

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

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

**REPLY IN SUPPORT OF PLAINTIFFS’
MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT..... 1

 I. Plaintiffs’ Claims Are Likely to Succeed on the Merits. 1

 A. This Court has subject matter jurisdiction. 1

 B. Plaintiffs lack an adequate alternative remedy.6

 C. Plaintiffs are likely to succeed on their procedural APA claims.10

 1. The challenged documents are final agency actions.....10

 2. The challenged documents are legislative rules that are subject to notice-and-comment requirements.....12

 3. The Department’s Interpretation and Fact Sheet are arbitrary and capricious. ..14

 4. The EEOC Document exceeds the EEOC’s statutory authority and violates the agency’s own regulations..... 15

 D. Plaintiffs are likely to succeed on their claims that the challenged guidance is contrary to law.16

 1. The Interpretation and Fact Sheet are contrary to Title IX.16

 2. The Interpretation and Fact Sheet violate the Constitution.17

 3. The EEOC Document is contrary to Title VII.....21

 4. The EEOC Document violates the Constitution.22

 II. Preliminary Relief Will Prevent Irreparable Harm and Further the Public Interest.22

 III. At a Minimum, Defendants Should Be Preliminarily Enjoined from Enforcing the Challenged Guidance Against Plaintiffs.....25

CONCLUSION.....25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	6, 11
<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018).....	23
<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez</i> , 458 U.S. 592 (1982).....	2, 24
<i>Appalachian Power Co. v. EPA</i> , 208 F.3d 1015 (D.C. Cir. 2000).....	12
<i>Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n</i> , 576 U.S. 787 (2015).....	3
<i>Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy</i> , 548 U.S. 291 (2006).....	18
<i>B.P.J. v. W.V. State Bd. of Educ.</i> , No. 2:21-cv-00316 (S.D. W. Va.).....	5
<i>Babbitt v. Farm Workers</i> , 442 U.S. 289 (1979).....	2
<i>Bangura v. Hansen</i> , 434 F.3d 487 (6th Cir. 2006)	6
<i>Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.</i> , 208 F. Supp. 3d 850 (S.D. Ohio 2016)	5, 9
<i>Bennett v. Ky. Dep’t of Educ.</i> , 470 U.S. 656 (1985).....	19
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	10, 11
<i>Bostock v. Clayton Cnty., Ga.</i> , 140 S. Ct. 1731 (2020).....	<i>passim</i>
<i>Bowen v. Massachusetts</i> , 487 U.S. 879 (1988).....	6

<i>Brannum v. Overton Cnty. Sch. Bd.</i> , 516 F.3d 489 (6th Cir. 2008)	24
<i>Cannon v. Univ. of Chi.</i> , 441 U.S. 677 (1979).....	9
<i>Ohio ex rel. Celebrezze v. U.S. Dep’t of Transp.</i> , 766 F.2d 228 (6th Cir. 1985)	3
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	22
<i>Colorado v. Toll</i> , 268 U.S. 228 (1925).....	2
<i>Wyoming ex rel. Crank v. United States</i> , 539 F.3d 1236 (10th Cir. 2008)	3
<i>Ctr. for Auto Safety v. NHTSA</i> , 452 F.3d 798 (D.C. Cir. 2006).....	11
<i>D.T. v. Sumner Cnty. Schs.</i> , 942 F.3d 324 (6th Cir. 2019)	23
<i>Detroit Edison Co. v. EPA</i> , 496 F.2d 244 (6th Cir. 1974)	12
<i>Dodds v. U.S. Dep’t of Educ.</i> , 845 F.3d 217 (6th Cir. 2016) (per curiam).....	17
<i>Doe v. Univ. of Cincinnati</i> , 872 F.3d 393 (6th Cir. 2017)	24
<i>Encino Motorcars, LLC v. Navarro</i> , 136 S. Ct. 2117 (2016).....	14
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	14
<i>Florida v. Weinberger</i> , 492 F.2d 488 (5th Cir. 1974)	6
<i>Free Enterprise Fund v. Public Co. Accounting Oversight Board</i> , 561 U.S. 477 (2010).....	10
<i>Furie Operating Alaska, LLC v. U.S. Dep’t of Homeland Sec.</i> , No. 3:12-CV-00158 JWS, 2013 WL 1628639 (D. Alaska Apr. 15, 2013).....	7

<i>Gen. Elec. Co. v. EPA</i> , 290 F.3d 377 (D.C. Cir. 2002)	13
<i>Gloucester Cnty. Sch. Bd. v. G.G.</i> , 136 S. Ct. 2442 (2016)	17
<i>Golden & Zimmerman, LLC v. Domenech</i> , 599 F.3d 426 (4th Cir. 2010)	11
<i>Grimm v. Gloucester Cnty. Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020), <i>cert. denied</i> , 141 S. Ct. 2878 (2021).....	16, 17
<i>Jackson v. Richards Med. Co.</i> , 961 F.2d 575 (6th Cir. 1992)	22
<i>Jama v. Dep’t of Homeland Sec.</i> , 760 F.3d 490 (6th Cir. 2014)	6
<i>Kansas v. United States</i> , 249 F.3d 1213 (10th Cir. 2001)	23
<i>Kentucky v. Yellen</i> , --- F. Supp. 3d ---, 2021 WL 4394249 (E.D. Ky. Sept. 24, 2021)	20
<i>Klein v. U.S. Dep’t of Energy</i> , 753 F.3d 576 (6th Cir. 2014)	4
<i>Koslow v. Pennsylvania</i> , 302 F.3d 161 (3d Cir. 2002).....	20
<i>La. Pub. Serv. Comm’n v. FCC</i> , 476 U.S. 355 (1986).....	21
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	4
<i>Lusardi v. McHugh</i> , 2015 WL 1607756 (EEOC Apr. 1, 2015).....	5
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986).....	2
<i>Marlow v. U.S. Dep’t of Educ.</i> , 820 F.2d 581 (2d Cir. 1987).....	9
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	2, 3, 4

<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923).....	3, 24
<i>Meriwether v. Hartop</i> , 992 F.3d 492 (6th Cir. 2021)	20
<i>Missouri v. Holland</i> , 252 U.S. 416 (1920).....	3
<i>Mozilla Corp. v. FCC</i> , 940 F.3d 1 (D.C. Cir. 2019).....	24
<i>NAACP v. Meese</i> , 615 F. Supp. 200 (D.D.C. 1985).....	7
<i>Nat’l Council for Adoption v. Blinken</i> , 4 F.4th 106 (D.C. Cir. 2021).....	13
<i>Nat’l Mining Ass’n v. McCarthy</i> , 758 F.3d 243 (D.C. Cir. 2014).....	12
<i>Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs</i> , 145 F.3d 1399 (D.C. Cir. 1998).....	25
<i>NFIB v. Sebelius</i> , 567 U.S. 519 (2012).....	19, 20
<i>NRDC v. Wheeler</i> , 955 F.3d 68 (D.C. Cir. 2020).....	14
<i>Ohio Forestry Ass’n v. Sierra Club</i> , 523 U.S. 726 (1998).....	5
<i>Ohio v. Yellen</i> , --- F. Supp. 3d ---, 2021 WL 2712220 (S.D. Ohio July 1, 2021), appeal pending, No. 21-3787 (6th Cir.).....	18
<i>Online Merchs. Guild v. Cameron</i> , 995 F.3d 540 (6th Cir. 2021)	4
<i>Pelcha v. MW Bancorp, Inc.</i> , 988 F.3d 318 (6th Cir. 2021)	13
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 451 U.S. 1 (1981).....	19
<i>Perez v. Mortg. Bankers Ass’n</i> , 575 U.S. 92 (2015).....	12

