IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

THE STATE OF TENNESSEE, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF EDUCATION, et al., Defendants.	)	Case No. 3:21-CV-308

MOTION HEARING
BEFORE THE HONORABLE CHARLES E. ATCHLEY, JR.

November 3, 2021
10:01 a.m.

APPEARANCES:

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(Proceedings commenced at 10:01 a.m.)

THE COURTROOM DEPUTY: All rise. Judge of the United States District Court. Hear ye, Hear ye, hear ye, this honorable court is now open pursuant to adjournment, the Honorable Charles E. Atchley, Jr. presiding. Please come to order and be seated.

THE COURT: All right. Good morning. Ms. Lanister, will you please call the case?

THE COURTROOM DEPUTY: Yes, sir. Civil action 3:21-CV-308, State of Tennessee, et al. versus U.S. Department of Education, et al.

THE COURT: All right. Thank you. Okay. First of all, enter an appearance. Who do we have over here?

MR. HEALY: Christopher Healy for defendants, and I'm here with Martin Tomlinson, my colleague.

THE COURT: Okay. Yes. I'm sorry we're in a different courtroom, and I'm used to the plaintiff being over here, but okay. So we'll just go ahead and finish it. Let's see. We have Mr. Healy and Mr. Tomlinson?

MR. TOMLINSON: Yes, Your Honor.

THE COURT: All right. Thank you. And on behalf of the plaintiffs?

MS. CAMPBELL: Your Honor, Sarah Campbell on behalf of the plaintiff states, and I have with me Matt Cloutier, Clark Hildabrand, and Travis Royer.

THE COURT: Okay.

MS. CAMPBELL: In the order that they're seated.

THE COURT: Okay. All right.

MS. CAMPBELL: Thank you, Your Honor.

THE COURT: Thank you. And on behalf of the potential intervening party?

MR. SCRUGGS: Jonathan Scruggs, Your Honor, on behalf of proposed intervenors, and with me is Hal Frampton, and next to him is Ryan Bangert.

THE COURT: Okay. Thank you so much. Okay. All right. First of all, a little housekeeping. When you're speaking, you can remove your mask if you want to. It's totally fine with me. As a matter of fact, it probably makes it a little easier for me to hear. If you want to keep it on, that's fine too.

All right. So we have here today, we're here on I guess a motion for a preliminary injunction, and then we have two motions to dismiss and then a motion to intervene. So I'm open to what, however the parties want to proceed, but what I propose is that we hear the plaintiff on their motions for preliminary injunction, hear a response from the defense on that, and then hear their motions to dismiss, so kind of all wrapped up in one; and then hear your responses on that, and then kind of give a little bit of opportunity if you want to add, and then we'll hear your motion to intervene, and then any

responses to that. Does that, orderly enough? Okay. All right. All right.

Well, thank you, all. I appreciate it. Let's go ahead and get started, and so I guess, Ms. Campbell, are you ready?

MS. CAMPBELL: I am ready. Would you like me to come to the podium?

THE COURT: Yes, please. Thank you.

MS. CAMPBELL: Okay.

MR. TOMLINSON: Your Honor, one other bit of housekeeping before we get started. With the Court's permission, Mr. Healy and I will be splitting up our argument by subject matter.

THE COURT: Yeah.

MR. TOMLINSON: Okay, and we'll cover that.

THE COURT: Yeah. Absolutely.

MR. TOMLINSON: Okay. Thank you.

THE COURT: And I assume -- I just started with you 'cause you're in the principle seat, but if other people are here to make arguments, other, that's totally fine.

MS. CAMPBELL: Thank you. I believe I'll be presenting all of our argument unless something goes awry, so.

THE COURT: Whenever you're ready.

MS. CAMPBELL: Thank you, Your Honor. Good morning, Judge Atchley. May it please the Court, my name is Sarah

Campbell. I represent the State of Tennessee, and I'm presenting argument on behalf of both Tennessee and the 19 other states that are plaintiffs in this action.

Plaintiff states brought this action because the United States Department of Education and the EEOC unilaterally rewrote the federal anti-discrimination laws they enforce, laws that affect employers and schools across the country by issuing guidance documents. In our constitutional structure, that's not how lawmaking is supposed to work. The states and Congress have lawmaking authority under our Constitution, and even when Congress delegates its lawmaking authority to administrative agencies, they must exercise that authority consistent with the Administrative Procedure Act. That didn't happen here, and the states' sovereign authority to enforce its own legal code was directly injured as a result. This Court should preliminarily enjoin enforcement of the agencies' unlawful guidance and the interpretations contained therein and deny defendants' motion to dismiss.

Contrary to defendants' arguments, their guidance does not merely implement the Supreme Court's *Bostock* decision. The Supreme Court could not have been clearer that its opinion in *Bostock* was limited to the question of whether firing an employee for being homosexual or transgender violates Title VII. The decision did not extend to other statutes such as Title IX and did not address distinct questions such as whether an

employer's bathroom or locker room policies or dress code policies constitute unlawful discrimination, and the Court's reasoning in *Bostock* does not compel or even support the agencies' new interpretation. The guidance documents are thus legislative rules that rewrite rather than interpret existing law.

The administrative and procedure, the Administrative Procedure Act and the Declaratory Judgment Act give plaintiffs the right to challenge those unlawful legislative rules now. Requiring plaintiffs to wait until the agencies have initiated enforcement actions as defendants would have it would put plaintiffs in the untenable position of having to choose between changing their laws and policies or risking significant civil penalties for the loss of significant federal funding. Plaintiffs aren't required to wait for the hammer to drop.

Unless the Court would prefer that I focus on specific questions, I'll begin by addressing jurisdiction and irreparable harm, then turn to the APA's final agency action and no adequate remedy requirements, and then briefly address our substantiate, procedural and substantive APA claims.

THE COURT: That will be fine. Focus on jurisdiction.

MS. CAMPBELL: Sure. I'd be glad to, Your Honor.

Plaintiffs easily satisfy Article III's jurisdictional requirements here. The Court explained in *Lujan* that where the plaintiff is the object of a challenged government action,

there's ordinarily little question that the action has caused that party injury and that a judgment preventing the action will redress it. That's exactly the situation we have here. Plaintiff states are targets of the regulation. We are entities that are subject to regulation under both Title IX and Title VII, so we easily satisfy Article III's standing requirements, especially given the special solicitude that this Court must afford to states under the Supreme Court's decision in *Massachusetts versus EPA*.

I'd like to start with the injury and fact requirement for Article III. We have satisfied that requirement, but because of several direct injuries, I want to begin with what we think are the most direct and concrete injuries here, and those are the injury to our sovereignty interests.

A long line of cases have allowed states to sue the federal government based on injuries to their sovereign interests. States have a sovereign interest in enacting and enforcing their own legal code, and here we cited in paragraph 99 of our complaint numerous laws including laws of Tennessee and many of the other plaintiff states that at least arguably conflict with the challenged guidance documents, both the Department of Education's Interpretation and Fact Sheet and the EEOC technical assistance document. There's nothing abstract or speculative about those injuries. Even if sovereignty may seem like an abstract concept, in some sense, I mean, this is, this

is direct interference with Tennessee and other states' ability to enforce its enacted laws. You don't get much more concrete than that, Your Honor.

I think defendants rely pretty heavily on *Massachusetts vs. Mellon*, but that case is easily distinguishable. I mean, first of all, I think that case has been limited narrowly over time and where the Court has recognized states' standing to sue to redress sovereignty injuries in a number of cases including *Massachusetts versus EPA* and earlier cases, but *Massachusetts vs. Mellon* also, it didn't involve any sort of direct interference with the state's ability to enforce its law. The Court said in *Mellon* that the challenged federal law did not require the states to do or to yield anything. No sovereign rights were actually invaded or threatened.

The same cannot be said here. Paragraph 99 identifies specific laws that plaintiffs will be unable to enforce if the challenged guidance is enforced against them, and really that injury is a present injury.

THE COURT: Is that, does -- for all states?

MS. CAMPBELL: Your Honor, there are -- the complaint I think includes laws for ten states we've cited, laws for a couple more states in our preliminary injunction reply brief. Kentucky also has some laws, so we don't have cited laws for every state; but under the Supreme Court's jurisprudence, when

you have a case like this which is just seeking equitable relief, it's not seeking any sort of individualized damages, the Court finds it sufficient that one plaintiff has standing and doesn't evaluate whether each and every plaintiff is able to independently establish standing.

And you know, a couple of cases that apply that principle are *Village of Arlington Heights versus Metro* which we cite in our preliminary injunction reply brief. That case in turn -- well, there's a later case that in turn cites *Village of Arlington* that's also highly relevant called *Boerne versus Flores*, and I think that case is particularly relevant because there it was a, there's a party who is seeking relief from an earlier judgment. The Court -- because of one, one of the parties that was seeking relief from the judgment had standing, that was sufficient. The Court didn't evaluate whether the other parties independently were able to satisfy standing, and there was also an argument there that the relief from the earlier judgment should be limited to that particular plaintiff that the Court had said established standing, and the Court rejected that argument because the claim was that the earlier judgment, the earlier district court order was inequitable. The claim implicated the orders in their entirety and not solely as they ran against that one party, and we think that same principle applies here because the remedy under the APA is that the challenged agency action be set aside and that the

plaintiffs are all advancing the same arguments for equitable relief against that challenged agency action.

So we have concrete sovereignty injuries. Those are really a present injury. That doesn't depend on whether the defendants ultimately enforce the challenged action. That is because we have these, this guidance out there that purports to speak with the force of law, that is already injuring plaintiff states. That's creating regulatory uncertainty for entities within the state that need to comply with both state law and what the agencies view as the proper interpretation of federal law.

I'll just give you a couple of cases that recognize sovereignty injuries and didn't even engage in the analysis as to whether there's a credible threat of enforcement. It's two Fifth Circuit cases, *Texas versus United States* which was the state's challenge to DAPA. And there, the Court recognized that because DAPA forced Texas to choose between incurring costs and changing its fee structure for driver's licenses and being pressured to change state law, that constituted an injury, and the Court, you know, didn't engage in any sort of inquiry about whether there was a credible threat of enforcement.

And then *Texas versus EEOC* which is a later Fifth Circuit case, 2019, relied on in part on the Texas, earlier *Texas versus United States* case, the guidance -- it was a challenge to an EEOC guidance document, similar to in this case.

It imposed a regulatory burden on Texas to comply with the guidance to avoid enforcement actions, and it pressured Texas to abandon its laws and policies. I think that same thing applies here, but even if the Court needs to engage in an inquiry about whether there's a credible threat of enforcement, that creates an injury, an imminent injury, that standard is met here.

The Sixth Circuit in *Online Merchants Guild* discussed several factors that the Court should look at to determine whether there's a credible threat of enforcement, and all of those, several of those here point in favor of finding a credible threat.

Most importantly, the defendants have not disavowed any intent to enforce. Their argument boils down to this, that, well, they haven't brought an enforcement action yet, but it can't be the case that we have to wait until there is a pending enforcement action to challenge the guidance. I mean, that would defeat the very notion of pre-enforcement review, Your Honor.

THE COURT: Well, have they done anything at all though? I mean, have they, have they threatened to enforce? Have they communicated or sent a letter or done anything other than just, you know -- I'm not aware of them having done anything to take a step towards enforcement.

MS. CAMPBELL: Well, Your Honor, the guidance itself, if you look at the Department of Educational's Interpretation

that was published in the federal register and the letter that was sent to educators, it says that they will fully enforce this, their interpretation of Title IX to prohibit discrimination based on gender identity and sexual orientation. So from their own mouths, they have said they will fully enforce it. They have -- sorry, Your Honor. Go ahead.

THE COURT: No. I'm just listening to you and I'm thinking, and I understand that, I do; but I guess what I'm asking is is they haven't yet, so is it ripe?

MS. CAMPBELL: We believe it is ripe because there is a credible threat of enforcement. Again, we don't have to wait until there is an actual pending action. They haven't disavowed enforcement. They have taken actions consistent with enforcement. They filed a Statement of Interest in the --

THE COURT: What --

MS. CAMPBELL: -- action in West Virginia challenging West Virginia's transgender participation in sports law, taking the position that that law violates Title IX, that -- and if you look to similar guidance that was issued during a previous administration, that guidance was enforced. I think that also provides an indication of a present intent to enforce this.

THE COURT: So what does the law say about that?

MS. CAMPBELL: About -- I'm sorry, Your Honor?

THE COURT: About, about whether or not that's enough to make this particular issue ripe for us here today.

MS. CAMPBELL: We believe that it's enough. I mean, there are several factors that the Sixth Circuit considers, but none of those factors is dispositive. It's really a multi-factor analysis. I think that the fact that the department itself has said it intends to fully enforce and the EEOC has also, you know, invited complaints to be filed based on this guidance, I think the fact that you have the agencies themselves saying they're going to enforce. We've heard nothing from defendants --

THE COURT: I'm sorry. I didn't mean to interrupt you.

MS. CAMPBELL: Go ahead.

THE COURT: Has anyone filed a complaint with the EEOC?

MS. CAMPBELL: Not that I am aware, but I wouldn't necessarily know about all those complaints.

THE COURT: Just because they're confidential.

MS. CAMPBELL: That's correct, Your Honor. That's correct, so I think that it's highly significant here that defendants have not disavowed enforcement. All they've said is that there is no pending enforcement action, but the whole point of pre-enforcement and review and the ability to obtain a preliminary injunction is that when there's a credible threat of enforcement, challenging parties should not be put to the choice of either, either, you know, abandoning their laws and complying

or facing really significant penalties; and the penalties here are steep, but you know, could include in the Title IX context loss of the state, all the state's federal educational funding which in Tennessee is 20 percent of the state's entire education budget. I mean, that is, that is significant.

And you know, if you look at how these typically play out and we've cited, you know, just a search from the OCR database, you know, looking at what happens when investigations are launched, in almost every case, the regulated entity ends up caving and agreeing to the department's interpretation because what's at stake is so significant. And I think especially given that, that the agency really uses guidance in a way to force compliance, pre-enforcement review is particularly appropriate here.

We have asserted some other injuries, Your Honor. I think the sovereignty injuries are certainly the most direct. We do have, you know, the potential loss of federal funding is of course a financial, significant financial injury. Financial harm is concrete, and you know, we also have asserted parens patriae theory of harm to our citizens. I don't think the Court needs to reach that necessarily. I think our sovereignty injuries and financial injuries, and the financial injuries also include potential compliance costs. I think all of that is more than sufficient to satisfy the injury and fact requirement, Your Honor.

