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.

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Court lacks jurisdiction over Plaintiffs' claims because they lack standing to challenge to documents issued by the Department of Education ("ED"), the Equal Employment Opportunity Commission ("EEOC"), and the Department of Justice ("DOJ"). Additionally, Plaintiffs' claims are not ripe, and judicial review is foreclosed because they have an adequate alternative remedy through Titles VII and IX. Defs.' Mot. at 3-11 ("Motion"), ECF No. 49-1. Plaintiffs also fail to state a claim under the Administrative Procedure Act ("APA") or the Constitution. *Id.* at 8-25. Plaintiffs' Opposition to Defendants' Motion ("Pls' Opp."), ECF No. 58, does little to advance their claims. Often they fail to address Defendants' arguments altogether. And when they do, they fail to establish subject matter jurisdiction or plausible claims. Plaintiffs may disagree with Defendants' interpretations of Titles VII and IX, but they cannot show any legal deficiencies in the challenged documents. Defendants' Motion should be granted.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

A. Plaintiffs Lack Article III Standing.

Plaintiffs lack standing because they cannot establish an imminent, concrete injury as a result of the agencies' interpretations of Titles VII and IX, as reflected in the challenged agency documents. Motion at 6-8. Plaintiffs claim injury merely because they have exercised their authority to enact and enforce laws that "are at least 'arguably proscribed' by the challenged guidance." Pls' Opp. at 9-10, ECF No. 58.[1] Plaintiffs contend that "[a]n 'arguable' conflict is sufficient under binding precedent[,]" *Id.* at 11, relying on *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). But there, a state commission

[1] Plaintiffs' claim to "special solicitude" as states, Pls' Opp. at 9, does not advance their assertion of standing. "Special solicitude" does not eliminate the injury-in-fact requirement. *See Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (finding that Massachusetts demonstrated injury); *see also, e.g., Del. Dep't of Nat. Res. & Envt'l Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009).

panel found probable cause to believe that one of the petitioners had violated the challenged statute, so the petitioners' intended political advertisement was "arguably proscribed" by the law. *Id.* at 162. Moreover, in that case the plaintiffs could not claim injury solely due to the statute – a ban on false statements in a political campaign – but could establish harm through the likelihood of both administrative proceedings and "the additional threat of criminal prosecution." *Id.* at 166. Here, of course, no federal agency has found that any of the Plaintiff states have violated Titles VII or IX based on the agencies' interpretations of those statutes, and Plaintiffs can show no impending agency enforcement action, let alone criminal proceedings. In sum, the Supreme Court has rejected the contention that merely "arguable" injury is sufficient for standing purposes. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401, 409 (2013) (any "threatened injury must be *certainly impending* to constitute injury in fact.").

Further, none of the cases Plaintiffs cite support the notion that a mere "arguable" conflict between a state law and an agency's interpretation of federal law is enough to support Article III standing. Pls' Opp. at 11.[2] Although Plaintiffs cite more than a dozen state laws that might "arguably" conflict with Defendants' actions, Compl. ¶¶ 98-99, ECF No. 1, they fail to specify which laws actually conflict with Defendants' actions, and in what way. This sort of abstract policy disagreement cannot

[2] *See Colorado v. Toll*, 268 U.S. 228, 229 (1925) (state had standing to challenge federal regulations where national park regulations would "assert exclusive control" and "establish a monopoly" over state forest reservations and highways); *Missouri v. Holland*, 252 U.S. 416, 431(1920) (not addressing standing, and only resolving merits of challenge to a statute and implementing regulations); *Ohio v. U.S. Dep't of Transp.*, 766 F.2d 228, 229 (6th Cir. 1985) (state had standing to challenge federal regulation where U.S. Department of Transportation had issued a "formal position . . . that the [state] statute is preempted").

constitute Article III injury.[3] *See Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (holding that raising "abstract questions . . . of sovereignty" are insufficient to establish standing).

Nor can Plaintiffs' argument be squared with *Mellon*, 262 U.S. 447. There, the Court held that Massachusetts lacked standing to sue the Treasury Secretary because its claim involved no "quasi-sovereign rights *actually* invaded or threatened." *Id.* at 485 (emphasis added). It further explained that, as *parens patriae*, "it is no part of [Massachusetts'] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government." *Id.* at 485-86. Plaintiffs attempt to distinguish *Mellon* by claiming the challenged law "did not interfere with the State's authority to enforce its own laws." Pls' Opp. at 11. But that was precisely what Massachusetts argued and the Court rejected. *Mellon*, 262 U.S. at 479 (rejecting Massachusetts's argument that petitioners are being forced to "yield a portion of their sovereign rights").

Plaintiffs also contend that enforcement of the challenged agency documents would cause "other concrete harms," such as the risk of losing federal educational funding and potential exposure to damages liability. Pls' Opp. at 11-12. But Plaintiffs have failed to establish that this risk is "imminent" rather than speculative, *see Clapper*, 568 U.S. at 409, and the cases they rely upon do not

[3] Defendants explained in their Motion that ten of the twenty Plaintiff states did not allege that they have laws that even "arguably" conflict with the agencies' interpretations of Titles VII and IX, and therefore those states lacked standing. Motion at 5 n.1. In response, Plaintiffs contend that so long as one Plaintiff state has standing, the Court does not need to determine whether the other Plaintiff states independently have standing. Pls' Opp. at 11 n.3. Not so. As the Supreme Court recently explained, "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). In addition, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *Id.* at 2208. Here, where Plaintiffs contend that, "[i]f this Court determines that narrower relief is warranted, it should enjoin enforcement of the challenged guidance against *all Plaintiffs*," ECF No. 57 at 25 (emphasis in original), the Court must assess whether each Plaintiff has standing.

support a conclusion that the alleged harm Plaintiffs have identified here is impending.[4] Plaintiffs have failed to allege any non-speculative, imminent loss of federal funding or damages exposure.

