

UNITED STATES DISTRICT COURT  
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

District Judge Charles E. Atchley, Jr.

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

On June 15, 2020, the Supreme Court held that discrimination based on sexual orientation and gender identity constitutes discrimination “because of sex” within the meaning of the prohibitions of Title VII of the Civil Rights Act of 1964. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). Since *Bostock*, the Department of Justice (“DOJ”), Department of Education (“ED”), and the Equal Employment Opportunity Commission (“EEOC”) have issued nonbinding documents, with no independent legal consequences, to explain their interpretations of *Bostock* in Title VII (for EEOC) and similar provisions in Title IX of the Education Amendments of 1972 (for DOJ and ED). Twenty states now ask this Court to preliminarily enjoin these nonbinding documents. Despite *Bostock*, and a series of post-*Bostock* decisions applying *Bostock*’s reasoning to Title IX, the Plaintiffs contend that the documents violate both the Administrative Procedure Act (“APA”) and the U.S. Constitution. Plaintiffs also contend that the EEOC’s technical assistance document improperly extends *Bostock*’s reasoning to circumstances beyond that decision in violation of the APA and the U.S. Constitution.

Plaintiffs cannot satisfy any of the four factors for a preliminary injunction. In particular, they fail to identify any imminent, concrete harm as a result of the challenged agency documents, let alone a harm that is irreparable. Rather than identify an actual “Case or Controversy” between the parties, Plaintiffs seek an advisory opinion concluding that discrimination against LGBT individuals beyond the immediate context of *Bostock* never violates Titles VII or IX. But no court has ever reached this conclusion (and numerous courts have held to the contrary). Nor have Plaintiffs identified any hardship if they waited for an actual enforcement action against one of the Plaintiff States to bring their challenge to the interpretations of Titles VII and IX. In short, Plaintiffs cannot show any immediate, irreparable harm from the Federal Government’s interpretation of anti-discrimination law.

Nor are they likely to succeed on the merits. Indeed, this Court lacks subject matter jurisdiction for a number of reasons, including a lack of standing and ripeness, and an adequate alternative remedy

under section 704 of the APA. These claims against ED are also barred by the *Thunder Basin* doctrine because Congress intended the comprehensive enforcement procedures of Title IX to provide an exclusive judicial remedy for challenges to the agency’s interpretation of the statute.

Even if Plaintiffs could surmount these fatal threshold obstacles, they fail to assert viable procedural and substantive violations of the APA because the challenged documents do not constitute final agency action, they are interpretive rules not subject to notice and comment requirements, and they were not arbitrary or capricious. Defendants’ interpretations comport with the reasoning of *Bostock*, and Plaintiffs’ attempts to distinguish between Titles VII and IX and the suggestion that the interpretations are contrary to law are unavailing. Also, the challenged EEOC document is not a substantive rule that EEOC lacks the authority to promulgate, and it is not a “significant” guidance document as defined by EEOC’s regulations. In addition, the challenged documents are all constitutional—they do not violate the Spending Clause, the “unconstitutional conditions” doctrine as applied to the First Amendment, separation of powers principles, or the Tenth Amendment. Finally, the balance of the equities and public interest militate against issuing a preliminary injunction, and especially against the broad injunction sought by Plaintiffs, which would cover Plaintiff states that lie within circuits that have already applied the reasoning of *Bostock* to Title IX and states that are not plaintiffs at all, and would enjoin aspects of the EEOC document the Sixth Circuit has upheld.

## **BACKGROUND**

### **I. THE SUPREME COURT’S *BOSTOCK* DECISION.**

The Supreme Court’s decision in *Bostock* establishes that discrimination based on sexual orientation or gender identity is barred by Title VII. 140 S. Ct. at 1741-42; 42 U.S.C. § 2000e-2. In reaching its conclusion, the Court observed that “[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result,” but that the statutory text nonetheless

required that sexual orientation and gender identity discrimination be encompassed within the statute's prohibition against discrimination "because of sex." *Bostock*, 140 S. Ct. at 1737.

The Court concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741. It explained that "homosexuality and transgender status are inextricably bound up with sex" because "to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." *Id.* at 1742. It rejected the employers' contention that Congress had to specifically name sexual orientation or gender identity in the statute to protect against discrimination on those bases: there is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." *Id.* at 1747. The Court concluded that where an employee's sexual orientation or gender identity was a but-for cause of an adverse employment action, that action occurred "because of sex." *Id.*

The Court also assessed the meaning of the phrase "discriminate against," and rejected the contention that Title VII's prohibition on discrimination was simply meant to protect against overarching employer policies that disfavor certain groups as a whole. *Id.* at 1740-41. Instead, the statute "tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups." *Id.* at 1740. This focus on individual discrimination thus requires that each instance of purportedly discriminatory conduct be assessed on its own—it is "no defense for [an] employer to note that . . . [it] gives preferential treatment to female employees overall." *Id.* at 1741.

The Court also rejected certain arguments as beyond the scope of the case before it. For example, it rejected the argument that recognizing sexual orientation or gender identity discrimination as encompassed by Title VII "may require some employers to violate their religious convictions." *Id.* at 1753. Those questions were not properly before the Court, and were "questions for future cases."

*Id.* at 1754. Similarly, it explained that whether other policies and practices, such as sex-segregated bathrooms or locker rooms, might constitute unlawful discrimination under Title VII, “are [also] “questions for future cases.” *Id.* at 1753.

## II. THE MARCH 2021 DOJ MEMORANDUM.

On March 26, 2021, the Principal Deputy Attorney General of the Civil Rights Division of the DOJ issued a memorandum to federal agency Civil Rights Directors and General Counsels to “share the Division’s view as to whether *Bostock* applies to Title IX.”<sup>1</sup> Mem. from Pamela S. Karlan, Principal Deputy Attorney General of the Civil Rights Division of the DOJ to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), (DOJ Mem.), Ex. A at 1. The memorandum explained that because the statutory prohibitions against sex discrimination contained in Titles VII and IX are similar, the Supreme Court and other federal courts “consistently look to interpretations of Title VII to inform Title IX.” *Id.* (citation omitted). Accordingly, after analyzing the text of Title IX, the memorandum concluded that *Bostock*’s discussion of the text of Title VII similarly required that Title IX be interpreted to prohibit sexual orientation and gender identity discrimination. *Id.*

The memorandum explained that Title IX’s prohibition of discrimination “on the basis of sex” is sufficiently similar to the language of Title VII’s prohibition of discrimination “because of . . . sex” to be considered interchangeable. *Id.* at 2. In particular, the memorandum reasoned that *Bostock*’s conclusion that sexual orientation and gender identity discrimination was discrimination “because of . . . sex,” compelled the similar conclusion that Title IX’s prohibition of discrimination “on the basis of sex” would prohibit recipients of federal funding from discriminating against an individual based on their sexual orientation or gender identity.<sup>2</sup> *Id.*

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<sup>1</sup> Although Plaintiffs mention DOJ’s March 26, 2021 Memorandum in their allegations, they do not request any relief specific to this document. *See* Compl. at 33-34 (prayer for relief), ECF 1.

<sup>2</sup> The previous Administration largely concurred that the reasoning of *Bostock* also applies to Title IX. On January 17, 2021, former Acting Assistant Attorney General John B. Daukus transmitted a memorandum to the Civil Rights Division that concluded that *Bostock*’s reasoning carried over into

The memorandum also found support from other cases both before and after the *Bostock* decision—including in the Sixth Circuit—that concluded that Title IX protects transgender students from discrimination on the basis of gender identity. *Id.* (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163, 2021 WL 263792 (Jun. 28, 2021); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh’g en banc pending*, No. 18-13592 (Aug. 28, 2020); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (per curiam)).

Finally, the memorandum explained that before reaching this conclusion, DOJ had considered, among other things, the dissenting opinions in *Gloucester* and *Adams* and the concerns raised by the dissents in *Bostock*. Ultimately, however, DOJ concluded, as the majority opinions in those cases had also determined, that there was “nothing persuasive in the statutory text, legislative history, or case law to justify a departure from *Bostock*’s textual analysis and the Supreme Court’s longstanding directive to interpret Title IX’s text broadly.” *Id.* at 3. The memorandum also noted that whether allegations of sex discrimination violate Title IX in any particular case “will necessarily turn on the specific facts,” and for that reason the memorandum would “not prescribe any particular outcome with regard to enforcement.” *Id.*

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Title IX in significant part. *See* Compl. Ex. B, ECF No. 1-3. In particular, that memorandum observed that “Justice Thomas has . . . reasoned that the phrases ‘on the basis of sex’ and ‘because of such individual’s . . . sex’ have been used by Congress ‘interchangeably,’” *Id.* at 15 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 185-86 (2005) (Thomas, J., dissenting)), and that “[i]f that is the case, then it seems to follow from the Supreme Court’s reasoning in *Bostock* that an individual who is, on the basis of sexual orientation or transgender status, ‘excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under any education program or activity receiving Federal financial assistance’ may be able to make out a claim of intentional discrimination on the basis of sex in violation of Title IX.” *Id.*

### III. ED'S NOTICE OF INTERPRETATION, LETTER, AND FACT SHEET.

On June 22, 2021, ED published in the Federal Register a Notice of Interpretation (“NOI”) “to clarify [its] enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX” in light of *Bostock*. 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 (June 22, 2021), Compl., Ex. A, ECF No. 1-2. ED explained that the interpretation would guide it in processing complaints and conducting investigations, but that “it does not itself determine the outcome in any particular case or set of facts.” *Id.* at 1.