THE COURT: So, and I understand what you're saying, and but they don't take the money away immediately, right? So if they went forward with something, you would have an opportunity then to address it.

MS. CAMPBELL: That's right.

THE COURT: And before the money would be lost.

MS. CAMPBELL: That's correct, Your Honor, but I think, you know, that's also the case in other cases the Court has considered where, like, such as *Sackett*. I mean, we're now getting into the adequate remedy at law requirement under the APA a little bit, but you know, I think the fact that you could raise this eventually as a defense at any action is not an adequate remedy when, you know, especially in context like this where the very bringing of the enforcement action or launching of an investigation itself has a chilling effect and a coercive effect that, I mean, forces or at least strongly encourages regulated parties to simply cave and change their laws or change their policies and agree with the agencies' interpretation. And I think when the penalties are so significant, that's what you see, and I think that does make pre-enforcement review here critical, just critically important to enable a meaningful challenge to the guidance.

I do want to address since we're here on a preliminary injunction motion, not just the concreteness and imminence of the injuries but also why this is irreparable harm since that is

of course is a requirement for getting a preliminary injunction.

THE COURT: Indispensable.

MS. CAMPBELL: Yes, Your Honor, and I do think we've met that requirement here. Sovereignty injuries are by their nature irreparable harms, and there are several decisions recognizing that. We've cited some in our briefing. The *Kansas versus United States* is a Tenth Circuit decision that deemed loss of sovereign interests irreparable. There's also a district court decision out of the Southern District of Georgia that arose and the challenge is to the Waters of the United States rule that granted a preliminary injunction based on the loss of sovereignty in that case being an irreparable harm. So the same sovereignty interests that give us standing I think also provide or satisfy the irreparable harm requirement.

Now defendants have pointed out that, that the threat of irreparable injury also needs to be certain and immediate I think for the same reasons that we can show -- well, let me step back for a second. I think there are a couple different reasons we satisfy that. As I explained earlier, the harm to our sovereignty is already occurring. We are already, you know, facing pressure to change our laws and policies. There is already regulatory uncertainty being created by the conflict between this federal guidance and what our state laws require. That injury is already occurring, but you know, when you combine

that with the enforcement actions that are threatened, even though we can't say precisely when that may happen, we do know that it's imminent, and I think it satisfies that certain and immediate requirement for irreparable harm. And I think that's, I think it's important just to reiterate the principle that we don't have to wait for the hammer to drop. I think if we, if there hasn't been any disavowment of enforcement and it's only a matter of when, given what's at stake here, we've satisfied that certain and immediate threat of irreparable harm requirement to obtain preliminary relief.

Your Honor mentioned ripeness, and I do just want to note that the prudential ripeness concerns that defendants have argued at points in their brief are just that, they're prudential. The Sixth Circuit has proceeded to address the merits of cases even when there are prudential ripeness concerns, and the Supreme Court has cast a lot of doubt of course on those prudential ripeness factors, whether the issues are fit for judicial review and whether there's hardship to the parties; but even if the Court were to consider those issues, I think we, this case is ripe, both for Article III purposes and prudentially.

The issues here really are legal in nature. I mean, the defendants have said, well, you know, this, adjudicating these things could require the consideration of specific factual circumstances, but they don't point out really any facts that

could change their conclusion on any of these issues, and really that's one of the problems. From our perspective, that's one of the problems with the guidance is that it takes these kind of blanket, hard-line positions when the facts should matter, and the challenge is to what the agencies have said in this guidance. It's not to, you know, ultimately what these particular adjudications will play out. Our challenge is to the fact that the guidance has taken these positions in a way that speaks with the force of law to regulated entities, and so those issues are purely legal. And we satisfy the hardship requirement because we, as I've explained, we face significant financial penalties if we choose not to comply with the guidance.

Unless the Court has other questions about jurisdiction --

THE COURT: I may come back to it.

MS. CAMPBELL: Sure.

THE COURT: I am going to come back to it, but please go on.

MS. CAMPBELL: Sure. Thank you, Your Honor. I will turn to the APA's finality and no adequate remedy requirements.

I don't think there's any dispute here that the first *Bennett* prong for final agency action that it's, the challenged action is the consummation of the agencies' decision-making process is satisfied. I don't read the defendants' briefs to

dispute that at all, so really where the dispute lies is on the second *Bennett* requirement which is that the challenged action create rights or obligations for the parties or that legal consequences will flow from that action.

The Supreme Court and the Sixth Circuit have emphasized that this is a pragmatic and flexible inquiry, and the courts have applied it in that way, particularly if you look to the D.C. Circuit's case law on that second *Bennett* prong. So the, that finality requirement is met when an agency announces its definitive view of the law and warns regulated parties that they'll face penalties if they fail to comply. It doesn't matter what the agency says, how it labels its guidance. The inquiry is a pragmatic one that determines, you know, what is the practical effect on the ground, and we think that that effect here clearly is to create legal consequences for parties and to essentially order them to comply or else.

So we believe that final agency action requirement is met, and we've talked a little bit about what language in the challenged actions support that view. I think, again, in the Interpretation and Fact Sheet, the Interpretation states that, "OCL will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity and that this interpretation will guide the department in processing complaints and conducting investigations."

The EEOC document explains what the *Bostock* decision

means for LGBTQ+ workers and all covered workers and for employers across the country. That's what the document itself states, so there are, I think it's clear that what the intent was here with these documents. You know, other language in the documents notwithstanding was to, was to speak with the force of law on this issue.

We've, you know, cited cases in our briefs involving similar circumstances in which final agency action was recognized when you had this kind of choice between complying with the guidance or facing enforcement penalties. That same situation exists here and we think satisfies that requirement.

On the no adequate legal remedy prong, *Sackett* I think is our best case there. It makes clear that regulated parties aren't required for an agency to drop the hammer, so the fact that a regulated agency may at some point be able to raise a defense in an enforcement proceeding is tantamount to an adequate remedy. Sorry, Your Honor. Go ahead.

THE COURT: No. I was just thinking. I was just trying to remember *Sackett*. You put a lot of cases in there.

MS. CAMPBELL: I did. I'm sorry, Your Honor, so *Sackett* was a Supreme Court decision involving a decision by the Army Corps of Engineers, and the, there was an ability for the regulated party to, if an enforcement proceeding was eventually brought to raise its arguments in that enforcement proceeding, but the problem was the regulated party couldn't initiate that

proceeding. So as the Court put it, you know, they were facing a situation where they had to just wait for the hammer to drop, and you know, we think that's analogous to this situation where the state can't initiate any investigation, or you know, we can't initiate any enforcement proceeding. We are just faced with having to wait until, until the Department of Education or the EEOC decides to go forward.

So they make two, the defendants make a couple of different arguments, so one relates to the adequate remedy requirement under the EPA, and then they also argue that there was a Congressional intent to preclude judicial review under the APA. So those are I think two slightly different arguments although I think they get conflated at times, so we think the adequate, no adequate remedy requirement is met here. We also think that there is absolutely no Congressional intent to preclude review under the APA.

The APA's judicial review provisions must be construed broadly, and the Congressional intent to preclude review under the APA must be fairly discernable from the statute's text structure and purpose. There is nothing in Title IX's text -- and I should say, they only make this argument with respect to Title IX. There's nothing in Title IX's text structure or purpose that suggests an intent to preclude judicial review. They point to this, you know, administrative scheme that exists for terminating federal funding, but if you look at the statute

itself, Title IX itself, the provision that addresses judicial review, it's § 1683. It says that, "Any department or agency action taken pursuant to Section 1682 shall be subject to such judicial review as may otherwise be provided by law for similar actions by such department or agency on other grounds."

If you then go to § 1682, § 1682 covers several different kinds of agency actions. It's not just talking about funding termination decisions. Section 1682 includes the issuance of rules and regulations and decisions to terminate funding. These administrative procedures that apply to funding termination decisions are distinct from, you know, any review that would be provided for the issuance of rules and regulations, and we cite a couple cases in our -- well, one case in particular, the *Romeo* case. That was a district court in Michigan that considered specifically whether a rule or regulation promulgated by the Department of, I think it was Education, Health, and Welfare at the time, but whether that could be reviewed under the APA, and it held that it could. That decision was affirmed by the Sixth Circuit, and I think that analysis in *Romeo* is correct. It kinds of walks through these provisions, § 1683 and § 1682, but the judicial review that is provided for the issuance of rules and regulations is the APA. That's what governs there, and this separate proceeding for the funding termination decisions which really is set up mostly through regulations and not the statutory text

itself doesn't apply.

Defendants rely on the *Board of Education of a Highland Local School District* case, Ohio District Court decision for the contrary conclusion. We just think that Court's analysis was really flawed there, and so would point the Court to the *Romeo* decision.

There's also a Second Circuit decision that we cite in a slightly different context involving Title VI but very similar provision where it says, similar judicial review provision to § 1683. And there, again, when it was an issuance of a rule or regulation, it was the APA that provided the judicial review procedures for that action.

So I think that's all I have for now on the APA's cause of action requirements. I'm happy to address our procedural and substantive APA claims --

THE COURT: Okay.

MS. CAMPBELL: -- if the Court wishes.

So I want to start with our argument that these guidance documents fail to comply with the APA's notice and comment requirements, and in the case of the EEOC, that this just exceeded the EEOC's statutory authority altogether because the EEOC lacks authority to issue substantive rules, so those claims really turn on whether these guidance documents are interpretive rules or instead legislative rules. Legislative rules are subject to notice and comment under the APA. We think

that these guidance documents are substantive rules.

Now the defendants say they're just implementing *Bostock*, they're just interpreting and restating, you know, what the statutes and regulations and binding precedent already say. That's simply not the case. *Bostock* did not address these issues. What *Bostock* said was that when someone, when an employer fires an employee because of the employee's homosexual or transgender status, that is necessarily discrimination based on sex. The Court assumed that sex means biological sex, anatomical differences between men and women; but in that particular case of firing someone because of homosexuality or transgenderism, that is, that is necessarily discrimination based on sex. So the Court did not say that Title VII writ large prohibits discrimination based on sexual orientation and gender identity. It was determining whether a particular fact pattern necessarily entailed discrimination based on sex.

So I want to walk through both I guess why the department's Interpretation and Fact Sheet is contrary to Title IX and why the EEOC document is contrary to Title VII. Those are slightly different arguments.

With respect to Title IX, *Bostock* of course didn't address Title IX. That wasn't even a statute that was at issue, and as the Sixth Circuit has recognized including recently in the *Meriwether versus Hartop* decision, Title IX and Title VII are different in important respects; and I think the most

important respect is that in Title IX itself, Section, the statute itself, § 1686, there is a safe harbor that specifically provides that nothing in Title IX should be construed to prohibit educational institutions from maintaining living facilities that are separated by but based on the different sexes.

Now at the -- as we've explained in our briefing, I think at the time that regulation was issued or at the time the statute was issued and then subsequent implicating regulations were issued, what everyone understood sex to mean was biological sex, physiological, you know, differences between men and women, and the Court certainly didn't hold otherwise in *Bostock*. It proceeded on that assumption that sex in Title VII meant biological sex.

So I think in light of that specific statutory authorization for regulated entities to maintain living, separate living facilities for the different sexes, it just doesn't in any way, you know, follow from that that the, that the department's interpretation of Title IX could be correct. It is changing the law, not just interpreting the law.

THE COURT: Well, if Congress means something different, they can change it, right?

MS. CAMPBELL: Congress certainly could change it, but the agency can't.

THE COURT: No, I understand.

MS. CAMPBELL: Yeah. Your Honor, Congress certainly could change it if it wanted to, but it hasn't, and it was well aware of these issues involving bathrooms and locker rooms and athletic teams. It was aware of all of those issues when it enacted Title IX, and it put in this safe harbor for that reason, and you know, directed the agency to come up with rules governing athletic teams. And one of those regulations that was promulgated shortly after Title IX's enactment specifically authorizes regulated entities to maintain athletic teams separated by sex when it involves competitive skill, to get on the team or it's a contact sport.

So that -- those features of Title IX I think make the department's interpretation, particularly as it applies to restrooms and lockers rooms and other living facilities and athletic teams just untenable. It is a rewriting of the statute, a substantive change in the law that makes this a legislative rule, not an interpretive rule; and because of that, the department, if it was going to do this, it needed to go through notice and comment. I mean, we don't think even after going through notice and comment this would have been valid because it's so contrary to the statutory text; but at a minimum, they needed to go through notice and comment rulemaking, and you know, these issues are incredibly sensitive issues. They affect a lot of individuals. They affect parents and kids and students, you know, across the country. This is

exactly the sort of thing that would have benefited from input from the public through the notice and comment procedures, but you know, the department didn't do that. They just issued this unilaterally and expected regulated entities to fall into compliance.

We also think that the EEOC document is contrary, sorry, the EEOC technical assistance document also is a substantive rule, not just an interpretive document. Again, *Bostock* didn't address this issue of bathrooms and locker rooms. That was very much on the minds of the justices. If you listen to the oral arguments in *Bostock*, if you look at the briefs, I mean, everyone was aware that there was this issue lurking involving bathrooms and locker rooms, and the Court's very careful not to address that, and it doesn't kind of logically follow from the Court's reasoning that transgender individuals must be required to use the restroom that, or locker room that corresponds to their gender identity.

Under Title VII, discrimination is treating someone who's similarly situated worse. It's disadvantaging someone, so there has to be a disadvantage, and there has to be a similarly-situated comparator, and I don't think you have either in the restroom and locker room context. You know, of course employers have for decades maintained separate facilities. You know, there are numerous court decisions recognizing that that's really needed for privacy, that people prefer that even though

you are separating people based on sex. So it's differential treatment based on sex, but it's not discriminatory because you're not disadvantaging anyone. And even if a particular transgender individual felt that he or she was being disadvantaged by not being able to use the restroom of their choice, to show discrimination, you still have to show that there are similarly situated, they're being treated worse than a similarly-situated individual; but individuals with different anatomy, you know, with a different sex at birth are not similarly situated for purposes of intimate facilities like restrooms and locker rooms.

I think what *Bostock* recognized is that they are similarly situated when, you know, you're talking about hiring and firing decisions when there's not any sort of bona fide occupational qualification. So while they may be similarly situated in that context, this is a different context.

THE COURT: And I understand that. So --

MS. CAMPBELL: So because this is a, really a change in the law, a substantive change in the law that imposes new obligations on regulated entities, it's a substantive rule. The EEOC doesn't even have authority to issue substantive rules, so that alone means that this, this technical assistance document should be satisfied.