<i>Pharm. Res. & Mfrs. of Am. v. U.S. Dep’t of Health & Human Servs.</i> , 138 F. Supp. 3d 31 (D.D.C. 2015)	11
<i>POET Biorefining, LLC v. EPA</i> , 970 F.3d 392 (D.C. Cir. 2020)	13
<i>Romeo Cmty. Schs. v. U.S. Dep’t of Health, Educ., & Welfare</i> , 438 F. Supp. 1021 (E.D. Mich. 1977), <i>aff’d</i> , 600 F.2d 581 (6th Cir. 1979)	8, 9, 10
<i>Sackett v. EPA</i> , 566 U.S. 120 (2012)	7, 9
<i>Sch. Dist. of Pontiac v. Sec’y of U.S. Dep’t of Educ.</i> , 584 F.3d 253 (6th Cir. 2009) (en banc)	18
<i>Sch. Dist. of Saginaw, Mich. v. U.S. Dep’t of Health, Educ., & Welfare</i> , 431 F. Supp. 147 (E.D. Mich. 1977)	9
<i>Shalala v. Guernsey Mem’l Hosp.</i> , 514 U.S. 87 (1995)	13
<i>South Dakota v. Dole</i> , 483 U.S. 203 (1987)	19, 20
<i>Stuart v. Metro. Gov’t of Nashville & Davidson Cnty.</i> , 679 F. Supp. 2d 851 (M.D. Tenn. 2009)	24
<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014)	2, 4, 5, 23
<i>Taylor v. Cohen</i> , 405 F.2d 277 (4th Cir. 1968) (en banc)	9
<i>Tenn. Hosp. Ass’n v. Azar</i> , 908 F.3d 1029 (6th Cir. 2018)	12, 13
<i>Texas v. EEOC</i> , 933 F.3d 433 (5th Cir. 2019)	3, 11
<i>Texas v. United States</i> , --- F. Supp. 3d ---, 2021 WL 3683913 (S.D. Texas Aug. 19, 2021)	24
<i>Texas v. United States</i> , 201 F. Supp. 3d 810 (N.D. Tex. 2016)	7, 9
<i>Texas v. United States</i> , 809 F.3d 134 (5th Cir. 2015)	2

<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994).....	8, 10
<i>U.S. Army Corps of Eng'rs v. Hawkes Co.</i> , 136 S. Ct. 1807 (2016).....	11
<i>Union Pac. R. Co. v. U.S. Dep't of Homeland Sec.</i> , No. 8:08CV336, 2010 WL 9013003 (D. Neb. June 11, 2010).....	6
<i>United States v. De Leon</i> , 810 Fed. Appx. 384 (6th Cir. 2020).....	5
<i>United States v. Glazer</i> , 14 F.3d 1213 (7th Cir. 1994).....	25
<i>Zivotofsky ex rel. Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012).....	3
Constitutional Provisions and Statutes	
5 U.S.C. § 704.....	6
5 U.S.C. § 706.....	25
20 U.S.C. § 1234g(a).....	8
20 U.S.C. § 1234g(b).....	9
20 U.S.C. § 1682.....	8
20 U.S.C. § 1683.....	8, 9
20 U.S.C. § 1686.....	13, 16, 18
42 U.S.C. § 2000d-2.....	8
2021 Tenn. Pub. Acts, ch. 40, § 1.....	23
2021 Tenn. Pub. Acts, ch. 452, § 6.....	23
U.S. Const. amend. I.....	20, 21, 23
U.S. Const. amend. X.....	21, 22
U.S. Const. amend. XIV.....	22
U.S. Const. art. III.....	3

Other Authorities

29 C.F.R. § 1695.1(b)(1).....15

34 C.F.R. § 100.8(a)(1).....9

34 C.F.R. § 100.98

34 C.F.R. § 100.108

34 C.F.R. § 100.118

34 C.F.R. § 106.3313, 16

34 C.F.R. § 106.37(c).....13

34 C.F.R. § 106.41(b)13

Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777
(2004).....3

EEOC, *Protections Against Employment Discrimination Based on Sexual
Orientation or Gender Identity* (June 15, 2021), <https://bit.ly/3zgP7iP>4

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 (June 22, 2021)..... *passim*

Office for Civil Rights Recent Resolution Search, U.S. Dep’t of Educ.,
<https://bit.ly/3FjTY6f>6

U.S. Dep’t of Educ., *Dear Colleague Letter on Transgender Students 3* (May 13,
2016), <https://bit.ly/3BlfhkT>24

U.S. Dep’t of Educ., *Memorandum for Kimberly M. Richey Acting Assistant
Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cnty.* (Jan. 8,
2021), <https://bit.ly/3mwKI7H>.....14

U.S. Dep’t of Justice et al., *Back-to-School Address for Transgender Students*
(Aug. 17, 2021), <https://bit.ly/3B8NvZn>1

INTRODUCTION

Defendants are of two minds about the effect of the guidance documents challenged in this case. When their audience is the regulated community, Defendants pull no punches. They take the position that conduct that violates the guidance—such as preventing a transgender student “from playing on a sports field [or] accessing the bathroom” consistent with the student’s gender identity—is “against the law” and that they are “ready to act to defend” the rights of transgender students. U.S. Dep’t of Justice et al., Back-to-School Address for Transgender Students at 1:07-1:27 (Aug. 17, 2021), <https://bit.ly/3B8NvZn>. But Defendants take a softer tack with this Court, professing to need “specific facts” to decide whether conduct violates Title IX and claiming that enforcement is “speculat[ive].” PI Opp. 18 (PageID#316).

Defendants cannot have it both ways. Because Defendants’ message to regulated parties has been clear—comply with the guidance or else face enforcement—Plaintiffs have standing to bring this pre-enforcement challenge to prevent irreparable harm to their sovereign interests. Plaintiffs are likely to succeed on the merits of their claims because, labels notwithstanding, the challenged guidance documents constitute final agency actions that are legislative, not interpretive, rules. These legislative rules violated the Administrative Procedure Act (“APA”) at every turn, and they are substantively unlawful because they conflict with the statutes they purport to interpret and violate the Constitution. Preliminary relief is warranted.

ARGUMENT

I. Plaintiffs’ Claims Are Likely to Succeed on the Merits.

A. This Court has subject matter jurisdiction.

The basic flaw in Defendants’ standing and ripeness arguments is the erroneous belief that a regulated party cannot obtain relief until there is a pending enforcement action. The Supreme Court has made clear that “[w]hen an individual is subject to” the threatened enforcement of a law,

“an actual . . . enforcement action is *not a prerequisite to challenging the law.*” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (emphasis added). A plaintiff “satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.’” *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). Plaintiffs easily satisfy those requirements, especially since “sovereign State[s]” are “entitled to special solicitude in [the Court’s] standing analysis.” *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007); *see also Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015).