ED explained that it had long recognized that Title IX protects all students—including LGBT students—from harassment and other forms of sex discrimination, *id.*,<sup>3</sup> but acknowledged that its Office for Civil Rights (“OCR”) “at times has stated that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity.” *Id.* Accordingly, ED issued its interpretation of Title IX “[t]o ensure clarity” in light of the *Bostock* decision. *Id.* ED explained that “[c]onsistent with the Supreme Court’s ruling and analysis in *Bostock*, the Department interprets Title IX’s prohibition on discrimination ‘on the basis of sex’ to encompass discrimination on the basis of sexual orientation and gender identity.” *Id.* ED noted that its interpretation flowed from Title IX’s “plain terms.” *Id.* ED based its interpretation on the textual similarities between Titles VII and IX and case law recognizing that *Bostock*’s reasoning applies to Title IX. Its interpretation also cross-referenced the DOJ’s March 2021 Memorandum. *Id.* ED also stated, “[s]imilar to the Court’s interpretation of Title VII, the Department’s interpretation of the scope of discrimination ‘on the

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<sup>3</sup> Even before *Bostock*, ED had interpreted Title IX as barring gender-based discrimination against LGBT students. *See Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Ed.*, 208 F. Supp. 3d 850, 854-55 (S.D. Ohio 2016).

basis of sex' under Title IX does not require the Department to take a position on the definition of sex, nor do we do so here." *Id.* n.1.

The next day, ED issued a "Dear Educator" letter highlighting ED's interpretation of Title IX as expressed in the ED NOI. Letter from Suzanne B. Goldberg, Acting Assistant Secretary of Education for Civil Rights to Educators (June 23, 2021), Compl., Ex. C, ECF No. 1-4. The letter explained that, consistent with the ED NOI, "OCR 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." *Id.* The letter also included a fact sheet ("Fact Sheet") jointly issued by ED and DOJ that provided examples of the types of incidents OCR and DOJ can investigate under Title IX, as well as information on how to file complaints. *Id.* The Fact Sheet did not purport to indicate whether a hypothetical incident would constitute discrimination in violation of Title IX or identify the outcome of any particular investigation. *Id.*

#### **IV. THE EEOC's TECHNICAL ASSISTANCE DOCUMENT.**

On June 15, 2021, the EEOC issued a technical assistance document ("EEOC Document") that discussed Title VII's prohibitions against employment discrimination on the basis of sexual orientation and gender identity. EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity, Compl., Ex. D, ECF No. 1-5. The EEOC Document made clear that "[t]he contents of this document do not have the force and effect of law and are not meant to bind the public in any way." *Id.* at 3. The EEOC Document did not reflect new policy; rather, it was "intended only to provide clarity to the public regarding existing requirements under the law or agency policies." *Id.*

The EEOC Document sought to do two things. First, it summarized the Court's *Bostock* decision. *Id.* at 3-12. Second, it explained the EEOC's "established legal positions on LGBTQ+-related matters, as voted by the Commission." *Id.* at 3. The EEOC Document explained that, years

before the *Bostock* decision, the EEOC “decided an array of matters involving employment discrimination based on sexual orientation and gender identity.” *Id.* For example, the EEOC had taken the position in 2012 that Title VII prohibits gender identity discrimination, and in 2015 that it also prohibits sexual orientation discrimination. *Id.* at 4.

The EEOC document also explained that “[c]ourts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers.” *Id.* In addition, the EEOC Document noted that since the EEOC’s 2015 decision in *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, , 2015 WL 1607756 (Apr. 1, 2015), it has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity. *Id.*

The EEOC Document explained that, “in certain circumstances,” the use of pronouns that are inconsistent with an individual’s gender identity could constitute unlawful harassment, *i.e.* where the conduct is sufficiently severe or pervasive to create a hostile work environment. *Id.* The EEOC Document noted that in the EEOC’s *Lusardi* decision, it explained that while the accidental failure to use an employee’s preferred name and pronouns would not violate Title VII, the intentional and repeated misuse of an employee’s preferred pronouns “could contribute to an unlawful hostile work environment.” *Id.* The EEOC Document did not decide the outcome of any particular case. *Id.* at 8-9 (stating that, if an individual “decides to file a charge of discrimination with the EEOC, the agency will conduct an investigation *to determine if* applicable [] laws have been violated”) (emphasis added).

The EEOC Document also observed that “[c]ourts and the EEOC consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws,” and referred to the EEOC Compliance Manual for more information. *Id.* at 5.

## V. THE AGENCIES' ENFORCEMENT FRAMEWORKS.

### A. ED's Enforcement of Title IX

Title IX is enforced in two main ways: (1) through private actions directly against recipients of federal funds; and (2) by federal agencies, such as ED, that may suspend or terminate funding to educational programs or request other legal action if they fail to secure voluntary compliance. *See* 20 U.S.C. § 1682; *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998).

ED is the agency with primary responsibility for the administrative enforcement of Title IX. When a complaint alleging noncompliance with Title IX is filed with ED, ED will “make a prompt investigation,” which “should include, where appropriate, a review of the pertinent practices and policies of the [funding] recipient, the circumstances under which the possible noncompliance with [Title IX] occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with [Title IX].” 34 C.F.R. § 100.7(c). If the investigation indicates a failure to comply with Title IX, the agency will so inform the recipient and the matter will be resolved by informal means whenever possible. *Id.* § 100.7(d); *see* 20 U.S.C. § 1682. When Title IX compliance cannot be achieved by informal means, compliance “may be effected by the suspension or termination or a refusal to grant or to continue Federal financial assistance or by any other means authorized by law.” 34 C.F.R. § 100.8(a); *see* 20 U.S.C. § 1682. Those “other means” may include a referral to DOJ with a “recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States[.]” 34 C.F.R. § 100.8(a). ED may not take any action to effect compliance by any “other means authorized by law” until after an ED official has determined that compliance cannot be secured by voluntary means, and at least 10 days after mailing a notice to the recipient of its intent to take such action due to the failure to comply. *Id.* § 100.8(d).

Where the agency seeks to achieve compliance through terminating or suspending federal funding, such relief is not effective until: (1) the responsible agency official has advised the recipient

of its failure to comply and determined that compliance cannot be achieved by voluntary means; (2) there has been an express finding on the record, after an opportunity for a hearing, of a failure by the recipient to comply with Title IX; and (3) 30 days have expired since the Secretary filed a full written report of the circumstances and the grounds for such action with the committees of the House and Senate having legislative jurisdiction over the program involved. *Id.* § 100.8(c); *see* 20 U.S.C. § 1682. This process includes a hearing before a hearing examiner, a decision by a reviewing authority, and, potentially, additional review by the Secretary. 34 C.F.R. §§ 100.9; 100.10. A final decision is subject to judicial review in the court of appeals for the circuit in which the recipient is located. 20 U.S.C. §§ 1683, 1234g(a), (b); 42 U.S.C. § 2000d-2; 34 C.F.R. § 100.11.

### **B. The EEOC's Enforcement of Title VII**

The EEOC plays a more limited role in implementing Title VII with respect to the states than it does with respect to private employers. Although the EEOC itself may bring enforcement actions against private employers, Title VII does not authorize them to bring actions against states. *See* 42 U.S.C. § 2000e-5(f)(1). If a state employee or job applicant believes that she has been subjected to an unlawful employment practice, she can file a charge with the EEOC. *Id.* § 2000e-5(b). The EEOC will then investigate and if, after completing its investigation, it determines that “there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the [state] of its action.” *Id.* The notice to the employee or applicant is typically referred to as a “notice of right to sue” because the employee or applicant can file suit only after she receives the notice.<sup>4</sup> *Id.* § 2000e-5(f)(1). If, however, the EEOC concludes that there is reasonable cause to believe that an employer violated Title VII, then it initiates conciliation. *Id.*

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<sup>4</sup> An individual can also request that the EEOC issue a notice of right to sue before it completes its investigation. 29 C.F.R. § 1601.28(a)(1), (a)(2), (d)(2). When a charging party requests a notice of right to sue in a charge involving a government respondent, such as a state or state agency, the Attorney General will issue the notice. 29 C.F.R. § 1601.28(d)(2).

§ 2000e-5(b). This is a process by which the EEOC tries to facilitate a settlement agreement with the state. *Id.* But if conciliation fails, Title VII instead requires that the EEOC refer the matter to DOJ, which decides whether to bring an enforcement action or issue notice of right to sue, which enables the employee to sue on her own in a *de novo* proceeding. *Id.*

### LEGAL STANDARDS

A preliminary injunction is an “extraordinary and drastic remedy” that “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (citations omitted). The party moving for a preliminary injunction has the burden of proof, *see Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002), and that burden must be met “by a clear showing.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal quotation marks and emphasis omitted). Even then, the final decision of whether a preliminary injunction should issue is within a court’s discretion. *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982).

In determining whether to issue a preliminary injunction, courts consider four factors: “(1) whether the party moving for the injunction is facing immediate, irreparable harm, (2) the likelihood that the movant will succeed on the merits, (3) the balance of the equities, and (4) the public interest.” *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 326 (6th Cir. 2019). Where the Federal Government is the defendant, the last two factors merge. *See Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020). And while the factors may be balanced, “the existence of an irreparable injury is mandatory,” and “even the strongest showing on the other three factors cannot eliminate the irreparable harm requirement.” *D.T.*, 942 F.3d at 326–27 (citation omitted). Indeed, “Plaintiffs requesting a preliminary injunction must demonstrate that irreparable harm is not merely possible, but likely.” *Blair v. Nationwide Ins. Co. of Am.*, No. 21CV00059DCLCHS, 2021 WL 1795163, at \*3 (E.D. Tenn. May 5, 2021) (citation omitted).

## ARGUMENT

Plaintiffs have failed to meet their burden to establish the preliminary injunction requirements. First, they cannot establish any harm, let alone irreparable harm, that will be remedied by a preliminary injunction. Second, they are not likely to succeed on the merits of their claim. Nor have they satisfied the other two preliminary injunction factors. Their motion should therefore be denied.

