No. 22-5807

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF TENNESSEE, ET AL.,

Plaintiffs-Appellees

v.

DEPARTMENT OF EDUCATION, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Tennessee, Knoxville Division
Case No. 3:21-cv-00308

MOTION TO PARTICIPATE IN APPEAL OR, IN THE ALTERNATIVE TO INTERVENE IN APPEAL

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Introduction

Women and girls deserve the chance to compete on a safe and fair playing field. A.F. is a high-school female athlete in Arkansas who benefits from Title IX and state laws that forbid men from playing in women's sports. The Association of Christian Schools International (ACSI) is an association of Christian secondary schools, colleges, and universities that—along with its member schools and their female athletes—also benefits from these laws.

So when the federal government tried to invalidate these protections and Appellee States sued to stop this overreach, A.F. and ACSI ("Intervenors") quickly moved to intervene below. Intervenors also asked to join the States' preliminary-injunction motion as they actively participated in the proceedings. These proceedings were successful, and the district court granted the States' injunction.

The day after the Administration appealed that ruling, the district court allowed A.F. and ACSI to intervene and confirmed their participation in the preliminary injunction. Because Intervenors are full parties in this case who benefit from the injunction and participated in the proceedings below, they are technically already Appellees. But out of an abundance of caution, they ask this Court to recognize their right to participate in this appeal and defend the injunction.[1]

This participation is appropriate for three reasons. First, the district court's intervention order made Intervenors parties to the case and specifically to the injunction on appeal. Intervenors therefore have the same right to participate in the appeal as any other party. Further,

[1] Counsel were timely notified of this motion—the States do not oppose the motion and the Administration takes no position on the motion.

as the district court confirmed, Intervenors benefit from the injunction. They should therefore be allowed to defend it on appeal.

Second, A.F. and ACSI have non-party appellate standing. They have a sufficient interest in this case and could be affected by the result of this appeal because they joined the States' requested injunction below and would be harmed were the injunction dissolved. What's more, Intervenors have a significant interest in preserving equal athletic opportunities for themselves, ACSI member schools, and the thousands of female athletes attending ACSI member schools. Intervenors also meet the requirements of de facto parties through their involvement in the proceedings at the district court.

Alternatively, Intervenors meet the requirements under Federal Rule of Civil Procedure 24 to intervene permissively and as-of-right: (1) Their intervention request is timely since this appeal is only a week old; (2) A.F. and ACSI have a significant interest in ensuring women and girls have equal access to athletic opportunities; and (3) the States cannot adequately represent Intervenors because Intervenors bring unique perspectives and raise different arguments. This Court should hear directly from the people most affected by the federal government's rewrite of Title IX—the schools and female athletes who are being asked to accommodate male athletes in women's sports.

Accordingly, Intervenors respectfully ask that this Court confirm their status as Appellees in this appeal.

Factual and Procedural History

In January 2021, President Biden issued an Executive Order changing the meaning of sex discrimination in Title IX to include gender identity and sexual orientation. Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021). He directed federal agencies to abide by this order in their agency's rules and policies. *Id*. The Department of Education, the Civil Rights Division of the Department of Justice, and the Office of Civil Rights then published their interpretations redefining sex discrimination under Title IX.

I. ACSI and A.F. benefit from Title IX and state sports laws that protect female athletics.

The Association of Christian Schools International is an organization that serves member individuals and member schools from early education to universities. Decl. of David Balik in Supp. of Mot. to Intervene (Balik Decl.) ¶¶ 3–20, ECF No. 51-5, attached as Exhibit A.[2] ACSI offers many benefits to its member schools and also advocates on their behalf. *Id*. at ¶¶ 8–20. But the Administration's actions eliminate the benefits that ACSI and its member schools and female athletes currently enjoy under Title IX and other state laws. *Id*. at ¶¶ 58–66.

A.F. is a female athlete who plays volleyball and basketball at a public secondary school in Arkansas. Decl. of A.F. in Supp. of Mot. to Intervene ¶ 2, ECF No. 51-4, attached as Exhibit B. Sports are a huge part of her life. *Id*. at ¶¶ 4–6. She has worked hard at her sports and intends to pursue opportunities for college scholarships. *Id*. at ¶¶ 20–

[2] Intervenors attach exhibits from the Eastern District of Tennessee Knoxville's record for the Court's convenience.

22. She is committed to the integrity of female athletic competition. *Id.* at ¶¶ 29–30.

Currently, A.F. and ACSI benefit from Title IX's protection of women's sports. A.F. also benefits from Arkansas' Save Women's Sports Law, and the female athletes attending ACSI schools benefit from other save women's sports laws across the country. Those laws currently forbid men from participating in women's sports. But the Administration's actions seek to strip those protections away. *See* Statement of Interest of the U.S., *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D.W. Va. June 17, 2021), ECF No. 42, attached as Exhibit C (arguing that West Virginia's Save Women's Sports Law, separating sports by biology, violates Title IX and should be enjoined so that men who identify as women can compete against female athletes).

II. A.F. and ACSI sought to intervene and join the State's preliminary-injunction request and then actively participated below.

Twenty States filed a complaint and a preliminary injunction against the Administration for reinterpreting federal law through executive fiat. On September 23, 2021, the Administration moved to dismiss that complaint and objected to that preliminary-injunction request.

Just 11 days later, ACSI and A.F. moved to intervene.[3] *See* Intervenor-Pls.' Mem. in Supp. of their Mot. to Intervene, ECF No. 51-

[3] The motion included two other female athletes—A.S. and C.F.—both of whom were high-school seniors at the time the motion was filed. Intervenors have not included them here since they have now graduated from high school and have elected not to pursue intercollegiate sports.

1, attached as Exhibit D. And on November 3, 2021, the district court heard argument on the States' motion for preliminary injunction, the Administration's motion to dismiss, and the motion to intervene. *See* Mot. Hr'g Tr., ECF No. 72, attached as Exhibit E. Intervenors participated in that hearing and argued that the case and the requested injunction would substantially affect A.F. and ACSI. *Id.*

III. The district court granted A.F. and ACSI's request to intervene and join the States' preliminary injunction.

On July 15, 2022, the district court granted the States' motion for preliminary injunction and denied the Administration's motion to dismiss but did not rule on the intervention request. *Tennessee v. U.S. Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *1 (E.D. Tenn. July 15, 2022). The Administration then appealed that ruling to this Court on September 13, 2022.

Seeking to move quickly to protect their interests, Intervenors moved the district court that same day to immediately rule on their intervention motion so that they could participate in this appeal and in the case below. The next day—on September 14, 2022—the district court granted that request for permissive intervention.[4] Mem. Op. and Order, ECF No. 102, attached as Exhibit F. Importantly, the district court also granted the Intervenor's request to join the States' preliminary-injunction and on that basis denied any need to issue a separate preliminary injunction for Intervenors. *Id.* Intervenors

[4] Because the Court ruled that Intervenors were entitled to intervene permissively, the Court did not rule on the request to intervene as a matter of right.

therefore are now parties to the case and participate in and benefit from the preliminary injunction that is the subject of this appeal.

Argument

Intervenors (I) are already parties in the case, and the Court should recognize that they are Appellees in this appeal. *See* Exhibit F. Intervenors also meet the requirements for (II) non-party appellate standing as they have an interest in this litigation and were involved in the district court's proceedings. *City of Cleveland v. Ohio*, 508 F.3d 827, 837 (6th Cir. 2007). In the alternative, (III) Intervenors meet the requirements for intervention permissively and as of right. The Sixth Circuit favors intervention, and Rule 24 should be "broadly construed in favor of potential intervenors." *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991). This Court should make clear that Intervenors are Appellees on this appeal.

I. By the district court's order granting permissive intervention and joinder to the preliminary injunction, Intervenors are proper parties to this appeal.

Intervenors can participate in this appeal because the district court granted their motion to intervene in the case and confirmed that they are parties to the preliminary injunction on appeal here. Indeed, Intervenors' separate motion for a preliminary injunction was denied as moot *because* they are covered by the preliminary injunction issued to the States. *See* Exhibit F.

On appeal, Intervenors have the same right to defend an injunction in their favor as any other party would have. Intervenors "became [parties] when the district court granted [their] motion to

intervene." *Cnty. Sec. Agency v. Ohio Dep't of Com.*, 296 F.3d 477, 483 (6th Cir. 2002); *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (because parties were not granted intervention, they "never obtained the status of party litigants in this suit"); *U.S. for Use of Ward Const. Serv., Inc. v. U.S. Fid. & Guar. Co.*, 26 F.R.D. 568, 570 (E.D. Ky. 1960 ("An intervenor in an action or proceeding is for all intents and purposes an original party"). Thus, when the district court granted the motion to intervene and allowed Intervenors to join and benefit from the States' preliminary injunction, Intervenors obtained the right to participate in the appeal of that injunction. *Cf.* 4 C.J.S. *Appeal & Error* § 334 (recognizing that any party with an interest adverse to setting aside the judgment below is a proper appellee).

This Court should therefore affirm that Intervenors are Appellees in this appeal. As beneficiaries of the preliminary injunction, it only makes sense that they should be allowed to defend it. Their involvement should not be limited due to the unique procedural posture: the district court granted the preliminary injunction *before* granting Intervenors' intervention motion. This is particularly so since the intervention order was issued only a day after the government filed its notice of appeal. Under Rule 24, Intervenors should be treated as original parties/Appellees in this appeal.

II. Intervenors meet the requirements of appellate non-party standing.

To have appellate standing, "a party must be aggrieved by the judicial action from which it appeals." *Vogel v. City of Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992) (citation omitted). But in some cases, this

Court holds that "Article III affords standing to non-parties for the purposes of appeal." *United States v. Perry*, 360 F.3d 519, 526 (6th Cir. 2004). In this Court, entities have non-party appellate standing if they are (1) "actually aggrieved . . . by the judgment or order . . . [(2)] as long as the appellant was treated as a *de facto* party to that claim in the lower court." *City of Cleveland*, 508 F.3d at 837.[5] Intervenors satisfy both requirements.

A. Intervenors have a significant interest in this appeal and the district court's injunction.

Intervenors have a "sufficient stake in the outcome of the controversy" and the results of this appeal could personally aggrieve them. *Bryant v. Yellen*, 447 U.S. 352, 368 (1980). In the Sixth Circuit, non-parties can have appellate standing and are "allowed to appeal" if an action affects a party's interests. *In re Siler*, 571 F.3d 604, 608 (6th Cir. 2009) (quoting *West v. Radio–Keith–Orpheum Corp.*, 70 F.2d 621, 623–24 (2d Cir. 1934) (citations omitted)). And parties "may pursue this appeal although they were not technically parties below." *Id.*

Intervenors have a significant interest in this appeal for two independent reasons. First, the district court made Intervenors parties to the case by granting them permissive intervention. *See Bryant*, 447 U.S. at 368. The district court also applied the States' preliminary-

[5] Non-party appellate standing does not require standing at the district court level. *See Doe v. Pub. Citizen*, 749 F.3d 246, 259 (4th Cir. 2014) ("By restricting nonparty appeals to only those individuals who sufficiently participate in the proceedings before the district court and have some concrete interest that is adversely affected . . . we address the prudential standing concerns" that occur when a non-party appeals a judgment.).

injunction relief to Intervenors—protecting their interest in safe, fair sports competitions. *See* Exhibit F. In the intervention order, the district court confirmed that the States' preliminary injunction applies to Intervenors, denying Intervenors' separate preliminary-injunction motion as moot since it had already granted them appropriate relief. *Id.* at 1, 14–15. And if this Court dissolves the injunction, Intervenors are harmed since their relief goes away. Intervenors are therefore "affected by the district court's . . . order" and would be affected were the injunction dissolved. *Doe*, 749 F.3d at 259.

Second, regardless of the district court's intervention ruling, Intervenors have a substantial interest in this appeal's outcome. Even non-parties can participate in an appeal if the decision below "affects [their] interests." *In Re Siler*, 571 F.3d at 608 (cleaned up); *Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) (non-party appellate standard satisfied when the party had a "legitimate interest" in the case and their interests would be affected).

A.F. and ACSI satisfy this hurdle because they have a substantial interest in fair, safe competition in women's sports. Courts across the country have determined "there is no question" that a woman's right to an equal athletic opportunity is "legitimate and important" interest. *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) ("Congress . . . recognized that addressing discrimination in athletics presented a unique set of problems."). And under Title IX, "an institution must effectively accommodate the interests of both sexes in both the selection of the sports." *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994); *see Miami Univ. Wrestling Club v. Miami*

Univ., 302 F.3d 608, 615 (6th Cir. 2002) ("Title IX prohibits gender inequity in connection with, among other things, the opportunity to participate in athletics.").

A.F. benefits from Title IX's correct interpretation that protects female athletes. She also benefits from Arkansas's law protecting her from competing against boys in girls' sports. Ark. Code § 6-1-107. She wishes to compete in female-only athletics to maintain a competitive environment protected from male participation.

ACSI itself has a substantial interest in this case too. ACSI has an interest in overturning the Administration's policy interpretations because the Administration passed them without following the Administrative Procedures Act—so ACSI lost the chance to "influence the rule making process in a meaningful way." *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979).

ACSI also has an interest in protecting its member schools. With the Administration's new interpretation of Title IX, the federal government is opening sports leagues to new competitors and changing the rules of play to include serious safety risks and create competitor standing for competitor female athletes. *See, e.g., Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997) (standing when regulation burdened firearm manufacturers and dealers but not their competitors); *XY Plan. Network, LLC v. U.S. Sec. & Exch. Comm'n*, 963 F.3d 244, 251 (2d Cir. 2020) (summarizing competitor standing doctrine); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (same).

And ACSI has an interest in protecting its female athletes at its member schools. ACSI's member schools and their female athletes benefit from sex-separated sports, providing opportunities for female

athletes to athletically achieve and improve without the risk of injury from male participation. They also benefit from the various Save Women's Sports laws that have been passed throughout the country. The Administration is imperiling these laws through their interpretation. Intervenor-Pls.' Verified Compl. ¶¶ 143–144, attached as Exhibit G. There's no question that the member schools have an interest in protecting their female athletes. *See Runyon v. McCrary*, 427 U.S. 160, 175 n.13 (1976) ("It is clear that the schools have standing to assert these arguments [involving student's right to privacy and free association and the parent's right to direct the child's education] on behalf of their patrons."); *Ohio Ass'n of Indep. Schs. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) ("[S]chools also have standing to assert the constitutional right of parents . . . ."). Thus, Intervenors have more than sufficient interest to justify participating in this appeal.

B. Intervenors actively participated in the proceedings below.

As for the second requirement for non-party appellate standing, Intervenors adequately participated at the district-court level. Intervenors need only show that they were "treated as [ ] *de facto* part[ies] to that claim in the lower court." *City of Cleveland*, 508 F.3d at 837. Hallmarks of "de facto" party status are participating from the inception of the case and participating in important hearings. *Martin-Trigona*, 702 F.2d at 386 (participation from inception of case); *In re Vargas*, 723 F.2d 1461, 1464 (10th Cir. 1983) (hearing participation); *S.E.C. v. Wencke*, 783 F.2d 829, 834 (9th Cir. 1986) (same). Both are present here.

Intervenors acted as parties to the case from early on. They moved to intervene when the lawsuit was only five weeks old. The Administration moved to dismiss the complaint, but the parties had not fully briefed that motion and the court had not decided the issue when Intervenors filed their motion. No one had engaged in discovery yet. And the court had not yet issued a scheduling order. Intervenors did not hesitate and moved to intervene at an early stage in the case. They sufficiently "participated in the proceedings below." *Martin-Trigona*, 702 F.2d at 386.

Not only did they file their intervention motion early in the case, but Intervenors substantively participated at the preliminary-injunction hearing. Intervenors were "initially present at the hearing", *In re Vargas*, 723 F.2d at 1464, and spoke on the merits of Intervenors' intervention motion and their interest in the case. *See* Exhibit E. Intervenors therefore adequately participated in the proceedings at the district court, and this Court should consider them to be de facto parties for non-party appellate standing.

III. Alternatively, Intervenors satisfy the requirements to intervene permissively and as-of-right.

Federal Rule of Civil Procedure 24 authorizes both intervention as of right and permissively. The Sixth Circuit favors intervention, even at the appellate level. *Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790, 790 (6th Cir. 2010) ("[W]e may grant either intervention of right or permissive intervention"). The intervention standard "on appeal is judged by essentially the same standard as intervention in district court." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002,

1008 (2022). Rule 24 should be "broadly construed in favor of potential intervenors." *Purnell*, 925 F.2d at 950. A.F. and ACSI should be granted (A) permissive intervention because their legal interests share common questions of law and fact with this case. They also satisfy the requirements for (B) intervention as of right because their motion is timely, they have a protectable interest affected by this appeal, and their arguments are unique from the States.

A. The court should grant A.F. and ACSI permissive intervention.

Intervenors qualify for permissive intervention as the district court already ruled. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." And, as this Court has noted, a "[s]trong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible . . . supports permissive intervention." *Buck v. Gordon*, 959 F.3d 219, 225 (6th Cir. 2020). In making this decision, a court should consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Intervenors satisfy these requirements.

First, Intervenors filed this motion without "undue delay and prejudice." *Blount-Hill v. Zelman*, 636 F.3d 278, 287 (6th Cir. 2011). This appeal began just last Tuesday. Intervenors responded immediately with a request to the district court that the court rule on Intervenors' motion to intervene so they could participate in this appeal. The appeal is in its infancy and is only a week old. And no one

could be legitimately surprised by Intervenors' request to be involved in this appeal given what transpired below. Intervenors have participated in this case from the beginning.

Second, Intervenors' involvement provides a more complete airing of the issues in dispute in this lawsuit. Their complaint "shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1), as Intervenors challenge the same administrative rewriting of Title IX as the Appellee States.

But Intervenors offer different arguments and perspectives from the Appellee States. The States' interest is upholding their own laws and preventing federal overreach. While these are important goals, Intervenors' goals differ. A.F. and ACSI seek to vindicate Title IX's purpose in providing equal opportunities for women and girls in athletics by maintaining sex-separated sports teams, regardless of state or local law. The States do not adequately represent Intervenors' interests, as the States' interests go no further than their own state laws, while Intervenors' stretch more broadly to protecting Title IX itself. Intervenors will therefore allow for a more complete resolution of the issues raised by the Administration's decision to rewrite Title IX. *See* Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021).

Third, Intervenors have a personal connection to this issue and the experiences that they share. A.F. and ACSI can provide unique perspectives from female athletes than can the States, thereby aiding in the disposition of the case. Their application satisfies the conditions for permissive intervention.

B. A.F. and ACSI also satisfy the requirements for intervention as of right because their request is timely, they have a substantial interest in this appeal, and their arguments differ from the States' arguments.

The Sixth Circuit considers four factors to evaluate a request for intervention as of right: (1) timeliness of the motion to intervene; (2) the intervenors' "substantial legal interest" in the case; (3) whether the intervenors' "ability to protect that interest may be impaired in the absence of intervention"; and (4) whether "the parties already before the court may not adequately represent their interest." *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999). Again, judicial economy favors the disposition of similar claims and issues in a single suit. *Jansen v. City of Cincinnati*, 904 F.2d 336, 339 (6th Cir. 1990).

First, as discussed above, the Intervenors' motion is timely. The Court first looks to the point to which the suit has progressed. *Blount-Hill*, 636 F.3d at 284. *See supra* § III.A. And they also look at whether the intervenor asserted a legitimate purpose for the intervention. *Kirsch v. Dean*, 733 F. App'x 268, 275–76 (6th Cir. 2018). Intervenors asserted a legitimate purpose as the district court already authorized A.F. and ACSI to permissively intervene just last week. They knew this appeal would affect their interests and acted quickly. *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 582–83 (6th Cir. 1982).

Second, A.F. and ACSI "have a substantial interest in the subject matter of this litigation." *Grutter*, 188 F.3d at 398. The Sixth Circuit embraces an "expansive notion" of what constitutes a sufficient interest. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Intervenors have a substantial interest in the correct interpretation of Title IX as described above. *See supra* § II.A.

The Sixth Circuit also finds that groups of people (like female athletes) have an interest in challenges to a law that affect that group. For example, this Court allowed potential school enrollees to intervene because they might benefit from a school's affirmative policy. *See Grutter*, 188 F.3d at 396–98 (finding "substantial legal interest" in preventing minority enrollment). So too here. Intervenors benefit from the correct interpretation of Title IX and from state sports laws that protect female athletes. *See* Ark. Code § 6-1-107. If the intervenors in *Grutter* could intervene because the challenged policy might benefit them in the future, Intervenors should be able to intervene because they currently benefit from laws imperiled by the Administration's re-interpretation of Title IX.

Third, to determine whether this appeal will impair Intervenors' interests, Intervenors "must show only that impairment of its substantial legal interest is possible if intervention is denied." *Grutter*, 188 F.3d at 399. A.F. and ACSI can show that this appeal could impair their rights.

If this Court overturns the district court's preliminary injunction, women and girls would lose their equal opportunities in sports. As a result, A.F. and the female athletes attending ACSI schools will lose opportunities to attract attention from college scouts, lose opportunities to win, and miss out on being champions in their own sports. Exhibit A at ¶¶ 68–89. Intervenors easily overcome the minimal burden to prove that this appeal could impair their interests. *Miller*, 103 F.3d at 1247; *see also Blount-Hill v. Ohio*, 244 F.R.D. 399, 403 (S.D. Ohio 2005), *aff'd sub nom. Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482 (6th Cir. 2006).

Finally, the States do not adequately represent A.F. and ACSI's interests. Intervenors need only show that representation of their interests "'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Grutter*, 188 F.3d at 400 ("proposed intervenors are not required to show that the representation will in fact be inadequate" (cleaned up)). Here, Intervenors will provide perspectives unavailable to the States, they will make different legal arguments and pose different strategies than the States, and that is enough to justify intervention. *Grutter*, 188 F.3d at 400.

For example, Intervenors will argue that the Administration violated the Administrative Procedure Act because Title IX does not merely permit sex-separated sports but *requires* separate sports teams for girls and boys in contests of speed, strength, or physical contact so that girls receive an "equal athletic opportunity." 34 C.F.R. § 106.41(c).[6]

What's more, *Hecox* and *B.P.J.*, the two cases in the country most like this one, granted intervention as of right and by permission. *Hecox v. Little*, 479 F. Supp. 3d 930, 955 (D. Idaho 2020); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 5711547, at *3 (S.D.W. Va. Dec. 1, 2021) (granting permissive intervention). Just as the government officials in those cases did not adequately represent the intervenors' interests, the States do not adequately represent Intervenors' interests here.

[6] The States' likely inadequate representation of Intervenors' interests is more thoroughly demonstrated in Intervenor-Plaintiffs' Memorandum in Support of their Motion to Intervene, attached as Exhibit D.

By highlighting these differences, Intervenors will provide a more unique airing on these issues. The female athletes will show how the involvement of men in women's sports eliminates their chance at fair competition. Their application satisfies the conditions for intervention as of right.

Conclusion

Intervenors are already parties to this case and to the injunction on appeal and therefore are already Appellees. But out of an abundance of caution due to the unusual trial-court timing—the grant of a preliminary injunction first, followed by the grant of intervention—Intervenors respectfully ask this court to confirm they may participate in the Administration's appeal as Appellees to defend the preliminary injunction protecting them. This Court should hear from those Title IX was meant to protect. For all these reasons, A.F. and ACSI ask the Court to grant them permission to participate in this appeal.

Dated: September 21, 2022

Respectfully submitted,

s/ *Jonathan A. Scruggs*
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RULE 32(G)(1) CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because this motion contains 4,670 words, excluding parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: September 21, 2022

s/ *Jonathan A. Scruggs*
JONATHAN A. SCRUGGS

Attorney for Intervenors-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Jonathan A. Scruggs*
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EXHIBIT A

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,

Intervenor-Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as Secretary of

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

Education; **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; CHARLOTTE A. BURROWS**, in her official capacity as Chair of the Equal Employment Opportunity Commission; **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.

DAVID BALIK'S DECLARATION
IN SUPPORT OF MOTION TO INTERVENE

I, David Balik, under penalty of perjury, declare as follows:

1. I am the Vice President - USA of the Association of Christian Schools International (ACSI), and have personal knowledge of the information below.

2. In my role as Vice President - USA, I oversee ACSI's field operations in the United States and supervise ACSI's division directors who are in regular contact with ACSI member schools. I also regularly review reports generated from ACSI's database, which includes statistics and other information about ACSI's member schools.

Association of Christian Schools International Background

3. ACSI is a Christian educational organization that serves member individuals and schools ranging from early education to colleges and universities.

4. ACSI is a non-profit corporation organized under California law with its principal place of business in Colorado.

5. ACSI serves member schools in all fifty states, with approximately 2,000 member schools from preschool to high school and more than sixty colleges and universities in the United States.

6. ACSI member schools serve approximately 500,000 students throughout the United States.

7. ACSI also serves over sixty colleges and universities in twenty-nine different states.

8. ACSI is the largest Protestant association of Christian schools in the world.

9. ACSI was founded in 1978 when several regional U.S. school associations joined together to advance excellence in Christian education.

10. ACSI's mission is to "strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ."

11. ACSI follows a Statement of Faith, which explains some of ACSI's religious beliefs on topics including the Bible, Jesus Christ, and the need for redemption.

12. The Statement of Faith also explains ACSI's position on biological sex as "believe[ing] that God wonderfully foreordained and immutably created each person as either male or female in conformity with their biological sex. These two distinct yet complementary genders together reflect the image and nature of God (Genesis 1:26–27)."

13. ACSI promotes Christian education and provides training and resources to Christian member schools and Christian educators by enhancing Christian educators' professional and personal development and providing vital support functions for Christian schools.

