UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE, et al. Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, et al. Defendants.	)	Case No. 3:21-cv-00308 Judge Atchley

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

For the second time in less than a decade, federal administrative agencies have attempted to effect radical social change in our nation's schools and workplaces by purporting to "interpret" federal antidiscrimination laws to prohibit discrimination based on gender identity. Just as they did in 2016, when their unlawful actions were quickly enjoined nationwide, *see Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), the Department of Education ("Department") and the Equal Employment Opportunity Commission ("EEOC") have once again told States and other regulated parties that they must ignore biological sex when it comes to athletics, locker rooms, pronouns, and who knows what else, or face enforcement actions.

The Department declared that it "interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination" based on "sexual orientation and gender identity" and vowed to "fully enforce Title IX" in that manner. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32,637, 32,637, 32,639 (June 22, 2021) ("Interpretation"). And the EEOC Chair issued a "technical assistance document" declaring that Title VII's prohibition of discrimination "because of . . . sex" prevents employers from maintaining showers, locker rooms, and bathrooms that are separated based on biological sex and requires employers to use a transgender employee's preferred pronouns. EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021), https://bit.ly/3zgP7iP ("EEOC Document").

These actions by the Department and the EEOC Chair are procedurally and substantively unlawful, in violation of the Administrative Procedure Act ("APA"). They are procedurally unlawful because, among other reasons, they impose new substantive obligations on States and other regulated entities without adhering to the APA's notice-and-comment requirements, which

are designed to ensure public participation. And they are substantively unlawful because the agencies' purported "interpretations" of Title IX and Title VII squarely conflict with the text of those statutes and violate the Constitution.

Contrary to the agencies' assertions, their interpretations are not required by the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *Bostock* held only that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII. *Id.* at 1737-38 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court "assum[ed]" that the term "sex" means "biological distinctions between male and female," *id.* at 1739, and it made clear that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues that were not before the Court such as "sex-segregated bathrooms, locker rooms, and dress codes." *Id.* at 1753. The initial guidance that agencies provided to regulated entities after *Bostock* confirmed that the decision was narrow and did not extend to Title IX or call into question sex-separated living facilities or sex-specific dress codes.

Plaintiffs—the States of Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia—seek a preliminary injunction prohibiting Defendants—the U.S. Department of Education ("Department"), the Secretary of Education, the EEOC, the EEOC Chair, the Department of Justice ("DOJ"), and the Attorney General and Assistant Attorney General of the United States—from enforcing the agencies' unlawful guidance. The injunction is necessary to prevent substantial irreparable harms—interference with the States' sovereign regulatory authority, threats to student and employee privacy and athletic opportunities for female students, and the infringement of First Amendment rights, to name just a few. Absent a preliminary injunction, Plaintiffs will be forced to choose

between capitulating to the agencies' unilateral rewriting of federal antidiscrimination law or risking enforcement actions and the loss of significant federal funds. Plaintiffs should not be put to that choice. This Court should immediately set aside the challenged guidance and enjoin its enforcement.

BACKGROUND

In 2016, the Department and the DOJ issued a "Dear Colleague" letter announcing a radically new interpretation of the term "sex" in Title IX. U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016), https://bit.ly/3BlfhkT. The letter advised Title IX recipients that the Departments would "treat a student's gender identity as the student's sex for purposes of Title IX." *Id.* at 2. That meant that school staff must "use pronouns and names consistent with a transgender student's gender identity" and "allow transgender students" to access locker rooms, showers, and restrooms "consistent with their gender identity." *Id.* at 3. The same year, the EEOC issued a fact sheet declaring that Title VII prohibits employment discrimination based on gender identity and requires employers to allow transgender employees to use restrooms and locker rooms consistent with their gender identity. EEOC, Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964 (May 2, 2016), https://bit.ly/3yfe5h9.

A broad coalition of States and other regulated parties promptly challenged these agency actions under the APA, and a federal district court deemed the actions procedurally and substantively unlawful and enjoined their enforcement nationwide. *Texas*, 201 F. Supp. 3d at 828-34. The court held that the guidance was procedurally unlawful because it violated the APA's notice-and-comment requirement for legislative rules, *id.* at 828-30, and substantively unlawful because it contravened the statutory text, *id.* at 831-34. The federal defendants initially

appealed the decision but later voluntarily dismissed the appeal. *See Texas v. United States*, No. 16-11534, 2017 WL 7000562 (5th Cir. Mar. 3, 2017).

One would imagine that, following this initial failed attempt to rewrite federal antidiscrimination law, federal agencies would think twice before trying it again. Not so. As one of his very first official acts, President Biden directed federal agencies to "fully implement" the Administration's policy of prohibiting "discrimination on the basis of gender identity and sexual orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7,023, 7,023 (Jan. 20, 2021). President Biden sought to justify this broad mandate by claiming that, "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX . . . along with [its] respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation." *Id.* But *Bostock* was not so sweeping. It held only that Title VII prohibits an employer from "fir[ing] someone simply for being homosexual or transgender," *Bostock*, 140 S. Ct. at 1737, while declining to "prejudge" other "federal or state laws that prohibit sex discrimination" or other actions such as "sex-segregated bathrooms, locker rooms, and dress codes," *id.* at 1753.

In response to the executive order, on March 26, 2021, the Civil Rights Division of the DOJ released a memorandum concluding that Title IX "prohibit[s] discrimination on the basis of gender identity and sexual orientation." U.S. Dep't of Justice, Memorandum Regarding Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://bit.ly/2WpV5zq. The Department and the EEOC Chair soon issued their interpretations of Title IX and Title VII, respectively. Neither agency engaged in notice and comment.