Plaintiffs not only intend to—but in many cases already have—exercised their sovereign authority to enact laws that are at least “arguably proscribed” by the challenged guidance. *Susan B. Anthony List*, 573 U.S. at 162. Defendants claim that “[t]his ‘arguable’ conflict is far from the type of certainty required to establish a concrete injury.” PI Opp. 17 (PageID#315). But “[n]othing in the [Supreme] Court’s decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate th[e] law.” *Susan B. Anthony List*, 573 U.S. at 163. An “arguable” conflict is sufficient under binding precedent.

Nor are Plaintiffs’ sovereignty interests too “abstract” to satisfy Article III’s injury-in-fact requirement. PI Opp. 18 (PageID#316). “[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.” *Maine v. Taylor*, 477 U.S. 131, 137 (1986); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (recognizing a State’s “sovereign interest[.]” in “creat[ing] and enforc[ing] a legal code”). And a long line of precedent confirms that States may seek injunctive relief in federal court to protect that interest. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (allowing Massachusetts to seek relief under the APA to “protect[.] its quasi-sovereign interests”); *Colorado v. Toll*, 268 U.S. 228, 229-

30 (1925) (allowing Colorado to challenge federal regulations alleged “to interfere with the sovereign rights of the State”); *Missouri v. Holland*, 252 U.S. 416, 431 (1920) (allowing Missouri to challenge federal action that allegedly “invade[d] the sovereign right of the State”); *Ohio ex rel. Celebrezze v. U.S. Dep’t of Transp.*, 766 F.2d 228, 233 (6th Cir. 1985) (allowing Ohio to challenge agency regulation “to vindicate its own law”); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (explaining that “[f]ederal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy” Article III).

Defendants’ reliance on *Massachusetts v. Mellon*, 262 U.S. 447 (1923), *see* PI Opp. 18-19 (PageID#316-17), is misplaced. The law challenged in *Mellon* merely required Massachusetts to “share . . . the field of state power” with Congress by helping implement a federal program. 262 U.S. at 485. It did not interfere with the State’s authority to enact and enforce its own laws. And the Supreme Court has limited *Mellon* to its facts because it is “hard to reconcile” with later decisions holding that States had standing based on injuries to their sovereign interests. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 802 n.10 (2015) (internal quotation marks omitted) (collecting decisions); *see also Massachusetts*, 549 U.S. at 520 n.17.¹ *Mellon* does not bar Plaintiffs’ claims.

Plaintiffs’ sovereignty injuries are directly traceable to the challenged guidance and would be redressed by the declaratory and injunctive relief sought in the Complaint, which would prohibit Defendants from enforcing their unlawful interpretations. *See Texas v. EEOC*, 933 F.3d 433, 449 (5th Cir. 2019) (holding that “[a]n injunction forbidding EEOC and the Attorney General from

¹ *Mellon* also conflated standing with both the merits, *see* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 826 (2004), and the political question doctrine, which the Supreme Court has since clarified occupies only a “narrow” field, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

enforcing” guidance would “safeguard Texas’s sovereign interests” and thus redress the State’s injuries). Plaintiffs’ procedural claims also satisfy the more “relaxed” redressability standard that applies to those claims. *Klein v. U.S. Dep’t of Energy*, 753 F.3d 576, 579 (6th Cir. 2014) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). That standard merely requires that Plaintiffs show “some possibility that the requested relief will prompt” the agency to “reconsider” its decision. *Massachusetts*, 549 U.S. at 518. There is at least “some possibility” that requiring the agencies to consider public comments and provide a reasoned explanation for their positions will prompt reconsideration here.²

A “credible threat” exists that the challenged guidance will be enforced. *Susan B. Anthony List*, 573 U.S. at 159. Defendants “ha[ve] not disavowed enforcement.” *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 551 (6th Cir. 2021). The Department has instead vowed to “fully enforce” its guidance and rely on it “in processing complaints and conducting investigations.” 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, 32,639 (June 22, 2021) (“Interpretation”). And the EEOC Document expressly invites employees to “fil[e] a charge of discrimination against . . . a state . . . employer.” EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021), <https://bit.ly/3zgP7iP> (“EEOC Document”).

Defendants’ “history of past enforcement” lends their threats additional credibility. *Online*

² Defendants suggest in a footnote that an injunction preventing enforcement by the EEOC would not redress Plaintiffs’ injuries because “the EEOC would still be able to apply the reasoning espoused in its administrative decisions.” PI Opp. 28 n.8 (PageID#326). But the EEOC would still be bound by any judgment that the substance of its guidance is unlawful and could not circumvent that judgment by relying on its administrative decisions. The DOJ Defendants likewise would be bound by that judgment and could not circumvent it by relying on their March 2021 memorandum.

Merchs. Guild, 995 F.3d at 550 (internal quotation marks omitted). The DOJ recently filed a statement of interest opposing a West Virginia law that “exclud[es] transgender girls from participating in single-sex sports restricted to girls.” Statement of Interest of the United States at 1, *B.P.J. v. W.V. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021), ECF No. 42 (footnote omitted). And Defendants enforced similar guidance during a previous administration. See, e.g., *Lusardi v. McHugh*, 2015 WL 1607756, at *6 (EEOC Apr. 1, 2015) (finding that restricting a transgender female employee from using the women’s restroom and using “male pronouns” to refer to the employee violated Title VII); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 855 (S.D. Ohio 2016) (noting OCR finding that Highland violated Title IX by refusing to allow a transgender girl to use the girls’ restroom).

Defendants protest that the claims in this case are not ripe. PI Opp. 16-18 (PageID#314-16). But those “prudential considerations” do not affect this Court’s subject-matter jurisdiction. *United States v. De Leon*, 810 Fed. Appx. 384, 388 (6th Cir. 2020) (resolving a constitutional challenge despite prudential ripeness concerns); see also *Susan B. Anthony List*, 573 U.S. at 167 (doubting the “continuing vitality of the prudential ripeness doctrine”).

Defendants’ ripeness arguments also lack merit. Plaintiffs’ claims are fit for review because they present “purely legal” issues that “will not be clarified by further factual development.” *Susan B. Anthony List*, 573 U.S. at 167 (internal quotation marks omitted). All of Plaintiffs’ claims—both procedural and substantive—turn on the content of the challenged guidance documents, which already identify specific factual situations that Defendants consider unlawful. Nothing more is required to adjudicate Plaintiffs’ claims. And delaying review would cause Plaintiffs significant hardship by allowing Defendants to use the “fear of future sanctions” to “force immediate compliance” with their unlawful interpretations. *Ohio Forestry Ass’n v.*

Sierra Club, 523 U.S. 726, 734 (1998); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967).