Plaintiffs' contention that they have standing because the challenged agency documents "harm[] the health and welfare of Plaintiffs' educational institutions, employers, and citizens," fares no better. Pls' Opp. at 12. The very case cited by Plaintiffs on this point notes that while states may have *parens patriae* standing to bring suit against private defendants, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n. 16 (1982); *see also Virginia v. Sebelius*, 656 F.3d 253, 268-69 (4th Cir. 2011) (same).

Plaintiffs further contend that their injuries are "directly traceable to the challenged guidance" and are redressable via their sought relief. Pls' Opp. at 12. But given Plaintiffs' concession that many of their claimed injuries are merely hypothetical—or, at most, "arguable"—they cannot show that such contingent future harm would be avoided by enjoining the challenged documents. Indeed, Plaintiffs do not dispute that, even if they were successful in this litigation, they could still be subject to private litigation raising related issues under Titles VII and IX.[5] And even before the issuance of the EEOC Document, the EEOC had already taken the position that an employer's intentional misuse

[4] *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (holding, after a trial, that citizenship question on decennial census would result in noncitizen households responding to the census at a lower rate, so certain states showed an "imminent injury" in loss of federal funding); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (finding standing to challenge settlement distribution in bankruptcy because plaintiffs had suffered a "loss" of their ability to assert a monetary claim); *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 261-62 (6th Cir. 2009) (holding that school districts had standing to challenge statutory requirements where those requirements had "already forced them to spend state and local funds" and "will continue to require such expenditures in the future.").

[5] *See, e.g., B.P.J. v. West Virginia State Bd. of Educ.*, 2:21-cv-00316 (D.W.V. 2021) (applying *Bostock* to Title IX); *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (same); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017); *Roberts v. Clark County Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016).

of pronouns or the refusal to allow for the use of bathrooms and work-related clothing consistent with a transgender employee's gender identity could contribute to an unlawful hostile work environment or otherwise may constitute discrimination under Title VII.[6] Plaintiffs' suggestion that all their hypothetical future injuries would be redressed by enjoining the challenged agency documents is incorrect.

Finally, Plaintiffs contend that they have established a "credible threat" of enforcement because Defendants have not disavowed enforcement and have a history of past enforcement. Pls' Opp. at 13. These allegations alone do not suffice for standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983). The Sixth Circuit examines various factors in deciding whether there is a credible threat of an enforcement action, including: (1) "a history of past enforcement;" (2) "enforcement warning letters sent to the plaintiffs regarding their specific conduct;" (3) whether the challenged statute allows "any member of the public to initiate an enforcement action;" and (4) "the defendant's refusal to disavow enforcement of the challenged statute[.]" *Online Merchants Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021) (citation omitted). But here, none of the agencies have sent any of the Plaintiffs enforcement warning letters, and the EEOC in fact lacks authority to bring Title VII enforcement actions against State employers, *see* Motion at 8. Indeed, as discussed above, the challenged documents are interpretive, non-binding, and do not purport to determine the outcome of any particular case. *See, e.g.,* Compl., Ex. A. at 3. Relatedly, while Defendants have not disclaimed their interpretations of Titles VII and IX, they have not taken enforcement actions against Plaintiffs based on those interpretations, making any potential enforcement action all the more speculative. And while private parties may

[6] *See, e.g., EEOC v. Deluxe Fin. Serv. Corp.*, No. 15-cv-02646 (D. Minn.) (consent decree entered in January 2016 where transgender employee experienced discrimination and hostile work environment based on refusal to allow employee to use the pronoun or restroom consistent with their gender identity); *EEOC v. Apple-Metro, Inc. & Hawthorne Apple, LLC.,* No. 1:17-cv-04333 (S.D.N.Y.); *EEOC v. Bojangles Rest., Inc.*, No. 5:16-cv-00654 (E.D.N.C); *Broussard & EEOC v. First Tower Loan LLC*, No. 2:15-cv-01161 (E.D. La.).

enforce Titles VII and IX, including by relying in part on the agency interpretations challenged here, as discussed above, that was true *before* the challenged agency documents were promulgated. The EEOC Document thus does not make the EEOC's pursuit of enforcement actions applying its interpretation of Title VII any more likely or imminent.

B. Plaintiffs' Claims Are Not Ripe.

Plaintiffs also failed to identify a ripe Case or Controversy because the agencies have not purported to determine the outcome of any particular dispute. Motion at 5-6 (citing *Warshak v. United States*, 532 F.3d 521 (6th Cir. 2008)). Plaintiffs do not dispute this point, and do not address, much less explain, why the Sixth Circuit's decision in *Warshak* does not control the outcome of this case. *See* Pls' Opp. at 14-15; *Cunningham v. Tenn. Cancer Specialists, PLLC*, 957 F. Supp. 2d 899, 921 (E.D. Tenn. 2013) (on a dispositive motion, a "court may treat those arguments that the plaintiff failed to address as conceded"). Instead, they argue only that their challenge raises "purely legal" issues. Pls' Opp. at 15. Plaintiffs further contend that they will suffer significant hardship if judicial review were delayed because the challenged agency documents impose the "fear of future sanctions" to "force immediate compliance" with the documents. *Id.* (citations omitted).

Abbott Laboratories and *Sierra Club* undermine, rather than support, Plaintiffs' argument. In *Abbott Laboratories*, "all parties agree[d]" that the issue tendered was "a purely legal one: whether the statute was properly construed," and no further administrative proceedings were contemplated. *Abbott Labs. v. Gardener*, 387 U.S. 136, 149 (1967). Here, Defendants dispute Plaintiffs' claim that the issues raised are purely legal ones. Motion at 5-6. Indeed, the question of whether Titles VII or IX have been violated typically is an inherently fact-bound inquiry. *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) ("Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships[.]'")(citation omitted); *Thompson v. Hendrickson USA, LLC*, No. 3:20-cv-00482, 2021 WL 848694, at *19 (M.D. Tenn.