Department of Education. On June 22, 2021, the Department's Office for Civil Rights published its Interpretation of Title IX in light of *Bostock*. The Department concluded that Title

IX's unique statutory requirements are no different from Title VII's and interpreted "Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity." Interpretation, 86 Fed. Reg. at 32,637. The Department noted that the Interpretation represented a change in position. *See id.* (acknowledging that it "at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity"). In fact, it was a complete about-face from the Department's position just months before, when it concluded that, even after *Bostock*, "sex" in Title IX "should be construed to mean biological sex, male or female." *See* U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cnty. (Jan. 8, 2021), https://bit.ly/3mwKI7H ("Richey Memorandum"). The Department did not explain its change in position or consider covered institutions' reliance on the Department's prior guidance and regulations.

In its new Interpretation, the Department declared that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department" and that the Interpretation will "guide the Department in processing complaints and conducting investigations." Interpretation, 86 Fed. Reg. at 32,639.

On June 23, 2021, an Acting Assistant Secretary for the Department issued a "Dear Educator" letter and a "Fact Sheet" on "Confronting Anti-LGBTQI+ Harassment in Schools." U.S. Dep't of Educ., Letter to Educators on Title IX's 49th Anniversary (June 23, 2021), https://bit.ly/3ksLLDj; U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM (together with Dear Educator Letter, "Fact Sheet"). The Fact Sheet identifies discrete examples of purportedly discriminatory conduct that the Department "can investigate." Fact Sheet. That conduct includes preventing a "transgender

high school girl" from competing on the "girls' cheerleading team" or using the "girls' restroom," as well as declining to use a transgender student's preferred name or pronouns. *Id.* The Fact Sheet encourages students who have been "treated unfairly . . . because of sexual orientation or gender identity" to "[c]onsider filing a complaint" with the DOJ's Civil Rights Division or the Department's Office of Civil Rights. *Id.*

EEOC. On June 15, 2021, EEOC Chair Charlotte Burrows published a "technical assistance document" on the EEOC website that purports to "explain[ ] what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country." EEOC Document. This document was published "upon approval of the Chair of the U.S. Equal Employment Opportunity Commission." *Id.* There is no indication that the full EEOC voted on whether to approve the document or even on whether to issue the document at all.

After surveying Title VII's general requirements, the EEOC Document provided examples of employer actions that would constitute sex discrimination under *Bostock*. Those examples include "[p]rohibiting a transgender person from dressing or presenting consistent with that person's gender identity," prohibiting a transgender person from using the "bathrooms, locker rooms, or showers" that correspond to the person's gender identity, and using "pronouns or names that are inconsistent with an individual's gender identity." *Id.*

Though the EEOC Document disclaims any binding legal effect, it directs people to contact the EEOC with any reports of discrimination, including by filing a formal charge. *Compare id.* ("The contents of this document do not have the force and effect of law and are not meant to bind the public in any way."), *with id.* ("For applicants and employees of private sector employers and state and local government employers, the individual can contact the EEOC for

help in deciding what to do next.").[1]

On July 7, 2021, a group of state Attorneys General led by Tennessee's Attorney General Herbert H. Slatery III—and including all Plaintiff States—sent a letter to President Biden detailing the procedural and substantive shortcomings in these agency actions. Letter from Herbert H. Slatery III et al. to President Biden (July 7, 2021), https://bit.ly/3sNdNNn. U.S. Senators raised similar concerns about the EEOC Document. Letter of U.S. Senators Josh Hawley and Mike Lee to EEOC Chair Burrows (July 14, 2021), https://bit.ly/3myFacP. Because the agencies have declined to reconsider their interpretations, Plaintiff States have sued for declaratory and injunctive relief and now move for a preliminary injunction.

ARGUMENT

This Court considers four factors in determining whether to grant a preliminary injunction: "(1) whether the moving party has shown a likelihood of success on the merits; (2) whether the moving party will be irreparably injured absent an injunction; (3) whether issuing an injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest." *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). All of these factors weigh in favor of preliminary relief here.

I. The States Are Likely to Succeed on the Merits Because the Agency Actions Are Procedurally Deficient and Contrary to Law.

Under the APA, agency action is unlawful and must be "set aside" when (as relevant here) it is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

[1] Private parties are already relying on the guidance to challenge Plaintiff States' laws. *See* Compl. at ¶ 47, *Curb Records, Inc. v. Lee*, No. 3:21-cv-00500 (M.D. Tenn. June 30, 2021), ECF No. 1 ("The [EEOC] has issued guidance that makes clear that transgender employees must be allowed to access restroom facilities based on their gender identity."); Compl. at ¶¶ 67-69, *A.S. v. Lee*, No. 3:21-cv-00600 (M.D. Tenn. Aug. 2, 2021), ECF No. 1 (alleging that the Department "issued an official interpretation to clarify its enforcement authority over discrimination based on sexual orientation and gender identity under Title IX").

law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2). Plaintiff States have challenged the recent guidance from the Department and the EEOC as procedurally and substantively unlawful under the APA. Those challenges are justiciable, and Plaintiff States are likely to succeed on the merits.

A. The States' Claims Are Justiciable.

Plaintiff States' claims are justiciable. The challenged agency interpretations are final agency actions, and Plaintiff States satisfy the requirements of Article III.

First, the Department's Interpretation and Fact Sheet and the EEOC Document are final agency actions subject to judicial review under the APA. To constitute a final agency action, "the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (cleaned up). And the action must be one by which "*rights or obligations have been determined*, or from which *legal consequences will flow*." *Id.* (emphases added; cleaned up). Courts must take a "pragmatic" approach to finality. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

The Department's Interpretation and Fact Sheet are final agency action because they purport to represent the Department's definitive interpretation of Title IX—an interpretation that will guide the agency's enforcement of the law and thus impose obligations on Plaintiff States and other regulated parties. *See* Interpretation, 86 Fed. Reg. at 32,639 (vowing to "fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity"). Moreover, legal consequences will flow from the Interpretation and Fact Sheet because Title IX recipients that do not comply with the guidance will risk the loss of substantial federal funds. *See, e.g.*,

Hawkes, 136 S. Ct. at 1815 (agency action was final where it warned regulated parties that, if they engage in certain conduct, "they do so at the risk of significant criminal and civil penalties").