It is no secret that the Department uses the threat of withholding federal funds to compel compliance with its guidance. A search of OCR complaints filed since 2010 reveals that nearly every target entered into a resolution agreement and agreed to comply with the Department’s view of the law rather than contest it. *See* Office for Civil Rights Recent Resolution Search, U.S. Dep’t of Educ., <https://bit.ly/3FjTY6f>. Plaintiffs should not be put to the choice of either abandoning enforcement of their laws or risking the loss of their federal education funding. There is no reason to place “sovereign [States] at such risk when so little would be gained by doing so and so much might be lost.” *Florida v. Weinberger*, 492 F.2d 488, 493 (5th Cir. 1974).

B. Plaintiffs lack an adequate alternative remedy.

Defendants contend that Plaintiffs’ claims are barred either because there is an adequate alternative remedy or because Title IX’s enforcement scheme is exclusive. PI Opp. 20 (PageID#318).³ They are wrong on both scores.

Adequate remedy. Raising arguments as defenses in future enforcement proceedings is not the sort of adequate remedy contemplated in 5 U.S.C. § 704. Section 704 ensures “that the APA’s general grant of jurisdiction to review agency decisions is not duplicative of more specific statutory procedures for judicial review.” *Bangura v. Hansen*, 434 F.3d 487, 501 (6th Cir. 2006). But that provision must be construed narrowly, so as not to “defeat the central purpose of providing a broad spectrum of judicial review of agency action.” *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *see also Union Pac. R. Co. v. U.S. Dep’t of Homeland Sec.*, No. 8:08CV336, 2010 WL 9013003, at *7 (D. Neb. June 11, 2010).

³ Defendants frame these arguments as jurisdictional, PI Opp. 20 (PageID#318), but they are not. “Because the APA does not confer jurisdiction, elements of a claim under the APA . . . are not jurisdictional.” *Jama v. Dep’t of Homeland Sec.*, 760 F.3d 490, 494 (6th Cir. 2014).

When administrative action imposes immediate consequences on regulated parties, courts routinely allow pre-enforcement challenges even if the parties could raise the same arguments as defenses in an eventual enforcement action. For example, *Sackett v. EPA*, 566 U.S. 120 (2012), allowed a pre-enforcement challenge to an EPA compliance order even though “judicial review ordinarily comes by way of a civil action brought by the EPA.” *Id.* at 127. Because the plaintiffs could not “initiate that process” and instead had to “wait for the Agency to drop the hammer” while accruing daily penalties, “APA review” was the only “adequate remedy.” *Id.* at 127, 131; *see also Furie Operating Alaska, LLC v. U.S. Dep’t of Homeland Sec.*, No. 3:12-CV-00158 JWS, 2013 WL 1628639, at *6 (D. Alaska Apr. 15, 2013) (allowed challenge to a yet-to-be-enforced penalty assessment notwithstanding the government’s argument that a “later-filed enforcement proceeding would provide” an adequate remedy).⁴

The same reasoning applies here. The challenged guidance forces Plaintiffs to choose between complying with the guidance, which would cause irreparable injury, or violating the guidance at the risk of significant financial penalties. Like the proposed alternatives in *Sackett* and *Furie*, the latter option would require Plaintiffs to “wait for the [agencies] to drop the hammer,” *Sackett*, 566 U.S. at 127, since there is no way for Plaintiffs to initiate the enforcement action. That is not an adequate remedy. The district court rightly rejected the same “alternative remedy” argument when States challenged nearly identical guidance from the Department and EEOC in 2016. *See Texas v. United States*, 201 F. Supp. 3d 810, 826-27 (N.D. Tex. 2016).

Exclusive enforcement scheme. District court jurisdiction over pre-enforcement

⁴ *NAACP v. Meese*, 615 F. Supp. 200 (D.D.C. 1985), is inapposite. It involved an attempt to enjoin the Attorney General from seeking to reopen consent decrees in other cases. The plaintiffs “almost by definition . . . ha[d] an adequate remedy” because they could “oppos[e] the Attorney General’s motions in the court in which he files his papers.” *Id.* at 203.

challenges to agency action is precluded only if Congress’s intent to preclude jurisdiction is “fairly discernible in the statutory scheme.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (internal quotation marks omitted). In *Thunder Basin*, the Court held that the Mine Safety and Health Act satisfied that standard because it established a “comprehensive enforcement structure” and the Act’s legislative history revealed a “clear concern with channeling and streamlining the enforcement process.” *Id.* at 216.

Defendants contend that the “review process . . . found in Title IX” is “remarkably similar” to the one in *Thunder Basin* because it provides for an administrative hearing followed by judicial review in the circuit court. PI Opp. 21 (PageID#319). But the only provision of Title IX that addresses judicial review is 20 U.S.C. § 1683, which provides that:

Any department or agency action taken pursuant to section 1682 of this title *shall be subject to such judicial review as may otherwise be provided by law for similar action* taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) *may obtain judicial review of such action in accordance with chapter 7 of Title 5*

(Emphasis added). Thus, the “elaborate procedural scheme,” PI Opp. 21 (PageID#319), that Defendants reference is established not by Title IX’s “statutory scheme” but instead by Department regulations and other statutes governing procedures for specified agency actions, including withholding federal funding. *See id.* at 10 (PageID#308) (citing 34 C.F.R. §§ 100.9-11; 20 U.S.C. § 1234g(a); 42 U.S.C. § 2000d-2).

But the “agency action taken pursuant to section 1682,” 20 U.S.C. § 1683, that is being challenged in this case is *not* the withholding of federal funds. It is the issuance of “rules, regulations, or orders of general applicability.” 20 U.S.C. § 1682. And courts have held that the APA is the relevant law that provides for judicial review of an agency’s rules. *Romeo Cmty. Schs.*

v. U.S. Dep't of Health, Educ., & Welfare, 438 F. Supp. 1021, 1028 (E.D. Mich. 1977) (allowing pre-enforcement APA challenge to Title IX regulation), *aff'd*, 600 F.2d 581 (6th Cir. 1979); *cf. Marlow v. U.S. Dep't of Educ.*, 820 F.2d 581, 582 (2d Cir. 1987) (concluding that similar judicial-review provision in the Rehabilitation Act did not preclude APA review of “a determination that a recipient has not violated section 504” because “[t]he statute by which federal agency action ‘similar’ to that [action] is made reviewable is the Administrative Procedure Act”). Indeed, Title IX’s statutory scheme “explicitly contemplates a cause of action under the A.P.A. for redress of unlawful agency action ‘not otherwise subject to judicial review.’” *Romeo*, 438 F. Supp. at 1029 (quoting 20 U.S.C. § 1683). Because no “elaborate statutory framework exists covering Plaintiffs’ claims,” there is no reason to think that Congress intended to preclude district-court review under the APA. *Texas*, 201 F. Supp. 3d at 826 (rejecting identical argument in challenge to similar guidance).