THE COURT: Well, a board can do it, right?

MS. CAMPBELL: Not even -- the EEOC, even if it's the

commission that does it, does not have authority to issue substantive regulations. Now, by its regulations, if something, I guess there's some daylight where there could be something that is nonsubstantive but still a significant guidance document. That's the terminology that the EEOC's regulations use, so in that situation, when it's a significant guidance document, that's supposed to have full commission approval, and it's also supposed to be subject to notice, a 30-day notice and comment period. So even if it's not kind of substantive in the legislative rule sense, we think that it's certainly a significant guidance document that should have, that should have satisfied those requirements, and defendants have never argued that it did.

Our, I really think our substantive claims are explained fully in our briefs. If the Court has questions about those, I'm happy to address them or of course any other questions that the Court may have on our other points.

THE COURT: Not right now, but I guess we'll hear what they have to say.

MS. CAMPBELL: Thank you, Your Honor.

THE COURT: Thank you.

MR. HEALY: Your Honor, I'm prepared to address the merits questions, and Mr. Tomlinson is prepared to address jurisdictional questions. Do you have a preference in terms of order?

THE COURT: Let's start with the jurisdiction and then go to the merits unless you've got a good reason to go otherwise.

MR. HEALY: The only reason I was maybe suggesting going first is that I do think it is sort of important to understand why the government's position is that the merits of the case are somewhat uncontroversial. I know it's somewhat unusual to not start with jurisdiction first, but I think it might be helpful --

THE COURT: Sure.

MR. HEALY: -- to clear the air first.

THE COURT: All right.

MR. HEALY: So the reason I suggested starting with the merits first is that I think it's important to understand here what is being challenged in this case and what is not actually being challenged in this case. This is a challenge to these specific guidance documents that do a specific, narrow thing which is apply the reasoning of *Bostock* which was very clear and defined a specific textual language within Title VII to the Title IX context which is extremely similar. And so *Bostock* as the Court is I'm sure aware applied the, in the context of Title VII what the phrase "because of sex" means and determined without deciding what the word "sex" means that that phrase "because of sex," the sex discrimination prohibition in Title VII encompassed gender identity and sexual orientation

discrimination.

It should be entirely uncontroversial to apply that language in extremely similar context in Title IX. The Sixth Circuit has numerous times as cited in our briefing looked to Title VII as the application of Title IX, and the reason I wanted to start with this is because the states' fundamental argument about why this language should be different is that the words "because of" and "on the basis of," they purportedly claim this has some different meaning because of the word "the," and I think that's just very obviously wrong. The basis doesn't necessarily mean there's only one basis. One can say the basis of X, Y, and Z, and it's very clear that that doesn't only require a singular basis.

THE COURT: They didn't talk about Title IX.

MR. HEALY: It's correct that the Court didn't talk about Title IX, but this is what we do as lawyers. We have to apply the reasoning of Supreme Court cases to analogous situations, and that's exactly what the department has done. And I think it's a misinterpretation of these documents and this lawsuit to suggest that this is a challenge to the agency's interpretation of how this would apply in scenarios regarding bathrooms or sports teams or living facilities and the like. It can't be arbitrary and capricious or unlawful for the agencies to take the narrow view and answer the question of what the sex discrimination prohibition in Title IX means without answering

the more complicated questions down the road of how the facts would apply in those particular circumstances.

And the fact remains that these contexts are extremely similar, and there's Sixth Circuit case law as demonstrated in the NOI and in the other documents that Title VII is frequently looked to to determine what Title IX means. And the Supreme Court itself, the Supreme Court itself in *Bostock* referred to by my count, I may not be exactly right on this, something like 33 times they used interchangeably the phrase "on the basis of" and "because of sex."

And so I think that's really important for the Court to be aware of as a background before we get into the many jurisdictional reasons why we don't think there's standing or ripeness as Mr. Tomlinson will address.

I'd also like to also address --

THE COURT: Real quick. Didn't the Supreme Court specifically say we do not purport to address bathrooms, locker rooms, or anything else of the kind?

MR. HEALY: Yes. That's absolutely true, but just because the Supreme Court's holding didn't apply to bathrooms, it doesn't mean that the reasoning wouldn't also apply in a different statute that's otherwise identical in many ways with respect to the narrow question of what sex discrimination means in Title IX. And with respect to the fact that Title IX has these other provisions of having to do with bathrooms and living

facilities and the regulations and in the statute, these documents just don't answer that question. They don't make that next step about how it would apply in particular factual circumstances.

And so that's why I think there is, the suggestion by the states that this amounts to creating new law or rewriting Title IX is just incorrect, and the Supreme Court in the *Dodds* case recognized that there is a, no likelihood of success on the merits of a PI brought by the school board where in large part due to the fact that the Sixth Circuit has expressly recognized that gender nonconforming individuals including transgender individuals can state a Title IX claim, so I just wanted to make that argument at the outset.

With respect to the EEOC document, plaintiffs argue that this document is an improper substantive rule, but the guidance on its face expressly disclaims the force and effect of law, and if you actually look at the document --

THE COURT: I know, but just because they say that doesn't mean it's so, right? I mean, you have to -- I mean --

MR. HEALY: I understand that. If you actually --

THE COURT: I'm not -- I'm not -- sorry to interrupt you, but I'm not saying that this is what they did, but they could do that just for the purpose to try to offer them some protection when they did want to do that.

MR. HEALY: I understand that, and I agree with you

that labels aren't dispositive here, but if you actually look at the document and see what the document does, the document says we will explain how, what the *Bostock* decision means in Title VII, and the EEOC document has to do with Title VII just as *Bostock* had to do with Title VII; and it explains its prior administrative decisions having to do with gender identity with respect to bathrooms and other context which are old decisions. One is the *Macy* EEOC case from 2012, and one is the case from 2015, the *Lusardi* case. It doesn't create new law, and it certainly isn't creating a substantive rule. So if you actually look at the substance of what the document says, I think you'll see.

THE COURT: I never thought I would get to the point where I thought of a 2012 case as old law.

MR. HEALY: These days, it's suddenly 2021. I don't know how we got here. The courts have routinely found that EEOC's interpretation of substantive provisions of Title VII lack the force of law, and we cited cases to that effect at ECF 49-1 at page 19. For similar reasons, is not significant guidance that would need to be voted on by the entire commission. As I've just described, this doesn't create new law or new policy. It simply states the holding of *Bostock*, explains what it means to the public, and applies these prior administrative decisions, so it is something that was properly promulgated by the chair.

THE COURT: But I guess in their mind, it didn't even rise to the level of the whole commission to vote on it?

MR. HEALY: Well, unless it is significant guidance, it need not be voted on by the whole commission. I think the reason it wasn't controversial in this way is because of the fact that it does something that is on its face very uncontroversial and that it describes what the *Bostock* decision does and it describes these prior administrative decisions that have already been the view of the EEOC for a number of years.

THE COURT: Is it controversial to get 20 states to sue them?

MR. HEALY: Politically controversial, but legally uncontroversial in our view.

I'd like to address some of the arguments with respect to final agency action. We heard from the states just now about the test from *Bennett versus Spear*. We agree with the state that this is a consummation of agencies' decision-making process, but we disagree with the states with respect to whether this actually creates rights or obligations.

I'd refer Your Honor to the *Center for Auto Safety* case from the D.C. Circuit which we cited in our briefing. The D.C. Circuit there examined letters that were issued to automakers that prescribe guidelines for how those automakers could issue regional recalls for automobiles, and the letter stated a set of criteria that if the automakers generally follow

that criteria, the agency believed that it would not have legal consequences. And the D.C. Circuit said, well, this wasn't final agency action because it simply stated a set of criteria, but it only stated what the agency believed the legal effect would be as a general matter. It didn't state specifically what the outcome would be in particular factual circumstances.

And if you look at the Notice of Interpretation, take that for an example, in the final several paragraphs of that interpretation, on page 4 of Exhibit 3 to the complaint is a good place to find that, it makes very clear that it's not, the interpretation is not stating what the outcome would be in particular factual circumstances having to do with bathrooms, for example. It says specifically, "We will be applying these in specific factual circumstances, and we do not purport to determine the outcome through this interpretation."

I think it's legally incorrect to suggest that the agency need explain its views on every open legal question about what Title IX sex discrimination means at once in one document. The primary purpose of this document is to inform the public about its views about the sex discrimination prohibition portion of Title IX in § 1681 and not with respect to how that might interact with the living, living facilities carved out in § 1686 or how that might interact with its regulations. Those are questions that are permissibly, you know, left to another day in this particular set of fact circumstances where it may be very

relevant for the purpose of whether or not discrimination occurred, whether for example, you know, what set of individuals are, are the right comparators for the, for discrimination.

For example, a child may be required to attend a health class that discusses certain bodily functions in accordance with the particular body that they have rather than their gender identity. That might be a fact that the agency would consider when determining whether that policy a school had to require this child to attend health class would be permissible or not, and I use that just as a hypothetical example, but you know, the facts of these particular situations are very relevant here.

And the *Center for Auto Safety* recognizes that just because there may be some ancillary practical effect of a particular agency guidance document doesn't mean that that actually has a binding legal effect. In the *Center for Auto Safety* case, the Court recognized that the automakers may see this list of criteria and say, well, we certainly should comply with these criteria if this is what the agency believes the law means, but that didn't mean that that, those practical effects of bringing particular auto manufacturers into compliance meant there was actually a binding legal effect. And here as Mr. Tomlinson will discuss, there were many, will be many opportunities for any of the states that are subject to a Title IX investigation or enforcement action down the road to bring up

these issues and discuss them with, in the context of specific facts.

So this is not a final agency action. In contrast, the *Center for Auto Safety* case was a case like *Hawkes* which had to do with --

THE COURT: Hold on. I think they just went in the wrong courtroom.

MR. HEALY: It seemed like the wrong courtroom. So in contrast to the *Center for Auto Safety* case with a case like *Hawkes* in which the Supreme Court was looking at whether specific jurisdictional determinations under the Clean Water Act, and the Court noted that these jurisdictional determinations actually narrowed the set of plaintiffs who could be subject to regulations under the Clean Water Act and actually limited the potential liability of these particular entities.

Here, these documents are merely stating that as a general matter, sex discrimination prohibition Title IX should match the Supreme Court's reasoning in Title VII which as I mentioned as a legal matter, I think that should be uncontroversial; but it did something very different in the context of these jurisdictional determinations under *Hawkes* because that actually specifically narrowed the discretion of the particular agency as to how it could bring particular suits under the Clean Water Act.

Plaintiffs mentioned that they believe that particular

consequences plainly flow from, from these documents and that they will be coerced to comply.

THE COURT: Well, I mean, that's kind of the purpose, isn't it, putting this out there and I guess a shot across the bow?

MR. HEALY: I think I would disagree with that, Your Honor. I think the primary purpose of these documents is to inform the public about the agencies' view of the law, and I don't think that there's enough information in these documents to credibly determine how particular factual circumstances would play out. And if there are actual legal consequences to this document, those legal consequences will be consequences that flow from Title IX, not from these guidance documents.

In numerous instances in the briefing, they say, well, the states will have to comply with these guidance documents. That's not the case. These, the states will have to comply with Title IX, and to the extent the documents' interpretation of Title IX is incorrect and they can't actually persuade a court that this, this interpretation is correct, then there won't be any legal consequences whatsoever. So again, I think the important point here is that this needs to actually arise in a particular circumstance.

You'll notice -- the argumentation on why these are interpretive rules not subject to notice and comment is quite similar. You'll notice that in the states' briefing, they

consistently attempt to describe the documents as necessarily requiring certain things with respect to bathrooms and sports facilities and the like. For example, if you look at ECF 58 on page 23, they note that the documents announce the department's position that refusing to allow transgender students to use living facilities or compete on sports team consistent with their gender identity violates Title IX. Their briefing is replete with statements like these, and every time those statements are made in their briefing, you'll notice it doesn't appear with any citation, and the reason it doesn't appear with any citation is because that's not what these documents actually do.

I refer Your Honor to the *First National Bank versus Sanders* case on the question of interpretive guidance. There the Sixth Circuit determined what the definition of the phrase "default date" meant and SBA loans and determined that merely defining this term as it had in the long-standing way did not actually create new procedures or rules, and there you might even imagine that there would be stronger consequences because it actually, the definition of default date would determine what the payout was for SBA loans that, that were in default, but that's not what the Sixth Circuit found.

I'd also refer Your Honor to the *Equity in Athletics* case in the Fourth Circuit which had to do with Title IX and had to do with an agency's promulgation of guidance under Title IX

having to do with gender proportionality in athletics. And the Fourth Circuit there found that it wasn't a legislative rule because the agency wasn't actually required to promulgate this guidance, and I think the same thing is true here. The agencies were not required to issue these guidance documents. They could have simply proceeded to investigate allegations of gender identity or sexual orientation discrimination in the Title IX context, and if necessary, bring enforcement actions, but they chose to issue these guidance documents as a means of informing the public of what the agency's interpretations of the law are. And it's very important to the public interest that, that agencies be able to do that as a general matter without taking the specific steps of how the law would apply in particular instances to get at what the agency's interpretation is.

THE COURT: So we'll, could they have been motivated to do this to try to get the states to do something that they did not think legally they could get them to do later on or they might lose in Title IX lawsuits?

MR. HEALY: Well, certainly that's nowhere on the face of the documents that that was their purpose, and I have no reason to think that that was the purpose. I think that would merely be speculative. I see nothing in the record that that would suggest that that was the case.

I think that more likely the agencies' purpose was they had a Supreme Court decision that was precisely analogous

and applied it in a, in a nearly exactly analogous circumstance, and I think it's an important point that on this specific, narrow question which is the purpose of this lawsuit which is what does sex discrimination mean in Title IX, the prior administration's interpretation is on the same page. And if you look at, I believe it's Exhibit 2 to the complaint, you'll see that although that document takes other steps that these documents don't with respect to how it might apply in bathrooms and etcetera and in religious circumstances, they, the prior administration also agreed that the, in the Title IX context, sex discrimination includes, likely includes sexual orientation and gender identity discrimination.

I'd like to very quickly address the constitutional claims, the *Pennhurst* issues unless you'd rather I move on.

THE COURT: No. I think, I think it's a good time to do that.