The EEOC Document also constitutes final agency action. It purports to represent the EEOC's position on "what the *Bostock* decision means for [employees] and for employers across the country" and in no way suggests that this position is preliminary or subject to change. EEOC Document. And legal consequences will flow from the guidance because it invites applicants and employees to contact the EEOC and "file a charge of discrimination," *id.*, if employers violate the guidance, creating a risk that employers who do not comply with the guidance will be subject to enforcement actions and potential liability, *see Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (concluding that EEOC guidance was "final agency action" because it "ha[d] the effect of committing the agency itself to a view of the law that, in turn, force[d] the plaintiff either to alter its conduct, or expose itself to potential liability" (quotation marks omitted)).

Second, this case easily satisfies Article III's case-or-controversy requirement. *See Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020) (requiring only "a 'substantial likelihood' of standing" at the preliminary-injunction stage). The challenged guidance injures Plaintiff States by interfering with their sovereign authority to make and enforce laws; threatening the loss of significant federal funding (in the case of the Department's Interpretation) or damages liability (in the case of the EEOC Document); and imposing administrative costs and burdens by forcing them to evaluate compliance with the agencies' new interpretations. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007) (States' sovereignty interests are "entitled to special solicitude" in Article III standing analysis); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (interference with a State's sovereign "power to create and enforce a legal code" is sufficient to establish standing); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) (future loss of federal funds sufficient

to establish standing); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232-33 (6th Cir. 1985) (potential preemption of state laws sufficient to establish standing); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"); *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 261-62 (6th Cir. 2009) (en banc) (plurality opinion) (compliance costs sufficient to establish standing); Eley Decl. ¶¶ 3-4 (attached as Ex. A); House Decl. ¶¶ 6-8 (attached as Ex. B); Carney Decl. ¶¶ 6-7 (attached as Ex. C); Mason Decl. ¶¶ 3-6 (attached as Ex. D). Those injuries are directly traceable to the challenged guidance and would be redressed by a judgment declaring the guidance invalid and setting it aside and an injunction preventing its enforcement.

Moreover, Plaintiff States face a "credible threat of enforcement" of the challenged guidance. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014). They currently have laws, policies, and practices that are at least "arguably . . . proscribed" by the agencies' guidance. *Id.* at 162 (cleaned up); *see, e.g.*, 2021 Tenn. Pub. Acts, c. 40, § 1 (providing that "[a] student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth"); 2021 Tenn. Pub. Acts., c. 452, § 6 (giving public school students, teachers, and employees a private right of action against a school that "intentionally allow[s] a member of the opposite sex to enter [a] multi-occupancy restroom or changing facility while other persons [are] present"); Tenn. Code Ann. § 49-6-2904(b)(2) (providing students a right to "[e]xpress religious viewpoints in a public school"); *id.* § 49-7-2405(a)(2), (a)(10) (providing, with certain limitations, that public higher education institutions in Tennessee "shall be committed to giving students the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue" and that "no faculty will face adverse employment action for classroom speech"); Mason

Decl. ¶¶ 3-6; Raymer Decl. ¶ 6 (attached as Ex. E).[2] And the Department's Interpretation and Fact Sheet, as well as the EEOC Document, indicate that alleged violations of the guidance will be investigated and enforcement proceedings initiated. Interpretation, 86 Fed. Reg. at 32,637, 32,639; Fact Sheet; EEOC Document.

B. The Department's Interpretation and Fact Sheet Violate the APA.

Plaintiff States are likely to succeed on their challenge to the Department's Interpretation and Fact Sheet because that guidance is procedurally deficient and contrary to law. The guidance is a legislative rule that was adopted without the required notice-and-comment procedures and is arbitrary and capricious. And the guidance is contrary to both Title IX and the Constitution.

1. The Interpretation and Fact Sheet Are Procedurally Deficient.

"The APA sets different procedural requirements for 'legislative rules' and 'interpretive rules': the former must be promulgated pursuant to notice-and-comment rulemaking; the latter need not." *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (citing 5 U.S.C. § 553). A rule that "intends to create new law, rights or duties" is legislative. *Id.* (quotation marks omitted). And "a rule that 'adopts a new position inconsistent with any of the Secretary's existing regulations' is necessarily legislative." *Id.* (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (alteration adopted)).[3] "The notice and comment rulemaking requirements were intended to 'assure fairness and mature consideration of rules of general application.'" *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005)

[2] *See also, e.g.*, Compl. ¶ 99, ECF No. 1, PageID#19 (citing laws of other Plaintiff States that at least arguably conflict with the challenged guidance).

[3] The analysis here turns on the substance of the documents, not what label the Department uses. *Detroit Edison Co. v. EPA*, 496 F.2d 244, 249 (6th Cir. 1974) ("The particular label placed upon [a regulation] is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." (alteration in original; quoting *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942))).

(quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion)). A "central purpose[] of the requirement . . . is to give those with interests affected by rules the chance to participate in [their] promulgation." *Id.*

The Department's Interpretation and Fact Sheet are legislative rules. They "create new law," *Azar*, 908 F.3d at 1042, by imposing on regulated entities a new obligation not to discriminate based on sexual orientation or gender identity—an obligation that appears nowhere in Title IX itself and that *Bostock* did not impose either, *see* pp. 13-18, *infra*. Moreover, both the Interpretation and Fact Sheet contradict the Department's existing regulations and thus effect "a substantive change in the regulations." *Guernsey Mem'l Hosp.*, 514 U.S. at 100 (quotation marks omitted). As detailed below, *see* pp. 14-15, *infra*, the Interpretation and Fact Sheet cannot be reconciled with Department regulations expressly authorizing Title IX recipients to draw distinctions based on biological sex in certain circumstances, including by providing separate athletic teams and living facilities.