### I. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM.

Plaintiffs have failed to meet their burden to show that they will suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs have “the burden of establishing a clear case of irreparable injury,” *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (6th Cir. 1968) (per curiam), and their burden to show irreparable harm is higher than what is required to establish standing. *See Ohio v. Yellen*, No. 1:21-cv-181, 2021 WL 1903908, at \*14 (S.D. Ohio May 12, 2021). To satisfy the “high standard” for establishing irreparable harm, Plaintiffs must show that their asserted injuries are “real,” “substantial,” and “immediate,” not speculative or conjectural. *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983); *see also Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020).

“The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoted in *Dodds*, 845 F.3d at 221). Importantly, “[a]n injunction against [even] threatened legal action will not issue if the party will have an adequate opportunity to fully present his defenses and objections in the legal action he seeks to enjoin.” *Travis v. Pennyrile Rural Elec. Co-op.*, 399 F.2d 726, 729 (6th Cir. 1968); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217-18 (1994) (rejecting claimed irreparable harm due to potential financial penalties that could be imposed for refusal to comply with a statute, where administrative and judicial review process was available in which all defenses to enforcement could be raised).

Here, Plaintiffs seek to preemptively enjoin Defendants’ nonbinding interpretations of Titles VII and IX in the absence of any particular enforcement action. Because there is no pending enforcement action, there is no current dispute for this Court to resolve. Plaintiffs should make their arguments only in a yet-to-materialize “legal action [the states] seek[] to enjoin,” not here. *Travis*, 399 F.2d at 729. Even if the Federal Government were ultimately to bring an enforcement action under Titles VII or IX against the Plaintiffs consistent with the challenged interpretations—a possibility as to which Plaintiffs can only speculate—Plaintiffs would have “an adequate opportunity to fully present [their] defenses and objections” in any such enforcement proceeding. *Id.* For example, as discussed above, before ED can seek the termination or suspension of federal financial assistance under Title IX, it must undertake a comprehensive set of procedures—including notifying the recipient of its non-compliance after express findings on the record—that culminate in the opportunity for judicial review. *See supra* at pp. 8-9 (describing procedures); *see also* 34 C.F.R. § 100.8(c); 20 U.S.C. § 1682; *id.* §§ 1683, 1234g(a), (b); 42 U.S.C. § 2000d-2; 34 C.F.R. § 100.11. Plaintiffs would have numerous opportunities to raise their claims in such proceedings, and they cannot show irreparable harm in the absence of the injunction they seek. Similarly, if ED were to refer an enforcement action to DOJ, Plaintiffs would have an opportunity to challenge ED’s interpretation and raise any defenses in court.

The same result applies to Title VII. As discussed, EEOC may not itself bring enforcement actions against states; such authority is limited to DOJ and private litigants. *See supra* at p. 10. Regardless, Plaintiffs have a fully adequate opportunity to challenge EEOC’s interpretation of Title VII in any *de novo* enforcement action or private lawsuit that potentially is brought in the future.

Plaintiffs nevertheless allege two<sup>5</sup> purportedly irreparable harms that they contend would result in the absence of a preliminary injunction. First, they contend that their sovereign interests

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<sup>5</sup> Elsewhere in their briefing Plaintiffs make cursory reference to other purported irreparable harms but fail to identify what those harms are with any specificity. For example, Plaintiffs contend that they are irreparably harmed due to unspecified “threats to student and employee privacy and

would be infringed if the Defendants were permitted to enforce their interpretations of Titles VII and IX. ECF No. 11 at 25. Second, they challenge Defendants’ recognition that under Titles VII and IX the intentional misuse of an individual’s preferred pronouns may contribute to an unlawful pattern of harassment, arguing that Defendants’ interpretation will infringe First Amendment rights. *Id.*

With respect to the alleged harm to their purported sovereign interests, Plaintiffs argue only that certain state laws may “arguably” conflict with Defendants’ interpretations of Titles VII and IX, Mem. in Supp. of Pls.’ Mot. for Prelim. Inj., (“PI Mem.”), ECF No. 11 at 10 & 11 n.2. Particularly where they identify no pending enforcement action against them, this is a far cry from the “certain and immediate” harm that would merit a preliminary injunction. *Memphis A. Philip Randolph Inst.*, 978 F.3d at 391.

Plaintiffs contend that they will be irreparably harmed because the agencies’ position “will also infringe First Amendment rights.” PI Mem. at 25. Again, Plaintiffs offer nothing more than pure speculation to support this injury—they neither identify a single individual whose First Amendment rights have been purportedly harmed, nor any particular infringement on speech rights that would amount to a constitutional violation, *see* Part II.B.5.b, *infra*.<sup>6</sup> More fundamentally, this claim is focused on alleged harm to Plaintiffs’ citizens, not the states themselves. The Supreme Court has long recognized that States cannot assert such “*parens patriae*” claims against the Federal Government to vindicate the rights of their citizens. *See Mellon*, 262 U.S. at 486 (rejecting claims on behalf of citizens

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athletic opportunities for female students,” PI Mem. at 2, as well as equally nebulous threats to “core privacy and safety interests of children of all ages.” *Id.* at 12. They fail to elaborate on these purported harms, which in any event appear to be *parens patriae* injuries that a state may not vindicate against the Federal Government on behalf of its citizens. *See Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). Regardless, “issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997).

<sup>6</sup> Further reflecting the speculative nature of Plaintiffs’ alleged harm, ED’s Title IX regulations expressly provide: “Nothing in this part requires a recipient to . . . [r]estrict any rights that would otherwise be protected from government action by the First Amendment.” 34 C.F.R. § 106.6(d).

brought by a state, because it is no “part of [a state’s] duty or power to enforce their [citizens’] rights in respect of their relations with the federal government”).

## **II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THEIR CLAIMS.**

Even if Plaintiffs could establish irreparable harm in the absence of preliminary relief, their motion still fails because they have not established a substantial likelihood of success. As discussed below, Plaintiffs’ claims are not ripe, they lack standing, there is an adequate alternative remedy, and the challenged agency documents comply with both the APA and the Constitution.

### **A. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs’ Claims.**

A plaintiff seeking declaratory and injunctive relief through a pre-enforcement challenge must establish three threshold requirements: (1) a concrete injury-in-fact sufficient to establish standing; (2) claims that are ripe for review; and (3) claims currently fit for judicial decision. *National Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997). Plaintiffs cannot establish any of these requirements.

#### **1. Plaintiffs Lack Both Article III Standing and a Ripe Claim.**

At the outset, Plaintiffs cannot succeed on their claims because they cannot show that they have standing or a ripe claim. “Article III of the Constitution limits federal courts’ jurisdiction” to the adjudication of ‘Cases’ and ‘Controversies.’” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). “[A]n essential and unchanging part of the case-or-controversy requirement” is that would-be plaintiffs must have “standing to invoke the authority of a federal court[.]” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006), assuring they have a “personal stake in the outcome of [a] controversy” that “justif[ies] exercise of the court’s remedial powers on [their] behalf.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Standing is therefore a “threshold jurisdictional question[.]” *Steel Co.*

*v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998), determining “the power of the court to entertain the suit,” *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To establish standing, Plaintiffs “must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Where a plaintiff seeks prospective relief, the “threatened injury must be *certainly impending* to constitute injury in fact;” “[a]llegations of possible future injury are not sufficient.” *Clapper*, 568 U.S. at 409. That is, the prospect of enforcing a purportedly unlawful statutory or regulatory regime against the Plaintiff must be “sufficiently imminent” to create a concrete injury. *Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio S. Ct.*, 769 F.3d 447, 451 (6th Cir. 2014). In addition, a “theory of standing [that] relies on a highly attenuated chain of possibilities, does not satisfy” this requirement. *Clapper*, 568 U.S. at 410. “The plaintiff . . . bears the burden of establishing these elements,” and therefore “must clearly . . . allege facts demonstrating each element.” *Spokeo*, 136 S. Ct. at 1547.

Ripeness is a justiciability doctrine designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies,” and “also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807–08 (2003) (citation omitted). As the Sixth Circuit has recognized, “[a]nswering difficult legal questions before they arise and before the courts know how they will arise is not the way we typically handle constitutional litigation.” *Warsbak v. United States*, 532 F.3d 521, 526 (6th Cir. 2008). The ripeness test comprises two elements: (1) the fitness of the matter for adjudication, and (2) the hardship to the plaintiffs in withholding relief. *Id.* at 525.

A claim is not fit for review unless it involves adverse parties and a concrete dispute, *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982). In other words, “a general interest in a judicial ruling on the

merits does not by itself confer jurisdiction on the federal courts.” *Warsbak*, 532 F.3d at 532. In a pre-enforcement challenge to a statutory scheme, where a court has “no idea whether or when” the statute will be enforced against the Plaintiff and “no idea what” the particular factual circumstances of any ultimate dispute will be, a claim is not ripe. *Id.* at 526. Accordingly, a party’s claim “is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998).

Here, for reasons similar to those that undermine Plaintiffs’ claim of irreparable harm, Plaintiffs fail to establish standing or a ripe claim. The agencies have merely set forth their nonbinding interpretations of the law—they have not purported to determine the outcome of any particular dispute, let alone a dispute with these Plaintiffs. Plaintiffs’ abstract disagreement over the interpretation of Titles VII and IX does not, in and of itself, create a ripe case or controversy. Indeed, as discussed, Plaintiffs’ own allegations highlight the speculative nature of their claims. For example, Plaintiffs contend that they have “laws, policies and practices that are at least ‘arguably . . . proscribed’ by the agencies’ guidance.” PI Mem. at 10. This “arguable” conflict is far from the type of certainty required to establish a concrete injury or a ripe claim.