MR. HEALY: Sure. Under *Pennhurst*, Congress must put states on notice that funding is conditioned upon compliance with certain standards, and the parameters of those standards can be permissibly set out in guidance or regulation, and we've cited the *Bennett* case for that. The -- all that's necessary is the existence and the basic nature of the condition, and that is easily met here. Indeed, any contrary conclusion would, would essentially mean that all interpretation, all prior interpretations of Title IX and Title VII would similarly fail

on the notice requirement.

For example, the, in the *Jackson* case, the Supreme Court noted that Congress didn't list any particular applications of the sex discrimination prohibition when it wrote Title IX, so its failure to mention discrimination based on sexual orientation or general identity does not create a notice problem. Certainly the states couldn't be making the argument that *Jackson* which defined sexual discrimination in Title IX to include retaliation, the states I imagine couldn't possibly be arguing that *Jackson* rendered Title IX unconstitutional, but that's essentially what they're asking this Court to conclude in the context of these guidance documents.

To hold, to -- in the states' view I think would require that all these developments of sex discrimination in Title IX over time, retaliation, deliberative difference, sex stereotyping, all these different ways that sex discrimination has been interpreted over the years would similarly be unconstitutional for lack of notice if the states' interpretation is correct.

I refer Your Honor also to the *Arlington versus Murphy* case having to do with IDEA. There was a *Pennhurst* violation because the statute did not even hint that expert fees were compensable under the IDEA. Here, in contrast to the *Arlington* case, there, the statute is ambiguous on its face. It simply says that there should not be discrimination on the basis of

sex, and for that reason, the Court has interpreted the term "over time" to mean different things; and the fact that, that that interpretation includes sexual orientation and gender identity discrimination doesn't create a *Pennhurst* problem.

Similarly, similar argument, this document does not impermissibly coerce the states. They provide no legal support for the proposition that coercion occurs where an old statutory condition is interpreted in a new context, and similarly, that would, that conclusion would require that a case like *Jackson* would have rendered Title IX unconstitutional because the statute doesn't say that retaliation is included within sex discrimination; and yet the Court found that retaliation is in fact included within sex discrimination, and there was no impermissible coercion in a case like *Jackson.*

With respect to the First Amendment and unconstitutional conditions claim, there is no unconstitutional condition here. That doctrine doesn't apply to cases between two sovereigns. There are two separate circuit courts that now agree with that, the *Koslow* case from the Third Circuit and the *Pace versus Bogalusa* case from the Fifth Circuit.

Even if that doctrine did apply, the states haven't actually identified how there is an actual First Amendment harm here. They merely point to the *Meriwether* case for the fact that a First Amendment claim might be stated on the, on the face of a complaint, but that was decided by the Sixth Circuit on a

motion to dismiss. And the negative implication of *Meriwether* is that under certain circumstances, there may be a conflict between the First Amendment interests and the government's interests under Title IX, and at summary judgment, it may not be that his First Amendment claim would have won out.

Finally, with respect to the separation of powers and sovereign immunity and Tenth Amendment claims, plaintiffs provide no reason why there's any more of a separation of powers problem than there would be in *Jackson*, unless you have questions about that.

I will turn this over to Mr. Tomlinson unless you have further questions for me.

THE COURT: Not at this time. Thank you.

MR. HEALY: I will also be handling the intervention motion later on.

THE COURT: Okay. Yes.

MR. TOMLINSON: Thank you, Your Honor. May it please the Court, Martin Mason Tomlinson for the United States.

Your Honor, with, with the Court's indulgence, I'd like to spend a few minutes talking about this process, how the process actually plays out when there's a Title IX complaint that comes into the Department of Education's Office of Civil Rights against a recipient of federal funding, because Ms. Campbell repeatedly used this phrase they have to wait for the hammer to drop, invoking this proverbial hammer. And I know

we did talk about this in our, briefly in our opposition to the motion for PI, but I do think this touches on a lot of these jurisdictional arguments, the Article III, the ripeness, certainly the adequate alternative remedy. And so I'd like to walk the Court through that briefly, and I know the Court has a lot to get to today.

Your Honor, the operative statutory provisions here are 20 U.S.C. § 1682 and 20 U.S.C. § 1683. Title IX does require the Department of Education to enforce nondiscrimination provisions in the statute through an administrative process, and to do that, the Department of Education has promulgated a number of regulations that set forth these procedures, and that's 34 C.F.R. § 100.6 through 34 C.F.R. § 100.11. The administrative process generally starts by someone who believes they've been discriminated against by a Title IX recipient files a complaint with OCR, and that's governed by 34 C.F.R. § 100.7.

OCR then evaluates this complaint mostly initially for the threshold issues. There are certain regulations about timeliness, to look to whether the, whether there's actually a Title IX recipient involved in the complaint; and so there are, I believe there are certain conditions on if a minor is making the complaint, they have to have parental consent or parental notification, and so they examine it for procedural issues.

If they decide to dismiss the claim, they notify the complainant. If they decide it will, not to dismiss and they'll

open for investigation, they then notify both the complainant and the Title IX recipient that they are opening an investigation. They then request the appropriate information from the school, interview witnesses, and the complainant. This is still a fact-gathering posture, and then after all this, if OCR gathers this information and comes to the conclusion that this Title IX recipient is violating nondiscrimination provisions, there's then a statutory requirement under 20 U.S.C. § 1682 and 34 C.F.R. § 100.8 that they try to work out some sort of informal or voluntary compliance before taking any further action.

If they attempt to do that and are unsuccessful, if it is successful, they then monitor to ensure there's compliance and then provide them with a letter that the issue is closed. If voluntary compliance is unsuccessful, they then have two options. One, they can either refer it to DOJ to bring an affirmative action or they can initiate administrative enforcement proceedings, and it's at this step of the process that we actually talk about sort of an affirmative enforcement action, and that's governed by 20 U.S.C. § 1682 and 34 C.F.R. § 100.8(a).

If the administrative proceedings are initiated, the Title IX recipient is then entitled to a hearing before an ALJ, and if there's still an adverse decision there, they're entitled to an administrative appeal of that ALJ. And they can then --

if it's still an adverse decision after that, they can then seek a discretionary review by the Secretary of Education. And if after all that there's still an agency decision that, a finding of fact that there's been a violation of a Title IX anti-discrimination provision, the school then, the school or Title IX recipient then has the option of complying with that decision to still receive the funding.

If they still wish to contest it further, they then have the right to seek judicial review in an Article III court under § 1683. As Ms. Campbell noted, § 1683 actually contains an implicit reference to the judicial review provision for similar actions which is withholding a funding which is I think -- I apologize. Let me get this. 20 U.S.C. § 1234(g), 1234(g) actually sets forth the judicial, the exact judicial review provisions, and I believe it, it allows them to seek review of the final agency action in the Court of Appeals in which they are located within either -- sorry. Let me make sure I get this right. It's 30 or 60 days. I apologize for not having that handy, Your Honor. I believe it's 60 days. Yes, shall within 60 days of that action filed within the United States Court of Appeals.

And 20 U.S.C. § 1682, Your Honor, also contains a specific provision at the end of that statute that says the Department of Education cannot terminate funding until 30 days after reporting the final decision of termination to committees

of both houses of Congress and waiting 30 days.

And so when the plaintiffs, the plaintiffs invoke cases like *Sackett* which involved --

THE COURT: What you just walked through was the process when, for challenging the enforcement of a Title IX claim. What about, what about a state that wants to challenge these rules?

MR. TOMLINSON: Well, Your Honor --

THE COURT: This interpretation of the law that they put forth?

MR. TOMLINSON: Your Honor, the process is the same, because it's important for this Court to realize what Title IX is and what Title IX isn't. Title IX is a education funding program, and these anti-discrimination provisions provide conditions and limitations on that funding, and so what we're talking about here is whether or not these recipients get funding. That's what Title IX is about, and so we're not talking about a criminal action or civil penalties, and so the core issue here is, both in the abstract and specifically in this case, will they have the opportunity to present all the arguments they're making here before these decision makers. Will they be able to challenge the validity and the interpretation and challenge the validity of this rule, and they will, and I don't even think they dispute that they won't be able to. They can raise all the arguments, the substantive

arguments they're raising here in court before -- they can attempt to raise this as part of a voluntary compliance process, they can attempt to raise this before the ALJ, they can attempt to raise this on the administrative appeal, they can attempt to raise this before the secretary, they can attempt to raise this before either or both of houses of Congress. And if all that fails, they can attempt to raise their, the problems they have with, again, either specifically in this case or in the abstract, you can raise problems with the interpretation of a Title IX discrimination provision before an Article III court; but the key here is do they have the opportunity for meaningful review. Does this process provide them with the opportunity for meaningful review.

THE COURT: Do they have to do it that way or can they do it now?

MR. TOMLINSON: They have to do it that way, and if Your Honor wants to jump into the --

THE COURT: I don't want to take you out of order. I just --

MR. TOMLINSON: And so, Your Honor, thank you for indulging me in walking through, the Court through that, but I do think when I hear the state talk about this hammer dropping and invocation of *Sackett* which is the case where essentially the plaintiffs just got a compliance order saying you owe us X amount of money and penalties are accruing every day, it's very

distinguishable from what, here. This is a very robust process that is provided to them to raise. Again, the key point is they can raise all of these arguments before multiple decision makers in both the agency and Article III courts, and that's been provided to them by Congress and --

THE COURT: In *Sackett*, the EPA was fining them already, right? Was it $25,000 a day?

MR. TOMLINSON: Your Honor, I was confused. It was either $37,500 or there was some talk that it could double to $75,000 a day.

THE COURT: 75, whatever it was. But it, but that was already taking effect.

MR. TOMLINSON: That's correct, Your Honor, and it's important to note the difference between these schemes, because the EPA in that scheme, in that case actually had complete discretion to choose one of two options. The EPA could either just issue them a compliance order or the EPA could initiate an enforcement action. The EPA didn't actually have to initiate an enforcement action to assess this penalty, and in that case they didn't. They just handed them a compliance order, and in fact, the *Sacketts* actually requested a hearing to see if they could talk to the agency about that and it was denied.

And so that, that sort of summary process by which the Sacketts in that case had no meaningful opportunity to present their arguments before either the agency or an Article III court

is extremely distinguishable from this case, 'cause as I just walked the Court through in what I hope was helpful detail, there are multiple steps along this way set up by the statutes and regulations here.

Your Honor, Ms. Campbell also said with regard to the interests here, especially the sovereignty interests, I believe she said you can't get much more concrete than this. Your Honor, you can get a lot more concrete than this, and we know you can get a lot more concrete than this because we have a lot of case law showing how this actually plays out in certain other cases when courts do find that there's standing, and it's worth distinguishing those from what we have here.

They have not said that they intend to engage in conduct which violates Title IX or Title VII as they understand it. The states have not said that they're currently involved in any enforcement action in which an agency has found or might find that they've violated Title IX or Title VII, certainly as it relates to these guidance documents. They haven't said that any agency has specifically notified them or threatened them with either a loss of funding or an enforcement action, and they haven't actually said -- they invoke this idea of state sovereignty, and they talk about it a lot, about how this is certainly an impending threat to state sovereignty; but for all this, it seems, the most concrete thing I heard Ms. Campbell say about what this injury to state sovereignty is now, she said it

was already occurring, the two examples she gave was they had, there was public pressure on them to change their laws which seems like it might not even be connected to these guidance documents, and she made a vague claim of regulatory confusion. Those are high level generality, abstract, nonspecific harms that are not sufficient to satisfy Article III, Article III's requirement that there be a certainly impending concrete harm. And we'd note, Your Honor, as Your Honor said, there's 20 states --

THE COURT: Well, I'm sorry. What about the chilling effect that she talked about? I mean, isn't that, that basically the mere fact that these have come out interferes with the sovereigns, their sovereignty and their ability to enact their own laws; the fact that the, that the Department of Education and the EEOC have come out and basically, their position, legislated a new meaning to these laws and to, that they're now forced to comply with?

MR. TOMLINSON: No, Your Honor, it's not. I'm not sure -- chilling effect is generally a First Amendment issue which I'm not sure how it arises here.

THE COURT: Maybe I didn't phrase it correctly, but I think you understand what I mean.

MR. TOMLINSON: Yes, Your Honor, and Your Honor, as Your Honor noted, there's 20 states here as plaintiffs. You've seen the signature blocks. All these states and all these

lawyers, they haven't made a single concrete example. They could say, well, our state, we were going to do X. We were -- here's a declaration. We were going to, you know, we were going to pass this law, like, we were going to do X. Our regulatory bodies were going to do X. They were all set to do this, but they couldn't. They were somehow prevented. Even that probably wouldn't be enough because it seems like that's a voluntary decision they're making in response to this nonbinding document, but they haven't even done that. They raise sort of this specter of state sovereignty. They make these broad arguments that it's somehow harming them without actually providing any sort of specific examples of anything they've been prohibited from doing or restrained from doing or threatened to not doing. There's simply no allegation whatsoever of that.

And as I mentioned, in terms of how concrete we can get, I went through examples of things they haven't done. I think it's worth spending a few minutes talking about the cases they cite in support of their state sovereignty argument because that, that shows what is required to get to the level of standing based on state sovereignty that just is not the case here.

First of all, Your Honor, they, they cite to this *Massachusetts versus EPA* case quite a bit. That was a case that's very distinguishable from this case. That was a case where the State of Massachusetts sued the EPA over the EPA's

decision not to regulate auto emissions under the Clear Air Act. The Court held there was an Article III standing, but that case was very unique, and certainly like the Court to review that case closely because the statutory structure there was very different. Specifically, there was this statute § 7601 by which Congress specifically enlarged Article III standing with regard to those types of petitions under the Clean Air Act, and the Supreme Court itself said that that enlargement of standing was of critical importance to the standing inquiry because it quote allowed Massachusetts to bring a challenge quote "without meeting all the normal standards for redress of ability and immediacy." And that was the Court, that was where the Court said in that specific circumstance based on that statutory provision, because Massachusetts had shown some possibility that they might change the decision maker's mind, it was sufficient.

In their briefs, plaintiffs cite that language as being sort of a, as generally applicable to Article III, but of course it's not. It was in that specific statutory context, and Your Honor can imagine, if the general standard for Article III standing was if we bring this suit we might change somebody's mind, it would be the exception that completely swallowed up all the Article III rules 'cause anybody could claim that at any time.

They also cite the Sixth Circuit decision in *Ohio ex rel. Celebrezze.* I apologize if I -- that case was a long time

ago, so hopefully I didn't mangle anybody's name who will still be offended, but that was a case where the State of Ohio had a statute, a state statute that required anyone transporting nuclear materials through the state to provide them with notice and get approval before doing so. The federal government then passed a statute that says, that essentially preempted the entire field of moving nuclear materials and specifically had a provision that said any state statute that requires notification is hereby preempted. And so there you had a literal federal statute targeting the Ohio statute saying your statute is preempted.