Because the Interpretation and Fact Sheet are legislative rules, the Department was required to give the States and other affected parties notice and an opportunity to participate. Indeed, it is hard to imagine an issue more in need of public input and deliberation. The Interpretation and Fact Sheet impose obligations on schools at every level across the country and implicate core privacy and safety interests of children of all ages, athletic opportunities for female students, and First Amendment rights. The Department's failure to adhere to notice and comment was a clear violation of the APA that warrants preliminary relief.

The Interpretation and Fact Sheet are also arbitrary and capricious because they conflict with prior agency guidance, including the Department's initial post-*Bostock* guidance and longstanding Department regulations that allow—and sometimes require—covered entities to draw distinctions based on biological sex. *See Dep't of Homeland Sec. v. Regents of the Univ.*

of Cal., 140 S. Ct. 1891, 1913-14 (2020); *see also* pp. 14-15, *infra*. The Department failed to adequately acknowledge its change in position, to provide "good reasons" for that change, or to consider the "serious reliance interests" at stake. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quotation marks omitted); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Institutions relied on this prior guidance, including in designing and constructing their facilities; had they known the Department would eventually interpret Title IX to prohibit discrimination based on gender identity, they may have offered more single-occupant living facilities. But the Department did not consider these interests—it merely noted that it had issued contrary guidance in the past. Interpretation, 86 Fed. Reg. at 32,637.

2. The Interpretation and Fact Sheet Are Contrary to Title IX.

The Interpretation and Fact Sheet are also substantively unlawful because their purported interpretation is contrary to Title IX. *Bostock* did not address Title IX at all and therefore cannot support the Department's guidance. And there are significant textual differences between Title IX and Title VII that preclude the Department's position.

The Department cannot simply point to *Bostock* to justify its interpretation of Title IX. As an initial matter, *Bostock* concerned only Title VII, expressly noted that "other federal or state laws that prohibit sex discrimination"—like Title IX—were not "before" the Court, and refused to "prejudge any such question" about what those statutes require. 140 S. Ct. at 1753. Nor is *Bostock*'s analysis necessarily applicable to Title IX. As the Sixth Circuit recently explained, "Title VII differs from Title IX in important respects." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). It therefore "does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Id.*; *cf. Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

The Department must instead justify its interpretation based on Title IX itself. But the Interpretation and Fact Sheet squarely conflict with Title IX. Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). As *Meriwether* emphasized, Title IX—unlike Title VII—also *expressly authorizes* separation based on sex in certain circumstances. 992 F.3d at 510 n.4. For example, it allows certain single-sex educational institutions and organizations. 20 U.S.C. § 1681(a)(1)-(9). And it makes clear that the statute's prohibition of sex discrimination does not prevent entities from "from maintaining separate living facilities for the different sexes." *Id.* § 1686; *see* 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh, the chief Senate sponsor of Title IX) (explaining that this statutory provision ensures that covered institutions may "permit differential treatment by sex . . . in sports facilities or other instances where personal privacy must be preserved").

The Department's own regulations are even more specific in this regard. They allow covered programs to "provide separate toilet, locker room, and shower facilities on the basis of sex," as long as the "facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33; *see* 45 Fed. Reg. 30,802, 30,960 (May 9, 1980) (similar). The Department allows covered programs to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport," 34 C.F.R. § 106.41(b), and even *requires* universities to consider sex in allocating athletic scholarships, *id.* at § 106.37(c); *Meriwether*, 992 F.3d at 510 n.4. These regulations underscore that "[p]hysical differences between men and women . . . are enduring" and that the "'two sexes are not fungible'" but rather have "'inherent

differences.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) (cleaned up) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

As the Department has always construed the term, "sex" in Title IX refers only to biological sex, and not gender identity. *E.g.*, 85 Fed. Reg. 30,178 (May 19, 2020) ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification."). That was the ordinary meaning of the term when Title IX was enacted. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1322 (11th Cir. 2021) (W. Pryor, C.J., dissenting) (collecting dictionary definitions from time of enactment); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632-33 (4th Cir. 2020) (Niemeyer, J., dissenting) (same).

Statutory context confirms this binary understanding of "sex." *See* 20 U.S.C. § 1681(a)(2) (describing how an institution may change "from . . . . admit[ting] only students of one sex to . . . admit[ting] students of *both sexes*") (emphasis added)); *id.* § 1681(a)(6)(B) (referring to ''Men's'' and ''Women's'' associations and organizations for ''Boy[s]'' and ''Girl[s],'' "the membership of which has traditionally been limited to persons of *one sex*") (emphasis added)). And the Department's regulations provide further evidence of this understanding. *See* 34 C.F.R. § 106.41(b) (covered institutions "may operate or sponsor separate teams for members of each sex where selection . . . is based upon competitive skill or the activity involved is a contact sport"); *id.* § 106.40(b)(1) (prohibiting discrimination based on pregnancy); 85 Fed. Reg. at 30,178 ("In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes.").

Because Title IX expressly authorizes separation based on biological sex in myriad contexts, including athletics and living facilities, it precludes the Department's view that a covered program may not prevent an individual of one sex from using facilities or competing on athletic teams designated for the other sex, or otherwise differentiate between the sexes in

circumstances where those differences matter.

The text of Title IX is materially different from Title VII in another respect: Title IX prohibits discrimination "on *the basis* of sex," 20 U.S.C. § 1681(a) (emphasis added), rather than "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1). That distinction is significant. *Bostock* concluded that Title VII's prohibition on discrimination "because of" sex imposed a but-for causation requirement, which the Court acknowledged "can be a sweeping standard." 140 S. Ct. at 1739. It followed from that standard that "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred," even if the primary reason for the termination was that the employee is homosexual or transgender. *Id.* at 1741-42 (acknowledging that "[w]hen an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies)").

Title IX, by contrast, prohibits only discrimination "on *the basis* of sex." That language makes clear that biological sex must be the *sole* reason for the discrimination. "A statutory provision's use of the definite article 'the,' . . . indicates that Congress intended the term modified to have a singular referent." *SEC v. KPMG LLP*, 412 F. Supp. 2d 349, 387-88 (S.D.N.Y. 2006); *accord Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004).

