legal authority to enforce the law against
10:37 14 Plaintiffs. In other words, although OSHA says this is a best
10:37 15 practice, there is no legal hook that they could use to
10:37 16 enforce their view of the law against the Plaintiffs; it a
10:37 17 question of legal authority, not trust.

10:37 18 Your Honor, if you have no further questions, I think
10:37 19 those are the only points I want to make and I appreciate you
10:37 20 taking the time to have this hearing.

10:37 21 **THE COURT:** Okay. Thank you both for being here and
10:37 22 I will take this under advisement. We are in recesses on this
10:37 23 case.

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

6 **WITNESS MY HAND** on this 3rd day of October, 2016.

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/s/ Denver B. Roden

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