Similarly, the *Wyoming ex rel. Crank* case from the Tenth Circuit, that was a case in which the State of Wyoming had a statute that purported to expunge domestic violence convictions under, almost automatically under a lot of circumstances for the purposes of allowing citizens of Wyoming to purchase firearms without violating § 922(g). ATF specifically sent Wyoming a letter saying we don't acknowledge this, we don't recognize this. Expungements under your state statute are null and void for the purposes of § 922(g) which essentially gutted the purpose of the law.

And so those are situations in which state sovereignty can be sufficient for Article III standing, where there's a specific federal action that directly targets a statute or state action, and there's no question that, that the state statute is

essentially null and void.

What we have here, even in plaintiffs' own language in the briefs, they say, you know, at least arguably conflict. And they come up with these possible hypothetical scenarios in which, well, if you know, if this happened and then OCR investigated, then this possibly could conflict with our state law. And they're not -- it's not that they're completely wrong about that, but it's just that we're so early in the process, and this dovetails with the ripeness inquiry as well. It's two speculative, it's too general, and especially given the fact specific nature of these anti-discrimination investigations, it's simply not appropriate for this Court not to let it play out.

I also did just very briefly want to talk -- they cite to the *Susan B. Anthony List* case a lot for the idea that because, that essentially enforcement of an action might be certainly pending. That was a very different case 'cause that involved a case where the State of Ohio's, the election commission that was charged with enforcing this law had specifically brought an action against Susan B. Anthony List before, and Susan B. Anthony List was saying you're going to do the exact same conduct in future elections. So it was very clear there was a collision course there, but even, even then, and this language is very important, even then the Court said, explicitly was not deciding whether that alone would be enough.

That was a statute that involved possible criminal penalties, and so Justice Thomas's opinion said, "Although the threat of commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create as an Article III injury under the circumstances of this case."

Here, as we just discussed, Article IX or Title IX rather, excuse me, is essentially a funding provision. We're not talking about criminal actions. We are not talking about civil penalties. We're talking about conditions on education funding.

Your Honor, they also mention financial harm in the form of lost funding. As we discussed, there would be plenty of opportunities to them, for them to contest loss of funding. It's certainly not concrete or certainly imminent especially in light of the fact that there's no, no pending investigations or enforcement actions that they can point to and no threat that such actions.

On the parens patriae action, Your Honor, plaintiffs conflate two lines of cases. There's a line of cases generally dealing with the states' parens patriae right to bring suit on behalf of its citizens. *Massachusetts versus Mellon* is still good law for the principle that a state cannot bring a parens

patriae action against the federal government, and it makes sense, Your Honor, because citizens of the State of Tennessee are also citizens of the, citizens of the United States, and both entities have an interest and responsibility in looking out for their citizens.

Your Honor, on ripeness, as Your Honor knows, the case law says that unquestionably overlaps with the Article III inquiry. I won't belabor the point because I feel like I've been talking about this for a while unless Your Honor has specific questions.

I do know that the Sixth Circuit has spoken about this in the *Warshak* case and I think has, you know, specifically said that answering difficult legal questions before they arise and before the courts know they will arise is not the way we typically handle litigation. And they also note that is the two-factor test, they -- the two questions they ask is is the claim fit for judicial decision in the sense that it arises in a concrete factual context and concerns of dispute those likely to come to pass, and what is the hardship to the parties of withholding consideration. And Your Honor, here they've offered some speculative, hypothetical examples of context in which these disputes might come to pass, but it's not concrete, and there's simply not a hardship to them for waiting until a concrete dispute arises.

Then also just briefly, cite the Court to the *Sierra*

Club case which really is similar to this in a lot of respects. That case involved a lawsuit by the Sierra Club against the National Forestry Service based on a broad, general plan to open this national forest up for some cutting. The Sierra Club thought it would allow for too much clear cutting so they brought an action, but the actual regulatory regime that required the National Forestry Service, before they did anything, before they took any concrete action to actually come up with and announce site specific plans for exactly how many trees they were going to allow to cut and at which point the Sierra Club or any other interested party would have a chance to voice an objection.

There, because you had this sort of general plan but also the fact specific determinations that were necessary before any actions were taken, the Court held that it wasn't ripe because they'd still have the opportunity to raise those arguments in a fact specific context.

Your Honor, briefly on the adequate alternative remedy point, again, we discussed the *Sackett* case. That seems clearly distinguishable. They also cited a District of Alaska case in *Furie* which involved a similar procedural situation and arose under the Jones Act, and I think the Department of Homeland Security essentially assessed a fee against this person without giving him an opportunity to contest that fee or seek judicial review.

Here this is much closer to the Sixth Circuit decision in *Haines*. In that, the *Haines* case, this was the case that involved the bus driver who had converted the bus, the passenger compartment or converted the luggage compartment to a passenger compartment and was issued a notice to take that off the road, but because -- and trying to bring a suit under the APA -- but because the statutory regime there which is very similar to the statutory regime here procedurally gave him an opportunity to first contest that decision with the Federal Motor Vehicle Safety Administration, Motor Carrier Administration, and then if that failed to seek review in an Article III court. The Court held that because, because he had the opportunity for meaningful review both before the agency and before an Article III court, that was sufficient to displace an APA claim.

You know, finally, Your Honor, on the jurisdictional stuff, *Thunder Basin*, you know, the key there is whether it's fairly discernable. The Court listed several factors in that. They really seem to emphasize the final factor which was whether it offered the opportunity for meaningful review, and here given, given the process that I walked the Court through, it seems very clear that there's a, that there's a process that's been created by Congress to adjudicate these Title IX anti-discrimination decisions; and it seems there's certainly a fairly discernable intent by Congress for people to follow those provisions instead of trying to essentially jump the line and

seek pre-enforcement review, especially in a situation like this when we're talking in the abstract.

THE COURT: What about with regard to Title VII?

MR. TOMLINSON: So Title VII, Your Honor, Title VII, the, our *Thunder Basin* -- the short answer, Your Honor, is our *Thunder Basin* argument is only with regard to Title IX, that Ms. Campbell said, and we certainly agree with that. Title VII doesn't have the same applicable sort of statutory framework here, and in fact Title VII, the EEOC cannot bring suits against states, and so that's another reason tying back to the core Article III inquiry that there's no certainly impending harm. They don't have the right to sue states, so but yes. Yeah. To clarify, the *Thunder Basin* argument only applies to Title IX and not Title VII.

Your Honor, unless you have any other questions on the threshold issues, I just briefly want to talk about the injunctive factors, Your Honor, most particularly irreparable harm or as Your Honor noted, there's case law that irreparable harm is indispensable in any preliminary injunction inquiry. There's also case law showing that the burden for showing irreparable harm is even higher than what is required to establish Article III standing. So we largely fall back on the Article III arguments we've made, but the, obviously the thresholds are even higher.

And you know, as the Court in the *Sumner County School*

District Court case held, you know, quote, "If the plaintiff isn't facing an imminent and irreparable injury, there's no need to grant relief now as opposed to the end of the lawsuit." And here as Ms. Campbell conceded, they're not aware of any investigation. They filed this PI motion two months ago. As far as we know, nobody's been able to come forward with any sort of specific concrete action threatening any of the plaintiffs. There's just no imminent and irreparable injury here.

And as Your Honor, Your Honor -- I'm sure Your Honor is well aware of this issue because Your Honor decided a case on Friday, the Bilyeu case involving irreparable harm, and this Court wrote, (As read) "Under Sixth Circuit precedent, plaintiffs must demonstrate certain and immediate irreparable harm for the grant, of preliminary injunction to be granted," and that the Court also noted that for something like, I think it was the loss of health insurance in that case remains only a possibility. That was not sufficient for irreparable harm. The Court also discussed under certain circumstances when there was still a final decision to be made that that was too speculative to form the basis of irreparable harm.

And also on irreparable harm, Your Honor, because we're talking about essentially a funding statute, it's not clear why, even if this harm -- regardless of how severe this harm would be, why it wouldn't be reparable, especially given the process as I walked the Court through. A lot of steps have

to happen before there's any loss of funding, and at the end of that process, there's an opportunity for Article III review presumably where you could seek some sort of relief, seeking the restoration of such funding. And as the *Johnson* case said, "The possibility that adequate compensatory or other corrective relief will be available at a later date weighs heavily against an irreparable harm claim."

And then just finally, Your Honor, on the public interest, balance of equities, because of all these, the speculative nature of their harm, there's no, there's no real public interest that they've articulated in resolving this now as opposed to waiting where there is a strong public interest in broadly enforcing anti-discrimination laws but also for these, the EEOC and the Department of Education to provide the public with notice of how the agency understands anti-discrimination statutes.

And finally, there's a strong public interest in actually allowing the agency to see how these play out in reality to determine how statute and the interpretation of the statute are actually going to be applied to individual's circumstances before an Article III court comes in to, to get involved in those decisions.

And Your Honor, I think that's all I have for you right now. I'm happy to answer any questions.

THE COURT: So on irreparable harm, states' argument

on injury to their sovereign interests, that that's irreparable?

MR. TOMLINSON: Well, again, Your Honor, it's so abstract and theoretical. It goes back to the sovereignty point on the Article III analysis. Even assuming that could be sufficient under some circumstances, here when there hasn't been a threat to any statute, there hasn't been a preemption of any statute, there hasn't been some sort of notice provided to them that they have to stop enforcing this statute and they haven't been able to sort of point to any specific action that they've had to take in violation of the statute or they've wanted to take in pursuance of the statute that they haven't been able to take, it's simply insufficient for, as the Court -- as the case law says, there's a higher standard for this, there's a higher standard for irreparable harm than under Article III standing. And to simply be able to sort of wave your hand and say, well, this is a threat to our state sovereignty without actually having to provide some sort of a concrete, imminent threat for why this Court needs to step in now and stop this is simply not sufficient under the law.

THE COURT: Ms. Campbell?

MS. CAMPBELL: Thank you, Your Honor. I want to begin by addressing defendant's argument that sovereignty interests are just abstract and theoretical. Your Honor, I can assure you that sovereignty interests are not abstract and theoretical to the state legislatures who enacted the laws that we cite in

paragraph 99 of our complaint. They are not abstract to the state officials that are charged with enforcing and administering those laws. They're not abstract to the regulated entities that are facing conflicting laws from the state and the federal court. There's nothing abstract about that, and I think it's really important too to underscore just the contrast between what the agencies are communicating to regulated parties and what you're hearing from defendant's counsel today.

You know, we cite in our preliminary injunction reply brief a video that was, you know, put out by the agencies, a Back to School message that in no uncertain terms said preventing a transgender student from using the restroom or competing on a sports team that corresponds to their gender identity is unlawful, and that, you know, they are ready to defend the rights of transgender students. That is a very different tune from what you're hearing from defendants' counsel today, that, you know, this is all just speculative and it depends on the facts.

You know, I've really heard nothing that would indicate that the laws that states have and the policies that many of the plaintiff states have right now with respect to transgender participation in sports, for example, that requires that students be assigned to sports team based on their biological sex, haven't heard anything suggesting that there are factual circumstances, you know, specific facts that would lead

the agencies to conclude that such a law is not a violation of Title IX; and in fact, they've taken exactly the opposite position in the West Virginia case in their statement of interest, that that law is a violation of Title IX. So there's nothing abstract about the conflict here between the states' laws and policies and the guidance, both the, you know, the Department of Education guidance and the EEOC guidance.

THE COURT: Well, has this kept the states from doing anything that they otherwise would have done or made them to do something that they didn't want to do?

MS. CAMPBELL: Your Honor, you know, I'm not able to tell you about the intentions of the individual legislatures or the individual legislatures as to what they would have done in the absence of this guidance. You know, I can't really speak to that. You know, I can say that plaintiffs are being put to this untenable choice of, you know, figuring out are we going to keep enforcing our laws, or you know, risk enforcement actions.

And I'll note too that in describing this enforcement scheme, administrative enforcement scheme that exists with respect to a funding determination in the Title IX context, you may have noticed that, you know, throughout that description, the focus was on compliance, compliance, compliance. That is how that whole process is used is to get regulated entities to just comply with what the agency says the law is. And that is why pre-enforcement review of this sort to the agency's guidance

which amounts to a legislative rule is so important, because having to raise that as a defense in these lengthy administrative enforcement proceedings that almost always result in, you know, the entry of a voluntary compliance order is not a meaningful, adequate remedy within the meaning of the APA.

So we think that we've satisfied the requirements for, you know, the Article III requirements for bringing this action, we've satisfied the irreparable harm requirement for getting a preliminary injunction, and we've satisfied the APA's requirements for final agency action and no adequate remedy.

I do want to respond to a few specific points that were raised. You know, first, with respect to the EEOC document, I think defendant's counsel took the position that this is uncontroversial legally, and that's why the EEOC technical assistance document isn't a legislature rule and it isn't a significant guidance document within the EEOC's regulations. You know, I think numerous courts, judges on the Federal Court of Appeals would be surprised to hear that this is uncontroversial legally. You know, the *Grimm* decision out of the Fourth Circuit which involved Title IX had a strong dissent by Judge Niemeyer. You may know that the Eleventh Circuit in the *Adams* case which also involved Title IX and a restroom policy, that, you know, the Court granted an en banc review in that case. The case is pending before the en banc court. There was a strong dissent at the panel stage, so the Federal Court of

Appeals I think certainly don't view that issue as one that is legally uncontroversial. I think it's quite controversial, you know, setting aside the political controversy which obviously exists, but I think, you know, legally that's a controversial matter as well.

The defendants point to the *Center for Auto Safety* case. They rely heavily on that in their briefs as well, but you know, that case actually supports our position. The D.C. Circuit said in that case that, "Finality can exist when an agency threatens enforcement of a policy guideline if the guideline is binding on its face or in practice," so again, the focus is on the practical effect. And here given the, you know, the threat that this will be fully enforced, guidance will be fully enforced. And again, I've heard nothing from defendant's counsel to disavow enforcement, and all indications are actually to the contrary, that they fully intend to enforce this guidance.

You know, another reason why this is, these documents are legislature rules and not interpretive rules is in the Title IX context specifically, they conflict with the agency's existing regulations concerning living facilities and which include bathrooms and locker rooms and athletics, and the Sixth Circuit has held in the *Azar* case that when guidance conflicts with the agency's existing regulations, that guidance is necessarily legislative or that rule is necessarily legislative,

so that's another reason why it is legislative.