Defendants’ contrary argument relies primarily on *Highland*, *see* PI Opp. 22 (PageID#320), but that case does not bind this Court and was wrongly decided for at least four reasons. *First*, *Highland* improperly inferred Congress’s intent from the Department’s *regulations* rather than the statutory scheme alone. 208 F. Supp. 3d at 862 (citing 34 C.F.R. § 100.8(a)(1)). *Second*, it erroneously concluded that “the judicial review provided ‘for similar action’ in § 1683 references the general provision for judicial review of funding termination decisions in 20 U.S.C. § 1234g(b).” *Id.* *Third*, it relied on inapposite cases that involved attempts to enjoin *pending* administrative proceedings that were initiated under *Title VI*. *Id.* (citing *Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968) (en banc), and *Sch. Dist. of Saginaw, Mich. v. U.S. Dep't of Health, Educ., & Welfare*, 431 F. Supp. 147 (E.D. Mich. 1977)). *Fourth*, it erroneously discounted *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Sackett. Highland*, 208 F. Supp. 3d at 862-64.

This case is distinguishable from *Thunder Basin* in another important respect. The statutory claims in *Thunder Basin* “ar[is]e under the Mine Act and f[all] squarely within the Commission’s expertise.” 510 U.S. at 214. The claims here, by contrast, include procedural challenges and claims that the guidance violates Title IX and the Constitution. These claims are “wholly collateral” to Title IX’s administrative-review scheme and do not involve the sort of fact-driven compliance questions that might benefit from administrative review. *See id.* at 212 (internal quotation marks omitted); *see also Romeo*, 438 F. Supp. at 1028 (finding no “factual issue for which an extensive administrative record need be compiled”).

This case is instead analogous to *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). That case involved a separation-of-powers challenge to the Public Company Accounting Oversight Board, which was created by the Sarbanes-Oxley Act. 561 U.S. at 487. The Board argued that the Act precluded district-court review by empowering the Securities and Exchange Commission to review any Board rule or sanction, with judicial review in the Court of Appeals. *Id.* at 489. The Court disagreed for reasons that apply equally here: the Act’s “text” did not “expressly limit the jurisdiction that other statutes confer on district courts,” *id.*; the “constitutional claims” at issue were “outside the Commission’s competence and expertise,” *id.* at 491; and precluding review would require the plaintiffs to “bet the farm . . . by taking the violative action before testing the validity of the law,” *id.* at 490 (internal quotation marks omitted).

C. Plaintiffs are likely to succeed on their procedural APA claims.

1. The challenged documents are final agency actions.

Defendants do not dispute that the challenged documents “mark the ‘consummation’ of the agenc[ies]’ decisionmaking process” and satisfy the first requirement for final agency action. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks omitted); *see* PI Opp. 23

(PageID#321). The parties' disagreement centers on the second requirement: whether the actions are ones by which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotation marks omitted). Under the "pragmatic" approach to finality the Supreme Court has "long taken," *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs.*, 387 U.S. at 149), the challenged documents satisfy that requirement because they "ha[ve] the effect of committing the agenc[ies] . . . to a view of the law that, in turn, forces the plaintiff[s] either to alter [their] conduct, or expose [themselves] to potential liability," *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019) (internal quotation marks omitted).

Defendants argue that "these documents have no *independent* legal effect" because "[t]he only consequences come from violating Title IX or its implementing regulations." PI Opp. 23-24 (emphasis added). That argument is a non-starter. Unlike *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426 (4th Cir. 2010), the Department did not simply "restate or report what already exists in the relevant body of statutes, regulations and rulings," *id.* at 432. The problem with the challenged documents is that they impermissibly *rewrite* existing law.

Defendants further argue that their actions are not final because the documents "merely express[] [Defendants'] view of what the law requires of a party." PI Opp. 24 (PageID#322) (quoting *Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 808 (D.C. Cir. 2006)). But *Center for Auto Safety* acknowledges that a "general statement[] of policy" may constitute final agency action if it is "binding on its face or in practice." 452 F.3d at 807.⁵ And "sometimes even interpretive rules

⁵ Courts have repeatedly rejected federal agencies' expansive reading of *Center for Auto Safety*. See, e.g., *Pharm. Res. & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 138 F. Supp. 3d 31, 44 (D.D.C. 2015) (rejecting reliance on this case because it did not involve an interpretive rule that required regulated parties to "change their behavior").

may be subject to pre-enforcement judicial review as final agency actions.” *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.); *see also Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 105-06 (2015) (explaining that “regulated entities are not without recourse” to challenge an interpretive rule). What matters is the actual *effect* of the challenged actions, not how Defendants describe them.

2. The challenged documents are legislative rules that are subject to notice-and-comment requirements.

The Department’s Interpretation and Fact Sheet and the EEOC Document are legislative rules that “intend[] to create new law, rights or duties.” *Tenn. Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (internal quotation marks omitted). Defendants raise two arguments in response. First, they argue that the challenged documents are not legislative rules because the documents say they do not have the force of law. PI Opp. 24 (PageID#322). Second, they argue that the documents merely “clarify” what Title VII and Title IX mean in light of *Bostock* and are thus interpretive rather than legislative rules. *Id.* at 27 (PageID#325). Both arguments fail.

Defendants’ first argument improperly focuses on the “particular label[s]” the agencies placed on the documents rather than on “the substance of what” they in fact have done. *Detroit Edison Co. v. EPA*, 496 F.2d 244, 249 (6th Cir. 1974) (internal quotation marks omitted). “It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000). Defendants may not evade the APA’s notice-and-comment requirements simply by pointing to self-serving statements in the challenged documents.

And when the substantive effect of the challenged documents is considered, the only permissible conclusion is that the documents are legislative. Start with the Interpretation and Fact

Sheet. They announce the Department’s position that refusing to allow transgender students to use living facilities or compete on sports teams consistent with their gender identity violates Title IX. That position squarely conflicts with both Title IX itself and its implementing regulations, which expressly permit sex-separated living facilities and athletic teams. *See* 20 U.S.C. § 1686; PI Mem. 14 (PageID#148) (citing 34 C.F.R. §§ 106.33, 106.37(c), 106.41(b)). The Interpretation and Fact Sheet “effec[t] a substantive change in the regulations” by “adopt[ing] a new position inconsistent with . . . [the Department’s] existing regulations” and are thus “necessarily legislative.” *Azar*, 908 F.3d at 1042 (first alteration in original) (quoting *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995)). And they are being “applied by the agency in a way that indicates [they are] binding.” *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).

Defendants may not simply point to *Bostock* to justify their change in position, since that decision was “narrow” and “limited only to Title VII itself.” *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). The Interpretation and Fact Sheet did not merely “remind parties of existing statutory or regulatory duties” but rather imposed *new* duties and “chang[ed] the text” of the statute and regulations they “profess[ed] to interpret.” *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 407 (D.C. Cir. 2020). Because neither Title IX, its implementing regulations, nor *Bostock* “compels or logically justifies” the Department’s Interpretation or Fact Sheet, those documents are legislative rules issued in violation of the APA’s notice-and-comment requirements. *Nat’l Council for Adoption v. Blinken*, 4 F.4th 106, 113 (D.C. Cir. 2021).

