IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff RACHEL TUDOR, Plaintiff-Intervenor v. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Defendants.	)	CASE NO. 5:15-CV-00324-C

PLAINTIFF UNITED STATES OF AMERICA'S MOTION TO LIFT STAY WITH INCORPORATED BRIEF

The United States respectfully submits this motion to notify the Court of a ruling issued in *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex.) ("*Texas*"), and to request that the stay issued by this Court on September 6, 2016 (ECF No. 123) be lifted and that this litigation be resumed. The United States requests that proceedings move forward because the scope of the *Texas* injunction occasioning the stay has been clarified, permitting the United States to proceed.

I. Background

On August 25, 2016, the United States advised the Court of the issuance of a preliminary injunction in the *Texas* litigation (ECF No. 112-1), a case in which the State of Oklahoma is a plaintiff, and the United States sought an extension of its deadline to

file a Motion to Compel Related to Privilege Claims Over ESI (ECF No. 112).[1] The United States did not believe that the *Texas* injunction was intended to limit proceedings in the case before this Court, or that the injunction by its terms purported to limit these proceedings, but pursuant to the *Texas* court's instruction, notified the *Texas* court on August 30 of pending litigation, including the instant case (Ex. 1). The plaintiffs in *Texas* responded to that notice (Ex. 2), and the United States filed a reply (Ex. 3).

Mindful of the imminent deadlines in the instant case, the United States then informed this Court of its intent to seek clarification of the scope of the *Texas* injunction, and sought an unopposed stay of this litigation pending that clarification. On September 6, this Court granted that stay and issued an Order stating that if the *Texas* court clarified that "its injunction does not cover this case," the parties to this case were to "confer immediately about all outstanding scheduling issues and file a proposed schedule with the Court no later than one week from the date of the *Texas* court's clarification." ECF No. 123 at 1. The Court's Order further stated that "[i]f the *Texas* court rules that its injunction covers this case, the United States may seek additional scheduling relief from this Court." *Id.* at 1-2.

On September 12, the United States sought further clarification of the scope of the *Texas* injunction (Ex. 4), with responses by plaintiffs in that case (including the State of Oklahoma) (Ex. 5), and a reply (Ex. 6). On October 18, the *Texas* court issued an Order

---

[1] In addition to lifting the stay, the United States requests that the Court set the deadline for the United States to file its motion to compel related to privilege claims over ESI, as contemplated in the Court's FRE 502(d) order (ECF No. 66 at 2), for one week from the date the Court lifts the stay.

(Ex. 7) responding to both the United States' Notice of Pending Litigation and its Motion for Clarification ("Clarification Order"). In its Clarification Order, the *Texas* court recognized that its injunction "is directed at the issue of access to intimate facilities," *id.* at 1, and clarified that though the injunction "applies in part" to this case, the United States' legal arguments in this case "fall outside the scope of" that injunction. *Id.* at fn 2. The *Texas* court also stated that the United States is "still 'enjoined from enforcing the Guidelines[2] against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions' (including Southeastern Oklahoma State University) . . . .'" *Id.*[3]

[2] The "Guidelines" is a shorthand term that the *Texas* court used to refer to six documents issued by federal agencies regarding a variety of federal statutes, including Title VII and Title IX. *Texas v. United States*, __ F. Supp. 3d __, 2016 WL 4426495 at *1 & n.4 (N.D. Tex. Aug. 21, 2016).

[3] The relevant discussion is contained in a footnote of the Clarification Order, which reads as follows:

> Plaintiffs have also listed numerous cases that they believe are not enjoined by the Court's preliminary injunction in their Notice of Pending Litigation. *See* Not. Pending Lit. 10–13, ECF No. 64. The Court agrees and clarifies that these cases are not included in the injunction. At oral argument, Defendants asked the Court to restrict the injunction to litigation in which the plaintiff states are involved. Tr'g at 7–8. The Court clarifies that the preliminary injunction attaches to Defendant's conduct in litigation not substantially developed before the August 21, 2016 Order (ECF No. 58), regardless of whether plaintiff states are involved. The Court seeks to avoid unnecessarily interfering with litigation concerning access to intimate facilities that was substantially developed before the Court's Order granting the preliminary injunction. In pending litigation concerning access to intimate facilities, if no responsive pleadings were filed and no substantive rulings issued before August 21, 2016, the preliminary injunction applies and Defendants are enjoined from relying on the Guidelines. The injunction applies in part to *United States v. Southeastern Okla. Univ.*, a case filed by the DOJ against a public university in Oklahoma (a plaintiff state here)

II. Discussion

The terms of the Clarification Order permit the United States to proceed with its claims in this case. However, this Court's Stay Order did not contemplate a scenario in which the *Texas* court would state that the United States' claims could proceed, but with limitations. Therefore, rather than presuming that the Stay Order's provision for lifting the stay is triggered, the United States seeks relief from the stay by way of this Motion. The limitations identified by the Clarification Order are inapplicable to the United States' intended course of litigation of the instant case, and this case should resume.

Specifically, in light of this clarification from the *Texas* court, the United States requests that the Court lift the stay in this case because the *Texas* injunction does not prevent the United States from asserting the claims that it has been litigating since this case was filed in early 2015. The United States understands that under the *Texas* injunction it is "still enjoined from enforcing the Guidelines" against Oklahoma to

---

> more than a year before the Court's August 21, 2016 injunction. No. 5:15-cv-324 (W.D. Okla.). Although the DOJ did not make the issue at the heart of this injunction (access to intimate facilities) a central feature of the complaint, the aggrieved private party has now intervened and introduced new claims that involve access to intimate facilities. No. 15:15-cv-324, ECF No. 23. Because litigation in *Southeastern* was substantially underway before the issuance of this injunction, DOJ's legal arguments in the case fall outside the scope of this injunction. However, Defendants (including DOJ) are still "enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions" (including Southeastern Oklahoma State University) and "enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex". ECF No. 58 at 37.

Ex. 7 at 6 n.2.

require transgender individuals' "access to intimate facilities" consistent with their gender identities, and understands this restriction to mean that the United States may not amend its Complaint to assert a claim that the Defendants violated Dr. Tudor's rights under Title VII or Title IX by depriving her of "access to intimate facilities." Ex. 7 at 6 fn.2. The United States will not seek to assert a new claim that is prohibited by the injunction.[4]

It is also important to note some actions that the *Texas* injunction does not prohibit. As the plaintiffs in the *Texas* case, including Oklahoma, acknowledge (Ex. 2 at 5), the *Texas* injunction does not restrict Dr. Tudor, as Plaintiff-Intervenor in this case, in any way, and she may continue to assert her claim that the Defendants violated her Title VII rights by barring her from women's restrooms (ECF No. 24 at ¶137). Furthermore, evidence of the Defendants' decision to deny Dr. Tudor access to women's restrooms may be relevant to the claims that the United States has asserted for purposes of proving, among other things, motive and credibility. For example, Dr. Tudor and some of the Defendants' witnesses disagree on whether the Defendants barred Dr. Tudor from women's restrooms and that factual dispute is relevant to the credibility of Dr. Tudor and these witnesses. So long as the United States does not amend its Complaint to assert that the Defendants violated Title VII or Title IX by barring Dr. Tudor from women's restrooms, it may use this evidence regarding Dr. Tudor's restroom access to support its

[4] The United States contests the propriety of the injunction issued by the *Texas* court and appealed its issuance and the Clarification Order to the U.S. Circuit Court of Appeals for the Fifth Circuit on October 20, 2016. If the *Texas* injunction is vacated or stayed, the United States would no longer be bound by its terms.

claims without running afoul of the *Texas* injunction.

The United States requests that the Court order expedited briefing of this motion to reduce any further delay as a result of the stay. The United States requests that the Court order the other parties to respond to this motion by November 3, 2016, and for the United States to file any reply brief by November 10, 2016.

III. Conclusion

For the foregoing reasons, the United States requests that the Court enter the attached proposed order and lift the stay so that the United States may proceed to litigate this case under the restrictions of the *Texas* injunction, as described above. The United States further requests expedited briefing as described above.[5]

[5] Although not required to do so, the United States attempted to confer with the Defendants before filing this Motion but were unable to schedule a time for a teleconference. The Defendants have, however, stated through email that they oppose the relief requested in this Motion as well as the request for an expedited briefing schedule.

Respectfully submitted,

Date: October 25, 2016

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division

DELORA L. KENNEBREW
Chief
Employment Litigation Section

MEREDITH L. BURRELL (MD no number issued)
Deputy Chief
Employment Litigation Section

/s/ Allan K. Townsend
ALLAN K. TOWNSEND (ME Bar No. 9347)
SHAYNA M. BLOOM (D.C. Bar No. 498105)
VALERIE MEYER (AZ Bar No. 023737)
Senior Trial Attorneys
Employment Litigation Section
Civil Rights Division
United States Department of Justice
Mailing Address:
U.S. Attorney's Office for the
Western District of Oklahoma
C/O Kay Sewell, Assistant U.S. Attorney
210 West Park Avenue, Suite 400
Oklahoma City, Oklahoma 73102
Telephone: (202) 616-9100
Facsimile: (202) 514-1005
Allan.Townsend@usdoj.gov
Shayna.Bloom@usdoj.gov
Valerie.Meyer@usdoj.gov

CERTIFICATE OF SERVICE

I certify that I served this document on all counsel of record through the Court's electronic filing system on the date below.

Date: October 25, 2016 /s/ Allan K. Townsend

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

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

DEFENDANTS' NOTICE OF PENDING LITIGATION

The Court has made clear that its preliminary "injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject," and instructed the parties to "file a pleading describing those cases so the Court can appropriately narrow the scope [of its injunction] if appropriate." Order at 37, ECF No. 58. Defendants submit this notice in accordance with the Court's instruction. Attached as Exhibit A is a list of currently pending cases involving Defendants and relating to the rights of transgender individuals under Title VII or Title IX.

As an initial matter, Defendants understand that this Court's preliminary injunction permits them to proceed with the ordinary course of litigation in any case that does not involve (1) "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions," (2) "initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex," or (3) "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order," which was issued August 21, 2016. *Id.* Defendants believe that the cases listed in

Exhibit A fall outside the scope of these prohibitions. Defendants understand that in such cases they are permitted to comply with all deadlines and court orders, file appeals as necessary, and continue to participate as an amicus or interested party.

Defendants bring one case in particular to the Court's attention. *United States v. Southeastern Oklahoma State University*, No. 5:15-cv-324 (W.D. Okla.), was filed by the Civil Rights Division of the U.S. Department of Justice on March 30, 2015, alleging that a transgender professor was denied promotion and tenure, and the opportunity to reapply for same, for discriminatory and retaliatory reasons in violation of Title VII. The defendant in that case is a public university in the State of Oklahoma, which is a plaintiff in this case. To be clear, *Southeastern Oklahoma State University* does not involve students or the enforcement of Title IX, and the United States has asserted no claim turning on access to bathrooms or other sex-segregated facilities. The parties are now in discovery, which is scheduled to conclude on September 1, 2016, and the case is on the calendar for trial before Judge Robin J. Cauthron on November 1, 2016. There is a pressing need to proceed in *Southeastern Oklahoma State University* so that pre-trial deadlines and the scheduled trial are not unduly delayed. Although Defendants do not believe that the case is intended to be covered by this Court's preliminary injunction, the Department of Justice has halted its discovery out of an abundance of caution. After this Court issued its order, the Department postponed depositions scheduled for August 24, 25, and 26, 2016. Given other impending deadlines, the Department will shortly seek a stay in *Southeastern Oklahoma State University* pending confirmation that proceedings in that case are not enjoined by this Court's order. Absent immediate confirmation from this Court, there will likely be substantial disruption to the schedule ordered by Judge Cauthron.

Defendants expect to file a motion seeking relief with respect to the Court's preliminary injunction. In the interim, however, Defendants ask this Court to make it clear beyond any doubt that they are free to proceed with all of the pending litigation listed in Exhibit A, including the case discussed above.

Date: August 30, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

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

Counsel for Defendants

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

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

EXHIBIT A

1. The U.S. Department of Justice is a defendant in *McCrory v. United States*, 5:16-cv-238 (E.D.N.C.) (filed May 9, 2016), which involves the Department's interpretation of Title VII as it relates to transgender individuals.

2. The U.S. Departments of Education and Justice are co-defendants in the following cases involving their interpretation of Title IX as it relates to transgender individuals:

   a. *Student and Parents for Privacy v. U.S. Department of Education*, No. 1:16-cv-4945 (N.D. Ill.) (filed May 4, 2016).

   b. *North Carolinians for Privacy v. U.S. Department of Justice*, No. 1:16-cv-845 (M.D.N.C.) (filed May 10, 2016).

   c. *Board of Education of the Highland Local School District v. U.S. Department of Education*, No. 2:16-cv-524 (S.D. Ohio) (filed June 10, 2016).

   d. *Women's Liberation Front v. U.S. Department of Justice*, 1:16-cv-915 (D.N.M.) (filed Aug. 11, 2016).

3. The U.S. Departments of Education, Justice, and Labor, as well as the Equal Employment Opportunity Commission, are co-defendants in *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb) (filed July 8, 2016), which raises substantially the same claims asserted here.

4. The U.S. Department of Justice is representing the United States as a plaintiff in the following cases involving the rights of transgender individuals under Title VII and/or Title IX:

   a. *United States v. Southeastern Oklahoma State University*, No. 5:15-cv-324 (W.D. Okla.) (filed Mar. 30, 2015).

   b. *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C.) (filed May 9, 2016).

5. The U.S. Department of Justice represented the United States as a plaintiff in *Doe v. Anoka-Hennepin School District No. 11*, No. 11-cv-1999 (D. Minn.) (filed July 21, 2011), which involved the rights of transgender individuals under Title IX. The district court entered a consent decree effective until March 6, 2017, and retained jurisdiction to enforce it.

6. The U.S. Department of Justice has filed a statement of interest and/or an amicus brief in these pending cases involving the rights of transgender individuals under Title IX:

   a. *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich.) (statement of interest filed Feb. 20, 2015).

   b. *G.G. ex rel. Grimm v. Gloucester County School Board*, No. 4:15-cv-54 (E.D. Va.) (statement of interest filed June 29, 2015), *rev'd on appeal*, No. 15-2056 (4th Cir.) (amicus brief filed Oct. 28, 2015), *stayed and mandate recalled pending petition for certiorari*, No. 16A52 (U.S. Aug. 3, 2016).

7. The U.S. Equal Employment Opportunity Commission has filed suit, intervened on behalf of plaintiff, or filed a subpoena enforcement action in these pending cases involving the rights of transgender individuals under Title VII. None of these actions involve schools as defendants or the issue of access to bathrooms:

   a. *U.S. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710 (E.D. Mich.) (complaint filed Sept. 25, 2014).

   b. *Broussard v. First Tower Loan, LLC*, No. 2:15-cv-1161 (E.D. La.) (intervention granted Sept. 16, 2015).

   c. *U.S. Equal Employment Opportunity Commission v. Bojangles Restaurants, Inc.*, No. 5:16-cv-654 (E.D.N.C.) (complaint filed July 6, 2016).

d. *U.S. Equal Employment Opportunity Commission v. Rent-A-Center East, Inc.*, No. 2:16-cv-2222 (C.D. Ill.) (complaint filed July 18, 2016).

e. *U.S. Equal Employment Opportunity Commission v. Help at Home, Inc.*, No. 2:16-mc-1188 (N.D. Ala.) (subpoena enforcement action filed July 20, 2016).

8. The U.S. Equal Employment Opportunity Commission has sought leave to participate as amicus curiae on behalf of plaintiff in *Robinson v. Dignity Health*, No. 4:16-cv-3035 (N.D. Cal.), a case alleging sex discrimination in health insurance benefits against a transgender employee in violation of Title VII. The case was initiated on June 6, 2016; the Commission filed its motion on August 22, 2016.

Date: August 30, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2016, a copy of the foregoing Defendants' Notice of Pending Litigation was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
Benjamin L. Berwick

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

STATE OF TEXAS, et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:16-cv-00054-O
	§	
UNITED STATES OF AMERICA, et al.	§	
	§	
Defendants.	§	

PLAINTIFFS' NOTICE OF PENDING LITIGATION

In accordance with the Court's orders (ECF No. 58 at 37; ECF No. 62), and in response to Defendants' Notice of Pending Litigation (ECF No. 61), Plaintiffs file this notice to address cases and matters impacted by the Court's injunction (hereinafter "the injunction"). Defendants listed seventeen pending cases (ECF No. 61), each of which they contend fall outside the scope of the injunction. Plaintiffs agree in part, and disagree in part, with Defendants, and also bring to the Court's attention additional matters and considerations.

As Plaintiffs read the injunction, there are four general categories of consideration that impact whether matters fall within its scope.

(1) "This subject"

The first filter or parameter of the injunction pertains to whether litigation or disputes involve "this subject." ECF No. 58 at 37. Plaintiffs aver that "this subject" refers precisely to whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities. Plaintiffs address whether certain matters

involve "this subject" on a case-by-case basis, *infra*.

(2) Whether Defendants are involved

The injunction extends to Defendants and, thus, does not generally extend to litigation involving private parties. *See* n.2, *infra*. However, Plaintiffs contend that the injunction generally precludes Defendants from involving themselves in private party litigation in any capacity, including participation as *amicus curiae* or the filing of a Statement of Interest. Plaintiffs address this argument more thoroughly, *infra*.

(3) Whether Plaintiffs or their schools are involved

As the Court made clear, the injunction applies to "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." (ECF No. 58 at 37). This category of application does not appear to be temporally limited. In other words, while the Court concerns itself with when certain litigation was initiated in other matters, Plaintiffs read the injunction to apply fully to cases involving "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions," irrespective of when the litigation commenced.

The following cases involve "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions," or surround disputes within the borders of Plaintiffs, to wit:

- *Broussard v. First Tower Loan, LLC,* No. 2:15-cv-1161 (E.D. La.) (filed Apr. 13, 2015)

In *Broussard*, Plaintiff, a female who identifies as male, alleged that Defendant terminated her in violation of Title VII. *Id*. (No. 2:15-cv-1161, ECF No. 1 ¶ 1). Plaintiff asserts that Defendant indicated that she could continue working at the company only if she agreed to be treated as a female. *Id*. (No. 2:15-cv-1161, ECF No. 1 ¶ 4).

Plaintiff further alleges that Defendant terminated her when she refused to agree to those conditions. *Id.* (No. 2:15-cv-1161, ECF No. 1 ¶ 4). EEOC intervened in the case and claims that Defendant violated Title VII based on the same facts that Plaintiff alleges. *Id.* (No. 2:15-cv-1161, ECF No. 71 ¶¶ 32–41). Because this dispute does not appear to involve "this subject," the injunction does not appear to apply to this case.

- *U.S. Equal Employment Opportunity Comm'n v. Help at Home, Inc.*, No. 2:16-mc-1188 (N.D. Ala.) (filed July 20, 2016)

In *Help at Home*, EEOC is seeking to enforce a subpoena in connection with its investigation into Defendant's termination of a male nursing assistant who identifies as female. *Id.* (No. 2:16-mc-1188, ECF No. 1-2; ECF No. 1-4). Defendant contends that substandard work performance was the sole cause of the firing, while the former employee asserts that he was let go for refusing to inform his patients that he identified as the opposite sex. *Id.* (No. 2:16-mc-1188, ECF No. 1-4; ECF No. 3). The district court has not ruled on the subpoena. Because this dispute does appear to not involve "this subject," the injunction does not appear to apply to this case.

- *United States v. Southeastern Okla. State Univ.*, No. 5:15-cv-324 (W.D. Okla.) (filed Mar. 30, 2015)

Plaintiffs disagree, in part, with Defendants' assessment that the injunction does not affect this case—a case with allegations brought by both DOJ and a private party. While the injunction impacts DOJ's ability to continue the case in the W.D. Okla., it does not preclude the private party from continuing in their claim.

Because Oklahoma is a Plaintiff in the case *sub judice*, the case in W.D. Okla. clearly involves "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." ECF No. 58 at 37. And because "this subject" appears to be at the forefront, the injunction applies to the case in W.D. Okla.

even though it was filed in 2015.

The case was brought by DOJ against a public university in Oklahoma for allegedly failing to promote a professor for identifying as the opposite sex. No. 5:15-cv-324, ECF No. 1. And while DOJ's complaint doesn't make "this subject" a feature of the litigation, the employee at issue, Professor Rachel Tudor, filed a complaint in intervention and alleged that the university improperly denied Dr. Tudor access to restrooms designated for the opposite sex. *Id*. (No. 5:15-cv-324, ECF No. 24 at ¶¶ 43–63). Since that time, DOJ has deposed no less than thirteen current and former university employees about "this subject."[1] The following are examples DOJ's foray into "this subject":

- During the deposition of the former Associate Vice President for Academic Affairs, DOJ asked: "Were any of those conversations regarding the restroom that Dr. Tudor was using?" "Did you have any conversations at any point with anybody at Southeastern about which restroom Dr. Tudor had been using?' "Did you personally have an opinion about which restroom Dr. Tudor should use after her transition to female?" Clark Deposition, attached hereto as Exhibit 1, p. 89, ln. 18–19, p. 89, ln. 22–24, p. 90, ln. 24 – p. 91, ln. 1.
- Deposing former professor and Assistant Vice President, DOJ asked: "Did you ever speak with anybody about the issue of what restroom Dr. Tudor would use after her gender transition?" "Do you remember what these female professors were concerned about with respect to Dr. Tudor using the women's restroom?" "Were you involved in a discussion with somebody about asking Dr. Tudor to use the unisex restroom?" Weiner Deposition, attached hereto as Exhibit 2, p. 39, ln. 2–4, p. 40, ln. 2–4, p. 42, ln. 3–5.
- In questioning the former Vice President for Academic Affairs, DOJ asked: "Did you talk to Ms. Conway about Dr. Tudor's use of rest rooms?" "Do you know whether Dr. Tudor ever used the woman's rest room at Southeastern?" "Did someone express a concern that some people might be uncomfortable using the rest room with Dr. Tudor?" "Was there ever a discussion of Dr. Tudor after her gender transition using the men's rest room?" "Do you think transgender people should be able to use the rest rooms consistent with the gender they identify with?" McMillan Deposition, attached hereto as Exhibit 3, p. 54, ln. 1–2, p. 62, ln. 19–20, p. 63, ln. 9–11, p. 65, ln. 15–16, p. 66, ln. 4–6.

---

[1] Rule 15(b) of the Federal Rules of Civil Procedure ("FRCP") permits that issues not pled can nonetheless be tried by consent. This can occur particularly when "parties actually recognize the issue to have been litigated." *Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 192 (5th Cir. 1985).

- Deposing the former HR Director, DOJ asked: "Do you know what restroom Dr. Tudor used after this June 1st conversation that you had with her?" "Why was the fact that Dr. Tudor was preoperative relevant to the conversation about restroom facilities?" "Was there anyone else other than you, that you know of, who was concerned that female students and female employees who knew Dr. Tudor as a male may be uncomfortable with or threatened by male preoperative Dr. Tudor in the female restroom while presenting as female?" Conway Deposition, attached hereto as Exhibit 4, p. 56, ln. 21–23, p. 91, ln. 2–4, p. 94, ln. 2–7.
- During the deposition of the former Director of the Office of Diversity, DOJ asked: "Have you ever spoken to anybody about the issue of what restroom Dr. Tudor used after she started presenting as a woman at work?" "So had Ms. Conway, at that point, made a decision about what she thought was appropriate with respect to Dr. Tudor's restroom use when you had this conversation with her?" "I think you referred to the – the restroom issue as one of the biggest issues in dealing with the gender transition. Did Ms. Conway explain why? Stubblefield Deposition, attached hereto as Exhibit 5, p. 86, ln. 21–23, p. 88, ln. 13–16, p. 92 ln. 8–10.