14. ACSI's member schools all affirm ACSI's Statement of Faith, including its position on gender.

15. ACSI offers several services to its members.

16. For example, ACSI offers teacher and administrator certifications, credentials educators and administrators, accredits and evaluates schools to ensure the educational quality and integrity of member schools, offers curriculum and textbook publishing and development, and provides research and resources on how member schools can create communities marked by healthy and productive spiritual, emotional, and cultural characteristics.

17. ACSI also helps member schools gain a better understanding of laws that impact them by holding workshops, providing member schools with guidance on how to develop better policies, procedures, and practices, sending alerts and policy memos to its member schools explaining issues related to religious education, religious freedom and other issues that relate to ACSI's mission, and providing other resources and articles.

18. ACSI submits public comment on regulations that affect its member schools, such as the implementation of the Emergency Assistance to Non-Public Schools, the Small Business Administration's loan and disaster assistance programs, and other regulations that affect charitable entities.

19. ACSI provides advocacy, policy, and other types of advice to its member schools about their athletic programs.

20. ACSI also offers certification services for its member schools' athletic directors.

The Interpretation and the Fact Sheet have a direct effect ACSI as an organization.

21. In January 2021, President Biden declared that Bostock's analysis changed the meaning of all federal law regarding sex discrimination to include gender identity and sexual orientation discrimination "so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021).

22. On June 22, 2021, the U.S. Department of Education (Department) published in the Federal Register its "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation").

23. On June 23, 2021, Acting Assistant Secretary Suzanne B. Goldberg issued a "Dear Educator" letter notifying Title IX recipients of the Department's new Interpretation and reiterating that the Department "will fully enforce Title IX 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.

24. The Dear Educator letter was accompanied by a "fact sheet" issued by the Civil Rights Division of the DOJ and the Office for Civil Rights ("OCR") at the Department. U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM (together with the Dear Educator Letter, "Fact Sheet").

25. ACSI has diverted resources by preparing and submitting a written comment in response to Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021), which preceded and resulted in the issuance of the Interpretation and the Fact Sheet.

26. ACSI submitted the written comment on June 10, 2021.

27. ACSI's written comment urged the Office of Civil Rights and the Department "to evaluate … questions of sexual orientation and gender identity [and] how it will ensure – as it must – that faith-informed institutions and their participants of good will are protected and continue to have every means at hand to teach and to live out Christian standards of conduct." P. George Tryfiates, *Written Comment—Title IX Public Hearing, June 7-11, 2021* (June 10, 2021), https://bit.ly/3A037Ng.

28. ACSI executive-level officials and staff diverted time from other tasks by drafting, reviewing, and submitting this written comment.

29. But the government never provided a notice and comment period before issuing its Interpretation and Fact Sheet.

30. Therefore, ACSI lost the opportunity to use its written comment to influence the rule making process in a meaningful way.

31. The Interpretation and the Fact Sheet frustrate ACSI's mission and purpose by requiring it to divert its resources to protect opportunities for female athletes in an unfair athletic environment created by Interpretation and Fact Sheet.

32. The Interpretation and the Fact Sheet also frustrate ACSI's mission and purpose by announcing and promoting an official governmental preference of a different and contrary view of gender than that held by ACSI and its member schools in their Statement of Faith, which places the government as opposing ACSI's mission and working to discourage public support of ACSI's mission and of promoting the position that God created each person as either male or female and equipping its member schools to provide a Christian education to their students.

The Interpretation and the Fact Sheet effect ACSI's member schools and their female athletes

33. Many ACSI member high schools view athletics as a way to further their mission of providing uniquely Christian educations for their students by teaching students how to foster physical development and athletic skills while learning the value of personal discipline, commitment, and promoting team goals over individual aspirations.

34. The majority of ACSI member high schools, colleges, and universities in the United States provide athletic opportunities for their students.[1]

35. ACSI member schools offer opportunities for student athletes to compete on separate teams for males and females.

36. For example, member schools compete in one or a combination of the following sports: basketball, cross country, cheerleading, diving, golf, volleyball, swimming, track and field, tennis, soccer, softball, pom, and water polo.

37. ACSI member schools promote their athletic teams as a distinct value to the education of their students.

38. ACSI member high schools, colleges, and universities promote their athletic programs to prospective students as one way to attract those students.

39. ACSI member colleges and universities also use their existing athletic programs—and the success of those programs—to recruit prospective student-athletes.

40. Many ACSI member high schools, colleges, and universities compete with other public schools attract prospective students and to recruit prospective student-athletes.

[1] Throughout the remainder of this declaration "ACSI member schools," "ACSI member high schools," or "ACSI member colleges and universities" denotes a significant number of, but not necessarily all, of ACSI member schools.

41. The athletic success of ACSI member schools provides many benefits.

42. For example, ACSI member schools host athletic events on their campuses.

43. This hosting allows them to obtain fees from their athletic programs in the form of ticket sales that support these programs and generally increases awareness of the member schools by allowing members of the public to visit the campus.

44. Athletic programs provide direct support through donations to the athletic programs.

45. ACSI member schools use their athletic programs to help brand their schools, develop campus unity, and offer entertainment and social activities for their prospective students, current students, alums, and the broader community.

46. Athletic programs also help ACSI member schools to develop strong alumni networks and encourage donations.

47. Successful athletic programs contribute to ACSI member schools' reputation and prestige by allowing them to advertise that success to the public and increase name-recognition of the schools in their local community and even on a national level.

48. For ACSI member colleges and universities, athletic success can also lead to increased applications for admission.

49. For example, one ACSI member university participated in the NCAA's post-season basketball tournament in 2021.

50. I have read that schools that perform well in the NCAA post-season basketball tournament typically receive an increase in public awareness and an increase in applications for enrollment. *See* Hayley Glatter, *The March Madness Application Bump*, The Atlantic, https://bit.ly/39UDeE4.

51. The websites of ACSI member schools have specific pages dedicated to athletics and the athletic achievements of current and past teams and individuals, including information on the number of championships the schools' teams have won and individual and team records.

52. ACSI member high school athletic teams have won state, conference, and district championships and their athletes have won individual titles.

53. ACSI member college and university athletic teams have won national and conference championships and their athletes compete for national individual titles.

54. I understand that students at ACSI member high schools that participated in athletics in high school have earned athletic scholarships to play their sport in colleges and universities affiliated with the NCAA.

55. My understanding is that these athletic scholarships significantly reduce the cost of higher education and provide other benefits including access to medical facilities, health benefits, travel expenses, and gear such as shoes, clothes, and bags.

56. I understand that some former students of ACSI member high schools that participated in athletics are now professional athletes and make their living playing the sport they played while at the ACSI member high school.

57. The Interpretation and the Fact Sheet threaten to reduce substantially the benefits of athletics to ACSI member schools.

58. For example, many of ACSI's member high schools, colleges, and universities are in direct competition with other public high schools, colleges, and universities and compete in the same arenas.

59. For example, ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California,

Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

60. More than 1,300 schools in these states are members of ACSI.

61. Many ACSI member high school sports teams compete against athletic teams from public high schools for state championships, conference championships, and district championships and records.

62. ACSI member college and university school sports teams compete in the NCAA Divisions I, II, and III and the National Association of Intercollegiate Athletics (NAIA) and frequently compete against public colleges and universities' athletic teams for national, regional, and conference championships and records.

63. For example, many ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities in head-to-head athletic events, where the schools' teams and individual athletes compete against each other and for national, state, conference, and/or district championships.

64. ACSI member high schools, colleges, and universities may also compete against public high schools, colleges, and universities for opportunities to host athletic events.

65. ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities to attract students to their schools based on the reputations of their athletic programs.

66. ACSI member colleges and universities compete against other public colleges and universities to recruit top-tier athletes to their athletic programs.

67. The Interpretation and Fact Sheet impose burdens on ACSI member high schools, colleges, and universities that it does not impose on other public high

schools, colleges and universities, which gives ACSI's member schools' competitors a competitive advantage.

68. For example, ACSI member schools only allow females to compete on their female sports teams.

69. But the Interpretation and the Fact Sheet create an uneven playing field for ACSI's member schools' female athletic teams by requiring them to compete against other public schools' female athletic teams that include biological males or withdraw from competition.

70. ACSI member high schools, colleges, and/or universities compete in the areas listed in paragraphs 59-69 against public schools in states with laws that that protect women by preserving biology-based eligibility standards for participation in female sports ("Save Women's Sports laws").

71. ACSI member schools' female teams would be at a competitive disadvantage if they were forced to play against athletics teams with males and therefore lose opportunities to fairly compete in athletic events by playing against teams with males.

72. The Interpretation and the Fact Sheet create a credible threat and substantial risk that the female athletic teams of ACSI member schools will be required to compete against biological males on a more frequent basis.

73. For example, ACSI member schools and their female athletic teams in Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, and West Virginia. I understand that these states currently protect females against competing against biological males in athletics because of Save Women's Sports laws.

74. By forcing ACSI members schools into a competitive disadvantage by requiring their female athletic teams to compete against males, the Interpretation and the Fact Sheet make it more difficult for ACSI member schools' female teams to

compete in female athletics, make it easier for public schools that compete against ACSI member schools to have athletic success, and illegally structure an unfair competitive environment.

75. The Interpretation and the Fact Sheet also make it harder for ACSI member schools' athletic teams to win games and titles compared to public schools' female athletic teams with males and therefore imposes a reputational harm on ACSI member schools that other public schools do not suffer.

76. By making it more difficult for ACSI member schools' athletic teams to win games and titles, the Interpretation and the Fact Sheet also harm ACSI member colleges and universities by making it more difficult to recruit top-tier athletes and therefore impedes the success of these programs.

77. The Interpretation and the Fact Sheet also deprive ACSI member schools and their female athletes of the benefit of laws that ensure a fair playing field for females by requiring sex designations in school-sponsored athletic teams to be based on biological sex.

78. For example, ACSI has member high schools in Alabama, Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, West Virginia that field sports teams for girls. All of these states have laws that ensure female athletes compete only against female athletes.

79. ACSI's member high schools and their female athletes compete in athletics against public high schools in these states.

80. ACSI has member high schools in Alabama and Mississippi that field sports teams for girls where Save Women's Sports laws require state high school associations to protect female athletes.

81. ACSI's member high schools and their female athletes are members of state high school associations in Alabama and Mississippi and compete in athletics against public high schools in these associations.

82. ACSI member colleges and/or universities have female athletes compete in sports against public colleges and universities which would include competing against colleges and universities in or from some if not all of the states of Arkansas, Florida, Idaho, Montana, Mississippi, Tennessee, or West Virginia.

83. ACSI has member high schools that field sports teams for girls that are members of state high school associations.

84. So ACSI member schools that are members of state high school associations must choose between remaining members of associations that require males to compete against females or leave the associations entirely.

85. For example, I have read that one ACSI member school previously decided to leave its athletic conference because of the conference's policies allowing males to compete against females. Samantha Pell, *Maryland High School Leaves Athletic Association over Transgender Policy* (Mar. 22, 2019), *available at* https://wapo.st/3B3uh7k.

86. The Interpretation and the Fact Sheet put ACSI member high schools to the same choice, only nationwide.

87. Therefore, the Interpretation and the Fact Sheet create a credible threat and substantial risk that ACSI member schools will be forced to re-evaluate their membership in state athletic associations, including by leaving those associations.

88. If ACSI member high schools remain members of high school athletic associations to which the Interpretation and the Fact Sheet apply, then their female athletic teams will be forced to compete against member schools who permit males to compete on their female athletic teams.

89. If ACSI member schools leave high school athletic associations, then they will suffer harm by being excluded from state-wide competitions, events, and championships, by suffering reputational harm by being excluded from a state-wide association, and by not being able to offer female student athletes to compete at the highest levels of high school competition.

90. For example, many ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

91. These schools have more than 200,000 students in middle school and high school, many thousands of whom are female athletes.

EXHIBIT D
Declaration of David Balik
In Support of Motion to Intervene

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

David Balik, Ed.D.

EXHIBIT B

EXHIBIT C
Declaration of A.F. In Support of Motion to Intervene

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,

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; **UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND,** in his official capacity as Attorney General of

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

the United States; **KRISTEN CLARKE**, in her official capacity as Assistant Attorney General for Civil Rights at the United States Department of Justice,

Defendants.

DECLARATION of A.F.
IN SUPPORT OF MOTION TO INTERVENE

I, A.F., under penalty of perjury, declare as follows:

1. I am a thirteen-year-old resident of Jonesboro, Arkansas, in Craighead County, and have personal knowledge of the information below.

2. I am an eighth-grade student and multi-sport athlete at Brookland Junior High School in Brookland, Arkansas, where I compete on the girls' basketball and volleyball teams, and I intend to compete in track this year.

Athletic Experience

3. Both of my parents were multi-sport athletes: my mom played tennis and volleyball, and my dad played baseball and golf. Both of my siblings are also talented athletes and compete in high school sports.

4. Sports has always been my world. Dad would play ball with my siblings and me from as early as I can remember. Though I loved playing with balls of all shapes and sizes, the basketball has always been my favorite. As a small child, I remember spending hours playing with our Little Tykes basketball set in our driveway.

5. When I reached kindergarten, I started playing organized sports. My parents signed me up for our town's youth recreational league called City Stars. I played basketball with City Stars from kindergarten through second grade.

6. In second grade, I started playing intermural basketball at Brookland

Elementary School. And I have continued to play on my school's girls' basketball team each school year from second grade to present. I currently compete on my school's eight-grade girls' basketball team.

7. In basketball, there are five girls per team (ten total) on the court at any given time.

8. And those five girls play one of these three positions:

a. a point guard;

b. two shooting guards on the wings; and

c. two post players, who used to be known as centers.

9. I am point guard for our team, which means I lead the offense, call the plays, start the plays, run the ball, and carry the ball.

10. Positions on the girls' basketball team are limited by a girl's capabilities demonstrated during tryouts. There are typically more than five girls on a given basketball team.

11. The five starting positions on the court are highly coveted and competitive.

12. Basketball season generally runs November through March and culminates with a state tournament. There is no downtime, no off-season. It's a very active sport and keeps me in shape with the constant running.

13. But I love it! Basketball is by far my favorite sport. I love the adrenaline rush and fast pace. I love the satisfaction of making of a shot or stealing the basketball. And, most of all, I love to win.

14. I intend to continue competing in basketball in high school, and possibly even college.

15. But basketball is not the only sport I compete in. In fifth grade, my mom asked me to try volleyball—in part, because it involves less physical contact

than basketball due to the net between you and your opponents.

16. I have played on Brookland High School's girls' volleyball team for the last three years and I intend to continue playing volleyball in high school.

17. In volleyball, there are six girls per team (twelve total) on the court at a given time. Just like in basketball, those initial starting positions are highly coveted and competitive.

18. While basketball is my favorite sport, I do enjoy a close team bond with my volleyball teammates.

19. And, because I love to compete, I also intend to try out for outdoor track this year. I do not yet know which events I would compete in, but I suspect I would enjoy sprints or middle-distance races.

20. Being a multi-sport athlete takes sacrifice. I have early morning practices every day before school. I lose a lot of sleep. I sacrifice time to hang out with my friends or have dinner with my family.

21. Though I am only in junior high, sports has played an important role in my life. As a Type-1 diabetic, sports gives me the opportunity to exercise and keep my body healthy. It has taught me how to work hard and persevere. It has taught me people skills, such as how to be a leader and communicate well with others. It has helped me grow in self-confidence. It has opened opportunities that I never imagined, such as singing the national anthem at basketball games or local college events.

22. I am eager to see what doors sports continues to open for me. My goal is to compete in high school. Beyond that, I would love to earn an athletic scholarship and compete in college.

Males Competing in Girls' Sports

23. The idea of males competing in girls' sports is completely unfair. A

couple years ago, I started hearing about this becoming an issue. And then over this past summer, I heard more about girls losing athletic opportunities from high school sports all the way up to the Olympics.

24. Males have physical advantages over females. For example, they are generally taller, larger, stronger, and faster. Their height makes it easier for them to shoot goals or spike balls. Their larger frame means they can block and defend more effectively. Their upper body strength means they can hit or throw the ball harder and faster. Their speed means they can get to the ball or run down the court more quickly. They have more endurance than girls.

25. Even at my age and grade level, I can see the difference in athletic performance between boys and girls. And this is something I have noticed for years.

26. I have observed that the boys' basketball team at my junior high school plays more roughly, more aggressively, and less cooperatively. My girls' basketball team is a little more laid back, shares the ball more, and works together more cohesively.

27. Basketball is a rough contact sport. It is common to see girls get knee and ankle injuries. The risk of injury, plus the constant running, mean that basketball is a sport that not many girls play.

28. I fear that if males start competing in girls' basketball, even fewer girls will want to try.

29. Title IX means everything to me. I love sports. And the fact that Title IX was passed to give girls like me the opportunity to play sports at school—just like boys get to do—means so much to me. I can't imagine what life would be like without those opportunities.

30. I am proud of my state for standing up for women's rights.

31. Males playing in girls' sports violates our rights as females to have fair

play and not be displaced by males. We should be able to play against our own sex, and not be forced to compete against someone who is biologically enhanced and could injure us.

32. If we girls lose our sports, I fear that it won't stop there. We could lose our scholarships and college opportunities to males, too. I fear that girls might stop even trying out for sports if they know they can't be competitive against a male.

EXHIBIT C
Declaration of A.F. In Support of Motion to Intervene

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

A[redacted] F[redacted]

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

B.P.J., by her next friend and mother, HEATHER JACKSON, *Plaintiff*,	)	
vs.	)	Case No. 2:21-cv-00316
WEST VIRGINIA STATE BOARD OF EDUCATION, HARRISON COUNTY BOARD OF EDUCATION, WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION, W. CLAYTON BURCH in his official capacity as State Superintendent, and DORA STUTLER in her official capacity as Harrison County Superintendent, *Defendants*.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, under 28 U.S.C. § 517,[1] to advise the Court of its view that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment do not permit West Virginia to categorically exclude transgender girls[2] from participating in single-sex sports restricted to girls.

[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

[2] The term "transgender" describes a person whose gender identity differs from the person's sex assigned at birth. For example, a transgender girl is a person who identifies as a girl but whose sex assigned at birth was male. The term "cisgender" describes a person whose gender identity is the same as the person's sex assigned at birth. Given Plaintiff's age, the United States refers only to "girls" and "boys," but the analysis applies equally to women and men.

The United States has a significant interest in ensuring that all students, including students who are transgender, can participate in an educational environment free of unlawful discrimination and that the proper legal standards are applied to claims under Title IX and the Equal Protection Clause. The U.S. Department of Justice ("DOJ") and U.S. Department of Education enforce Title IX to protect students from sex discrimination in federally funded education programs and activities. This includes ensuring that recipients offer equal athletic opportunities to students regardless of their sex. DOJ is further charged with coordinating federal agencies' implementation and enforcement of Title IX. 28 C.F.R. Pt. 54; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 0.51. DOJ also has authority to investigate and resolve complaints that a school board is depriving students of equal protection based on sex (and other bases). 42 U.S.C. § 2000c-6.

Under the law challenged here, West Virginia (or the "State") prohibits girls who are transgender from participating on female "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education." W. Va. Code §§ 18-2-25d(c)(1)-(2) ("H.B. 3293"). The State claims that H.B. 3293 will protect athletic opportunities for girls. Neither the facts nor the law supports that assertion. To be sure, there remain significant barriers to providing full equity in athletics for female students.[3] But permitting participation by transgender girls, who make up "approximately one half of one percent" of the United States' population, is not one of them. *See Hecox v. Little,* 479 F. Supp. 3d 930, 977 (D. Idaho 2020), *appeals docketed*, Nos. 20-35813, 20-35815 (9th Cir.

[3] Indeed, on the day Plaintiff filed this lawsuit, the United States filed an *amicus* brief in the Sixth Circuit to clarify the standards for assessing whether a school equitably meets its students' athletic interests and abilities, regardless of sex. *See* U.S. Br. as Amicus Curiae, *Balow v. Michigan State Univ.*, No. 21-1183 (6th Cir. May 26, 2021).

Sep. 17, 2020). The United States submits this Statement of Interest to provide its view that Plaintiff's Title IX and Equal Protection Clause challenges are likely to succeed on the merits.

BACKGROUND

The Governor of West Virginia signed H.B. 3293 into law on April 28, 2021, and it is set to go into effect on July 8, 2021. The law mandates that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education . . . shall be expressly designated as [male, female, or coed] based on biological sex." W. Va. Code § 18-2-25d(c)(1). The law defines "biological sex" as "an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth." *Id.* § 18-2-25d(b)(1). It further defines "female" to mean "an individual whose biological sex determined at birth is female," with a corresponding definition for "male."[4] *Id.* §§ 18-2-25d(b)(2)-(3). The law prohibits girls who are transgender from participating on girls' sports teams, stating that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex"—where "male sex" is determined by sex assigned at birth—"where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 18-2-25d(c)(2). There is no parallel provision for participation on boys' sports teams. The law also creates a private cause of action for "[a]ny student aggrieved" by a violation, allowing for injunctive relief, damages, fees, and costs against a county board of education or state institution of higher education. *Id.* § 18-2-25d(d)(1). The Legislature's proffered justification is that "[c]lassification of teams according to biological sex is necessary to promote equal athletic opportunities for the female sex." *Id.* § 18-2-25d(a)(5). Specifically, "[b]iological males would displace females to a substantial extent if permitted to compete on teams

[4] The United States does not concede the accuracy of these definitions.

designated for biological females." *Id.* § 18-2-25d(a)(3).

Plaintiff B.P.J is an 11-year-old girl who is transgender. She argues that Defendants' compliance with H.B. 3293 will bar her from participating in school athletics in violation of Title IX and the Equal Protection Clause. No. 1 at 2.[5] B.P.J. participated on an all-girls cheerleading team while in elementary school, and she wants to participate in girls' athletics as she enters middle school in the 2021-22 school year. No. 2-1 at 21-22. Specifically, B.P.J. wants to try out for Bridgeport Middle School's girls' cross-country and track teams. The middle school principal informed B.P.J.'s mother that her daughter may not participate on the girls' cross-country or track teams because of H.B. 3293. No. 2-1 at 23. B.P.J. does not seek to join the boys' cross-country and track teams because she is a girl and such participation would "devastate" B.P.J., "completely erase who she is," and undermine her social transition. No. 1 at 17; No. 2-1 at 23. Even if B.P.J. wanted to participate on the boys' team, the principal said it would be "confusing" for her to join the boys' teams because she looks like and presents as a girl. No. 2-1 at 23. In reality, then, H.B. 3293 will exclude B.P.J. entirely from the cross-country and track programs at her middle school. B.P.J. has moved for a preliminary injunction, arguing that Defendants' compliance with H.B. 3293 violates Title IX and the Equal Protection Clause. She requests this Court to enjoin West Virginia from enforcing H.B. 3293 and "any other law, custom, or policy that precludes B.P.J.'s participation on girls' school sports teams in West Virginia" and allow B.P.J. to participate on girls' sports teams consistent with her gender identity. No. 19 at 8.

ARGUMENT

On a motion for a preliminary injunction, the court reviews: (1) the movant's likelihood

[5] "No.__ at __" refers to the docket entry number and page number of documents filed in this case, using the Court's CM/ECF pagination.

of success on the merits; (2) the threat of irreparable harm to the movant absent an injunction; (3) the balance of hardships; and (4) the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citation omitted). The United States believes that Plaintiff will likely succeed on the merits of her Title IX and equal protection claims and does not address the other factors.

A state law that limits or denies a particular class of people's ability to participate in public, federally funded educational programs and activities solely because their gender identity does not match their sex assigned at birth violates both Title IX and the Equal Protection Clause. H.B. 3293 does exactly this. H.B. 3293's prohibition applies to all transgender girls in public secondary and postsecondary education—regardless of a student's specific circumstances—and to no one else.[6]

H.B. 3293 violates Title IX by effectively prohibiting, solely on the basis of sex, a certain subset of students—girls who are transgender—from participating in athletic programs offered by recipients of federal financial assistance ("recipients"). On its face, H.B. 3293 restricts girls who are transgender from participating on girls' teams. But because forcing transgender girls to participate on boys' teams also causes discriminatory harm, H.B. 3293 affords them no opportunity to participate on single-sex sports teams at all.

H.B. 3293 also violates the Equal Protection Clause. Discriminatory treatment against transgender people is subject to heightened scrutiny because it constitutes both discrimination based on sex and discrimination against a quasi-suspect class. H.B. 3293 fails heightened scrutiny

[6] To be sure, West Virginia may not remedy the violation by extending its categorical ban to boys who are transgender. The Supreme Court has explained that federal nondiscrimination mandates protect individuals. By extending its discriminatory ban to boys, West Virginia would not avoid liability, but rather would double it. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("Nor is it a defense for an employer to say it discriminates against both men and women because of sex. . . . Instead of avoiding Title VII exposure, this employer doubles it.").

analysis because West Virginia cannot demonstrate that prohibiting a handful of transgender student athletes from playing on athletic teams consistent with their gender identity is substantially related to any important government interest. Thus, this Court should find a likelihood that Plaintiff will succeed on the merits of both her Title IX and Equal Protection Clause claims.

I. B.P.J. Is Likely To Prevail On Her Title IX Claim

B.P.J. is likely to prevail on her Title IX claim against Defendants. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's implementing regulations mandate that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient." 34 C.F.R. § 106.41(a); 28 C.F.R. § 54.450(a). Although the regulations allow recipients to operate or sponsor separate teams based on sex, the regulations do not define "sex" or address how students who are transgender should be assigned to such teams. 34 C.F.R. § 106.41(b); 28 C.F.R. § 54.450(b). The regulations do not require, or even suggest, that recipients assign students who are transgender to teams based on their sex assigned at birth, as H.B. 3293 requires.