The EEOC Document, too, goes well beyond the text of Title VII to impose new duties on employers. Defendants attempt to defend that guidance as an “interpretation” of Title VII by claiming it is consistent with the “EEOC’s previous administrative decisions, which *Bostock* supports.” PI Opp. 28 (PageID#326). But *Bostock* could not possibly support the EEOC’s

administrative decisions concerning restrooms or pronouns because the Supreme Court did not consider those issues. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737-38 (2020). And announcing the agency’s definitive view about what the “*Bostock* decision means for . . . employers across the country,” PI Opp. 28 (PageID#326), is a far cry from the EEOC’s prior fact-specific administrative decisions. The EEOC Document was issued not to “put[] the public on notice of *pre-existing* legal obligations,” but to “speak with the force of law” and “creat[e] legal effects” for regulated employers. *NRDC v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020).

3. The Department’s Interpretation and Fact Sheet are arbitrary and capricious.

Plaintiffs are also likely to succeed on their claim that the Interpretation and Fact Sheet are arbitrary and capricious. The Department contends that it “adequately acknowledge[d] its change in position” when it observed that it “at times has stated that Title IX’s prohibition on sex discrimination does not encompass discrimination based on . . . gender identity.” PI Opp. 27 (PageID#325) (quoting 86 Fed. Reg. at 32,637). But acknowledging a change in position is not the same as providing “good reasons” for that change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). And “the Supreme Court’s recent decision in *Bostock*,” PI Opp. 27 (PageID#325), cannot provide the requisite “good reasons.” *Bostock* did not address Title IX. And the Department had *already* considered whether *Bostock* required it to change its longstanding interpretation of Title IX and concluded that it did not. U.S. Dep’t of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: *Bostock v. Clayton Cnty.* (Jan. 8, 2021), <https://bit.ly/3mwKI7H>.⁶ The Department’s departure from both its longstanding regulations and

⁶ Defendants erroneously claim that “[t]he previous Administration largely concurred that the reasoning of *Bostock* also applies to Title IX.” PI Opp. 4 n.2 (PageID#302). In fact, the DOJ’s initial post-*Bostock* memorandum concluded that Title IX “does not prohibit different treatment of

its initial post-*Bostock* guidance without any explanation is the epitome of arbitrary and capricious.

Defendants contend that no “reliance interest in sex-separated facilities and athletic teams is . . . implicated here” because “the challenged documents do not prohibit sex-separated living facilities and athletic teams.” PI Opp. 28 (PageID#326). That argument blinks reality. The Interpretation and Fact Sheet require educational institutions to allow a transgender female—i.e., a biological male—to use living facilities and compete on athletic teams designated for biological females. No “individualized inquiry,” PI Opp. 29 (PageID#327), will change that. Given that Defendants and the public all understood “sex” to mean *biological sex* for decades after Title VII and Title IX were enacted, the Interpretation and Fact Sheet implicate serious reliance interests. And Defendants do not dispute that they failed to consider those interests.

4. The EEOC Document exceeds the EEOC’s statutory authority and violates the agency’s own regulations.

Defendants do not dispute that the EEOC Document was issued without approval of the Commission and without notice and comment. They instead contend that the Commission was not required to follow these procedures because the EEOC Document was not significant guidance. PI Opp. 32-33 (PageID#330-31). But the EEOC Document is “significant” by the EEOC’s own standards because it was “disseminated to regulated entities” and “the general public” and “may reasonably be anticipated . . . [t]o raise novel legal or policy issues.” 29 C.F.R. § 1695.1(b)(1). It is hard to imagine an action more likely “to raise novel legal or policy issues” than a nationwide mandate to employers concerning pronoun, restroom, and locker room usage for transgender employees. That is true even if it was not “the first time the EEOC has taken a position on these issues.” PI Opp. 33 (PageID#331). Given *Bostock*’s express reservation of those issues and

the sexes where the physiological differences of the sexes are relevant,” such as in living facilities. U.S. Dep’t of Justice, Memorandum for the Civil Rights Division Regarding Application of *Bostock v. Clayton County* 4 (Jan. 17, 2021) (Compl. Ex. B at 16).

continued litigation in the lower courts, those issues were nothing if not “novel.”

Nor do Defendants dispute that the EEOC lacks statutory authority to promulgate substantive rules. *See* PI Opp. 32 (PageID#330). They instead claim that the EEOC Document does not exceed the EEOC’s limited authority because it “expressly disclaims any legal effect on its own.” *Id.* As already explained, however, *see* pp. 11-12, *supra*, it is the practical effect of the guidance that controls, not its label. And the practical effect of the guidance is to impose substantive obligations on employers across the country. *See* pp. 13-14, *supra*.

D. Plaintiffs are likely to succeed on their claims that the challenged guidance is contrary to law.

1. The Interpretation and Fact Sheet are contrary to Title IX.

The Department’s Interpretation and Fact Sheet are contrary to Title IX because they essentially erase 20 U.S.C. § 1686 from the statute, conflict with Title IX’s implementing regulations, and ignore relevant physiological differences between the two sexes that justify differential treatment in certain contexts such as living facilities and athletics.

Defendants offer no real response to these arguments. They do not even cite 20 U.S.C. § 1686, the provision that allows educational institutions to “maintain[] separate living facilities for the different sexes.” They cite only the *regulation* that allows schools to provide such facilities, *see* PI Opp. 30 (PageID#328) (citing 34 C.F.R. § 106.33), and argue that this *regulation* “cannot override the statutory prohibition against discrimination,” *id.* at 31 (PageID#329) (emphasis omitted) (quoting *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021)). But § 1686 is not a regulation. It is statutory language that *Congress* enacted at the same time as the prohibition of sex discrimination. And it squarely forecloses the Department’s interpretation. Defendants’ “oversight can only be taken as a way to reach conclusions on how schools *should* treat transgender students, rather than a determination of

what the statute requires of them.” *Grimm*, 972 F.3d at 635 (Niemeyer, J., dissenting).

Defendants try to get around Title IX’s implementing regulations by arguing that the Department “has not included a definition of the word ‘sex’ in its regulations.” PI Opp. 30 (PageID#328). But Defendants fail to cite any dictionary or other authority from the time surrounding the enactment of Title IX to support their assumption that “sex” encompasses gender identity. And they neglect to mention that *Bostock* “proceed[ed] on the assumption that ‘sex’ . . . refer[s] only to biological distinctions between male and female.” 140 S. Ct. at 1739. As Plaintiffs have explained, the plain language and statutory structure of Title IX make clear that “sex” means biological sex. *See* PI Mem. 15 (PageID#149). The Department’s Interpretation and Fact Sheet—which interpret Title IX to allow a member of one “sex” to use living facilities and compete on athletic teams designated for the other “sex”—simply cannot be reconciled with the statutory text or the Department’s longstanding regulations.

Dodds v. U.S. Department of Education, 845 F.3d 217 (6th Cir. 2016) (per curiam), does not support Defendants’ position either. There, the Sixth Circuit declined to stay a preliminary injunction that required a school district to allow a transgender girl to use the girls’ restroom. *Id.* at 222. The Court did not definitively address whether the school district had violated Title IX. It instead declined to stay the injunction because it was “not convinced” that the district would prevail on appeal and the balance of harms weighed in the student’s favor. *Id.* at 221-22. As Judge Sutton pointed out in his dissent, however, the Supreme Court reached exactly the opposite conclusion when it granted a similar stay request. *Id.* at 222 (Sutton, J., dissenting); *see also Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).