Nor have Plaintiffs identified any enforcement action to which they are, or will soon be, subject in which a Defendant is seeking to enforce its view of the law, let alone one that is “certainly impending.” *See Clapper*, 568 U.S. at 409. Indeed, their complaint merely states in a conclusory fashion that “Plaintiffs operate and are home to programs and activities subject to Title IX, and thus the Department has pledged to enforce its Title IX interpretation against Plaintiffs.” Compl. ¶ 62; *id.* ¶ 101 (similar with respect to EEOC). This assertion is entirely speculative, because it provides “no idea whether or when” an enforcement action against the Plaintiffs might arise, and “no idea what” the factual circumstances of any such enforcement action might be. *Warsbak*, 532 F.3d at 526. Plaintiffs have alleged no more than an abstract disagreement with the agencies’ nonbinding interpretation of

the law and have identified no concrete situation that would permit the Court to evaluate Plaintiffs' claims in the context of specific facts rather than abstract principles. And because Plaintiffs would have a full opportunity to present their claims in the context of any future enforcement proceeding against them, they face no hardship from the withholding of judicial review now. Thus, Plaintiffs' suit "involves contingent, future events that may never occur," *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1082 (6th Cir. 2013) (reversing pre-enforcement preliminary injunction), and this Court would merely be "render[ing]" an advisory opinion in 'a case in which no injury would have occurred at all.'" *Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 500 (D.C. Cir. 1994) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). This is precisely the kind of academic exercise that Article III forbids.

Nor can Plaintiffs demonstrate an injury for standing purposes. Plaintiffs' claimed harm here rests on the possibility that, at some point in the future, they may be subjected to an enforcement action based on the Defendants' interpretations of Titles VII and IX. PI Mem. at 9. But that contention only demonstrates that this case presents no imminent injury. Plaintiffs claim that the challenged documents "injure[] Plaintiff States by interfering with their sovereign authority to make and enforce laws; threatening the loss of significant federal funding (in the case of ED'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." PI Mem. at 9. None of these alleged harms establishes Plaintiffs' standing to sue.

As discussed with respect to irreparable harm, Plaintiffs' allegations of interference with their sovereign authority to make and enforce laws are speculative; they cannot be reconciled with the Supreme Court's decision in *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923), which made clear that Article III jurisdiction is not satisfied by raising "abstract questions . . . of sovereignty." There, Congress had enacted through the Spending Clause a program permitting States to accept

funding to protect the health of mothers and infants and provided that violating the program's conditions could result in the withholding of funds. *Id.* at 478–79, 484–85. Massachusetts brought suit, alleging that the statute “imposed upon the [S]tates an illegal and unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated.” *Id.* at 482. The Court held that the State’s “naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute” was insufficient to establish an Article III case or controversy. *Id.* at 483. Instead, the Court held that Massachusetts was required to allege that a sovereign interest was “actually invaded or threatened,” *id.* at 485—precisely what Plaintiffs have failed to demonstrate here.

Relatedly, Plaintiffs claim injury to their “authority to make and enforce laws,” since there are state laws that they claim “arguably” conflict with the challenged documents. PI Mem. at 9–10. But this allegation fails to support standing just as it fails to demonstrate irreparable harm. *See supra* at pp. 13–14. At a minimum, this does not demonstrate the kind of concrete and certainly impending harm that would suffice for prospective injunctive relief. *See, e.g. Clapper*, 568 U.S. at 409.

Plaintiffs’ claimed loss of federal funds fails to demonstrate Article III standing, as they have not shown that any enforcement action is sufficiently imminent to establish a concrete, non-speculative injury. Indeed, Plaintiffs’ declarants (who are from only the State of Tennessee rather than the other 19 Plaintiff states), fail to identify any actual, impending enforcement action from violations of Title IX, or imminent loss of federal funding. Moreover, any noncompliance must be resolved by informal means where possible, *see* 20 U.S.C. § 1682; 34 C.F.R. § 100.7(d), allowing Plaintiffs the opportunity to remedy any issues before any loss of federal funds would occur.

Plaintiffs’ claimed fear of damages liability under Title VII as a result of the EEOC Document is both speculative and not traceable to the EEOC Document. As an initial matter, as discussed above, Title VII does not authorize EEOC to bring enforcement actions against states. *See* 42 U.S.C. § 2000e-

5(f)(1). Moreover, even if the EEOC Document were enjoined, neither the scope of Title VII's protections against sex discrimination, including discrimination based on sexual orientation and gender identity, nor the EEOC's obligation to investigate charges of discrimination and issue notices of right to sue would change. That is because Title VII itself, not the EEOC Document, requires the EEOC to investigate charges of discrimination and issue notices of right to sue. *See id.* § 2000e-5(b), (f)(1). And, as discussed below, the aspects of the EEOC Document Plaintiffs appear to challenge are not even based on the EEOC's interpretation of *Bostock*, but rather its administrative decisions dating back nearly a decade. *See pp. 27-28, infra.*

Plaintiffs fare no better in asserting standing based on the alleged imposition of “administrative costs and burdens by forcing them to evaluate compliance with the agencies’ new interpretations,” PI Mem. at 9, because despite submitting five declarations in support of their motion, Plaintiffs have provided no evidence that any Plaintiff state has sustained any administrative costs—or even undertaken efforts at all—to comply with the agencies’ interpretations of Titles VII and IX. And if Plaintiffs evaluated compliance with the challenged documents in the future, any resulting injury would be entirely self-inflicted. *Clapper*, 568 U.S. at 418 (without any immediate threat of harm, costs of avoiding enforcement are self-inflicted and, thus, non-justiciable injuries).

## **2. The Court Lacks Jurisdiction Because Plaintiffs Have an Adequate Alternative Remedy under Titles VII and IX, and that Remedy is Exclusive.**

This Court also lacks jurisdiction over Plaintiffs’ claims for two additional reasons: First, the APA’s alternative remedy provision precludes them from bringing this standalone action because they may simply defend any future Title VII or IX enforcement action, and second, it is “fairly discernable” that Congress intended Title IX to create the exclusive remedy for the claims against ED.

First, to determine whether the APA precludes an action where there is an adequate alternative remedy, “the essential inquiry is whether another statutory scheme of judicial review exists so as to preclude review under the more general provisions of the APA.” *Bangura v. Hansen*, 434 F.3d 487, 501

(6th Cir. 2016). Where “Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action” a court lacks subject matter jurisdiction over APA claims. *Boven v. Massachusetts*, 487 U.S. 879, 903 (1988). Here, for example, if DOJ filed suit against any of the Plaintiff states based on its interpretation of Titles VII or IX, the state would:

Almost by definition [] have an adequate remedy in a court, that is, the remedy of opposing the Attorney General’s motion in the court in which [s]he files h[er] papers. Not only would the filing of such an opposition there be a judicial remedy obviating the need for resort to the APA in this District, but it is a far more appropriate, far more logical remedy than a lawsuit here seeking injunctive relief.

*NAACP v. Meese*, 615 F. Supp. 200, 203 (D.D.C. 1985). As in *NAACP*, it is far more appropriate for Plaintiffs to assert their claims in the context of a future enforcement action, if one occurs, after an investigation and the compilation of a factual record. All claims therefore must be dismissed for lack of subject matter jurisdiction under the alternative remedy provisions of the APA. *See* 5 U.S.C. § 704.

Second, Congress did not intend for pre-enforcement judicial review of Title IX claims, because it provided an elaborate procedural scheme for administrative enforcement proceedings that culminates in the opportunity for judicial review. Where it is “fairly discernable” that an elaborate statutory review scheme was intended to create an exclusive remedy, parallel jurisdiction outside that scheme is precluded. *See Thunder Basin*, 510 U.S. at 207, 216; *see also Elgin v. Dep’t of Treasury*, 567 U.S. 1 (2012). In *Thunder Basin*, the Supreme Court held that a statute providing for administrative proceedings followed by judicial review in the court of appeals, foreclosed a parallel enforcement action. *See Thunder Basin*, 510 U.S. at 207-08. In that case, a mine operator challenged an agency’s interpretation of a statute, which interpretation would form the basis for an enforcement action against the operator. *See id.* at 216. Confronted with a review process remarkably similar to that found in Title IX, the Court held that Congress’s intent to preclude pre-enforcement judicial review was “fairly discernible in the statutory scheme” under the Mine Act. *Id.* at 207 (citation omitted); *see* 30 U.S.C. § 801 *et seq.*

Like here, no action had yet been taken against the plaintiff in *Thunder Basin*. And like here, the claims “turn[ed] on a question of statutory interpretation.” *Thunder Basin*, 510 U.S. at 216. Here, just as in *Thunder Basin*, “[n]othing in the language and structure of the Act or its legislative history suggests that Congress intended to allow [regulated parties] to evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings” based on the challenged rule. *Id.* And like in *Thunder Basin*, a comprehensive procedural scheme that “applies to all violations of the Act and its regulations” provides the opportunity for judicial review. *Id.* at 209. Such statutory procedural remedies are exclusive even for constitutional claims. *See Elgin*, 567 U.S. at 1.

As in *Thunder Basin*, this Court does not have jurisdiction to consider Plaintiffs’ anticipatory challenge to the interpretation of Title IX. By providing for administrative review, followed by judicial review, Congress did not intend to allow pre-enforcement injunctive relief. Plaintiffs style their complaint as challenging the statutory interpretation announced in Defendants’ documents, but the same was true in *Thunder Basin*. 510 U.S. at 205 (describing plaintiff’s pre-enforcement “challenge [to] the [agency’s] interpretation of” a statute). Courts consistently have refused to allow funding recipients to circumvent the civil rights laws’ administrative enforcement processes. *See, e.g., Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968) (*en banc*); *Sch. Dist. of City of Saginaw v. Dep’t of Health, Ed., & Welfare*, 431 F. Supp. 147 (E.D. Mich. 1977). This Court should do the same here.