This Court should reject any attempt by the State to argue that *the regulations* do not prohibit the assignment of students to teams based on sex assigned at birth, regardless of whether such a classification harms transgender students. When assigning students to single-sex sports teams, a recipient must still comply with the *statutory* prohibition against discrimination based on sex in Title IX itself. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) ("[T]he implementing regulation cannot override the statutory prohibition against

discrimination on the basis of sex."), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, No. 20-1163 (Feb. 19, 2021). And the Supreme Court has recently clarified that discrimination against a person for being transgender *is* discrimination based on sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746-47 (2020); *see also Grimm*, 972 F.3d at 619. Therefore, any interpretation of Title IX's regulations that requires gender identity discrimination would violate the statute's nondiscrimination mandate. Because H.B. 3293 requires the Defendants to engage in precisely this type of sex discrimination that causes harm to B.P.J, the law violates Title IX. A discriminatory state law is no defense to a Title IX violation.

A. H.B. 3293 Requires Recipients To Discriminate In Violation Of Title IX

B.P.J. prevails on her Title IX claim by showing: (1) she was excluded from an education program or activity on the basis of sex; (2) the educational institution in question is a recipient of federal financial assistance; and (3) the improper discrimination caused her harm. *See Grimm*, 972 F.3d at 616 (citation omitted). The United States believes she is likely to make this showing.

There is no question that the school district that B.P.J. attends is a recipient of federal funds. Nor can there be any doubt that B.P.J. will be excluded from a recipient's education program or activity: Bridgeport Middle School's principal told B.P.J.'s mother that B.P.J. is ineligible for the girls' cross-country and track program. *See* No. 2-1 at 23. That is precisely the effect of H.B. 3293. It excludes all girls who are transgender from participating in girls' athletics in public secondary and postsecondary schools.

Any argument that B.P.J. has not been excluded because she could join the boys' team is untenable. B.P.J. is a girl, not a boy. She describes herself as a girl. No. 2-1 at 31. She lives and identifies as a girl in her daily life. No. 2-1 at 20. Her middle school principal acknowledged it would be "confusing" for B.P.J. to join the boys' teams given that she neither looks like, nor

presents herself as a boy. No. 2-1 at 23. As the Fourth Circuit has explained, for purposes of a discrimination analysis, B.P.J. is similarly situated to other girls. *See Grimm*, 972 F.3d at 610, 618 ("Grimm was similarly situated to other boys, but was excluded from using the boys[']restroom facilities based on his sex-assigned-at-birth."). Requiring her to join a boys' team would harm B.P.J. for the reasons discussed below. In practice, Harrison County Schools' compliance with H.B. 3293 will exclude B.P.J. from all of her school's single-sex sports teams.

It is also clear that this exclusion is based on sex. H.B. 3293 targets girls who are transgender. In *Bostock*, the Supreme Court explained that "discrimination based on . . . transgender status necessarily entails discrimination based on sex." *See* 140 S. Ct. at 1746-47. Following *Bostock*, the Fourth Circuit held that Title IX prohibits discrimination against students because they are transgender. *Grimm*, 972 F.3d at 616-17; *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending*, No. 18-13592 (11th Cir. Aug. 28, 2020). In *Grimm*, the Fourth Circuit found that a school board policy violated Title IX because the school board:

> could not exclude Grimm from the boys[']bathrooms without referencing his 'biological gender' under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions.

972 F.3d at 616. So too here. H.B. 3293 separates students onto athletic teams by their "sex determined at birth," W. Va. Code § 18-2-25d (b)(2)-(3), and it is impossible to enforce H.B. 3293 against B.P.J. without referencing her sex assigned at birth.

Finally, H.B. 3293 causes B.P.J. discriminatory harm. To comply with H.B. 3293, B.P.J.'s school district must exclude her from girls' sports entirely, all the way through high school. *See Gregor v. W. Va. Secondary Sch. Activities Comm'n*, 2020 WL 6292813, at *4 (S.D. W. Va. Oct.

27, 2020) (citations omitted) (acknowledging a person may be irreparably harmed if they cannot participate in a sport at all); No. 2-1 at 60 ("[I]t can be extremely harmful for transgender youth to be excluded from the team consistent with their gender identity.").[7] B.P.J., unlike her cisgender peers, would miss the many benefits of interscholastic athletics, including skill-building, exercise, motivation, social ties, and increased confidence. No. 2-1 at 46-47. As many courts have recognized, this type of exclusion would cause a student like B.P.J. to experience stigma, isolation, and dignitary harm. *See Grimm*, 972 F.3d at 597-601, 617-18 (bathroom policy made plaintiff feel "alienat[ed]" and "humiliate[ed]"); *Adams*, 968 F.3d at 1307 (bathroom policy made plaintiff feel "sorely 'alienated' and 'different' from other students because he is transgender"); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045-47 (7th Cir. 2017) (exclusion from boys' restroom "stigmatized" transgender boy, causing him "significant psychological distress" including "depression and anxiety"), *cert. dismissed*, 138 S. Ct. 1260 (2018); *Dodds v. Dep't of Educ.,* 845 F.3d 217, 221-222 (6th Cir. 2016) (finding that exclusion from the girls' restrooms "had substantial and immediate adverse effects" on plaintiff's "daily life," "health," and "well-being").[8]

Requiring that B.P.J. participate on a boys' team would likewise cause her real and lasting harm. Joining the boys' team would contravene B.P.J.'s medically-supervised social transition. No. 2-1 at 20-21, 60. It would "erase who she is" and "devastate her," causing mental and

[7] If she attends a public college in West Virginia, B.P.J. also will be banned from women's intercollegiate sports.

[8] Conversely, the mere presence of transgender students in sex-segregated spaces that align with their gender identity does not violate cisgender students' Title IX rights. *See Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534 (3d Cir. 2018) (restrooms and locker rooms), *cert. denied*, 139 S. Ct. 2636 (2019); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020) (restrooms, locker rooms, and showers).

emotional distress. No. 2-1 at 23, 32-33. Forcing her to run on the boys' team would "constitute harm under Title IX, as it 'invites more scrutiny and attention' from other students, 'very publicly branding all transgender students with a scarlet "T".'" *Grimm*, 972 F.3d at 617-18 (quoting *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) (brackets omitted), *cert. denied*, 139 S. Ct. 2636 (2019)). Being on a boys' team would make B.P.J. vulnerable to invasive questions, gossip, and ridicule for participating on the "wrong" team. This "emotional and dignitary" harm is "legally cognizable under Title IX." *See id.* at 618 (citing *Adams*, 968 F.3d at 1306-07, 1310-11). On these facts, the United States believes B.P.J. is likely to prevail on the merits of her Title IX claim.

B. Title IX Itself Provides Sufficient Protection Against H.B. 3293's Concern That Boys Will Displace Girls In Athletics

In addition to requiring recipients to discriminate based on sex, the West Virginia Legislature's justification for H.B. 3293 ignores Title IX's existing protections in the athletics context. The State seeks to justify the law on the theory that "[i]n the context of sports involving competitive skill or contact, biological males and biological females are not in fact similarly situated. Biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females." W. Va. Code § 18-2-25d(a)(3).[9] As an initial matter, there are no facts to suggest that, in this case, allowing B.P.J. to participate in girls' sports will substantially displace other girls, or that any cisgender boy seeks a spot on a girls' team. An overview of Title IX's regulations, which can be credited with creating hundreds of thousands of athletic opportunities for girls, demonstrates why H.B. 3293 is unnecessary.

[9] H.B. 3293's definition of "biological males" wrongly conflates two distinct groups, cisgender boys and transgender girls. The legislature's conflation of these groups is inappropriate given the Fourth Circuit's analysis of similarly situated students in *Grimm*. 972 F.3d at 610, 618 (finding that the plaintiff, a transgender boy, was "similarly situated to other boys").

Since 1975, Title IX's implementing regulations have required recipients to provide equal athletic opportunities for their students regardless of sex. 45 C.F.R. § 86.41(c) (subsequently codified at 34 C.F.R. § 106.41(a) and 28 C.F.R. § 54.450(a)). The regulations recognized that in order to expand opportunities for girls, as the underrepresented sex, recipients could offer sex-segregated sports teams. 45 C.F.R. § 86.41(b) (subsequently codified at 34 C.F.R. § 106.41(b); 28 C.F.R. § 540(b). B.P.J. does not challenge her school's ability to offer separate boys' and girls' sports teams. She simply challenges how her school and her state intend to assign her, as a transgender girl, to a single-sex team.

The regulations further require that a recipient's "selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c); 28 C.F.R. § 54.450(c). The regulation ensures that recipients provide athletic participation opportunities that effectively accommodate the interests and abilities of each sex, and protects against boys usurping girls' athletic participation opportunities. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856-57 (9th Cir. 2014). It does not preclude recipients from treating transgender students consistent with their gender identity. Nor can it. *See Grimm*, 972 F.3d at 618 ("[T]he implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex."). And as a factual matter, there is no discernible risk that transgender girls will somehow "displace" cisgender girls "to a substantial extent." W. Va. Code § 18-2-25d(a)(3); *see also Hecox*, 479 F. Supp. 3d at 977 ("It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women.").

Moreover, under Title IX, recipients may both permit transgender girls to participate on girls' athletic teams *and* exclude cisgender boys from the girls' teams. B.P.J. is a girl. She has participated on an all-girls community cheerleading team for the last two years. No. 2-1 at 21. Her middle school principal acknowledged that it would be confusing to identify her any other way. No. 2-1 at 23. Consistent with Fourth Circuit precedent, B.P.J. is similarly situated to other girls. *See Grimm*, 972 F.3d at 610. An analogous claim by a cisgender boy to play on a girls' team rather than the corresponding boys' team would fail because: (1) he lives and presents as a boy and therefore is not similarly situated to girls for purposes of permissibly sex-segregated activities; and (2) he experiences no cognizable "emotional and dignitary harm" from being excluded from the girls' team. *Id.* at 618 (citing *Adams*, 968 F.3d at 1306-07, 1310-11).

At its core, Title IX is about ensuring equal educational opportunities to all students regardless of their sex. Despite its claim of "promot[ing] equal athletic opportunities" for girls, W. Va. Code § 18-2-25d(a)(5), H.B. 3293 does the opposite. It targets a vulnerable and historically marginalized subset of girls and prohibits them from participating in athletics. It bars girls who are transgender from teams that are consistent with their gender identity—and effectively bars them from all single-sex sports teams at the secondary and postsecondary levels—without regard to any individual's specific circumstances and without any facts to suggest that there is a "problem" that requires solving in the first place. H.B. 3293 does so despite the fact that Title IX already protects equal athletic opportunities for all students and H.B. 3293 does so in violation of Title IX's mandate to offer educational opportunities free of sex discrimination.

II. H.B. 3293 Cannot Survive Heightened Scrutiny Under The Equal Protection Clause

B.P.J. is also likely to succeed on the merits of her equal protection claim because H.B. 3293 discriminates based on sex and transgender status. The Equal Protection Clause

prevents states from discriminating against individuals on the basis of sex and against people who are transgender absent an "exceedingly persuasive" justification. *Grimm*, 972 F.3d at 610-13. The State cannot demonstrate such a justification.

A. H.B. 3293 Is Subject To Heightened Scrutiny

To determine whether a statute or policy warrants heightened scrutiny under the Equal Protection Clause, a court asks whether the classification at issue jeopardizes the exercise of a fundamental right or categorizes based on an inherently suspect characteristic. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citations omitted). Heightened scrutiny applies here for two separate reasons: H.B. 3293 discriminates based on sex and H.B. 3293 discriminates based on transgender status.

The Supreme Court has long held that classifications based on sex warrant heightened scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (*VMI*) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982)). H.B. 3293 singles out girls who are transgender, including B.P.J., for different treatment based on the sex they were assigned at birth. W. Va. Code § 18-2-25d(b)(1). The Fourth Circuit's controlling precedent holds that excluding transgender students from sex-segregated spaces that align with their gender identity is discrimination based on sex under the Equal Protection Clause. *Grimm*, 972 F.3d at 607-10. Other circuits agree. *See Adams*, 968 F.3d at 1296; *Whitaker By Whitaker*, 858 F.3d at 1051. Just as in *Grimm*, H.B. 3293 discriminates on the basis of sex: it treats B.P.J. differently from all other students with the same gender identity based solely on her sex assigned at birth. 972 F.3d at 608 (school district policy limiting bathroom access to "corresponding biological genders" or sex listed on birth certificate "creates sex-based classifications").

Fourth Circuit precedent also requires heightened scrutiny here because people who are

transgender are a quasi-suspect class. *Grimm,* 972 F.3d at 611–13. The Fourth Circuit observed, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment." *Id.* at 610-11 (citation omitted). It does not matter that H.B. 3293 categorizes teams without explicitly referencing "transgender students": by categorizing teams based on that law's definition of "biological sex," girls who are transgender are the only group who cannot compete on sports teams that align with their gender identity. W. Va. Code § 18-2-25d(b). Because H.B. 3293 discriminates against a quasi-suspect class—girls who are transgender—this Court must apply heightened scrutiny. *Grimm,* 972 F.3d at 610.

B. H.B. 3293 Is Not Substantially Related To Achieving The State's Articulated Governmental Interest

H.B. 3293 cannot survive the rigorous analysis that heightened scrutiny demands. To survive heightened scrutiny, the state must show the law "serves important governmental objectives" and the "discriminatory means employed are substantially related to the achievement of those objectives." *See VMI*, 518 U.S. at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724) (internal quotation marks omitted). "The burden of justification is demanding" and the justification must be "'exceedingly persuasive.'" *Id.* (quoting *Miss. Univ. for Women,* 458 U.S. at 724). The inquiry provides enhanced protection in circumstances where there is a greater danger that the legal classification results from either impermissible prejudice or stereotypes, *see, e.g.*, *Grimm*, 972 F.3d at 614–15, or "a bare . . . desire to harm a politically unpopular group," *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Moreover, when evaluating an articulated governmental interest, the "justification must be genuine, not hypothesized" and "must not rely on overbroad generalizations." *VMI*, 518 U.S. at 533; *see also Grimm*, 972 F.3d at 615 (holding that policy restricting access to restroom by

"biological sex" is "marked by misconception and prejudice" against transgender plaintiff) (citation omitted); *Adams*, 968 F.3d at 1297 (finding no substantial relationship between defendants' articulated justification and restroom policy where the concerns were hypothesized and treated transgender plaintiff unfavorably "simply because he defies gender stereotypes"). A classification does not withstand heightened scrutiny when "the alleged objective" differs from the "actual purpose" underlying the classification. *Miss. Univ. for Women,* 458 U.S. at 730.

The State proffers "promoting equal athletic opportunities for the female sex" as its governmental interest. W. Va. Code § 18-2-25d(a)(4). There is no doubt that promoting equal athletic opportunities is an important governmental interest. *See Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 104 (4th Cir. 2011) (citing *Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265, 272 (7th Cir. 1994)). The State contends this law is necessary to "promote equal athletic opportunities for the female sex" because "[i]n the context of sports involving competitive skill or contact, biological males and biological females are not . . . similarly situated" and "[b]iological males would displace females to a substantial extent if permitted to compete on teams designated for biological females." W. Va. Code § 18-2-25d(a)(3)-(5). But as explained above, Title IX already ensures that cisgender boys will not "displace [girls] to a substantial extent" and the State does not claim that cisgender boys have sought to do so. The truth is H.B. 3293 targets transgender girls. This Court should reject the State's proffered explanation as factually inaccurate, based on biases, and employing overbroad generalizations about transgender girls. Further casting doubt on the State's justification, H.B. 3293 hinders equal athletic opportunities for girls by creating an additional hurdle for participation.

First, the State's justification lacks a factual basis. H.B. 3293's text and legislative record make clear that the law was calculated to exclude girls who are transgender from girls' athletic

teams. The State already allows schools to have "separate teams for members of each sex," and under existing state law, cisgender boys cannot join a girls' team except in limited circumstances. W. Va. Code R. § 127-2-3.8.[10] When asked how H.B. 3293 would change this status quo, counsel for the bill explained that it "would affect those that changed their sex after birth." No. 1-1 at 14. Other delegates, including bill sponsors, also made clear that the bill's focus was on transgender girls. No. 1-1 at 21, 25. So, when the State says, "biological males would displace females" in athletics, W. Va. Code § 18-2-25d(a)(3), and defines students by their sex assigned at birth, *id.* § 18-2-25d(b)(1), the State's objective is clear: to define transgender girls as "boys" and then to prevent them from participating on girls' athletics teams. *See VMI*, 518 U.S. at 535-36 ("[B]enign justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." (internal quotation marks and citation omitted)).

Recently, an Idaho District Court found a similar law unconstitutional. *See Hecox*, 479 F. Supp. 3d at 979. The *Hecox* court rejected Idaho's claim that barring girls who are transgender from girls' athletic teams had any relationship to ensuring equality and opportunities for girls' athletics. As was the case in *Hecox*, H.B. 3293's legislative record "reveals no history of transgender athletes ever competing in sports" in West Virginia and no evidence that female athletes have been displaced by transgender athletes in West Virginia. *Id.* at 978. The West

[10] H.B. 3293's reliance on *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), does not support the law's discriminatory means. W. Va. Code § 18-2-25d(a)(3). *Clark* did not address the participation of transgender athletes. Instead, *Clark* upheld a school district's policy that cisgender boys could not play on a girls' volleyball team where "boys' overall opportunity is not inferior to girls'." 695 F.2d at 1131. At issue here is a transgender girl who seeks to play on a girls' team. *Clark* thus provides no support for the State's discriminatory purpose because, simply, transgender women "have not and could not 'displace' cisgender women in athletics 'to a substantial extent.'" *Hecox*, 479 F. Supp. 3d. at 977 (quoting *Clark*, 695 F.3d at 1131).

Virginia Department of Education's Executive Director of Policy and Government Relations testified that the agency has received no complaints about transgender athletes. No. 1-1 at 14-15. One of the bill's sponsors, Delegate Ellington, stated that he knew of no complaints regarding transgender athletes in West Virginia, *see* No. 1-1 at 9, 19, much less that transgender girls are so numerous and skilled that they could "displace" other women and girls in sports.[11] Instead, he pointed to "two transgender girls" who "were allowed to compete in state track and field meets in Connecticut." No. 1-1 at 21. The existence of two runners in another state fails to provide an "exceedingly persuasive justification" for H.B. 3293's categorical bar. *See Hecox*, 479 F. Supp. 3d. at 979 (citing *VMI*, 518 U.S. at 533). As in Idaho, the record here contains "no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote 'sex equality' or to 'protect athletic opportunities for females'" in West Virginia. *Id.* at 978-79 (citation omitted). The State can point to no valid evidence to justify H.B. 3293.

On the contrary, the State disregarded evidence that giving girls who are transgender the same athletic opportunities that all other girls enjoy has not displaced cisgender girls. The West Virginia Legislature had before it evidence that sixteen states successfully allow transgender students to participate in sports consistent with their gender identity. No. 25 at 38-39, 75. The National Collegiate Athletic Association ("NCAA") has allowed transgender students who meet certain conditions to participate in intercollegiate sports consistent with their gender identity for over ten years. *Id.*; *see also* NCAA, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf. Yet, girls and young women who are transgender have not displaced cisgender girls in those states or in college

[11] The bill's co-sponsors and the Governor of West Virginia also stated that they did not know of any girls who are transgender in West Virginia who competed on girls' teams, much less who dominated or displaced cisgender girls. No. 1 at 2, 14.

athletics. The lack of "empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities" for girls shows that H.B. 3293's exclusion of transgender girls "has no relationship" to the law's objective. *Hecox*, 479 F. Supp. 3d. at 979, 982.

Second, statements by H.B. 3293's sponsors show that a misunderstanding or fear of transgender girls, and in certain instances, outright anti-transgender bias, rather than an interest in promoting women's athletic opportunities, motivated this bill. For example, Delegate Mazzochi said that she did not "want all this mixing and matching" of transgender and cisgender children in "locker rooms." No. 1 at 12. Delegate Bridges announced on Facebook he was co-sponsoring H.B. 3293, then "liked" comments to his post that advocated for physical violence against girls who are transgender, compared them to pigs, and called them by a pejorative term ("tranny"). Jordan Bridges, "Update: The bill passed out of committee." Facebook (Mar. 16, 2021), https://perma.cc/HA5C-VJ4N.[12] He also made other anti-transgender comments, saying that "this country is going down hill [sic] fast" in response to a news article discussing transgender-inclusive business practices. Jordan Bridges, "I swear my hand." Facebook (Oct. 23, 2019), https://perma.cc/8BHK-7V5Z. The biases and moral disapproval articulated by the bill's sponsors are not justifiable reasons to legislate. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (holding moral disapproval of same-sex sexual conduct was impermissible basis for legislation); *see also Palmore v. Sidoti,* 466 U.S. 429, 433 (1984) (finding in a race discrimination suit that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").[13]

[12] The archived and live Facebook pages are available via the permalink. DOJ has retained permanent copies of these Facebook pages in the event that they are modified or deleted.

[13] Intermediate scrutiny is the appropriate level of review in this case. But even under rational basis review, H.B. 3293 would fail because bare dislike of an unpopular social group is never a

Third, even if this Court were to credit the State's purported objective of wanting to protect girls' athletic opportunities, H.B. 3293's categorical exclusion of transgender girls is not "substantially related" to that objective, as the equal protection caselaw requires. *See VMI*, 518 U.S. at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724) (internal quotation marks omitted). H.B. 3293's assumption that transgender girls, as a group, enjoy some inherent competitive advantage over their cisgender classmates ignores the facts of this case. Excluding B.P.J., who has not gone through puberty and is receiving puberty-delaying treatment, No. 2-1 at 21, 32, contributes nothing to ensuring competitive fairness. *See* No. 2-1 at 6-8. By sweeping so broadly, the State proved itself "less concerned with ensuring equality in athletics than [] with ensuring exclusion of transgender women athletes." *Hecox*, 479 F. Supp. 3d at 984.

Finally, H.B. 3293 may hinder rather than promote athletic opportunities for all girls. Though the law purports to bar only transgender girls from joining the girls' team, the practical effect is that *every* girl in West Virginia may be subject to having her eligibility for a single-sex team challenged merely because some other student claims the girl in question is not a "real" girl. This is likely to affect girls who do not adhere to sex stereotypes and who present as less stereotypically feminine. While intended to expose transgender girls, the consequences would be harmful for gender non-conforming cisgender girls as well. Indeed, two doctors testified that being the subject of such a challenge would be "psychologically devastating," "embarrassing, humiliating," "lead to the . . . person being ostracized," and increase her suicide risk. No. 25 at 97-98, 101. Thus, rather than protecting opportunities for girls, the law could reasonably chill

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legitimate legislative motive. *See Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446-47 (1985)*; Moreno*, 413 U.S. at 534. The State's prohibition of transgender girls from girls' teams is not rationally related to its stated interest of protecting girls' athletic opportunities. *See Cleburne,* 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

athletic participation by all girls who do not conform to sex stereotypes.

H.B. 3293 cannot survive heightened scrutiny. The State cannot point to any valid evidence that allowing transgender girls to participate on girls' sports teams endangers girls' athletic opportunities. Instead, the State legislated based on misconceptions and overbroad assumptions about transgender girls. It is illogical for the State to believe it can protect girls' athletic opportunities by barring girls from playing sports. The harm to B.P.J. is real and it will be lasting. The United States believes B.P.J. will succeed on the merits of her equal protection claim.

CONCLUSION

Title IX and the U.S. Constitution bar Defendants from implementing the policy commanded by H.B. 3293. That policy does nothing to further the State's purported goal of protecting athletic opportunities for girls. At the same time, it violates the nondiscrimination mandates of Title IX and the Equal Protection Clause.

Respectfully submitted, this 17th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

Respectfully submitted,

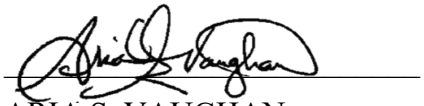

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EXHIBIT D

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,

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

INTERVENOR-PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO INTERVENE

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.

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Introduction

Female athletes deserve the chance to compete on a safe, equal playing field. A.S., C.F., and A.F. are female athletes in Arkansas who have dedicated most of their young lives to excellence in their respective team sports. Like millions of other girls, they deserve the opportunity to compete on a safe and fair playing field against other female athletes. And schools around the country, like those that belong to the Association of Christian Schools International (ACSI), also want to protect their female student athletes and give them a fair chance to be champions. But the federal government recently issued new Title IX rules by executive fiat that erase women's sports and eliminate the opportunities for women that Title IX was intended to protect. A.S., C.F., A.F., and ACSI ("Intervenors") ask this Court to allow them to intervene as-of-right or by permission under Federal Rule of Civil Procedure 24. Plaintiffs consent to Intervenors' motion to intervene. Intervenors' request should be granted for three reasons.

First, Intervenors' request is timely because the case is only five weeks old. Second, Intervenors have a significant interest in preserving equal athletic opportunities for themselves, ACSI member schools, and the thousands of female athletes attending ACSI member schools. A.S., C.F., A.F., and ACSI member schools' female athletes currently compete in public school team and individual athletics in states—like Arkansas—that ensure women can compete in athletics on a safe and fair playing field. ACSI's member schools have an interest in protecting its female athletic teams, and the educational and reputational benefits they derive from those teams. And ACSI has interests as an organization. The federal government's redefinition of "sex" harms all of these interests by forcing female athletes to compete against and lose opportunities to biological males.

Third, Plaintiffs cannot adequately represent Intervenors' interests because Intervenors bring unique perspectives, raise different arguments, and have different litigation goals as female athletes, schools, and an organization. Adding the female athletes and ACSI guarantees a thorough presentation of the arguments against the unlawful changes to Title IX. This Court needs to hear from the very persons most directly injured by this unlawful recasting of Title IX.