2. The Interpretation and Fact Sheet violate the Constitution.

Spending Clause. The Interpretation and Fact Sheet violate the Spending Clause for three separate reasons. They impose conditions that (1) were not clearly established by Congress; (2)

are unconstitutionally coercive; and (3) require Plaintiffs to violate the Constitution. Defendants' responses to these arguments lack merit.

Defendants attempt to water down the Spending Clause's clear-notice rule to require nothing more than notice that *some* condition is attached to the receipt of funds. PI Opp. 33 (PageID#331). But a statute enacted pursuant to the Spending Clause must "furnish[] clear notice regarding the liability at issue" in specific cases. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (asking "whether . . . a state official would clearly understand that one of the obligations of the [Individuals with Disabilities in Education] Act is the obligation to compensate prevailing parents for expert fees"). Congress must tell States not only "that there *are* conditions," but also "*what* those conditions are." *Ohio v. Yellen*, --- F. Supp. 3d ---, 2021 WL 2712220, at *12 (S.D. Ohio July 1, 2021), *appeal pending*, No. 21-3787 (6th Cir.).

Defendants are thus mistaken that Title IX is constitutional simply because Plaintiffs are "clearly on notice that they must comply with the antidiscrimination provisions of Title IX." PI Opp. 33 (PageID#331). By that logic, the statute at issue in *Arlington* would have provided clear notice too, because it clearly imposed an obligation to compensate prevailing parents for certain "costs," which allegedly included expert fees. 548 U.S. at 297. Allowing the federal government to impose brand-new conditions on States under the guise of statutory interpretation would undermine the purposes of the clear-notice requirement.

Defendants' argument also once again ignores that § 1686 expressly *allows* educational institutions to maintain separate living facilities for the different sexes. The question is not whether the prohibition on sex discrimination, standing alone, provides clear notice to States but whether Title IX *as a whole* provides clear notice. *See Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 271 (6th Cir. 2009) (en banc) (plurality opinion) (explaining that the Court "must

not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981)). It is inconceivable that a reasonable state official would have understood Title IX to prohibit educational institutions from maintaining living facilities separated by biological sex.

Defendants claim that “the parameters” of funding conditions “can permissibly be set out in agency interpretations, guidance, or regulations.” PI Opp. 34 (PageID#332). But the sole authority they cite for that proposition, *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 670 (1985), did not consider that issue because the statute itself provided the “requisite clarity” in that case, *id.* at 666. It follows from our constitutional structure that agencies may *not* cure the unconstitutional ambiguity of a statutory condition. While the Spending Clause empowers Congress to place conditions on federal funds, it requires Congress to do so *unambiguously*. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). If Congress fails to satisfy that requirement, no amount of agency clarification can save Congress’s unlawful action. Even if an agency can cure statutory ambiguity, the Department has not done so here. The Department’s longstanding regulations expressly *allow* sex-separated living facilities and sports teams.

As for coercion, Defendants contend that “there is no coercion where the only issue is the interpretation of a longstanding condition on federal funding.” PI Opp. 35 (PageID#333). But that argument ignores that the sheer amount of federal funding at stake can render a statute unconstitutionally coercive. Congress may not use “financial inducements to exert a ‘power akin to undue influence.’” *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012) (opinion of Roberts, C.J.). The “financial inducement” here, which amounts to approximately twenty percent of Tennessee’s total annual education budget, Eley Decl. ¶ 3 (PageID#166), is “so coercive as to pass the point at which pressure turns into compulsion,” *NFIB*, 567 U.S. at 580 (quoting *Dole*, 483 U.S. at 211); *see also*

Kentucky v. Yellen, --- F. Supp. 3d ---, 2021 WL 4394249, at *4 (E.D. Ky. Sept. 24, 2021) (finding the American Rescue Plan Act unconstitutionally coercive because it offered States funds “equal to roughly *one-fifth* of their general fund revenues for the preceding year”). Even if the amount of funding alone were not coercive, the Department’s threat to withhold *existing* Title IX funding if States fail to comply with the *new* obligations imposed in the Interpretation and Fact Sheet undoubtedly crosses the line. *See NFIB*, 567 U.S. at 580.

Defendants accuse Plaintiffs of attempting to “extend” the unconstitutional-conditions doctrine, PI Opp. 36 (PageID#334), but Plaintiffs seek only to enforce the “unexceptionable” proposition that the spending power “may not be used to induce the States to engage in activities that would themselves be unconstitutional,” *Dole*, 483 U.S. at 210.⁷ The Interpretation and Fact Sheet fail to acknowledge the many situations in which treating transgender students consistently with their gender identity may implicate First Amendment rights. It is hardly “speculat[ive],” PI Opp. 36 (PageID#334), that Plaintiffs will be forced to violate their employees’ and students’ First Amendment rights to fully comply with those documents. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), provides a concrete example. And if Defendants are right that whether a particular application of the guidance will violate the First Amendment is a “fact-intensive” inquiry, PI Opp. 37 (PageID#335), that only proves that the sweeping pronouncements contained in the Interpretation and Fact Sheet are unlawful.⁸

⁷ Defendants argue that “the ‘unconstitutional conditions’ doctrine does not apply ‘to cases between two sovereigns.’” PI Opp. 36 (PageID#334) (quoting *Koslow v. Pennsylvania*, 302 F.3d 161, 174 (3d Cir. 2002)). But *Koslow* concerned only whether Congress may require States to relinquish their *own* constitutional rights. 302 F.3d at 173-74.

⁸ Defendants note that the Department’s regulations already provide that funding recipients are not required to violate the Constitution. PI Opp. 38 n.12 (PageID#336). That was further reason for the Department to consider and expressly address the First Amendment implications of its guidance.

Tenth Amendment and separation of powers. Defendants contend that their “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*.” PI Opp. 38 (PageID#336). Since three Supreme Court Justices thought that intrusion was unprecedented, it is hard to see how that argument helps Defendants. *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting, joined by Thomas, J.) (“A more brazen abuse of our authority to interpret statutes is hard to recall.”); *id.* at 1836 (Kavanaugh, J., dissenting) (“[T]he implications of this Court’s usurpation of the legislative process will likely reverberate in unpredictable ways for years to come.”). Regardless, the intrusion here is even greater than in *Bostock*. Unlike the federal judiciary, administrative agencies lack any constitutionally prescribed role in our system of government. *See, e.g., La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power on it.”). And Title IX expressly allows regulated parties to maintain living facilities that are separated by sex. The Interpretation and Fact Sheet usurp the authority of Congress and the States by rewriting the statutory text.