The decision in *Board of Education of the Highland Local School District v. United States Department of Education*, 208 F. Supp. 3d 850 (S.D. Ohio 2016), is instructive on this point, as it addressed—and rejected—a claim identical to the one Plaintiffs bring here because there was an adequate alternative remedy. *Id.* at 861. In *Highland*, the school district sought to preliminarily enjoin agencies from relying on ED guidance documents that discussed Title IX’s application to discrimination against transgender students. *Id.* at 859. The school district sought an injunction preventing the Federal Government from taking any adverse action against it, including steps to revoke federal funding, based on the agency’s

interpretation of Title IX. *Id.* The court concluded that it lacked subject matter jurisdiction over the school district's APA and constitutional claims because there was an adequate remedy through Title IX's administrative process. *Id.* at 860-64. Applying *Thunder Basin*, the court concluded that ED's enforcement scheme precluded district court jurisdiction over plaintiffs' pre-enforcement challenges, and denied the school district's request for a preliminary injunction. *Id.* at 861-64. *See Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 428 (6th Cir. 2016) (holding that statutory scheme provided an adequate remedy that precluded APA review because it provided for review in federal courts following administrative review).

Here, just as the court concluded in *Highland*, the *Thunder Basin* doctrine prevents Plaintiffs from circumventing the administrative and judicial process Congress has provided them under Title IX. *See* 20 U.S.C. § 1682 (administrative process); *id.* § 1683 (judicial review); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."). Because the Court lacks subject matter jurisdiction over Plaintiffs' claims, they cannot establish a likelihood of success.

## **B. The Challenged Documents Do Not Violate the APA.**

### **1. The Challenged Documents Do Not Constitute Final Agency Action.**

Plaintiffs' APA claims fail because the challenged documents do not reflect "final agency action," 5 U.S.C. § 704, which is any agency action that is (1) "the consummation of the agency's decisionmaking process" and that (2) also determines "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Plaintiffs' challenge fails on this second prong: they contend that ED's NOI and Fact Sheet constitute final agency action because they reflect a "definitive interpretation of Title IX," but these documents have no independent legal effect. *See* Compl. Ex. A at 1 (ED's NOI "does not itself determine the outcome in any particular case or set of facts."); Compl. Ex. C at 5 (listing scenarios that ED "can investigate" without purporting to determine an outcome of any such investigation).

The only consequences come from violating Title IX and its implementing regulations, not from failing to comply with the challenged documents. Indeed, in a proceeding to enforce a statute, an agency could assert an interpretation without referring at all to the challenged documents. *See Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432-33 (4th Cir. 2010) (an agency document that “informs the regulated community” of the agency’s position on “what violates the law” does not determine rights or obligations, and thus is not final agency action).

ED’s NOI sets forth ED’s views on the application of *Bostock* to Title IX, and the ED/DOJ Fact Sheet is a “resource for students and families” on confronting possible LGBTQI+ discrimination in schools. Neither document requires recipients of federal funds to take, or refrain from taking, any action. Nor do the documents specify whether any set of facts would constitute discrimination in violation of Title IX. Because “the case law is clear that [the courts] lack authority to review claims under the APA where an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party,” the ED NOI and the ED/DOJ Fact Sheet cannot constitute final agency action. *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006) (quotation marks omitted); *see also Am. Tort Reform Ass’n v. OSHA*, 738 F.3d 387, 404-05 (D.C. Cir. 2013); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 858-59 (4th Cir. 2002); *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001).

Plaintiffs fare no better concerning their claim that the EEOC Document constitutes final agency action. PI Mem. at 9. The EEOC Document does not determine rights or obligations and no “legal consequences” flow from it. Rather, the EEOC Document reflects the EEOC’s views of the law, and this view “has force only to the extent the agency can persuade a court to the same conclusion.” *AT&T*, 270 F.3d at 976. Indeed, the EEOC Document unequivocally states that 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. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.” Compl. Ex. D at 3.

Plaintiffs claim that consequences flow from the EEOC Document because it invites employees to contact the EEOC and file a charge of discrimination if employers do not comply with the EEOC Document, which creates a risk that employers who do not comply will be subject to enforcement actions and potential liability. PI Mem. at 9. Workers would have every incentive to contact the EEOC even in the absence of the EEOC Document because Title VII’s administrative scheme requires them to do so if they want to pursue a Title VII action. If the EEOC received a charge of discrimination from an employee who suffered an adverse employment action based on her sexual orientation or gender identity, the EEOC would open an administrative investigation, as Title VII requires it to do with any charge. Such an administrative investigation is not a sufficient “legal consequence” to constitute final agency action. *E.g., Bannum, Inc. v. Sanyer*, 251 F. Supp. 2d 7, 11 (D.D.C. 2003) (“an agency’s initiation of an investigation . . . does not constitute final agency action.”) (quoting *Jobs, Training & Servs., Inc. v. East Texas Council of Gov’ts*, 50 F.3d 1318, 1324 (5th Cir. 1995)); *see FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980) (initiation of administrative complaint not sufficient to constitute final agency action); *see also, e.g., Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831,836 (D.C. Cir. 2001) (statement that EEOC had reasonable cause to believe employer was violating Title VII not final agency action).

In sum, the challenged documents “create[] no new legal obligations beyond those the [statute] already imposed.” *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1028 (D.C. Cir. 2016). They simply inform the public of the agencies’ interpretation of Titles VII and IX, without purporting to alter those obligations at all. *Id.* They do not “creat[e] ‘new law, rights or duties,’” but rather “go[] ‘to what the [agency] thinks [the statute] means.’” *Hadley-Mem’l Hosp. v. Kynard*, 981 F. Supp. 690, 693 (D.D.C.

1997) (citation omitted). “[L]egal consequences do not emanate from [the documents] but from the [] Act and its implementing regulations.” *Domenech*, 599 F.3d at 433. Plaintiffs’ APA claims thus fail.<sup>7</sup>

## **2. The Challenged Documents Are Interpretive Rules Exempt from Notice and Comment Requirements, and are Not Arbitrary or Capricious.**

Rules issued through the notice-and-comment process are often referred to as “legislative rules” because they have the “force and effect of law.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015). Plaintiffs claim that ED’s NOI, the ED/DOJ Fact Sheet, and the EEOC Document, are subject to notice and comment requirements because they constitute legislative rules. PI Mem. at 11-12. Not so.

Notice and comment requirements do not apply to “interpretive rules, general statements of policy, or rules of agency organization, procedure or practice.” 5 U.S.C. § 553(b)(A). “[T]he critical feature of interpretive rules is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’” *Perez*, 575 U.S. at 97 (quotation omitted); *St. Francis Health Care Centre v. Shalala*, 10 F. Supp. 2d 887, 894 (N.D. Ohio 1998) (holding that HHS guideline providing “colorable interpretation of the statute and regulation” constituted an interpretive rule). An interpretive rule “simply states what the administrative agency thinks the statute means.” *First Nat’l Bank of Lexington v. Sanders*, 946 F.2d 1185, 1188 (6th Cir. 1991). An agency that enforces “less than crystalline” statutes must interpret them, “and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement, which the [APA] assimilates to an interpretive rule.” *Hector v. USDA*, 82 F.3d 165,

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<sup>7</sup> As discussed above, Plaintiffs do not specifically challenge or seek relief from DOJ’s March 2021 Memorandum. Even if they did, such a challenge would fail because that document does not determine rights or obligations. DOJ Mem. at 3 (“this statement does not prescribe any particular outcome with regard to enforcement”).

167 (7th Cir. 1996). Even where an agency changes its prior interpretation of a statute in an interpretive rule, it need not engage in notice and comment. *Perez*, 575 U.S. at 100-01.

Contrary to Plaintiffs' contention, PI Mem. at 12, neither ED nor EEOC have "creat[ed] new law," or imposed "new obligations," *id.* at 22; rather, they have interpreted the sex discrimination provisions of Titles VII and IX, consistent with the reasoning of *Bostock*, to prohibit discrimination based on sexual orientation and gender identity. The challenged documents are non-binding, and do not purport to have the force and effect of law, and instead "advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (citation omitted). The documents are therefore paradigmatic interpretive rules, exempt from notice-and-comment. *Id.*

Plaintiffs' argument appears to boil down to a contention that any interpretive document becomes a legislative rule if there is disagreement about its interpretation. *See* PI Mem. at 12 (contending that the agencies' interpretation "appears nowhere in Title IX itself"). Whether Defendants' interpretations are correct, they remain interpretations, and it is for a court to decide, in the context of a final enforcement action, whether to accept those interpretations. *See Perez*, 575 U.S. at 97. But that is a merits issue, not a procedural APA problem.

Plaintiffs also contend that the NOI and Fact Sheet are arbitrary and capricious because they conflict with prior agency documents, including ED's initial post-*Bostock* memorandum and ED regulations. PI Mem. at 12. Plaintiffs contend that ED failed to adequately acknowledge its change in position, provide good reasons for that change, or to consider the alleged "serious reliance interests" at stake. *Id.* at 12-13. But ED expressly recognized in the NOI 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," Compl. Ex. A at 2, and explained that it was seeking to clarify its interpretation in light of the Supreme Court's recent decision in *Bostock*, and that discrimination based on sexual

orientation and gender discrimination could cause harm, among other bases. *Id.* These are permissible and sufficient reasons, and that is all the APA requires. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency generally need not demonstrate “that the reasons for the new policy are *better* than the reasons for the old one,” but only that “the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.”) (emphasis in original).