Under the injunction, Defendants are prohibited from action regarding "this subject" in Oklahoma, a Plaintiff State, and "their respective schools, school boards, and other public, educationally-based institutions." Accordingly, Defendants must cease requesting information through interrogatories, deposition testimony, or any other means. Further, they should cease seeking relief in the Oklahoma case based on "this subject" as long as the injunction remains in place.

At the same time, however, the injunction does not prevent Professor Tudor's case and claims from moving forward. While the injunction restrains the Defendants, it will generally not apply to private parties.[2] Dr. Tudor moved to intervene as of right under FRCP 24(a), and the Court granted the motion. No. 5:15-cv-324, ECF No. 7; ECF No. 23. This procedural avenue was open to Dr. Tudor because Title VII provides a statutory right to intervene to aggrieved parties. 42 U.S.C. § 2000e5(f)(1). Dr. Tudor, who is named throughout the main complaint, meets that definition. No. 5:15-

[2] Injunctive relief will generally extend to those that are in privity with (or controlled by) those enjoined. *See*, *e.g.*, *Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981) (quoting *In Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1944)) (citations omitted).

cv-324, ECF No. 1. Dr. Tudor asserts several claims that are not part of DOJ's complaint, including the specific allegation that the university improperly restricted access to intimate areas. No. 5:15-cv-324, ECF No. 24 at ¶¶ 43–63. In addition to granting the intervention, the W.D. Okla. also joined Dr. Tudor's claims to the case. (No. 5:15-cv-324, ECF No. 23). Thus, there are no jurisdictional or other hurdles preventing Dr. Tudor from proceeding against the university.

- *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 2:16-cv-00943 (E.D. Wisc.) (filed July 19, 2016)

This case is pending in a Plaintiff State, Wisconsin. In *Whitaker*, a female student, who identifies as male, alleged that school officials discriminated against her by, among other things, denying her access to the intimate areas designated for boys. *Whitaker,* ECF No. 12 ¶¶ 27–68. However, while *Whitaker* generally involves "this subject," Defendants are not parties. For that reason, the injunction does not necessarily extend to *Whitaker*.

However, in that *Whitaker* involves a dispute between a student and a school district, it is postured like the Fourth Circuit case arising out of Gloucester County, VA. In that litigation, DOJ filed a Statement of Interest and argued that the school board's policy of designating restrooms on the basis of sex violates Title IX. *G.G. v. Gloucester Cnty. Sch. Bd.*, 4:15-cv-00054-RGD-DEM (E.D. Va.) (ECF No. 28). Therefore, while the injunction does not prevent the current parties in *Whitaker* from moving forward, it should preclude Defendants' prospective participation, via a Statement of Interest, brief as *amicus curiae*, or other involvement, either before the district court of the Seventh Circuit Court of Appeals.

- *U.S. Dep't of Educ. v. Sumner Cnty. Sch. Dist., Tenn.*, Complaint # 04-16-1526 (filed June 15, 2016)

As the Court may recall, after the briefing and argument on Plaintiffs' motion

for preliminary injunction was completed, but before this Court's ruling was issued, Plaintiffs received notice of a new investigation by DOE into a public school in Sumner County, Tennessee (one of the Plaintiff States).[3] This investigation is squarely within the portion of the injunction precluding the Defendants from commencing new investigations, or pursuing ongoing ones, on the matter of access to intimate areas in public educational facilities.

As in many of the cases/investigations already documented by Plaintiffs, ECF No. 52 at 2–8, the investigation represented by the proposed Exhibit W was triggered by a claim that a school prohibited a student from accessing an intimate area belonging to the opposite sex. ECF No. 57-1 at 10. Accordingly, DOE demanded that the Sumner County School District turn over, *inter alia*, copies of all correspondence regarding "the Student's access to bathrooms and locker rooms" and "[a]ll complaints . . . regarding the Student using the girls' bathroom or locker room." *Id*. at 12.

Through counsel, the Sumner County School Board informed DOE that it will not produce any information or otherwise cooperate with the investigation as long as the injunction remains in place, and that the Board considers the investigation closed in light of the injunction. *See* Exhibit 6, attached hereto. Indeed, the Sumner County investigation is squarely within the scope of the Court's order. Thus, the Sumner County investigation should cease immediately, and Defendants should desist from continuing or commencing any similar efforts.

[3] Plaintiffs promptly moved the Court for leave to file a new exhibit pertaining to the investigation. ECF No. 57. The proposed Exhibit W (ECF No. 57-1) details a new investigation by Defendants that, Plaintiffs aver, is now enjoined by the Court's order. Although Plaintiffs reference this proposed exhibit herein, Plaintiffs note that their motion to admit Exhibit W to the evidentiary record supporting their motion for preliminary injunction remains pending and respectfully renew our request that the Court admit Exhibit W to the record.

(4) "Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order."

This restriction speaks for itself and applies to the entirety of Defendants' "Guidelines" notwithstanding the circumstances presented in any given litigation, or whether that litigation involves "this subject." Under the APA, successful challenges impact the *entirety* of an agency initiative. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990).

(A) Cases within the injunction

- *Privacy Matters v. United States*, No. 16-cv-03015 (D. Minn.) (filed Sept. 7, 2016).

The Plaintiffs in *Privacy Matters* assert that Defendants exceeded their authority by promulgating a new rule that forces them to share intimate areas in public schools with the opposite sex in violation of fundamental dignity and personal privacy rights. *Id.* (No. 16-cv-03015, ECF No. 1). As the suit was filed after the injunction, Defendants "are enjoined from using the Guidelines or asserting the Guidelines carry any weight" in *Privacy Matters*. ECF No. 58 at 37.

- *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb.) (filed July 8, 2016).

Though this case was instituted on July 8, 2016, it appears that the Court's overriding concern regarding when litigation was initiated was so that the injunction "should not unnecessarily interfere with litigation currently pending before other federal courts on this subject . . . ." ECF No. 58 at 37. Whether the injunction will "unnecessarily interfere" with other litigation, Plaintiffs respectfully suggest, should not turn on when a case was filed, but the depth and stage of the litigation at issue.

The lawsuit in D. Neb., brought by multiple States, is nearly substantively identical to this matter. As here, the Plaintiff States in D. Neb. claim that Defendants' "Guidelines" violated the APA's "notice and comment" requirement and prohibition

against agency action in excess of statutory authority. *Id.* (No 4:16-cv-3117, ECF. No. 1 at ¶¶ 62–92). They base these claims on an understanding of the controlling federal laws and regulations—and the reasons why the new obligations imposed by Defendants are invalid under them—which is identical to that which the Plaintiffs set forth in this case. *Id.* (No 4:16-cv-3117, ECF. No. 1 at ¶¶ 23–47).[4]

More importantly, nothing has happened on the case in D. Neb. since its filing. Because the Plaintiffs in D. Neb. have not moved for injunctive relief, and no responsive pleading has been filed, extending the injunction to that litigation will not unnecessarily interfere with those proceedings, or otherwise harm the Plaintiffs in those proceedings from seeking relief. Rather, since the Plaintiffs in D. Neb. seek the same result as the Plaintiffs herein, principles of judicial economy suggest that enjoining Defendants as to that case is proper.

- *U.S. Equal Employment Opportunity Commission v. Bojangles Restaurants, Inc.*, No. 5:16-cv-654 (E.D.N.C.) (filed July 6, 2016)

This case, filed shortly before the injunction, is in nearly the same posture as D. Neb.—nothing happened until after the injunction. On Sept. 6, 2016, Bojangles filed an answer in response to Defendant's lawsuit. Thus, enjoining Defendants as to these cases will not unnecessarily interfere with that litigation.

- *Women's Liberation Front v. U.S. Department of Justice*, 1:16-cv-915 (D.N.M.) (filed Aug. 11, 2016)

This case, filed shortly before the injunction, is in the exact same posture as D. Neb.—nothing substantive has happened since the case was filed. Thus, enjoining Defendants as to this case will not unnecessarily interfere with that litigation.

[4] Because of the nearly identical nature of the Nebraska lawsuit, and the relief sought by the Plaintiffs in that case, the complaint in that matter should functionally serves as a brief as *amici curiae* in support of Plaintiffs herein.

(B) Additional matters within the injunction

Since the institution of investigations, complaints, and litigation involving Titles VII and IX is virtually a daily occurrence, there are likely myriad cases that commenced at or around the time of the injunction. While matters instituted after the injunction certainly fall within the ambit of the injunction, Plaintiffs respectfully ask the Court to extend the injunction to matters instituted before the injunction but on which no responsive pleading has yet been filed. Where no responsive pleading exists, there can be no unnecessary interference, and justice should not be inhibited just because something has been filed, though no responsive pleadings have been filed, or substantive rulings issued.

(C) Known matters that may fall outside the injunction

The following matters, Plaintiffs aver, may fall outside of the injunction in light of when they were filed, the identity of the parties, what has happened in the case since the filing, and/or whether they involve "this subject."

- *McCrory v. United States*, 5:16-cv-238 (E.D.N.C.) (filed May 9, 2016)
- *North Carolinians for Privacy v. U.S. Department of Justice*, No. 1:16-cv-845 (M.D.N.C.) (filed May 10, 2016)
- *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C.) (filed May 9, 2016)
- *Carcaño v. McCrory*, No. 1:16-cv-236 (M.D.N.C.) (filed Mar. 28, 2016)
- *Berger v. United States Dep't of Justice*, No. 1:16-cv-844 (M.D.N.C.) (filed June 29, 2016)
- *Board of Education of the Highland Local School District v. U.S. Department of Education*, No. 2:16-cv-524 (S.D. Ohio) (filed June 10, 2016)
- *Doe v. Anoka-Hennepin School District No. 11*, No. 11-cv-1999 (D. Minn.) (filed July 21, 2011) (Intervenor-Complaint filed by DOJ on Mar. 6, 2012)

- *Students and Parents for Privacy v. U.S. Department of Education*, No. 1:16-cv-4945 (N.D. Ill.) (filed May 4, 2016)

These matters (a) all involve "this subject," (b) all involve Defendants as parties, and (c) have all seen extensive substantive action since their filings, all of which were before the injunction.

- *Robinson v. Dignity Health*, No. 4:16-cv-3035 (N.D. Cal.) (filed June 6, 2016)

The pleadings in this matter (a) do *not* involve "this subject," and (b) do *not* involve Defendants as parties. However, since Defendants filed their Notice of Pending Litigation in this matter (ECF No. 61), the Court in *Robinson* granted EEOC's motion (dated Aug. 22, 2016) to file an *amicus curiae* brief. No. 4:16-cv-3035, ECF No. 48. Thus, Plaintiffs request that the Court's treatment of this, and other like matters as to Defendants should be like *Whitaker*, *supra*—that the injunction does not prevent the current parties from moving forward, but it does preclude Defendants' participation, via a Statement of Interest, brief as *amicus curiae*, or other participation as to "this subject." Since EEOC's motion to participate as *amicus curiae* was filed after the injunction, EEOC should be required to withdraw the motion.

- *U.S. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*, Inc., No. 2:14-cv-13710 (E.D. Mich.) (filed Sept. 25, 2014)
- *U.S. Equal Employment Opportunity Commission v. Rent-A-Center East, Inc.*, No. 2:16-cv-2222 (C.D. Ill.) (filed July 18, 2016)

Defendants are parties in these matters. However, the pleadings do *not* involve "this subject." Thus, Plaintiffs believe that the injunction does not prevent the current parties from moving forward, but it does preclude Defendants from raising, as new or litigated issues in these matters, "this subject."

- *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich.) (filed Sept. 5, 2014)

Defendants are not parties to this matter. However, the center of the dispute in this case does involve "this subject." Moreover, Defendants did file a Statement of Interest in this matter on Feb. 20, 2015, in the same way that they did in the Gloucester County, VA case. Like an *amicus curiae* brief, a Statement of Interest does not carry any binding effect, *see Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951 n.14 (5th Cir. 2011), or enduring right to participate in litigation. Rather, such a filing is tantamount to a one-time "suggestion." *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 867 n.55 (5th Cir. 1975). Thus, while the injunction does not prevent the current parties in *Tooley* from moving forward, it should preclude Defendants' future participation in the case, both before the district court and the Sixth Circuit Court of Appeals.

(5) The Gloucester County, VA case

- *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 4:15-cv-54 (E.D. Va.) (initially filed June 11, 2015), *rev'd on appeal*, 822 F.3d 709 (4th Cir. 2016), *stayed and mandate recalled pending disposition of petition for certiorari*, 136 S. Ct. 2442 (U.S. Aug. 3, 2016) (No. 16A52), *petition for cert. filed*, (U.S. Aug. 29, 2016) (No. 16-273).

With a petition for certiorari presently pending before the Supreme Court, this case is in somewhat of a unique status. As the Court may recall, Defendants participated in it by filing a Statement of Interest under 28 U.S.C § 517 when the case was in the district court. Defendants also filed a brief as *amicus curiae* before the Fourth Circuit. 2015 WL 6585237. While the injunction could be reasonably construed to preclude Defendants from further participation in this matter, Rule 37(4) of the Supreme Court Rules expressly contemplates the participation of the Solicitor General's Office (part of DOJ) in any Supreme Court proceeding at the will

of the Solicitor General. Sup. Ct. R. 37(4) ("No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General . . . ."). Thus, Plaintiffs do not contend that the injunction should operate to impede upon the Supreme Court's perpetual invitation to the Solicitor General to participate in matters pending before it.

Respectfully submitted this the 9th day of September, 2016,

LUTHER STRANGE
Attorney General of Alabama

BRAD D. SCHIMEL
Attorney General of Wisconsin

PATRICK MORRISEY
Attorney General of West Virginia

HERBERT SLATERY, III
Attorney General of Tennessee

MARK BRNOVICH
Attorney General of Arizona

SCOTT PRUITT
Attorney General of Oklahoma

JEFF LANDRY
Attorney General of Louisiana

SEAN REYES
Attorney General of Utah

SAM OLENS
Attorney General of Georgia

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

PRERAK SHAH
Senior Counsel to the Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General for
Special Litigation

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General for
Special Litigation
Texas Bar No. 24002695
Austin.Nimocks@texasattorneygeneral.gov

MICHAEL TOTH
Senior Counsel for Special Litigation

Office of Special Litigation
OFFICE OF THE ATTORNEY GENERAL
OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548

Tel: 512-936-1414

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 9th day of September, 2016, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks
Austin R. Nimocks

EXHIBIT 1

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,) Case No:
) 5:15-CV-00324-C
RACHEL TUDOR,)
Plaintiff-Intervenor)
)
v.)
)
SOUTHEASTERN OKLAHOMA STATE)
UNIVERSITY, and)
THE REGIONAL UNIVERSITY SYSTEM)
OF OKLAHOMA,)
Defendants.)

****

ORAL DEPOSITION OF

BRYON K. CLARK

MAY 4, 2016

****

ORAL DEPOSITION OF BRYON K. CLARK, produced as a witness at the instance of the Plaintiff United States, and duly sworn, was taken in the above-styled and -numbered cause on the 4th day of May, 2016, from 8:30 a.m. to 5:01 p.m., before Cheryl K. Perlich, CSR in and for the State of Texas, reported by machine shorthand, at the Office of the United States Attorney, located at 600 East Taylor Street, Suite 2000, Sherman, Texas 75090 pursuant to the Federal Rules of Civil Procedure.

EXHIBIT 1

1 **Dr. Tudor was transitioning to female?**
2 A. Instead of a conversation, I'd like -- it would
3 be more that I was listening, not conversing back.
4 **Q. Did you have any other conversations with**
5 **anyone else about Dr. Tudor's transition?**
6 MR. JOSEPH: Object to the form.
7 A. Not that I recall specifically about that. I'm
8 sure there's -- but I don't remember a specific point in
9 time or anything or individuals.
10 **Q. But you believe you had additional**
11 **conversations at Southeastern about Dr. Tudor's**
12 **transition?**
13 A. I'm not sure I'd classify it as a
14 conversations. Again, more that individuals may have
15 been talking and maybe I was then injected, but I don't
16 specifically remember the details of any of those
17 conversations.
18 **Q. Were any of those conversations regarding the**
19 **restroom that Dr. Tudor was using?**
20 MR. JOSEPH: Object to the form.
21 A. I don't recall.
22 **Q. Did you have any conversations at any point**
23 **with anybody at Southeastern about which restroom**
24 **Dr. Tudor had been using?**
25 MR. JOSEPH: Object to the form.

1 A. I don't recall any specific details about that.
2 **Q. Do you recall anything generally?**
3 A. No, I don't.
4 **Q. Did you ever hear that anybody at Southeastern**
5 **had expressed concern about Dr. Tudor's use of the**
6 **women's restroom?**
7 A. No, I don't recall that.
8 **Q. At any time, did you become aware of a change**
9 **in the first name that Dr. Tudor was using?**
10 A. Rephrase it.
11 **Q. At any point, did you become aware that**
12 **Dr. Tudor was using a different first name?**
13 A. I don't have a recollection of -- I don't think
14 I had any interaction with Dr. Tudor before the
15 transition. I don't recall that at all so I couldn't
16 tell you what other name may have been used.
17 **Q. To your knowledge, has anyone else at**
18 **Southeastern, and that includes students, faculty**
19 **members, administration, transitioned to female?**
20 A. Not that I'm aware of, but I don't ask people.
21 **Q. To your knowledge, has anyone else at**
22 **Southeastern transitioned to male?**
23 A. I have no knowledge.
24 **Q. Did you personally have an opinion about which**
25 **restroom Dr. Tudor should use after her transition to**

1 **female?**
2 MR. JOSEPH: Object to the form.
3 A. No.
4 **Q. To your knowledge, are there any other**
5 **transgender people at Southeastern?**
6 A. Not to my knowledge.
7 **Q. Are you familiar with the Faculty Senate's**
8 **Recognition Award for Teaching?**
9 A. Yes.
10 **Q. How often is that award given out?**
11 A. I believe annually.
12 **Q. Do you know how many of those awards are given**
13 **out each year?**
14 A. I believe four awards are given for teaching,
15 one from each of the former schools.
16 **Q. Were you ever responsible in any way for**
17 **determining who would receive those teaching awards?**
18 A. As a member of the Faculty Senate, yes, I play
19 the role in voting for, but the ultimate determination
20 was determined by vote, not an individual.
21 **Q. At the time that you participated in the**
22 **process, was it a vote of the entire Faculty Senate that**
23 **determined the recipients?**
24 A. I don't recall.
25 **Q. Does nomination for the Faculty Senate Award**

EXHIBIT 2

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
et al.)
Plaintiff)
)
vs.) CASE NO. 5:15-CV-00324-C
)
SOUTHEASTERN OKLAHOMA)
STATE UNIVERSITY et al.)
Defendant)

ORAL DEPOSITION
DR. CHARLES WEINER
March 11, 2016

ORAL DEPOSITION OF DR. CHARLES WEINER, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 11th day of March, 2016, from 8:38 a.m. to 2:27 p.m., before Cheryl Duncan, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of U.S. Attorney's Office, 600 E. Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

EXHIBIT 2

1 A. No.
2 Q. Did you ever speak with anybody about the
3 issue of what restroom Dr. Tudor would use after her
4 gender transition?
5 A. Yes.
6 Q. Who is that?
7 A. I, I cannot recall.
8 Q. What was discussed?
9 A. That there were people -- there were female
10 professors who were concerned about her using the
11 female bathroom on the third floor.
12 Q. And when did you hear those -- about those
13 concerns?
14 A. I don't remember.
15 Q. Do you remember who raised those concerns?
16 A. No.
17 Q. Did these female professors work in the
18 same building as Dr. Tudor?
19 A. Yes.
20 Q. Do you remember what department they worked
21 in?
22 A. The department she was in.
23 Q. Do you remember if they were tenured
24 professors?
25 A. I don't remember.

1 (Brief interruption)
2 Q. Do you remember what these female
3 professors were concerned about with respect to
4 Dr. Tudor using the women's restroom?
5 A. They didn't -- they did not believe at the
6 time that she had made the conversion.
7 Q. By "conversion," do you mean sex
8 reassignment surgery?
9 A. Yes.
10 Q. And did you have an understanding of why
11 that was important to them?
12 A. Yes.
13 Q. Why was it?
14 A. Because they were concerned.
15 Q. Right. But do you have any understanding
16 of why they were concerned about using a restroom
17 with Dr. Tudor before she had had sex reassignment
18 surgery?
19 A. They thought she was still a man.
20 Q. Was anything done to address those
21 professors' concerns?
22 A. Yes.
23 Q. What was that?
24 A. To ask Dr. Tudor to use the bathroom on the
25 second floor, unisex bathroom on the second floor.

1 it?
2 A. I don't know.
3 Q. Were you involved in a discussion with
4 somebody about asking Dr. Tudor to use the unisex
5 restroom?
6 A. I'm sure I was.
7 Q. Do you remember who that conversation was
8 with?
9 A. It had to be with Cathy Conway, but I can't
10 remember specifically.
11 Q. Would that have been around the same time
12 that you learned about Dr. Tudor's name change?
13 A. A little bit later.
14 Q. Which was later, the conversation about the
15 restroom or the information about the name change?
16 MR. JOSEPH: Object to the form.
17 A. The conversation about the restroom.
18 Q. Was anybody else around when Cathy Conway
19 was talking to you about Dr. Tudor using the unisex
20 restroom?
21 A. No.
22 Q. Do you remember anything else about what
23 Cathy Conway told you regarding Dr. Tudor using the
24 unisex restroom?
25 A. Other than what's already -- what I already

EXHIBIT 3

EXHIBIT 3

1 IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

2

UNITED STATES OF AMERICA,)
3)
Plaintiff,)
4)
RACHEL TUDOR,)
5)
Plaintiff Intervenor,)
6)
vs.) No. 5:15-CV-00324-C
7)
SOUTHEASTERN OKLAHOMA STATE)
8 UNIVERSITY, and)
)
9 THE REGIONAL UNIVERSITY)
SYSTEM OF OKLAHOMA,)
10)
Defendants.)

