

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

**THE STATE OF TENNESSEE; THE
STATE OF ALABAMA; THE STATE OF
ALASKA; THE STATE OF ARIZONA;
THE STATE OF ARKANSAS; THE
STATE OF GEORGIA; THE STATE OF
IDAHO; THE STATE OF INDIANA;
THE STATE OF KANSAS; THE
COMMONWEALTH OF KENTUCKY;
THE STATE OF LOUISIANA; THE
STATE OF MISSISSIPPI; THE STATE
OF MISSOURI; THE STATE OF
MONTANA; THE STATE OF
NEBRASKA; THE STATE OF OHIO;
THE STATE OF OKLAHOMA; THE
STATE OF SOUTH CAROLINA; THE
STATE OF SOUTH DAKOTA; THE
STATE OF WEST VIRGINIA,**

Plaintiffs,

—and—

**ASSOCIATION OF CHRISTIAN
SCHOOLS INTERNATIONAL; A.S., a
minor, by Brandi Scarborough, her mother;
C.F., a minor, by Sara Ford, her mother;
A.F., a minor, by Sara Ford, her mother,**

Proposed Intervenor-Plaintiffs,

v.

**UNITED STATES DEPARTMENT OF
EDUCATION; MIGUEL CARDONA, in
his official capacity as Secretary of
Education; EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION;
CHARLOTTE A. BURROWS, in her
official capacity as Chair of the Equal
Employment Opportunity Commission;**

Case No. 3:21-CV-00308-CEA-DCP

UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

**Proposed Intervenor-Plaintiffs’ Response to the Defendants’
Notice of Supplemental Authority**

The Department of Education’s unilateral attempt to rewrite Title IX is reviewable under the Administrative Procedure Act, a conclusion underscored by comparing the Department’s forceful announcement of a new, universal legal standard to the nonbinding multi-factor, discretionary Department of Homeland Security guidance found to be non-reviewable in *Arizona v. Biden*, 31 F.4th 469, 477–79 (6th Cir. 2022).

Agency action is reviewable when “rights or obligations have been determined” or “legal consequences will flow.” *Id.* at 477 (citation omitted). The Sixth Circuit examines four factors when conducting this analysis: (1) whether the agency’s action “impose[s] liability’ on a regulated party, create[s] legal rights, or ‘mandate[s], bind[s], or limit[s] other government actors’ in the future,” *Id.* at 477 (citing *Parsons v. U.S. Dep’t of Just.*, 878 F.3d 162, 169 (6th Cir. 2017)), (2) whether the agency’s action will have “a sufficiently direct and immediate impact on the aggrieved party and a direct effect on its day-to-day business,” *Berry v. Dep’t of Lab.*, 832 F.3d 627, 633 (6th Cir. 2016), (3) whether the agency’s action preserves officials’ “independent

decision making” and can be “discretionarily relied on,” *Parsons*, 878 F.3d at 170, and (4) “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.” *Biden*, 31 F.4th at 477 (citing *Air Brake Sys. v. Mineta*, 357 F.3d 632, 645 (6th Cir. 2004)).

Under this analysis, the DHS Guidance in *Arizona* was a non-reviewable policy document because it simply provided examples of what immigration officials should take into consideration when exercising their prosecutorial discretion. The “Guidance couches its instructions on lots of conditional language that preserves officials’ discretion”; it “leaves the exercise of prosecutorial discretion to [officials] judgement”; and it merely provides “‘example[s]’ of what officials should consider” *Id.* at 478. The DHS Guidance did not impose any regulatory compliance costs as “direct or appreciable legal consequences.” *Id.* (citing *Parsons*, 878 F.3d at 170). An agency’s “choice ‘not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed’ to an agency’s ‘discretion.’” *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