Statement of Facts

In January 2021, President Biden released an Executive Order stating that laws that prohibit sex discrimination, including Title IX, now prohibit discrimination based on sexual orientation and gender identity. Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021). The Department of Education (Department) published a notice of interpretation, called "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation"). In this notice, the Department stated its current view that "Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity." *Id*. The next day, the Civil Rights Division of the Department of Justice (DOJ) and the Office of Civil Rights (OCR) issued a "Dear Educator" letter notifying Title IX recipients of the Department's new Interpretation and reiterating that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." Letter to Educators on Title IX's 49th Anniversary (June 23, 2021). The Dear Educator letter was accompanied by a "fact sheet" issued by the DOJ and the Office for Civil Rights at the Department. U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools (together with the Dear Educator Letter, "Fact Sheet"). The Fact Sheet defined discrimination under the Department's new interpretation of Title IX. These

actions threaten Title IX's original purpose: to prohibit discrimination against women.

I. Association of Christian Schools International is an organization that serves member individuals and schools ranging from early education to colleges and universities.

ACSI promotes excellence in Christian education and equips member schools to do the same. Decl. of David Balik in Supp. of Mot. to Intervene (Balik Decl.) ¶¶ 3–20, attached as Exhibit D. ACSI serves schools at every level of education—from early educational institutes to high schools to colleges and universities. *Id.* at ¶¶ 5–7. All told, ACSI represents thousands of schools with about five hundred thousand students. *Id.*

ACSI offers many services, benefits, and resources to its member schools, including teacher certifications, school accreditations, curriculum development, and other resources to ensure member schools strive for excellence and create communities marked by healthy and productive spiritual, emotional, and cultural characteristics. *Id.* at ¶¶ 8–20. ACSI also advocates for its member schools with government officials and policymakers on issues that impact education, religious freedom, and other areas of concern for its schools. *Id.* at ¶¶ 15–20

ACSI and its member schools value athletics as part of the educational experience. *Id.* at ¶¶ 19–20, 33. For that reason, ACSI provides services related to member schools' athletic programs. *Id.* at ¶¶ 19–20. Likewise, member schools offer athletics to its male and female students and promote its sports. *Id.* at ¶¶ 33–37. Athletics benefit member schools. *Id.* at ¶¶ 38–56 Among other benefits, athletic programs contribute to the schools' brand and reputation, help attract students, and provide social events for its students, alums, and the broader community. *Id.* Teams from member schools frequently compete against public high schools, colleges, and universities, for titles, records, and individual championships. *Id.* at ¶¶ 58–66.

For ACSI member schools and its female athletes, the Interpretation and the Fact Sheet eliminate these athletic benefits. ACSI member schools and its female athletes compete against schools bound by Title IX. *Id.* at ¶¶ 58–66. But while ACSI member schools only permit females to compete on its female sports teams, the Interpretation and the Fact Sheet require public schools to allow males to compete in female sports. *Id.* at ¶¶ 68–69. So the Interpretation and Fact Sheet put ACSI's member schools and its female athletes at a competitive disadvantage. *Id.* at ¶¶ 68–89. ACSI member schools cannot fairly, or safely, compete against other public schools in female athletics. *Id.* And the female athletes at ACSI member schools lose the chance to compete on an even playing field. *Id.* at ¶¶ 68–91.

The Interpretation and the Fact Sheet harm ACSI too. The Interpretation and the Fact Sheet undermine ACSI's purpose by promoting an opposite view about biology than the view ACSI and its member schools espouse. *Id.* at ¶ 32. And ACSI tried to submit public comments on proposed Title IX regulations to ensure that any changes protected religious schools. *Id.* at ¶¶ 25–28. But without a notice and comment period, ACSI's pleas fell on deaf ears.

II. A.S., C.F., and A.F. are talented middle and high school female athletes.

A.S., C.F., and A.F. are athletes at public schools in Arkansas. Declaration of A.S. ¶ 2, attached as Exhibit A; Declaration of C.F. ¶ 2, attached as Exhibit B; Declaration of A.F. ¶ 2, attached as Exhibit C. Sports are a large part of their lives and they have committed themselves to excellence on their respective teams. A.S. Decl. ¶ 5; C.F. Decl. ¶ 4; A.F. Decl. ¶¶ 4–5. Since early childhood each has pursued the delight of athletic training and competition. *Id.* Each athlete's parents were involved in sports growing up and their siblings are also competitive athletes. A.S. Decl. ¶ 3; C.F. Decl. ¶ 3; A.F. Decl. ¶ 3. Sports are a family activity. C.F. and A.F.

had a ball in their hands almost as soon as they could sit up. C.F. Decl. ¶ 4; A.F. Decl. ¶ 4.

A.S. plays soccer at Brookland High School. A.S. first kicked a ball in first grade; she has not stopped since. A.S. Decl. ¶¶ 4–5. C.F. competes in basketball, tennis, and track and field at Brookland High School. But her first love is basketball. C.F. Decl. ¶¶ 2, 19. A.F. plays volleyball, basketball, and intends to compete in track and field at Brookland Middle School. A.F. Decl. ¶ 2. But even at a young age, her favorite sport was basketball. A.F. Decl. ¶ 4.

These young women have worked incredibly hard and sacrificed much to play their respective sports. A.S. Decl. ¶ 16; C.F. Decl. ¶ 26; A.F. Decl. ¶ 20. But they do so because they are committed athletes who want to be the best that they can be—and they want to win. A.S. Decl. ¶ 17; C.F. Decl. ¶ 27; A.F. Decl. ¶ 13. The benefits that they reap from sports stretch far beyond the court or track—these female athletes are learning life skills and accessing opportunities that shape their future. A.S. Decl. ¶ 18; C.F. Decl. ¶ 24; A.F. Decl. ¶ 21. They also would love to play sports in college and earning an athletic scholarship would play a key role in their decision on where to attend college. A.S. Decl. ¶ 19; C.F. Decl. ¶ 43; A.F. Decl. ¶¶ 14, 22.

These young women are committed to the integrity of female athletic competition, support Arkansas's Fairness in Women's Sports Act, and are distressed that the Department and the DOJ re-wrote Title IX. A.S. Decl. ¶¶ 31-34; C.F. Decl. ¶¶ 44-45; A.F. Decl. ¶¶ 29-30. They wish to have their personal concerns fully set forth and represented in this case in which the Department and the DOJ want to change the definition of "sex" that would leave them, and other female athletes, defenseless against male participation in their sports.

A.S., C.F., and A.F. were upset and shocked to hear about males competing in girls' sports. A.S. Decl. ¶ 20; C.F. Decl. ¶ 28; A.F. Decl. ¶ 23. Males have clear athletic advantages, like greater strength, height, and endurance. A.S. Decl. ¶ 28; C.F. Decl.

¶ 28; A.F. Decl. ¶ 24. These female athletes have each experienced and observed males' athletic domination even at their young ages. A.S. Decl. ¶¶ 26-27; C.F. Decl. ¶ 30; A.F. Decl. ¶ 26. They are afraid of competing against males in rough contact sports, like basketball and soccer, and getting injured by males. A.S. Decl. ¶ 29; C.F. Decl. ¶¶ 32-34; A.F. Decl. ¶ 27.

But even beyond safety, they believe it is not fair to force them to compete against males. A.S. Decl. ¶ 29; C.F. Decl. ¶ 40; A.F. Decl. ¶ 31. They are worried that females like them will be displaced in their sports by bigger, faster, and stronger males. *Id*. They are moving to intervene to ensure other female athletes have a chance to enjoy the same athletic opportunities. A.S. Decl. ¶ 36; C.F. Decl. ¶ 44; A.F. Decl. ¶ 32.

Argument

Federal Rule of Civil Procedure 24 authorizes both intervention as of right and permissive intervention. The Sixth Circuit favors intervention, and Rule 24 should be "broadly construed in favor of potential intervenors." *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991). The female athletes and ACSI should be granted (I) intervention as of right because their motion is timely, they have protectable interests directly affected by this litigation, and their arguments are unique from those of the Plaintiffs involved in this case. They also satisfy the requirements for (II) permissive intervention because their legal interests share common questions of law and facts with this case.

I. The female athletes and ACSI satisfy the requirements for intervention as of right because their request is timely, their interests are affected by this litigation, and their arguments differ from the Plaintiffs' arguments.

The Sixth Circuit uses four factors to evaluate a request to intervene as of right: (1) timeliness of the motion to intervene; (2) the intervenors' "substantial legal

interest" in the case; (3) whether the intervenors' "ability to protect that interest may be impaired in the absence of intervention"; and (4) whether "the parties already before the court may not adequately represent their interest." *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999). Judicial economy favors the disposition of similar claims and issues in a single suit. *Jansen v. City of Cincinnati*, 904 F.2d 336, 339 (6th Cir. 1990). The female athletes and ACSI satisfy each requirement.

A. The motion to intervene is timely.

The Intervenors' motion is timely because this lawsuit is in its infancy. The Sixth Circuit measures timeliness by considering five factors: "1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention." *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011). No one factor is determinative, and the factors should be weighed in relation to all relevant circumstances. *Id.*

First, the Court looks to the point to which the suit has progressed. *Id.* Here, the case is in its infancy as it is only a few weeks old. Courts regularly grant requests in similar time frames or even much later than this intervention. In *Gratz v. Bollinger*, the Court found that the intervention was timely as it was filed approximately four months after the initial complaint and the case was still in its initial stages. 183 F.R.D. 209, 212 (E.D. Mich. 1998), *rev'd on other grounds sub nom. Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). On appeal in *Grutter*, the Court affirmed that the intervention was timely. 188 F.3d at 398. *See Jansen*, 904 F.2d at

340–41 (timely intervention where intervenors moved to intervene halfway through the discovery process because the intervenors only found out their interests were not adequately represented two weeks prior); *Chill v. Farmers Ins. Co.*, No. 3:20-CV-00191, 2021 WL 638124, at *6 (M.D. Tenn. Feb. 18, 2021) (timely intervention where intervenor moved to intervene within two months of the initial complaint and before the initial case management conference); *Morelli v. Morelli*, No. 2:00-CV-988, 2001 WL 99859, at *2 (S.D. Ohio Feb. 1, 2001) (timely intervention where motion to intervene filed seven weeks after the complaint was filed, discovery had not been initiated, and pretrial conference had not been held).

The female athletes and ACSI easily clear this hurdle because this lawsuit was filed five weeks ago. The Defendants moved to dismiss the complaint, but that motion has not been fully briefed or decided by this Court.[1] The parties have not engaged in discovery, and this Court has yet to issue a scheduling order. Intervention at this early stage in the proceedings easily meets this factor.

Second, courts have looked at whether the intervenor asserted a legitimate purpose for the intervention and at other times looked at whether the intervention was timely. *Kirsch v. Dean*, 733 F. App'x 268, 275–76 (6th Cir. 2018). Here, the Intervenors have an interest in safeguarding women's opportunities in sports. They found out about the case only a few weeks ago and moved quickly to intervene.

Third, the Court considers the length of time the proposed intervenors knew their interests would be affected by the litigation. *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 582–83 (6th Cir. 1982). The case is only five weeks old. The female athletes and ACSI quickly noticed their interests would be impacted by the litigation and intervened. Choosing to intervene in a case of this magnitude is a substantial

[1] The Defendants filed their motion to dismiss on September 23, 2021. The Plaintiff States' response is due on October 8, 2021.

decision. It would not be reasonable to require intervenors to act more quickly than the Intervenors here.

Fourth, the other parties will not be prejudiced by adding the female athletes and ACSI. Courts consider the prejudice caused by the delay and not the prejudice caused by the intervention itself. *U.S. v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013). There is no delay here. The litigation just started. And the Intervenors will not slow anything down because the Intervenors request to join and adopt the State's motion for preliminary injunction.[2] And finally, there are no unusual factors here that would mitigate for or against intervention. *Jansen*, 904 F.2d at 340–41.

Because the female athletes and ACSI did not delay, there is no prejudice to any party for their intervention request. They filed their complaint in this lawsuit concurrently with this motion. *See* Intervenor-Plaintiffs' Proposed Verified Compl. (Proposed Compl.), attached as Exhibit E. Their motion is therefore timely.

B. The female athletes and ACSI have a substantial and legally protectable interest in fair, safe competition.

Along with timeliness, the female athletes and ACSI "have a substantial interest in the subject matter of this litigation. *Grutter*, 188 F.3d at 398. The Sixth Circuit takes a "rather expansive notion of the interest sufficient to invoke intervention of right," *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), and approves "decisions of other courts 'reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Grutter*, 188 F.3d at 398 (quoting *Miller*, 103 F.3d at 1245).

Other courts across the country have already found "there is no question" that a woman's right to an equal athletic opportunity is a "legitimate and important"

[2] While Intervenors will be making different arguments throughout the litigation based on their unique interests, they will not make any different arguments for the preliminary injunction motion to ensure that their intervention will not delay resolution of that motion.

interest." *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) ("Congress … recognized that addressing discrimination in athletics presented a unique set of problems."). Under Title IX, "an institution must effectively accommodate the interests of both sexes in both the selection of the sports and the levels of competition, to the extent necessary to provide equal athletic opportunity." *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994); *see Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) ("Title IX prohibits gender inequity in connection with, among other things, the opportunity to participate in athletics.").

Given this imperative interest, courts have allowed athletes to intervene in other similar cases—i.e., cases where males seek access to female sports. *See, e.g.*, *Hecox v. Little*, 479 F. Supp. 3d 930, 952, 955, 958 (D. Idaho 2020) (allowing female athletes to intervene to defend Idaho's law guaranteeing equal opportunities for female athletes). And courts have also allowed male athletes to intervene to defend a district policy forcing female athletes to compete against male athletes. Order Granting Mot. to Intervene, *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. April 25, 2021), ECF No. 93. If male athletes can intervene to defend laws enabling them to compete on a female athletic team, then female athletes can intervene against a law that could strip away their equal opportunity in athletics. That's only fair.

The Sixth Circuit also finds groups of people (like female athletes) have an interest in challenges to a law that affects that group. For example, minority students who benefitted from an affirmative action program had the right to intervene in a lawsuit challenging that program. *See Grutter*, 188 F.3d at 396–98 (finding "substantial legal interest" in preventing minority enrollment).

So too here. The female athletes currently benefit from Arkansas's law protecting them from competing against boys. Ark. Code § 6-1-107. They also benefit

from a correct interpretation of Title IX that protects female athletes. The Interpretation and the Fact Sheet would deprive them of those protections. The female athletes are competitive high school and middle school athletes directly impacted by Title IX. A.S. Decl. ¶ 2; C.F. Decl. ¶ 2; A.F. Decl. ¶ 2. They will be harmed—by being put at a competitive disadvantage and being deprived a fair chance to win—if male athletes are permitted to compete against them. *See, e.g.*, Doriane Lambelet Coleman et. al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 Duke J. Gender L. & Pol'y 69, 87–99 (2020) (explaining males win against comparably trained females). They want to engage in female-only competitions and maintain a competitive environment protected from physiologically-advantaged male participants. They also have an interest in their safety if they are forced to compete against males in contact sports like basketball and soccer. A.S. Decl. ¶ 23; C.F. Decl. ¶¶ 32-33; A.F. Decl. ¶ 27. Concussions, knee injuries, and ankle injuries are already potential risks in these sports. A.S. Decl. ¶ 24; C.F. Decl. ¶ 33; A.F. Decl. ¶ 27. The female athletes have an interest in minimizing these risks by ensuring they compete only against other girls. So these female athletes have a "substantial legal interest" in athletic opportunities and preventing the decline of female athletes in women's sports.

ACSI adds additional "substantial interest[s]" to this case. For starters, ACSI has an interest in overturning the Interpretation and the Fact Sheet because they were passed without following the Administration Procedure Act—so ACSI lost the chance to "influence the rule making process in a meaningful way." *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979); Balik Decl. ¶¶ 25–30. And ACSI lost time drafting a written comment which was ignored. Balik Decl. ¶¶ 25–30. *Cf. Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576–77 (6th Cir. 2013) (organizational injury from action that drained resources). So ACSI has an interest here.

Next, ACSI has an interest on behalf of its member schools. ACSI's member schools benefit from fairness in female sports. Balik Decl. ¶¶ 38–56. But the Interpretation and the Fact Sheet put ACSI's member schools at a competitive disadvantage compared to other public schools, which causes them injury. *Id.* at ¶¶ 68–89. The federal government opens each sports league to new competitors and changes the rules of play to include serious safety risks, and thus creates competitor standing for competitor female athletes, as well as competitor schools, to vindicate their educational, athletic, aesthetic, and recreational interests, protected by statute, in competing fairly in only women's-only sports. *Id. See, e.g.*, *XY Plan. Network, LLC v. United States Sec. & Exch. Comm'n*, 963 F.3d 244, 251 (2d Cir. 2020) (summarizing competitor standing doctrine); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (same). For example, the Interpretation and the Fact Sheet make it harder for ACSI's member schools to win athletic championships, games, and events, make it more difficult for ACSI member colleges and universities to recruit top-flight student athletes, and force ACSI member high schools to decide whether to participate or leave state-wide athletic associations. Balik Decl. ¶¶ 68–89. Because the Interpretation and the Fact Sheet harm ACSI's member schools and this challenge is germane to ACSI's purpose of providing services to its member schools (including athletic advice), ACSI has an associational interest in this case. *See, e.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 341–43 (1977) (explaining this interest).

Finally, ACSI has an interest because of the damage the Interpretation and the Fact Sheet inflict on ACSI's member schools' female athletes. Balik Decl. ¶¶ 90–91. There's no doubt that the member schools have an interest in protecting their female athletes. *See Runyon v. McCrary*, 427 U.S. 160, 175 n. 13 (1976) ("It is clear that the schools have standing to assert these arguments [involving student's right to privacy and free association and the parent's right to direct the child's education]

on behalf of their patrons."); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) ("[S]chools also have standing to assert the constitutional right of parents …."); *id.* (collecting cases). And because ACSI is "an organization dedicated exclusively to advancing the interests of the member schools," ACSI has a substantial interest in protecting the member schools' female athletes. *Id.*[3]

From individual athletes to high schools and colleges, the Intervenors represent a wide swath of substantial interests affected by the Interpretation and the Fact Sheet. They should be permitted to intervene.

C. The female athletes' and ACSI's interests could be impaired by this litigation which threatens to undermine equal opportunities for women.

Third, to determine whether a proposed intervenor's interests will be impaired, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Grutter*, 188 F.3d at 399. But "it is not necessary that the would be intervenor demonstrate that the impairment is probable; they need only demonstrate that such is possible." *Blount-Hill v. Ohio*, 244 F.R.D. 399, 403 (S.D. Ohio 2005), *aff'd sub nom. Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482 (6th Cir. 2006). The burden to meet this element is minimal. *Miller*, 103 F.3d at 1247 ("[T]his court has already acknowledged that potential stare decisis effects can be a sufficient basis for finding an impairment of interest.").

If the federal government is not restrained by the courts, the protection of women's equality in athletics will be eliminated. As a result, female athletes, including A.S., C.F., A.F., and female athletes at ACSI schools, will lose

[3] *Cf. Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 281 (3d Cir. 2002) (nonprofit corporation representing psychiatrists had standing to sue on behalf of psychiatrists' patients); *Public Citizen v FTC*, 869 F.2d 1541, 1550 (D.C. Cir. 1989) (allowing public action group to sue on behalf of its members' children to require a federal agency to prohibit the sale of items advertising smokeless tobacco without a health warning).

opportunities to attract attention from college scouts, lose opportunities to win titles, and miss out on becoming champions in their own sports. Balik Decl. ¶¶ 68–89. Because the market for college athletic scholarships is nationwide (and because schools only have limited athletic scholarships), allowing males to compete in women's sports takes away female roster spots and reduces their limited chances of receiving college scholarships. *See* A.S. Decl. ¶ 19; C.F. Decl. ¶ 43; A.F. Decl. ¶ 14, 22; *Full Ride Scholarships and How to Get Them*, Next College Student Athlete, https://bit.ly/3FanCLb (last accessed Oct. 1, 2021). *Hardin v. Ky. Utils. Co.*, 88 S. Ct. 651, 654 (1968) ("[W]hen the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.").

ACSI's schools meanwhile will miss the chance to attain athletic prominence and attract other talented students, will lose a fair playing field against other public schools, and could be forced to leave certain divisions and conferences altogether. Balik Decl. ¶¶ 68–89.

The Intervenors only have to overcome a minimal burden to prove their interest will be impaired if they do not prevail in this suit. *Miller*, 103 F.3d at 1247; *see also Blount-Hill*, 244 F.R.D. at 403 (granting intervention even though "there is nothing to indicate that the impairment [proposed intervenor] is likely to result from a ruling in favor of the Plaintiffs, it is one of the possible consequences of such a ruling. As the Sixth Circuit has stated, the burden for satisfying this element is minimal....").

If the Interpretation and the Fact Sheet stand, the female athletes and ACSI will be affected by this litigation. A.S., C.F., A.F., and ACSI member schools' female athletes will be at a competitive disadvantage by being forced to compete against males in athletics. Balik Decl. ¶¶ 90–91. ACSI member schools will lose opportunities for their female sports teams to compete on a fair playing field. Balik

Decl. ¶¶ 68–89. They therefore have a significant interest which this case could impair.

D. The Plaintiffs do not adequately represent the female athletes' and ACSI's interests because they will raise arguments and pursue strategies Plaintiffs will not.

As for the fourth requirement for intervention as of right, the Plaintiffs do not adequately represent Intervenors' unique interests. Intervenors offer different arguments and distinct perspectives that Plaintiffs do not and cannot.

Proposed intervenors need only show that representation of their interests "'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Grutter*, 188 F.3d at 400 ("proposed intervenors are not required to show that the representation will in fact be inadequate" (cleaned up)). A proposed intervenor "should be treated as the best judge of whether the existing parties adequately represent his or her interests, and ... any doubt regarding adequacy of representation should be resolved in [movant's] favor." James William Moore, et al, 6 Moore's Federal Practice § 24.03[4][a] (3d ed. 1997).

Plaintiffs are twenty States with an interest in upholding their own laws and preventing federal agencies from usurping congressional authority. These are important goals, but they differ from the Intervenors'. The female athletes and ACSI seek to provide equal opportunities for women in athletics—ACSI for its member schools and their female athletes—by maintaining sex-separated sports teams as guaranteed by Title IX. *See supra* § I.B (detailing Intervenors' interests).

As such, the Plaintiffs cannot adequately represent Intervenors' interests. Intervenors only have to show that "there is a *potential* for inadequate representation." *Grutter*, 188 F.3d at 400. And their burden to show that is minimal. *Id*. They clear that hurdle.

What's more, Intervenors will offer different arguments and strategies in this litigation, and that is enough to justify intervention. *Grutter*, 188 F.3d at 400. First, the Plaintiffs argue that the Interpretation and Fact Sheet violate the Administrative Procedure Act because they are contrary to Title IX. But they do not explicitly argue that Title IX affirmatively requires sex-separated athletic teams. Pls. Mot. for Prelim. Inj. 13–18, ECF No. 11. In contrast, Intervenors will highlight that Title IX not only permits, but *requires* separate sports teams for girls and boys in contests of speed, strength, or physical contact so that girls are receive an "equal athletic opportunity." 34 C.F.R. § 106.41(c); *See* Proposed Compl., ¶¶ 314–30; Proposed. Compl. Prayer for Relief ¶¶ 4, 6.

They will argue that this "equal athletic opportunity" requires both equal treatment and effective accommodation.[4] Proposed Compl., ¶¶ 314–30. For equal treatment, the Department considers whether "program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability" between the sexes. 44 Fed. Reg. 71,415 (Dec. 11, 1979). That means girls must be guaranteed equal opportunities to engage in post-season competition and equal quality of competition. *Id.* at 71,416; 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.[5] They also deserve equal access to publicity and scholarships. 34 C.F.R. § 106.41(c); 44 Fed. Reg. 71,415.

But none of this is possible when males dominate women's sports. That's why sex-separated sports have always been the means to provide an "equal opportunity" for women. And from the beginning of Title IX, schools were advised

[4] Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics. 44 Fed. Reg. 71,413. Many circuits, including this one, have deferred to these documents in determining what violates Title IX. *See Miami Univ. Wrestling Club*, 302 F.3d at 615 (citing cases); *Horner*, 43 F.3d at 273.

[5] The 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test is viewable at: https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

to "determine the relative abilities of members of each sex for each . . . sport offered, in order to decide whether to have single sex teams or teams composed of both sexes." 40 Fed. Reg. 52,656 (Sept. 6, 2006).

And for effective accommodation, Intervenors will argue that OCR's policies elaborate that schools must provide "equal opportunity in … levels of competition," and competitive opportunities "which equally reflect [girls'] abilities." 44 Fed. Reg. 71,417–418 (emphasis added). Proposed Compl., ¶¶ 314–30. Compliance with this mandate turns on "whether the policies … are discriminatory in … effect," or whether there exists "disparities" with respect to benefits, treatment, or opportunities that deny equal opportunity. *Id.* at 71,417.

Intervenors will argue that "[t]reating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004). *See* Proposed Compl., ¶¶ 314–30. Plus, in many sports, Title IX's mandate of non-discrimination could not be achieved with sex-blind programs. Failing to provide females with separate sports teams with equal competition violates Title IX. See 44 Fed. Reg. at 71,417–418; *see also Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993).

Second, Plaintiffs do not explicitly argue. that "sex" discrimination under Title IX does not include "gender identity" discrimination. Title IX does not define "sex." But in 1972 when Title IX was passed, "sex" was defined as "one of the two divisions of organic esp. human beings respectively designated male or female." Webster's New International Dictionary 2081 (3d ed. 1968). That meaning controls Title IX. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (when term not defined it should be given its "ordinary, contemporary, common meaning.").

Intervenors will argue that throughout Title IX, "sex" is used as a binary concept, containing only male and female. *See* Proposed Compl., ¶¶ 49, 132, 362. For example, Title IX allows schools in certain circumstances to change "from being an institution which admits only students of one sex to being an institution which admits students of both sexes." 20 U.S.C. § 1681(a)(2) (emphases added). Title IX also exempts "father-son or mother-daughter activities . . . but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex." 20 U.S.C. § 1681(a)(8) (emphases added). Not only does this provision say "the" other sex rather than "another" sex, but it uses terms directly tied to biology like "father-son" and "mother-daughter." At the time, mother was defined as "a female parent," Webster's New International Dictionary 1474 (3d ed. 1968); "father" as "a male parent," *id.* at 828; "son" as a "male offspring," *id.* at 2172; and "daughter" as "a human female," *id.* at 577. None of this would make sense if "sex" included the non-binary concept of gender identity.