Mar. 5, 2021). Both ED's NOI and the EEOC Document recognize the fact-intensive nature of Titles VII and IX violations, and do not purport to determine the outcome of any particular scenario. Compl. Ex. A at 4 (the NOI "does not determine the outcome in any particular case or set of facts."); Compl., Ex. D at 8, ECF No. 1-5 (noting actions that could be considered harassment "in certain circumstances"). Accordingly, the question of whether any Plaintiff state potentially has violated Titles VII and IX necessarily would turn on the facts of any given situation.

Nor do the challenged documents reflect the end of administrative proceedings, as they did in *Abbott*. Unlike the federal regulation at issue in *Abbott*, the challenged agency documents do not reflect even the *beginning* of an administrative proceeding. Rather, both Titles VII and IX contain detailed administrative and judicial enforcement regimes, which only commence when an administrative action is initiated. Defs.' Opp. to Mot. for Prelim. Inj. ("Defs.' PI Opp.") at 9-11, ECF No. 48. Plaintiffs do not allege that they have been or are about to be subject to an enforcement action based on the agencies' interpretations of Title VII or IX, let alone that those enforcement actions have reached their conclusions. *Abbott Laboratories* does not support Plaintiffs' contention that they have a ripe claim.

Sierra Club further demonstrates that Plaintiffs' claims are unripe. There, the plaintiff challenged a Forest Service plan that set regulations for logging in a particular area. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729 (1998). But the Court explained that the plan did not command anyone to do anything, and the plan did not inflict any practical harm because, before the Forest Service could permit logging, it would have to follow specified administrative procedures, and, if challenged, justify the proposal in court. *Id.* at 733-34. So too here. The challenged agency documents do not command the states to do anything; they simply provide the public with the agencies' views of Titles VII and IX. Nor do the challenged documents subject the states to liability—Titles VII and IX do. And there is no practical harm in withholding judicial review now because of the administrative process that would occur before any potential enforcement action. Defs.' PI Opp. at 9-11. Plaintiffs thus lack a ripe claim.

C. Plaintiffs Have an Adequate Alternative Remedy under Titles VII and IX.

As Defendants explained in their Motion, the APA's alternative remedy provision precludes Plaintiffs from bringing this standalone action because they may simply defend any future Title VII or IX enforcement action if one is ever brought, or seek judicial review of any funding termination. Motion at 8-9. Plaintiffs dispute the adequacy of a future enforcement action because the agency documents force them to "comply . . . or risk financial penalties." Pls' Opp. at 16 (citing *Sackett v. EPA*, 566 U.S. 120, 127, 131 (2012)). Plaintiffs' reliance on *Sackett* is misplaced, and Plaintiffs face no "immediate consequences" that would justify raising their arguments in a pre-enforcement challenge.[7]

In *Sackett*, the Supreme Court held that property owners could challenge the EPA's issuance of an administrative compliance order. 566 U.S. at 122. The Court held that the property owners lacked an adequate alternative remedy because the relevant judicial review provision contemplated civil actions brought by the EPA—a process the property owners could not initiate—and, "each day . . . they accrue, by the Government's telling, an additional $75,000 in potential liability." *Id.* at 127. Unlike in *Sackett*, no federal agency has determined that any Plaintiff state has violated Titles VII or IX, ordered the Plaintiff states to take any particular action, or imposed any financial penalty, let alone one that is continuously accruing. Accordingly, *Sackett* is inapposite, and Plaintiffs have failed to establish any "immediate consequences" flowing from the challenged agency documents.[8]

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[7] Plaintiffs incorrectly contend that the "adequate alternative remedy bar" of section 704 is not jurisdictional. Pls' Opp. at 15 n.6 (citing *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017); *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 (6th Cir. 2014)). The Sixth Circuit has held that the adequate alternative remedy inquiry is jurisdictional. *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 428 (6th Cir. 2016). *Jama* is not to the contrary, as that case addressed the question of final agency action rather than the adequacy of an alternative remedy. *See Jama*, 760 F.3d at 495.

[8] Plaintiffs' reliance upon the unpublished district court decision in *Furie Operating Alaska, LLC v. U.S. Dep't of Homeland Sec.*, No. 3:12-CV-00158, 2013 WL 1628639 (D. Alaska Apr. 15, 2013), is equally misplaced. In *Furie*, the district court held that the company lacked an adequate alternative remedy because the company was "subject to a $15 million penalty and possible sanctions for non-payment, and such a substantial liability certainly interferes with its ability to conduct business." *Id.* at

Plaintiffs contend that they are at risk of significant financial penalties if they fail to "comply[] with" the challenged documents. Pls' Opp. at 16. But because Plaintiffs have failed to identify any imminent enforcement action and have every opportunity to raise any defenses to the agencies' interpretations of Titles VII and IX in any future enforcement action, they have an adequate alternative remedy. *Compare Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) ("When enforcement actions are imminent—and at least when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses—there is no adequate remedy at law.") *with Quicken Loans Inc. v. United States*, 152 F. Supp. 3d 938, 949-50 (E.D. Mich. 2015); *In re Peter*, 322 F. Supp. 270, 271 (E.D. Ky. 1970).

