

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

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

**RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiffs respectfully provide this Response to Defendants’ Notice of Supplemental Authority regarding *Arizona v. Biden*, No. 22-3272, 2022 WL 1090176, \_\_F.4th\_\_ (6th Cir. Apr. 12, 2022). Over two weeks before the Notice, the Sixth Circuit granted a stay pending appeal of a nationwide preliminary injunction of a memorandum that the Secretary of Homeland Security “issued to his deputies outlining the Department’s immigration enforcement priorities and policies.” *Id.* at \*1. This Court should take the author of the order’s advice and consider its application here “with a grain of adjudicative salt” considering the substantial differences between this case and that immigration one. *Id.* at \*10 (Sutton, C.J., concurring).

**First**, the States in *Arizona* did “not protest regulation of them as States or preemption of local lawmaking authority.” *Id.* at \*4 (order). But that is a central aspect of the harm to Plaintiff States in this case. Defendants understand this distinction. Indeed, since the argument in November 2021, the Biden Administration has repeatedly emphasized its commitment to “combatting” what it calls “legislative attacks on transgender kids at the state level.” White House, *Fact Sheet: Biden-Harris Administration Advances Equality and Visibility for*

*Transgender Americans* (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-biden-harris-administration-advances-equality-and-visibility-for-transgender-americans/>. President Biden has told the American public that “the onslaught of anti-transgender laws . . . is simply wrong” and that his “administration is standing up . . . against all these hateful bills.” White House, *President Biden on Transgender Day of Visibility 2022* (Mar. 31, 2022), <https://www.youtube.com/watch?v=8wCjz2SIYVo>. Because Congress has declined the Biden Administration’s call to rewrite Title VII and Title IX, Defendants are “expanding Federal non-discrimination protections” through acts such as these regulations masquerading as mere guidance. White House, *A Proclamation on Transgender Day of Visibility, 2022* (Mar. 30, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/30/a-proclamation-on-transgender-day-of-visibility-2022/>; *see Arizona, 2022 WL 1090176*, at \*6 (“Labels, it is true, do not control the inquiry. Legal effects do.”).

The Sixth Circuit’s order in *Arizona* emphasized that it would “not overlook whether the agency’s action puts a party to a ‘Catch-22,’ stuck between heavy compliance costs or feared liability, neither of which can be undone.” 2022 WL 1090176, at \*5. Yet that is precisely the situation Tennessee and other Plaintiff States find themselves in. As one example, during the recently concluded session of the Tennessee General Assembly, the legislature considered a bill that would protect teachers who use pronouns consistent with students’ biological sex. *See* H.B. 2633/S.B. 2777, 112th Gen. Assem. (2022). The Tennessee House of Representatives voted 67–25 in favor of the bill. But the bill stalled out in the Senate Finance Committee. The General Assembly’s Fiscal Review Committee, quoting extensively from the U.S. Department of Education guidance challenged in this case, concluded that Title IX now “prohibits recipients of federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities” and placed a \$5,385,248,493 fiscal note on the bill.

Tenn. Gen. Assem. Fiscal Rev. Comm., *Fiscal Memorandum HB 2633 - SB 2777* (Mar. 7, 2022), <https://www.capitol.tn.gov/Bills/112/Fiscal/FM2118.pdf>.

Defendants' strongarming of Plaintiff States is even more egregious considering the U.S. Supreme Court's recent reassertion in *Cameron v. EMW Women's Surgical Center, P.S.C.*, that "[p]aramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." 142 S. Ct. 1002, 1011 (2022). A State's "opportunity to defend its laws in federal court" and to exercise its sovereign power to enact laws governing its own citizens "should not be lightly cut off." *Id.* After all, "a State 'clearly has a legitimate interest in the continued enforceability of its own statutes.'" *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986)).

**Second**, a major component of the Sixth Circuit's analysis was its consideration of the "considerable discretion baked into the immigration system." *Arizona*, 2022 WL 1090176, at \*6. The Sixth Circuit reasoned that "Congress did not remove all discretion from the Department in making removal and detention decisions." *Id.* at \*5. Nevertheless, the panel acknowledged its "approach does not apply when Congress, as opposed to the agency, sets all of the marching orders." *Id.* Here, Congress specified in Title VII and Title IX that it was prohibiting discrimination "because of . . . sex," 42 U.S.C. § 2000e-2, and "on the basis of sex," 20 U.S.C. § 1681(a). Congress never gave Defendants authority to rewrite those statutes to encompass discrimination because of or on the basis of gender identity or sexual orientation.

**Third**, the Sixth Circuit's opinion in *Arizona* is not a prohibition on injunctions that apply to parties outside the geographic bounds of the Circuit. Chief Judge Sutton emphasized that he did "not take issue with the court's decision to extend the remedy beyond the Southern District of Ohio as to the three state claimants." *Arizona*, 2022 WL 1090176 at \*10 (Sutton, C.J., concurring). He simply found the nationwide injunction "especially troubling in the domain of

immigration law.” *Id.* at \*11. As Plaintiff States previously argued, Defendants should be preliminarily enjoined, at a minimum, from enforcing the challenged guidance against Plaintiffs.

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