Intervenors will also argue that if sex included gender identity, then many Title IX exemptions would be illogical and even discriminatory. *See, e.g.*, Proposed Compl., ¶¶ 132, 361–62. For example, Title IX exempts institutions "traditionally" limiting their admissions to "only students of one sex," 20 U.S.C. § 1681(5); sororities and fraternities "traditionally . . . limited to persons of one sex," § 1681(6); "living facilities for the different sexes," § 1686; "separation of students by sex within physical education classes" for sports whose major activity "involves bodily contact," 34 C.F.R. § 106.34(a)(1); and human sexuality classes and choirs separated by "sex," 34 C.F.R. § 106.34(a)(3)–(4). But if sex includes gender identity, these provisions would affirmatively bless schools' ability to create female-only choirs or transgender-only fraternities. That makes little sense. Intervenors will argue that these exemptions only work if sex throughout Title IX means biological sex alone.

Intervenors will also argue that Title IX's purpose confirms its text and structure. *See* Proposed Compl., ¶¶ 31–45, 361. After all, Title IX was "enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities, which was documented in hearings held in 1970 by the House Special Subcommittee on Education." *McCormick*, 370 F.3d at 286; *see also N. Haven Bd. of Educ.. v. Bell*, 456 U.S. 512, 523 n.13 (1982). Title IX's statutory context and purpose simply focus on biology.

Third, Plaintiffs fail to raise the implications of redefining sex in Title IX to include gender identity. Intervenors will argue that the Interpretation would undermine sex-based classifications everywhere. *See, e.g.*, Proposed Compl., ¶¶ 132, 361–62. This Court has already recognized "a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex" in prisons and schools. *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987) (in prisons); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 498 (6th Cir. 2008) (in schools). But that right would be virtually non-existent if sex were redefined.

For example, homeless shelters for women who have "been physically or sexually abused" would be required to admit males, thus adding to the trauma for women. *See The Downtown Soup Kitchen v. Municipality of Anchorage*, No. 3:21-cv-155 (D. Alaska 2019) (challenging local law forcing women's homeless shelter to accept biological males).

Likewise, separation based on biological sex makes imminent sense in prisons or jails, where "female and male inmates are not housed together" because of the "serious and real" risk of harassment, assault, rape, and even murder. *De Veloz v. Miami-Dade Cnty.*, 756 F. App'x 869, 877 (11th Cir. 2018). Safety matters in sports

too. World Rugby recently issued guidelines excluding biological males from women's rugby because of the injury risk to females.[6]

Or what about sex-based classifications like the Military Selective Service Act, which requires "every male citizen" between 18 and 26 to register for the draft? 50 U.S.C. § 3802(a). Or prior social security laws that favored biological females to "redress[ ] our society's longstanding disparate treatment of women"? *Califano v. Webster*, 430 U.S. 313, 317 (1977). The Supreme Court upheld these laws, but the logic of the Interpretation and Fact Sheet would effectively overturn these rulings. *Rostker v. Goldberg*, 453 U.S. 57 (1981) (selective service); *Califano*, 430 U.S. at 317–18 (social security).

Intervenors will argue that the Interpretation and Fact Sheet would also explicitly invalidate laws like Title IX that allow sex classifications in military schools, 34 C.F.R. § 106.13, dormitories, *id.* § 106.32, sororities and fraternities, *id.* § 106.14, and, of course, school athletics, *id.* § 106.41. These laws cannot be squared with the logic of the redefinition of sex. And if "[o]ver 100 federal statutes prohibit discrimination because of sex," invalidating Title IX's sex-based classification is "virtually certain to have far-reaching consequences." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting). "Before issuing [a] radical decision," the Department and the DOJ should "give[ ] some thought to where its decision [might] lead." *Id.*

By highlighting these dangers, Intervenors will provide a unique perspective on these issues. The female athletes will show how allowing physiologically bigger, stronger, and faster biological males to compete in women's sports personally harms their chance at fair competition and eliminates their "chance to be champions." *McCormick*, 370 F.3d at 295. *See supra* § I.B; *See, e.g.*, Proposed Compl., ¶¶ 56–106.

[6] *Transgender Women Guidelines*, World Rugby, https://bit.ly/2Z8kFKA.

And ACSI will demonstrate how being forced to compete against other schools that redefine sex directly harms their reputation by creating an unfair competitive market. *See supra* § I.B.

Finally, *Hecox* and *Soule*, the two cases in the country most similar to this one, granted intervention as of right and by permissive. *Hecox*, 479 F. Supp. 3d 930 at 955; *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021). Just as the government officials in those cases did not adequately represent the intervenors' interests, Plaintiffs do not adequately represent Intervenors' interests here.

II. Alternatively, the Court should grant the female athletes' and ACSI's permissive intervention.

Along with satisfying the requirements for intervention as of right, Intervenors also qualify for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." "Strong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible … supports permissive intervention." *Buck v. Gordon*, 959 F.3d 219, 225 (6th Cir. 2020). In making this decision, a court should also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Intervenors satisfy these requirements for three reasons.

First, as discussed above, Intervenors timely filed this motion with no prejudice or delay to the original parties. They have filed a responsive pleading and their participation will provide no obstruction to effective litigation by the parties. See supra § I.A.

Second, Intervenors' involvement provides a more complete airing of the issues in dispute in this lawsuit. Their legal issue "shares with the main action a

common question of law or fact," Fed. R. Civ. P. 24(b)(1), as their interests situate and compel them to challenge the Interpretation and Fact Sheet.

Finally, Intervenors, unlike Plaintiffs, have a personal connection to this issue and unique experiences to share. They can provide unheard perspectives and arguments, thereby aiding in the disposition of the case. Their application satisfies the conditions for permissive intervention.

Conclusion

This case raises important legal issues for women and specifically for female athletes that will be impacted by this Court's decision about the Interpretation and the Fact Sheet. This Court should hear from those who Title IX was meant to protect and who lose by the federal governments' actions. For these reasons, A.S., C.F., A.F., and ACSI should be permitted to intervene, as of right or permissively.

Respectfully submitted this 4th day of October, 2021.

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**Pro hac vice* applications forthcoming

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Certificate of Service

I hereby certify that on the 4th day of October, 2021, 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/ W. Andrew Fox
W. Andrew Fox
Attorney for Intervenor-Plaintiffs

EXHIBIT E

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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EXHIBIT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

THE STATE OF TENNESSEE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case No. 3:21-cv-308
v.	)	
	)	Judge Atchley
	)	
UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,	)	Magistrate Judge Poplin
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Before the Court is the Motion to Intervene [Doc. 51] by the Association of Christian Schools International ("ACSI") and minors A.S., C.F., and A.F., seeking intervention of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, permissive intervention under Rule 24(b). Because the Court finds that the proposed intervenors have not established standing with respect to certain claims and relief sought in their proposed complaint, the Motion to Intervene [Doc. 51] will be **DENIED IN PART**. The Motion [Doc. 51] will be **GRANTED IN PART** and Proposed Intervenors will be permitted to join and file their proposed complaint only insofar as it asserts the same claims and seeks the same relief as Plaintiffs' Complaint [Doc. 1].

Finally, the Motion for Preliminary Injunction [Doc. 52] will be **DENIED AS MOOT** in light of the Court's Memorandum Opinion and Order [Doc. 86] granting Plaintiffs' Motion for Preliminary Injunction [Doc. 10].

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 30, 2021, twenty States filed a Complaint [Doc. 1] challenging the legality of certain documents issued by the Department of Education ("Department") and Equal Employment

Opportunity Commission ("EEOC") in response to the President's "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." Exec. Order. No. 13988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021). First, the Department of Education published an Interpretation of Title IX entitled "Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County," 86 Fed. Reg. 32637 (June 22, 2021), and a "Dear Educator" letter notifying those subject to Title IX of the Department's Interpretation. Accompanying the letter is a Fact Sheet that expounds on the Department's interpretation of Title IX (with the Dear Educator Letter, the "Fact Sheet"). Second, the EEOC issued a "Technical Assistance Document" relating to "Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity" (June 15, 2021).

This lawsuit challenges, *inter alia*, the validity and legality of the Department's Interpretation and Fact Sheet and the EEOC's Technical Assistance Document. Plaintiff States contend that Defendants' documents are procedurally and substantively unlawful under the Administrative Procedure Act ("APA") and the United States Constitution. [*Id*.]. The Complaint seeks preliminary and permanent injunctive relief, declaratory relief, and a judgment setting aside the Interpretation, Fact Sheet, and Technical Assistance Document. [*Id*. at 33-34]. After additional briefing and a hearing, the Court denied Defendants' Motion to Dismiss [Doc. 49] and granted Plaintiffs' Motion for Preliminary Injunction [Doc. 10]. [Doc. 86].

Proposed intervenor ACSI is a Christian educational organization that serves member individuals and schools from early education through collegiate level. [Doc. 51-5 at ¶ 3]. ACSI is a non-profit corporation organized under California law, with a principal place of business in Colorado. [*Id.* at ¶ 4]. It serves approximately 2,000 member schools, with members in all fifty

states. [*Id.* at ¶ 5]. Those schools in turn serve approximately 500,000 students. [*Id.* at ¶ 6]. ACSI's Statement of Faith takes the position that human beings are created by God "as either male or female in conformity with their biological sex." [*Id.* at ¶ 12].

ACSI provides training and education resources to its member schools, including professional and personal development tools and support functions. [*Id.* at ¶ 13]. It also provides guidance on policies and procedures and sends alerts and policy memos related to religious education and religious freedom. [*Id.* at ¶ 17]. ACSI submits public comments on regulations that may affect its member schools. [*Id.* at ¶ 18]. It also offers certification services for its member schools' athletic directors. [*Id.* at ¶ 20].

Through the Declaration of David Balik, USA Vice President of ACSI, [Doc. 51-5], ACSI says it diverted resources to preparing and submitting a written comment in response to the Executive Order. [Doc. 51-5 at ¶ 5]. The Department did not open a notice and comment period prior to issuing the Interpretation and Fact Sheet. [*Id.* at ¶ 29]. ACSI argues it lost its opportunity to influence the rule-making process in a meaningful way. [*Id.* at ¶ 30]. ACSI avers that the Interpretation and Fact Sheet frustrate ACSI's mission and purpose by announcing a view of gender that is contrary to that espoused by ACSI and its member schools. [*Id.* at ¶ 32].

ACSI member schools compete with public schools in at least 35 states, some of which are Plaintiffs in this action. [*Id.* at ¶ 59]. Many ACSI high school sports teams, for example, compete against public high school teams for state, conference, and district championships. [*Id.* at ¶ 61]. Many member schools themselves compete against public high schools, colleges, and universities to attract prospective students and host athletic events. [*Id.* at ¶¶ 40 & 64]. ACSI argues that the Interpretation and Fact Sheet put ACSI schools at a competitive disadvantage by forcing their female athletic teams to compete against public school teams that may include biological males.

[*Id.* at ¶ 74]. According to ACSI, "[t]he Interpretation and Fact Sheet also make it harder for ACSI member schools' athletic teams to win games and titles compared to public schools' female athletic teams with males," imposing reputational harm on ACSI member schools. [*Id.* at ¶ 75]. This in turn will make it more difficult for ACSI schools to recruit top-tier athletes. [*Id.* at ¶ 76].

At the time of filing their declarations, proposed intervenors A.S., C.F., and A.F. were minor, female student athletes. [Docs. 51-2, 51-3 & 51-4]. Each declarant is a student in Arkansas who has spent many hours practicing and competing in her chosen sport(s). [*Id.*]. Each girl avers that she has observed that boys her age have physical advantages in athletic competition and mentions the aggressive and/or less cooperative style of play in boys' sports. [Doc. 51-2 at ¶¶ 28-30; Doc. 51-3 at ¶¶ 28-30; Doc. 51-4 at ¶¶ 24-26]. A.S., C.F., and A.F. all indicate their belief that allowing transgender girls to compete in girls' sports will rob biological female athletes of a fair and safe chance to compete. [*Id.*].

The Proposed Intervenors argue they are entitled to intervene as of right pursuant to Rule 24(a) because (1) their motion is timely, (2) they have a substantial interest in fair and safe competition for female athletes, (3) impairment of that interest is possible if intervention is denied, and (4) the Plaintiff States do not adequately represent their interests because they make different arguments and raise different issues than the Proposed Intervenors. [Doc. 51-1]. In the alternative, Plaintiffs argue they should be permitted to intervene because their legal issues share common questions of law and fact with the main action.

Defendants respond that the Proposed Intervenors seek relief beyond that requested in the Complaint and must therefore demonstrate standing. [Doc. 63 at 11-23]. Because Proposed Intervenors cannot show, *inter alia*, a concrete injury in fact sufficient to establish standing, they should not be permitted to intervene. [*Id.*]. Defendants also argue that the Proposed Intervenors

have not made certain showings required to intervene as of right. Specifically, Defendants contend that (1) Proposed Intervenors have not shown they have a substantial interest in the subject matter of the litigation, (2) have therefore not shown the impairment of that interest, and (3) have not established that their interests are inadequately represented by the Plaintiff States. [Doc. 63 at 23-28; *id.* at 28, n. 2]. Defendants also oppose permissive intervention, arguing that even if they could demonstrate standing, the Proposed Intervenor's involvement will unduly delay the resolution of the action and add unnecessary factual and procedural complexity to the case. [*Id.* at 31-32].

In reply, Proposed Intervenors argue that they do not in fact seek relief beyond what Plaintiffs seek. Because they seek the same practical relief as the Plaintiff States, Proposed Intervenors claim that Article III standing is not required. [Doc. 66 at 12]. To the extent the Court regards their Proposed Complaint as a request for additional or distinct relief, Proposed Intervenors "clarify that they seek only overlapping relief with the state plaintiffs." [*Id.* at 15]. Proposed Intervenors reiterate that they have shown that their interests are affected by this litigation and that the States may not adequately represent those interests. [*Id.*].

II. ANALYSIS

"A plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1650 (2017). With multiple plaintiffs, at least one plaintiff must have standing as to each form of relief requested in the complaint, and "[t]he same principle applies to intervenors of right." *Id.* at 1651. For all relief that is sought, there must be a litigant with standing, whether that litigant is an original plaintiff, coplaintiff, or an intervenor of right. *Id.* Thus, "[a]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Id.*

In *Town of Chester*, it was unclear whether the intervenor sought the same relief as the original plaintiff or different relief, "such as a money judgment against the Town" in its own name. *Id.* The complaint sought a money judgment for the plaintiff. *Id.* Because it was not clear whether the intervenor sought separate damages for itself or simply the same damages sought by the plaintiff, the Supreme Court of the United States remanded the matter. *Id.* at 1652. *Town of Chester* makes clear that "[a] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* at 1650.

The United States Court of Appeals for the Sixth Circuit does not appear to have applied *Town of Chester* to determine whether a potential intervenor seeks relief that is different from that requested by the plaintiff. The Court looks, then, to decisions from other circuits in deciding this issue. In *Wayne Land and Mineral Group, LLC v. Delaware River Basin Commission*, 959 F.3d 569 (3rd Cir. 2020), the United States Court of Appeals for the Third Circuit considered a motion to intervene by three Pennsylvania State Senators. The case involved the Delaware River Basin Compact, an agreement adopted into law by four states regarding the conservation, development, and control of the water resources of the Delaware River Basin. *Id.* at 571. An interstate agency was created with authority to review and approve projects having a substantial impact on the water resources of the basin. *Id.* The Executive Director of that Commission issued a determination, putting people on notice that any natural gas extraction project in certain areas required approval from the Commission. *Id.* at 572.

Wayne Land and Mineral Group, LLC, owned property – some of which was in the Delaware River Basin – which they had purchased to access natural gas reserves via fracking. *Id.* at 572. Wayne sued the Commission, challenging the agency's authority to regulate the company's proposed fracking activities. *Id.* Wayne sought a declaration that the Commission did not have

jurisdiction over, or the authority to review and approve, their proposed activities. *Id.* Three Pennsylvania State Senators sought to intervene as plaintiffs. *Id.* Their motion to intervene was initially denied, but after the case was dismissed, appealed, and remanded, they again sought to intervene. *Id.* at 573.

The Senators' proposed complaint sought two types of relief. First, they asked the district court to "invalidate the *de facto* moratorium [on fracking] and enjoin its further enforcement," arguing that it violated the terms of the Compact because it exceeded the scope of authority granted to the Commission under the Compact. *Id.* Second, and in the alternative, the Senators sought an order requiring the Commission to provide just compensation for the deprivation of the economic value of the property in question. *Id.* The district court denied the motion to intervene, finding the Senators lacked a significantly protectable interest in the litigation. *Id.*

In their appellate briefing, the Senators downplayed their request for injunctive relief. *Id.* They stated that "the redress or benefit" they in fact sought was a declaration that the Commission lacked authority under the Compact to institute a moratorium on fracking within the Basin. *Id.* at 575-76. For the purposes of the standing analysis, the Third Circuit therefore assumed that the Senators sought declaratory relief alone. *Id.* at 576. The court nonetheless found differences between the relief requested by Wayne and the Senators.

First, the Senators challenged the Commission's authority under the Compact as a whole, not simply the section of the Compact that the Commission relied on in issuing its "Determination," or so-called moratorium. *Id.* at 576. Second, the Senators challenged the Commission's authority to institute a moratorium on fracking in the Basin. *Id.* "The Senators therefore seem to want a declaration not simply that the DRBC may not review Wayne's proposed fracking activities, but that it may not review any firm's fracking activities." *Id.* The Third Circuit

found that the Senators appeared to be seeking relief different from that sought by Wayne, and remanded to the district court to make a determination as to standing. *Id.* at 575.

The Court has examined the Third Circuit's decision in detail because it finds the facts and arguments analogous to this case. As the Third Circuit did, the Court will closely examine the relief requested by the Plaintiffs and compare it to that requested by the Proposed Intervenors. Proposed Intervenors assert at least three claims that are not asserted by Plaintiff States: two Title IX claims and a claim under the Regulatory Flexibility Act. Specifically, Count I is a Title IX claim of sex discrimination for failure to provide effective accommodation under 20 U.S.C. § 1681; Count II is a Title IX claim for failure to provide equal treatment, benefits, and opportunities for girls, also under 20 U.S.C. § 1681; and Count VI is a claim under the Regulatory Flexibility Act, 5 U.S.C. § 601, asserting Defendants failed to prepare and make available for public comment an initial and final regulatory flexibility analysis before issuing the Interpretation and Fact Sheet. Thus, on the face of the Proposed Complaint, Proposed Intervenors press three claims not pursued by Plaintiffs.

Next, the Court looks to the relief requested by the Proposed Intervenors. Defendants say Proposed Intervenors seek at least two forms of relief not sought by Plaintiff States:

> 4. A declaratory judgment that Title IX and its implementing regulations do not prohibit discrimination on the basis of sexual orientation or gender identity, including by any acts that tend to prohibit males from participating in female athletics.
> . . .
> 6. In the alternative, if Title IX is deemed to prohibit discrimination on the basis of sexual orientation and gender identity, then:
> a. A declaratory judgment that, as applied to ACSI (including its current and future members) and the individual athletes, that Title IX violates constitutional principles of federalism, the Spending Clause, the Tenth Amendment, and Congress's enumerated powers . . ..

[Doc. 51-6 at 62].

The closest comparison in the Complaint that the Court could identify is the request for "[a] declaratory judgment affirming that Plaintiffs and Title IX recipients located therein may continue to separate students by biological sex in appropriate circumstances in accordance with Title IX's statutory text and longstanding Department regulations." [Doc. 1 at 33]. The Complaint seeks a declaratory judgment that Title IX does not prohibit Plaintiffs from, *inter alia*, maintaining showers, locker rooms, etc. separated by biological sex. [*Id.*]. Though not addressed by either party, Proposed Intervenors also ask the Court to "award nominal damages and any actual damages." [Doc. 51-6 at 63].

The Court is not persuaded that Proposed Intervenors seek the same practical relief as Plaintiff States. A careful comparison of the complaints shows that Proposed Intervenors press different claims than Plaintiffs, seek a more expansive declaratory judgment regarding the scope of Title IX, and seek actual and nominal damages. First, Proposed Intervenors assert at least three claims against Defendants that have no analogue in the Complaint. For example, Intervenors assert a claim under Title IX for sex discrimination. They argue the Interpretation and Fact Sheet violate Title IX by failing to provide competitive opportunities for female athletes that accommodate their abilities and provide equal levels of competition. [Doc. 51-6 at 47]. While Intervenors may make similar arguments about the validity of the Interpretation and Fact Sheet, unlike Plaintiffs, they are asserting a substantive Title IX violation, not only a challenge to the validity or legality of the guidance documents in view of the APA.

Relatedly, Proposed Intervenors seek a more expansive declaratory judgment regarding the scope of Title IX: that Title IX – as a whole – does not prohibit discrimination on the basis of sexual orientation or gender identity. In contrast, Plaintiff States seek a declaratory judgment that, *inter alia*, the States may continue to separate students by biological sex in appropriate

circumstances in accordance with Title IX. The Third Circuit's Holding in *Wayne Land & Mining Group* is instructive here. There, the intervenor-senators challenged the authority of the Commission under the Compact as a whole, while the plaintiff challenged only the section of the Compact on which the Commission relied in issuing its determination. Similarly, Proposed Intervenors seek a judgment applicable to all of Title IX, while the Plaintiff States seek a declaratory judgment that Title IX does not prohibit/require certain specified conduct. Elsewhere, Plaintiffs do assert that "Title IX's prohibition of discrimination 'on the basis of sex' does not encompass discrimination based on sexual orientation or gender identity." [Doc. 1 at ¶ 132]. But as in *Wayne*, this contention still relates to specific language in Title IX. So it is still narrower than the relief Proposed Intervenors seek. *See Wayne*, 959 F.3d at 576 (finding plaintiff's relief related to specific agency determination and its impact on plaintiff, while proposed intervenors sought declaration regarding agency authority under the Compact as a whole and as to any impacted fracking firm).

Finally, Proposed Intervenors seek actual and nominal damages. This request presumably arises out of their claims for substantive violations of Title IX.[1] Unlike the facts in *Town of Chester*, there is no question of overlap with the Complaint, as Plaintiffs do not seek money damages. That Proposed Intervenors are, as a practical matter, seeking some of the same relief as Plaintiffs does not relieve them of the obligation to demonstrate standing for relief that goes beyond the Complaint. There is no question that a plaintiff must demonstrate standing for "each claim" he asserts and "for each form of relief sought." *Town of Chester*, 137 S. Ct. at 1650. Proposed Intervenors' Complaint asserts claims not made by Plaintiff States, seeks a broader

[1] "[T]he Administrative Procedure Act expressly excludes 'money damages' from the 'relief' available against the United States." *Sossamon v. Texas*, 563 U.S. 277, 294 n.2 (2011) (Sotomayor, J., dissenting); *Armendariz-Mata v. U.S. Dep't of Justice*, 82 F.3d 1996 (5th Cir. 1996) (holding sovereign immunity not waived under 5 U.S.C. § 702 of the APA when the substance of the complaint at issue is a claim for money damages).

declaratory judgment regarding Title IX, and seeks actual and nominal damages. These claims and relief are different than that requested in the Complaint and, accordingly, Proposed Intervenors must establish they have Article III standing.

To show Article III standing, a plaintiff must show (1) it has suffered an injury in fact; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.* at 561. Proposed Intervenors do not address the elements of standing.[2]

Instead, they disclaim any request for relief that the Court construes as distinct from Plaintiffs' requests. [Doc. 66 at 15]. They also argue that if the Court finds they lack standing as to certain claims or requests for relief, they be permitted to intervene as to relief that overlaps with that requested by Plaintiffs. [*Id.* at 11]. *Wayne Land and Mineral Group* is again instructive. There, the proposed intervenors requested an injunction, but on appeal, represented that the relief they sought was a declaratory judgment. 959 F.3d at 576-77. For the purpose of the standing analysis, the court therefore assumed that the Senators sought declaratory relief alone. *Id.* at 576. While the court ultimately found that the Senators sought relief beyond that sought by Plaintiffs, its analysis was based on the Senators' representation that they only sought declaratory relief. Relatedly, in *Sherman v. Town of Chester*, 339 F. Supp. 3d 346, 358 (S.D.N.Y. 2018), the court found that the proposed intervenor sought relief that was different from that sought by the plaintiff – specifically, a money judgment in its own name – and lacked standing to do so. It therefore denied the motion to intervene as to the cause of action that exceeded the scope of the complaint, but otherwise

[2] In arguing that they have a substantial and legally protectable interest in this litigation, Proposed Intervenors do mention several types of standing, including competitor standing. [Doc. 51-1 at 20-21]. They do not, however, flesh out this argument by showing that each requirement for Article III standing is met.

permitted intervention. *Id.* at 357 ("[Intervenor] may join and file the Proposed Intervenor Complaint only insofar as it does not state a claim for damages in [its] own name.").

The Court finds that Proposed Intervenors have failed to establish standing as to the claims and requests for relief that go beyond Plaintiffs' Complaint. Specifically, Proposed Intervenors have failed to establish that they have standing to bring the following causes of action: Count I, sex discrimination for failure to provide effective accommodation under 20 U.S.C. § 1681; Count II, failure to provide equal treatment, benefits, and opportunities for girls under 20 U.S.C. § 1681; and Count VI, violation of the Regulatory Flexibility Act, 5 U.S.C. § 601. The Court further finds that Proposed Intervenors have not established standing to seek the relief requested in ¶¶ 4 and 6 of their Prayer for Relief [Doc. 51-6 at 62], to the extent these requests are broader than the declaratory judgment sought by Plaintiffs. Finally, Proposed Intervenors have not shown standing to seek actual and nominal damages. The Motion to Intervene [Doc. 51] is **DENIED IN PART** as to these claims and requests for relief.