Defendants further established in their Motion that Congress did not intend for pre-enforcement judicial review of Plaintiffs' Title IX claim because it provided an elaborate procedural scheme for administrative enforcement proceedings under Title IX that culminates in the opportunity for judicial review. Motion at 9-11 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 216 (1994); *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012)). As Defendants explained, it is "fairly discernible" that Congress intended Title IX's review scheme to be exclusive, as it contains the same features that the Supreme Court highlighted in *Thunder Basin* as barring pre-enforcement challenges, including a requirement to seek voluntary compliance, notice and an opportunity for a hearing prior to any termination of Federal funds, and judicial review. *See* 20 U.S.C. §§ 1682, 1683; 34 C.F.R. § 100.7(d)(1); 34 C.F.R. § 106.81 (incorporating 34 C.F.R. §§ 100.6-100.11); 34 C.F.R. §§ 100.10(a), (b), (e); *see also* Motion at 9-11. This review scheme demonstrates Congress's intent to channel enforcement-related disputes through the agency, followed by judicial review in the court of appeals. The APA thus precludes this standalone action, and Plaintiffs' arguments to the contrary are unavailing.

*6. Here, no agency has imposed liability against any Plaintiff state, and Plaintiffs have failed to identify any such interference to their schools or employers based solely on the challenged agency documents.

Plaintiffs first contend that *Thunder Basin* is inapplicable because they are not challenging the withholding of federal funds. Pls' Opp. at 17-18. But contrary to Plaintiffs' assertion, the challenged agency documents are not "rules, regulations, or orders of general applicability" approved by the President, as specified by 20 U.S.C. § 1682. *See infra* at 13-17 (documents are interpretive, and do not constitute final agency action). More fundamentally, Plaintiffs' claimed injury *is* the potential loss of federal funds, Pls' Opp. at 16, and Plaintiffs' legal claims similarly aver that the agency documents "place in jeopardy a significant amount of Plaintiffs' education-related federal funding[.]" Compl. ¶ 141. In any event, the precise nature of Plaintiffs' challenge does not preclude the administrative process, "so long as a court can eventually pass upon the challenge," and the *Thunder Basin* channeling analysis still governs. *See Jarkesy v. SEC*, 803 F.3d 9, 18 (D.C. Cir. 2015).

Plaintiffs next contend that *Board of Education of the Highland Local School Dist. v. Department of Education.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016), a decision that rejected similar claims to the ones Plaintiffs bring here, was wrongly decided. Pls' Opp. at 18-19. Plaintiffs' largely undeveloped critiques of *Highland* are meritless. As an initial matter, Plaintiffs are simply wrong that the court inferred Congress's intent exclusively from regulations rather than the statutory scheme. *See Highland*, 208 F. Supp. 3d at 862 (lengthy discussion of statutory provisions and Congressional intent). Second, Plaintiffs cursorily contend that the *Highland* court erred in concluding that section 1683 references the general provision for judicial review of funding determinations in 20 U.S.C. 1234g(b), but they entirely fail to develop this argument or describe its import here. Third, Plaintiffs criticize the *Highland* court's reliance on cases seeking to enjoin enforcement actions under Title VI of the Civil Rights Act of 1964. But Plaintiffs do not dispute the *Highland* court's conclusion that Title VI, 42 U.S.C. § 2000d-2, is "virtually identical to § 1683," and therefore, reliance on Title VI cases is appropriate. *Highland*, 208 F. Supp. 3d at 862. Finally, Plaintiffs claim that the *Highland* court improperly discounted the Supreme Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Sackett*. But the

Highland court correctly explained that *Cannon*'s conclusion about an implied right of action was inapplicable because Title IX was not enacted for the benefit of school districts. *Highland*, 208 F. Supp. 3d at 863. Nor do Plaintiffs challenge the *Highland* court's conclusion that the enforcement scheme in *Sackett* "bears little resemblance to that of Title IX or the Mine Act in *Thunder Basin*." *Id.* The *Highland* court explained that, unlike in *Sackett*, where the EPA had issued a compliance order that subjected the plaintiffs to additional penalties for each day they refused to comply and made it more difficult to obtain a permit from the Army Corp of Engineers, the school district in *Highland* "faces no such consequences for its failure to comply with Title IX at this time." *Id.* at 863-64. In short, Plaintiffs have not shown that *Highland* was wrongly decided.

Plaintiffs further contend that the instant case is distinguishable from *Thunder Basin* because their 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." Pls' Opp. at 19. But the outcome of any Title IX case *is* plainly fact-dependent, *see supra* at 7-8, and Plaintiffs' core contention that ED's or DOJ's interpretation of Title IX is incorrect cannot be adjudicated in the abstract. *Elgin*, 567 U.S. 15-16; *see e.g., Doe v. FAA*, 432 F.3d 1259, 1262-63 (11th Cir. 2005) (applying *Thunder Basin* and rejecting attempt to "avoid the statutorily established administrative-review process by rushing to the federal courthouse for an injunction preventing the very action that would set the administrative-review process in motion"). Indeed, the Supreme Court has held that a constitutional challenge was precluded, given a comprehensive scheme, even where the agency lacked the authority to consider plaintiffs' constitutional challenges in the first instance. *Elgin*, 567 U.S. at 6-7, 15-18; *see also Jarkesy*, 803 F.3d at 19 (holding that even where an agency lacks the authority to rule on certain challenges in the first instance, *Thunder Basin* still bars judicial review where the court of appeals can consider such challenges).

Plaintiffs' reliance on *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), is equally misplaced. Pls' Opp. at 19. There, the Court held it is presumed Congress does not intend to limit jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is "wholly collateral to a statute's review provisions"; and if the claims are "outside the agency's expertise." *Id.* at 489 (quotation omitted). The Court noted that the petitioners there were challenging the existence of a Government board rather than any standards, registration requirements or other rules, and therefore the challenge was "collateral" to any orders or rules from which agency review may be sought. *Id.* at 490.