But here the Department of Education’s Title IX Notice of Interpretation bound government actors to a new view of Title IX across the board, and it leaves no independent discretion to anyone, let alone to agency officials, to disregard it. The Department seeks to pursue enforcement proceedings to impose liability on regulated parties, including States: it vowed to “*fully enforce* Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that received Federal financial assistance.” 86 Fed. Reg. 32,637, 32,639 (emphasis

added). This statement declares the government's intent to enforce new statutory rights and asserts new protected classes for third parties. It is meant to make the regulated community comply, as confirmed in a "Dear Educator" letter which notified Title IX recipients that the Department "*will fully enforce Title IX*" against them "to prohibit discrimination based on sexual orientation and gender identity." Letter to Educators on Title IX's 49th Anniversary (June 23, 2021), <https://bit.ly/3ksLLDj> (emphasis added). The Department's attached Fact Sheet even gave examples of what *is* a violation, such as preventing a "transgender high school girl" from "try[ing] out for the girls' cheerleading team." U.S. Dep't of Justice & U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools* (June 2021), <https://bit.ly/3sQjZnM>.

There is nothing conditional about these actions. The Department seeks to "regulate the States by telling them what they can or cannot do in their jurisdiction"; claims that its view of Title IX will "preempt any state or local law"; and requires officials to enforce this view on everyone. *Biden*, 31 F.4th at 474.

So, unlike the DHS Guidance in *Arizona*, the Department of Education's action puts Title IX recipients in a regulatory Catch-22. Title IX recipients like the States must either (1) adopt the Department's interpretation of sex and change their day-to-day educational operations to let men into women's sports, harming female athletes at their schools and at competitor schools, or (2) risk the loss of federal funds and substantial potential liability. 86 Fed. Reg. at 32,639. Just as in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 599 (2016), agency action is final when it

warns regulated parties that, if they engage in certain conduct, “they do so at the risk of significant criminal and civil penalties.”

The Department’s new Title IX mandate also will have a serious and direct impact on female athletes, including proposed intervenors A.S., C.F., and A.F. Each athlete would enjoy protection under Arkansas’ Act to Create Fairness in Sports against competition by male-bodied athletes but for the Department’s new standard, which announces an interpretation of Title IX that purports to preempt the Arkansas statute. As a result, the Department’s action denies beneficiaries of state law, like A.S., C.F., A.F., otherwise immediately available legal rights and protections.

Even for schools that do not receive Title IX funds, such as Association of Christian Schools International member schools, the Department’s new legal standard will have a serious “direct effect on [their] day-to-day business.” *Berry v. Dep’t of Lab.*, 832 F.3d 627, 633 (6th Cir. 2016). The Department seeks to create an uneven playing field for member schools’ female athletic teams by requiring them to compete against other public schools’ female athletic teams that include biological males. *See* Intervening-Plaintiffs’ Proposed Verified Complaint at 36. Whatever response States and schools choose, these effects—lost athletic records and lost athletic opportunities for women, or racking up substantial ongoing potential liabilities—cannot be undone.

Respectfully submitted this 11th day of May, 2022.

W. Andrew Fox
BPR No. 017356
GILBERT & FOX
625 S. Gay Street, Suite 540
Knoxville, TN 37902
Telephone: (865) 525-8800
Facsimile: (865) 525-8200
andy@andrewfoxlaw.com

/s/ Jonathan A. Scruggs
Ryan L. Bangert*
TX Bar No. 24045446
Jonathan A. Scruggs*
BPR No. 25679
Henry W. Frampton, Iv*
SC Bar No. 75314
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
rbangert@ADFlegal.org
jscruggs@ADFlegal.org

Christiana Kiefer*
DC Bar No. 196922
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, D.C. 20001
Telephone: (202) 393-8690
Facsimile: (202) 347-3622
ckiefer@ADFlegal.org

*Admission *Pro hac vice*

Attorneys for Proposed Intervenor-Plaintiffs

Certificate of Service

I hereby certify that on the 11th day of May, 2022, I electronically filed the foregoing document with the Clerk of Court and that the foregoing document will be served via the CM/ECF system on all counsel of record.

s/ Jonathan A. Scruggs
Jonathan A. Scruggs
Attorney for Proposed Intervenor Plaintiffs