To the extent Proposed Intervenors seek relief that overlaps with Plaintiffs' Complaint, the Court will grant the motion for permissive intervention pursuant to Rule 24(b). Rule 24(b) allows the Court to "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question or law or fact." Fed. R. Civ. P. 24(b)(1). As pleaded, Proposed Intervenors have sought relief beyond that in the Complaint without establishing standing, so they cannot intervene as to those claims / requests for relief. But they also seek relief and assert causes of action that overlap with – and in some cases are identical to – those pleaded in the Complaint. Exactly like Plaintiffs, they seek a declaratory judgment that the Department lacked authority to issue the Interpretation and Fact Sheet [Doc. 51-6 at ¶ 2] and a judgment setting aside and vacating the Interpretation and Fact Sheet [*Id.* at ¶ 3]. And while they seek a broader declaration as to Title

IX, that necessarily encompasses the Plaintiffs' request for a declaration that Title IX permits separation by biological sex in appropriate circumstances. [*Id.* at ¶ 4]. Indeed, Plaintiffs seek a judgment that Title IX does not prohibit Plaintiffs and Title IX recipients from maintaining athletic teams separated by biological sex or from assigning an individual to a team based on the individual's biological sex. This is the primary focus of Proposed Intervenor's complaint. Proposed Intervenors thus have claims that share common questions of law and fact with Plaintiffs' Complaint and will be permitted to intervene to the extent that their claims and requests for relief overlap with Plaintiffs'.

Finally, the Court finds that, once properly limited to supporting Plaintiffs' claims, Proposed Intervenors' participation in this litigation will not unduly delay this action or prejudice the adjudication of the rights of the original parties. *See Purnell v. City of Akron*, 925 F.2d 941, 951 (6th Cir. 1991) (reversing denial of permissive intervention). Defendants argue that Proposed Intervenors' participation will add factual and legal complexity to this case. [Doc. 63 at 32]. For example, Defendants expect Proposed Intervenors to introduce factual questions such as whether transgender girls have a competitive advantage over biological girls in athletics and whether biological girls face a greater risk of injury when competing against transgender girls. [*Id.*]. Denial of Intervenor's direct Title IX claims, however, is likely to reduce or eliminate the significance of these admittedly complex factual issues.

However, due to the complexity of the issues presented in this litigation, Intervenors must submit a complaint that comports with this Order. Reimagining Intervenor's complaint so that it overlaps with Plaintiffs' claims and requests for relief would be impractical and inefficient as this litigation proceeds. Proposed Intervenors have represented to the Court that they do not seek relief beyond that sought by Plaintiffs, and have disavowed any relief that goes beyond Plaintiffs'

Complaint. The Court has found that they lack standing to assert certain claims and seek certain forms of relief, as explained above. Proposed Intervenors will therefore be required to file a complaint in accordance with this Memorandum Opinion and their representations to the Court.

III. CONCLUSION

Accordingly, the Motion to Intervene [Doc. 51] is **GRANTED IN PART** and **DENIED IN PART** as follows:

- The Motion to Intervene [Doc. 51] is **DENIED** as to Proposed Intervenors' requests for relief that exceed the scope of Plaintiffs' Complaint. Specifically, intervention is denied as to:
    - Count I, sex discrimination for failure to provide effective accommodation in violation of 20 U.S.C. § 1681;
    - Count II, failure to provide equal treatment, benefits, and opportunities for girls in violation of 20 U.S.C. § 1681;
    - Count VI under the Regulatory Flexibility Act, 5 U.S.C. § 601;
    - Prayer for Relief ¶¶ 4 and 6, to the extent the requested declarations exceed Plaintiffs' request for declaratory judgment regarding Title IX;
    - Prayer for Relief ¶ 8, for nominal damages and any actual damages.
- The Motion to Intervene [Doc. 51] is otherwise **GRANTED** pursuant to Rule 24(b)(1).

It is **FURTHER ORDERED** that Intervenors **SHALL FILE** a complaint in accordance with this Order on or before **September 21, 2022**. Intervenors are put **ON NOTICE** that any complaint filed that is not limited as set forth in this Order will be stricken.

Finally, because the Court granted Plaintiff States' Motion for Preliminary Injunction,

which Intervenors joined in and adopted, Intervenor-Plaintiffs' Motion for Preliminary Injunction [Doc. 52] is **DENIED AS MOOT**.

SO ORDERED.

CHARLES E. ATCHLEY JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT G

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.F., a minor, by Sara Ford, her mother,

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; **UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND,** in

Case No. 3:21-CV-00308

INTERVENOR-PLAINTIFFS' VERIFIED COMPLAINT

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.

Introduction

1. Intervenor-Plaintiff Association of Christian Schools International (ACSI) is an association representing thousands of schools nationwide with hundreds of thousands of students, many of whom are female athletes. Intervenor-Plaintiff A.F. is a female athlete in Arkansas who competes in girls' sports like basketball and volleyball.[1] Athletics provides numerous benefits to ACSI member school athletes and A.F.—self-esteem; teamwork; joy in victory and lessons from defeat; opportunities to compete; collegiate recruiting and athletic scholarship options; and more. Fifty years ago, Title IX of the Education Amendments paved the way for these athletes by ensuring that girls and women had the same opportunities to compete in interscholastic athletics as boys and men.[2]

2. But the U.S. Department of Education will curtail these gains—and reduce the advantages of sports for girls—through its unlawful re-interpretation of Title IX to permit boys who are biologically male to compete in girls' athletic competitions if they claim a female gender identity. In doing so, the government puts girls at a competitive disadvantage, increases their risk of injury, and creates an unfair playing field that deprives girls of the inherent benefits of athletics.

[1] Proposed Intervenors A.S. and C.F. are not included in this Verified Complaint because they have now graduated from high school and have elected not to pursue playing college sports.

[2] For clarity, this complaint refers to biological males as "boys," "men," or "males" and biological females as "girls," "women," or "females." This nomenclature reflects that this case concerns the effects of *biological* differences between males and females and Title IX's focus on creating equal opportunities for members of both biological sexes.

3. The Constitution and the Administrative Procedure Act bar unelected bureaucrats from singlehandedly upending longstanding federal law and starting a sea of change in sports and education. The re-interpretation itself is contrary to Title IX because it denies girls athletic opportunities. And the government acted unlawfully when it rewrote Title IX through an arbitrary rule without public participation and oversight.

4. Intervenor-Plaintiffs will suffer irreparable harm if this Court does not enjoin the government's attempted revision of Title IX and declare its interpretation illegal. Intervenor-Plaintiffs need a preliminary and permanent injunction and declaratory relief to ensure that they can continue to enjoy the benefits of athletics and fair competition.

Jurisdiction and Venue

5. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution and federal law.

6. This Court also has jurisdiction under 28 U.S.C. § 1346(a) because this is a civil action against the United States.

7. This Court has jurisdiction under 28 U.S.C. § 1361 to compel an officer of the United States or any federal agency to perform his or her duty.

8. This Court has jurisdiction to review Defendants' unlawful actions and enter appropriate relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 701–706.

9. This Court has inherent jurisdiction to review and enjoin ultra vires or unconstitutional agency action through an equitable cause of action. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689–71 (1949).

10. This case seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, 5 U.S.C. § 705–706, and Federal Rule of Civil Procedure 57;

injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65; costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and other relief under this Court's inherent equitable powers.

11. Venue is proper in this Court under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims occurred in this district, the effects of Defendants' challenged actions are felt in this district, and Defendants can and do perform official duties in this district.

Intervenor-Plaintiffs

A.F.

12. A.F. is a ninth-grade female student and basketball and volleyball athlete at Brookland Junior High School in Brookland, Arkansas. Because A.F. is a minor, she brings this action by her mother, Sara Ford.[3]

Association of Christian Schools International

13. ACSI is a Christian educational organization that serves member individuals and schools ranging from early education to colleges and universities. It is the largest Protestant association of Christian schools in the world.

14. ACSI is a non-profit corporation organized under California law with its principal place of business in Colorado.

15. ACSI serves member schools in all fifty states, including approximately 2,000 member schools from preschool to high school and more than sixty colleges and universities in the United States.

16. ACSI member schools serve approximately 500,000 early education through high school students throughout the United States.

17. ACSI also serves over sixty colleges and universities located in twenty-nine different states.

[3] This complaint refers to A.F. as the "individual athlete."

18. ACSI serves more than seventy members in Tennessee, including early education, elementary, middle, and high schools, a college, and a university.

19. ACSI regularly conducts in-person audits of its accredited member schools, including those located in Tennessee.

20. ACSI regularly provides consultation, accreditation, curriculum, and other services for its member schools, including those located in Tennessee.

21. ACSI advertises itself to schools throughout Tennessee.

22. ACSI seeks relief on behalf of itself, its current and future members, and its current and future members' female athletes.

Defendants

23. Defendant United States Department of Education (Department) is an executive agency of the federal government responsible for enforcing and administrating Title IX. 20 U.S.C. §§ 3411, 3441.

24. Defendant Miguel Cardona is the United States Secretary of Education and is responsible for the operation of the Department and enforcing and administrating Title IX. *Id.* § 3411.

25. Defendant United States Department of Justice (DOJ) is an executive agency of the United States. DOJ also has the authority to enforce Title IX. Exec. Order No. 12,250, 28 C.F.R. part 41, app. A (1980).

26. Defendant Merrick B. Garland is the Attorney General of the United States and is responsible for the operation of the DOJ, including enforcing Title IX.

27. Defendant Kristen Clarke is the Assistant Attorney General for Civil Rights at DOJ. She is responsible for enforcing Title IX. 28 C.F.R. § 42.412.

28. Defendants Cardona, Garland, and Clarke are sued in their official capacities.

Factual Allegations

Designed to promote equal opportunities for women in education, including school-sponsored sports, Title IX has fostered and protected women's athletics.

29. In 1972, Congress enacted Title IX, 20 U.S.C. § 1681, which forbids education programs or activities receiving federal financial assistance from discriminating against persons based on their sex. Title IX provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a).

30. Title IX was designed to eliminate discrimination against women in education.

31. Recognizing that athletics are integral to the educational process, Title IX was also designed to actively promote equal opportunities for women in athletics.

32. Before Title IX, schools often emphasized boys' athletic programs "to the exclusion of girls' athletic programs." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3rd Cir. 1993).

33. For example, many high schools did not have girls' sports teams, which drastically reduced the number of women who could compete in college. And the average university devoted a mere two percent of its athletic budget to women's sports.

34. To end this discrimination against women in athletics, Title IX and its implementing regulations have defined "program or activity" to include interscholastic athletics (including high school and intercollegiate athletics). *See* 34 C.F.R. § 106.41(a); 44 Fed. Reg. 71,413–15 (Dec. 11, 1979); *Id.* at 71,417–418.

35. Title IX and its implementing regulations require that, if an entity subject to Title IX provides athletic programs or opportunities separated by sex, then

it must do so in a manner that "provide[s] *equal athletic opportunity* for members of both sexes." 34 C.F.R. § 106.41(c) (emphasis added).

36. Title IX requires athletic opportunities to "effectively accommodate the interests and abilities" of girls and boys. 34 C.F.R. § 106.41(c).

37. Title IX also requires that male and female athletes "receive *equivalent treatment*, benefits and opportunities." 44 Fed. Reg. at 71,414 (emphasis added).

38. Title IX has been strikingly successful towards its intended goals in providing women with opportunities for athletic competition and scholarships.

39. For example, between 1972 and 2011, girls' participation in high school athletics increased from approximately 250,000 to 3.25 million students. U.S. Dept. of Educ., OCR, *Protecting Civil Rights, Advancing Equity* 33 (2015), https://bit.ly/2VF516Q.

40. In college, women's numbers have grown almost as steeply, from 30,000 in 1972 to more than 288,000 in 2017-18.

41. By 2018, forty-four percent of athletes in the NCAA were female student athletes. *National Collegiate Athletic Association, Number of NCAA College Athletes Reaches All-time High* (Oct. 10, 2018), https://bit.ly/3inIG6Z.

42. These developments have increased the opportunities for women and girls to benefit from being on athletic teams, developing skills associated with competitive sports, attending college on athletic scholarships, and competing in high-level competitions.

43. In short, Title IX has "enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory [and] the agony of defeat." *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999).

The term "sex" in Title IX refers to biological sex.

44. Although Title IX does not define "sex" or "on the basis of sex," these terms clearly refer to biological sex based on Title IX's text, history, and past application.

45. The dictionary definition of the term "sex" has never meant gender identity, including when Title IX was enacted in 1972.

46. For decades, Title IX has been understood to allow distinctions by sex, rather than require an androgenous or interchangeable view of the sexes. This is why, for example, the Supreme Court recognized the need to continue separating sex-specific privacy facilities when integrating women into the Virginia Military Institute. *United States v. Virginia*, 518 U.S. 515, 556–58 (1996) (Ginsburg, J.).

47. Throughout Title IX, the term "sex" is used as a binary concept, containing only male and female.

48. For example, Title IX contemplates a transition period for schools to change "from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*," in certain circumstances. 20 U.S.C. § 1681(a)(2) (emphases added).

49. In the sports context, Title IX and its implementing regulations similarly make clear that the term "sex" means biological sex.

50. For example, Title IX and its implementing regulations expressly permit schools to sponsor sex-specific teams "where selection for such teams is based on competitive skill or the activity involved is a contact sport," 34 C.F.R. 106.41(b), and allow "separation of students by sex within physical education classes" for sports whose major activity involves bodily contact, 34 C.F.R. § 106.34(a)(1).

51. Ignoring the physical differences between the sexes would in many sports make it impossible to, as Title IX requires, "accommodate the . . . abilities" of

girls and women, and to provide athletic opportunities of equal quality to girls and women.

52. Dr. Bernice Sandler—who is frequently recognized as "the Godmother of Title IX"— testified to the House Subcommittee on Postsecondary Education in support of regulations implementing Title IX in 1975, that ignoring differences in male and female physiology would for many sports "effectively eliminate opportunities for women to participate in organized competitive athletics. For these reasons, such an arrangement would not appear to be in line with the principle of equal opportunity." Statement of Dr. Bernice Sandler, Director, Project on the Status & Education of Women, Ass'n of American Colleges, June 25, 1975, Hearings on Sex Discrimination Regulations at 343.

53. Dr. Sandler was correct. Permitting males to compete in girls' or women's athletic events doesn't make victory for girls and women more difficult; it makes victory over comparably talented and trained male athletes all but impossible for girls and women in most athletic competitions, because of inherent and biologically dictated differences between the sexes.

Males have marked performance advantages over women in almost all athletic contests.

54. Male puberty quickly increases the levels of circulating testosterone in healthy teen and adult males to levels ten to twenty times higher than the levels that occur in healthy females, and this natural flood of testosterone drives a wide range of physiological changes that give males a powerful physiological athletic advantage over females.

55. From puberty on, males have large and natural advantages over females that effect boys' and men's muscle gain, bone strength, and cardiovascular and respiratory system, which enhance their strength, speed, and recovery.

56. Physiological athletic advantages enjoyed over females by similarly fit males after puberty include advantages in the respiratory, cardiovascular, muscular, and other systems which result in faster oxygen uptake, higher short-term and sustained levels of oxygen to transport to the muscles, increased muscle fibers and muscle mass, and the ability to unleash more power (e.g., in vertical jumps), superior protection against stress fractures and fractures from collisions, and taller average heights.

57. These advantages render females, on average, unable to compete against males in power-based or endurance-based sports.

58. Meanwhile, female puberty brings distinctive changes to girls and women that impede athletic performance, including increased body fat levels which—while healthy and essential to female fertility—creates increased weight without providing strength, as well as wider hips and different hip-joint orientation that result in decreased hip rotation and running efficiency.

59. These are inescapable biological facts of the human species, not stereotypes, "social constructs," or relics of past discrimination.

60. Likewise, no amount of testosterone suppression can eliminate male physiological advantages relevant to performance and safety.

61. One year (or more) of testosterone suppression does not substantially eliminate male performance advantages, including in the areas of muscle mass and lean body mass, which together contribute to greater average male weight.

62. After male pubertal growth, testosterone suppression does not materially shrink bones so as to eliminate height, leverage, performance, and weight differences that follow from simply having longer, larger bones, and being taller after male puberty.

63. Because of these inherent physiological differences between men and women after puberty, male athletes consistently achieve records superior to those of

comparably fit and trained women across almost all athletic events, with wider consistent disparities in long-term endurance and strength events.

64. The physiological differences between males and females after puberty directly result in stark disparities in the athletic record books because boys and men can consistently run faster and jump higher and farther than comparably fit girls and women.

65. For example, in Olympic sport competitions since 1983, men have performed between 5.5% (800-m freestyle, swimming) and 36.8% (weightlifting) better than women.

66. Likewise, Olympic world records indicate that in running events men perform 10.7% better than women and that in jumping events men perform 17.5% better than women.

67. While this gap is clearly pronounced at the elite level, it is equally evident at the high school level, including in Arkansas where the individual athlete and ACSI member schools and their female athletes compete.

68. To illustrate, the tables below show the top five boys' and girls' results in the state of Arkansas in different high school athletic events during the 2021 season. [4]

Table 1: Best Arkansas High School Outdoor 100m Times in 2021

Boy	Time	Girl	Time
Woyn Chatmon	10.60	Takiria Brown	12.07
Ja'keylen Haney	10.63	Raghan Allen	12.17
Shunderick Powell	10.70	Kamaria Russell	12.30
Jaylen Hopson	10.70	Kinleigh Hall	12.31
Damari Smith	10.73	Jalia Bunn	12.43

[4] Results listed in this table are publicly available online at AthleticNET: https://bit.ly/3F6i5VY.

Table 2: Best Arkansas High School Outdoor 400m Times in 2021

Boy	Time	Girl	Time
Woyn Chatmon	48.18	Kinleigh Hall	57.25
Adrian Carranco	49.00	Grace Lueders	57.29
Carson Lenser	49.03	Anna Woolsey	58.21
DeAndra Burns Jr.	49.06	Joey Babel	59.65
Patrick Elliott	49.87	Joli Ducharme	59.86

Table 3: Best Arkansas High School Outdoor High Jump Results in 2021

Boy	Height	Girl	Height
Sam Hurley	6’ 10	Sydney Billington	5’ 10
Jaqualen Moore	6’ 10	Madison Holloway	5’ 7
Trey Haworth	6’ 7	Carshaila Rozier	5’ 6
Dewayne Ashford	6’ 6	Rachel Wilson	5’ 6
Jonah Hill	6’ 6	Brandi Rottman	5’ 6

Table 4: Best Arkansas High School Outdoor Long Jump Results 2021

Boy	Distance	Girl	Distance
Sam Hurley	23’ 2	Madison Holloway	18’ 9.25
Daryl Searcy	23’ 0	Blakelee Winn	18’ 6.75
Link Lindsey	22’ 10.5	Ta’Nya Burnett	17’ 11.5
Treyvon Woodard	22’ 9.75	Essence Flowers	17’ 10.5
Bryson Bailey	22’ 8.75	Hannah Brewer	17’ 9.5

69. Each year, hundreds of high school boys achieve times or results in track and field events better than the world's single best elite woman competitor that year.[5]

70. This reality is evident in the performance of male athletes who have competed as women after undergoing testosterone suppression regimes.

71. For example, CeCe Telfer, a male who ran as Craig Telfer throughout high school and the first two years of college, certified compliance with the NCAA requirement of one year on testosterone-suppressing drugs and began competing in female track events in CeCe's senior collegiate year, for the 2019 indoor and outdoor track and field seasons.

72. CeCe's "personal bests" in events either improved or did not substantially decline following at least one year on testosterone suppressing drugs, as Table 5 demonstrates.

Table 5: Comparison of "Craig" and "CeCe" Telfer Performance Times Before and After Hormone Suppression

Event	"Craig" Telfer	"Cece" Telfer
Indoor 200 Meter Dash	24.64s (2017)	24.45s(2019)
Indoor 60 Meter Hurdles	8.91s (2018)	8.33s (2019)
Outdoor 100 Meter Dash	12.38s (2017)	12.24s(2019)
Outdoor 400 Meter Hurdles	1:02.00s (2017)	57.53s(2019)

73. In short, when males compete in female events after puberty, gifted and dedicated female athletes are denied the equal athletic opportunity guaranteed by Title IX by being forced to compete against male athletes with inherent, biological, and immutable advantages.

5 Doriane Lambelet Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don't Abandon Title IX*, Washington Post (Apr. 29, 2019), https://wapo.st/2VKlNN1.

The inclusion of males in female "contact" sports creates an enhanced risk of injury for female participants.

74. In many women's sports collisions between players, or between players and equipment such as balls or sticks, is a common cause of injury.

75. For example, in soccer, head injuries occur from collisions with another player's head or body, collision with the goal or ground, or from an unanticipated blow from a kicked ball.

76. In basketball, players often collide with each other during screens, while diving for a loose ball, or while driving to the basket.

77. Physiological differences between the biological sexes, combined with basic principles of physics, create enhanced risks of injury—and more severe injuries—for female athletes when competing against male athletes.

78. For example, males are larger, heavier, and run faster than females, thus bringing more kinetic energy into any collision between athletes. When a collision occurs between male and female athletes, the lighter females will suffer more abrupt deceleration in collisions with male bodies, creating heightened injury risk for impacted females.

79. Males also hit and kick balls faster, resulting in higher speed collisions between balls and athletes. For example, university-level male soccer players kick the ball on average with 20% greater velocity than university-level female soccer players. A soccer ball kicked by a male, travelling an average 20% faster than a ball kicked by a female, will deliver more energy on head impact, and will thus increase the risk of an impact injury such as concussion.

80. All other variables being equal, females are more vulnerable to injuries including concussions and ACL tears than are males. Allowing males to participate in female athletics increases the risk to female athletes of sustaining these injuries

because of the likelihood of more forceful collisions between male and female athletes than compared to collisions between only female athletes.

81. In 2020, after an extensive review of the scientific literature, consultation with experts, and modeling of expected injuries, World Rugby published revised rules governing male participation on female teams, along with a detailed explanation of how the new policy was supported by current evidence.[6]

82. Their analysis found that "the magnitude of known risk factors for head injury are … predicted by the size of the disparity in mass between players," and that the "addition of [male] speed as a biomechanical variable further increases these disparities." They observed an increase of up to 50% in neck and head acceleration that would be experienced in a typical tackle scenario in women's rugby if men were to participate.

83. While rugby is a contact-heavy sport, females forced to compete against male athletes in any contact sport will face an enhanced risk of injury due to immutable physiological differences between the sexes.

84. In female team sports, each player is vital to the success of the team and the loss of a single athlete due to injury can reduce the chances for success of the other girls and women on the team.

Increasing numbers of girls already are losing athletic victories and opportunities to male competitors who identify as females.

85. Increasing numbers of boys and men are competing and trying to compete in female sports and depriving girls and women of athletic opportunities and accomplishments.

86. For example, male athletes seeking to compete against female athletes have challenged laws in Idaho, Indiana, Utah, West Virginia, and Florida that

[6] World Rugby Transgender Guidelines, https://bit.ly/3ortlpU (accessed Sept. 21, 2021).

require or permit schools to maintain separation based on sex for school-sponsored athletic teams or sports based on biological sex.

87. Therefore, in Idaho, West Virginia, Indiana, Utah, and Florida, males are actively seeking access to compete in female sports through litigation.

88. In Connecticut, two biological males competing in female athletics won 15 women's state championship titles in girls' high school track and field (titles previously held by nine different girls).

89. At the University of Montana, a National Collegiate Athletic Association (NCAA) Division I school, June Eastwood, a male who previously competed on the men's track and cross-country teams, began competing on the women's track and cross-country teams after being treated for a year with testosterone suppression medication.

90. June Eastwood placed first in the women's mile at the University of Montana's conference championships and won the race by more than 3.5 seconds.

91. Likewise, Craig Telfer ranked 212th and 433rd in the 400-meter hurdles among men's Division II athletes in 2016 and 2017 respectively, yet CeCe Telfer took the Division II national championship in women's 400-meter hurdles in 2019 by almost two seconds.[7] *See supra* ¶¶ 71–72.

92. The Connecticut athletes, June Eastwood, and CeCe Telfer displaced women and prevented women from earning championships.

93. Likewise, in the 2020 Olympics, Laurel Hubbard, a biological male, qualified for and participated in the Tokyo Olympic Games in weightlifting.

94. Rachel McKinnon, a biological male, won a UCI Masters World Track Cycling Championship in the 2018 women's 200-meter sprint record, setting a new world record.

[7] Results listed are available online at Track & Field Results Reporting System: https://bit.ly/2YeXM8a (accessed Sept. 21, 2021).

95. Laurel Hubbard and Rachel McKinnon displaced women and prevented women from competing in or winning championship events.

96. For example, Hannah Mouncey, a biological male, competed in Australian rules football before being banned from entering the Australian Football League Women's league based on "strength, stamina or physique." *Transgender footballer Hannah Mouncey threatens legal action against AFL*, News.com.au (Jan. 17, 2021), https://bit.ly/3Bb7si0.

97. The photograph below shows Hannah Mouncey (in red) tackling a female during a match:

98. In addition to displacement, men competing against women have caused significant injuries to women in athletics.

99. For example, Fallon Fox, a biological male, competed against females in mixed martial arts.

100. In a match, Fallon Fox gave a female opponent a concussion and fractured the orbital bone in her skull. The opponent said afterwards, "I have never felt the strength I felt in a fight like that." Richard Presley, *Transgender MMA*

Fighter Fallon Fox Breaks Opponent's Skull, ATBK (May 20, 2021), https://bit.ly/39UDnaA.

101. Meanwhile, multiple sources report that the percentage of children identifying as transgender has multiplied rapidly within just the last few years.