11

12

13

14 DEPOSITION OF DOUGLAS MCMILLAN

15

16 TAKEN ON BEHALF OF THE PLAINTIFF

17

18 IN OKLAHOMA CITY, OKLAHOMA

19

20 ON AUGUST 10, 2016

21

22

23

24 ---

25 REPORTED BY: ROSIE STANDRIDGE, CSR

EXHIBIT 3

09:46 1 Q. Did you talk to Ms. Conway about Dr. Tudor's
09:46 2 use of rest rooms?
09:46 3 A. Yes.
09:46 4 Q. And when was that?
09:46 5 A. It was at the time -- it may have been
09:47 6 during that conversation. I'm not sure.
09:47 7 Q. What was discussed about Dr. Tudor's use of
09:47 8 rest rooms?
09:47 9 A. Dr. -- I mean Ms. Conway asked me what rest
09:47 10 room Dr. Tudor should use.
09:47 11 Q. What did you tell her?
09:47 12 A. I didn't know why she was asking me that.
09:47 13 Q. Did you tell her that?
09:47 14 A. I said, why are you asking me that?
09:47 15 Q. Okay. And what did she say?
09:47 16 A. She said -- I don't even remember her
09:47 17 response to it, to be honest with you. I thought -- I
09:47 18 can tell -- well --
09:47 19 Q. Well, let me ask another question.
09:47 20 A. Okay.
09:47 21 Q. What did you think the reason was for her
09:47 22 asking you?
09:47 23 A. I thought that perhaps Dr. Tudor had a need
09:47 24 for privacy and may have issues with medical issues
09:48 25 related to the transition, that she might need a

09:56 1 Ms. Robinson about Dr. Tudor's gender transition?
09:56 2 A. I don't recall. All summer '07 is what --
09:57 3 Q. Yes.
09:57 4 A. -- you're asking?
09:57 5 Q. Yes.
09:57 6 A. Yeah, I don't recall.
09:57 7 Q. Did you have any conversations with
09:57 8 Dr. Snowden during that time period about Dr. Tudor's
09:57 9 gender transition?
09:57 10 A. I don't recall.
09:57 11 Q. Did you have any other conversations
09:57 12 involving Dr. Mangrum other than that one meeting you
09:57 13 referenced about Dr. Tudor's gender transition?
09:57 14 A. I don't recall.
09:57 15 Q. Did you have any conversations with
09:57 16 Dr. Mischo apart from that meeting that you mentioned
09:57 17 about Dr. Tudor's gender transition?
09:57 18 A. I don't recall.
09:57 19 Q. Do you know whether Dr. Tudor ever used the
09:57 20 woman's rest room at Southeastern?
09:57 21 A. I do not.
09:57 22 Q. Did you ever hear about anyone having any
09:57 23 concerns that people would be uncomfortable using the
09:57 24 women's rest room while Dr. Tudor was in there?
09:57 25 A. I did not. Can I ask for a clarification of

09:58 1 that last question?
09:58 2 Q. Sure. What do you need to clarify?
09:58 3 A. Are you asking me did someone express a
09:58 4 concern about that?
09:58 5 Q. That was -- that would have been responsive
09:58 6 to my question, yes. Did someone express a concern
09:58 7 about using the rest room with Dr. Tudor?
09:58 8 A. Not -- not that I remember.
09:58 9 Q. Did someone express a concern that some
09:58 10 people might be uncomfortable using the rest room with
09:58 11 Dr. Tudor?
09:58 12 A. I only remember one. No one on campus, no.
09:58 13 Q. What are you remembering?
09:58 14 A. The -- and I'm in a conversation with
09:58 15 Charlie Babb. I don't know if I can talk about that
09:58 16 or not, but --
09:58 17 Q. Well, go ahead.
09:58 18 A. Okay.
09:58 19 MR. JOSEPH: Wait. Just for clarification,
09:58 20 what's the question?
09:58 21 MR. TOWNSEND: The question was, did you
09:59 22 ever hear that people were concerned that some people
09:59 23 might be uncomfortable using the same rest room as
09:59 24 Dr. Tudor?
09:59 25 MR. JOSEPH: Okay. Thank you.

10:00 1 concern was valid?
10:00 2 A. No.
10:00 3 Q. Or words to that -- let me strike that.
10:00 4 A. I just --
10:00 5 Q. Did you --
10:00 6 A. -- listened.
10:00 7 MR. JOSEPH: Object to the form.
10:00 8 Q. (By Mr. Townsend) So did you say anything
10:00 9 that you remember on that conversation with Mr. Babb?
10:00 10 A. No.
10:00 11 Q. Did anybody other than Mr. Babb have a
10:00 12 concern that people might be uncomfortable using the
10:00 13 same rest room as Dr. Tudor?
10:00 14 A. Not that I recall.
10:00 15 Q. Was there ever a discussion of Dr. Tudor
10:00 16 after her gender transition using the men's rest room?
10:01 17 A. No, not that I recall.
10:01 18 Q. When you had that discussion with Mr. Babb
10:01 19 on the phone, how did that come about? Did he call
10:01 20 you, or did you call him?
10:01 21 A. I don't remember.
10:01 22 MR. JOSEPH: Object to the form.
10:01 23 Q. (By Mr. Townsend) Was there anything else
10:01 24 discussed on that call?
10:01 25 A. I don't remember.

10:01 1 Q. Was that call in the summer 2007 time
10:01 2 period?
10:01 3 A. I don't know.
10:01 4 Q. Do you think transgender people should be
10:01 5 able to use the rest rooms consistent with the gender
10:02 6 they identify with?
10:02 7 A. I don't have an opinion.
10:02 8 Q. Are you aware that that's an issue that has
10:02 9 received a lot of media attention?
10:02 10 A. I am now.
10:02 11 MR. JOSEPH: Object to the form.
10:02 12 Q. (By Mr. Townsend) What do you mean by you
10:02 13 are now?
10:02 14 A. Well, this whole case has made me very aware
10:02 15 of it.
10:02 16 Q. So you haven't thought more about your views
10:02 17 on the issue since a lot of people have been talking
10:02 18 about it?
10:02 19 A. I -- they're nonsettled, the most
10:02 20 accurate --
10:02 21 THE REPORTER: I'm sorry. Could you --
10:02 22 THE WITNESS: Nonsettled. I don't have a
10:02 23 final opinion about it.
10:02 24 Q. (By Mr. Townsend) What's -- are there
10:02 25 certain reasons why you haven't come to the view that

EXHIBIT 4

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
et al.)
)
Plaintiff,)
)
VS.) Civil Action No.
) 5:15-CV-00324-C
)
SOUTHEASTERN OKLAHOMA STATE)
UNIVERSITY, et al.)
)
Defendant.)

****

ORAL DEPOSITION OF
CATHY CONWAY
MARCH 10, 2016

****

ORAL DEPOSITION OF CATHY CONWAY, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 10th day of March, 2016, from 8:58 a.m. to 4:52 p.m., before Chrissa K. Mansfield-Hollingsworth, CSR in and for the State of Texas, reported by machine shorthand, at the offices of U.S. Attorney's Office, located at 600 East Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure.

EXHIBIT 4

1 A. I don't know about their views. They said
2 nothing about their views to me.
3 Q. (By Mr. Townsend) Do you know whether any of
4 the people that you talked to about Dr. Tudor's gender
5 transition have any moral objection to transgender
6 people?
7 MS. COFFEY: Object to form.
8 A. Could you repeat the question?
9 Q. (By Mr. Townsend) Do you know whether any of
10 the people that you spoke to about Dr. Tudor's gender
11 transition have any moral objection to transgender
12 people?
13 A. No.
14 MS. COFFEY: Object to form.
15 Q. (By Mr. Townsend) Do you know whether any of
16 the people that you spoke to about Dr. Tudor's gender
17 transition have any religious objection to transgender
18 people?
19 A. No.
20 MS. COFFEY: Object to form.
21 Q. (By Mr. Townsend) Do you know what restroom
22 Dr. Tudor used after this June 1st conversation that you
23 had with her?
24 MS. COFFEY: Object to form.
25 A. No.

1 A. Yes.
2 Q. Why was the fact that Dr. Tudor was
3 preoperative relevant to the conversation about restroom
4 facilities?
5 MS. COFFEY: Object to form.
6 A. This was new to all of us.
7 Q. (By Mr. Townsend) Is that the only reason?
8 A. Dr. Tudor had changed her name and presented
9 herself as a female.
10 Q. The term preoperative used in that sentence
11 that I read, what operation is that referring to?
12 MS. COFFEY: Object to form.
13 A. Well, as stated, male to female.
14 Q. (By Mr. Townsend) So is that referring to sex
15 reassignment surgery?
16 A. Yes.
17 MS. COFFEY: Object to form.
18 Q. (By Mr. Townsend) So why was the fact that
19 Dr. Tudor had not had sex reassignment surgery relevant
20 to the conversation about the use of restroom
21 facilities?
22 MS. COFFEY: Object to form. Asked and
23 answered.
24 A. She was beginning her year of transition. She
25 changed her name.

1 A. Yes.
2 Q. Was there anyone else other than you, that you
3 know of, who was concerned that female students and
4 female employees who knew Dr. Tudor as a male may be
5 uncomfortable with or threatened by male preoperative
6 Dr. Tudor in the female restroom while presenting as
7 female?
8 MS. COFFEY: Object to form.
9 A. I've explained before. Threatened was not a
10 concern I had.
11 Q. (By Mr. Townsend) Did anyone else have that
12 concern?
13 A. I don't know.
14 Q. In the first sentence -- oh, no. Strike that.
15 In the third paragraph, last sentence on -- the third
16 paragraph on Page 3 of this exhibit, Exhibit 30, it
17 says, It was recommended that Cathy Conway, HR director,
18 contact Dr. Tudor and suggest that he may want to use
19 this private restroom during the transition period of
20 time. In that -- did I read that sentence correctly?
21 A. Yes.
22 Q. In that sentence, Dr. Tudor's referred to by
23 the pronoun he, correct?
24 A. Yes.
25 Q. Do you have an understanding as to why

EXHIBIT 5

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff(s),)
)
RACHEL TUDOR,)
)
Plaintiff Intervenor,)
)
-vs-) No. 5:15-CV-00324-C
)
SOUTHEASTERN OKLAHOMA STATE)
UNIVERSITY, and)
)
THE REGIONAL UNIVERSITY)
SYSTEM OF OKLAHOMA,)
)
Defendant(s).)

DEPOSITION OF CLAIRE STUBBLEFIELD, PhD

TAKEN ON BEHALF OF THE PLAINTIFF(S)

IN OKLAHOMA CITY, OKLAHOMA

ON MAY 17, 2016

REPORTED BY: LESLIE A. FOSTER, CSR

EXHIBIT 5

1 there, but --
2 Q (BY MR. TOWNSEND) I'm just trying to nail down
3 the timeframe here.
4 A I didn't know her prior -- if that's what
5 you're asking me. I didn't know Dr. Tudor or had --
6 hadn't come in contact with Dr. Tudor other than the
7 first time it was communicated, either her call or
8 e-mail. I'm not sure just -- I don't know if she called
9 and asked for an appointment or if she wanted to talk to
10 me. I'm not sure about that.
11 Q So did you hear anything when Dr. Tudor
12 switched from presenting as a man at work to a woman at
13 work about that transition? At the time that it
14 happened?
15 A No. I didn't know Dr. Tudor.
16 Q But did you hear anything about her gender
17 transition --
18 A No.
19 Q -- at the time?
20 A Did not know of her.
21 Q Have you ever spoken to anybody about the issue
22 of what restroom Dr. Tudor used after she started
23 presenting as a woman at work?
24 MR. JOSEPH: Object to the form.
25 A Ask that once again, please.

1 transition from AAO to AAO. And she just wanted to talk
2 about doing the best for Dr. Tudor, and we just -- it was
3 not an official sit-down, pencil-and-paper communication.
4 It was, "How best can we serve her?"
5 What -- she says, "I've never, you know, been
6 involved in this before. In your training have you
7 picked up anything that would make this an easier
8 transition for -- for Dr. Tudor on our campus or anywhere
9 she is?"
10 And so we talked about the bathroom issue. She
11 said that's probably the biggest one as far as how she
12 feels, you know, in the transition.
13 Q So had Ms. Conway, at that point, made a
14 decision about what she thought was appropriate with
15 respect to Dr. Tudor's restroom use when you had this
16 conversation with her?
17 A Restate what you asked.
18 MR. TOWNSEND: Go ahead and repeat it.
19 THE COURT REPORTER: "Question: So had
20 Ms. Conway, at that point, made a decision about what she
21 thought was appropriate with respect to Dr. Tudor's
22 restroom use when you had this conversation with her?"
23 A I don't understand what you're -- how you're
24 asking that.
25 Q (BY MR. TOWNSEND) Well, you said --

1 a unisex restroom when you talked to Ms. Conway?
2 MR. JOSEPH: Object to the form.
3 A I don't know. There would -- there are a
4 number -- that's the one I like to use when I was in that
5 building.
6 Q (BY MR. TOWNSEND) Did Ms. Conway -- let me
7 strike that.
8 I think you referred to the -- the restroom
9 issue as one of the biggest issues in dealing with the
10 gender transition. Did Ms. Conway explain why?
11 A I did not say that.
12 Q Okay. I thought I heard you say that, but
13 let's -- let's strike that question, then.
14 All right. Was there anybody else involved in
15 this conversation with you and Ms. Conway about Dr. Tudor
16 that we've been discussing?
17 A Regarding the -- that bathroom issue? Is that
18 what we're talking about?
19 Q Regarding -- well, did you have more than one
20 conversation with Ms. Conway around this same time about
21 Dr. Tudor?
22 A Not that I recall.
23 Q So during this one conversation, was there
24 anyone else present?
25 A No.

EXHIBIT 6

EXHIBIT 6

E. Todd Presnell
Partner
Direct: 615.252.2355
Fax: 615.252.6355
tpresnell@bradley.com

August 24, 2016

G. Anthony Brown, Esq.
Acting Team Leader
United States Department of Education
Office for Civil Rights
61 Forsyth St., Southwest
Suite 19T10
Atlanta, Georgia 30303-8927

Re: Complaint #04-16-1526

Dear Mr. Brown:

I represent the Sumner County (Tennessee) Board of Education (Board). The Board's Director of Schools, Dr. Phillips, forwarded me your letter—dated August 9, 2016 but received by Dr. Phillips on August 15, 2016—notifying him that the Office for Civil Rights (OCR) is investigating allegations that the Board discriminated against a transgender student on the basis of sex in violation of Title IX and demanding production of eleven categories of information within fifteen calendar days of August 9, 2016.

On August 21, 2016, the United States District Court for the Northern District of Texas issued a nationwide preliminary injunction prohibiting the Office for Civil Rights from "initiating, continuing, or concluding any investigation based on [its] interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex." Prelim. Inj. Order, 37, ECF No. 58, *Texas v. United States*, No. 7:16-cv-00054-O. The State of Tennessee is a party–plaintiff in this case, and the injunction covers OCR investigations of Tennessee's "schools, school boards, and other public, educationally-based institutions." *Id.* I attach a copy of the injunction order for your review.

On August 22, 2016, Herbert H. Slatery III, Tennessee's Attorney General and Reporter, and Andreé S. Blumstein, Tennessee's Solicitor General, informed me, as the Board's attorney, that the injunction bars OCR from proceeding with its investigation and that the Board should not produce any information to OCR or otherwise cooperate with the investigation as long as the injunction remains in place. General Slatery and General Blumstein recommended that the Board inform OCR that, based on the injunction, it considers the investigation closed and will not produce the requested information.

7/3872642.1

EXHIBIT 6

Based on the Court's Preliminary Injunction Order and the recommendation of Tennessee's Attorney General and Reporter and Solicitor General, the Board respectfully declines to produce the requested information and considers this investigation closed.

Yours very truly,

BRADLEY ARANT BOULT CUMMINGS LLP

By: ______________________
E. Todd Presnell

ETP/rc
Enclosures

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

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

DEFENDANTS' REPLY REGARDING PENDING LITIGATION

INTRODUCTION

At the Court's instruction, Defendants filed "a pleading describing" the "litigation currently pending before other federal courts on this subject" so that "the Court can appropriately narrow the scope [of its Preliminary Injunction] if appropriate." Prelim. Inj. Order ("Order") at 37, ECF No. 58. Plaintiffs responded to that filing by inviting the Court to substantially broaden its Preliminary Injunction while the case is litigated. *See* Pls.' Notice of Pending Litigation ("Pls.' Notice"), ECF No. 64. Plaintiffs' understanding of how the Preliminary Injunction should apply to pending litigation is misguided in at least three important respects.

First, Plaintiffs would have this Court "unnecessarily interfere" with a range of pending cases—an outcome that the Court specifically sought to avoid. Order at 37. Plaintiffs ask this Court to prohibit Defendants from advancing certain legal arguments in other federal courts so long as this litigation is pending—even where the arguments do not rely on the Guidance Documents at issue in this lawsuit.[1] Such a prohibition would improperly interfere with the

[1] As the Court is aware, the Amended Complaint challenges several memoranda, fact sheets, and guidance documents reflecting Defendants' interpretation of the prohibition in Title VII and Title IX, and Title IX's implementing regulations, against discrimination "because of sex" or "on the basis of sex" as applied to discrimination against

Executive Branch's authority to conduct litigation and with other courts' ability to consider and resolve the issues before them. *Second*, while Plaintiffs acknowledge that the Preliminary Injunction should cover only cases involving "this subject"—which Plaintiffs describe as "whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities," Pls.' Notice at 1—Plaintiffs inexplicably seek to extend the Preliminary Injunction to cases that do not involve even their own understanding of the "subject" of the injunction. *Third*, Plaintiffs would extend this Court's Preliminary Injunction far beyond the reach of its authority, to extend to cases that do not involve the plaintiff states and where there has not even been an attempt to make any showing of injury or irreparable harm. The Court should reject Plaintiffs' attempt to dramatically expand the scope of the Preliminary Injunction and should clarify that Defendants are not prohibited from fully participating and raising any arguments they consider appropriate in any of the cases mentioned in the parties' notices of pending litigation.[2]

ARGUMENT

1. In its Preliminary Injunction, the Court prohibited defendants from "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated" after the Preliminary

---

transgender individuals because their gender identity is different from their sex assigned at birth. The Court used the term "Guidelines" to refer collectively to six specific documents: (1) a 2010 Dear Colleague Letter issued by the Office for Civil Rights (OCR) of the Department of Education (ED) regarding harassment and bullying; (2) an April 2014 ED OCR Guidance Document regarding sexual violence; (3) a December 2014 memo issued by then Attorney General Eric Holder; (4) a June 2015 Occupational Safety and Health Administration (OSHA) Best Practices guide; (5) a May 3, 2016 Equal Employment Opportunity Commission (EEOC) fact sheet; and (6) a May 13, 2016 Dear Colleague Letter on transgender students issued jointly by ED and the Department of Justice (DOJ) (hereinafter, referred to as the "Guidelines" or the "Guidance Documents"). *See* Order at 3 n.4. Those "Guidelines" also cover subjects that have nothing to do with this litigation, as discussed *infra* and in Defendants' Motion for Clarification.

[2] The one exception is the Department of Education (ED) matter regarding the Sumner County School District in Tennessee. *See* Pls.' Notice at 6-7. Plaintiffs erroneously include this matter on their list of pending litigation, when it is actually an ED investigation, which was initiated prior to the issuance of the injunction. In any event, as it involves access to restrooms and locker rooms by a transgender individual in a school district in a plaintiff state, ED has paused its investigation for the time being. However, Defendants have asked the Court to clarify that this and other similar investigations can continue as long as they do not rely on the Guidance Documents at issue in this lawsuit, which are the only even arguably final agency action that Plaintiffs have challenged. *See* Defs.' Mot. for Clarification at 11-12.

Injunction Order was issued. Order at 37. Plaintiffs now suggest that this Court should also bar their use in certain cases that were already pending at the time that the Preliminary Injunction was entered, effectively forbidding other federal judges from evaluating these documents for themselves. Plaintiffs also suggest that, in one case, this Court "should preclude Defendants' future participation, . . . both before the district court [in which Defendants have already filed a statement of interest] and the Sixth Circuit Court of Appeals," rather than allowing those courts to manage their own cases. Pls.' Notice at 12. And Plaintiffs ask this Court to involve itself in discovery disputes before another district court, determining what questions Defendants may ask in their depositions. *Id.* at 4-5. Although Plaintiffs concede that the Supreme Court should remain free to govern its own proceedings, *id.* at 12-13, they would nonetheless have this Court "unnecessarily interfere" with a range of cases before other federal courts.

Plaintiffs suggest that this Court erred when it distinguished between cases initiated after the issuance of its Preliminary Injunction and those filed before, barring Defendants "from using the Guidelines or asserting the Guidelines carry weight" only in cases begun after the injunction was issued. Order at 37. Plaintiffs argue that pending cases in which no responsive pleading had been filed are indistinguishable from cases post-dating the Preliminary Injunction. *See* Pls.' Notice at 9. Indeed, they assert that this Court should preempt numerous other federal courts with pending matters because Plaintiffs think that "principles of judicial economy" counsel a broader injunction, and indeed that "justice" would "be inhibited" by allowing other courts to exercise their own legally-bestowed authority to adjudicate various questions, including questions concerning subjects that Plaintiffs concede are *not* the "subject" of the Preliminary Injunction. *Id.* at 9, 10.

Plaintiffs' position suggests a skewed understanding of the relationships between federal courts, under which a complaint filed in one court can be construed as "functionally . . . a brief as

amici curiae in support of Plaintiffs" in another, rather than an independent invocation of federal court jurisdiction. *Id.* at 9 n.4. It is common for a particular question of federal law to be at issue before two or more district courts or courts of appeals. When that occurs, the district courts resolve their cases independently, as do their respective courts of appeals. When it becomes necessary, the Supreme Court will grant review to resolve disagreements between the lower courts. There is no principle of judicial economy that authorizes one district court to impose its view of the law upon another, and justice is not inhibited when district courts disagree. *See W. Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) ("The federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs."). Quite the contrary, such disagreements provide assistance to reviewing courts by airing competing legal positions. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984). This Court apparently had at least some of these concerns in mind when it distinguished between cases in which a complaint had been filed—cases that had already been assigned to district judges of authority equal to this Court's—and those in which such action was only contemplated. Plaintiffs offer no explanation for their contrary view that this Court can and should interject itself into similar cases pending before other courts.[3]

Plaintiffs also urge this Court to decide when other federal district courts and courts of appeals may hear argument from Defendants as interested parties or friends of the court. Under

[3] To be clear, it is Defendants' position that the Preliminary Injunction should not be read to interfere with litigation in which Plaintiffs are not parties in other courts, even if filed after the date that the injunction was issued, such as *Privacy Matters v. United States*, No. 16-cv-3015 (D. Minn. Sept. 7, 2016). Understood otherwise, the injunction would raise significant questions and concerns—both logistical and legal. Would plaintiffs in other cases be barred from asserting their legal rights against the government? Or would Defendants be barred from defending themselves? As explained below and in Defendants' Motion for Clarification, any reading of the injunction that would prevent the Attorney General from deciding what arguments should be made in defense of federal agencies in litigation—and from actually making such arguments—would be inappropriate. *See* Defs.' Mot. for Clarification at 12-15.

this Court's Preliminary Injunction, Defendants may offer their views to other courts so long as they do not "enforc[e] the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions" or "us[e] the Guidelines or assert[] the Guidelines carry weight in any litigation initiated following the date of this Order." Order at 37. Again, Plaintiffs object to the apparent meaning of the Preliminary Injunction. Plaintiffs argue that Defendants should be precluded "from involving themselves in private party litigation in any capacity, including participation as *amicus curiae* or the filing of a Statement of Interest." Pls.' Notice at 2; *see also id.* at 6, 11-12. But such activity—apart from being specifically authorized by statute, *see* 28 U.S.C. § 517, as discussed below—does not constitute enforcement of the Guidelines, and thus does not even arguably fall within the scope of this Court's Preliminary Injunction as long as Defendants do not assert that the Guidelines carry any weight.[4] Nowhere do Plaintiffs explain why they believe that the Preliminary Injunction should encompass amicus participation or statements of interest, and it should not.