Here, unlike in *Free Enterprise*, Plaintiffs do not dispute that they may obtain meaningful review through ED's administrative process and judicial review in the applicable court of appeals. Defs.' PI Opp. at 9-10. In addition, Plaintiffs' challenges are not "collateral" to Title IX—rather, they go to the heart of the interpretation of Title IX and what sorts of conduct are covered by the statute. *See* Compl., Prayer for Relief C-F. Finally, determining the appropriate interpretation of Title IX is plainly within ED's competence as the agency primarily responsible for its enforcement. Accordingly, *Free Enterprise* fails to support Plaintiffs' claim that *Thunder Basin* does not foreclose judicial review here. *See Jarksey*, 803 F.3d at 20 (distinguishing *Free Enterprise* and holding that the Exchange Act's judicial review provision provided meaningful judicial review of constitutional challenges to an enforcement action).

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE APA OR THE CONSTITUTION

A. The Challenged Documents Do Not Constitute Final Agency Action

The challenged documents do not constitute final agency action because they have no independent legal effect that determines any rights or obligations. Motion at 11-14. Plaintiffs disagree, first contending that legal consequences "plainly flow" from the challenged documents "because Title IX recipients that do not comply with the guidance will risk the loss of substantial federal funds." Pls' Opp. at 20 (citing *Army Corps. Of Eng'rs v. Hawkes*, 578 U.S. 590, 599-00 (2016)). Plaintiffs' reliance on

Hawkes is without merit. In *Hawkes*, the Supreme Court concluded that legal consequences flowed from the agency's jurisdictional determination because it "both narrow[ed] the field of potential plaintiffs and limit[ed] the potential liability a landowner faces for discharged pollutants without a permit." *Hawkes*, 578 U.S. at 599. Here, the challenged agency documents do nothing like that; they neither create nor extinguish any form of liability or legal protection, much less with respect to a particular Plaintiff.

Plaintiffs further contend that the ED and DOJ documents "specify factual situations the Department considers unlawful." Pls' Opp. at 21. But the ED NOI explains that although "this interpretation will guide the Department in processing complaints and conducting investigations, it does not determine the outcome in any particular case or set of facts." Compl., Ex. A at 3. And the ED/DOJ Fact Sheet merely provides "examples of the kinds of incidents" the agency "can investigate" without purporting to determine an outcome of any such investigation. Compl., Ex. C at 5, ECF No. 1-4. Contrary to Plaintiffs' contention, nothing in the challenged documents suggests that they are "binding on [their] face or in practice." Pls' Opp. at 21. Because, at most, the challenged documents simply provide the agencies' "view of what the law requires of a party, even if that view is adverse to the party," the documents do not constitute final agency action. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006) (citation omitted); *see also Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 404-05 (D.C. Cir. 2013).

Finally, Plaintiffs contend that the EEOC Document constitutes final agency action for two reasons. First, Plaintiffs claim that the EEOC Document invites applicants and employees to contact the EEOC and "file a charge of discrimination' if employers violate the guidance." Pls' Opp. at 21. But the EEOC Document does not invite applicants and employees to contact the EEOC if an employer violates the guidance; rather, the EEOC invites applicants or employees to contact the EEOC if they believe there has been a violation *of Title VII*. *See* Compl., Ex. D at 8 ("If a job applicant

or employee's Title VII rights have been violated, what can the applicant or employee do?"). Indeed, Plaintiffs do not dispute that even before the EEOC Document, applicants and employees could—and did—contact the EEOC and file a charge of sex discrimination on the basis of gender identity. In fact, Title VII mandates that applicants and employees follow this procedure with respect to any claim of discrimination, regardless of the existence of the EEOC Document. The EEOC Document makes these actions no more or less likely, which highlights the document's lack of legal consequence.

Second, Plaintiffs contend that the EEOC Document is final agency action because it "purports to explain[] what the *Bostock* decision means . . . for employers across the country," and "dictates" how "EEOC must assess claims" of discrimination based on transgender status. Pls' Opp. at 21-22. But the EEOC Document simply recites the basic facts and holding in *Bostock*, and then separately explains the EEOC's views of Title VII as reflected in its previous administrative decisions. *See generally* Compl., Ex. D. Plaintiffs do not dispute that even without the EEOC Document, the EEOC would still assess claims of sex discrimination under Title VII consistent with its previous administrative decisions and binding Supreme Court precedent in *Bostock*.

The Fifth Circuit's decision in *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), is not to the contrary. In *Texas*, the Fifth Circuit held that EEOC guidance concerning the consideration of prior criminal convictions in hiring decisions constituted final agency action, because, among other things, the agency conceded that the guidance bound EEOC staff "to an analytical method in conducting Title VII investigations and directs their decisions about which employers to refer for enforcement actions." *Id.* In addition, the Fifth Circuit noted that the challenged guidance "leaves no room for EEOC staff *not* to issue referrals to the Attorney General when an employer uses a categorical felon-hiring ban." *Id.*

In contrast, the EEOC Document exhibits none of the attributes that the Fifth Circuit found dispositive of final agency action in *Texas*. The EEOC Document does not bind EEOC staff to an

analytical method in conducting Title VII investigations or dictate that EEOC staff issue referrals to the Attorney General under any set of circumstances. Indeed, it does not dictate in any manner how EEOC staff must assess potential sex discrimination on the basis of sexual orientation or gender identity. *Cf. id.* at 446. Accordingly, the Fifth Circuit's decision in *Texas* is inapposite, and the EEOC Document is not final agency action.

B. The Challenged Documents Are Interpretive Rules.

Plaintiffs contend that the challenged documents constitute legislative rules because they "create new law" by imposing a new obligation not to discriminate on the basis of gender identity. Pls' Opp. at 22. But the challenged documents create no obligations at all; rather, each is an interpretive rule that "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). The fact that the challenged documents supply "crisper and more detailed lines than the authority being interpreted," does not convert an interpretive rule into a legislative one. *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 105-06 (4th Cir. 2011) (holding that ED's interpretation of Title IX did not amount to a legislative rule requiring notice-and-comment). Nor do the challenged documents "foreclose [an] alternative course[] of action or conclusively affect rights of other parties," *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 580 n.8 (6th Cir. 2003), as the ED NOI expressly states that "it does not determine the outcome in any particular case or set of facts," Compl., Ex. A at 3, and the EEOC Document disclaims any intent to "bind the public in any way." Compl., Ex. D at 2..