And then another feature of this that is important is that even if the guidance purports not to bind regulated parties, it does bind the agency itself, and that is a significant factor in the administrative law, you know, case law, especially the D.C. Circuit case law; that when something binds the agency itself that that, that legal consequences will flow from that. And I've heard, again, nothing to the contrary from my friend on the other side as to why this doesn't apply to the agency.

Moving to the -- well, just briefly on the, whether there's a threat of enforcement, defendants' counsel pointed to criminal penalties, that *Susan B. Anthony List* that involved criminal penalties, and the Sixth Circuit has made clear that criminal penalties are not required. And we do not cite this case in our brief, but I will provide it to the Court. It's *Kiser versus Reitz*, 765 F.3d 601. It's a 2014 case I believe where the Court specifically said the threat need not stem from a criminal action.

And you know, the -- we point to a number of factual distinctions between this case and some of the cases cited in our brief. You know, there may not be a case on all fours, but what's important in the credible threat of enforcement context, irreparable harm, I mean, all of that, it's a very contextual inquiry.

You know, the courts in those cases never indicated that one thing or the other was dispositive, you know, that the fact in some of these cases that the guidance, the challenged federal action, you know, specifically said the state law was preempted, or you know, that there may have been a determination of probable cause or something like that. That was part of the contextual inquiry, but none of those things were dispositive, and you know, we cite a number of cases in where courts have allowed states to sue the federal government to vindicate their sovereign interests.

And you know, again, there's nothing abstract about conflict here. We're not required to admit that we're violating the law. Nothing in the case law requires us to do this, and I think Your Honor can understand why maybe we'd be hesitant to say that, but I think that we, our policies and laws are in conflict with what the agencies say the law is. There's really no way around that, particularly when you look at the athletics laws that require that participation be based on biological sex, and the agencies have taken the position that preventing a transgender student from competing consistent with their gender identity is unlawful discrimination. I don't see how you reconcile those things.

So the fact that the guidance doesn't specifically say, you know, hey, Tennessee, your law violates this or your law is preempted, that's not necessary. I mean, that is an

obvious implication of the agencies' guidance.

I'm turning to our substantive APA claims which I didn't really address earlier, but I do want to address the clear notice point at our *Pennhurst* argument. The defendant's counsel points to the *Jackson* case, you know, which recognized retaliation claims. I think that's a very different situation where you have a general prohibition on discrimination that, you know, may later be interpreted to include different kinds of discrimination. I think what's really critical about Title IX in particular is that you have § 1686 which addresses this specific, the specific issue of living facilities, bathrooms, lockers rooms, other things of that sort. In light of that specific statutory language that, you know, told educational institutions, hey, there is a safe harbor here. Nothing about this prevents you from maintaining separate living facilities for the different sexes. You can't say that states would have had clear notice that Title IX would prohibit them from doing that, at least in the instance where you have a transgender student who wants to use the restroom that corresponds to their general identity rather than their biological sex.

I think defendants misunderstand our unconstitutional conditions argument a bit. The cases they cite which involve, you know, the state not being able to assert that against the federal government, those involve situations where the state is saying hey, federal government, you're depriving us of our

constitutional rights. That's different from the situation we have here. What *South Dakota versus Dole* recognized is that the federal government cannot condition federal funding on requiring the states to violate, the states themselves to violate the law, so it's not about whether the states are giving up their own constitution rights. It's about the whether the federal government can force the states as a condition of receiving funding to themselves violate the law. So that's the principle that we're invoking here, and that's why I think *Meriwether* is so important, because *Meriwether* recognizes that at least in some instances, the guidance's position on pronouns would present a conflict with the First Amendment and could require the state to trample on its citizens First Amendment rights in that respect at least.

On the point about whether, you know, the EEOC has enforcement authority against the states, you know, it may be that the EEOC cannot initiate enforcement actions against the states. It can, however, investigate state entities, state defendants. It can enter into reconciliation agreements with state defendants, and you know, also defendants in the suit include the DOJ officials who can bring suits against the state.

As to whether, you know, the EEOC document is just interpretive because you have these prior adjudications, and really only one of the adjudications, *Lusardi*, addresses bathrooms and pronouns. You know, I think that's a real stretch

to say that just because the agency itself has previously reached that conclusion in an administrative adjudication that that somehow means, you know, when it announces that more broadly to bind the agency and to apply to employers across the country, that that's just restating existing law. No. All it's stating is the agency's prior case specific conclusion. You're still -- you know, that doesn't mean that you're just, you're just interpreting the statute, because that decision itself misinterprets Title VII and changes the substantive law. The guidance is still a substantive rule that was issued in excess at the EEOC's statutory authority.

And then I'll end just by addressing the public interest since I didn't discuss that earlier. I think the public interest would clearly be served by a preliminary injunction in this case. I'd refer to the regulatory uncertainty that the guidance creates. You know, it's a little ironic that they say on the one hand that it's helpful for regulative parties to know what the agencies' views are. In fact, I think issuing this guidance in the way that they did, you know, as purporting to, you know, be the agencies' definitive position on this, I mean, that really creates a lot of regulatory uncertainty for entities that are facing, you know, conflicting state and federal laws, that they have to figure out, you know, how and whether to comply with.

So I think putting this on hold while this case

proceeds to the merits would have the benefit of giving regulated entities some certainty, and you know, even if the state doesn't have, the states don't have the authority under a parens patriae theory to directly assert the interest of their citizens and students and employees, I think those harms that are at issue here are clearly relevant to the public interest and whether the public interest would be served by a preliminary injunction preventing enforcement of the guidance.

So for all of those reasons, we do ask the Court to grant our preliminary injunction motion and deny the motion to dismiss, and I'm glad to answer any other questions the Court has.

THE COURT: Any response?

MR. HEALY: I do have a couple of points in response.

MS. CAMPBELL: Thank you, Your Honor.

THE COURT: Thank you.

MR. HEALY: I have just a few points in response, and I believe Mr. Tomlinson also has one or two.

First, with respect to the amicus brief filed in the West Virginia case, I think that essentially makes defendants' point, that this has to apply in a particular factual circumstance. In that case, there were particular facts having to do with the harms to a particular individual that applied in that circumstance, and so I don't think the fact that the

government filed an amicus brief taking a position in that case defeats any arguments in this case.

I'd also mention that that case appeared in the, within the Fourth Circuit that has decided these questions already in *Grimm*, so that precedent is relevant with respect to the West Virginia case.

Regarding my use of the, my potential overuse of the phrase "uncontroversial" with respect to Title VII, I only meant to say that the question is uncontroversial with respect to the EEOC because *Bostock* decided the question in the context of Title VII which is what the EEOC document refers to and the administrative decisions that, that the EEOC document refers to as well have been decided for a long time. There's a separate question of even whether they could challenge these old cases from prior years under the APA. There's an APA statute of limitations for six years, so it's not clear whether they can even bring a challenge to those old interpretations.

With respect to whether these documents conflict with existing regulations and whether they bind the agency, I would just repeat the point I made earlier that the question of whether and under what circumstances they would conflict with agency regulations or how the, any potential legal conflict would play out down the road is simply not a question that is addressed in these documents, and it's not unlawful or arbitrary or capricious for the agency to answer the narrow question here

without answering the question of how it would, would play out in other legal circumstances or in a particular situation having to do with bathrooms or under § 1686 which is in the statute unlike the bathrooms and athletic facilities. Those are potentially hard legal questions that the agency need not answer all at once.

With respect to whether it binds the agency, I would refer Your Honor, again, to the language of the specific document. I'll just read it for the record. The document itself on page 4 says, "While this interpretation will guide the department in processing complaints and in conducting investigations, it does not determine the outcome of any particular case or set of facts. Where OCR's investigation reveals that one or more individuals has been discriminated against because of their sexual orientation or gender identity, the resolution of such a complaint will address the specific compliance concerns or violations identified in the course of the investigation."

So there is an amount of fact finding and legal determinations that would have to occur in the context of an investigation, and disallowing the agency from stating at a high level of generality what they believe the law means would pose a problem.

With respect to *Jackson*, the *Jackson* case with respect to *Pennhurst*, counsel mentioned that there's a safe harbor in §

1686. I agree. Again, my point is only that this document doesn't say anything about how and under what circumstances § 1686 would or would not conflict with this interpretation, and there isn't any requirement for the agency to do that.

With respect to unconstitutional conditions, even if the plaintiffs' reading of *South Dakota versus Dole* is correct, and I think the *Koslow* case is very clear that, that it's not correct and that this doesn't apply in cases between two sovereigns, they haven't actually shown that there would be a First Amendment violation. And our point about the *Meriwether* case which I mentioned earlier, that that determination would depend on specific facts at summary judgment and the *Meriwether* case still holds.

And I believe those are all the points I have, so we'd request that you grant the motion to dismiss and deny the motion for preliminary injunction. I'll leave it to Mr. Tomlinson.

MR. TOMLINSON: Your Honor, just very briefly, and to reiterate, plaintiffs' counsel said, came back with this statement that somehow the states were put in an untenable choice between interpretation of, their interpretation of the statutes and their own laws versus these guidance documents.

Again, we just refer to the Court back to this process that simply not -- in terms of being put in an untenable choice of having to make a decision now or lose funding, that's simply not the way the process works. As discussed ad nauseam with

Your Honor, there's so many steps along the way where they have an opportunity to present their factual and legal arguments before agency decision makers all way on up to the secretary, over to Congress, and then eventually before an Article III court. It's simply not an untenable choice. They have an opportunity to present these arguments at multiple steps along the way, and so that's the only point I wanted to make unless Your Honor has further questions.

THE COURT: No, I understand. All right. We -- let's take a break. I'm sure everybody would like to have a little bit of a break, and then we'll come back and we'll argue the motion to intervene. I may have some questions, but let's come back at 12:20. I've got 12:02. 12:20, give everybody an opportunity to stretch their legs.

THE COURTROOM DEPUTY: All rise. This honorable court is now in recess.

(Recess taken.)

THE COURTROOM DEPUTY: All rise. This honorable court is now in session. Please come to order and be seated.

THE COURT: Thank you. I appreciate your patience. All right. Mr. Scruggs?

MR. SCRUGGS: Thank you, Your Honor, and may it please the Court, as noted my name is Jonathan Scruggs. I'm here on behalf of proposed intervenors Association of Christian Schools International and three individual female athletes from the

State of Arkansas.

Your Honor, our motion to intervene and the department's response raise a host of different issues, but we've heard a lot from a lot of different attorneys, a lot of different arguments; so I'm going to try to narrow focus in on what I think is most important, and the way I propose to do that is to identify and then go back and unpack four principles established by the Sixth Circuit's *Grutter* decision that justify intervention here.

So first, intervenors do not need standing for intervention. Second, intervenors have a valid interest in protecting equal opportunity policies that benefit them. Third, intervenors can show impairment if the litigation might affect those equal opportunity policies, and then fourth, intervenors can show inadequate representation by identifying arguments that we will make that the current parties may not make.

Each of these principles apply here, Your Honor, and in fact, I think the argument for intervention is stronger here than in *Grutter*. In *Grutter*, the intervenors did not have a legal right or a cause of action to argue that the affirmative action policy there should be maintained, but here the intervenors do have a legal right under Title IX and the state's Save Women's Sports Act and a cause of action under those laws to argue that there is a obligation to maintain sex-separated sports.

If the future applicants in *Grutter* had a basis to intervene and the advocacy association as well, then we have a basis to intervene here. In arguing otherwise, I think the department effectively overlooks *Grutter* and tries to change the standards for intervention in the Sixth Circuit which this Court should reject.

So let me go back and unpack those four principles that I think are decisive here. First goes to the point of standing, and I think actually and in an effort to bring consensus, I don't think we and the department dispute much on the general principles. I don't think they can dispute that the Sixth Circuit has said that intervenors don't need standing if they seek the same scope of relief as the plaintiffs, and we agree that if we sought broader scope, then we will have to establish then, but it's more about the application here. We think that we have sought the same scope of relief as the states, and in fact, at the end of the day, what are the states seeking to accomplish? They're seeking to set aside the Interpretation and Fact Sheet which is what we want, but also to maintain their authority to maintain sex-separated sports pursuant to what is now I believe nine states have passed those sex-separated sports law. Texas recently passed one of these laws just a few weeks ago, so we believe we are seeking the same scope of relief, and just to clarify and streamline the issues, as we noted in our reply, we disclaim seeking broad relief to

make things easy.

So that focuses really in on the factors for intervention, so let's go through those three, other three points that I noted, and that is, we as intervenors have a substantial interest in maintaining these equal opportunity policies. That is the message of *Grutter*, that the minority applicants there had a substantial interest in the maintaining and seeking educational opportunity. Well, our individual athletes and the female athletes of these ACSI schools have a strong basis to obtain equal athletic opportunity under both Title IX of the Save Women's Sports Act, and in fact, Your Honor, I really don't think the department disputes that at a high level. It's hard to do so when the Sixth Circuit, various other circuits have acknowledged that female athletes have an interest and even a legal right to obtain equal athletic opportunity.

What I read, the department's argument is not really about substantial interest. It's actually about impairment. They dispute that this litigation can possibly impair our client's interests, but it's first useful to know what the standard is, that we don't have to show definite impairment or even probable impairment. In both *Grutter* and in the *Miller* case, the Court, Sixth Circuit said that merely possible impairment is a basis for intervention, and we have certainly shown that because we are currently benefiting from the Save

Women's Sports Act and Title IX. And if the Fact Sheet and Interpretations stay in place, those benefits go away by definition, so it is taking those benefits away from the intervenors.

Now, the department comes back and responds and says, well, this case is not about the Save Women's Sports Act. Well, that's where we definitely disagree, and I'll go even farther than the states and not just say that those laws arguably conflict with the Interpretation and Fact Sheet, they necessarily do, and it's impossible to find out a way that they don't conflict. In fact, I think it is useful as we've mentioned before here, a few times before, to look at the actual arguments the department is making in the West Virginia case. Those arguments are not very fact specific. They are very broad and focus not on the particular facts of that case but the meaning, their interpretation of Title IX, and their belief that if you allow sex-separated sports, that that, and exclude men who identify as women from female sports, that violates Title IX; and that also is resonated in the FAQ, the educator letter, Your Honor. It mentioned the cheerleader example. There's not a mention of we need more facts regarding those things. It just lays out that example.