Plaintiffs also claim that the EEOC Document is defective because it unreasonably extends *Bostock*’s reasoning to “circumstances that were not before the Court,” since *Bostock* declined to address an employer’s use of pronouns or locker room policies. PI Mem. at 22-23. As an initial matter, Plaintiffs fail to identify what aspects of the EEOC Document they believe improperly extend the *Bostock* decision. The Document merely “explains what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country,” and “explains the [EEOC’s] established legal position on LGBTQ+-related matters, as voted by the Commission.” Compl. Ex. D at 3-4. If Plaintiffs’ concerns are related to the EEOC Document’s discussion of the use of bathrooms and pronouns, the EEOC Document makes clear that it is relying on EEOC’s previous administrative decisions, which *Bostock* supports. *See Id.* at 8. Plaintiffs’ claim that the EEOC Document misapplies or over-extends *Bostock* is misplaced.<sup>8</sup>

Finally, Plaintiffs contend that the agencies were required to consider Plaintiffs’ purportedly “serious reliance interests,” including “in designing and constructing their facilities.” PI Mem. at 13. But any purported reliance interest in sex-separated facilities and athletic teams is not implicated here, as the challenged documents do not prohibit sex-separated living facilities and athletic teams. Rather, the challenged documents simply state ED’s view that Title IX prohibits discrimination against

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<sup>8</sup> This also highlights yet another problem with Plaintiffs’ standing. Even if the Court were to enjoin the EEOC from relying on the EEOC Document, the EEOC would still be able to apply the reasoning espoused in its administrative decisions, highlighting the lack of a redressable Article III injury caused by the EEOC Document.

individuals who seek to access sex-segregated facilities or participate in sex-segregated athletics, which requires an individualized inquiry into the harm imposed by the application of the sex-specific rule to the individual in question. Moreover, Plaintiffs have failed to allege any facts supporting their claim that they are harmed by any reliance interests, let alone serious ones.

### 3. ED's Interpretation of Title IX is Not Contrary to Law.

Plaintiffs next assert that ED's application of the reasoning in *Bostock* to Title IX is contrary to the plain reading of the statute, and note that the Sixth Circuit has held that because "Title VII differs from Title IX in important respects . . . it does not follow that principles announced in the Title VII context *automatically* apply in the Title IX context." PI Mem. at 13 (quoting *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021)). But establishing that there are *some* differences between the statutes does not mean that they should not be interpreted similarly; to the contrary, the Sixth Circuit has recognized that "[g]enerally, courts have looked to Title VII, 42 U.S.C. § 2000e, as an analog for the legal standards in both Title IX discrimination and retaliation claims." *Nelson v. Christian Bros. Univ.*, 226 F. App'x 448, 454 (6th Cir. 2007) (citations omitted). And as courts have recognized, "Title IX's language closely resembles Title VII's." *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251, 273 (4th Cir. 2021) (explaining that although *Bostock* involved Title VII rather than Title IX, its reasoning "is consistent with the broadly applicable text of Title IX."); *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011) (holding that the "Supreme Court's interpretation of Title VII properly informs our examination of Title IX[.]").

The resemblance is particularly notable with respect to the language at issue in *Bostock*. Just as Title VII prohibits discrimination "because of" sex, Title IX prohibits discrimination "on the basis of sex." Because of the similar phrasing, Courts have consistently recognized that *Bostock's* reasoning extends to Title IX, and Plaintiffs have identified no case to the contrary. *See, e.g., Grimm*, 972 F.3d at 618; *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. United States Dep't of Health & Human*

*Servs.*, ---F. Supp. 3d ---, No. 20-11297, 2021 WL 3667760, \*15 (D. Mass. Aug. 18, 2021) (holding that “[t]hough *Bostock* was a Title VII case, the Supreme Court’s reasoning applies equally outside of Title VII.”); *Doe v. Univ. of Scranton*, No. 3:19-cv-01486, 2020 WL 5993766, \*5, n.61 (M.D. Pa. Oct. 9, 2020) (finding “persuasive” the argument that *Bostock* extends to Title IX); see also *Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020); *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 64 (D.D.C. 2020).

Plaintiffs contend that the term “sex” in Title IX refers only to “biological sex, and not gender identity,” and that ED has “always” construed the term “sex” accordingly. PI Mem. at 15 (citing 85 Fed. Reg. [30,026,] 30,178 (May 19, 2020)). This is wrong on both counts: ED thus far has not included a definition of the word “sex” in its regulations, expressly declining to do so when it amended those regulations in 2020, 85 Fed. Reg. at 30,178<sup>9</sup> (“defining sex is not necessary to effectuate these final regulations”), and when it issued the NOI. See Compl. Ex. A at 1-2 n.1. And of course, Title IX does not refer to “biological sex” at all.

Plaintiffs next contend that the NOI and Fact Sheet “squarely conflict” with Title IX because Title IX expressly authorizes separation based on sex in certain circumstances. PI Mem. at 14. For example, they claim that ED’s interpretation conflicts with ED’s own regulations, which allows schools to “provide separate toilet, locker room, and shower facilities on the basis of sex” so long as the “facilities provided for students of one sex” are “comparable to such facilities provided for students of the other sex.” *Id.* (citing 34 C.F.R. § 106.33; 45 Fed. Reg. 30,802, 30,960 (May 9, 1980)). But as discussed above, Plaintiffs are mistaken in their conclusion that the NOI prevents schools from maintaining separate programs or facilities based on sex. The Fourth Circuit rejected a similar argument in *Grimm*, 972 F.3d at 618, and held that the violation of Title IX is not in maintaining sex-

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<sup>9</sup> Plaintiffs similarly improperly read the words “biological sex” into 34 C.F.R. § 106.41(b) and (b)(1). PI Mem. at 15.

separated facilities; it is in excluding transgender students from the sex-separated facility or program matching their gender identities. The court further held that “[Section 106.33] cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the mere act of creating sex-separated restrooms in and of itself is not discriminatory . . .” *Id.*

Plaintiffs also challenge ED’s conclusion that Titles VII and IX contain textual similarities such that it was reasonable to apply the reasoning of *Bostock* to Title IX. PI Mem. at 16. In particular, Plaintiffs take issue with ED’s conclusion that the “because of” and “on the basis of” language in the two statutes were interchangeable. *Id.* And although the Plaintiffs acknowledge that the Supreme Court treated this language interchangeably in *Bostock, id.*,<sup>10</sup> they suggest that ED should have ignored that usage. Plaintiffs have provided no support for the counterintuitive notion that an agency acts arbitrarily and capriciously when it follows the Supreme Court’s own approach to interpreting a statutory term. Indeed, even the previous Administration’s interpretation, which Plaintiffs prefer, recognized that “the phrases ‘on the basis of sex’ and ‘because of such individual’s . . . sex’ have been used by Congress ‘interchangeably,’” Compl. Ex. B at 15.

Plaintiffs next take issue with ED’s conclusion that Title IX unambiguously prohibits sexual orientation and gender identity discrimination, because they claim that Title IX’s authorization of sex-separated living facilities at most leads to an ambiguity. PI Mem. at 17. There is no ambiguity, but even if there were, the mere mistaken conclusion that the statute was unambiguous would not result in an APA violation, since the interpretation would still be lawful. *See, e.g., Grimm*, 972 F.3d at 618; *see also* 5 U.S.C. § 706 (APA is not violated where error is harmless).

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<sup>10</sup> *See, e.g., Bostock*, 140 S.Ct. at 1753 (stating that “today’s holding” is “that employers are prohibited from firing employees *on the basis of* [sexual orientation] or transgender status.”) (emphasis added). *See also Safeco Ins. Co. v. Burr*, 551 U.S. 57, 63-64 & n.14 (2007) (noting that statutory phrases “based on” and “because of” have same meaning); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (same); *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 176 (2009) (same).

Finally, Plaintiffs take issue with ED's explanation that lower federal court decisions support its interpretation of Title IX. PI Mem. at 17. Notably, Plaintiffs do not dispute that the Fourth Circuit's decision in *Grimm* fully supports ED's interpretation; rather, Plaintiffs simply disagree with it. *Id.* But that disagreement does not render ED's interpretation arbitrary or capricious.<sup>11</sup> Plaintiffs also challenge Defendants' purported failure to cite *Meriwether* or "other decisions that would undermine its Interpretation." PI Mem. at 18. But *Meriwether* did not purport to interpret the scope of sex discrimination in Title IX, *see* 992 F.3d 492, and, as discussed above, there are no other contrary cases to discuss, because no courts have agreed with Plaintiffs' argument that *Bostock's* reasoning does not apply to Title IX. Plaintiffs cannot establish a likelihood of success on their APA claim against ED.

#### 4. The EEOC Document is Not Contrary To Law.

As to the EEOC document, Plaintiffs first contend that it constitutes a substantive rule which the agency lacks the authority to promulgate. PI Mem. at 20-21. But the Document expressly disclaims any legal effect on its own. *See* Compl. Ex. D at 3 (noting that "[t]he contents of this document do not have the force and effect of law"). Indeed, Courts routinely find that the EEOC's interpretations of substantive provisions of Title VII lack the "force of law." *See In re Union Pacific R.R. Empl. Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007); *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001).

Plaintiffs also contend that because the EEOC Document constitutes "significant guidance," the EEOC Chair violated the EEOC's procedures by issuing the document without the approval of the entire Commission. PI Mem. at 21. Plaintiffs are mistaken. Pursuant to 29 C.F.R. § 1695.2(d), "[a]ny significant guidance or guidance that is otherwise subject to notice and comment procedures

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<sup>11</sup> Plaintiffs note that the Eleventh Circuit recently withdrew its decision in *Adams v. School Bd. of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020) and decided to rehear the case *en banc*. This cannot establish that ED's interpretation is arbitrary and capricious. The Eleventh Circuit decided to rehear the case *en banc* after ED issued the NOI. An agency's action cannot be arbitrary and capricious based on events that happen after the challenged action, particularly where other courts held consistently with ED's interpretation before it was issued.

must be approved by a Commission vote,” but the EEOC Document is neither. Under the definition set forth at § 1695.1(b)(1)(iv), guidance is “significant” if it can be expected to “raise novel legal or policy issues.” But the EEOC Document explains that the information contained in the document “is not new policy.” Compl. Ex. D at 4. Rather, the EEOC Document “explains the [EEOC’s] established legal position on LGBTQ+-related matters, as voted by the Commission.” *Id.* Nothing in the EEOC Document reflects a change in the EEOC’s legal position on the scope of Title VII, and it plainly is not the first time the EEOC has taken a position on these issues.