Against all this, the Department's attempts to justify its interpretation of Title IX are unavailing. Interpretation, 86 Fed. Reg. at 32,638. *First*, the Department concluded that there is a "textual similarity" between Title IX and Title VII. As explained above, however, the two statutes in fact contain materially different language. The Department asserted that the *Bostock* opinion used "because of" and "on the basis of" interchangeably. *Id.* But "[j]udicial opinions are not statutes." *In re Plavix Mktg., Sales Practics and Prod. Liab. Litig. (No. II)*, 974 F.3d 228, 235 (3d Cir. 2020). The dispositive question is what *Congress* intended. And Congress's use of

different language in Title IX indicates that it intended "to convey a different meaning." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1578 (2016) (Thomas, J., concurring in the judgment).

Second, the Department asserted that both Title VII and Title IX "specifically protect individuals against discrimination." Interpretation, 86 Fed. Reg. at 32,638. True enough. But the relevant question is what constitutes prohibited discrimination under each statute. And given the textual differences between Title VII and Title IX, what is discrimination under one statute is not necessarily discrimination under the other.

Third, the Department contended that Title VII and Title IX are similar because neither statute contains an exception for discrimination against homosexual or transgender individuals. *Id.* That argument is a non-starter. An exception for such discrimination would be necessary only if the statutes otherwise prohibited it. But, as explained above, Title IX prohibits discrimination only on the basis of biological sex.

Fourth, the Department wrongly concluded that Title IX *unambiguously* prohibits sexual-orientation and gender-identity discrimination. Interpretation, 86 Fed. Reg. at 32,638. Not so. At the very least, the fact that Title IX expressly allows sex-separated living facilities precludes any conclusion that the statute *unambiguously* prohibits covered programs from requiring individuals to use living facilities that correspond to their biological sex.

Finally, the Department contends that lower federal-court decisions support its interpretation of Title IX. *See id.* at 32,639 (citing *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020); *Grimm*, 972 F.3d at 616). But the *Adams* decision is no longer good law. After the panel replaced its original opinion with a narrower one that "d[id] not reach the Title IX question" at all, *Adams*, 3 F.4th at 1304, the Eleventh Circuit granted rehearing en banc and vacated even the narrower opinion, *Adams v. Sch. Bd. of St. Johns Cnty.*, -- F.4th --,

No. 18-13592, 2021 WL 3722168 (11th Cir. Aug. 23, 2021). And the Fourth Circuit's decision in *Grimm* suffers from the same shortcomings as the Department's Interpretation. Requiring a school to allow "a biological female who identifies as male[] to use the male restroom compromises the separation as explicitly authorized by Title IX." *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting). Notably, the Department failed even to mention *Meriwether* or any other decisions that would undermine its Interpretation.

3. The Interpretation and Fact Sheet Violate the Constitution.

The Department's guidance is also contrary to law because it violates the Spending Clause, the First Amendment, and structural constitutional safeguards.

Spending Clause. Congress enacted Title IX pursuant to its Spending Clause authority. "The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (quotation marks omitted). If "Congress intends to impose a condition on the grant of federal moneys," as it did under Title IX, "it must do so unambiguously." *Id.*

As explained above, Title IX does not unambiguously prohibit discrimination based on sexual orientation or transgender status. Nor does it unambiguously prohibit covered programs from separating athletic teams or living facilities based on biological sex. Both the statute and its implementing regulations expressly allow sex-separated facilities. *See* 20 U.S.C. § 1686; 34 C.F.R. § 106.33. And longstanding regulations expressly authorize sex-separated sports teams. 34 C.F.R. § 106.41(b). Because Congress did not "*provide*[] *clear notice to the States* of their [purported] obligation" to treat individuals according to their gender identity, the Department may not impose that obligation under the guise of a regulatory "interpretation." *Pontiac*, 584 F.3d at 271 (plurality opinion).

The Department's guidance violates the Spending Clause for an additional reason: it uses the threat of withholding substantial federal funding to coerce Plaintiff States into adopting the agency's preferred policies. Eley Decl. ¶¶ 3-4; House Decl. ¶¶ 7-8; Carney Decl. ¶¶ 6-7. Threatening to withhold a State's education-related federal funding if it fails to prohibit discrimination based on sexual orientation or gender identity—a requirement that appears nowhere in Title IX itself—"is much more than 'relatively mild encouragement'—it is a gun to the head." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

First Amendment. The Department's position that the use of biologically accurate pronouns could constitute unlawful discrimination runs headlong into the First Amendment. In *Meriwether*, the Sixth Circuit held that a state university "flouted" the First Amendment and "violated [a professor's] free-speech rights" by punishing the professor for declining to use a student's "preferred pronouns." 992 F.3d at 511-12; *cf. United States v. Varner*, 948 F.3d 250, 256-57 (5th Cir. 2020) (declining to use a transgender litigant's preferred pronouns and noting that some transgender individuals prefer less traditional pronouns such as xe/xem/xyr/xyrs/xemself).

The Department's guidance also conflicts with religious liberty. *Bostock* emphasized that the First Amendment, the Religious Freedom Restoration Act, and federal antidiscrimination laws all provide robust protections for religious employers and employees. 140 S. Ct. at 1754. The Department did not even acknowledge the potential conflict between its interpretation of Title IX and the religious-freedom rights of the entities and individuals that the statute regulates. That conflict provides an additional reason to set aside the unlawful guidance.

Congress's spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. By threatening to withhold

funds from Plaintiff States unless they adopt policies or engage in conduct that, at least in some circumstances, would violate the First Amendment rights of their students and employees, the Interpretation and Fact Sheet impose unconstitutional conditions on the receipt of federal funds.