3. The EEOC Document is contrary to Title VII.

Bostock did not decide whether Title VII prohibits “sex-segregated bathrooms, locker rooms, [or] dress codes.” 140 S. Ct. at 1753. Defendants do not disagree. Instead, they argue that the EEOC Document is “consistent with the *reasoning of Bostock*.” PI Opp. 27 (PageID#325) (emphasis added). But they do not explain how treating *differently* situated individuals *differently* constitutes discrimination under *Bostock*. Nor could they. *Bostock* instructs that “[t]o ‘discriminate against’ a person . . . mean[s] treating that individual worse than others *who are similarly situated*.” 140 S. Ct. at 1740 (emphasis added). While physiological differences between men and women are not relevant to firing decisions, they are highly relevant to decisions about

restrooms, locker rooms, and the like where bodily privacy is at stake.⁹

4. The EEOC Document violates the Constitution.

As explained above, *see* p. 21, *supra*, Defendants' argument that *Bostock* forecloses Plaintiffs' Tenth Amendment and separation-of-powers claims is unavailing. And the EEOC Document is an especially egregious violation of these fundamental principles because Congress has never delegated substantive rulemaking authority to the EEOC. *See Jackson v. Richards Med. Co.*, 961 F.2d 575, 583 (6th Cir. 1992).

Defendants' sovereign-immunity arguments also miss the mark. The EEOC's position that Title VII requires employers to treat transgender employees consistent with their gender identity, regardless of the context, was not the "direct holding of the Supreme Court in *Bostock*." Opp. 38 (PageID#336). So even if *Bostock*'s interpretation of Title VII is a lawful abrogation of the States' sovereign immunity, it does not follow that the EEOC Document is too. To the contrary, the EEOC Document prohibits actions that do not actually violate the Constitution and therefore exceeds Congress's Fourteenth Amendment enforcement authority. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

II. Preliminary Relief Will Prevent Irreparable Harm and Further the Public Interest.

A regulated party is not required to wait until "there is [a] *pending* enforcement action," PI Opp. 13 (PageID#311) (emphasis added), to seek preliminary relief. As explained above, *see*

⁹ Defendants also argue in a footnote that this Court is bound by *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd*, 140 S. Ct. 1731 (2020), to the extent it held that "Title VII protects against discrimination based on transgender/transitioning status" or prohibits sex-specific dress codes. PI Opp. 40 n.13 (PageID#338). But all that *Harris Funeral Homes* held is that Title VII prohibits employers from *firing* an employee for failing to conform to sex stereotypes or because of the employee's transgender status. 884 F.3d at 571, 573. *Harris Funeral Homes* expressly declined to consider whether the employer in that case "violated Title VII by requiring men to wear pant suits and women to wear skirt suits." *Id.* at 573. *Harris Funeral Homes* thus provides no greater support for the EEOC Document than *Bostock*.

pp. 4-5, *supra*, there is every reason to believe that Defendants will soon enforce the challenged guidance. This is not a case involving “ifs.” *Contra D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019) (explaining that “ifs” about whether actions that might trigger enforcement would occur made preliminary relief improper). Plaintiffs face “certain and immediate” harm from Defendants’ threatened enforcement. *Id.* (internal quotation marks omitted).

And those harms are irreparable. Defendants do not dispute that a State’s “inability to enforce its duly enacted” laws “inflicts irreparable harm on the State.” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see also, e.g., Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (irreparable harm where agency action put its “sovereign interests and public policies at stake”). They instead counter that Plaintiffs are not certain to suffer this harm because their laws only “arguably” conflict with the challenged guidance. PI Opp. 14 (PageID#312). But Defendants cite no authority requiring a party to “confess that he will in fact violate th[e] law” to obtain preliminary relief. *Susan B. Anthony List*, 573 U.S. at 163. And it is hard to see how enforcement of the challenged guidance would *not* interfere with Plaintiffs’ enforcement of laws requiring schools to assign students to athletic teams according to biological sex or allowing schools and employers to maintain sex-separated living facilities. *See, e.g., 2021 Tenn. Pub. Acts, ch. 40, § 1; 2021 Tenn. Pub. Acts, ch. 452, § 6; see also Compl. ¶ 99* (PageID#19).

These irreparable sovereign harms alone are sufficient to warrant preliminary relief. But enforcement of the challenged guidance would also harm the important interests that these and other state laws are intended to protect—including student and employee privacy, safety, and First Amendment freedoms. “When constitutional rights” such as these “are threatened or impaired, irreparable injury is presumed.” *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 407 (6th Cir. 2017); *see also Mozilla Corp. v. FCC*, 940 F.3d 1, 62 (D.C. Cir. 2019) (recognizing that bodily injury is

irreparable); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that “the constitutional right to privacy . . . includes the right to shield one’s body from exposure to viewing by the opposite sex”). These harms are not “speculat[ive]” or “nebulous,” as Defendants contend. PI Opp. 13-14 & n.5 (PageID#311-12). Common sense dictates that being “forced to share changing, shower, and bathroom space with members of the opposite sex” does not provide the same “level of privacy and comfort” that an individual could “expect” in a facility reserved for members of a single sex. *Stuart v. Metro. Gov’t of Nashville & Davidson Cnty.*, 679 F. Supp. 2d 851, 859 (M.D. Tenn. 2009), *vacated after settlement*. And even the “Dear Colleague” letter the Department issued in 2016 acknowledged that allowing transgender students to participate in sports consistent with their gender identity could implicate the “competitive fairness or physical safety of the sport.” U.S. Dep’t of Justice & U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students 3 (May 13, 2016), <https://bit.ly/3BlfhkT>.

Mellon does not bar Plaintiffs from asserting those harms as *parens patriae* in the circumstances of this case. See PI Opp. 13-14 n.5 (PageID#311-12). The Supreme Court has clarified since *Mellon* that “a State has a quasi-sovereign interest in the health and well-being . . . of its residents in general”—an interest that may “suffice[] to give the State standing to sue as *parens patriae*,” especially when the State has attempted to address the injury “through its sovereign lawmaking powers.” *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607; see also *Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 3683913, at *15 (S.D. Texas Aug. 19, 2021) (describing “the Supreme Court’s careful circumscription of *Mellon*”).

Regardless, the harms the challenged guidance would impose on Plaintiffs’ citizens are highly relevant to whether a preliminary injunction would serve the public interest. Surely protecting student and employee safety and privacy and safeguarding fair competition in female

sports serves the public interest. Enforcement of the challenged guidance, meanwhile, would *undermine*, rather than further, the purposes of Title VII and Title IX by prohibiting conduct that is *not* unlawful discrimination. *See* PI Opp. 39 (PageID#337). And it would saddle regulated parties with obligations that Congress never intended.

III. At a Minimum, Defendants Should Be Preliminarily Enjoined from Enforcing the Challenged Guidance Against Plaintiffs.

The APA instructs the “reviewing court” to “hold unlawful and set aside agency action, findings, and conclusions” that are procedurally or substantively unlawful. 5 U.S.C. § 706. Courts have long held that this means the challenged “rules are vacated.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted). If this Court determines that narrower relief is warranted, it should enjoin enforcement of the challenged guidance against *all Plaintiffs*. Defendants urge the Court to exclude Plaintiffs “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.” PI Opp. 39-40 (PageID#337-38). But this Court is not bound by decisions of the Fourth or Seventh Circuits,¹⁰ so those decisions do not prevent this Court from awarding relief to parties that are properly before it.

CONCLUSION

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

¹⁰ A circuit court’s decision is not “‘binding’ on district courts outside its territory” because “[o]pinions ‘bind’ only within a vertical hierarchy.” *United States v. Glazer*, 14 F.3d 1213, 1216 (7th Cir. 1994).

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