## **5. The Challenged Documents Do Not Violate the Constitution.**

### **a. Plaintiffs’ Spending Clause Argument Lacks Merit.**

Plaintiffs’ Spending Clause arguments are twofold: first, they contend that ED may not seek to prohibit sexual orientation and gender identity discrimination because Title IX does not “unambiguously” prohibit such discrimination. PI Mem. at 18 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)). Second, they argue that ED’s interpretation unconstitutionally coerces states that receive federal funding. *Id.* at 19. Neither contention has merit.

Recipients of federal funds like Plaintiffs are clearly on notice that they must comply with the antidiscrimination provisions of Title IX, and “the possibility that application of [the condition] might be unclear in [some] contexts” does not render it unenforceable under the Spending Clause. *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 665-66, 673 (1985) (where statute makes clear that conditions apply to receipt of federal funds, Congress need not “specifically identif[y] and proscrib[e]” each action that will violate its terms). Unlike *Pennhurst*, in which the federal law at issue was unclear as to whether the states incurred any obligations *at all* by accepting federal funds, Title IX clearly conditions receipt of funds on complying with the statute’s prohibitions on sex discrimination. *See* 20 U.S.C. § 1681(a). “Nothing more is required under *Pennhurst*, which held that Congress need provide no more than ‘clear notice’ to the [S]tates that funding is conditioned upon compliance with certain standards.”

*Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005). Indeed, “so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely.” *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

When Congress makes clear that a State’s acceptance of federal funds requires agreement to certain conditions, the parameters of those conditions can permissibly be set out in agency interpretations, guidance or regulations. For example, in *Bennett*, the Court upheld a statutory scheme—Title I of the Elementary and Secondary Education Act of 1965—where “the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the [statute’s] requirements.” 470 U.S. at 669. The Court emphasized that “[t]he fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements,” *id.*, and that “if the State was uncertain” as to its obligations, “it could have sought clarification” from ED. *Id.* at 672.

So too here: Over time, courts have interpreted Title IX to include diverse forms of discrimination without issue. *See, e.g., Bostock*, 140 S. Ct. at 1753 (“Congress’s key drafting choices . . . virtually guaranteed that unexpected applications would emerge over time.”); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (severe student-on-student sexual harassment could violate Title IX, even though “the level of actionable ‘harassment’ . . . ‘depends on a constellation of surrounding circumstances, expectations, and relationships.’” (quotation omitted)); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 1509 (2005) (holding that retaliation is a form of intentional sex discrimination under Title IX even though it was not specifically mentioned in the statute). “Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.” *Id.* at 175.

Moreover, the Fourth Circuit recently rejected the precise Spending Clause argument Plaintiffs raise here. In *Grimm*, 972 F.3d at 619, n.18, the school board claimed that the Spending Clause required

that the word “sex” in Title IX be construed to bar application of the statute to gender identity “in order to give the Board fair notice.” The Fourth Circuit rejected this argument, holding that “*Bostock* forecloses that ‘on the basis of sex’ is ambiguous as to discrimination against transgender individuals.” *Id.* It further explained that “the Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination.” *Id.*

Here, there is no *Pennhurst* problem because the existence and basic nature of the condition on federal funds in Title IX is clear. *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002); *accord Cutter*, 423 F.3d at 586. For this reason, Plaintiffs’ reliance on the plurality opinion from *Sch. Dist. of the City of Pontiac v. Sec’y of the U.S. Dep’t of Educ.*, 584 F.3d 253 (6th Cir. 2009), is also misguided—there, too, the Sixth Circuit was attempting to determine whether a particular condition on federal funding *existed at all* on the face of the statute. *Id.* at 256. Here, Title IX has always clearly conditioned federal funding on compliance with the statutory prohibition on sex discrimination, and courts, not agency interpretations, determine the ultimate scope of liability.

Nor does ED’s interpretation result in impermissible coercion. The Supreme Court has explained “that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.” *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *Nat’l Fed. of Indep. Bus. v. Sebelius* (“*NFIB*”), 567 U.S. 519, 584-85 (2012). Coercion may occur when Congress threatens funding as to an old and large program to force states to participate in a new one. *NFIB*, 567 U.S. at 585 (“What Congress is not free to do is to penalize States that choose not to participate in [a] new program by taking away their existing . . . funding.”). But here, there is no coercion where the only issue is the interpretation of a longstanding condition on federal funding. And Plaintiffs have failed to identify any legal support for the proposition that coercion may occur when an existing statutory condition is interpreted in a new context—a routine task for courts and agencies that apply broad cooperative spending statutes. *See Pace v. Bogalusa City*

*Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (*en banc*) (rejecting claim that statute prohibiting disability discrimination by recipient of federal funds is unduly coercive.).

**b. ED Did Not Create an Unconstitutional Condition.**

Plaintiffs next claim that ED’s interpretation of Title IX amounts to an “unconstitutional condition” on the receipt of Federal funds because they say it will force them to violate their citizens’ First Amendment rights. PI Mem. at 19 (citing *Dole*, 483 U.S. at 210). This claim fails.

The so-called “unconstitutional conditions” doctrine holds that the government may not deny a benefit on a basis that infringes the recipient’s constitutionally protected interests. *See e.g.*, *Dole*, 483 U.S. at 208; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). But Plaintiffs would extend this doctrine many times further: In their view, any condition on federal funding *to states* is unconstitutional whenever the recipient state may later end up violating its citizens’ speech rights by implementing the condition. *See* PI Mem. at 19. No legal support is provided for this broad extension of the doctrine, and indeed, courts have held that the “unconstitutional conditions” doctrine does not apply “to cases between two sovereigns.” *Koslow v. Pennsylvania*, 302 F.3d 161, 174 (3d Cir. 2002).

Regardless, even if the doctrine did apply, “[a] finding of an unconstitutional condition presupposes that there *is* a relinquishment of a constitutional right.” *F. for Acad. & Institutional Rts., Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 301 (D.N.J. 2003), *aff’d*, 446 F.3d 1317 (3d Cir. 2006) (emphasis added). Here, Plaintiffs merely speculate that the challenged documents will someday require them to violate some citizen’s First Amendment rights. *See, e.g.*, PI Mem. at 20 (speculating that “at least in some circumstances” states would “violate the First Amendment rights of their students and employees”). At the very least, such a claim is unripe, *see supra* at pp. 16-17, but at most, Plaintiffs appear to twist the unconstitutional conditions doctrine into a novel kind of facial claim, where even the *possibility* of a single unconstitutional application of an interpretation renders the entire scheme invalid. This cannot be right—the Supreme Court has long held that a plaintiff bringing a facial claim

“must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Of course, there are numerous such valid circumstances, and even *Meriwether*, the primary case upon which Plaintiffs rely, recognizes as much. There, a public college professor brought First Amendment claims against college officials after he received a written reprimand for violating the college’s policy requiring faculty to refer to students by pronouns that reflected their gender identity. *Id.* at 500-02. The Sixth Circuit concluded that the professor had stated a plausible First Amendment claim when the college sought to discipline him without considering the professor’s proposed compromises or his request for a religious accommodation. *Id.* at 517. The court also concluded that Title IX did not change that conclusion, because the professor’s decision not to refer to the student using the student’s preferred pronoun did not have the effect of denying the student equal access to an educational program or activity, and did not create a hostile educational environment. *Id.* at 511.

The important negative implication of *Meriwether* is that, where conduct—including the misuse of pronouns—is sufficiently severe and pervasive that it creates a hostile educational environment, such conduct may violate Title IX and outweigh any First Amendment interests. The *Meriwether* decision simply highlights the fact-intensive nature of Title IX cases and why Plaintiffs’ pre-enforcement challenge—devoid of any concrete facts—cannot support preliminary relief. *See, e.g., Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000) (denying preliminary injunction and finding that a First Amendment claim required “‘a particularized balancing’ of the various interests at stake[.]”).

Similarly, Plaintiffs contend that ED’s interpretation conflict with religious liberty “at least in some [unidentified] circumstances.” PI Mem. at 19-20. They note that the *Bostock* Court underscored the importance of protections for religious employers and employees. *Id.* at 19. But *Bostock* actually highlights why Plaintiffs’ pre-enforcement challenge is improper, since that case recognized that “none of the employers before us today represent in this Court that compliance with Title VII will infringe

their own religious liberties in any way.” *Bostock*, 140 S. Ct. at 1753-54. Just as with Plaintiffs’ free speech claim, Plaintiffs fail to identify any concrete factual scenario showing a conflict between ED’s interpretation of Title IX and religious freedom.<sup>12</sup>

**c. The Challenged Documents Do Not Violate Separation-of-Powers Principles or the Tenth Amendment.**

Finally, Plaintiffs contend that the challenged documents usurp Congress’s legislative authority, and infringe upon powers reserved to States under the Tenth Amendment. PI Mem. at 20, 23-24. First, ED’s interpretation that Title IX bars discrimination on the basis of sexual orientation and gender identity is no more an intrusion on Congress’s legislative authority than the Supreme Court’s similar conclusion regarding Title VII in *Bostock*, or the Court’s conclusion in *Jackson*, 544 U.S. at 175, that Title IX bars retaliation despite not being explicitly mentioned in the statute. Plaintiffs’ separation-of-powers and Tenth Amendment arguments against ED thus lack merit.