Structural Provisions. The Interpretation and Fact Sheet also violate important structural constitutional safeguards. The Department's purported "interpretation" of Title IX is not a permissible reading of the statute and instead constitutes an unlawful exercise of Congress's legislative authority that exceeds the agency's jurisdiction. *See* 5 U.S.C. § 706(2)(B)-(C) (allowing a court to set aside agency action that is "contrary to constitutional right [or] power" or "in excess of statutory jurisdiction, authority, or limitations"); U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in . . . Congress."). Even if Title IX were ambiguous with respect to the issues the Interpretation and Fact Sheet address, those issues are ones of "deep . . . political significance" that must be decided by Congress, not an unelected administrative agency. *King v. Burwell*, 576 U.S. 473, 486 (2015) (quotation marks omitted). Nor may an administrative agency interpret a statute in a manner that intrudes so significantly on Plaintiff States' traditional authority to protect the privacy and safety of their citizens without clear evidence that Congress intended that result. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

C. The EEOC Document Violates the APA.

Plaintiff States are also likely to succeed on the merits of their claim challenging the EEOC Document because that Document exceeds the EEOC's statutory authority and is both procedurally and substantively flawed.

As an initial matter, the EEOC Document exceeds the EEOC's statutory authority

because neither the full EEOC nor an individual EEOC Commissioner has authority to issue rules or regulations. "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)).[4] The "technical assistance document" that the EEOC Chair published, however, purports to define regulated entities' obligations under Title VII and dictate how employers structure their workplaces down to the pronouns they (and their employees) must use. Accordingly, the EEOC has issued regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C); *see also Texas*, 933 F.3d at 451 (concluding that the EEOC "overstepped its statutory authority" in issuing guidance that amounted to "a substantive rule"). The EEOC Document must be set aside for that reason alone.

Even if the EEOC had rulemaking authority, its issuance of the EEOC Document was procedurally unlawful for two separate reasons. *See* 5 U.S.C. § 706(2)(D) (requiring "observance of procedure required by law"). *First*, the EEOC Chair violated the EEOC's own procedures by issuing the EEOC Document "upon approval of the Chair of the U.S. Equal Employment Opportunity Commission"—*not* the entire Commission. *See* EEOC Document. This unilateral action violates an EEOC regulation requiring approval of "significant guidance" by the entire Commission. *See* 29 C.F.R. § 1695.2(d) (providing that "[a]ny significant guidance or guidance that is otherwise subject to notice and comment procedures must be approved by a Commission vote"); *id.* § 1695.5 (requirements for "significant" guidance). The EEOC document here is a "significant" document because it was "disseminated to regulated entities or the general public and [can] reasonably be anticipated . . . [t]o raise novel legal or policy issues

[4] The EEOC instead has authority only "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a).

arising out of legal mandates [and] the President's priorities." *Id.* § 1695.1(b)(1).

Second, the EEOC Document violated the notice-and-comment requirements of both the APA and EEOC regulations. The EEOC Document is a legislative rule that was subject to notice and comment under the APA because it imposed new obligations on employers—obligations that were not imposed by Title VII itself or *Bostock*'s interpretation of Title VII. *See Tenn. Hosp. Ass'n*, 908 F.3d at 1042; pp. 11-12, *supra*. And because the EEOC Document is a "significant guidance document," the EEOC's own regulations independently required "a period of notice and public comment of at least 30 days." 29 C.F.R. § 1695.6(a).

The EEOC Document is also substantively unlawful because it is contrary to Title VII and violates the Constitution.

As for Title VII, the EEOC Document unreasonably extends *Bostock*'s reasoning to circumstances that were not before the Court. To be sure, *Bostock* interpreted Title VII. But it resolved only a single question: whether *terminating* an employee "simply for being homosexual or transgender" constitutes discrimination "'because of . . . sex.'" 140 S. Ct. at 1737-38 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court expressly did "not purport to address bathrooms, locker rooms, or anything else of the kind" and acknowledged that "policies or practices" other than termination "might or might not qualify as unlawful discrimination." *Id.* at 1753.

Nor does it necessarily follow from *Bostock*'s reasoning that an employer who declines to use a transgender employee's preferred pronouns or to allow a transgender employee to use the locker room that corresponds to the employee's gender identity is engaging in prohibited discrimination under Title VII. Indeed, as the DOJ recognized earlier this year before reversing course, sex-separated bathrooms, locker rooms, and the like do not discriminate based on transgender status. U.S. Dep't of Justice, Application of *Bostock v. Clayton County* 4 (Jan. 17, 2021) ("*Bostock* does not require any changes to . . . sex-specific facilities or policies."). Sex-

separated bathrooms are permissible under Title VII—as they have always been, *see, e.g.*, *Causey v. Ford Motor Co.*, 516 F.2d 416, 424 (5th Cir. 1975)—because they do not treat any employees "worse than others who are similarly situated," *Bostock*, 140 S. Ct. at 1740. And the government's important and compelling interests in protecting privacy justify separating living facilities based on biological sex. *See, e.g.*, *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and this "reasonable expectation of privacy" is "particularly" strong "while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex"). While "[a]n individual's homosexuality or transgender status *is not relevant* to employment decisions" about hiring and firing, *Bostock*, 140 S. Ct. at 1741 (emphasis added), *sex is relevant* to decisions about locker rooms, showers, and the like where biological differences between the two sexes matter.

Tellingly, counsel for the plaintiffs in *Bostock* stated at oral argument that such a practice is "not discriminatory because" no one is "subjected to a disadvantage." Tr. of Oral Arg. at 12-13, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623); *see also* Reply Br. for Resp'ts at 19-21, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 1731 (2020), 2019 WL 4464222, at *19-21; Reply Br. for Pet'r at 23, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), 2019 WL 4464221, at *23 ("Sex-specific dress, bathroom, fitness, or other policies may be justified as bona fide occupational qualifications . . . , and they may not even be discriminatory at all because they do not constitute '*disadvantageous* terms or conditions of employment.'" (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 118 (2d Cir. 2018)).

The EEOC Document also violates the Constitution in several respects. Like the Department's guidance, the EEOC Document violates the separation of powers and the Tenth

Amendment by usurping Congress's lawmaking authority and infringing on areas of traditional state authority without Congress evincing that intent. *See* p. 20, *supra*.

