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

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| **THE STATE OF TENNESSEE,** *et al.,*<br><br>Plaintiffs,<br><br>—and—<br><br>**ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; A.F.,** a minor, by Sarah Ford, her mother,<br><br>Intervenor-Plaintiffs,<br><br>v.<br><br>**UNITED STATES DEPARTMENT OF EDUCATION**, *et al.*,<br><br>Defendants. | **Case No. 3:21-CV-00308-CEA-DCP**<br><br>**INTERVENORS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE INTERVENORS' COMPLAINT** |

## Introduction

The government should not get a second "bite at the apple" to try to dismiss Intervenors' complaint. The Court instructed Intervenors to file an amended complaint that "asserts the *same claims* and seeks the *same relief*" as the Plaintiff States. ECF No. 102 at 1 (emphasis added). And Intervenors did just that. *See* ECF No. 104.

Now, the government asks this Court to strike this complaint by quibbling with its language and seeking to restrict the arguments Intervenors may make in support of the same relief both the States and Intervenors request. The motion is baseless and should be denied.

## Argument

Motions to strike are disfavored and rarely granted. *See E.E.O.C. v. FPM Group, Ltd.*, 657 F. Supp. 2d 957, 966 (E.D. Tenn. 2009) (denying motion to strike); *see also Operating Engineers Local 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015) (stating same). Striking an entire pleading is "a drastic remedy" to be used "sparingly" and as a last resort. *See FPM Group, Ltd.*, 657 F. Supp. 2d at 966. In fact, Rule 12(f) motions are an improper vehicle to procure dismissal of a complaint. *See*, *e.g.*, *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (citing 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1380, at 782 (3d ed. 1969)).

But that's exactly what the government seeks. In requesting this drastic remedy, the government raises two arguments. First, it argues that Intervenors have "enlarge[d] the scope of the declaratory relief sought" by the States. That's wrong. The States' complaint requests:

> A declaratory judgment that Title IX does not prohibit Plaintiffs *and Title IX recipients located therein* from maintaining athletic teams separated by biological sex or from assigning an individual to a team based on the individual's biological sex.

ECF No. 1 at 33 (emphasis added). Thus, the States' requested relief would apply to the States themselves *and all Title IX recipients in those States*. Similarly, Intervenors' complaint seeks a declaratory judgment that

> Title IX and its implementing regulations do not prohibit the Plaintiff States, Title IX recipients in the Plaintiff States, *or Intervenor-Plaintiffs or their members* ***in the Plaintiff States*** from maintaining athletic teams separated by biological sex or from assigning an individual to a team based on the individual's biological sex.

ECF No. 104 at 57 (emphasis added). Intervenors expressly limited their requested relief to Intervenors or their members *in the Plaintiff States*. Intervenor schools within the Plaintiff States are just a subset of the Title IX recipients already

covered by the States' request.[1] Intervenors are therefore requesting relief that overlaps entirely with the relief requested by the States, and the government's motion should be denied.

If the Court finds any vagueness in Intervenors' requested relief that is subject to a broader interpretation, Intervenors request that the Court construe any such vagueness in Intervenors' favor. *See, e.g., Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1140 (N.D. Cal. 2010) ("[W]hen ruling on a motion to strike, the Court takes the plaintiff's allegations as true and must liberally construe the complaint in the light most favorable to the plaintiff."). Intervenors simply desire to make it clear that their member schools in the Plaintiff States are entitled to the same relief as other Title IX recipients in those States.

Second, the government notes that Intervenors' complaint includes an argument supporting the APA claim that the States' complaint did not include—namely, that Title IX *requires* sex-separation in sports because it's the only meaningful way of giving women equal athletic opportunities. That's true. Intervenors made this argument as one of many ways the agency action is arbitrary, capricious, and an abuse of discretion. And the argument is permissible. The Court did not limit Intervenors' *arguments* to those raised by the States: the Court limited Intervenors to asserting "the same claims" as the States. ECF No. 102 at 1. After all, standing is only required when an intervenor presses claims or seeks relief *beyond the relief sought by the plaintiff*, not when an intervenor makes

[1] For clarity, only recipients of federal funding are subject to Title IX and its implementing regulations. 20 U.S.C. § 1681 (limiting reach of Title IX to "any education program or activity receiving Federal financial assistance"). Thus, Intervenor schools that are not Title IX recipients are already not bound by Title IX or its implementing regulations and thus are self-evidently outside the scope of this request for relief.

different arguments for the same relief. *See Town of Chester, N.Y. v. Laroe Ests., Inc.,* 137 S. Ct. 1645, 1651 (2017).

Under the government's theory, Intervenors could not make any argument, cite any case, or point to any evidence that the Plaintiff States did not first raise. This novel theory would reduce Intervenors' role to merely copying the States' briefs and would allow the government to police every Intervenor filing going forward for arguments, citations, or evidence not first presented by the States. That makes no sense. And it contradicts the Court's Intervention Order, which anticipates that Intervenor will contribute to the full factual and legal airing of the claims asserted by the States. *See* ECF No. 102 at 13.

The government's argument here merely rehashes its opposition to Intervenors' intervention, a position this Court rejected. In opposing Intervenors' motion to intervene, the government called Intervenors' arguments "a near mirror image" and "virtually exactly the same" as those of the States. ECF No. 63 at 22, 30. Now, the government argues just the opposite—that Intervenor fails to mimic the States' pleading. It can't have it both ways. Nor can the government covertly attempt to relitigate the motion to dismiss and intervention decision on a Rule 12(f) motion.[2]

Because Intervenors filed a complaint that asserts the same claims and seeks the same relief as the States, the government's motion to strike is baseless and should be denied.

[2] It should be noted that the Sixth Circuit granted Intervenors' request to intervene and participate in briefing on appeal—based on part on Intervenors' amended complaint—which underscores that this Court's intervention order was rightly decided. *See* ECF No. 108. at 1-2.

Respectfully submitted this 14th day of October, 2022.

*s/ Jonathan A. Scruggs*

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**Certificate of Service**

I hereby certify that on the 14th day of October, 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.

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