Moreover, Plaintiffs concede that the Preliminary Injunction should not prohibit Defendants from participating as amici in the Supreme Court in *Gloucester County v. G.G.*, No. 16-273 (Aug. 29, 2016), because Supreme Court Rule 37(4) provides that "[n]o motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General." Pls.' Notice at 12-13. But the federal courts of appeals have the same rule. *See* Fed. R. App. P. 29(a) ("The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court."). And Congress provided for comparable authority of the Attorney General in federal district courts, providing explicitly that,

[4] As Defendants noted in their Motion for Clarification, there are separation of powers concerns even if the Preliminary Injunction is read only to prevent the government from arguing that the Guidance Documents are entitled to deference in litigation initiated after August 21, 2016. *See* Defs.' Mot. for Clarification at 13 n.4. Defendants respectfully disagree with this aspect of the Preliminary Injunction (among others).

"[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. Similarly, the EEOC has authority to conduct certain litigation on its own behalf and to file amicus briefs. *See* Defs.' Mot. for Clarification at 14-15. There is no basis for construing the Preliminary Injunction to avoid interference with the Supreme Court Rule, but to allow—or even require— interference with rules of other federal courts or, indeed, federal statutory authority. Indeed, there is no basis for interfering with Defendants' authority to participate as amicus in any forum.

Plaintiffs' interpretation would raise significant separation of powers concerns, as Defendants explained in their recently-filed Motion for Clarification. *See* Defs.' Mot. for Clarification at 12-16. The Attorney General's authority to conduct litigation, which extends to advocating for the interests of the United States in cases to which the United States is not a party, may be supervised only by the President. *See United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings . . . be faithfully executed."); U.S. Const. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed"); *The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief*, 14 Op. O.L.C. 13, 19 (1990) ("The filing of briefs in courts of law through [the President's] subordinates—particularly as such filings may bear on the legality of action taken by Executive departments or agencies—is integral to the discharge of his constitutional duty to see that the laws are faithfully executed."). This Court did not suggest that it was attempting to interfere with the exercise of

these constitutionally and statutorily-delegated authorities, and the Preliminary Injunction should not now be interpreted to do so.[5]

2. Plaintiffs acknowledge that the Preliminary Injunction should encompass only those cases that involve its "subject," which Plaintiffs describe as "whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities," Pls.' Notice at 1.[6] *See id.* ("The first filter or parameter of the injunction pertains to whether litigation or disputes involve 'this subject.'"). However, they then take a completely contrary position in arguing that the injunction should cover litigation that does not involve "this subject."

For example, with respect to *United States v. Southeastern Oklahoma State University*, No. 5:15-cv-324 (W.D. Okla.), in which DOJ has alleged that a university professor was denied a promotion because she is transgender, Plaintiffs admit that the "DOJ's complaint doesn't make 'this subject' a feature of the litigation," but argue that the injunction should nevertheless restrict DOJ's legal arguments in that litigation. Pls.' Notice at 3-6. But the United States has not asserted *any* claim in that case that the defendant University violated Title VII because it denied the professor access to any "intimate facilities." Thus, the "subject" of the Preliminary Injunction in the instant case is not a claim made by the government in the other case. Plaintiffs apparently object to a line of questioning that DOJ undertook in some depositions, questioning University administrators about conversations involving the professor's use of bathrooms, which is at issue in the professor's complaint in intervention. Plaintiffs suggest that this line of questioning could

[5] Defendants have also asked the Court to clarify that, even in litigation to which the Preliminary Injunction applies, it should not be read to preclude Defendants from asserting arguments regarding their interpretation of Title VII and Title IX as applied to transgender individuals. *See* Defs.' Mot. for Clarification at 12-15.

[6] Defendants do not agree that "the subject" of the injunction is even this broad, as, *inter alia*, it should not be understood to encompass Title VII. *See* Defs.' Mot. for Clarification at 10-11. Moreover, Defendants note that they do not contest that federal law permits entities to separate the sexes in intimate facilities. *See, e.g.*, 34 C.F.R. § 106.33. Rather, "the subject" of the injunction is that part of the Guidelines articulating that under Title IX, transgender men, like all men, may use men's facilities and that transgender women, like all women, may use women's facilities.

be understood as a surreptitious attempt to expand the DOJ complaint, which (as Plaintiffs admit) could occur only with the University's consent. Pls.' Notice at 4 n.1.[7] Simply stated, asking questions about a transgender employee's use of bathroom facilities in discovery—with its relaxed relevance standards—is not "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." Order at 37.

Similarly, *EEOC v. Bojangles Restaurants, Inc.*, No. 5:16-cv-00654 (E.D.N.C. July 6, 2016), and *Robinson v. Dignity Health*, No. 4:16-cv-3035 (N.D. Cal. June 6, 2016), do not involve the subject of the Preliminary Injunction.[8] *Bojangles Restaurant* is a case alleging sexual harassment and retaliation against a transgender individual, and *Robinson* involves a claim of discrimination related to health insurance benefits. Neither case involves access to sex-segregated facilities, and there is no plausible reason that the Preliminary Injunction should be extended to those cases, as Plaintiffs now suggest, *see* Pls.' Notice at 9, 11. Plaintiffs' position is even more confounding when considered in conjunction with their concession that certain cases—for example, *Broussard v. First Tower Loan, LLC*, No. 2:15-cv-1161 (E.D. La. Apr. 13, 2015); and *EEOC v. Help at Home, Inc.*, No. 2:16-mc-1188 (N.D. Ala. July 20, 2016)—fall outside the scope of the Preliminary Injunction precisely because they do not involve "this subject." *See* Pls.' Notice at 3. There is no reason to understand this limitation to apply to some cases but not to others.

---

[7] Again, the United States has not raised any claim in the *Southeastern Oklahoma State University* case turning on the professor's access to restrooms or similar facilities. Nor has the United States sought discovery related to the professor's access to women's restrooms for purposes of expanding the complaint to make such a claim. Nor is the United States requesting a change to the current facilities access policies that the Regional University System of Oklahoma has presented in the case. Instead, the discovery mentioned by Plaintiffs is relevant to witness credibility and motive, among other aspects of the case. For example, since the professor and some of the defendants' witnesses disagree on what those witnesses told the professor regarding her access to women's restrooms, that factual dispute is relevant to the credibility of the professor and those witnesses.

[8] In *Robinson*, the district court granted the EEOC's motion to file an amicus brief and deemed the brief filed. The Court also accepted the defendant's brief in response to the EEOC amicus brief and ordered the EEOC to file a reply, which it did on September 8.

Plaintiffs also seem to suggest that the Preliminary Injunction should apply with respect to the entirety of the Guidelines "notwithstanding the circumstances presented in any given litigation" and even where the litigation does not involve the "subject" of the Preliminary Injunction. Pls.' Notice at 8. Again, this argument cannot be reconciled with Plaintiffs' admission that the scope of the Preliminary Injunction is properly limited to its "subject." As Defendants explained in their Motion for Clarification, the Guidelines address issues far beyond the issue of the use of sex-segregated facilities by transgender individuals in educational settings. These issues include harassment, bullying, and sexual violence—not limited to transgender individuals—and discrimination based on race, color, national origin, disability, and sex discrimination that does not involve transgender individuals. *See* Defs.' Mot. for Clarification at 6-8. There is simply no basis to think that the Court intended to enjoin these aspects of the Guidelines, which have not been challenged by Plaintiffs and were not the subject of the Preliminary Injunction proceedings. Such a broad interpretation of the injunction would be inappropriate because, among other reasons, there has been no showing—indeed, no allegation—and no finding by the Court of injury or irreparable harm with respect to these other forms of discrimination.

Plaintiffs also suggest that the Preliminary Injunction extends to any "disputes within [their] borders." Pls.' Notice at 2. Plaintiffs offer no explanation for their broad reading of the Preliminary Injunction, to somehow extend to matters involving private parties within the plaintiff states. Indeed, *Bojangles Restaurants* and *Robinson* are cases that involve private parties *outside* of the borders of the plaintiff states. There is no basis for such an expansion of the Preliminary Injunction as, *inter alia*, Plaintiffs do not have standing to litigate the rights of private parties and have made no showing of injury or harm with respect to private parties.

3. Finally, Plaintiffs would have the Court exceed its authority by enjoining Defendants from participating in litigation and raising certain arguments even where the matter does not involve any of the plaintiff states—specifically, the aforementioned *Bojangles Restaurants* and *Robinson* matters, as well as *Privacy Matters v. United States*, No. 16-cv-3015 (D. Minn. Sept. 7, 2016); *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb. July 8, 2016); *Women's Liberation Front v. U.S. Department of Justice*, No. 1:16-cv-915 (D.N.M. Aug. 11, 2016); and *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich. Sept. 5, 2014).[9] As explained in Defendants' Motion for Clarification, this position is problematic in at least two respects. First, such an injunction would be far broader than necessary to provide Plaintiffs with complete relief. *See* Defs.' Mot. for Clarification at 17-18. Second, and relatedly, it would exceed the scope of any plausible showing of injury or irreparable harm. *See id.* at 18-19. In short, Plaintiffs cannot plausibly allege that they suffer any harm when Defendants participate in litigation that does not involve their states. Nor has the Court made any finding of such harm, which would be necessary to justify the entry of preliminary injunctive relief.

CONCLUSION

Plaintiffs' attempts to expand this Court's Preliminary Injunction are unpersuasive. As explained in their Notice of Pending Litigation, Defendants do not believe that this Court's injunction interferes with any litigation that is currently pending (although clarification is required as to many other matters, as discussed in Defendants' Motion for Clarification). Defendants respectfully ask that this Court make clear that the Preliminary Injunction does not prohibit Defendants from fully participating in all of the pending litigation identified by the parties.

[9] Plaintiffs also suggests that Defendants should be precluded from raising the "subject" of the Preliminary Injunction in matters that were pending at the time that the injunction was issued, in which "this subject" is not currently as issue, and that do not involve the plaintiff states. *See* Pls.' Notice at 11. But the Preliminary Injunction does not impose such a prohibition, and Plaintiffs fail to explain why it should.

Dated: September 14, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2016, a copy of the foregoing Reply Regarding Pending Litigation was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
Benjamin L. Berwick

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

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

DEFENDANTS' MOTION FOR CLARIFICATION OF THE COURT'S PRELIMINARY INJUNCTION ORDER AND UNOPPOSED REQUEST FOR EXPEDITED CONSIDERATION

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 5

A. The Court should clarify that the Preliminary Injunction is limited to addressing the plaintiffs' allegations of harm. 6

1. The Court should clarify that the Preliminary Injunction does not extend beyond the use of sex-segregated facilities by transgender individuals in public schools to affect programs addressing discrimination on the basis of race, national origin, or disability and other activities about which the plaintiffs have alleged no harm. 6

2. The Court should clarify that the Preliminary Injunction does not extend beyond the use of sex-segregated facilities to limit well-established prohibitions on sex stereotyping, bullying, and harassment directed towards transgender individuals. 8

3. The Court should clarify that the Preliminary Injunction, which arises out of claims related to public educational facilities under Title IX, does not affect employment matters arising under Title VII. 10

4. The Court should clarify that the Preliminary Injunction does not extend beyond enjoining the alleged final agency action to limit other, future actions over which there is no subject-matter jurisdiction. 11

B. The Court should clarify that the Preliminary Injunction does not limit Defendants' ability to urge other courts to adopt their interpretation of Title VII and Title IX, including in courts that already have accepted that interpretation. 12

C. The Court should clarify that the Preliminary Injunction does not limit the enforcement of anti-discrimination statutes outside of the plaintiff states. 16

D. The Court should clarify that the Preliminary Injunction does not enjoin any activities or programs of the Department of Labor. 20

E. The Court should clarify that the Preliminary Injunction does not enjoin the EEOC from fulfilling statutory duties necessary to protect the rights of individuals alleging discrimination. 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Alabama Nursing Home Asso. v. Harris,
617 F.2d 385 (5th Cir. 1980) 3, 5

Califano v. Yamasaki,
442 U.S. 682 (1979) 2, 17

Carcaño v. McCrory,
No. 1:16-cv-236 (M.D.N.C. Aug. 26, 2016)........15

Church of the Holy Light of the Queen v. Holder,
443 F. App'x 302 (9th Cir. 2011) 20

EEOC v. AirGuide Corp.,
No. 7-415, 1978 WL 134 (S.D. Fla. Aug. 29, 1978) 22

EEOC v. Bass Pro Outdoor World, L.L.C.,
No. 15-20078, 2016 WL 3397696 (5th Cir. June 17, 2016) 21

EEOC v. Boh Bros. Constr. Co.,
731 F.3d 444 (5th Cir. 2013) (en banc) 9

EEOC v. Burlington N., Inc.,
644 F.2d 717 (8th Cir. 1981) 22

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 13

Flores v. Huppenthal,
789 F.3d 994 (9th Cir. 2015) 18

G.G. ex rel. Grimm v. Gloucester County Sch. Bd.,
822 F.3d 709 (4th Cir. 2016), *mandate recalled, stay granted*, 136 S. Ct. 2442, *petition for certiorari pending*, No. 16-273 15

Glenn v. Brumby,
663 F.3d 1312 (11th Cir. 2011) 9

Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers,
415 U.S. 423 (1974) 20

Harris County v. Carmax Auto Superstores Inc.,
177 F.3d 306 (5th Cir. 1999) 20

Holland v. Nat'l Mining Ass'n,
309 F.3d 808 (D.C. Cir. 2002) 19

Hollon v. Mathis Indep. Sch. Dist.,
491 F.2d 92 (5th Cir. 1974) (per curiam) 17

Howe v. Yellowbook USA,
840 F. Supp. 2d 970 (N.D. Tex. 2011) 22

Los Angeles Haven Hospice, Inc. v. Sebelius,
638 F.3d 644 (9th Cir. 2011) 17, 19

Lewis v. Casey,
518 U.S. 343 (1996) 18

Lion Health Servs. v. Sebelius,
635 F.3d 693 (5th Cir. 2011) 17

Mach Mining, L.L.C. v. EEOC,
135 S. Ct. 1645 (2015) 23

Meinhold v. U.S. DOD,
34 F.3d 1469 (9th Cir. 1994) 17

Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.,
362 F.3d 333 (5th Cir. 2004) 11

Price v. Choctaw Glove & Safety Co.,
459 F.3d 595 (5th Cir. 2006) 22

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 9

Privacy Matters v. U.S. Dep't of Educ.,
No. 0:16-cv-3015 (Sept. 7, 2016) 15

Sanchez v. Standard Brands, Inc.,
431 F.2d 455 (5th Cir. 1970) 23

Scott v. Schedler,
826 F.3d 207 (5th Cir. 2016) 5

Smith v. City of Salem,
378 F.3d 566 (6th Cir. 2004) 9

Texas v. United States,
787 F.3d 733 (5th Cir. 2015) 17

The Real Truth About Abortion, Inc. v. FEC,
681 F.3d 544 (4th Cir. 2012) 17

U.S. Dep't of Def. v. Meinhold,
114 S. Ct. 374 (1993) 17

United States v. Cox,
342 F.2d 167 (5th Cir. 1965) 14

United States v. Mendoza,
464 U.S. 154 (1984) 18

United States v. Nixon,
418 U.S. 683 (1974) 13

Va. Soc'y for Human Life, Inc. v. FEC,
263 F.3d 379 (4th Cir. 2001) 17, 18

Constitutional Law

U.S. Const. art. II, § 3 14

Statutes

5 U.S.C. § 705 (2015) 18

28 U.S.C. § 516 (2012) 13

28 U.S.C. § 517 (2012) 13, 15

28 U.S.C. § 518 (2012) 13

28 U.S.C. § 519 (2012) 13

29 U.S.C. § 651 (2012) 20

42 U.S.C. § 2000e-5(b) (2012) 13, 21, 22, 23

42 U.S.C. § 2000e-16 (2012) 23

Administrative and Executive Materials

29 C.F.R. § 1601.28(a)(2) (2013) 23

29 C.F.R. Part 1614 (2010) 24

34 C.F.R. § 106.33 (2013) 7, 15

Effect of an Appropriations Rider on the Auth. of the Justice Dep't to File a Sup. Ct. Amicus Brief,
14 Op. O.L.C. 13 (Feb. 5, 1990) 14

Rules of Evidence and Procedure

Fed. R. App. P. 29(a) 15

Fed. R. Civ. P. 65 .... 5, 20

INTRODUCTION

Defendants move to clarify the scope of the Preliminary Injunction issued by this Court. Defendants respectfully disagree with the Court's conclusion that entry of a preliminary injunction was warranted in this case. This filing, however, addresses only the scope of the Court's injunction. As explained below, the terms of the order entered by the Court could be read to extend well beyond the appropriate scope of potential relief. The Court should clarify that its order does not extend so broadly.

Based on Plaintiffs' motion for a preliminary injunction, as well as the August 12, 2016 hearing before this Court on Plaintiffs' motion, the preliminary injunction request is about access by transgender individuals to sex-segregated restrooms, locker rooms, and similar facilities in public educational settings. The Court described this matter as "present[ing] the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school." Prelim. Inj. Order ("Order") at 1, ECF No. 58; *see also* Pls.' Notice of Pending Litigation ("Pls.' Notice") at 1, ECF No. 64 (describing the "subject" of the Preliminary Injunction as "whether federal law permits entities subject to Titles VII and IX to separate the sexes *in intimate facilities*" (emphasis added)). However, the injunction could be read to sweep far more broadly than the Court may have intended, to encompass a broad range of federal programs, responsibilities, and activities that are not at issue in this litigation, that were not the subject of any allegations of harm by Plaintiffs or findings of harm by this Court in support of the Preliminary Injunction, and that are not within the appropriate scope of preliminary injunctive relief.

First, the Preliminary Injunction could be read to apply to protections unrelated to sex-segregated facilities in public schools, including those targeting discrimination based on race, color, national origin, disability, and sex discrimination that does not involve transgender individuals; bullying, harassment, and sexual violence directed at transgender individuals; and employment discrimination. For example, a literal reading of the text of the Preliminary Injunction could prohibit Defendants, during the pendency of this litigation, from relying on six memoranda, fact sheets, and guidance documents (hereinafter collectively referred to as "Guidance Documents" or the "Guidelines," as the Court used that collective term, *see* Order at 3 n.4, for convenience), even to the extent that they concern legal questions not at issue here. Consequently, if read broadly, the Preliminary Injunction would exceed the relief that could be connected to Plaintiffs' request for a preliminary injunction or that would be permitted under the Administrative Procedure Act (APA).

Second, the Preliminary Injunction could be read to prohibit Defendants from advancing certain legal arguments in other federal courts so long as this litigation is pending—even where the arguments do not rely on the Guidance Documents at issue in this lawsuit, and even where those arguments already have been accepted by those federal courts. Such a prohibition would improperly interfere with the Executive Branch's authority to conduct litigation and with other courts' ability to consider and resolve the issues before them.

Third, the geographic scope of the Preliminary Injunction also could be read to exceed the proper scope of relief available to the plaintiffs in this case. Although the Court stated that the "injunction should apply nationwide," Order at 36, the relief afforded seems to be limited to the plaintiff states, at least in some respects. If the Preliminary Injunction were to be read more broadly, to encompass non-plaintiff states, it would run afoul of the Supreme Court's admonition

that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), who have no cognizable interest in application of the Guidance in states other than their own.

Fourth, aspects of the Preliminary Injunction could be read to preclude certain federal agencies from discharging statutory obligations, in a manner that might extend beyond the issues presented in this case and impair the rights of third parties.

In each of these respects, the Preliminary Injunction is susceptible to more than one reading, and this Court's clarification could demonstrate that some or all of the sources of potential overbreadth identified here were not intended. Defendants therefore move for clarification of the scope of the Preliminary Injunction, to provide more "explicit notice of the precise conduct that is outlawed." *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 385, 387-88 (5th Cir. 1980).

Given the importance of the issues identified herein, Defendants request expedited briefing and consideration of this motion. Specifically, Defendants propose that Plaintiffs file a response to this motion for clarification by September 19, 2016, and that Defendants file a reply by September 23, 2016; and Defendants respectfully ask that the Court issue a ruling by October 3, 2016. The undersigned counsel for Defendants consulted with counsel for Plaintiffs, who represented that Plaintiffs do not oppose this expedited briefing schedule.

BACKGROUND

Plaintiffs brought this lawsuit against the U.S. Departments of Education ("ED"), Justice ("DOJ"), and Labor ("DOL"), as well as the Equal Employment Opportunity Commission ("EEOC") and various agency officials in their official capacities (collectively, "Defendants"). ECF No. 1. The Complaint challenges several memoranda, fact sheets, and guidance documents reflecting Defendants' interpretation of the prohibition in Title VII and Title IX, and Title IX's implementing regulations, against discrimination "because of sex" or "on the basis of sex" as

applied to discrimination against transgender individuals because their gender identity is different from their sex assigned at birth. Plaintiffs moved for a preliminary injunction, ECF No. 11, which the Court granted on August 21, 2016.

In its Preliminary Injunction, the Court enjoined Defendants during the pendency of this litigation from (1) "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions," (2) "initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex," and (3) "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order." Order at 37. The Court used the term "Guidelines" to refer collectively to six specific documents: (1) a 2010 Dear Colleague Letter issued by ED's Office for Civil Rights ("OCR") regarding harassment and bullying; (2) an April 2014 ED OCR Guidance Document regarding sexual violence; (3) a December 2014 memo issued by then Attorney General Eric Holder; (4) a June 2015 OSHA Best Practices guide; (5) a May 3, 2016 EEOC fact sheet; and (6) a May 13, 2016 Dear Colleague Letter on transgender students issued jointly by ED and DOJ. *See id.* at 3 n.4.

The Court concluded that its Preliminary Injunction "should apply nationwide." *Id.* at 36. But it recognized that some states "do not want to be covered by this injunction," and said that the Preliminary Injunction "therefore only applies to those states whose laws" do not "authorize schools to define sex to include gender identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities." *Id.* at 36-37. The Court also stated that "an injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject." *Id.* at 37. It therefore directed the parties to "file a pleading describing"

such cases currently pending before other courts, so that the Court could "appropriately narrow the scope [of its Preliminary Injunction] if appropriate." *Id.* Defendants filed that pleading on August 30, 2016. *See* ECF No. 61.

ARGUMENT

Although Defendants disagree that preliminary injunctive relief is warranted in this case, Defendants are implementing and complying with this Court's Preliminary Injunction—and will continue to do so—pending further action by this Court or on review. As currently drafted, however, the Preliminary Injunction could be read to implicate numerous federal programs, responsibilities, and activities that are not the subject of this litigation and were not within the scope of the preliminary injunctive relief requested by Plaintiffs. The Preliminary Injunction thus may have unintended effects on the ability of the Executive Branch to carry out the duties and obligations assigned to it by Congress in other settings, under other statutes, and outside the plaintiff states, and would undermine the agencies' ability to protect individuals from forms of discrimination that are not at issue in this case.

Because, as this Court has recognized, "[a] preliminary injunction 'is an extraordinary and drastic remedy,'" Order at 8, and because Fed. R. Civ. P. 65(d) requires a preliminary injunction to provide "explicit notice of the precise conduct that is outlawed," *Alabama Nursing Home Ass'n*, 617 F.2d at 387-88, Defendants file this motion in an effort to clarify the scope of the Court's Preliminary Injunction and thereby to facilitate the Defendants' understanding of and compliance with this Court's directives. *Cf. Scott v. Schedler*, 826 F.3d 207, 208 (5th Cir. 2016) (emphasizing need "to prevent uncertainty and confusion on the part of those faced with injunctive orders").

A. The Court should clarify that the Preliminary Injunction is limited to addressing the plaintiffs' allegations of harm.

1. The Court should clarify that the Preliminary Injunction does not extend beyond the use of sex-segregated facilities by transgender individuals in public schools to affect programs addressing discrimination on the basis of race, national origin, or disability and other activities about which the plaintiffs have alleged no harm.