In addition, the EEOC Document constitutes an unlawful attempt to abrogate Plaintiff States' sovereign immunity. Congress may abrogate the States' sovereign immunity pursuant to its authority to enforce the Fourteenth Amendment only to remedy violations of the Constitution by the States; it may not substantively redefine a State's constitutional obligations. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (explaining that there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). But Congress never identified any pattern of discrimination against homosexual or transgender individuals by the States, let alone one that amounted to a constitutional violation. Neither the Supreme Court nor the Sixth Circuit has held that discrimination based on sexual orientation or transgender status is unconstitutional. *See Ondo v. City of Cleveland*, 795 F.3d 597, 608-10 (6th Cir. 2015) (ruling that homosexuals are not a suspect or quasi-suspect class and denying an Equal Protection claim based on sexual orientation using the rational-basis test).

II. The Remaining Factors Weigh in Favor of Granting the States a Preliminary Injunction.

A preliminary injunction is necessary to serve the public interest. It will eliminate the regulatory uncertainty created by the agencies' recent actions and concomitant threat of enforcement—uncertainty that has caused upheaval for and imposed significant compliance costs on Plaintiff States and other regulated entities. Schools and employers are already facing enormous challenges as they continue to respond to the COVID-19 pandemic. An injunction will maintain the status quo and prevent Defendants' unlawful guidance from saddling regulated parties with additional burdens. An injunction will also further the public interest by cabining

the agencies' authority to its proper sphere and ensuring that the States and the public have ample opportunity to participate in the important policy decisions implicated by the agencies' guidance.

A preliminary injunction is equally necessary to prevent irreparable harm to Plaintiff States. If Defendants are permitted to enforce their unlawful guidance, the Plaintiff States' sovereign authority to enact and enforce laws and policies that conflict with the guidance, such as those providing for sex-separated athletic teams and living facilities, will be infringed. And a State "suffers a form of irreparable injury" any time it is prevented from "effectuating statutes enacted by representatives of its people." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). The underlying interests these laws and policies are designed to protect—such as ensuring equal athletic opportunities for females and protecting privacy—will also be harmed.

Enforcement of the challenged guidance—specifically the agencies' position that using accurate pronouns may violate Title VII and Title IX—will also infringe First Amendment rights. And it is well settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quotation marks omitted).

Defendants, meanwhile, will suffer no harm if this Court grants the preliminary injunction. Because the challenged guidance is procedurally and substantively unlawful, Defendants have no valid interest in enforcing it. *Deja Vu of Nashville, Inc. v. Metro. Gov't*, 274 F.3d 377, 400 (6th Cir. 2001) ("[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment[.]").

CONCLUSION

Plaintiff States respectfully request that this Court preliminarily enjoin Defendants from enforcing the interpretations of Title IX and Title VII reflected in the challenged guidance.

Respectfully submitted,

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***Pro Hac Vice Application Forthcoming**

****Admitted Pro Hac Vice**

CERTIFICATE OF SERVICE

I hereby certify that, on September 2, 2021, a true and exact copy of the foregoing document was forwarded, by certified mail, to the parties identified below:

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Washington, D.C. 20202

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Secretary of the U.S. Department of Education
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Equal Employment Opportunity Commission
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/s/ Matthew D. Cloutier
MATTHEW D. CLOUTIER
Assistant Attorney General

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

THE STATE OF TENNESSEE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, et al. Defendants.	)	Case No. 3:21-cv-00308

DECLARATION OF HOWARD H. ELEY

Pursuant to 28 U.S.C. § 1746, I, Howard H. Eley, duly affirm under penalty of perjury as follows:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to make this Declaration.

2. My name is Howard H. Eley, Commissioner of the Department of Finance and Administration. As Commissioner, I serve as the Governor's Chief Financial Officer.

3. Educational programs and activities in Tennessee that are funded through the Tennessee Department of Education received an estimated $1,544,025,800 of federal funds in Fiscal Year 2020-2021 and an estimated $5,374,168,400 of state funds in Fiscal Year 2020-2021. The Tennessee Department of Education's total annual budget for Fiscal Year 2020-2021 was estimated to be $7,099,171,100.[1] Federal funds were distributed to the following educational programs and activities in Tennessee through the Tennessee Department of Education:

[1] The total estimated annual budget is greater than the sum of the estimated federal and state funds received because the Tennessee Department of Education also receives funds from other sources that are neither federal nor state.

Programs	Estimated Federal Funding	Estimated State Funding
Administration	$1,643,500	$8,830,300
Technology, Infrastructure, and Support Systems	$325,100	$6,341,000
Academic Offices	$6,326,700	$7,784,100
Data and Research	$9,661,100	$35,398,500
Early Childhood Education	$17,684,200	$90,851,900
Centers of Regional Excellence (CORE)	$2,196,600	$74,440,700
ESSA and Federal Programs	$784,726,900	$1,022,200
Improving Schools Program	$30,095,900	$35,963,700
School Nutrition Program	$413,217,900	$4,812,800
Special Education Services	$252,573,500	$1,079,600
College, Career and Technical Education	$25,514,400	$9,853,900
Alvin C. York Institute	$60,000	$5,856,400

4. The information above describes only the federal funds distributed through the Tennessee Department of Education. It is estimated that public higher education institutions in Tennessee received $88,354,400 in federal funding and $2,125,287,100 in state funding in Fiscal Year 2020-2021.

Howard H. Eley

Dated: Aug 30, 2021

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

THE STATE OF TENNESSEE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, et al. Defendants.	)	Case No. 3:21-cv-00308

DECLARATION OF EMILY HOUSE

Pursuant to 28 U.S.C. § 1746, I, Emily House, duly affirm under penalty of perjury as follows:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to make this Declaration.