102. In 2017, a study reported that 3–4 in 100 teens in the United States reported that they are or may be transgender. A more recent 2021 study suggests that the rate of transgender identification among America's youth may be as high as 9 in 100. William Malone, *Time to Hit Pause on 'Pausing' Puberty in Gender-Dysphoric Youth*, Medscape (Sept. 17, 2021), https://wb.md/3D4IVf5. This marked increase has been attributed in part to social and peer pressure, as documented in a 2018 study of "Rapid Onset Gender Dysphoria" conducted by Brown University professor Lisa Littman.

103. As more males identifying as females compete against females in high school and college, more females will lose competitive opportunities; lose out on varsity spots, playing time, medals, and advancements to regional meets and games, championship titles, and records; lose the experience of fair competition; lose the opportunities for victory and the satisfaction, public recognition, and scholarship opportunities that can come from victory; and lose scholarship opportunities, as well as facing an increased risk of injury in contact sports.

104. For female athletes who train hard to be the best that they can be, the situation is neither fair nor safe.

President Biden directs executive agencies to interpret and apply Title IX in light of *Bostock*.

105. In *Bostock v. Clayton County*, the U.S. Supreme Court held that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. 140 S. Ct. 1731, 1737–38 (2020).

106. The Court assumed that "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id.* at 1739.

107. The Court reiterated that "other federal or state laws that prohibit sex discrimination," such as Title IX, were not "before" the Court. *Id.* at 1753. The Court thus expressly declined to "prejudge" whether its decision in *Bostock* would "sweep beyond Title VII" to those other laws. *Id.* at 1737–38.

108. The Court did not consider or decide what Title IX's statutory phrase "on the basis of sex" means. *Id.* at 1737–38.

109. Nor did the Court address Title IX's safe harbor for sex-separated living facilities or any of the other distinctions Title IX makes between the two biological sexes.

110. Even so, in January 2021, President Biden declared that *Bostock*'s analysis changed the meaning of all federal law regarding sex discrimination to include gender identity and sexual orientation discrimination "so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, 86 Fed. Reg. 7023–25 (Jan. 20, 2021).

111. Accordingly, President Biden directed federal agencies to "review all existing orders, regulations, guidance documents, policies, programs, or other agency actions" that either "(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations" or "(ii) are or may be inconsistent with the policy set forth" in the Executive Order. *Id.*

112. President Biden further directed that the "head of each agency" "consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy" set forth in the Executive Order. *Id.*

113. Finally, President Biden directed "the head of each agency [to] develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified" within 100 days of the Executive Order. *Id.*

114. On February 23, 2021, citing the Executive Order, the Department and the DOJ withdrew the previous administration's litigation position that Title IX does not allow schools to let men compete in women's sports. Dep't of Educ. Office for Civil Rights, Letter to City of Hartford, et al. (Feb. 23, 2021), *available at* https://bit.ly/3uBeJpa (last visited Sept. 30, 2021).

115. At the top of case documents in which the Department and the DOJ had defended women's sports just the last year, the Department and the DOJ added a red-lettered disclaimer stating, "This document expresses policy that is inconsistent in many respects with Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." Dep't of Educ., Letter to City of Hartford, et al. (Aug. 31, 2020), available at https://bit.ly/2ZH5ubr (last viewed September 30, 2021).

116. Two months later, President Biden then issued a second executive order specific to Title IX, with provisions similar to the February 23, 2021 letter. Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

117. The Title IX executive order stated, that under Title IX, "all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity." *Id.* It also provided for a 100-day review period of Department of Education regulations under Title IX. *Id.*

118. On March 26, 2021, the Civil Rights Division of the DOJ released a memorandum concluding that Title IX "prohibit[s] … discrimination on the basis of gender identity and sexual orientation." U.S. Dep't of Justice, Memorandum

Regarding Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://bit.ly/2WpV5zq.

119. The Department then held hearings in June 2021 soliciting public input on the correct understanding and enforcement of Title IX, at which a female athlete explained the devastating impact of allowing men to compete on women's teams. U.S. Dep't of Educ., Office of Civil Rights, Transcript, Virtual Public Hearing on Title IX of the Education Amendments of 1972 at 104–07 (June 7 to June 11, 2021) (testimony of Selina Soule).

The Department of Education re-defines Title IX's definition of "sex."

120. The Department of Education has engaged in at least two agency actions to implement President Biden's Executive Order.

Notice of Interpretation

121. *First*, on June 22, 2021, the Department published in the Federal Register its "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32,637 (June 22, 2021) ("Interpretation") (attached as Exhibit A).

122. In the Interpretation, the Department acknowledged that it previously "stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity." *Id.*

123. Contrary to these pronouncements, *earlier this year*, the Department concluded that *Bostock* did not apply to Title IX or require a different interpretation of Title IX. *See* U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Jan. 8, 2021), https://bit.ly/3mwKI7H.

124. And in 2017, the Department rescinded and withdrew prior statements of policy and guidance on Title IX that had determined that Title IX's "prohibitions on discrimination 'on the basis of sex' … and its implementing regulations require access to sex-segregated facilities based on gender identity." Dear Colleague Letter (Feb. 22, 2017), https://bit.ly/3nSpG47.

125. Now, the Department's current view is that "Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity." 86 Fed. Reg. at 32,637 (June 22, 2021).

126. The Interpretation relied heavily on *Bostock*'s analysis of Title VII and applied the analysis to Title IX. *See id.* at 32,637–38.

127. The Department concluded that "[t]here is textual similarity between Title VII and Title IX" and cited decisions from federal courts of appeals that "recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity." *Id.* at 32,637–639 (collecting cases).

128. In fact, the texts of Title VII and Title IX are materially different. *Compare* 42 U.S.C. § 2000e-2(a) *with* 20 U.S.C. § 1681(a).

129. The Department failed to cite decisions from federal courts of appeals that recognized that "Title VII differs from Title IX in important respects." *See, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

130. The Department failed to consider that Title IX uses the term "sex" as a binary concept and any contrary reading would lead to inconsistent application, create conflicts within Title IX, and cause other problems in application. *See, e.g.*, 20 U.S.C. § 1686; 20 U.S.C. § 1681(a)(8); 34 C.F.R. § 106.40(b).

131. Nevertheless, the Department concluded that the phrase "on the basis of sex" in Title IX has the same meaning as the phrase "because of . . . sex" in Title

VII and that this interpretation "is most consistent with the purpose of Title IX." 86 Fed. Reg. at 32,638–39.

132. The Department also noted that the DOJ "concluded that *Bostock*'s analysis applies to Title IX." *Id.*

133. The Department failed to mention that the DOJ had reached the exact opposite conclusion about *Bostock* just two months before. U.S. Dep't of Justice, Memorandum for the Civil Rights Division Regarding Application of *Bostock v. Clayton County* 4 (Jan. 17, 2021) ("*Bostock* does not require any changes to . . . sex-specific facilities or policies.") (attached as Exhibit B).

134. Finally, the Department pledged to enforce its Title IX interpretation and declared that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department." 86 Fed. Reg. at 32,639.

135. The Department also declared that its Interpretation "will guide the Department in processing complaints and conducting investigations." *Id.*

Fact Sheet

136. *Second*, on June 23, 2021, Acting Assistant Secretary Suzanne B. Goldberg issued a "Dear Educator" letter notifying Title IX recipients of the Department's new Interpretation and reiterating that the Department "will fully enforce Title IX 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.

137. The Dear Educator letter was accompanied by a "fact sheet" issued by the Civil Rights Division of the DOJ and the Office for Civil Rights ("OCR") at the Department of Education. U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM (together with the Dear Educator Letter, "Fact Sheet") (attached as Exhibit C).

138. The Fact Sheet purports to provide examples of what constitutes discrimination under Title IX.

139. For example, the Fact Sheet indicates that preventing a "transgender high school girl" from "try[ing] out for the girls' cheerleading team" would constitute discrimination, notwithstanding that the decision in *Bostock* did not address athletics, and indeed, made clear it was not addressing athletics or other situations outside the narrow factual situation of the case.

140. In fact, *Bostock* did not address any of the examples of purported discrimination identified in the Fact Sheet.

141. The Department also issued guidance on sexual harassment, confirming that it understood any differences in school's codes of conduct or other actions based on sexual orientation or gender identity to fall under this prohibited Title IX rubric, including its procedures for handling complaints on campus. Questions and Answers on the Title IX Regulations on Sexual Harassment 1, 7 (July 2021), https://bit.ly/3zToUWV (last accessed Sept. 30, 2021).

States pass Save Women's Sports laws to protect female athletes.

142. In response to the increasing number of males trying to compete against and defeat females in athletic competitions, many states have passed laws that protect women by preserving biology-based eligibility standards for participation in female sports.

143. Alabama, Arkansas, Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Montana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia have laws providing that sex designations for school-sponsored athletic teams in high school must be based on biological sex. Ala. Code § 16-1-52(b)(2); Ark. Code § 6-1-107(b)-(c); Ariz. Rev. Stat. Ann. § 15-120.02; Fla. Stat. Ann. § 1006.205(3)(a); Idaho Code § 33-6203(1); Ind. Code § 20-33-13(4);

Iowa Code § 261I.2; Ky. Rev. Stat. Ann. § 156.070(g); La. Stat. Ann. § 4:444; 2021 Mont. Laws ch. 405(1); Miss. Code. Ann. § 37-97-1; Okla. Stat. tit. 70, § 27-106; S.C. Code Ann. § 59-1-500; S.D. Codified Laws § 13-67-1; 2021 Tenn. Pub. Acts, c. 40, § 1; Tex. Educ. Code § 33.0834; Utah Code Ann. § 53G-6-902; W. Va. Code Ann. § 18-2-25d.[8]

144. The laws in Alabama, Arkansas, Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia also provide that sex designations for school-sponsored athletic teams in middle school must be based on biological sex. Ala. Code § 16-1-52(b)(2); Ark. Code § 6-1-107(b)-(c); Ariz. Rev. Stat. Ann. § 15-120.02; Fla. Stat. Ann. § 1006.205(3)(a); Idaho Code § 33-6203(1); Ind. Code § 20-33-13(4); Iowa Code § 261I.2; Ky. Rev. Stat. Ann. § 156.070(g); La. Stat. Ann. § 4:444; Miss. Code. Ann. § 37-97-1; Okla. Stat. tit. 70, § 27-106; S.C. Code Ann. § 59-1-500; S.D. Codified Laws § 13-67-1; Tenn. Code Ann. § 49-6-310(a); Tex. Educ. Code § 33.0834; Utah Code Ann. § 53G-6-902; W. Va. Code Ann. § 18-2-25d.

145. For example, Alabama and Mississippi have laws providing that sex designations for school-sponsored athletic teams that are members of the state high school associations must be based on biological sex. Ala. Code § 16-1-52(b)(1); Miss. Code. Ann. § 37-97-1.

[8] This complaint refers to these laws collectively as "Save Women's Sports laws."

146. Moreover, Arkansas, Florida, Idaho, Iowa, Louisiana, Montana, Mississippi, Oklahoma, South Carolina, South Dakota, and West Virginia have laws providing that sex designations for school-sponsored athletic teams in public colleges and universities must be based on biological sex. Ark. Code § 6-1-107(b)-(c); Fla. Stat. Ann. § 1006.205(3)(a); Idaho Code § 33-6203(1); Iowa Code § 261I.2; La. Stat. Ann. § 4:444; 2021 Mont. Laws ch. 405(1); Miss. Code. Ann. § 37-97-1; Okla. Stat. tit. 70, § 27-106; S.C. Code Ann. § 59-1-500; S.D. Codified Laws § 13-67-1; W. Va. Code Ann. § 18-2-25d.

147. But the Interpretation and the Fact Sheet eviscerates these protections for female athletes.

148. The Department and the DOJ are also actively seeking to eliminate these protections.

149. On June 17, 2021, the Department and DOJ filed a statement of interest in which they took the position that Title IX prohibits West Virginia from "categorically exclud[ing] transgender girls from participating in single-sex sports restricted to girls" and that West Virginia's law violates Title IX. Statement of Interest of the United States at 1, 7, *B.P.J. v. W.V. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021), ECF No. 42 (footnote omitted).

150. Likewise, on June 17, 2021, the DOJ filed a statement of interest in which it took the position that the Equal Protection Clause of the Fourteenth Amendment prohibits Arkansas's law. Statement of Interest of the United States at 6–17, *Brandt v. Rutledge*, No. 21-cv-00450 (E.D. Ark. June 17, 2021), ECF No. 19.

151. By seeking to reverse protections for female athletes in these states, the Department and the DOJ, via their application of the Interpretation and the Fact Sheet, harm the Intervenor-Plaintiffs: the individual athlete (A.F.) who competes in female athletics in Arkansas, and ACSI, its member schools, and their female athletes who compete in states that currently ensure a fair playing field for women.

A.F. is a high school basketball and volleyball athlete.

152. A.F. is a ninth-grade female student at Brookland Junior High in Brookland, Arkansas.

153. A.F. currently plays basketball and volleyball.

154. Next year, she will be a sophomore at Brookland High School.

155. Brookland Junior High School is a public junior high school in Arkansas that competes in athletics against other public junior high schools.

156. Brookland High School is a public high school in Arkansas that competes in athletics against other public high schools.

157. Brookland High School and Brookland Junior High School are members of the Arkansas Activities Association, Arkansas' primary sanctioning body for interscholastic sports.

158. Thus, as a student-athlete at Brookland Junior High School, A.F. competes against athletes from other public schools.

159. A.F. began playing organized sports in kindergarten, started playing basketball in second grade, and started playing volleyball in fifth grade.

160. Basketball is a physically demanding sport. It often involves physical contact with other players and injuries are common among female athletes.

161. Basketball and volleyball teams—including A.F.'s teams—only allow a limited number of players on the court at one time.

162. On A.F.'s teams, those positions are highly coveted and competitive.

163. Positions on the team are determined during tryouts based on athletic ability and skill.

164. Athletics have shaped A.F. as a person by giving her an opportunity to exercise and stay healthy, teaching her how to work hard and persevere, giving her self-confidence, and opening opportunities for her including singing at the national anthem at basketball games and local college events.

165. A.F. intends to play basketball and volleyball at Brookland High School, to seek an athletic scholarship in college basketball or volleyball, and to play one of those sports in college.

The Interpretation and Fact Sheet have a direct effect on ACSI as an organization.

166. ACSI was founded in 1978 when several regional U.S. school associations joined together to advance excellence in Christian education.

167. ACSI's mission is to "strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ."

168. ACSI follows a Statement of Faith, which explains some of ACSI's religious beliefs on topics including the Bible, Jesus Christ, and the need for redemption.

169. The Statement of Faith also explains ACSI's position on biological sex as "believe[ing] that God wonderfully foreordained and immutably created each person as either male or female in conformity with their biological sex. These two distinct yet complementary genders together reflect the image and nature of God (Genesis 1:26–27)."

170. ACSI promotes Christian education and provides training and resources to Christian member schools and Christian educators by enhancing Christian educators' professional and personal development and providing vital support functions for Christian schools.

171. ACSI's member schools all affirm ACSI's Statement of Faith, including its position on gender.

172. ACSI offers several services to its members.

173. For example, ACSI offers teacher and administrator certifications, credentials educators and administrators, accredits and evaluates schools to ensure

the educational quality and integrity of member schools, offers curriculum and textbook publishing and development, and provides research and resources on how member schools can create communities marked by healthy and productive spiritual, emotional, and cultural characteristics.

174. ACSI also helps member schools gain a better understanding of laws that impact them by holding workshops, providing member schools with guidance on how to develop better policies, procedures, and practices, sending alerts and policy memos to its member schools explaining issues related to religious education, religious freedom and other issues that relate to ACSI's mission, and providing other resources and articles.

175. ACSI submits public comment on regulations that affect its member schools, such as the implementation of the Emergency Assistance to Non-Public Schools, the Small Business Administration's loan and disaster assistance programs, and other regulations that affect charitable entities.

176. ACSI provides advocacy, policy, and other types of advice to its member schools about their athletic programs.

177. ACSI also offers certification services for its member schools' athletic directors.

178. ACSI diverted resources by preparing and submitting a written comment in response to Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021), which preceded and resulted in the issuance of the Interpretation and the Fact Sheet.

179. ACSI submitted the written comment on June 10, 2021.

180. ACSI's written comment urged the Office of Civil Rights and the Department "to evaluate … questions of sexual orientation and gender identity [and] how it will ensure – as it must – that faith-informed institutions and their participants of good will are protected and continue to have every means at hand to teach and to live out Christian standards of conduct." P. George Tryfiates, *Written*

Comment—Title IX Public Hearing, June 7-11, 2021 (June 10, 2021), https://bit.ly/3A037Ng.

181. ACSI executive-level officials and staff diverted time from other tasks by drafting, reviewing, and submitting this written comment.

182. But the Department never considered ACSI's written comment because it did not provide a notice and comment period before issuing its Interpretation and Fact Sheet.

183. Therefore, ACSI lost the opportunity to use its written comment to influence the rule making process in a meaningful way.

184. Likewise, the Department failed to consider an important aspect of the Interpretation and the Fact Sheet—i.e., how those documents affected religious organizations and schools—and therefore failed to take those important religious considerations into account when promulgating the Interpretation and the Fact Sheet.

185. The Interpretation and the Fact Sheet also frustrate ACSI's mission and purpose by requiring it to divert its resources to protect opportunities for female athletes in an unfair athletic environment created by Interpretation and Fact Sheet.

186. The Interpretation and the Fact Sheet also frustrate ACSI's mission and purpose by announcing and promoting an official governmental preference of a different and contrary view of gender than that held by ACSI and its member schools in their Statement of Faith, which places the government as opposing ACSI's mission and working to discourage public support of ACSI's mission and of promoting the position that God created each person as either male or female and equipping its member schools to provide a Christian education to their students.

Because the Interpretation and the Fact Sheet affect all public schools nationwide, it necessarily will harm the many ACSI member schools whose female athletes compete against those public schools.

187. Many ACSI member high schools view athletics as a way to further their mission of providing uniquely Christian educations for their students by teaching students how to foster physical development and athletic skills while learning the value of personal discipline, commitment, and promoting team goals over individual aspirations.

188. The majority of ACSI member high schools, colleges, and universities in the United States provide athletic opportunities for their students.[9]

189. ACSI member schools offer opportunities for student athletes to compete on separate teams for males and females.

190. For example, member schools compete in one or a combination of the following sports: basketball, cross country, cheerleading, diving, golf, volleyball, swimming, track and field, tennis, soccer, softball, pom, and water polo.

191. ACSI member schools promote their athletic teams as a distinct value to the education of their students.

192. ACSI member high schools, colleges, and universities promote their athletic programs to prospective students as one way to attract those students.

193. ACSI member colleges and universities also use their existing athletic programs—and the success of those programs—to recruit prospective student-athletes.

[9] Throughout the remainder of this complaint "ACSI member schools," "ACSI member high schools," or "ACSI member colleges and universities" denotes a significant number of, but not necessarily all, of ACSI member schools.

194. Many ACSI member high schools, colleges, and universities compete with other public schools regulated by Title IX and its implementing regulations to attract prospective students and to recruit prospective student-athletes.[10]

195. The athletic success of ACSI member schools provides many benefits.

196. For example, ACSI member schools host athletic events on their campuses.

197. This hosting allows them to obtain fees from their athletic programs in the form of ticket sales that support these programs and generally increases awareness of the member schools by allowing members of the public to visit the campus.

198. Athletic programs provide direct support through donations to the athletic programs.

199. ACSI member schools use their athletic programs to help brand their schools, develop campus unity, and offer entertainment and social activities for their prospective students, current students, alums, and the broader community.

200. Athletic programs also help ACSI member schools to develop strong alumni networks and encourage donations.

201. Successful athletic programs contribute to ACSI member schools' reputation and prestige by allowing them to advertise that success to the public and increase name-recognition of the schools in their local community and even on a national level.

202. For ACSI member colleges and universities, athletic success can also lead to increased applications for admission.

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[10] As used for the remainder of the complaint the use of the adjective "public" to describe a school means that the school receives federal funding and is regulated by Title IX and its implementing regulations, including the Interpretation and the Fact Sheet.

203. For example, one ACSI member university participated in the NCAA's post-season basketball tournament in 2021.

204. Schools that perform well in the NCAA post-season basketball tournament typically receive an increase in public awareness and an increase in applications for enrollment. *See* Hayley Glatter, *The March Madness Application Bump*, The Atlantic, https://bit.ly/39UDeE4.

205. The websites of ACSI member schools have specific pages dedicated to athletics and the athletic achievements of current and past teams and individuals, including information on the number of championships the schools' teams have won and individual and team records.

206. ACSI member high school athletic teams have won state, conference, and district championships and their athletes have won individual titles.

207. ACSI member college and university athletic teams have won national and conference championships and their athletes compete for national individual titles.

208. Students at ACSI member high schools that participated in athletics in high school have earned athletic scholarships to play their sport in colleges and universities affiliated with the NCAA.

209. These athletic scholarships significantly reduce the cost of higher education and provide other benefits including access to medical facilities, health benefits, travel expenses, and gear such as shoes, clothes, and bags.

210. Some former students of ACSI member high schools that participated in athletics are now professional athletes and make their living playing the sport they played while at the ACSI member high school.

211. The Interpretation and the Fact Sheet threaten to reduce substantially the benefits of athletics to ACSI member schools.

212. For example, many of ACSI's member high schools, colleges, and universities are in direct competition with other public high schools, colleges, and universities and compete in the same arenas.

213. For example, ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

214. More than 1,300 schools in these states are members of ACSI.

215. Many ACSI member high school sports teams compete against athletic teams from public high schools for state championships, conference championships, and district championships and records.

216. ACSI member college and university school sports teams compete in the NCAA Divisions I, II, and III and the National Association of Intercollegiate Athletics (NAIA) and frequently compete against public colleges and universities' athletic teams for national, regional, and conference championships and records.

217. For example, many ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities in head-to-head athletic events, where the schools' teams and individual athletes compete against each other and for national, state, conference, and/or district championships.

218. ACSI member high schools, colleges, and universities may compete against public high schools, colleges, and universities for opportunities to host athletic events.

219. ACSI member high schools, colleges, and universities compete against public high schools, colleges, and universities to attract students to their schools based on the reputations of their athletic programs.

220. ACSI member colleges and universities compete against other public colleges and universities to recruit top-tier athletes to their athletic programs.

221. The Interpretation and Fact Sheet illegally impose burdens on ACSI member high schools, colleges, and universities that it does not impose on other public high schools, colleges and universities, which gives ACSI's member schools' competitors a competitive advantage.

222. For example, ACSI member schools only allow females to compete on their female sports teams.

223. But the Interpretation and the Fact Sheet create an uneven playing field for ACSI's member schools' female athletic teams by requiring them to compete against other public schools' female athletic teams that include biological males.

224. ACSI member high schools, colleges, and/or universities compete in the areas listed in paragraphs 212–222 against public schools in states with Save Women's Sports laws. *See supra* ¶¶ 142–146.

225. For example, ACSI member schools in Alabama, Arkansas, Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Montana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia compete against public high schools, colleges, and/or universities.

226. Because of the inherent biological and physiological athletic advantages of biological males compared to similarly fit biological females, ACSI member schools' female teams are at a competitive disadvantage and therefore lose opportunities to fairly compete in athletic events by playing against teams with males who identify as females.

227. The Interpretation and the Fact Sheet create a credible threat and substantial risk that the female athletic teams of ACSI member schools will be required to compete against biological males on a more frequent basis.

228. For example, ACSI member schools and their female athletic teams in Alabama, Arkansas, Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Montana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia are currently protected from competing against biological males in athletics because of Save Women's Sports laws.

229. But the Interpretation and the Fact Sheet would eliminate that protection and create a credible threat and substantial risk that ACSI member schools' female athletic teams and their female athletes will be forced to compete against (and lose to) biological males.

230. For example, males in Florida, Idaho, Indiana, and West Virginia are actively challenging those states' Save Women's Sports laws and are actively seeking to compete against female athletes. *See supra* ¶¶ 86–87.

231. By forcing ACSI member schools into a competitive disadvantage by requiring their female athletic teams to compete against males, the Interpretation and the Fact Sheet make it more difficult for ACSI member schools' female teams to compete in female athletics, make it easier for public schools that compete against ACSI member schools to have athletic success, and illegally structure an unfair competitive environment in violation of Title IX and other federal law.

232. The Interpretation and the Fact Sheet also make it harder for ACSI member schools' athletic teams to win games and titles compared to public schools' female athletic teams with males and therefore imposes a reputational harm on ACSI member schools that other public schools do not suffer.

233. By making it more difficult for ACSI member schools' athletic teams to win games and titles, the Interpretation and the Fact Sheet also harm ACSI member colleges and universities by making it more difficult to recruit top-tier athletes and therefore impedes the success of these programs.

234. The Interpretation and the Fact Sheet also deprive ACSI member schools and their female athletes of the benefit of laws that ensure a fair playing field for females by requiring sex designations in school-sponsored athletic teams to be based on biological sex.

235. For example, ACSI has member high schools in Alabama, Arkansas, Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Montana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia that field sports teams for girls.

236. ACSI's member high schools and their female athletes compete in athletics against public high schools in these states.

237. ACSI has member high schools in Alabama, Indiana, Iowa, Kentucky, Mississippi, South Dakota, and Texas that field sports teams for girls where Save Women's Sports laws require state high school associations to protect female athletes.

238. ACSI's member high schools and their female athletes are members of state high school associations in Alabama, Indiana, Iowa, Kentucky, Mississippi, South Dakota, and Texas and compete in athletics against public high schools in these associations.

239. ACSI member colleges and/or universities have female athletes who compete in sports against public colleges and universities which would include competing against colleges and universities in or from some if not all of the states of Arkansas, Florida, Idaho, Iowa, Louisiana, Montana, Mississippi, Oklahoma, South Carolina, South Dakota, or West Virginia.