Second, Plaintiffs argue that the EEOC Document improperly abrogates sovereign immunity and also violates the Tenth Amendment. PI Mem. at 23-24. Plaintiffs’ argument on this score is unclear. To be sure, Title VII abrogates the States’ sovereign immunity. *Fitzpatrick v. Blitzer*, 427 U.S. 445, 447-48, 453 n.9 (1976). But if Plaintiffs’ complaint focuses on the determination that Title VII forbids discrimination on the basis of sexual orientation and gender identity, that determination is not the result of the EEOC Document, but rather the direct holding of the Supreme Court in *Bostock*. Certainly, *Bostock* did not render Title VII unconstitutional. These claims all fail.

**III. THE BALANCE OF THE EQUITIES DOES NOT JUSTIFY RELIEF.**

An injunction also is improper because the balance of the equities and the public interest tip sharply in Defendants’ favor. First, because Plaintiffs cannot establish the first two injunction factors,

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<sup>12</sup> ED’s Title IX regulations explicitly provide that ED will not enforce Title IX in a manner that would restrict any rights that would otherwise be protected by the First Amendment, 34 C.F.R. § 106.6(d), further undermining Plaintiffs’ claimed conflict.

“it is clear they cannot make the corresponding strong showings [on the second two factors] required to tip the balance in their favor.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009). Plaintiffs cannot establish that their alleged injury outweighs any harm that an injunction would cause Defendants and unrepresented third parties, or that granting the injunction would not be adverse to the public interest. *McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Outweighing Plaintiffs’ non-existent showing of harm is the substantial public interest in achieving Titles VII and IX’s goals of eliminating discrimination in the workplace and education settings. Violations of federal civil rights statutes constitute irreparable harm as a matter of law. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993); *Rogers v. Windmill Pointe Vill. Club Ass’n*, 967 F.2d 525, 528 (11th Cir. 1992). Enjoining the documents and interpretations challenged here likely would prevent Defendants from explaining to the public and regulated entities their understanding of the requirements imposed by Titles VII and IX, leaving regulated entities confused about their legal obligations, and harming those the statutes are intended to protect. *Dodds*, 845 F.3d at 222 (holding that the public interest weighed heavily against a stay of an injunction where the injunction sought to protect a transgender student’s constitutional and civil rights, “a purpose that is always in the public interest”); *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993). In addition, there is “inherent harm to an agency” in preventing it from enforcing statutes and regulations that “Congress found it in the public interest to direct that [it] develop and enforce.” *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Plaintiffs have failed to show any irreparable harm that would justify inflicting these injuries.

#### **IV. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED TO THE PLAINTIFF STATES.**

If this Court were to enjoin any aspect of the challenged documents (and it should not), its injunction should apply only to the Plaintiff States, excluding those in the Fourth and Seventh Circuits

where the courts of appeals have already concluded that Title IX prohibits discrimination based on sexual orientation or gender identity. “The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.” *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). Thus, the “plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.” *Id.* at 1934; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162-64 (2010); *Printz v. United States*, 521 U.S. 898, 935 (1997). Injunctions must be no broader than “necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Furthermore, in circuits that have held that Title IX precludes discrimination based on gender identity, it would be inappropriate for this Court to enjoin the Federal Government from enforcing that view of the law. *See, e.g., Grimm*, 972 F.3d at 618-19; *Whitaker*, 858 F.3d at 1049 (abrogation on other grounds as recognized by *Illinois Rep. Party v. Prtizker*, 973 F.3d 760 (7th Cir. 2020)); *see also United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 773 (9th Cir. 2008) (“[p]rinciples of comity require that, once a sister circuit has spoken to an issue, that pronouncement is the law of that geographical area”). This would include Plaintiffs South Carolina, West Virginia and Indiana.<sup>13</sup>

Plaintiffs have no interest in whether other States are subject to the Defendants’ interpretation of Titles VII and IX during the pendency of this lawsuit. Any injury would be fully redressed through an injunction that applied only where their courts of appeals have not ruled on this issue.

## CONCLUSION

For the reasons explained above, the States’ preliminary-injunction motion should be denied.

DATED: September 23, 2021

Respectfully submitted,

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<sup>13</sup> If this Court issues any relief with respect to the EEOC Document (and, again, it should not), it is bound by the Sixth Circuit’s decision in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018), *aff’d sub nom. Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), holding that Title VII protects against discrimination based on transgender/transitioning status, and upholding the EEOC’s interpretation of dress codes for transgender employees that is reflected in the EEOC Document. *See* Compl. Ex. D at 7 (discussing dress codes). Accordingly, the Court should not enjoin these aspects of the EEOC Document for any Plaintiff state.

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# EXHIBIT A



U.S. Department of Justice

Civil Rights Division

Principal Deputy Assistant Attorney General  
950 Pennsylvania Ave, NW - RFK  
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MEMORANDUM

March 26, 2021

**TO:** Federal Agency Civil Rights Directors and General Counsels

**FROM:** Principal Deputy Assistant Attorney General Pamela S. Karlan  
Civil Rights Division PSK

**SUBJECT:** Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972

Several federal agencies have recently contacted the Civil Rights Division with questions regarding the application of the Supreme Court’s reasoning in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. \_\_\_ (2020), to Title IX of the Education Amendments of 1972, as amended (20 U.S.C. § 1681 *et seq.*) (Title IX), particularly in light of Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 (Jan. 25, 2021). The Department of Justice is charged with coordination of the implementation and enforcement of Title IX by Executive agencies. Exec. Order No. 12250, § 1-2, 45 Fed. Reg. 72,995 (Nov. 4, 1980). Under the Executive Order 12250 authority delegated to the Civil Rights Division, 28 C.F.R. § 0.51(a) (1981) and 28 C.F.R. § 42.412(a) (1981), I write to share the Division’s view as to whether *Bostock* applies to Title IX.

Executive Order 13988 sets out the Administration’s policy that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.” Citing the Supreme Court’s holding in *Bostock* that the prohibition on discrimination “because of . . . sex” under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), covers discrimination on the basis of gender identity and sexual orientation, the Executive Order explains that *Bostock*’s reasoning applies with equal force to other laws that prohibit sex discrimination “so long as the laws do not contain sufficient indications to the contrary.” The Executive Order directs agencies to review other laws that prohibit sex discrimination, including Title IX, to determine whether they prohibit discrimination on the basis of gender identity and sexual orientation. We conclude that Title IX does.

Title IX provides that “[n]o person in the United States 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). Because their statutory prohibitions against sex discrimination are similar, the Supreme Court and other federal courts consistently look to interpretations of Title VII to inform Title IX. *See, e.g., Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001). Thus, *Bostock*’s discussion of the text of Title VII informs the Division’s analysis of the text of Title IX.

First, like Title VII, Title IX applies to sex discrimination against individuals. The *Bostock* Court focused on this feature of Title VII in reaching its holding. *Bostock*, 140 S. Ct. at 1740–41 (“[The statute] tells us three times—including immediately after the words “discriminate against”—that our focus should be on individuals”). Similarly, Title IX focuses on individuals when it uses the term “person.” See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (stating that, in enacting Title IX, Congress “wanted to provide *individual citizens* effective protection against those [discriminatory] practices” (emphasis added)).

Second, Title IX’s “on the basis of sex” language is sufficiently similar to “because of” sex under Title VII as to be considered interchangeable. In *Bostock* itself, the Supreme Court described Title VII’s language that way: “[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.” *Bostock*, 140 S. Ct. at 1737 (emphasis added); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate’s sex, that supervisor ‘discriminate[s]’ *on the basis of* sex.” (emphasis added)). The *Bostock* Court concluded that Title VII’s prohibition of discrimination “because of” sex includes discrimination because of sexual orientation and transgender status, finding that when an employer discriminates against employees for being gay or transgender, “the employer must intentionally discriminate against individual men and women in part because of sex.” *Bostock*, 140 S. Ct. at 1740–43. The same reasoning supports the interpretation that Title IX’s prohibition of discrimination “on the basis of” sex would prohibit recipients from discriminating against an individual based on that person’s sexual orientation or transgender status. This interpretation of Title IX is consistent with the Supreme Court’s longstanding directive that “if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.” *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (citations and internal alterations omitted).

In the months following the *Bostock* decision, two appellate courts have reached the same conclusion, citing *Bostock* to support their holdings that Title IX protects transgender students from discrimination on the basis of gender identity. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, No. 20-1163 (Feb. 24, 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh’g en banc pending*, No. 18-13592 (Aug. 28, 2020). Other circuits reached this conclusion before *Bostock*. See *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50 (7th Cir. 2017) (transgender boy was likely to succeed on his claim that school district violated Title IX by excluding him from the boys’ restroom); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (per curiam) (school district that sought to exclude transgender girl from girls’ restroom was not likely to succeed on the claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity).

After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX’s prohibition on discrimination “on the basis of sex” is that it includes discrimination on the basis of gender identity and sexual orientation. Before reaching this conclusion, the Division considered whether Title IX “contain[s] sufficient indications” that would merit a contrary conclusion. The Division carefully considered, among other things, the dissenting opinions in

*Gloucester* and *Adams*, and the concerns raised in the dissents in *Bostock*. Like the majority opinions in those cases, however, the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly. Whether allegations of sex discrimination, including allegations of sexual orientation or gender identity discrimination, constitute a violation of Title IX in any given case will necessarily turn on the specific facts, and therefore this statement does not prescribe any particular outcome with regard to enforcement.

I hope this memorandum provides a starting point for your agencies to ensure the consistent and robust enforcement of Title IX, in furtherance of the commitment that every person should be treated with respect and dignity. The Civil Rights Division is available to answer any questions your agencies have as you implement Title IX's protections against sexual orientation and gender identity discrimination.