2. My name is Emily House, and I serve as the Executive Director of the Tennessee Higher Education Commission. I have served in this capacity since January 2021 and prior to that, I served as THEC's Deputy Executive Director and Interim Executive Director. My responsibilities include leading the State of Tennessee's higher education coordinating board, with authority over academic program approval, student- and institution-level data collection, capital and facilities projects, and the distribution of student financial aid.

3. The Tennessee Higher Education Commission was created in 1967 by the Tennessee General Assembly to achieve coordination and foster unity with regard to higher education in the State. The Commission coordinates and provides guidance to the institutions governed by the University of Tennessee Board of Trustees, the six locally-governed state universities, and the community colleges, and colleges of applied technology governed by the Tennessee Board of Regents. There are currently ten public universities, two special purpose

institutes, 13 community colleges, and 27 colleges of applied technology in Tennessee that serve approximately 250,000 students.

4. Tennessee's public higher education institutions are arms of the State and alter egos of Tennessee.

5. All of Tennessee's public higher education institutions receive federal funds and are subject to the requirements of Title IX.

6. If any program or activity at one of Tennessee's public higher education institutions is determined not to be in compliance with the requirements of Title IX, the U.S. Department of Education may terminate federal funding to that program or activity.

7. Tennessee's public higher education institutions use federal funds for many purposes, including:

a. Student loans

b. Student grant aid (scholarships)

c. Research and service

d. Veterans' affairs (i.e., GI Bill)

e. Funding for Historically Black Colleges and Universities

8. The loss of federal funds to Tennessee's public higher education institutions would require these institutions to either eliminate certain educational services currently offered using federal funds or to seek new funding to pay for those services.

Emily House

Dated: August 26, 2021

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

THE STATE OF TENNESSEE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, et al. Defendants.	)	Case No. 3:21-cv-00308

DECLARATION OF EVE CARNEY

Pursuant to 28 U.S.C. § 1746, I, Eve Carney, duly affirm under penalty of perjury as follows:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to make this Declaration.

2. My name is Eve Carney, and I am the Chief of Districts and Schools for the Tennessee Department of Education ("Department"). In this role, my responsibilities include the oversight and implementation of federal education grant programs.

3. The Department supports the education of approximately 976,000 students in Tennessee who are educated through local education agencies, Tenn. Code Ann. § 49-1-103(2), the Tennessee public charter school commission, *id.* § 49-13-105, state special schools, *id.* § 49-50-1001, and the Achievement School District, *id.* § 49-1-614(a).

4. The Department administers the distribution of state and federal funds to all K through grade 12 public schools in Tennessee, including charter schools. All public school districts in Tennessee receive federal funds.

5. The Department provides funding for and directly operates several state special schools, including the Tennessee School for the Blind, the Tennessee Schools for the Deaf (campuses in Knoxville, Nashville, and Jackson), and the Alvin C. York Agricultural Institute. It also currently oversees or operates approximately 27 public schools in the Achievement School District, *see* Tenn. Code Ann. § 49-1-614(a). All of these schools receive federal funds.

6. The Department and Tennessee's public schools use federal funds for many purposes, including, but not limited to:

a. Providing supplemental educational support, materials, and enrichment for students;

b. Providing non-academic support for students;

c. Providing professional learning opportunities for teachers;

d. Providing technology for student use.

7. The loss of federal funds would require Tennessee's public schools to either eliminate certain educational services offered using federal funds or seek new funding to pay for those services.

Eve C. Carney

Eve Carney

Dated: Sept. 1, 2021

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

THE STATE OF TENNESSEE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, et al. Defendants.	)	Case No. 3:21-cv-00308

DECLARATION OF JOSH MASON

Pursuant to 28 U.S.C. § 1746, I, Josh Mason, duly affirm under penalty of perjury as follows:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to make this Declaration.

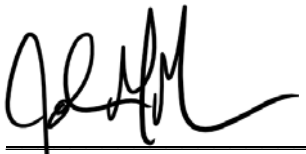
2. My name is Josh Mason, Assistant Commissioner of State Special Schools for the Tennessee Department of Education ("Department"). My responsibilities include supervising the directors of Tennessee's state special schools.

3. The Department directly operates several state special schools: the Tennessee School for the Blind, the Tennessee Schools for the Deaf (campuses in Knoxville, Nashville, and Jackson), and the Alvin C. York Agricultural Institute.

4. Tennessee's state special schools maintain sex-separated bathroom and locker room facilities.

5. At least one of Tennessee's state special schools, the Alvin C. York Agricultural Institute, maintains separate sports teams for members of each sex for at least one sport (basketball).

6. Two of Tennessee's special schools, the Tennessee School for the Deaf (Knoxville campus) and the Tennessee School for the Blind, provide residential learning opportunities for some of their students. These schools provide separate bedrooms for members of each sex.



Josh Mason

Dated: September, 1, 2021

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

THE STATE OF TENNESSEE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, et al. Defendants.	)	Case No. 3:21-cv-00308

DECLARATION OF STEPHEN C. RAYMER

Pursuant to 28 U.S.C. § 1746, I, Stephen C. Raymer, duly affirm under penalty of perjury as follows:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to make this Declaration.

2. My name is Stephen C. Raymer, HR Business Solutions Administrator. As HR Business Solutions Administrator, I serve as the Human Resources Officer for the Tennessee Department of Human Resources. My responsibilities include providing oversight of Human Resource functions for the Tennessee Department of Human Resources and 12 state agencies through a Memorandum of Understanding.

3. The State of Tennessee is an employer subject to the requirements of Title VII.

4. The State of Tennessee employs about 42,000 employees, excluding employees at public higher education institutions.

5. State employees reside in every county in Tennessee.

6. State agencies do not have a practice of automatically permitting all employees to use the bathroom that corresponds with their gender identity. Instead, if a state agency learns that a transgender employee has concerns about which bathroom to use, or that the employee's coworkers have concerns about the bathroom that employee is using, the agency will work with all affected employees to achieve a solution. This case-by-case approach sometimes results in the transgender employee using a single-user bathroom, if available.

Stephen C. Raymer

Dated: August 20, 2021