240. The states in paragraph 239 have Save Women's Sports laws that require public colleges and universities to protect female athletes. *See supra* ¶ 146.

241. The female athletic teams of ACSI member schools in paragraphs 235–239 are currently able to compete on an even playing field against other female athletic teams from schools covered by the laws in paragraphs 142–146.

242. The Interpretation and the Fact Sheet deprive ACSI member schools and their female athletes of that protection and benefit and force them to compete against biological males.

243. In fact, the Department and the DOJ are actively trying to eliminate these laws by intervening in pending litigation challenging these laws. *See supra* ¶¶ 149–50.

244. In challenging these laws, the Department and the DOJ rely on the same incorrect interpretation of Title IX as the interpretation taken in the Interpretation and the Fact Sheet. Statement of Interest of the United States at 6–10, *B.P.J. v. W.V. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021), ECF No. 42.

245. These athletes challenge these laws based on a similarly incorrect interpretation of Title IX and argue—like the Department and the DOJ—that Title IX requires males to compete against females. Compl., *D.N. v. DeSantis*, No. 21-cv-61344 (S.D. Fla. June 29, 2021), ECF No. 1; Compl., *B.P.J. v. West Virginia State Bd. of Educ.*, No. 21-cv-00316 (S.D. W. Va. May 26, 2021), ECF No. 1.

246. Therefore, the Interpretation and the Fact Sheet create a credible threat and substantial risk that ACSI member schools in Idaho, West Virginia, and Florida and their female athletic teams and athletes will be forced to compete against (and lose to) biological males because males in these states are already trying to access women's sports.

247. The Interpretation and the Fact Sheet also require ACSI member schools to evaluate their membership in state-wide athletic associations.

248. The Interpretation and the Fact Sheet apply to high school athletic associations and require those associations to force member schools to allow biological males to compete on female athletic teams.

249. ACSI has member high schools that field sports teams for girls that are members of state high school associations.

250. So ACSI member schools that are members of state high school associations must choose between remaining members of associations that require males to compete against females or leave the associations entirely.

251. For example, one ACSI member school previously decided to leave its athletic conference because of the conference's policies allowing males to compete against females. Samantha Pell, *Maryland High School Leaves Athletic Association over Transgender Policy* (Mar. 22, 2019), *available at* https://wapo.st/3B3uh7k.

252. The Interpretation and the Fact Sheet put ACSI member high schools to the same choice, only nationwide.

253. Therefore, the Interpretation and the Fact Sheet create a credible threat and substantial risk that ACSI member schools will be forced to re-evaluate their membership in state athletic associations, including by leaving those associations.

254. If ACSI member high schools remain members of high school athletic associations to which the Interpretation and the Fact Sheet apply, then their female athletic teams will be forced to compete against member schools who permit males to compete on their female athletic teams.

255. If ACSI member schools leave high school athletic associations, then they will suffer harm by being excluded from state-wide competitions, events, and championships, by suffering reputational harm by being excluded from a state-wide association, and by not being able to offer female student athletes to compete at the highest levels of high school competition.

The individual athlete and ACSI member schools' female athletes are harmed by the Interpretation and the Fact Sheet.

256. The individual athlete and ACSI's member schools' female athletes are harmed by the Interpretation and the Fact Sheet.

257. Athletics provides female athletes with countless advantages. *See supra* ¶¶ 29–43.

258. Athletic participation is associated with positive educational outcomes, including better attendance, higher grades, fewer disciplinary issues, a greater desire to go to college, and higher advanced placement enrollment rates.

259. Females who participate in sports are more confident and have higher self-esteem.

260. Participating in high school sports can provide girls with the opportunities for athletic scholarships in college which significantly reduce the cost of education and provide other benefits.

261. For example, participating in a collegiate sport affiliated with the NCAA can include benefits such as access to top-tier coaching, facilities, and equipment; consultation with nutritionists and dieticians; paid travel to games, academic support services; medical and wellness care; access to psychologists; access to the NCAA Student Assistance Fund; team gear and apparel; and the opportunity to make money on their own name, image, and likeness.

262. Women's increased participation in sports creates network effects at all levels of athletic competition so that more women competing means more women pushing each other forward and raising the bar for athletic achievement.

263. For example, many ACSI member schools compete against public schools in at least the following 35 states: Arizona, Alaska, Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virgina, Washington, Wisconsin, and West Virginia.

264. These schools have more than 200,000 students in middle school and high school, many thousands of whom are female athletes.

265. The individual athlete and many female athletes at ACSI member high schools, colleges, and universities are currently protected against being forced to compete against males because of state Save Women's Sports laws. *See supra* ¶¶ 143–147.

266. But the Interpretation and the Fact Sheet deprive female athletes of these opportunities and these benefits.

267. Upon information and belief, female athletes at ACSI member schools face an obstacle in asserting their own right to challenge the Interpretation and the Fact Sheet because many of the athletes are minors, value anonymity, and face a financial burden in legal costs associated with such challenges.

268. As a result of the Interpretation and the Fact Sheet, the individual athlete and ACSI's member schools' female athletes will be forced to compete against biological males.

269. But males enjoy performance advantages over females in virtually all athletic contests. *See supra* ¶¶ 54–104.

270. As a result of these advantages and the inherent and biologically dictated differences between the male and female sex, female athletes are unlikely to win when competing against comparably talented and trained male athletes.

271. Consequently, the individual athlete and ACSI's member schools' female athletes are put at a significant disadvantage in competing against males in athletic competitions.

272. The individual athlete and ACSI's member schools' female athletes will also be exposed to heightened risks of injury on the soccer field, basketball court, or any other contact sport when competing against males. Such injuries could range in

severity, but at the extreme end might result in the end of their participation in athletics altogether.

273. As a result of their biologically dictated performance disadvantage and increased risk for injury, the individual athlete and ACSI's member schools' female athletes will have fewer opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records.

274. For example, the Interpretation and the Fact Sheet create a credible threat that the individual athlete will be forced to compete against males for roster spots and positions on the volleyball and basketball teams at Brookland Junior High School and Brookland High School.[11]

275. The Interpretation and the Fact Sheet create a credible threat that the individual athlete will be forced to compete against males from other teams in volleyball and basketball.

276. Likewise, the individual athlete and ACSI's member high schools' female athletes will lose opportunities to be noticed by college recruiters for scholarship opportunities and will therefore lose scholarships to compete in athletics at the collegiate level.

277. The individual athlete is training to compete in a sport in college and to gain an athletic scholarship.

278. But athletic scholarships are limited and competitive.

279. For example, NCAA Division I female soccer teams are limited to providing approximately 14 full-tuition scholarships, NCAA Division II female soccer

[11] Males will be unable to compete for roster spots on female teams at ACSI member schools.

teams are limited to providing approximately 10 full-tuition scholarships, and NAIA Division I female soccer teams are limited to providing 12 scholarships.

280. Likewise, NCAA Division I female basketball teams are limited to providing approximately 15 full-tuition scholarships, NCAA Division II female basketball teams are limited to providing approximately 10 full-tuition scholarships, and NAIA Division I female basketball teams are limited to providing 11 scholarships.

281. Other collegiate sports have other scholarship restrictions.

282. Collegiate soccer and basketball teams—as well as other athletic teams—also have a limited number of roster spots for non-scholarship athletes.

283. NCAA and NAIA schools recruit female athletes from a national market.

284. Therefore, the individual athlete and ACSI member schools' female athletes are competing against a national market for a limited number of available scholarships.

285. Because the Department and the DOJ open each sports league to new competitors and because it changes the rules of play, including the introduction of new and serious safety risks, the Department's and the DOJ's enforcement actions pose imminent injury to, and thus create competitor standing for, female athletes, colleges, and schools to vindicate their educational, athletic, aesthetic, and recreational interests, protected by law, in competing fairly in single-sex sports.

286. By allowing biological males to participate in female sports in high school, the Interpretation and the Fact Sheet force the individual athlete and ACSI member schools' female athletes to compete for limited collegiate athletic scholarships and collegiate roster spots against competitors who have inherent physical advantages over them.[12]

[12] This holds true at all colleges that accept federal funds and have not claimed a religious exemption under Title IX.

287. This reduces their chances of earning a college scholarship or making a collegiate team.

288. ACSI, its members, its members athletes, and the individual athlete have no adequate or speedy remedy at law to correct or redress the deprivation of rights caused by the Interpretation and the Fact Sheet.

289. Unless the Interpretation and the Fact Sheet is set aside and enjoined, ACSI, its members, its members athletes, and the individual athlete will suffer irreparable injury.

Claims for Relief

Claim One
Agency Action Without Observance of Procedure Required by Law
(5 U.S.C. § 706)

290. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–289 of this complaint.

291. Under the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

292. Likewise, a court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

293. The Department is an "agency" under the APA. *Id.* § 701(b)(1).

294. The Department has promulgated, and Defendants are enforcing nationwide, a new legislative rule, namely the Interpretation and the Fact Sheet, that uses Title IX and its implementing regulations and agencies to prohibit discrimination on the basis of sexual orientation and gender identity.

295. The Department's Interpretation and Fact Sheet are "rules" under the APA. *Id.* § 701(b)(2); 5 U.S.C. § 551(4).

296. The Department, through the Interpretation and the Fact Sheet, is unlawfully withholding agency action by refusing to enforce Title IX as applied to sex separation for school-sponsored athletic teams.

297. Defendants have communicated the Interpretation and the Fact Sheet to covered entities nationwide through public statements and press releases, and to state and local governments and implementing agencies nationwide.

298. The Interpretation and the Fact Sheet announce a new rule that creates new law, rights, and obligations under Title IX and its implementing regulations.

299. The Interpretation and the Fact Sheet are final agency actions subject to judicial review. *Id.* § 704.

300. The Interpretation and the Fact Sheet are definitive in their declaration of what Defendants think that the law requires, and mandatory on entities covered by Title IX and its implementing regulations and on entities subject to Defendants' enforcement.

301. Legal consequences are required in and already flowing from the Interpretation and the Fact Sheet.

302. The Interpretation and the Fact Sheet declare themselves to be treated as if they have the full force of law, and Defendants have done so.

303. The APA requires agencies to engage in "notice and comment" for legislative rules. 5 U.S.C. § 553.

304. Notice-and-comment requirements mandate that an agency (1) provide notice to the public of the proposed rulemaking, typically by publishing notice in the Federal Register, (2) give interested parties an opportunity to submit written data, views, or arguments on the proposed rule, and consider and respond to significant comments received, and (3) include in the promulgation of the final rule a concise general statement of the rule's basis and purpose. *Id.*

305. Notice-and-comment requirements also mandate that an agency consider all the relevant comments offered during the public-comment period before finally deciding whether to adopt a proposed rule.

306. The APA also requires that a rule not be made effective until at least 30 days after it was published. *Id.*

307. The Department failed to provide the public with advance notice and comment before issuing the Interpretation and the Fact Sheet, in violation of the APA.

308. Because the Interpretation and Fact Sheet are legislative rules that were adopted without the required notice-and-comment procedures, they are unlawful and should be "set aside." 5 U.S.C. § 706(2).

309. In the alternative, the Interpretation and the Fact Sheet were guidance documents, which, prior to publication, were required to be (but were not) submitted for public notice and an opportunity for comment or to provide a statement of good cause for omitting these procedures under 34 C.F.R. Pt. 9.

310. The Interpretation and the Fact Sheet must also be enjoined and declared unenforceable under 5 U.S.C. § 705 in order to preserve status and rights pending review of this Court.

311. The Interpretation and the Fact Sheet must be set aside under 5 U.S.C. § 706.

312. Under 5 U.S.C. § 701(a), no statute precludes judicial review of the Interpretation or the Fact Sheet, and they are not committed to agency discretion by law.

Claim Two
Agency Action That is Arbitrary, Capricious, and an Abuse of Discretion
(5 U.S.C. § 706)

313. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–289 of this complaint.

314. Under the APA, a reviewing Court must "hold unlawful and set aside agency action" if the agency action is "arbitrary," "capricious," or "an abuse of discretion." 5 U.S.C. § 706(2)(A).

315. Likewise, a court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

316. The Department is an "agency" under the APA. *Id.* § 701(b)(1).

317. The Interpretation and the Fact Sheet, and Defendants' enforcement of them, explicitly rely on an interpretation of the Title IX or its implementing regulations and *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) that is erroneous—that Title IX prohibits discrimination on the basis of sexual orientation and gender identity.

318. Without reliance on this legal interpretation, the Interpretation and the Fact Sheet would not have been promulgated.

319. The Department failed adequately to consider important aspects of the issue and to give due consideration to public comments.

320. The Interpretation and the Fact Sheet contradict the text, structure, legislative history, and historical judicial interpretation of Title IX and its implementing regulations, all of which confirm that "sex" means biological sex—that is, a person's status as male or female as determined by biology—and require that biological sex to be taken into account to ensure women have equal opportunities in athletics.

321. The Interpretation and the Fact Sheet create inconsistent and confusing standards, allow absurd results, lead to discrimination, and undermine other sex-

based classifications because the text, structure, legislative history, and historical judicial interpretation of Title IX and its implementing regulations impose requirements that "sex" means biological sex—that is, a person's status as male or female as determined by biology.

322. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider their impact on private religious schools, universities, and colleges and the students that attend those schools, universities, and colleges, including their First Amendment interests in freedom of speech, religion, and association; their interests under the Religious Freedom Restoration Act; their other liberty interests; their interests in allowing sex-segregated facilities; and their interests in allowing sex-segregated athletic teams.

323. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider their impact on the interests of female athletes including their First Amendment interests in freedom of speech, religion, and association; their interests under the Religious Freedom Restoration Act; their other liberty interests, including their privacy interests; and their interests in receiving an equal opportunity to participate in and benefit from interscholastic athletics as part of their education.

324. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider reliance interests of private religious schools, universities, and colleges in not being subject to a prohibition on discrimination on the basis of sexual orientation or gender identity under Title IX.

325. In promulgating the Interpretation and the Fact Sheet, the Department failed to consider the inconsistent and confusing standards, absurd result, discrimination, and the effect on other sex-based classifications that are caused by the Interpretation and the Fact Sheet.

326. The Department also failed to consider the reliance and structural interests of the States and other grant recipients, especially States accepting federal funds contingent on compliance with Title IX.

327. The Interpretation and the Fact Sheet did not separately consider each component of the policy, let alone articulate a reasoned decision that considers alternatives and that considers legitimate liberty, privacy, and reliance interests, and therefore is inconsistent with the requirements of *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–15 (2020).

328. The Department failed to adequately acknowledge that the Interpretation and the Fact Sheet were a change in position from its existing regulations and initial post-*Bostock* guidance.

329. The Department failed to consider any alternative policies that respect the interests of private religious schools, universities, and colleges and their students, including their female students and female student-athletes, such as (1) taking no action; (2) creating rules to protect female sports and privacy under the correct understanding of Title IX; (3) grandfathering existing categories of programs and practices covered by Title IX; (4) confirming that religious exemption apply under the Religious Freedom Restoration Act and the First Amendment, even in the context of sexual orientation and gender identity; (5) creating or expanding existing exemptions for those with safety concerns, moral objections or other reliance on past policies.

330. These failures render the Interpretation and the Fact Sheet arbitrary, capricious, and an abuse of discretion.

331. The Interpretation's and the Fact Sheet's rationale is contrived for the President's policy convenience, set forth in his sweeping and mandatory Executive Order 13,988, rather than based on law and necessary considerations under the APA. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

332. The Department, through the Interpretation and the Fact Sheet, is unlawfully withholding agency action by refusing to enforce Title IX as applied to sex separation for school-sponsored athletic teams.

333. Therefore, the Interpretation and the Fact Sheet must be set aside under 5 U.S.C. § 706.

334. The Interpretation and the Fact Sheet must also be enjoined and declared unenforceable under 5 U.S.C. § 705, in order to preserve status and rights pending review of this Court.

335. Under 5 U.S.C. § 701(a), no statute precludes judicial review of the Interpretation or the Fact Sheet, and they are not committed to agency discretion by law.

Claim Three
Agency Action that is Contrary to Law, *Ultra Vires*, Issued in Excess of Statutory Authority, and Contrary to Constitutional Rights
(5 U.S.C. § 706)

336. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–289 of this complaint.

337. Under the APA, a reviewing Court must "hold unlawful and set aside agency action" if the agency action is "not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)–(C).

338. Likewise, a court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

339. The Department is an "agency" under the APA. *Id.* § 701(b)(1).

340. As a federal agency, the Department has no power to act unless Congress confers that power, and actions that are unauthorized by Congress are ultra vires.

341. Title IX and its regulations do not prohibit discrimination on the basis of sexual orientation or gender identity.

342. The Interpretation and the Fact Sheet mandate to the contrary exceeds Defendants' authority under Title IX and related regulations.

343. Congress has not delegated to the Executive Branch any authority to mandate the Interpretation and the Fact Sheet.

344. This reading of Title IX and its regulations is compelled by the U.S. Constitution's clear-notice rule, a substantive canon of statutory interpretation that applies because the displacement of traditional state police power authority, any implicit abrogation of state sovereign immunity, and the attachment of conditions under Title IX and its regulations to Spending Clause legislation.

345. The Interpretation and the Fact Sheet violate the major questions doctrine of statutory interpretation because Congress did not, in Title IX, clearly give the Department of Education authority to impose the Interpretation and the Fact Sheet since it vastly changes the rights and obligations set forth in Title IX and the way that student athletics are operated in the country.

346. Because the Interpretation and the Fact Sheet exceed Defendants' authority under Title IX and its implementing regulations, the Interpretation and Fact Sheet are *ultra vires*, contrary to law, and issued in excess of the Department's authority.

347. The Interpretation and the Fact Sheet go so far beyond any reasonable reading of the relevant Congressional text and its implementing regulations such that the new rules, regulations, guidance, and interpretations functionally exercise lawmaking power reserved only to Congress. U.S. Const. art. I, § 1.

348. The Department's Interpretation and Fact Sheet are contrary to law and exceed the Department's statutory authority because *Bostock*'s interpretation of Title VII's language is inapplicable to Title IX's materially different language.

349. The Department's Interpretation and Fact Sheet are contrary to law because, properly interpreted, Title IX's prohibition of discrimination "on the basis of sex" does not encompass discrimination based on sexual orientation or gender identity, either as a component of the term sex, on any sex stereotyping theory, or as separate or subsidiary protected classes.

350. The Department's Interpretation and Fact Sheet are contrary to law because Title IX and longstanding Department regulations expressly permit distinctions based on biological sex in certain circumstances.

351. Any application or enforcement of the Title IX and its regulations to discrimination because of sexual orientation or gender identity exceeds Congress's Article I enumerated powers and transgresses on the reserved powers of the State under the federal constitution's structural principles of federalism and the Tenth Amendment, as discussed below in Claim Seven.

352. The Department, through the Interpretation and the Fact Sheet, is unlawfully withholding agency action by refusing to enforce Title IX as applied to sex separation for school-sponsored athletic teams.

353. Therefore, the Interpretation and Fact Sheet must be set aside under 5 U.S.C. § 706 and the Court's inherent equitable power to enjoin *ultra vires* and unconstitutional actions.

354. The Interpretation and Fact Sheet must also be enjoined and declared unenforceable under 5 U.S.C. § 705 in order to preserve status and rights pending review of this Court.

355. Under 5 U.S.C. § 701(a), no statute precludes judicial review of the Interpretation or the Fact Sheet, and they are not committed to agency discretion by law.

Claim Four
Structural Principles of Federalism and Lack of Enumerated Powers
(Constitutional Structure, Spending Clause, and the Tenth Amendment)

356. Intervenor-Plaintiffs repeat and reallege each allegation contained in paragraphs 1–289 of this complaint.

357. Any application or enforcement of Title IX to discrimination because of gender identity or sexual orientation exceeds Congress's Article I enumerated powers and transgresses on the reserved powers of the State under the federal constitution's structural principles of federalism and the Tenth Amendment. U.S. Const. art. I, § 8, cl. 1; *id*. amend. X.

358. Although protecting the States, these structural principles serve to "protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). By providing protections for the sovereignty of the States, the Constitution secures "'the liberties that derive'" to individual citizens "'from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation omitted).

359. Under the U.S. Constitution's structural principles of federalism and the Tenth Amendment, the U.S. Constitution's clear-notice rule governs any interpretation of federal law in this area.

360. A "clear and manifest" statement is necessary for a statute to preempt "the historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), to abrogate state sovereign immunity, or to permit an agency to

regulate a matter in "areas of traditional state responsibility," *Bond v. United States*, 134 S. Ct. 2077, 2089–90 (2014).

361. The federal Constitution limits the States and the public's obligations to those requirements "unambiguously" set forth on the face of any Spending Clause statute. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

362. Under the U.S. Constitution's structural principles of federalism and the Tenth Amendment, a clear contemporaneous statement is necessary both to make a statute apply to the States and to show that the statute applies in the particular manner claimed. *Gregory v. Ashcroft,* 501 U.S. 452, 460–70 (1991).

363. This canon resolves ambiguity in the substantive scope of many statutes that preempt traditional state regulation. *Bond*, 572 U.S. at 859.

364. The Supreme Court thus applies this canon to protect private parties when the government "intrudes into an area that is the particular domain of state law" because Congress must "'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'" *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021) (citations omitted).

365. This canon applies here because the federal officials seek to displace state authority over education and privacy in education, with a possible abrogation of state sovereignty from suit, and under a statute that is enacted under the Spending Clause, in order to extend federal law to the College's housing.

366. The U.S. Constitution's clear-notice rule governs any interpretation of federal law in this area because the federal officials displaced traditional state authority over education and educational privacy, with a possible abrogation of state sovereignty from suit, and under a statute that is enacted under the Spending Clause, to extend federal law to the Intervenor-Plaintiffs.

367. In the Interpretation and the Fact Sheet, and actions taking to implement those measures, Defendants expressly and impliedly, but improperly, preempt the prerogative of States to safeguard privacy expectations in educational settings.

368. Defendants also subject States to private lawsuits for damages and attorneys' fees on these new theories, even though States did not know of these liabilities and could not have known or consented to this waiver of their sovereign immunity.

369. Title IX does not prohibit, let alone clearly and unmistakably prohibit, discrimination on the basis of gender identity or sexual orientation, and therefore does not support any clear notice to justify the burden the gender identity mandate imposes on Intervenor-Plaintiffs, the public, or the States.

370. The Interpretation and the Fact Sheet are not in accord with the understanding that existed among the public or the courts at the passage of Title IX or when the States chose to begin accepting federal money for educational purposes.

371. No State could unmistakably know or "clearly understand" that Title IX would impose on it the conditions created by the Interpretation and the Fact Sheet.

372. The public and the States thus lacked the constitutionally required clear notice when the Act was passed or the grants were made that the Act would apply in this way. *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985).

373. Likewise, under the major questions doctrine, Congress must "speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021) (citations and quotation marks omitted).

374. The Interpretation and the Fact Sheet fail this test, as Title IX contradicts their requirements, and did not clearly authorize them.

375. Because Defendants have violated these constitutional standards of clear notice, any application or enforcement of Title IX to discrimination on the basis of gender identity or sexual orientation violates the structural principles of federalism, the Spending Clause, and the Tenth Amendment and effectively coerces or commandeers the States, including in grant conditions and in the States' historical and well-established regulation of healthcare, freedom of speech, conscience protection, and religious freedom. *New York v. United States*, 505 U.S. 144, 162 (1992).

376. These structural principles protect citizens, not just states. *Bond v. United States*, 564 U.S. 211, 220, 222 (2011).

377. This Court may review and enjoin ultra vires or unconstitutional agency action. 5 U.S.C. §§ 702–705; *Larson*, 337 U.S. at 689–91.

378. The Court should therefore declare that the Interpretation and Fact Sheet are unconstitutional and enjoin their application.

PRAYER FOR RELIEF

Intervenor-Plaintiffs respectfully request that this Court enter judgment against Defendants and provide Intervenor-Plaintiffs in the Plaintiff States, including ACSI's current and future members and their members current and future students, with the following relief:

1. A declaratory judgment holding unlawful the Department's Interpretation and Fact Sheet;

2. A declaratory judgment holding that the Department lacked authority to issue the Interpretation and Fact Sheet;

3. A judgment setting aside and vacating the Interpretation and Fact Sheet.;

4. 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;

5. A preliminary and permanent injunction prohibiting Defendants and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with those individuals from enforcing the Interpretation and Fact Sheet in the Plaintiff States;

6. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy so that such declarations will have the force and effect of final judgment;

7. That this Court retain jurisdiction of this matter to enforce this Court's order;

8. That this Court grant to Intervenor-Plaintiffs reasonable costs and expenses of this action, including attorneys' fees in accordance with any applicable federal statute, including 28 U.S.C. § 2412;

9. That this Court grant the requested injunctive relief without a condition of bond or other security being required of Intervenor-Plaintiffs;

10. That this Court grant such other and further relief as this Court deems just and proper; and

11. All other relief to which Intervenor-Plaintiffs are entitled.

Respectfully submitted this 19th day of September, 2022.

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DECLARATION UNDER PENALTY OF PERJURY

I, David Balik, Ed.D., Vice President of the Association of Christian Schools International, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that paragraphs 13–22, 166–255, 263–264, 286–289, and 291–378 of the foregoing Verified Complaint are true and correct to the best of my knowledge as they relate to ACSI, its member school, and its member school's athletes.

Executed this 16th day of September, 2022, at Trussville, Alabama.

David Balik, Ed.D.

DECLARATION UNDER PENALTY OF PERJURY

I, A[redacted] F[redacted], declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that allegations of the foregoing Verified Complaint are true and correct to the best of my knowledge as they relate to me.

Executed this 16th day of September, 2022, at Jonesboro, Arkansas.

A[redacted] F[redacted]

Certificate of Service

I hereby certify that on the 19th day of September, 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 Intervenor-Plaintiffs