In seeking a preliminary injunction, Plaintiffs focused on the application of the Guidelines to the use of sex-segregated bathrooms, locker rooms, and similar facilities by transgender individuals in public schools and other public educational institutions. The Court's order, however, could be read to limit Defendants' ability to enforce and interpret anti-discrimination statutes in areas distinct from the subject of Plaintiffs' request for relief. Such a reading would exceed the Court's authority by giving relief beyond that necessary to address the alleged harms, in a manner that would interfere with the Executive Branch's obligation to enforce federal law. We respectfully ask the Court to clarify that the preliminary injunction applies only to transgender individuals' use of sex-segregated facilities in public educational institutions.

Plaintiffs asserted that the challenged Guidelines had "informed the nation's schools that they must immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk losing Title IX-linked funding." ECF No. 11 at 1. And Plaintiffs' assertions of irreparable harm were limited to access to sex-segregated facilities by transgender persons. Furthermore, with their preliminary injunction papers, Plaintiffs submitted evidence concerning enforcement actions taken by Defendants with respect to access by transgender persons to bathrooms, locker rooms, and similar facilities, and the restroom policies of the Harrold Independent School District and others allegedly at risk of enforcement action. *See* Pls.' Notice at 1 (describing the "subject" of the Preliminary Injunction as limited to "intimate facilities").

This Court has similarly indicated that the Preliminary Injunction is limited to the application of the Guidelines to transgender issues relating to the use of intimate facilities in educational settings. Indeed, the Court described it as "present[ing] the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school." Order at 1. The Court explained that Plaintiffs challenge "Defendants' assertions that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex." *Id.* at 2-3. In concluding that, for purposes of the Preliminary Injunction, Plaintiffs had demonstrated a likelihood of success on the merits, this Court relied principally on its reasoning that the text of an ED regulation governing sex-segregated facilities under Title IX, 34 C.F.R. § 106.33, unambiguously permitted separation of the sexes based on "biological and anatomical differences between male and female students as determined at their birth." Order at 31. And in weighing the remaining three preliminary-injunction factors, including irreparable harm, this Court similarly focused on Plaintiffs' asserted privacy, safety, and sovereignty interests in "differentia[ting] intimate facilities on the basis of biological sex." *Id.* at 34.

As currently drafted, however, the Preliminary Injunction could be understood to implicate a broad array of matters beyond the use by transgender persons of sex-segregated bathrooms, locker rooms, and similar facilities, because some of the enjoined Guidance Documents address subjects beyond the application of Title VII and Title IX to the use of such facilities by transgender persons. For instance, the 2010 ED OCR Dear Colleague Letter (entitled "Dear Colleague Letter: Harassment and Bullying") describes conduct generally—not limited to transgender individuals—

that constitutes harassment in violation of Title IX, as well as other federal statutes that were not the subject of this case—such as Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990—and schools' obligations to investigate and remedy student complaints of harassment and bullying. *See* ECF No. 6-1. Much of this document concerns harassment and bullying based on race, national origin, disability. *See id.* Similarly, the April 2014 ED Guidance (entitled "Questions and Answers on Title IX and Sexual Violence") addresses a wide array of topics related to sexual violence against students—again, not limited to transgender victims—at educational institutions receiving federal funds, including the definition of sexual violence, procedural requirements for handling complaints, confidentiality and reporting requirements, training, and prevention. *See* ECF No. 6-2. The greater part of these two documents does not specifically address transgender individuals, nor do the documents address the use of restrooms, locker rooms, and similar facilities by transgender individuals. Because Plaintiffs do not seek a preliminary injunction against the Guidelines to the extent that they address matters beyond the use of such facilities by transgender persons, Defendants ask this Court to clarify that the Preliminary Injunction does not enjoin Defendants' continued use of and reliance upon those portions of the Guidelines that address other subjects.

2. The Court should clarify that the Preliminary Injunction does not extend beyond the use of sex-segregated facilities to limit well-established prohibitions on sex stereotyping, bullying, and harassment directed towards transgender individuals.

Defendants further seek to clarify that, aside from the question of what portion of the Guidelines they may rely on, the Preliminary Injunction does not enjoin Defendants from protecting transgender individuals from discrimination in contexts other than the use of such sex-segregated facilities, such as discrimination against transgender individuals with respect to hiring,

firing, and other employment decisions; bullying, sexual, or other physical violence; or other forms of harassment and discrimination against transgender students in schools and transgender individuals in the workplace. For example, ED's OCR often receives complaints about bullying or harassment of transgender individuals in schools. And the EEOC investigates complaints of workplace discrimination against transgender individuals, such as firing, failure to hire or promote, harassment, and other employment practices. These complaints often arise with respect to private employers—entities that were not the subject of Plaintiffs' motion for preliminary injunction or this Court's Order granting that motion, and with respect to which Plaintiffs have not alleged, let alone established, any irreparable harm. None of these other forms of discrimination was at issue in the proceedings on Plaintiffs' preliminary injunction motion, and the Court should not issue a preliminary injunction that would prevent the agencies from protecting transgender individuals from such discrimination through investigation or enforcement.

Defendants also note that, in many instances, the agencies' applications of the law in contexts that do not involve sex-segregated facilities (such as bullying and harassment in schools) rely on the settled interpretation that Title VII and Title IX prohibit discrimination on the basis of sex-stereotyping—that is, discrimination based on a perception that an individual fails to conform to stereotypical notions of masculinity or femininity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 454 (5th Cir. 2013) (en banc) ("[N]umerous courts, including ours, have recognized that a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes."). For example, ED receives complaints regarding the harassment or bullying of transgender individuals in schools, and the EEOC receives charges regarding harassment and discrimination against transgender individuals in the workplace. Often, the

harassment or discrimination is based on the transgender individual's failure to conform to typical notions of how a male or a female should look or behave. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). Defendants therefore request that the Court confirm that the injunction does not prohibit the agencies from investigating and enforcing the law to prevent discrimination based on unlawful sex-stereotyping against transgender persons.

3. The Court should clarify that the Preliminary Injunction, which arises out of claims related to public educational facilities under Title IX, does not affect employment matters arising under Title VII.

Although the Court's Preliminary Injunction makes passing references to Title VII, its overwhelming focus is on Title IX and its implementing regulations, and the issue of access to sex-segregated restrooms, locker rooms, and similar facilities by transgender individuals in schools. For example, the Background section of the Court's opinion on the Preliminary Injunction includes a subsection on Title IX, but not Title VII. *See* Order at 5. In a footnote, the Court explained that "where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX because the two statutes are commonly linked." *Id.* at 9 n.7. In finding that Plaintiffs have standing, the Court focused on "various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities." *Id.* at 10; *see also id.* at 10 n.8 (listing state laws). In determining that Plaintiffs are likely to succeed on the merits of their claim, the Court relied on its conclusion that Title IX's implementing regulations are unambiguous. *See id.* at 31-33. Furthermore, the Court's analysis of irreparable harm rested entirely on alleged inconsistencies between the aforementioned state statues regarding public educational institutions and Defendants' interpretation of Title IX and its implementing

regulations. *See id.* at 33-35.[1] Perhaps most importantly, the terms of the Preliminary Injunction do not prohibit investigations under Title VII, as the Court enjoined Defendants "from initiating, continuing, or concluding any investigation" based only on Defendants' interpretation of Title IX. *Id.* at 37. And the Preliminary Injunction does not prohibit Defendants from taking enforcement actions with respect to Title VII, provided that such activities are not directed against "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." Therefore, Defendants ask the Court to confirm that the Preliminary Injunction does not apply to their interpretation of Title VII.[2]

4. The Court should clarify that the Preliminary Injunction does not extend beyond enjoining the alleged final agency action to limit other, future actions over which there is no subject-matter jurisdiction.

The Preliminary Injunction could also be read as providing a remedy broader than would be permitted under the APA. In their motion for a preliminary injunction, Plaintiffs argued that the issuance of the Guidelines violated the APA. Of course, agency action is subject to challenge under the APA only if it is final. *See, e.g.*, *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir. 2004) ("If there is no 'final agency action' a federal court lacks subject matter jurisdiction."). The Court agreed with Plaintiffs' argument, concluding, among other things, "that the Guidelines are final agency action under the APA." Order at 17. The Court therefore enjoined Defendants "from enforcing *the Guidelines*

---

[1] The Court suggests that Defendants conceded that "the Guidelines conflict with Plaintiffs' policies and practices." Order at 34; *see also* Order at 35. But Defendants made no such concession. Instead, they stated that Plaintiffs identified "a small number of specific 'policies and practices' that *they claim* are in conflict with defendants' interpretation of Title IX." Defs.' Opp'n to Pls.' App. for Prelim. Inj. at 8, ECF No. 40 (emphasis added). In any event, this statement applied only to Title IX. With respect to Title VII, Defendants correctly pointed out that "Plaintiffs do not identify a single action being taken against them as employers under Title VII. Nor have they identified a single way that their conduct has changed as a result of the agencies' interpretation of Title VII." *Id.*

[2] By its terms, the Preliminary Injunction already makes clear that it does not apply to *investigations* involving Defendants' interpretation of Title VII or to enforcement related to Title VII against parties other than the Plaintiffs.

against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." Order at 37 (emphasis added). Thus, based on the explicit terms of the Preliminary Injunction, it appears that Defendants are not prohibited from enforcing their interpretation of the underlying statute against Plaintiffs and their public educational institutions, provided that they do not rely on the Guidelines.

However, the Court also enjoined Defendants "from initiating, continuing, or concluding any investigation *based on Defendants' interpretation* that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex." *Id.* (emphasis added). On its face, this prohibition would appear to prevent Defendants from engaging in such an investigation even if they do not rely on the Guidelines in any way. But as the Guidelines are the only even arguably final agency action at issue in this case, the Court cannot properly enjoin agency action that is not based on the Guidelines. Therefore, Defendants respectfully ask the Court to clarify that they are not enjoined from engaging in investigations and enforcement actions based on their interpretation of the law, as long as they do not rely on the Guidelines in so doing.

B. The Court should clarify that the Preliminary Injunction does not limit Defendants' ability to urge other courts to adopt their interpretation of Title VII and Title IX, including in courts that already have accepted that interpretation.

The Preliminary Injunction enjoins Defendants "from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order." Order at 37. Defendants understand that they are preliminarily enjoined from relying upon the Guidance Documents "in any litigation initiated" after August 21, 2016. *Id.* Defendants request clarification that they are not, however, barred from articulating their interpretation of Title VII and Title IX as applied to transgender individuals in any federal court proceeding initiated after that date, so long as they do not rely on these documents or claim that they are entitled to deference or other legal

weight.[3] To construe the Court's order more broadly—to prevent the government from asserting arguments regarding its interpretation of Title VII and Title IX as applied to transgender individuals—would exceed the scope of relief requested by Plaintiffs, *see* Tr. at 18-19 (requesting an injunction under which Defendants could not "walk into a court or an administrative agency . . . and argue that Title IX means what they say it means because of this letter or this guidance"), conflict with statutes authorizing the Attorney General and defendant agencies to conduct litigation, and raise separation-of-powers concerns.[4] And it would have the remarkable effect of precluding the federal government from urging courts to accept a position that already is the law in their circuit.

Congress has vested the Attorney General with the authority to conduct litigation on behalf of the United States. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."); *id.* § 518 (granting authority to the Attorney General and the Solicitor General to direct the conduct and argument of cases in the interest of the United States); *id.* § 519 ("[T]he Attorney General shall supervise all

---

[3] For reasons described in Section A, any order that prevented Defendants from asserting its interpretation of Title VII and Title IX in other litigation would exceed the proper scope of relief under the APA, because, *inter alia*, the Guidelines are the only even arguably final agency action in this case.

[4] Defendants believe that there are separation of powers concerns even if the Preliminary Injunction is read only to prevent the government from arguing that the Guidance Documents are entitled to deference in litigation initiated after August 21, 2016. However, as the Preliminary Injunction unambiguously prohibits such activity, Defendants do not seek clarification on this point, although they respectfully disagree with the Court's decision and reserve the right to challenge this and other aspects of the Preliminary Injunction in any subsequent appeal.

litigation to which the United States, an agency, or officer thereof is a party."); *see also United States v. Nixon*, 418 U.S. 683, 694 (1974). Congress has also vested the EEOC with the authority to conduct certain litigation on its own behalf, 42 U.S.C. § 2000e-5(f)(1) ("[T]he Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge"); *see EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291–92 (2002) ("The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. Absent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief. And if the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum.").

That authority necessarily extends to selecting legal arguments and, in the case of the Attorney General, not only defending federal agencies when they are sued, but also advocating for the interests of the United States in litigation in which the United States is not a party.[5] Moreover, under the constitutional separation of powers, this authority may be supervised only by the President. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings . . . be faithfully executed."); *see* U.S. Const. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed"); *The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief*, 14 Op. O.L.C. 13, 19 (1990) ("The filing of

[5] Certain agencies also have independent authority to conduct litigation at the administrative level. For example, the Solicitor of Labor may conduct litigation in DOL administrative tribunals to enforce Executive Order 11246, which, among other things, prohibits employment discrimination by federal contractors on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. ED has similar authority to conduct litigation at the administrative level. Defendants ask the Court to confirm that the Order does not interfere with this authority.

briefs in courts of law through [the President's] subordinates—particularly as such filings may bear on the legality of action taken by Executive departments or agencies—is integral to the discharge of his constitutional duty to see that the laws are faithfully executed."). Thus, while the Preliminary Injunction enjoins reliance on the Guidance Documents themselves, Defendants ask the Court to confirm that it does not dictate which statutory and regulatory arguments the Attorney General and the EEOC may or may not assert in litigation before other courts.[6]

Similarly, Congress has authorized DOJ and the EEOC to file amicus briefs and statements of interest in cases initiated by private parties that raise issues of federal concern. *See* 28 U.S.C. § 517; *see also* Fed. R. App. P. 29(a). It is Defendants' understanding that the Preliminary Injunction does not prohibit the filing of amicus briefs and statements of interest setting forth their interpretation of Title VII and Title IX in any private litigation, regardless of when the case was filed.

Finally, some federal courts of appeals and federal district courts have disagreed with certain conclusions in the Court's Preliminary Injunction. *See, e.g.*, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720-21, 723 (4th Cir. 2016), *mandate recalled, stay granted*, 136 S. Ct. 2442, *petition for certiorari pending*, No. 16-273 (concluding that 34 C.F.R. § 106.33 is ambiguous, and that courts must give "controlling weight" to ED's interpretation that "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity"); Mem. Op., Order & Prelim. Inj., *Carcaño v. McCrory*, No. 1:16-cv-236, ECF No. 127 (M.D.N.C. Aug. 26, 2016) (accepting Defendants' interpretation of Title IX and its implementing regulations as prohibiting

[6] For example, the government was recently sued in the District of Minnesota. *See Privacy Matters v. U.S. Dep't of Educ.*, No. 0:16-cv-3015 (Sept. 7, 2016). Read broadly, the Preliminary Injunction could be understood to prevent the government from defending itself in that case, which involves a school district in a non-plaintiff state.

discrimination against transgender persons because their gender identity is different from their sex assigned at birth and thereby requiring that individuals have access to public restrooms and other sex-segregated facilities consistent with their gender identity, and therefore enjoining a contrary state law); *id.* at 35 n.22 (concluding that this Court's order, "a district court opinion from outside the Fourth Circuit," does not affect *G.G.*'s status as controlling law). Where a federal court of appeals has ruled in favor of the government's legal interpretation—or where it does so while the Preliminary Injunction remains in effect—Defendants respectfully request that the Court confirm that the Preliminary Injunction does not prohibit them from relying on the ruling of the court of appeals within that circuit. Similarly, Defendants respectfully ask this Court to clarify that they are not enjoined from interpreting and enforcing Title VII and Title IX in accordance with the rulings of other federal district courts as to parties in litigation before those courts and on review therefrom.

C. The Court should clarify that the Preliminary Injunction does not limit the enforcement of anti-discrimination statutes outside of the plaintiff states.

In their opposition to Plaintiffs' motion for a preliminary injunction, Defendants explained their view that a nationwide injunction would not be appropriate. *See* Defs.' Opp'n to Pls.' App. for Prelim. Inj. at 28-30, ECF No. 40. Nonetheless, the Court found that "this injunction should apply nationwide." Order at 36. However, the Court also stated that the Preliminary Injunction "only applies to those states whose laws direct separation." *Id.* at 37. And the Court enjoined Defendants from "enforcing the Guidelines" with respect only to "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." *Id.* Thus, Defendants

ask the Court to confirm that they are enjoined from "enforcing the Guidelines" and otherwise applying their understanding of the law only as to the plaintiff states.[7]

A broader reading of the Preliminary Injunction—one that extended the scope to non-plaintiff states—would not only be inconsistent with the Court's directive that Defendants are enjoined from "enforcing the Guidelines" only as to Plaintiffs and their public educational institutions, but would also run afoul of the Supreme Court's admonition that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702; *see also Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (same). "This rule applies with special force where there is no class certification." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). As a general matter, appellate courts have reversed the entry of nationwide injunctions by district courts where, as here, such breadth is not necessary to afford relief to the specific plaintiffs. *See id.* at 664-65; *Va. Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994); *see also U.S. Dep't of Defense v. Meinhold*, 114 S. Ct. 374 (1993) (granting stay pending appeal of nationwide scope of injunction); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam) (vacating preliminary injunction as overbroad because "[i]n this case, which is not a class action, the injunction against the School District from enforcing its regulation against anyone other than [plaintiff] reaches further than is necessary to serve [the] purpose" of preserving the status quo among the parties). While a nationwide injunction may be "appropriate if necessary to afford relief

[7] Defendants understand the Court, in describing the scope of the Preliminary Injunction as "nationwide," to have rejected the argument that relief should be limited to the Fifth Circuit. Therefore, Defendants only seek to clarify that the scope of the Preliminary Injunction is limited to the plaintiff states.

to the prevailing party," *Va. Society for Human Life*, 263 F.3d at 393, that prerequisite is certainly not satisfied here, where the plaintiff states have no interest in the enforcement of the law—or lack thereof—outside their borders. *See id.* ("In this case VSHL is the only plaintiff. An injunction covering VSHL alone adequately protects it from the feared prosecution."); *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (upholding issuance of nationwide injunction in part because of "a substantial likelihood that a partial injunction would be ineffective" in providing complete relief to the plaintiff states due to migration of individuals across state lines).

An injunction extending to non-plaintiff states would also exceed the scope of any injury established by Plaintiffs, and would thus raise Article III concerns. *See Flores v. Huppenthal*, 789 F.3d 994, 1005-06 (9th Cir. 2015); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) (the scope of an injunction "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established"); 5 U.S.C. § 705 ("On such conditions as may be required and *to the extent necessary to prevent irreparable injury*, the reviewing court … may issue all necessary and appropriate process … to preserve status or rights pending conclusion of the review proceedings. (emphasis added)). Plaintiffs cannot plausibly allege that they are injured when Defendants enforce the law in non-plaintiff states. Furthermore, the Court's conclusion that Plaintiffs had established an injury-in-fact and irreparable harm was premised on alleged conflicts between Defendants' interpretations of the law and certain laws of the plaintiff states. *See* Order at 10-11 n.8, 34-35. There has been no showing of any kind of injury or harm to non-plaintiff states. Indeed, 12 states and the District of Columbia filed a brief supporting Defendants' position and explicitly disavowing any allegations that they are harmed by Defendants' interpretation of the law. *See* States' Amicus Curiae Br. in Opp'n to Pls.' App. for Prelim. Inj., ECF No. 34. Thus, a preliminary injunction that prevents Defendants from "enforcing the Guidelines" or conducting

investigations in non-plaintiff states would be far broader than necessary to remedy any injury or irreparable harm to Plaintiffs.

Finally, a nationwide injunction could prevent other district courts and courts of appeals from weighing in on the legal issues presented in this case, thereby "substantially thwart[ing] the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see also Va. Society for Human Life*, 263 F.3d at 393. This factor is particularly important where, as here, "a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *Los Angeles Haven Hospice*, 638 F.3d at 664. As the D.C. Circuit has cautioned, "[a]llowing one circuit's statutory interpretation to foreclose . . . review of the question in another circuit," would "squelch the circuit disagreements that can lead to Supreme Court review." *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002). Although the Court has indicated that it does not intend the Preliminary Injunction to "unnecessarily interfere with litigation currently pending before other federal courts on this subject," Order at 37, were the injunction to be understood to prohibit Defendants from applying their understanding of the law in non-plaintiff states, it would risk stunting the development of the case law by preventing new cases from arising in other circuits.

Therefore, for all of these reasons, Defendants respectfully ask that the Court confirm that the geographic scope of the Preliminary Injunction is limited to the plaintiff states, and does not extend to actions taken by Defendants with respect to non-plaintiff states.

D. The Court should clarify that the Preliminary Injunction does not enjoin any activities or programs of the Department of Labor.

While DOL and the Secretary of Labor (in his official capacity) were named as defendants in this case, Plaintiffs' only challenge to DOL's activities was based on the OSHA Best Practices Guide. *See* ECF No. 6-4. In their Amended Complaint, Plaintiffs described DOL as "the federal agency responsible for supervising the formulation, issuance, and enforcement of rules, regulations, policies, and forms by the Occupational Safety and Health Administration," ECF No. 6 ¶ 16, and described the Secretary of Labor as the individual "authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA," *id.* ¶ 17. Plaintiffs made no mention of any other DOL activities or programs, and certainly did not even purport to establish irreparable harm stemming from any DOL actions. Furthermore, although OSHA interprets and enforces the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, it does not interpret or enforce Title VII or Title IX, and neither the Occupational Safety and Health Act nor OSHA's standards were briefed or argued in this case. Defendants therefore respectfully seek clarification that the Preliminary Injunction does not bar OSHA from any interpretation of, or reliance on, the Occupational Safety and Health Act or its standards.

Moreover, were the Preliminary Injunction to enjoin other DOL activities beyond enforcement of the Occupational Safety and Health Act, it would violate the precept that a "preliminary injunction is only available upon adequate notice and a fair opportunity to oppose it." *Harris Cty., Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 326 (5th Cir. 1999); *see also* Fed. R. Civ. Pro. 65(a)(1); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 433 n. 7 (1974). Here, there was no notice that DOL programs outside of OSHA were at issue. In addition, a preliminary injunction cannot exceed the scope of the complaint. *See, e.g*,. *Church of Holy Light of Queen v. Holder*, 443 F. App'x 302,

303 (9th Cir. 2011) ("The injunction is therefore overly broad because it reaches beyond the scope of the complaint and enjoins government regulations that were explicitly never challenged or litigated."). Therefore, Defendants request that the Court clarify that the Preliminary Injunction does not apply to any activities or programs of DOL; alternatively, Defendants seek clarification that the injunction does not apply to any DOL activities or programs outside of OSHA.

E. The Court should clarify that the Preliminary Injunction does not enjoin the EEOC from fulfilling statutory duties necessary to protect the rights of individuals alleging discrimination.

As explained previously, Defendants do not understand the Preliminary Injunction to extend beyond access to sex-segregated facilities by transgender individuals in educational settings, but are seeking clarification from the Court on this point. As previously discussed, Defendants do not read the Preliminary Injunction to prohibit investigations under Title VII, and it would appear that the Preliminary Injunction does not prohibit Defendants—and the EEOC in particular—from taking enforcement actions related to Title VII, provided that such activities are not directed against "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions," *id.*[8] Nonetheless, out of an abundance of caution, Defendants seek to confirm that the EEOC is not enjoined from conducting its investigatory and enforcement work as required by statute and to protect the rights of individuals alleging discrimination.