I'd also point the Court to a few other examples that have not been mentioned. Your Honor, currently we represent numerous female athletes in the State of Connecticut who are

challenging a athletic association policy that allows men to compete against women. Well, those clients filed a Title IX complaint with the department under the previous administration, and under the previous administration, the department said that potentially violated Title IX; but when the administration switched over, they have now withdrawn that opinion.

Likewise, in the *Hecox* case which is involving the Save Women's Sports Act in Idaho, the prior administration filed an amicus brief in support of the female athletes there; but when the administration switched, they withdrew that support and that amicus brief because all of it centers around their interpretation of Title IX. It's not dependent on any facts, and in fact, I think it's very useful, my friend from the department got up here and argued, well, this is essentially an easy application of *Bostock* into Title IX. And I think from their view, that is what they think, but that is a legal principle; and we dispute that it is uncontroversial or a easy thing, but the point is that if you incorporate Title IX under their -- excuse me. If you incorporate their view of *Bostock* into Title IX, that it makes sex-separated sports legal and invalidates the sex separated, the Save Women's Sports Act.

And to put a point on that, Your Honor, it's not just the holding, but if you even incorporate the logic of essentially their *Bostock* reading into Title IX, it invalidates the sports act. That's because the whole logic of Title IX is

if you take into account gender identity and thereby notice sex, that is discrimination on the basis of sex and it's illegal.

Well, Your Honor, if you take that logic and apply it to Title IX, then sex-separated sports are all illegal because by definition you have to notice sex to sex separate sports; and that's exactly why contrary to what my friend said, numerous courts have said that we don't just incorporate Title VII principles into Title IX.

I think the Nineth Circuit put it best when they said unlike most employment settings, athletic teams are gender segregated, period. That's why you cannot possibly incorporate *Bostock* into Title IX, because you would eradicate what I think everyone in this room thinks that shouldn't be eradicated is not eradicated, that is, sex-separated sports.

Now that is not an argument to say that *Bostock* should overrule Title IX. It's an argument to say Bostock's logic, that logic that the department is using, can't be applied to Title IX, and I haven't heard a response why that isn't the case; because again, these things don't turn on the facts. The argument that is being made in the West Virginia case is that any time you effectively sex separate sports and exclude a male athlete who identifies as female, that is gender identity discrimination and illegal.

So to bring that back, I just, in terms of impairment, we again don't need to show that this litigation will impair our

interests or even may impair. It just might impair, and certainly given what the department has said in the West Virginia case and has said in these documents and said elsewhere, that really the department can't have it both ways. It can't go around and say this is our interpretation of Title IX, it's generalized, it applies in all these general ways. We should incorporate *Bostock* wholesale in all situations to Title IX and then come and say, well, we need -- you know, it might change.

As my, I think my friends in the state said, I haven't heard a fact that would make a relevant difference. I welcome if my friends from the department will come up here and either, you know, clarify or reject their position in the West Virginia case or affirm that the same, that the Save Women's Sports Act are legal under Title IX, I think that would be great. I just don't think they're going to do that, and that's because they've committed themselves to this interpretation.

And Your Honor, again, it's useful to note that under that *Miller* case that I cited before, it said that the mere potential stare decisis effects can be a sufficient basis for impairment that justifies intervention.

So continuing on, I think I've talked about this, those Save Women's Sports Act, another argument the department makes is that, well, you can't show impairment because we have not identified a specific male athlete who identifies as female

that we have competed against. Now my response to that is a few things. First, I don't think that's exactly true. The ACSI schools have identified schools in Idaho and in Florida where they are competing, they have female sports teams. And in those states, there is current litigation where male athletes who identify as female are trying to participate in female sports. That's the first thing.

The second thing is that I think it overlooks the scholarship, the nationwide scholarship market. There is a limited amount of scholarships and sports slots available to women nationwide that effectively people all across the country are competing for. So if you open up that market to men, that necessarily hurts the chances of women to obtain that benefit and obtain the value of those scholarships in other athletic opportunities; but probably most importantly, Your Honor, I think *Grutter*, again, is decisive on this. Because in the *Grutter* case, the Court, and neither the intervenors, the intervenors did not argue or show that they were competing head to head against Caucasian applicants for a final slot in the law school or the university. They didn't show that, that but for the Affirmative Action policy, they would be admitted, and I think that's an important point, Your Honor.

And to give an example on it, many of those intervenors could have had 180 on their LSAT score and a 4.0 GPA. The Affirmative Action policy may not have benefited them

that much. They might have gotten in anyway. Same thing on the other end of the spectrum. There have been maybe many of those intervenors that have failing grades perhaps. We don't know 'cause the Sixth Circuit didn't require it, but the point is, and it didn't require it because what did it say was the interest in the impairment. It said quote, or it said that the decision affects applicant's educational opportunity quote "by diminishing their likelihood of obtaining admission," unquote. And that's the same thing that the *Hecox* case said that involved, again, an intervention attempt by biological females to intervene in that case, and it identified the impairment that the litigation quote may be, that the intervenors quote "may be more likely to have to choose between competing against transgender athletes or not competing at all," unquote.

Again, it's the loss of likelihood of obtaining those equal athletic opportunities, equal educational opportunities, and the Sixth Circuit in the *Hecox* case has said that shows at least the possibility of impairment, and I think that is exactly sufficient here. To require more as the department asks is effectively to require that we show definite impairment or really to show standing, to show an injury in fact or actual causation which, again, we don't have to show.

And lastly, Your Honor, let me point to the fact of inadequate representation. I think you've seen our argument there. We have identified an argument that we will make that

the states have not, not just that Title IX allows sex-separated sports but it requires it in many instances. We rely not on a scholarship or a regulation provision just relating to scholarships which is I believe the states cite that in passing, but we rely on a separate regulation that basically lays out both that you can have what's called an equal treatment claim and a accommodation claim under that regulation; that that is what is often brought, for example, when a university eliminates either male sports or female sports, and athletes often bring challenges under those claims to say that's taking away our equal opportunity. That's essentially our argument there, that if you open up female sports to men who identify as women, it's no longer female sports by definition, that it's become something different. And by definition, as we've shown, we've highlighted how generally speaking these males have physiological advantages over females, that they are con -- they would win. They would take away the chance to be champions as I believe the Second Circuit has said in one case involving Title IX, and that's just inevitable, Your Honor.

So that highlights that we are bringing a separate argument. Again, we don't have to show that inadequate representation will happen, only that it may happen, and I think we've shown that. Again, our argument is even stronger in *Grutter*, because in *Grutter* at the time of intervention, the parties didn't have this voluminous, you know, briefing, that

they just simply said, look. Here's an argument that we don't know if the university is going bring or not, but that's sufficient. Well, here we've compared the briefs, and you can see that we have brought an argument that is different than the states' argument.

And Your Honor, I'd also note a second point that, how we differ in arguments, and I think the department even admits this in its response brief is, again, we are not simply arguing that the Save Women's Sports Act arguably violates their interpretation but they definitely do. And the state has good reason not to go as far as we do, because they don't want to as they note kind of admit they violated the law. That puts them even more in the target of the department, but we fully believe that, and I think it bears fruit from what the department has said in West Virginia.

Now to clarify, for standing I don't think the states need to admit that the laws definitely conflict. I think they're exactly right under S.B.A. List, that all they need to show is the arguable standard; because otherwise, if you would have to show definite violation, well, in some ways, you've blended the merits and standing. You've resolved the issue if you decide, well, it definitely violates the law in these kind of what is the language or what does the interpretation mean or not, but that's just another argument that I think highlights our interests are different because our interests are not merely

upholding state sovereignty or upholding the state law. It's to gain the benefit of those laws which is equal athletic opportunities, something that our clients desperately want.

So for all those reasons, we respectfully ask the Court to grant intervention, unless the Court has any other questions.

THE COURT: I don't think so. Thank you though. Real quick before, and it's my understanding the states do not oppose this intervention? I think that's what was represented in the pleadings and --

MS. CAMPBELL: That's correct, Your Honor. We do not oppose.

MR. HEALY: Thank you, Your Honor. So the proposed intervenors appear to concede that they don't have standing, but they argue that they need not show standing, and I think this is a problem because this is not the rule from *Town of Chester* which rejected the Court of Appeals' ruling finding that the intervenors had sought essentially the same relief. They claim that they seek essentially the same practical relief, but that's just not, that's just not the standard here.

There's a recent case from the Third Circuit which is not cited in our briefing, but it's *Wayne Land & Mining Group versus Delaware River Basin Commission*. It's 959 F.3d 569 at Note 6. It says, "We clarify here that at the outset that under *Town of Chester*, 'different from' does not necessarily mean

'entirely different from.' For all relief sought, there must be a litigant with standing. A punitive intervenor of right is, therefore, required to demonstrate Article III standing not only in cases where the relief it seeks is categorically distinct from that sought by the plaintiff but also in cases where the intervenors seeks additional relief beyond that which the plaintiff requests."

So I think it's very clear that they need to show standing here. They have not shown standing, and indeed they've conceded that they don't have standing, and it's very clear that the proposed complaint seeks additional relief beyond that which the plaintiff states seek.

They now state on reply that they disclaim any relief that is different than what the states seek, but this is an appropriate attempt to make their intervention motion a moving target. The one case that they cite for their ability to do that is this *North American Interpipe* case from the Court of International Trade. If you look at the docket in that case, Your Honor, it's different than how they describe it. There the intervenors fail to file a proposed complaint, so the Court issued an order asking the proposed intervenors whether they sought the same relief or whether they needed to show standing for the purposes of Article III; and they filed supplemental briefs saying, no, actually we don't seek the same relief, so it's not that they disclaimed it on reply which is what these

intervenors appear to attempt to do.

There's a case from the Western District of Tennessee called *Martin versus Correction Corporation of America*, 231 F.R.D. 532. At page 536, that identifies that the Court needs to accept as true all well pleaded, nonconclusory allegations in a motion to intervene in the proposed complaint or answer an intervention in a declaration supporting the motion. So this belabored attempt to make this a moving target is inappropriate, and indeed, if they merely are disclaiming what they're seeking, I'm not really sure what their, what relief they are seeking, particularly where they have a Title IX claim that is different.

And if you go to the *Town of Chester* case, Your Honor, from the Supreme Court, it's says very, very forthrightly, "A party must demonstrate standing for each claim he seeks to press." And these plaintiffs unlike the -- these proposed intervenors -- unlike the plaintiff states bring claims directly under the citizens sue provision of Title IX, and the fact that they bring those separate claims is another reason that they need to demonstrate standing under *Town of Chester*.

Unless Your Honor has questions about the particular arguments on standing, I won't go through the reasons that they don't have standing since they concede it.

THE COURT: Do you concede it?

MR. SCRUGGS: No, Your Honor. We just -- we don't concede it as a fact. We're making a point that -- yeah. You

got it.

THE COURT: The no is sufficient. Why don't you run through the facts.

MR. HEALY: Sure. They haven't demonstrated standing with respect to the student athletes because those athletes have not identified any harms specific to them. They only, they only express their someday fear of potentially competing against a transgender athlete and losing to that athlete or losing potential scholarships in the future. That's very clearly not a harm.

With respect to associational standing -- I would mention by the way that the proposed intervenors haven't provided any argumentation in their reply brief, and the Court can treat it as conceded even if they haven't developed those arguments. With respect to associational standing, they have not established, notwithstanding this new declaration they've provided, that they are a traditional membership association. Their declaration appears to note that there is the sort of financial transactions that happen back and forth between them and their purported members.

Regardless, even if this were a traditional membership association, there's no certainly impending injury, because just as with the student athletes, the actual member, purported member schools haven't identified that there will be any harm to them. They simply claim that they may lose some standing and

they may have to make the unilateral decision to pull out of particular athletic conferences and so forth, but these are merely speculative. I think it's very clear that these don't rise to the level of standing and they need to demonstrate that, and the reason they need to demonstrate that is there are a number of different aspects of their relief that, that are not the same as the relief that plaintiffs seek. They, for example, seek a declaratory judgment that Title IX never prohibits gender identity and sexual orientation relief, no discrimination which the states do not seek. That's paragraph 4 of the prayer for relief.

They have a separate request for money damages which they note in their briefing where there is a separate request for money damages that does require standing, and here they actually have in prayer for relief in paragraph 8, they have a request for nominal and actual damages that appears nowhere in the states' complaint.

They also request declaratory judgments as applied to them which the states of course do not seek. They haven't demonstrated third-party standing for the reasons we've stated in our briefing, and they also have not actually demonstrated any diversion of their resources that isn't connected with this litigation.

They're citing case law on the reasons that they don't need to establish standing is not in the contrary. For example,

in the *Doe versus Zucker* case which they cite, that merely stands for the unremarkable proposition that where a proposed intervenor actually does not seek anything different than what the current parties seek, they don't need to show standing. And similarly in the *Kane*, in *Kane* in California, those courts actually address the standing inquiry in the alternative. Here the intervenors very clearly do not have standing and have not even attempted to demonstrate that they do in their briefing.

They cite two out-of-circuit cases in a footnote for the proposition that they need not show standing for any relief that overlaps. No Sixth Circuit case appears to have so held.

The one district court in this circuit that, to have addressed this issue, the *Chapman versus Tristar* case which we cite in our briefing held that wherever a party seeks different relief, it must show Article III standing. That appears to be the rule in this circuit, and in any event, the government here disputes the standing of the states, so we think it would be inappropriate for this Court not to address the standing question with respect to the intervenors.

With respect to the declarations that they provided, they sort of dropped these declarations that have factual allegations on, along with their reply, but they don't actually develop any arguments as to these facts in their briefing. So I do think we would consider that, we think you could consider that conceded.

With respect to the significantly protectable interest, counsel's argument appears to try to pivot defendants' arguments from an interest to whether or not that interest was affected and was impaired rather, and I think the simple fact is that if this Court allows these parties to intervene, it would essentially mean that any individual or any cisgender girl who plays sports anywhere in a state with a Save Women's Sports Law could intervene. They don't appear to make any argument more directly funneled than that. I mean, that appears to be their argument, that they have an interest in being protected by Title IX and by Save Women's Sports laws, and that that alone gives them an interest to intervene.

Now if that's true, that means that millions of cisgender girls potentially who play sports in this country could intervene in this lawsuit, and that simply can't be the rule, and that can't be enough because the Sixth Circuit has expressly cautioned against making Rule 24 essentially meaningless.