Plaintiffs contend that the ED NOI is a legislative rule because the interpretation "squarely conflicts with Title IX itself," because Title IX permits sex segregation in certain contexts. Pls' Opp. at 23. As explained below, no such conflict exists, and simply because Plaintiffs disagree with Defendants' interpretation of the statute, that does not change the fact that the ED NOI remains an interpretation, not a legislative rule. *See* Motion at 15. And, contrary to Plaintiffs' suggestion, nothing

in ED's NOI or the ED/DOJ Fact Sheet forecloses sex-separated living facilities or athletic teams. In addition, ED expressly noted that its "interpretation of the scope of discrimination 'on the 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." Compl, Ex. A at 2. Plaintiffs' allegation of conflict with Title IX and its implementing regulations is thus misplaced.

Finally, Plaintiffs claim that the EEOC Document is a legislative rule because it goes beyond just informing the public of pre-existing legal obligations or rights and instead seeks to "speak with the force of law." Pls' Opp. at 24. But the EEOC Document by its own terms expressly disclaims having the force and effect of law, Compl., Ex. D at 2, and states that it is providing the "EEOC's established legal positions on sexual-orientation and gender-identity-related workplace discrimination issues." *Id.* Plaintiffs do not dispute that the EEOC's interpretation of Title VII was based on its previous administrative decisions. Nor do they dispute that even in the absence of *Bostock* or the EEOC Document, the EEOC would continue to abide by its interpretation of Title VII as reflected in its previous administrative decisions. Plaintiffs' contention that the EEOC Document constitutes a legislative rule subject to notice-and-comment requirements is therefore groundless.

C. ED's NOI and the ED/DOJ Fact Sheet are not Arbitrary and Capricious.

Plaintiffs next assert that the NOI and Fact Sheet are arbitrary and capricious because they purportedly fail to acknowledge that the documents conflicted with ED's initial post-*Bostock* documents and regulations. Pls' Opp. at 24-25. But ED acknowledged in the ED NOI that "OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity;" that it was seeking to clarify its interpretation in light of *Bostock*; and that discrimination based on sexual orientation and gender identity discrimination could cause harm. Compl., Ex. A at 1. Plaintiffs' suggestion that ED failed to acknowledge a change in views

or the rationale for that change is thus flatly contradicted by ED's NOI, which not only recognizes the change in position, but also provides a robust rationale for the change.

Plaintiffs' contention that ED failed to acknowledge alleged reliance interests is equally meritless. Pls' Opp. at 24-25. Most strikingly, they identify only a single, speculative reliance interest, unsupported by facts, that some unidentified schools "may have offered more single-occupant living facilities." *Id.* at 25. But regardless, Plaintiffs appear to incorrectly assume that ED's NOI has interpreted the term "sex" in Title IX to preclude sex-separated facilities or teams. ED's NOI expressly disclaimed providing any definition of "sex" for purposes of Title IX. *See* Compl., Ex. A at 1 n.1. And the challenged documents do not prohibit sex-separated facilities or athletic teams. Accordingly, Plaintiffs' purported reliance interest is not implicated by the NOI or Fact Sheet.

D. The EEOC Document Does Not Exceed the EEOC's Authority.

Plaintiffs next contend that the EEOC Document exceeds the EEOC's statutory authority because the EEOC lacks the authority to issue rules or regulations. Pls' Opp. at 25-26. But the EEOC Document does not constitute or purport to be a substantive rule defining the obligations of employers under Title VII. Motion at 19. Rather, the EEOC Document simply describes the *Bostock* decision and further explains its views of Title VII as reflected in its previous administrative decisions. The EEOC plainly possesses the authority to issue technical assistance guidance covering these topics.

Plaintiffs also allege 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. Pls' Opp. at 26-27. Plaintiffs contend that the EEOC Document reflects "significant guidance" because it raises "novel legal or policy issues" regarding employers' use of pronouns, restrooms, and locker rooms for transgender employees. *Id.* at 26. Not so. There is nothing "novel" about the interpretation expressed in the EEOC Document. The EEOC Document explains that the information contained in the document "is not new policy," and further "explains the

[EEOC's] *established* legal position on LGBTQ+-related matters, as voted by the Commission." Compl., Ex. D at 4 (emphasis added). The EEOC's re-articulation of its long-held views of Title VII does not constitute "significant guidance" requiring a Commission vote.

E. The ED NOI and ED/DOJ Fact Sheet are not Contrary to Law.

ED reasonably concluded in the NOI that it possessed enforcement authority over discrimination based on sexual orientation and gender identity under Title IX, on multiple grounds including: the *Bostock* decision; the textual similarities between Titles VII and IX; case law holding that Title IX's prohibition on sex discrimination encompasses discrimination based on gender identity and sexual orientation; the purpose of Title IX; and DOJ's independent determination reaching the same conclusion. Motion at 16-19; *see* Compl., Ex. A at 1-4. Plaintiffs' disagreement with these conclusions does not make them contrary to law.

Plaintiffs first claim that ED's NOI and the ED/DOJ Fact Sheet are substantively unlawful because the interpretation reflected in those documents is contrary to Title IX. Pls' Opp. at 27. They contend that the challenged interpretations "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." *Id.* Plaintiffs' arguments are without merit.