Title VII created the EEOC and the administrative charge process to protect the substantive rights of individuals and provide a method for resolving employment discrimination claims without litigation. *See* 42 U.S.C. § 2000e-5(b). Further, the EEOC serves as a gatekeeper for an

[8] The EEOC does not have the authority to file an enforcement action against a state or local public employer directly. *See* Defs.' Opp'n to Pls.' App. for Prelim. Inj. at 3 n.1, ECF No. 40. Instead, the agency investigates state or local public employers for potential Title VII violations, and then refers any case for which it finds reasonable cause to believe a Title VII violation occurred to the Attorney General, who decides whether to bring any enforcement action. *See* 42 U.S.C. § 2000e-5(f)(1).

individual's federal complaints of employment discrimination, because some of its actions in the administrative charge process have been deemed by the courts to be prerequisites to suit for charging parties. Therefore, nonperformance of these actions by the EEOC could result in depriving individuals of their right to pursue relief on their own behalf in court. Title VII expresses each of these requirements in mandatory, not permissive, language, and sets forth related time limits. *See, e.g., Equal Employment Opportunity Comm'n v. Bass Pro Outdoor World, L.L.C.*, No. 15-20078, 2016 WL 3397696, at *8 (5th Cir. June 17, 2016).

For example, an individual alleging non-federal sector discrimination under Title VII, including sex discrimination, must file a charge with the EEOC within 180 or 300 days of the occurrence of the alleged unlawful practice. *See* 42 U.S.C. § 2000e-5(e)(1). The EEOC must be able to conduct intake for such charges in order to preserve the statutory rights of individuals who allege that they have been subject to discrimination. Failure to accept these charges could prevent charging parties from filing a charge within the statutory time frame, which may result in a loss of these individuals' right to file a private suit alleging discrimination under Title VII. *See Price v. Choctaw Glove & Safety Co.*, 459 F.3d 595, 598 & n.7 (5th Cir. 2006) ("In order to file suit under Title VII, a plaintiff first must file a charge with the EEOC within 180 [or 300] days of the alleged discriminatory act."); *see also Howe v. Yellowbook, USA*, 840 F. Supp. 2d 970, 976 (N.D. Tex. 2011). A delay in accepting charges could also limit a charging party's right to recovery, since back pay is available for only two years before the charge is filed. *See* 42 U.S.C. § 2000e-5(g)(1).

Further, the EEOC must be able to conduct intake interviews of potential charging parties who may wish to file charges so the agency can determine the substance of the individual's allegations of discrimination, counsel individuals about their rights under Title VII, determine whether a discriminatory basis is alleged, and accurately record the charge of discrimination. The

EEOC also has a statutory duty to notify respondents of the existence of any charge filed against them within 10 days of the filing of that charge, *see id.* § 2000e-5(b), and the agency must continue to comply with that statutory mandate. Failure to notify respondents of a charge may lead to the loss of evidence critical to an investigation, resulting in dismissal of subsequent litigation. *See EEOC v. AirGuide Corp.*, 1978 WL 134 (S.D. Fla. 1978); *see also EEOC v. Burlington N., Inc.*, 644 F.2d 717 (8th Cir. 1981) (finding that if an employer raises as a defense that the EEOC failed to serve a charge within ten days of its filing, the court will weigh the EEOC's reasons and the prejudice it caused).

Title VII also imposes on the EEOC a statutory duty to investigate all charges of discrimination, including sex discrimination, filed with the agency and, should EEOC's investigation lead to a determination that there is reasonable cause to believe discrimination occurred, to attempt to secure voluntary compliance with the law through conciliation. *See* 42 U.S.C. § 2000e-5(b); *see also, e.g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). If the EEOC's administrative process is ongoing 180 days after the filing of a charge with the EEOC, a charging party has the right to request a notice of right to sue, which provides the charging party with the right to file suit in federal court based on his or her charges. The EEOC has a statutory duty to issue such a notice, if requested, *see* 42 U.S.C. § 2000e-5(f)(1); *see also* 29 C.F.R. § 1601.28(a)(2), and such issuance is not an imprimatur that EEOC believes discrimination has occurred.[9]

Given these statutory mandates and related deadlines—as well as the terms of the "investigations" portion of the Preliminary Injunction, which is limited to investigations pursuant

---

[9] In charges involving state or local governments as respondents, the EEOC cannot issue the notice of right to sue or file suit; the Department of Justice determines whether to file suit and issues the notice of right to sue for those charges. *See* 42 USC §2000e-5(f)(1).

to Title IX—Defendants ask that the Court confirm their understanding that the Preliminary Injunction does not prohibit the EEOC from undertaking these activities in instances where a charging party alleges discrimination based on sex because a transgender person's gender identity is different from their sex assigned at birth.

Finally, the EEOC oversees the Executive Branch's internal equal employment opportunity (EEO) process. Pursuant to that process, each executive branch agency subject to section 717 of Title VII, 42 U.S.C. § 2000e-16, including the EEOC itself and the other defendant agencies, is responsible for investigating EEO complaints filed by its employees or applicants challenging the agency's actions, including allegations of sex discrimination. *See generally* 29 C.F.R. Part 1614. The complaint may be resolved by settlement or mediation at any time during the investigation. Upon conclusion of the investigation, the complainant may then request either a final agency decision from the respondent federal agency or a hearing before an EEOC Administrative Judge, who may issue a decision. If the respondent agency or complainant is dissatisfied with the Administrative Judge's decision, either or both may appeal to the EEOC's Office of Federal Operations. Some of these complaints include allegations of discrimination against transgender individuals.

Plaintiffs' complaint does not challenge the EEOC's federal sector process. Indeed, Plaintiffs would have no standing to do so—and could not possibly allege that they suffer any irreparable harm—because that process applies only to departments and agencies of the federal government and their employees and prospective employees. Accordingly, it is Defendants' understanding that the Preliminary Injunction does not affect the Executive Branch's internal EEO process and does not prohibit defendant agencies from resolving/investigating—or the EEOC from adjudicating—these administrative EEO complaints filed against them.

CONCLUSION

Defendants respectfully request that the Court issue an order clarifying the scope of the Preliminary Injunction with respect to the issues raised in this motion by October 3, 2016.

Dated: September 12, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

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

Counsel for Defendants

CERTIFICATE OF CONFERENCE

I hereby certify that on September 8 and September 12, 2016, the undersigned counsel consulted with counsel for plaintiffs, Austin R. Nimocks, who represented that plaintiffs do not oppose the proposed expedited briefing schedule for this motion.

/s/ Benjamin L. Berwick
Benjamin L. Berwick

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016, a copy of the foregoing Motion for Clarification of the Court's Preliminary Injunction Order and Unopposed Request for Expedited Consideration was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
Benjamin L. Berwick

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

STATE OF TEXAS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	CIVIL ACTION NO. 7:16-CV-00054-O
	§	
UNITED STATES OF AMERICA, ET AL.,	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR CLARIFICATION OF THE COURT'S PRELIMINARY INJUNCTION ORDER

TABLE OF CONTENTS

Introduction 1
I. The Court Enjoined Defendants' Rule, Not Merely a Few Documents 1
II. The Scope of the Injunction 3
A. The Injunction Impacts Access to Intimate Areas 3
B. Title VII, DOL, and OSHA 5
C. "Transgender" 8
D. Geography 9
III. Nature of Future Advocacy by Defendants—What Can Defendants *Do* From This Point Forward? 10
IV. Future Use of the Enjoined Guidances—What Can Defendants *Use* From This Point Forward? 12
Conclusion 16
Certificate of Service 18

TABLE OF AUTHORITIES

Cases

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 13–14

Cent. & S. W. Servs., Inc. v. EPA,
220 F.3d 683 (5th Cir. 2000) 13

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999) 6

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,
No. 2:14-cv-13710 (E.D. Mich.) 4

G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.,
822 F.3d 709 (4th Cir. 2016) 9

Her Majesty the Queen in Right of Ontario v. EPA,
912 F.2d 1525 (D.C. Cir. 1990) 12

Lightfoot v. D.C.,
339 F. Supp. 2d 78 (D.D.C. 2004) 3

Milk Indus. Found. v. Glickman,
949 F. Supp. 882 (D.D.C. 1996) 2, 8

Mora-Meraz v. Thomas,
601 F.3d 933 (9th Cir. 2010) 2

Nat'l Pork Producers Council v. EPA,
635 F.3d 738 (5th Cir. 2011) 12

Osborne v. Ohio,
495 U.S. 103 (1990) 14

Phillips Petroleum Co. v. Johnson,
22 F.3d 616 (5th Cir. 1994) 2

Shell Offshore Inc. v. Babbitt,
238 F.3d 622 (5th Cir. 2001) 2

Stellas v. Esperdy,
366 F.2d 266 (2d Cir. 1966).................................... 3

United States v. Nat'l Treasury Emps. Union,
513 U.S. 454 (1995) 13

United States v. Reese,
92 U.S. 214 (1875) 14

United States v. Southeastern Okla. State Univ.,
No. 5:15-cv-324 (W.D. Okla.) 4

Virginia v. Am. Booksellers Ass'n, Inc.,
484 U.S. 383 (1988) 13

Statutes

29 U.S.C. § 657–59 7

29 U.S.C. § 662 7

Rules

Fed. R. Civ. P. 11 11

Other Authorities

OSHA's 2015 Statistics, *available online at*
https://www.osha.gov/dep/2015_enforcement_summary.html 7

Tr. of Hr'g on Mot. for Inj. at 5–7, 77–78 (Aug. 12, 2016) 11

Tr. of Hr'g on Mot. for Inj. at 61 (Aug. 12, 2016) 12

www.stopbullying.org 15

INTRODUCTION

Perhaps unable to find a law or command they find unambiguous, Defendants now interpret the Court's injunction so as to allow them to continue down the path that the Court blocked them from taking. Defendants, as Article II agencies accustomed to deference, demonstrate an artful inability to recognize an unambiguous directive of an Article III court. While this case illustrates that the nature of deference to executive agencies can breed a certain insouciance toward the rule of law, the purpose of Article III courts is to resolve disputes and not engage in perpetual tinkering. Indeed, Defendants' motion demonstrates that accountability for their unchecked mischief is something they are not fully willing to embrace.

If granted, Defendants' motion (ECF No. 65) functionally vacates the Court's thorough and unambiguous injunction. Conveniently to their ends, Defendants contend that the injunction "could be read to extend well beyond the appropriate scope of relief." ECF No. 65 at 1. But the injunction is neither ambiguous nor burdensome. Appropriately, it is narrowly tailored as to geographic extent, parties, and proscribed conduct so as to preserve the status quo until final disposition of this case. ECF No. 58 at 37. The Court should deny Defendants' motion.

I. The Court Enjoined Defendants' Rule, Not Merely a Few Documents

In a creative endeavor to avoid the Court's injunction, Defendants suggest that they should be able to argue their rule—that all intimate areas are open to everyone—so long as they don't expressly reference the guidances.[1] ECF No. 65 at 2, 4, 7–8. This argument misapprehends both the problem that forms the basis for Plaintiffs' request for relief as well as the relief provided by the Court.

While Defendants implicitly assert that their various guidances are the fundamental problem at issue, they are not. The rule at issue, because it was not

[1] For the sake of clarity and simplicity, Plaintiffs employ the word "guidance" to refer to all of the regulatory "dark matter" (guidances, memos, interpretations, etc.), both known and unknown, that evidence the rule at issue in this matter.

properly promulgated in accordance with the APA, possesses no clear or distinct form. Like gravity, the rule may not be visible, but the evidence of its existence is overwhelming. Thus, Defendants' guidances are not the rule itself, as the actual rule lurks somewhere beneath.

Defendants admit as much to the Court, in articulating that "the challenged guidance documents simply *announce* the federal government's interpretations of Titles VII, IX, and applicable regulations," ECF No. 40 at 29 (emphasis added), and that "they merely *explain* what the defendant agencies understand," *id.* at 30 (emphasis added). Plaintiffs agree that the Defendants' guidances are best considered evidences of the rule, but not the rule itself. ECF No. 52 at 8, 14 (discussing "the documents that evidence [the rule]").

Much of the evidence, of course, is in the enforcements of the rule across the country. And the uniformity of these enforcements demonstrates that there is an actual binding rule—that no matter the circumstances, individuals should be given access to the intimate spaces that conform to their chosen "gender identity," without regard to the privacy, dignity, or safety needs of others. Thus, evidence abounds of the rule's existence as well as its finality in the minds and actions of Defendants.

Of course, the existence of unwritten rules that run afoul of the APA is hardly new. In *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994), the Fifth Circuit addressed an unpublished rule of the Department of Interior that changed the procedure for determining oil and gas royalties. In *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001), the Fifth Circuit addressed an unwritten "alteration of an existing practice." This why it is "the substance of what the [agency] . . . has done which is decisive," *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 893–94 (D.D.C. 1996), and not the form in which that action has occurred.[2]

---

[2] *See also*, *e.g.*, *Mora-Meraz v. Thomas*, 601 F.3d 933, 938 (9th Cir. 2010) (addressing a so-called

Wherever a rule is unwritten, there is nonetheless documentary evidence of the rule's existence. However, it is not always the case that an agency fully promulgates what looks like, smells like, and acts like a rule, while merely avoiding notice and comment. Indeed, non-APA rulemaking appears in a multitude of forms—some recognizable, others not—precisely because the APA was not followed.

By contending that the guidances themselves are the rule, instead of merely evidence of the rule, Defendants obscure the nature of the injunction as well as the line distinguishing permissible from impermissible behavior moving forward. Thus, Defendants misapprehend the injunction when they say that "based on the explicit terms of the Preliminary Injunction, it appears that Defendants are not prohibited from enforcing . . . the underlying statute against Plaintiffs and their public educational institutions, provided that they do not rely on the Guidelines." ECF No. 65 at 18. If "enforcement" involves putting the sexes together in intimate areas, then the injunction proscribes Defendants from enforcing Titles VII or IX to that end. If "enforcement" involves, for example, the EEOC adjudicating a workplace claim of racial discrimination, nothing about the injunction precludes Defendants from doing their job in that regard.

II. The Scope of the Injunction

The scope of the injunction is clear. It applies to intimate areas in both Title VII and IX contexts and enjoins Defendants across the country.

A. The Injunction Impacts Access to Intimate Areas

Plaintiffs' application for preliminary injunction (ECF Nos. 11 & 52), and their

---

"twelve-month rule" which the Court acknowledged was a "specific unwritten rule."); *Stellas v. Esperdy*, 366 F.2d 266, 269 (2d Cir. 1966), *vacated and remanded on other grounds*, 388 U.S. 462 (1967) (acknowledging that determinations on whether applicants qualify for investor visas may involve "written or unwritten rules"); *Lightfoot v. D.C.*, 339 F. Supp. 2d 78, 94 (D.D.C. 2004), *clarified on denial of reconsideration*, 355 F. Supp. 2d 414 (D.D.C. 2005), *and rev'd and remanded*, 448 F.3d 392 (D.C. Cir. 2006) ("This policy determination process—which Defendants are clearly undertaking when setting out *unwritten* termination, suspension and modification procedures which affect Plaintiffs' property interests—is clearly substantive rule-making." (emphasis added)).

Notice of Pending Litigation (ECF No. 64), turns on access to, and the expectations of privacy in, intimate areas. This necessarily means that the injunction does not extend to Defendants' involvement in, for example, a Title VII dispute that does not involve access to intimate areas. *See*, *e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710, ECF No. 76 ("Opinion & Order") (E.D. Mich. Aug. 18, 2016). However, Defendants have a well-documented history of taking disputes that do not involve intimate areas, and turning them into intimate area battles. This is seen most clearly in the Oklahoma case, where DOJ decided to deeply explore access to intimate areas, though it never raised that issue in its pleadings. *See United States v. Southeastern Okla. State Univ.*, No. 5:15-cv-324 (W.D. Okla.); ECF No. 64 at 3–6.

In any dispute, the complaint or pleadings contains only the initial allegations of wrongdoing. Indeed, where a case oftentimes ends varies from where it began. Thus, while Plaintiffs agree that the scope of the injunction regards only access to intimate areas, Plaintiffs maintain well-founded concerns that Defendants are nonetheless undeterred by the injunction in their quest to mix the sexes in intimate areas. Accordingly, as Plaintiffs already indicated, as to any investigation, dispute, or litigation that involves the interpretation of "sex" under Titles VII or IX, Defendants should be prohibited from raising access to intimate areas as a material aspect of the dispute, or otherwise participating in discovery, briefing, or argumentation regarding access to intimate areas.

Moreover, the Court should further require Defendants to affirmatively disavow in all matters not identified in their Notice of Pending Litigation (ECF No. 61) that access to intimate areas is at issue. If, as in the Oklahoma case, access to intimate areas is raised only by a private litigant, Defendants should be precluded from participating in discovery regarding, or otherwise advancing argument, regarding access to intimate areas.

B. Title VII, DOL, and OSHA

The focal point of the case *sub judice* is intimate area access under Titles IX *and* VII. The injunction, the various filings discussing this discrete issue at length (*see*, *e.g.*, ECF Nos. 6, 11, 40, 52, 61 & 64), and the factual realities of what is involved in this matter make clear that Title VII is a substantive part of the injunction.

Take, for example, the Plaintiffs, Harrold ISD and Heber-Overgaard Unified School District. As the Court knows, schools are not merely institutions of education, but also workplaces and subject to Title VII. Indeed, schools strive not only to provide safe and reasonable educational environments for children, but also safe and reasonable workplaces for their employees. *See* Exhibit P, ECF No. 11-2 at ¶ 5. The evidence before the Court shows that, in many educational institutions, intimate areas are accessed simultaneously by both students and teachers (employees). *See*, *e.g.*, *id*. at ¶ 6.

Even in educational institutions where students and faculty possess designated facilities, it is unavoidable that students and teachers (or coaches) will sometimes share the same facilities. *See*, *e.g.*, Exhibit N, ECF No. 6-14 at 3 ("For example, if a physical education teacher repeatedly made remarks about students' bodies whenever students changed clothes in a locker room, that conduct would likely create a hostile environment and be considered unlawful sexual harassment."). This type of student/teacher interaction can occur, for example, when football players and their coaches share the same facilities at the football stadium, or when a separate fieldhouse or athletic facility requires track athletes and their adult coaches to share intimate facilities. Regardless of the particular circumstance afoot, the intimate nature of education—where children and employee adults acting *in loco parentis* are constantly together—means that Titles VII and IX and inextricably intertwined as to the Court's injunction. This is why all Defendants are proper parties and enjoined

from using both Title VII and Title IX in a way contrary to the injunction.[3]

In an effort to undermine the injunction, Defendants reference various ministerial duties that EEOC must perform in receiving and processing Title VII complaints by private individuals. ECF No. 65 at 22–23. In reading Defendants' motion, one would think that the Court's injunction has ground due process in the employment discrimination context to a halt.[4] Defendants go too far.

Clearly, the EEOC's performance of various ministerial duties is unimpeded by the injunction. EEOC may receive private complaints, issue its notices, and gather the necessary facts, as it always does. However, in cases alleging discrimination on the basis of "sex," and involving access to intimate areas, EEOC may not suggest, conclude (via reasonable cause determinations or otherwise), or adjudicate that Title VII requires employers to mix the sexes in intimate areas. This modest restriction on EEOC's enforcement powers, of course, does not impede the right of an individual that brings a complaint to full due process. Regardless of the EEOC's substantive determinations, an individual that files a complaint will have a right to argue his/her theory of the case and continue their litigation into federal court. But the injunction is clear that EEOC does not get to substantively side with private litigants when access to intimate areas is part of the equation—a reasonably narrow restriction for a limited set of circumstances.

All of this application necessarily extends to Defendants, United States Department of Labor, Thomas E. Perez, in his Official Capacity as United States Secretary of Labor, and David Michaels, in his Official Capacity as the Assistant

[3] Indeed, the relationship between Title VII and Title IX is so strong that courts routinely look to Title VII case law for guidance in Title IX matters, and vice versa. *See, e.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999). Thus, any ruling regarding Title IX functionally, if not directly, applies to Title VII. Therefore, in any instance—Title VII or Title IX—where access to intimate areas is at issue, Defendants are enjoined.

[4] Defendants contend that "nonperformance of these actions by the EEOC could result in depriving individuals of their right to pursue relief on their own behalf in Court." ECF No. 65 at 28. This is nonsense.

Secretary of Labor for the Occupational Safety and Health Administration. As the Court is aware, in 2015, OSHA published a "guide" for employers regarding restroom access. OSHA's so-called "guide" evidences the rule enjoined by the Court, as the "guide" concludes that "all employees should be permitted to use the facilities that correspond with their gender identity," which is "internal" and could be "different from the sex they were assigned at birth." Exhibit D, ECF No. 6-4. And OSHA postures this "guide" as clearly reflecting an underlying, enforceable rule. It cites to one of DOL's own final rules as supportive, along with a CFR regarding "toilet facilities," as well as enforcements by EEOC. *Id*. at 4.

Furthermore, DOL and OSHA possess powerful enforcement mechanisms.[5] This regards public employers and their workers where there is an OSHA-approved State Plan. Twenty-two states and territories, including several Plaintiffs, have such plans.[6] In 2015, OSHA conducted 35,820 inspections and found 65,044 violations.[7] No matter why OSHA visited each of the 35,820 job sites in 2015, every single visit provides it with an opportunity to find a new violation for its "Core principle"—that "[a]ll employees, including transgender employees, should have access to restrooms that correspond to their gender identity." Exhibit D, ECF No. 6-4 at 1.

As Plaintiffs articulated from the outset, what is before the Court is a rule on which *all* "Defendants have conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights." ECF No. 6 at 3. The rule at issue, though not

[5] *See*, *e.g.*, 29 U.S.C. §§ 657–59, 662.
[6] Alaska, Arizona, California, Hawai'i, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming all have state plans that cover both private and public sector workers. List *available online at* https://www.osha.gov/dcsp/osp/index.html.
[7] *See* OSHA's 2015 Statistics, *available online at* https://www.osha.gov/dep/2015_enforcement_summary.html.

formalized, is nonetheless being implemented and enforced by *all* Defendants.[8] To succeed, Defendants' regulatory shell game depends not only upon a clandestine rule, but for the rule to become ubiquitous through the collective efforts of all Defendants. It is, perhaps, by design that no single agency purports to assume ownership over it such that every Defendant can always argue, as they do here, that they are not responsible. But to enjoin only some Defendants, and not all, permits the rule to live at the expense of the Court's authority.

C. "Transgender"

Neither Plaintiffs' amended complaint (ECF No. 6), nor its application for preliminary injunction (ECF Nos. 11 & 52), turns on whether an individual describes themselves as "transgendered." In fact, Plaintiffs do not employ the word as operative in any of their filings. And in the injunction, the Court only mentions the term in recognizing and reciting Defendants' arguments.[9] The substance of the injunction does not turn on whether one identifies themselves as "transgender."

This, of course, is because the laws and regulations at issue are unambiguous *biological* categories, as the Court recognized. Thus, as to any dispute or question regarding intimate areas, any application of "sex" by Defendants that runs contrary to the biologically-grounded nature of the term is enjoined. Because the laws and regulations at issue are unambiguous, and cover every member of the human race (whether male and female), they necessarily cover anyone that, for example, identifies with a particular national origin, or identifies with a certain political party. There is no need for the Court to digress into various additional categories.