With respect to *Grutter*, the, in the briefing on reply, the proposed intervenors recognize that the intervenors in *Grutter* actually had applied or intended to apply to the law school at issue in that case. Here, there's nothing like that. There's no actual intention or actual impending competition against a transgender athlete. There's merely statements that what if someday I have to participate in a competition and worry

about what would happen in that instance.

Similarly, in *Hecox*, counsel attempts to distinguish that case, but the fact is that there, there actually was, there had been a particular competition with a transgender person on a sports team and a loss to that particular individual; so there had been an ongoing demonstration of harm, and here that isn't the case.

Similarly, with respect to adequate representation, they make the point in their brief that they essentially seek the same practical result with respect to standing, but they claim that all they need to do to demonstrate inadequate representation is come up with some set of arguments that the plaintiff states haven't made. And again, if that were the case, if that were the rule in this circuit, that would mean that all an intervenor would need to do to demonstrate inadequate representation is make up some new arguments regardless of how colorable they are that would allow them to intervene, and I just think that can't be correct.

The *Bradley* case which we cite in our briefing demonstrates that the key here is really adversity. Is there adversity between the proposed intervenors and the parties who exist, and here I don't think that they can demonstrate adversity. They demonstrate merely that, that they may want to make new arguments and they seek essentially the same result, but there isn't actually any adversity of interest. And without

more, I think we could end up in a situation where many, many parties would seek to intervene in this lawsuit under a similar theory, and they might be allowed to do so.

Finally, I'd make a point on permissive intervention. They need standing on permissive intervention too. That's what the *Chapman* case held. We've made a number of arguments in our briefing about why intervention would prejudice defendants. We didn't get an opportunity to respond to their preliminary injunction motion with respect to the preliminary injunction motion factors as applied to them, and I think that that is clearly prejudiced.

And I also think that this would add unnecessary factual complexity to this case. The intervenor counsel suggested that this lawsuit should be about, about women in athletics and that these documents necessarily determine an outcome with respect to women in athletics, and as -- I don't want to repeat a lot of the arguments I was making before, but I do think it's important to note that these documents don't state anything about athletics, and they don't state anything about Save Women's Sports laws; and whether and to what extent there's a conflict between those, those laws and the documents here or the interpretation of Title IX rather is a question that is not presented in this case.

They mention, again, this West Virginia amicus brief. Once -- as I mentioned earlier, there's this whole record in

this case. There's a set of facts in this case that apply. There's a binding Fourth Circuit precedent there that the department relied on, so the fact that the government has made that statement there doesn't preclude them from making any inconsistent, you know, a statement here that, that is reflected in the documents.

I had a couple of smaller points. On the FAQ document, they mention that it essentially, their argument is that it essentially determines where Title IX applies. The document on its face just says here's what the Department of Education can investigate. It doesn't determine the outcome of particular investigations. And they also haven't, they mentioned the point about having not identified a specific athlete. I think they should be required to do that for standing purposes.

I think that runs through my list, and I don't have anything further unless Your Honor has questions.

THE COURT: I don't believe I do.

MR. HEALY: Thank you.

MR. SCRUGGS: Thank you, Your Honor. A few points.

As for standing, you know, I think we just fundamentally disagree about what the law requires. This -- just this past term, the U.S. Supreme Court in *Little Sisters of the Poor versus Pennsylvania* said that intervenors do not need to show standing if they're seeking the same relief. That was

for standing to appeal, but I think that same logic applies.

I think the fundamental mistake the department is making is essentially applying a standing analysis engross in a sense. So let's, for example, assume despite my disclaimer, let's assume that we sought both similar relief and different relief. Well, the Court would have to engage in a standing analysis about the different relief, but to the extent that we sought it on the same relief, it would be sufficient if the states had standing, so I think that's pretty basic, Your Honor.

I want to go to the point about anyone can intervene. Well, let me back up. I want to be clear on this. I think counsel is right that we did seek damages which would require separate standing, and that's why I came up and said I'll, we're disclaiming that. We're not going to seek damages, and of course it's perfectly appropriate for intervenors to do that as the exact standard that counsel cited, that you take all the papers put forth by the intervenors and construe them favorably toward us and toward intervention. So I don't think it's very controversial that a litigant can disclaim a certain scope of relief for example.

I want to go now to the intervention. Essentially I think the department's argument is it disagrees with the Sixth Circuit's standard and disagrees with *Grutter*. Counsel says it can't be the standard that, you know, we would, we don't have to show a male athlete who identifies as female competing. Well,

that exact same argument could have been made in *Grutter*, that anyone in *Grutter* could have intervened who intended to apply to the university or was about to apply to the university. Of course the answer to that question is, well, no. They still have substantial interest. This Court has a fair amount of discretion to exclude other potential intervenors either because they're untimely or late or it would disrupt the flow of this litigation which we don't, which is not true for us.

One point on *Hecox* that is useful to point out, Your Honor, my friend correctly notes that there the two female athletes had competed against males who identified as females, but they did so in Montana. So the Save Women's Sports Act in Idaho wouldn't have even protected them, but the Court still said they had a valid interest in that law to intervene on behalf to protect their rights in Idaho. So I think *Hecox* is very relevant for that reason and to argue for intervention.

Your Honor, again, I point the Court to the FAQ specifically mentions cheerleading. I think that's evident, combined that with the *B.P.J.* litigation.

For the most part, we will rest on the rest of our briefing. I would just simply conclude by noting that, you know, what Title IX means directly affects the ability of our intervenors to compete on a fair playing field, and this case is going to determine what that playing field looks like and whether it stays fair. So we believe we have a substantial

interest, and this Court should hear from the very parties most invested in protecting women's sports. Thank you.

THE COURT: Did you have anything else you wanted to add to that?

MR. HEALY: No, Your Honor.

THE COURT: All right. Thank you. Okay. Real quick. Back to our other, the injunction and everything else, Ms. Campbell. I understand we've talked about this before and that you all have covered this issue in your briefing, and we've already had today, but if you would please just sum up for me exactly why this is ripe.

MS. CAMPBELL: Sure, Your Honor. May I approach?

THE COURT: Absolutely.

MS. CAMPBELL: Thank you.

THE COURT: Take as much time as you need, and of course the defense, I'm going to ask them the same thing, why it's not, so.

MS. CAMPBELL: Thank you, Your Honor. I'm glad to address ripeness. I'll begin by reiterating that the ripeness considerations that defendants point to are prudential ripeness considerations, and the Sixth Circuit has, in a recent opinion that's cited in our brief, proceeded to address the merits, you know, without even determining whether the prudential ripeness factors are satisfied, so we don't think those are jurisdictional. They don't go to the Court's Article III

jurisdiction, but even if they do, we have satisfied those ripeness requirements.

Our challenge is to these guidance documents, the words in these guidance documents, the interpretations that are reflected in them. Whatever factual differences, or you know, specific facts defendants now say, you know, might change the outcome of a particular adjudication, that's not reflected in the guidance documents, and we don't need to know those. This Court doesn't need to know what those are in order to rule on our claims challenging the existing guidance documents, and really that's one of the very problems with the guidance documents is that they take these definitive positions about bathroom use by transgender individuals, and you know, participation on athletic teams. The Fact Sheet does specifically mention that issue. So does the EEOC -- sorry. The EEOC documents does not and it mentions bathrooms specifically.

One of the problems with the guidance documents is that it draws those definitive lines and doesn't account for any factual variations, and you know, I think it's notable that, you know, some of the governing athletic associations that have addressed these issues have, they haven't taken these sort of blanket positions. You know, what they have said is, well, you know, it may depend on whether the athlete, transgender athlete in question has undergone hormone therapy or it may depend on

the precise sport. We don't disagree that perhaps -- I mean, we think that our laws are valid, you know, but it doesn't really turn on factual distinctions like that, but certainly it could; and were this the subject of public notice and comment, certainly those are the kinds of factual distinctions that would be drawn out, but our challenge is to the guidance that the agencies have actually issued, and those challenges do not require any sort of factual development. Those are ripe for adjudication. They are pure issues of law, Your Honor.

And as to whether we have suffered significant hardship which is the other ripeness factor, we believe that we have and that we will if we aren't allowed to adjudicate these issues now because of the significant threat of enforcement and accompanying, you know, loss of federal funding that, and civil penalties that could occur.

THE COURT: Well, and I certainly don't want to put words in the defense mouths, but didn't they say that they didn't even know how they were going to enforce this? Didn't I hear that? So I mean, there's been no attempt to enforce at all, right?

MS. CAMPBELL: Not that I am aware of, no, on any specific investigations or complaints yet, but there has been no disavowment of enforcement.

THE COURT: And it's almost like that this guidance has gone out there and now they're looking at it and they're

thinking we don't know how to enforce this.

MS. CAMPBELL: I suspect that they are fully capable of determining how to enforce this if they wish, and it is in our opinion only a matter of time which is why enforcement, or sorry, pre-enforcement review is needed now.

And I'll just reiterate too that the sovereignty injuries that we're pointing to, those are not future injuries. Those are present, ongoing injuries that have already occurred and that will continue to occur until we have preliminary relief and are allowed to adjudicate these claims.

THE COURT: Can you talk a little bit more about that, the sovereignty?

MS. CAMPBELL: Sure, Your Honor. Specifically why those are present injuries?

THE COURT: Yes.

MS. CAMPBELL: You know, the guidance is out there. This is the position that the agency has said will bind it, will guide its processing of complaints and that it has vowed to enforce. That creates a, I don't know if chilling effect is the right word, but it creates a pressure for the state to change its laws.

THE COURT: I used chilling effect, and I probably shouldn't have used that.

MS. CAMPBELL: Well, yeah. I'm not sure I should either.

THE COURT: I understand what we're saying.

MS. CAMPBELL: I guess I'll refer to what the, how the courts have referred to it. I think if you look to the two Fifth Circuit cases that I mentioned earlier, there's *Texas versus United States* in 2015 and *Texas versus EEOC* in 2019. Both of those cases talked about this, that this pressure that administrative action placed on states to change their laws, and that is exactly the pressure that is created now. And those cases didn't involve -- you know, they didn't look at whether there was a credible threat of enforcement. They didn't engage in that inquiry at all because the injury there had already happened, this pressure because of the threat of enforcement to change their law. That was already occurring, and that's exactly the same sovereignty injury that the states are already facing as a result of this guidance.

THE COURT: Thank you.

MS. CAMPBELL: Anything else, Your Honor?

THE COURT: I don't think so. I'm sure there will be, but it will be later tonight. Thank you.

MS. CAMPBELL: Thank you, Your Honor.

MR. TOMLINSON: Thank you, Your Honor. On the -- I assume same questions to me or do you --

THE COURT: Yes.

MR. TOMLINSON: We can start there.

THE COURT: Look, you can talk about what you want to,

but that's what I want to hear.

MR. TOMLINSON: Okay. Well, that's what I want to talk to you about, Your Honor.

Your Honor, on the ripeness issue, as opposing counsel said, there's a two-factor test that's set out by numerous courts including the Sixth Circuit and *Warshak*. The first factor is is this claim fit for a judicial decision in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass. That's from *Warshak*, and here, Your Honor, clearly we don't have a concrete factual context. We know that just because you could look back through the transcript of the argument here today. We've talked about women's sports, we've talked about bathrooms, we've talked about warning letters, we've talked about whether there's some sort of preemption issue, we've talked about all the various, various kinds of hypotheticals, various sort of procedure mechanisms, excuse me; but clearly we don't have a concrete factual context which is why we're talking about these things in the hypothetical and the abstract, and so it's just not present here.

And second factor is what, whether there's a hardship to the parties of withholding court consideration, and that sort of dovetails with this Article III injury, in fact, issues that we've been talking. I won't belabor those same points over and over again, but it is worth noting, I think there's a -- in the

Sierra Club case which I cited to the Court which was the National Forestry Service, this clear-cutting plan case, there the Court held that it was not ripe and specifically said it was not ripe because there was no hardship to the Sierra Club in waiting for a more concrete, fact specific context for this challenge to arise. And they noted that this general forestry plan that Sierra Club was challenging at that early stage does not command anyone to do anything or to refrain from doing anything. It does not grant, withhold, or modify any form of legal license, power, or authority and does not subject anyone to any civil or criminal liability. It creates no legal rights or obligations.

Now that's exactly what we have here. We have a broad interpretive document that doesn't specifically purport to govern any of these factual situations we've talked about. It doesn't purport to preempt any laws. It doesn't purport to do any of these hypothetical circumstances we're talking about.

Are there scenarios in which it would become, these issues could come to pass? Possibly, but they, plaintiffs need to wait for those situations to arise, and at that point they'll be ripe, and this Court will have the benefit of a concrete factual context to decide those issues.

And instead what we have here is exactly what *Warshak* was warning that the Sixth Circuit does not want courts to do. It says answering difficult legal questions before they arise

and before the courts know how they will arise is not the way they typically handle litigation, and that's what we have here.

Your Honor, on the sovereignty point, I guess I would just direct the Court to our briefs and the discussion earlier, but again, we, the states, for all the states that are involved in this, they make these general, abstract allegations that there's been some sort of regulatory confusion or pressure on them; but they don't actually give any concrete example or evidence that there are some, there's something that they'll be enforced to do or prohibited from doing in some sort of exercise of state sovereignty, and I would once again sort of refer the Court back to the process for making these challenges.

Even if there was some sort of abstract threat to state sovereignty, they certainly have plenty of process by which to challenge that, through the administrative process, and ultimately they could bring all these same arguments they're making here today before an Article III court once they do have a concrete factual circumstance in which it arises. Unless the Court has any further questions --

THE COURT: I don't think so. All right. Anything else?

MS. CAMPBELL: No, Your Honor.

THE COURT: All right. Okay. Thank you. Thank you, both. Actually thank all three of you. Very well briefs. It's given me a lot to think about, and an order will be forthcoming,

all right? Thank you.

MR. HEALY: Thank you, Your Honor.

MS. CAMPBELL: Thank you.

THE COURTROOM DEPUTY: All rise. This honorable court is now in adjournment.

(Proceedings concluded at 1:18 p.m.)

C E R T I F I C A T E

STATE OF TENNESSEE)

COUNTY OF KNOX)

I, Kara L. Nagorny, RPR, RMR, CRR, do hereby certify that I reported in stenographic machine shorthand the above proceedings; that the foregoing pages were transcribed under my personal supervision and with computer-aided transcription software and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties nor an employee or relative of any attorney or counsel connected with the action nor financially interested in the action.

Transcript completed and dated this 10th day of December, 2021.

Kara L. Nagorny

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