The bulk of Plaintiffs' contention is premised on the claim that Title IX expressly allows sex-separated facilities and athletic programs, and that the challenged interpretation—which concludes that Title IX prohibits discrimination on the basis of gender identity—is to the contrary. As discussed above, *see supra* at 17-18, nothing in the challenged documents precludes an educational institution from offering sex-separated bathrooms, locker rooms, or athletic teams. Indeed, the Fourth Circuit rejected this precise argument in *Grimm*, 972 F.3d at 618. Other than stating their disagreement with the Fourth Circuit's decision, *see* Pls' Opp. at 30, Plaintiffs fail to explain why *Grimm* was wrongly

decided. Ultimately, the heart of Plaintiffs' argument is that the term "sex" in Title IX refers only to "biological sex, and not gender identity." Pls' Opp. at 29. As discussed above, as in *Bostock*, the ED NOI expressly does not reach any conclusions about the meaning of "sex" under Title IX. *See supra* at 18.

Plaintiffs next criticize ED's conclusion that Titles VII and IX contain sufficient similarities such that it is appropriate to apply the reasoning of *Bostock* to Title IX. Pls' Opp. at 30. They contend that although the Supreme Court in *Bostock* used the terms "because of" and "on the basis of" sex interchangeably, because "[j]udicial opinions are not statutes," it was inappropriate for ED to adopt the same analysis in the NOI. *Id.* Plaintiffs cite to no authority for the proposition that it is arbitrary and capricious for an agency to follow a Supreme Court opinion and conclude that terms used interchangeably therein are in fact interchangeable. Disagreement with that analysis is of no moment.[9]

Plaintiffs also take issue with ED's conclusion that the text of both Titles VII and IX contains no exception for sex discrimination associated with an individual's sexual orientation or gender identity, because "[a]n exception for such discrimination would be necessary only if the statutes otherwise prohibited it." Pls' Opp. at 31. Plaintiffs' argument misses the mark. As the NOI explained, the *Bostock* Court observed that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." Compl. Ex. A at 2. The NOI further noted that Title IX must be accorded a "sweep as broad as its language." *Id.* (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)). ED reasonably concluded that its textual analysis of Title IX was supported by the lack of any carve-out of coverage for gender identity and sexual orientation discrimination.

[9] Plaintiffs further criticize ED's conclusion that both Titles VII and IX "specifically protect individuals against discrimination" because of the alleged textual differences between the two statutes. Pls' Opp. at 30-31. But Plaintiffs acknowledge that both statutes serve this same general purpose, *id.* at 30, and as discussed above, it is not arbitrary and capricious for ED to apply the same textual analysis as the Supreme Court in *Bostock*.

Plaintiffs next challenge ED's conclusion that Title IX unambiguously prohibits sexual orientation and gender identity discrimination. Pls' Opp. at 31. They contend that because Title IX permits sex-separated living facilities, this "precludes any conclusion that the statute *unambiguously* prohibits covered programs from requiring individuals to use living facilities that correspond to their biological sex." *Id.* As discussed *infra*, p. 17-18, ED reasonably concluded, as the Court did in *Bostock* with respect to Title VII, that Title IX prohibits sex discrimination on the basis of gender identity and sexual orientation, and that "to the extent other interpretations may exist, this is the best interpretation of the statute." Compl., Ex. A at 2. Plaintiffs' arguments therefore are misplaced.

Finally, Plaintiffs' argument that ED's reliance on lower-court decisions holding that Title IX prohibits discrimination on the basis of sexual orientation and gender identity was erroneous lacks merit. Pls' Opp. at 31. Plaintiffs' disagreement with the Fourth Circuit's decision in *Grimm* does not make ED's citation to that opinion arbitrary and capricious. Nor does the fact that, after ED issued the NOI, the Eleventh Circuit revised its opinion in *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020). In addition, Plaintiffs' claim that ED "failed even to mention *Meriwether* or any other decisions that would undermine its Interpretation," Pls' Opp. at 31, also fails to establish that the NOI is arbitrary and capricious. *Meriwether* did not address the scope of sex discrimination in Title IX, *see Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), and there were no contrary cases to discuss in the NOI because no courts have agreed with Plaintiffs' argument. Motion at 19. Plaintiffs did not address, much less respond to, these arguments.[10] Plaintiffs fail to establish that ED's interpretation of Title IX was contrary to law.

[10] Plaintiffs also mistakenly criticize ED for failing to mention that *Bostock* proceed[ed] on the assumption that 'sex' . . . refer[s] only to biological distinctions between males and females." Pls' Opp. at 32 (citation omitted). ED directly addressed this issue in the NOI. Compl., Ex. A at 2 n.1.

F. The Challenged ED and DOJ Documents Do Not Violate the Constitution.

The ED NOI and ED/DOJ Fact sheet do not violate the Spending Clause because recipients of federal funding 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. Motion at 20.

In response, Plaintiffs contend that ED's interpretation of Title IX failed to put them on notice that federal funding was conditioned on them not discriminating on the basis of gender identity or sexual orientation. Pls' Opp. at 33-34. Plaintiffs' argument fails to acknowledge, let alone dispute, that "[b]ecause 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." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Indeed, given the breadth of Title IX, under Plaintiffs' theory Title IX would be completely unenforceable against the states because it does not address with any specificity the conduct covered by the statute. And Plaintiffs fail to address, let alone distinguish, this case from cases where the Supreme Court has interpreted Title IX to include diverse forms of discrimination, such as student-on-student harassment and retaliation, without running afoul of the Spending Clause. Motion at 21 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Jackson*, 544 U.S. at 182).[11] Nor do Plaintiffs address, much less challenge, *Grimm*'s rejection of the precise Spending Clause argument Plaintiffs raise here. *Id.* at 20-21.