Defendants' invitation for the Court to "clarify" its injunction as to how it

[8] The APA defines "rule" broadly, and what it or is not a rule cannot be evaded by giving it a different name(s). Indeed, it is "the substance of what the [agency] . . . has done which is decisive." *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 893–94 (D.D.C. 1996).

[9] The subject matter of this litigation, as recognized by the Court, is "Defendants' swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines," ECF No. 58 at 37, and not on whether someone defines themselves as "transgendered."

impacts those that define themselves as "transgender" should be acknowledged for what it is—a surreptitious effort to get the Court to contrive an ambiguity in the applicable laws and regulations. Indeed, this was Defendants' formula for success before the Fourth Circuit. That court, citing *only* to Defendants' "dark matter," concluded that the applicable laws and regulations were ambiguous. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 722–23 (4th Cir. 2016) (concluding that the DOE has "consistently enforced" the rule since 2014 and that these enforcement efforts are "in line with the existing guidances and regulations of a number of federal agencies," including OSHA and EEOC), *stayed and mandate recalled pending disposition of petition for cert.*, 136 S. Ct. 2442 (U.S. Aug. 3, 2016) (No. 16A52), *petition for cert. filed*, (U.S. Aug. 29, 2016) (No. 16-273).

D. Geography

Arguably the most audacious part of Defendants' motion is their request that the Court "confirm" that its injunction, which is "nationwide," is not nationwide. ECF No. 65 at 22–25. Defendants ask the Court to adopt their bad habit of rewriting terms to mean something other than their plain, ordinary meaning. Here, Defendants ask the Court to agree that "nationwide" means "plaintiff states."

There at least two problems with Defendants' cavalier approach. First, Defendants misapprehend the Court's admonition regarding "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." ECF No. 58 at 37. As Plaintiffs explained in their Notice of Pending Litigation (ECF No. 64), this language is not temporally limited regarding when litigation began. While the Court concerns itself with when certain litigation was initiated in other matters, the language at issue ("Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions") applies irrespective of when any given litigation commenced. This language, thus, emphasizes the absence of a temporal restriction regarding the Plaintiff States. It does not exist to transform the

clear meaning of "nationwide" into "plaintiff states."

Secondly, Defendants completely forget to whom the Court's injunction is directed—them. Defendants are federal administrators and agencies, with footings in every state and territory. Discussing whether the injunction applies in "the Fifth Circuit" or "plaintiff states" is a clever way to remove the focus of the Court's relief from the wrongdoers. But, as here, where Defendants are collectively and systematically engaged in enforcing a pervasive and unlawful rule across the country, an injunction that precludes Defendants from acting everywhere is quite clear.[10]

III. Nature of Future Advocacy by Defendants—What Can Defendants *Do* From This Point Forward?

Defendants are correct that the injunction precludes them from advancing arguments, or otherwise advocating guidance, legal positions, or otherwise, that relate to or rely upon all of their "dark matter" regarding access to intimate areas (regardless of whether that "dark matter" is specifically identified by Plaintiffs or the Court). All such guidances suffer from the same legal flaw. Thus, it would be nonsensical for the injunction to not apply to guidances unidentified by Plaintiffs (in its pleadings or other filings) that rely upon the same substance or draw the same conclusions enjoined by the Court.

Defendants nonetheless ask the Court to bless their continued mission to force the sexes to share intimate areas, in particular through litigation. In this ruse, Defendants intend to appropriate court dockets as the new publishers of its rule. Yet, by permitting Defendants to broadcast their rule through court filings, Defendants are able to circumvent the injunction. Indeed, by allowing Defendants to articulate their rule in court briefs, or the filing of new Statements of Interest, Defendants can

---

[10] Defendants' additional concern about whether the "burden" of the Court's injunction is ironic. An injunction that applies "nationwide" carries with it the absence of burden. Defendants do not have to engage in enforcement gymnastics or difficult mathematics to figure out where the Court's prohibition does and does not apply. Rather, Defendants are, quite simply, enjoined everywhere.

subsequently publicize or circulate that new Statement of Interest to every public school in the country. This allows Defendants to accomplish the same purpose they sought to accomplish through their various pieces of "dark matter"—veiled threats of the removal of Title IX-linked funds, which generally leads to DOE getting its way. *See*, *e.g.*, Exhibit J, ECF No. 6-10 at 8–9 nn. 9, 23; Tr. of Hr'g on Mot. for Inj. at 5–7, 77–78 (Aug. 12, 2016).

Thus, it is the rule itself, along with the evidence of it, which is enjoined. Without the injunction of the rule itself, Defendants may republish their rule and continue down the same path, relegating this Court to a bump in the road rather than a judicial check on executive power. The Court's judicial power is reduced to nothing if it can only enjoin a certain document which, as Defendants now believe, can be reissued the next day without running afoul of the Court's directive.

To be sure, the injunction does not preclude Defendants from engaging in legitimate judicial advocacy in certain to-be-determined limited fora. *See* ECF No. 64; n.12, *infra*. However, as made clear by the rules, arguments to a tribunal must be "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11. As the Court has found, when it comes to access to intimate areas, individuals may be separated based on "the biological and anatomical differences between male and female students as determined at their birth." ECF No. 58 at 31. What the term "sex" means in Titles VII and IX is clear, as the Court found. The evidence of the meaning of "sex" as a biologically-based category is overwhelming, ECF No. 6 at ¶¶ 23–37, and not even something Defendants contest. ECF No. 40.

If Defendants are able to craft an appropriate textual argument about the meaning of "sex" at the time that Titles VII or IX were enacted, or locate legislative history that supports an alternate meaning, they should be encouraged to present such arguments in ongoing litigation that the Court is expected to determine is not

within the purview of its injunction. But to allow Defendants carte blanche to continue to argue their rule in other locations, and essentially ignore what this Court did, would functionally rescind the Court's injunction.

IV. Future Use of the Enjoined Guidances—What Can Defendants *Use* From This Point Forward?

Unlike the prior section regarding what Defendants may do, this section addresses how the guidances already produced may be employed, if at all, from this point forward. Because the various guidances are stained with the taint of their illegality, no aspect of them should be permitted any use (outside of perhaps historical storage or reference). That any portion or section of the guidances may be lawful does not remove them from the ambit of the Court's ruling or otherwise authorize their future use. Under the injunction, Defendants may not use, create, proliferate, or otherwise distribute any guidance or writing that prohibits separating the sexes in intimate areas.[11]

The Court found that the Defendants' rule is "final agency action under the APA" and that the Defendants do not dispute that the rule is a "consummation" of the agencies' decision-making process. Tr. of Hr'g on Mot. for Inj. at 61 (Aug. 12, 2016); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755–56 (5th Cir. 2011) (citing *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (deciding that EPA guidance letters constitute final agency actions as they "serve[d] to confirm a definitive position that has a direct and immediate impact on the parties . . . .")). *Id.* at 17. Thus, all of the guidances at issue embody a rule that, now enjoined, forever taints them.

Defendants note that many of the guidances that describe the rule mention other areas of discrimination, such as "race, national origin, or disability . . . distinct

[11] An exception may exist if the Court permits Defendants to continue to advocate their rule in a handful of cases, already identified, where Defendants' argument was well-established with the federal court at the time of this Court's injunction on Aug. 21, 2016.

from the subject of Plaintiffs' request for relief." ECF No. 65 at 12. Defendants claim that the injunction thus ". . . could be read to limit Defendants' ability to enforce and interpret anti-discrimination statutes . . . " *Id.* But there is nothing in the injunction substantiating this concern. The injunction does not prevent Defendants from relying on statutes or other actual law or validly adopted regulations to undertake lawful anti-discrimination enforcement actions.

Because the injunction does not "disrupt" these other laws, the Court was correct in enjoining the guidances in their entirety. *Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (explaining that vacating a rule is appropriate where the consequences are not "disruptive."). It is not the duty of the Court to rewrite the various administrative documents in the record so that they comply with Titles VII and IX, and the applicable regulations. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (holding that the entirety of an unconstitutional law fails unless it is "readily susceptible" to a narrowing construction); *see also United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (citing the "obligation to avoid judicial legislation" and declining to modify statute).

Under the APA, courts are not charged with engaging in remedial measures like reformation or redaction. Indeed, were findings under the APA to be applied in piecemeal fashion, the APA would hardly be a deterrent to improper agency action. If courts only struck down improper sentences or paragraphs within agency guidances, there would be no incentive for agencies to comply with the APA and enact wholly proper regulations, interpretations, and the like. To the contrary, agencies would be imbued with the desire to continually "enact" that which is proper with that which is not, knowing that a discerning court would only strike down the improper part and functionally allow the entire guidance to survive.

Yet the Supreme Court has repeatedly admonished against relying on judicial intervention in this manner. *Ayotte v. Planned Parenthood of N. New England*, 546

U.S. 320, 330 (2006) (providing that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied.") (quoting *United States v. Reese,* 92 U.S. 214, 221 (1875)); *see also Osborne v. Ohio,* 495 U.S. 103, 121 (1990) (judicial rewriting of statutes would derogate Congress' "incentive to draft a narrowly tailored law in the first place"). The Court should not indulge Defendants' invitation to do their work for them.

Moreover, under Defendants' view of how its guidances should be treated, there is no basis upon which individuals and entities would know what elements of the guidances are enjoined or improper. Only the citizen distinctly aware of the injunction, imbued with the legal training necessary to understand the parameters, and who takes the time to compare the injunction against the voluminous guidances, could potentially discern the parts of the "dark matter" that are improper versus those that are not. This, of course, assumes that separating the proper from the improper is an easy or clear exercise, devoid of confusion or tough choices.

Missing from Defendants' argument is the representation of any actual *need* for its enjoined guidances to survive for the legitimate purposes of Defendants' enforcement authority. Defendants' argument appears to presume that, apart from the survival of the guidances enjoined by the Court, there is no basis upon which anyone would know that invidious discrimination on the basis of race is unlawful, or that violence against students is improper. But the Court knows this to be untrue. The volumes of material produced by Defendants that address these, and other topics, are virtually unlimited.[12] Moreover, since Defendants' preferred method of

[12] Defendants are, indeed, experts at producing "dark matter." For example, Defendants contend that a certain guidance enjoined by the Court (Plaintiffs' Exhibit A, ECF No. 6-1) also "concerns harassment and bullying based on race, national origin, and disability." ECF No. 65 at 14. However, DOE has released volumes of other "dark matter" that addresses the topic. A search for "bullying" on DOE's website (www.ed.gov) brings up no less than a dozen documents, in addition to Exhibit A, that address

rulemaking and publication avoids the inconvenience of notice, public comment, and the timelines associated therewith, reconstituting and releasing the permissible substance of any enjoined guidance, if Defendants so desired, should be easy.

Even if there were a demonstrable need for parts of the guidances to survive, the only way to attempt to move forward along those lines begins with redaction. The Court would need to engage in the laborious exercise of identifying those parts of the guidances that must be **blacked out** before continued usage.[13] Similarly, all enjoined guidances would need to have a new cover page added to each item that explains the nature of the guidance's taint, and why certain matter is **blacked out**.

Even if the Court were inclined to engage in piecemeal redactions and oversight of the circumstantial use of the enjoined "dark matter," it is impossible to redact the guidances already distributed. Undoubtedly, copies of now improper guidances exist on countless computers, endless e-mail strings, and in hard copy forms in various files across the country. There is no way, practical or otherwise, for the Court to reach its editorial hand into those places and properly revise the guidances, or even notify the owners of those guidances about what is or is not. Thus, while the Court can control what "dark matter" may look like moving forward, properly redacting the endless distribution of unredacted copies already distributed isn't realistically possible.

Therefore, the Court should not entertain Defendants clever efforts to breathe

---

bullying. DOE also links to a bullying website, listed as www.bullyinginfo.org, which links to www.stopbullying.org. The bottom line is this—that over several years, Defendants have released countless publications which more that educate the public, and others, on everything that may be properly discussed or covered within the enjoined guidances. Defendants cannot make a credible case that there is any actual *need* for the enjoined guidances, or parts thereof, to survive. The request to permit the use of some of the guidances is nothing more than a ploy to circumvent the injunction.

[13] This raises an additional problem in that Defendants would need to first identify the universe of the "dark matter" to be redacted. Plaintiffs identify many of the most significant documents in their Amended Complaint, ECF No. 6, but it will likely take Defendants some time to fully marshal every memo, press release, web page, blog post, guidance, and the like that evidences the rule, and then present them to the Court in a cogent fashion for redaction.

post-injunctive life into its stained guidances. Indeed, the Court's adjudication serves as an enduring blemish on the guidances akin to a scarlet letter.

Conclusion

Defendants' propensity to interpret what they read in the way that they want to read it is well-established. The Court should resist this latest attempt to have its injunction interpreted by Defendants in a way that avoids the Court's judicial authority, is self-serving only to Defendants' policy agenda regarding intimate areas agenda, and contravenes the clear federal law that the Court's order is designed to uphold.

Respectfully submitted this the 19th day of September, 2016,

LUTHER STRANGE Attorney General of Alabama BRAD D. SCHIMEL Attorney General of Wisconsin PATRICK MORRISEY Attorney General of West Virginia HERBERT SLATERY, III Attorney General of Tennessee MARK BRNOVICH Attorney General of Arizona SCOTT PRUITT Attorney General of Oklahoma JEFF LANDRY Attorney General of Louisiana SEAN REYES Attorney General of Utah SAM OLENS Attorney General of Georgia	KEN PAXTON Attorney General of Texas JEFFREY C. MATEER First Assistant Attorney General BRANTLEY STARR Deputy First Assistant Attorney General PRERAK SHAH Senior Counsel to the Attorney General ANDREW LEONIE Associate Deputy Attorney General for the Office of Special Litigation AUSTIN R. NIMOCKS Associate Deputy Attorney General for the Office of Special Litigation */s/ Austin R. Nimocks* AUSTIN R. NIMOCKS Texas Bar No. 24002695 austin.nimocks@texasattorneygeneral.gov MICHAEL TOTH Senior Counsel for the Office of Special Litigation Office of Special Litigation Attorney General of Texas P.O. Box 12548, Mail Code 009 Austin, Texas 78711-2548 Tel: 512-936-1414 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 19th day of September, 2016, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks
Austin R. Nimocks

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

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF THE COURT'S PRELIMINARY INJUNCTION ORDER

INTRODUCTION

Plaintiffs' response confirms the need to clarify the scope of the Court's Preliminary Injunction. Despite their rhetoric, Plaintiffs agree with much of the relief sought in the Defendants' Motion for Clarification. And where Plaintiffs disagree, it is based on a breathtaking, and wholly unsupported, view of the scope of the Preliminary Injunction.

Plaintiffs concede that the Preliminary Injunction is limited to the topic of "putting the sexes together in intimate areas," Pls.' Resp. to Defs.' Mot. for Clarification ("Pls.' Resp.") at 3, ECF No. 73—that is, access by transgender individuals to restrooms, locker rooms, and similar facilities in accordance with their gender identity—and agree that it does not preclude Defendants from enforcing non-discrimination laws, conducting investigations, and making arguments in litigation where access to "intimate areas" is not at issue. Plaintiffs also agree that the Preliminary Injunction should not interfere with many activities of the Equal Employment Opportunity Commission (EEOC). *Id.* at 6.

Where Plaintiffs do actually oppose clarification, they largely fail to address the arguments raised by Defendants and provide no support for their sweeping contentions. Plaintiffs do not explain how they are injured or harmed by Defendants' activities in non-plaintiff states, by Defendants' enforcement of Title VII against private parties, or by any activities of the Department of Labor (DOL). Nor do Plaintiffs explain how the Preliminary Injunction could permissibly extend beyond the Guidelines—the only allegedly final agency action that Plaintiffs have identified in their application for a preliminary injunction—to encompass Defendants' underlying interpretation of the relevant statutory and regulatory provisions. There is no basis for Plaintiffs' assertion that the Court can somehow enjoin "unknown" regulatory "dark matter," *id.* at 1 n.1, and wholly unidentified "clandestine rule[s]," *id.* at 8, that "lurk[] somewhere beneath," *id.* at 2. Finally, Plaintiffs have no response to Defendants' arguments that the Preliminary Injunction cannot be read to prohibit Defendants from litigating, or filing statements of interest or amicus briefs regarding, the important issues raised in this case in litigation before other federal courts, unless Plaintiffs are parties to the other litigation and it was initiated after the issuance of the

Preliminary Injunction. Were the Preliminary Injunction to reach as far as Plaintiffs imagine, it would dramatically exceed the authority of this Court.

ARGUMENT

I. Plaintiffs implicitly concede that the Preliminary Injunction should be clarified

Although Plaintiffs urge the Court to deny Defendants' Motion for Clarification, *see* Pls.' Resp. at 1, they appear to concede that clarification would in fact be appropriate in some respects. Most importantly, Plaintiffs recognize that the scope of the Preliminary Injunction is limited to access by transgender individuals to restrooms, locker rooms, and similar facilities. *See, e.g.*, *id.* at 3 (describing the scope of the injunction as limited to "intimate areas"); *id.* at 3-4 ("Plaintiffs' application for preliminary injunction . . . turns on access to, and the expectations of privacy in, intimate areas."); *see also* Pls.' Notice of Pending Litigation at 1, ECF No. 64 (describing the "subject" of the Preliminary Injunction as "whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities").[1]

Plaintiffs therefore appear to agree that the Preliminary Injunction should not be read to prevent the defendant agencies from enforcing non-discrimination laws in circumstances that do not involve access to "intimate areas"—such as harassment and bullying based on race, national origin, disability, and sex; sexual violence against students; and hiring, firing, and other employment decisions; as well as instances of sex discrimination against transgender individuals that do not involve access to sex-segregated facilities, *see* Defs.' Mot. for Clarification ("Defs.' Mot.") at 7-9, ECF No. 65—even if those circumstances are also analyzed in the enjoined Guidelines. *See* Pls.' Resp. at 13 ("The injunction does not prevent Defendants from relying on statutes or other actual law or validly adopted regulations to undertake lawful anti-discrimination enforcement actions."). Thus, the Court should clarify that the Preliminary Injunction does not prohibit Defendants from protecting all individuals—including transgender individuals—from

---

[1] Plaintiffs' characterization of Defendants' position as requiring "that all intimate areas are open to everyone," Pls.' Resp. at 1, is inaccurate. Defendants' actual position is that all women—including transgender women—should be permitted to use facilities that are designated for women, and that all men—including transgender men—should be permitted to use facilities that are designated for men. Nothing in Defendants' Guidelines or elsewhere would require that men have access to women's facilities, or vice versa.

such discrimination through investigations and enforcement of relevant anti-discrimination laws in circumstances that do not involve access to bathrooms, locker rooms, and similar facilities.[2]

In their Motion for Clarification, Defendants also explained that the Preliminary Injunction should not be understood to prevent the EEOC from engaging in various activities necessary to protect the rights of individuals alleging discrimination. *See* Defs.' Mot. at 21-24. Plaintiffs agree on this count as well. *See* Pls.' Resp. at 6. And Plaintiffs do not offer any response to Defendants' understanding that the injunction does not disrupt the federal sector equal employment opportunity (EEO) process, *see* Defs.' Mot. at 24, and thus have conceded this point. Therefore, the Court should confirm that the Preliminary Injunction does not interfere with these EEOC activities to protect the rights of individuals alleging discrimination or with the federal sector EEO process.

II. The Preliminary Injunction should not be read to apply where there has been no showing of harm to Plaintiffs

"[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)

[2] Plaintiffs insist that, while Defendants should not be prohibited from enforcing non-discrimination laws in contexts that do not involve access to sex-segregated facilities by transgender individuals, Defendants should be prohibited from relying on the Guidelines while doing so. *See* Pls.' Resp. at 12-16. As justification for that assertion, Plaintiffs contend that there is no "actual *need* for its enjoined guidances to survive" because the Guidelines have no independent legal effect and Defendants may continue to "rely[] on statutes or other actual law." *Id.* at 12-13. Indeed, those assertions reinforce the correctness of Defendants' arguments in opposing Plaintiffs' application for a preliminary injunction: the Guidelines themselves do not have the force of law, but instead only explain the agencies' interpretation of the underlying non-discrimination statutes and regulations, meaning that the Guidelines have no independent legal effect and thus could cause no irreparable harm. Furthermore, Plaintiffs do not even claim to suffer an injury from those portions of the Guidelines that are unrelated to the subject of the Preliminary Injunction. As a result, there would be no basis for the Court to preliminarily enjoin those aspects of the Guidelines. Plaintiffs' argument is really one of severability. Specifically, Plaintiffs contend that, although the Court has invalidated only a portion of some of the Guidelines, they are invalid in their entirety because of "the taint of their illegality." Pls' Resp. at 12. But "[w]hether an administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent." *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (Scalia, J.); *accord Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). Unchallenged portions of a regulation must be invalidated only "[w]here there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted." *North Carolina*, 730 F.2d at 796; *accord Davis Cnty.*, 108 F.3d at 1459; *Bell Atl. Tel. Co. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994). Here, there is no doubt that the agency would have intended the provisions of the Guidelines related to other forms of discrimination to remain in effect even if their application to transgender persons' use of sex-segregated facilities was invalidated. For example, there is no reason that the agency would have intended its discussion of schools' legal obligation to address bullying and harassment based on race, national origin, or disability to rise or fall on the question of whether discrimination based on gender identity is sex-based discrimination under Title IX. *See* ECF No. 6-1. Plaintiffs have failed to create any doubt on this score, let alone "substantial doubt."

(emphasis added); *see also Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (same). The purpose of a preliminary injunction is to preserve the status quo *between the parties* until the case can be adjudicated on the merits, *see, e.g.*, *Wenner v. Tex. Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir. 1997); it is not a vehicle for shutting down entirely government regulatory and enforcement activity in a particular area. Nonetheless, in several respects, Plaintiffs urge the Court to ignore these limitations on its authority, and to adopt a reading of the Preliminary Injunction that is inconsistent with its text and far broader than necessary to remedy any injury even arguably alleged by Plaintiffs.

First, Plaintiffs contend that all aspects of the Preliminary Injunction should apply nationwide, including to non-plaintiff states. *See* Pls.' Resp. at 9-10. But, as Defendants have explained, such a broad geographic scope is flatly inconsistent with the Preliminary Injunction's text, which enjoins enforcement of the Guidelines only with respect to "Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." Order at 37.[3] Plaintiffs' request to expand the injunction is also unnecessary to remedy any injury to Plaintiffs and would stunt the development of case law in this important and emerging area. *See* Defs.' Mot. at 16-19. The plaintiff states have no interest in the investigation and enforcement of Defendants' interpretation of the law outside their borders, where they do not operate schools. They suffer no injury when Defendants enforce their understanding of the law in non-plaintiff states. Nor has there been any showing of injury or harm to non-plaintiff states (which plaintiffs would lack standing to assert in any event). To the contrary, 12 states and the District of Columbia have explicitly disavowed any such harm, and made clear that they agree with and support Defendants' interpretation in this case. *See* States' Amicus Curiae Br. in Opp'n to Pls.' App. For Prelim. Inj., ECF No. 34.

[3] Plaintiffs' insistence that this language serves only to "emphasize[] the absence of a temporal restriction regarding the Plaintiff States," finds no support in the actual text of the Preliminary Injunction. This argument assumes that the Court also enjoined enforcement of the Guidelines against non-plaintiff states, but declined to say so explicitly.

Although Defendants raised all of these points in their Motion for Clarification, Plaintiffs have entirely failed to respond to them. Instead, they state that "Defendants are federal administrators and agencies, with footings in every state and territory." Pls.' Resp. at 10. But that truism is no answer to the arguments raised by Defendants. Plaintiffs identify no reason that the Preliminary Injunction should extend to non-plaintiff states to provide *Plaintiffs* with complete relief, or to remedy an injury that *Plaintiffs* suffer. As a result, Defendants respectfully ask the Court to clarify that the Preliminary Injunction extends only to the plaintiff states, and does not apply to any action taken by Defendants with respect to non-plaintiff states.

Second, Plaintiffs also largely fail to address Defendants' request that the Court confirm that the Preliminary Injunction does not prohibit enforcement of Title VII against private entities, wherever they are located. *See* Defs.' Mot. at 10-11. In particular, Plaintiffs offer no explanation as to why the Preliminary Injunction should be understood to restrict, for example, the EEOC's enforcement of Title VII in cases involving private litigants. *See id.* at 6. Plaintiffs have not identified—nor has the Court found—any injury or harm that Plaintiffs would suffer as a result of enforcement against private entities. Such a restriction would not be "modest" or "reasonably narrow," as Plaintiffs' contend, *id.*, because it is not justified by Plaintiffs' allegations nor necessary to afford Plaintiffs with complete relief. Therefore, the Court should clarify that the Preliminary Injunction does not apply to the enforcement of Title VII against private entities.[4]

Third, for similar reasons, Plaintiffs have failed to effectively refute Defendants' argument that the Court should clarify that the Preliminary Injunction does not enjoin any activities of DOL.

---

[4] As Defendants pointed out in their motion, several aspects of the Court's opinion strongly suggest that the Preliminary Injunction should be understood as entirely limited to Title IX, including the fact that the Court's finding of injury and irreparable harm rested on alleged inconsistencies between certain state statutes regarding public educational institutions and Defendants' interpretation of Title IX and its implementing regulations. Defendants therefore requested that the Court make clear that its Preliminary Injunction does not encompass Title VII. *See* Defs.' Mot. at 10-11. Plaintiffs' only response is to point out that "schools are . . . also workplaces . . . subject to Title VII." Pls.' Resp. at 5. But even if the Preliminary Injunction extends as far as the enforcement of new Title VII actions against Plaintiffs and their public educational institutions, it should not be read to encompass Title VII enforcement against private parties or outside of public schools in the plaintiff states. Moreover, by its clear terms, the Preliminary Injunction does not apply to *investigations* involving Defendants' interpretation of Title VII. *See* Order at 37 (enjoining Defendants from "initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in *Title IX's* prohibition against discrimination on the basis of sex" (emphasis added)). Plaintiffs do not dispute this point.

See Defs.' Mot. at 20-21. As previously explained, OSHA's Best Practices Guide—like the other Guidelines—is advisory. *See* Defs.' Opp'n to Pls.' App. for Prelim. Inj. ("Defs.' PI Opp'n") at 5 n.3, ECF No. 40. Moreover, Plaintiffs' arguments with respect to OSHA-approved State Plans, *see* Pls.' Resp. at 7, display a fundamental misunderstanding of how such State Plans function. OSHA does not "enforce" its standards in states or territories with plans that cover both private and state and local government workplaces. *See* 29 U.S.C. § 667(e). Rather, these states and territories must adopt workplace safety and health standards and programs that are "at least as effective as" as OSHA standards. *Id.* § 667(c). The states and territories then enforce their own standards and programs. *Id.* §§ 667(b), (c)(2). In any event, there are no OSHA standards at issue here—only an unenforceable best practices guide—and states with State Plans that do not adopt OSHA's advice regarding access to restrooms by transgender individuals would not be in violation of the statute. Plaintiffs have therefore not shown—and cannot show—any injury or harm related to OSHA or DOL more broadly, and Defendants respectfully ask the Court to clarify that the Preliminary Injunction does not apply to any DOL or OSHA activities or programs.[5]

III. The Preliminary Injunction should not be read to apply beyond the Guidelines, which are the only arguably final agency actions in this case

Agency action is subject to challenge under the APA only if it is final. *See, e.g.*, *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir. 2004) ("If there is no 'final agency action' a federal court lacks subject matter jurisdiction."). As a result, a plaintiff cannot bring an APA challenge based on an abstract disagreement with an agency's understanding of the law, but must identify concrete, final action by the agency. *See, e.g.*, *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("The federal courts are not authorized to review agency policy choices in the

[5] In their Motion for Clarification, Defendants specifically raised the issue of activities and programs of DOL other than those of OSHA, which were not referenced in either the Amended Complaint or the motion for a preliminary injunction. *See* Defs.' Mot. at 20-21. DOL enforces laws that were not briefed at all in the preliminary injunction proceedings. Plaintiffs did not respond to this point, and have not identified any other DOL activities or programs that they believe to be properly within the scope of the Preliminary Injunction. Accordingly, Defendants ask that the Court confirm that the Preliminary Injunction does not prevent DOL from enforcing the various other laws that have been committed to its jurisdiction.

abstract."); *MPHJ Tech. Investments, LLC v. Fed. Trade Comm'n*, No. 14-cv-11, 2014 WL 12495297, at *3 (W.D. Tex. Sept. 16, 2014). Here, Plaintiffs identified the Guidelines as the allegedly unlawful final agency action, and the Court agreed, over Defendants' objection. *See* Order at 17 (concluding "that the Guidelines are final agency action under the APA").

Yet Plaintiffs now contend that the Preliminary Injunction should be read to encompass not only the Guidelines—the only arguably final agency action at issue in this litigation—but also other hypothetical agency action, "both known and unknown." Pls.' Resp. at 1 n.1. Plaintiffs ask the Court to enjoin "the actual rule" that "lurks somewhere beneath" the challenged Guidelines, *id.* at 2, as well as "guidances *unidentified* by Plaintiffs (in its pleadings or other filings)," *id.* at 10 (emphasis added). But Defendants have been transparent about their understanding that prohibiting transgender individuals from accessing restrooms, locker rooms, and similar facilities consistent with their gender identity amounts to sex-based discrimination under Title IX and its implementing regulations (as well as under Title VII). *See, e.g.*, Defs.' PI Opp'n at 1. Defendants have also been clear that the challenged Guidelines simply express the agency's understanding of what the law requires—they are not the source of any legal requirements. *See, e.g.*, *id.* at 7, 14.

In any event, because the Court can enjoin only final agency action, the Preliminary Injunction should not be understood to extend beyond the Guidelines, to encompass the agencies' understanding of the law in the abstract or hypothetical rules not identified by Plaintiffs. Plaintiffs decided to challenge the agencies' interpretation of the law before it had coalesced into a concrete enforcement action against them. The Guidelines were the only even arguably final agency action that Plaintiffs could identify, and Plaintiffs made them the focal point of their motion for a preliminary injunction. As Plaintiffs admit, "[t]he injunction does not prevent Defendants from relying on statutes or other actual law or validly adopted regulations to undertake lawful anti-discrimination enforcement actions." Pls.' Resp. at 13. Plaintiffs are absolutely correct on this point. When a court decides that a document is an invalid legislative rule, the remedy is to vacate the document, not to bar the agency from ever acting on its underlying interpretation of the statute. *See, e.g., Natural Res. Def. Council v. E.P.A.*, 643 F.3d 311, 320-23 (D.C. Cir. 2011) (concluding

that an EPA publication was "a legislative rule that required notice and comment," and "vacat[ing]" it because no notice and comment occurred); *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 385 (D.C. Cir. 2002) (same).[6] Defendants thus ask the Court to clarify that they are not enjoined from taking actions that are not based on the Guidelines, but that reflect the agencies' interpretation of the relevant statutes and implementing regulations.

IV. The Preliminary Injunction should not be read to prevent Defendants from asserting their interpretation of the law in other federal courts

Based on its plain language, the Preliminary Injunction applies only to "litigation initiated following the date of [the] Order." Order at 37. The Court should reject Plaintiffs' arguments to expand the Preliminary Injunction beyond its text, to litigation that was pending at the time that the Court entered the Preliminary Injunction. *See* Defs.' Reply Regarding Pending Litigation ("Defs.' Reply") at 2-7, ECF No. 72. Furthermore, as Defendants have explained, the Preliminary Injunction should be clarified to confirm that it applies only to litigation to which Plaintiffs are a party, even if initiated after the date of the Preliminary Injunction. *See* Defs.' PI Opp'n at 28-30; Defs.' Mot. at 12-16; Defs.' Reply Regarding Pending Litigation ("Defs.' Reply"), ECF No. 72. In short, Plaintiffs' proposed expansion of the Preliminary Injunction would improperly interfere with the Executive Branch's authority to conduct litigation, thereby raising significant separation of powers concerns, and would interfere with the authority of other federal courts to manage their dockets and to decide cases before them, in violation of principles of comity. And it would extend this Court's Preliminary Injunction far beyond the reach of its Article III authority, to cases that do not involve the plaintiff states and where there has not even been an attempt to make any showing of injury or irreparable harm.

Plaintiffs address none of these arguments. Instead, they assert that Defendants are engaged in a "ruse" to "appropriate court dockets as the new publishers of its rule." Pls.' Resp. at

[6] Plaintiffs seem to reject the very idea of interpretive rules. *See* Pls.' Resp. at 2-3. But it is well established that an agency can "advise the public of the agency's construction of the statutes and rules which it administers" without subjecting its interpretation to notice and comment rulemaking. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). There is nothing improper about administrative action of this type—indeed, it is explicitly recognized by the APA, and serves to clarify statutes and regulations that may otherwise be unclear.

10. This argument appears to be a concern that other courts might agree with Defendants' understanding of the law as, indeed, many already have. But the fact that other courts might disagree with this Court is no reason to interfere with the constitutional duty of those courts to hear and consider arguments and to "say what the law is" in cases in which the government is a party. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). To the contrary, such disagreements provide assistance to reviewing courts by airing competing legal positions. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984). Nor is submitting a brief to a court some kind of clandestine way of promulgating a rule, as Plaintiffs suggest. It is advocacy—a completely appropriate function of the Attorney General and other agencies, who are charged by statute with representing the interests of the United States in courts across the country.

Plaintiffs' arguments are based on a fundamental mischaracterization of our federal court system. They seek to place this Court in the role of the Supreme Court, announcing binding precedent and preventing the government from asserting a contrary legal position before other federal courts in cases that do not involve the plaintiff states. Even if this Court's ruling were a final judgment—which it is not—it would not be binding on other federal courts. Nor would it "functionally rescind the Court's injunction," Pls.' Resp. at 12, for the government to assert its interpretation of the law in proceedings before other courts. The Supreme Court has expressly held that nonmutual collateral estoppel does not apply against the government, meaning that the government can litigate the same legal issue against multiple parties in multiple fora before the Supreme Court considers the issue. *See Mendoza*, 464 U.S. 154. Plaintiffs' expansive view of the Preliminary Injunction in this case cannot be reconciled with that holding.[7] Defendants ask this Court to confirm that the Preliminary Injunction does not dictate which arguments the government may assert before other courts, with the exception of litigation involving access to sex-segregated

[7] Plaintiffs' suggest that Defendants might violate Rule 11 of the Federal Rules of Civil Procedure if they assert their interpretation of the law before other courts, because this Court has found that the meaning of the term "sex" is clear. *See* Pls.' Resp. at 11. There is no basis for this position. The Preliminary Injunction ruling is not precedential even within *this* district, let alone within other federal jurisdictions. Furthermore, while this Court has thus far disagreed with Defendants' understanding of Title IX and its implementing regulations, other Courts have taken the opposite view. Thus, Defendants' arguments are not remotely frivolous within the meaning of Rule 11.

facilities by transgender individuals initiated after the entry of the Preliminary Injunction to which Plaintiffs are parties.

CONCLUSION

For the reasons stated in Defendants' motion and set forth above, Defendants respectfully request that the Court clarify the scope of the Preliminary Injunction by October 3, 2016.

Dated: September 23, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director, Federal Programs Branch

/s/ Benjamin L. Berwick

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, a copy of the foregoing Reply in Support of Defendants' Motion for Clarification of the Court's Preliminary Injunction Order was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick
Benjamin L. Berwick

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

STATE OF TEXAS et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00054-O**
	§	
UNITED STATES OF AMERICA et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Notice of Pending Litigation (ECF No. 61), filed August 30, 2016; Plaintiffs' Notice of Pending of Litigation (ECF No. 64), filed September 9, 2016; and Defendants' Reply Regarding Pending Litigation (ECF No. 72), filed September 14, 2016. Also before the Court are Defendants' Motion for Clarification (ECF No. 65), filed September 12, 2016; Plaintiffs' Response (ECF No. 73), filed September 19, 2016, and Defendants' Reply (ECF No. 74), filed September 23, 2016. The Court held a hearing on September 30, 2016 to address the issues raised in these pleadings. *See* ECF No. 76. Defendants seek to clarify the Court's preliminary injunction in this case.

The parties have agreed in their briefing that the injunction is directed at the issue of access to intimate facilities. Pls.' Resp. Mot. Clarify 3–5, ECF No. 73; Defs.' Reply Mot. Clarify 1–2 n.1–2, ECF No. 74. At oral argument Plaintiffs' counsel agreed that Defendants may offer textual analyses of Title IX and Title VII in cases where the Government and its agencies are defendants, and if the United States Supreme Court or any Circuit Court requests that Defendants file amicus

curiae briefs, they may do so. Tr'g 26–28; 32–33. Thus, the remaining issues related to the request for clarification appear to be (1) whether Defendants' Guidelines are enjoined in total or whether the principle of severability applies to them; (2) whether the injunction applies to Title VII investigations, particularly as it applies to workplaces where school teachers or school staff may or must use the same intimate facilities as students; (3) whether the injunction applies to OSHA or DOL activity; (4) whether the injunction prevents Government agencies from carrying out their statutory duties, which traditionally fall within their core missions to prevent various forms of discrimination; and (5) the geographic scope of the injuction. Mot. Clarify 6–11, 16–21, ECF No. 65.

Having considered the parties' submissions and applicable law, the Court finds that the parties must provide additional briefing on whether the Defendants' Guidelines are enjoined in total or whether the principal of severability applies to them, whether Title VII is implicated by this injunction, and whether the injunction applies to OSHA or DOL activity. Plaintiffs must submit a response addressing these issues on or before **October 24, 2016**. Defendants must submit a reply on or before **October 28, 2016**.

Furthermore, the Court offers the following clarifications to its August 21, 2016 Order granting the preliminary injunction (ECF No. 58):

I. NATIONWIDE INJUNCTION

The Court's August 21, 2016 Order granted a nationwide injunction. ECF No. 58. Defendants argue that "the geographic scope of the Preliminary Injunction [] could be read to exceed the proper scope of relief available to the [P]laintiffs in this case" and they contend that this "would run afoul of the Supreme Court's admonition that 'injunctive relief should be no more

burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" Mot. Clarify 2, 16, ECF No. 65 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); Defs.' Reply 2–4, ECF No. 74; Tr'g at 6–7. According to Defendants, they have a right to rely on the Guidelines in litigation before other courts that have agreed with their interpretation of sex in Title VII and IX to mean gender identity. Tr'g at 7.

Plaintiffs argue that "Defendants are federal administrators and agencies, with footings in every state and territory" and they are "collectively and systematically engaged in enforcing a pervasive and unlawful rule across the country . . . ." Resp. Mot. Clarify 9–10, ECF No. 73. "An injunction that precludes Defendants from acting everywhere[,]" Plaintiffs contend, "is quite clear." *Id.*; Tr'g at 17–19 (arguing that the geographic extent of the harm Plaintiffs suffer is nationwide). The Court agrees that the scope of this injunction should be and is nationwide.

As stated in one of the most recent *Texas v. United States* Fifth Circuit opinions, "the Constitution vests the District Court with 'the judicial Power of the United States[,]'" and "[t]hat power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (quoting U.S. Const. art. III, §1), *aff'd by equally divided Supreme Court*, 136 S. Ct. 2271 (June 23, 2016) (finding that a nationwide injunction was warranted because "partial implementation of DAPA would 'detract from the integrated scheme of regulation created by Congress,'" and create a "substantial likelihood that a geographically-limited injunction would be ineffective . . . ."); *see also Chevron Chem. Co. v. Voluntary Purchasing Grps.*, 659 F.2d 695, 705–06 (5th Cir. 1981) (directing the district court to issue broad injunction on remand in a trade dress case); *Califano*, 442 U.S. at 702 (finding that the

scope of an injunction is dictated by the extent of the violation, not the geographical extent of the plaintiff class, thus a nationwide injunction was consistent with the principles of equity); *Brennan v. J.M. Fields, Inc.*, 488 F.2d 443, 449–50 (5th Cir. 1973) (affirming a nationwide injunction against a national chain); *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 826 (5th Cir. 1972) ("[C]ourts should not be loath to issue injunctions of general applicability . . . . The injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a[s] public policy judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium."); *Wirtz v. Ocala Gas Co.*, 336 F.2d 236, 240 (5th Cir. 1964) (describing certain FLSA injunctions as "sufficiently broad and general to enjoin any practices which would constitute violations of the Act's provisions").

It is clear from Supreme Court and Fifth Circuit precedent that this Court has the power to issue a nationwide injunction where appropriate. Both Title IX and Title VII rely on the consistent, uniform application of national standards in education and workplace policy. A nationwide injunction is necessary because the alleged violation extends nationwide. Defendants are a group of agencies and administrators capable of enforcing their Guidelines nationwide, affecting numerous state and school district facilities across the country. *Texas*, 809 F.3d at 187–88. Should the Court only limit the injunction to the plaintiff states who are a party to this cause of action, the Court risks a "substantial likelihood that a geographically-limited injunction would be ineffective." *Id.*[1]

[1] As noted previously, "Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation. However, [this] injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of the state law." Order 37, ECF No. 58.

Accordingly, Defendants Motion to Clarify is **DENIED** as they request that the Court limit the injunction to plaintiff states.

II. INJUNCTION DOES NOT AFFECT DEFENDANTS' CORE MISSIONS

Defendants argue that the Court's Preliminary Injunction Order (ECF No. 58) should clarify that it does not enjoin the EEOC from fulfilling statutory duties necessary to protect the rights of individuals alleging discrimination and that it does not affect programs which combat discrimination based on race, national origin, or disability and other activities, or limit the enforcement of anti-discrimination statues outside the plaintiff states. *See* Mot. Clarify 6–11, 16–21, ECF No. 65 (citing 42 U.S.C. § 2000e-5(b), (e)(1), (f)(1); *E.E.O.C. v. Bass Pro Outdoors World, L.L.C.*, No 15-20078, 2016 WL 3397696, at *8 (5th Cir. June 17, 2016); 29 C.F.R § 1614). The Court **CLARIFIES** that these duties are not affected by the Preliminary Injunction Order (ECF No. 58).

Indeed, the Court's Order did not purport to alter any statute or statutory duties Defendants may exercise in pursuit of their governmental duties under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the American with Disabilities Act of 1990. This injunction also does not affect a school's obligation to investigate and remedy student complaints of sexual harassment, sex stereotyping, and bullying.

Defendants are simply prevented from using the Guidelines to argue that the definition of "sex" as it relates to intimate facilities includes gender identity. Order 36–37, ECF No. 58. The Court's preliminary injunction neither affects EEOC's fulfillment of its statutory duties, nor Defendants' ability to enforce anti-discrimination statutes nationwide. The injunction does not affect those programs addressing discrimination on the basis of race, national origin, or disability.

Defendants are simply "enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of [its August 21, 2016] Order."[2] Order 37, ECF No. 58.

III. CONCLUSION

Accordingly, the Court clarifies that: (1) the preliminary injunction applies nationwide; and (2) Defendants' core missions to combat discrimination based on race, national origin, or disability, and the EEOC's statutory duties are not otherwise affected by the preliminary injunction (ECF No. 58).

The injunction is limited to the issue of access to intimate facilities. Defendants are enjoined from relying on the Guidelines, but may offer textual analyses of Title IX and Title VII in cases where the Government and its agencies are defendants or where the United States Supreme

[2] Plaintiffs have also listed numerous cases that they believe are not enjoined by the Court's preliminary injunction in their Notice of Pending Litigation. *See* Not. Pending Lit. 10–13, ECF No. 64. The Court agrees and clarifies that these cases are not included in the injunction. At oral argument, Defendants asked the Court to restrict the injunction to litigation in which the plaintiff states are involved. Tr'g at 7–8. The Court clarifies that the preliminary injunction attaches to Defendant's conduct in litigation not substantially developed before the August 21, 2016 Order (ECF No. 58), regardless of whether plaintiff states are involved. The Court seeks to avoid unnecessarily interfering with litigation concerning access to intimate facilities that was substantially developed before the Court's Order granting the preliminary injunction. In pending litigation concerning access to intimate facilities, if no responsive pleadings were filed and no substantive rulings issued before August 21, 2016, the preliminary injunction applies and Defendants are enjoined from relying on the Guidelines. The injunction applies in part to *United States v. Southeastern Okla. Univ.*, a case filed by the DOJ against a public university in Oklahoma (a plaintiff state here) more than a year before the Court's August 21, 2016 injunction. No. 5:15-cv-324 (W.D. Okla.). Although the DOJ did not make the issue at the heart of this injunction (access to intimate facilities) a central feature of the complaint, the aggrieved private party has now intervened and introduced new claims that involve access to intimate facilities. No. 15:15-cv-324, ECF No. 23. Because litigation in *Southeastern* was substantially underway before the issuance of this injunction, DOJ's legal arguments in the case fall outside the scope of this injunction. However, Defendants (including DOJ) are still "enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions" (including Southeastern Oklahoma State University) and "enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex". ECF No. 58 at 37.

Court or any Circuit Court request that Defendants file amicus curiae briefing on this issue. The parties are **ORDERED** to brief the remaining issues of whether the Defendants' Guidelines are enjoined in total or whether the principal of severability applies to them, whether the injunction implicates Title VII in any manner (and specifically where school employees and staff may share intimate facilities with students), and whether OSHA or DOL activity is implicated by the injunction. Plaintiffs must respond on or before **October 24, 2016**, and Defendants must reply on or before **October 28, 2016.**

SO ORDERED on this **19th day** of **October, 2016.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
RACHEL TUDOR,	)	
	)	
Plaintiff-Intervenor	)	
v.	)	CASE NO. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
	)	
Defendants.	)	

[PROPOSED] ORDER

Plaintiff United States of America's Motion to Lift the Stay (ECF No. 125) is hereby GRANTED. The court in *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex.) has clarified that its injunction in that case only restricts the United States with respect to activity it has not pursued in this case. *See* ECF No. 125-7 at 6 n.2. The *Texas* court's injunction does not permit the United States to amend its Complaint to assert a claim that the Defendants violated Dr. Tudor's rights under Title VII or Title IX by depriving her of access to intimate facilities, such as restrooms. This recital is intended to reflect the *Texas* injunction, and not any independent limitations imposed by this Court; if the *Texas* court's injunction is stayed or vacated, the United States will not be bound by the above restrictions.

The parties are hereby ORDERED to confer about a schedule for the remainder of this case and to submit a proposed schedule no later than one week from the date of this Order. Plaintiff's deadline to file a motion to compel related to privilege over ESI, as contemplated in the Court's FRE 502(d) Order (ECF No. 66 at 2), is one week from the date of this Order.

IT IS SO ORDERED THIS _____ day of ________, 2016.

____
ROBIN J. CAUTHRON
United States District Judge