Plaintiffs further contend that ED's interpretation of Title IX violates the Spending Clause because it "uses the threat of withholding substantial federal funding to coerce Plaintiffs into adopting

[11] Plaintiffs contend that "agencies may *not* cure the unconstitutional ambiguity of a statutory condition." Pls' Opp. at 34 (emphasis in original). Even if true, this argument is irrelevant since ED concluded that Title IX unambiguously prohibits discrimination based on sexual orientation and gender identity. Compl., Ex. A at 1 ("As . . . in *Bostock*, this interpretation flows from the statute's 'plain terms'"); *id.* at 3 ("After reviewing the text of Title IX and Federal court's interpretation of Title IX, the Department has concluded that the same clarity exists for Title IX.").

the agency's preferred policies." Pls' Opp. at 34-35. Plaintiffs argue that Tennessee is at risk of losing both future and existing funding as a result of the challenged interpretation, and that this amounts to coercion. *Id.* at 35. As Defendants explained, coercion may occur when Congress threatens funding as to an old and large program to force states to participate in a new one. Motion at 22. Plaintiffs have failed to cite to any authority to support the proposition that coercion may occur when an existing statutory condition is interpreted in a new factual context. Indeed, case law is to the contrary. *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). Thus, ED's interpretation does not amount to coercion.

Plaintiffs also argue that ED's NOI and the ED/DOJ Fact Sheet violate the Spending Clause because they "induce the States to engage in activities that would themselves be unconstitutional." Pls' Opp. at 36 (citation omitted). Specifically, Plaintiffs contend that ED's position that the failure to use pronouns consistent with an individual's gender identity could violate Title IX "runs headlong into the First Amendment," both in terms of free-speech rights and religious liberty. Pls' Opp. at 36. As an initial matter, Plaintiffs have failed to plead any concrete facts that would support the notion that the challenged documents will someday require them to violate some citizens' First Amendment rights, and any such challenge is unripe. Motion at 23.[12] More fundamentally, as Defendants explained in their Motion—and which Plaintiffs do not dispute—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

[12] Plaintiffs seek to excuse this failure by claiming that the conflict between the challenged interpretation and *Meriwether* is "as 'concrete' as it gets." Pls' Opp. at 36-37. Plaintiffs seem to believe that *Meriwether* held that a prohibition on gender identity discrimination necessarily conflicts with the First Amendment As explained in Defendants' Motion, the Sixth Circuit made no such holding. Motion at 24. Plaintiffs' speculative claimed conflict lacks merit.

protected by the First Amendment, 34 C.F.R. § 106.6(d). Motion at 25. This further highlights the abstract and speculative nature of Plaintiffs' claimed constitutional injuries.

Plaintiffs also claim that the NOI and Fact Sheet usurp Congress's legislative authority. Pls' Opp. at 37. As Defendants have explained, ED's interpretation that Title IX encompasses 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 certain forms of retaliation. Motion at 25. In their opposition, Plaintiffs do not address *Jackson* at all, and contend that because *Bostock* was a 6-3 decision, the agency's interpretation represents an "unprecedented" intrusion. Pls' Opp. at 38. Again, this simply shows Plaintiffs' disagreement with *Bostock*, rather than any reasoned basis to conclude that the agency's interpretation usurps Congress's law-making function. And it is undisputed that Congress has given ED the power to promulgate interpretive rules, *see* 5 U.S.C. § 553(b)(A), which is precisely what it did here. Finally, Plaintiffs contend that Title IX "expressly allows regulated parties to maintain living facilities that are separated by sex." Pls' Opp. at 38. As discussed *supra* at 16-17, the challenged agency documents say nothing to the contrary.

G. The EEOC Document is not Contrary to Law.

Plaintiffs claim that the EEOC Document is contrary to Title VII because it unreasonably extends *Bostock* to new circumstances. Pls' Opp. at 38. This argument is premised upon the incorrect assumption that the EEOC Document purports to apply *Bostock* in the context of bathrooms, locker rooms, and so forth. But the EEOC Document makes clear that it is providing the "EEOC's established legal positions on sexual-orientation and gender-identity-related workplace issues," Compl., Ex. D at 3, which had been decided "[b]efore *Bostock*." *Id.* at 4. These interpretations have

long been upheld in case law.[13] The EEOC Document expressly states that its views about the application of Title VII to such situations is based on the EEOC's previous administrative decision in *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015), rather than on *Bostock*. Compl., Ex. D at 8. Plaintiffs' argument that the EEOC Document applies the reasoning in *Bostock* to circumstances not before the Court thus lacks merit.

Plaintiffs also recycle their argument that the EEOC Document violates Title VII by reframing it as a usurpation of Congress's lawmaking authority. Pls' Opp. at 39-40. For the same reasons that the EEOC Document does not violate Title VII, it does not violate separation-of-powers principles. They further argue that the EEOC Document unlawfully attempts to abrogate Plaintiffs' sovereign immunity, Pls' Opp. at 40. But Title VII itself abrogates the States' sovereign immunity, and *Bostock* held that Title VII's ban on sex discrimination encompasses discrimination on the basis of gender identity. Motion at 25. Plaintiffs argue that the EEOC Document improperly waives the states' sovereign immunity for Title VII violations beyond those discussed in *Bostock*. Pls' Opp. at 40. But as explained above, the EEOC Document does not purport to extend *Bostock*'s reasoning; rather, the EEOC Document explains the agency's long-held interpretation of Title VII as reflected in the EEOC's previous administrative decisions, which are consistent with *Bostock*.

[13] *See 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 Cnty., Ga.*, 140 S. Ct. 1731 (2020) (upholding the EEOC's interpretation of dress codes for transgender employees as reflected in the EEOC Document); *Roberts v. Clark Cnty. Sch. Dist.*, 315 F. Supp. 3d 1001 (D. Nev. 2016) (precluding transgender employee's access to bathroom corresponding to gender identity violated Title VII); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129-30 (E.D. Pa. 2020). *Blair v. Brooklyn Transportation Corp.*, 2018 WL 1581974, *6 (E.D.N.Y. 2018).

CONCLUSION

For the reasons stated in Defendants' motion to dismiss, as well as the reasons discussed above, Defendants' motion should be granted and Plaintiffs' complaint should be dismissed.

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Respectfully submitted,

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