IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS;	§	
HARROLD INDEPENDENT	§	
SCHOOL DISTRICT (TX);	§	
STATE OF ALABAMA;	§	
STATE OF WISCONSIN;	§	
STATE OF WEST VIRGINIA;	§	
STATE OF TENNESSEE;	§	
ARIZONA DEPARTMENT	§	
OF EDUCATION;	§	
HEBER-OVERGAARD	§	
UNIFIED SCHOOL DISTRICT (AZ);	§	
PAUL LePAGE, Governor of the	§	
State of Maine;	§	
STATE OF OKLAHOMA;	§	
STATE OF LOUISIANA;	§	
STATE OF UTAH;	§	
STATE OF GEORGIA;	§	
STATE OF MISSISSIPPI,	§	
by and through Governor Phil Bryant;	§	
COMMONWEALTH OF KENTUCKY,	§	
by and through	§	
Governor Matthew G. Bevin,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:16-cv-00054-O
	§	
UNITED STATES OF AMERICA;	§	
UNITED STATES DEPARTMENT	§	
OF EDUCATION; JOHN B. KING,	§	
JR., in his Official Capacity as United	§	
States Secretary of Education; UNITED	§	
STATES DEPARTMENT OF JUSTICE;	§	
LORETTA E. LYNCH, in her Official	§	
Capacity as Attorney General of the	§	
United States; VANITA GUPTA, in her	§	
Official Capacity as Principal Deputy	§	
Assistant Attorney General;	§	
UNITED STATES EQUAL	§	
EMPLOYMENT OPPORTUNITY	§	

COMMISSION; JENNY R. YANG, in her Official Capacity as Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for Occupational Safety and Health Administration,	§
Defendants.	§

PLAINTIFFS' REPLY IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Actions speak louder than words. Though Defendants repeat ad nauseam that they are "impos[ing] no independent legal requirements on plaintiffs," there has been "no enforcement action threatened or taken," or their guidance documents "are not legally binding," they are nonetheless culpable for re-writing Congressional text in fact by their actions. And what Defendants have done is plainly clear—they are enforcing their new rules as binding law across the nation.

By asking this Court to refrain from action, Defendants now seek to complete their efforts to unilaterally re-write the law in flagrant disregard for the checks and balances provided by the other branches of government. This follows their various nationwide efforts to enforce their new rules as the law of the land—something *completely omitted* in their response (ECF No. 40). Indeed, Defendants have conducted, and continue to pursue, many nationwide enforcement efforts through systematic investigations, thinly veiled threats, various agency adjudications, and now federal lawsuits. Yet they cast their own lawsuit against North Carolina[1] as one brought by a third party "challenging the same agency guidance at issue here." ECF No. 40 at 40. The many instances and mechanisms of enforcement of Defendants' new rules, demonstrated *infra*, is the clearest evidence that their new rules threaten to irreparably harm every state, school district, and employer across the country.

To evade review of the Court, Defendants systematically abuse the exceptions to the rulemaking process through the use of "regulatory dark matter"—the thousands of "agency and presidential memoranda, guidance documents ('nonlegislative' or interpretive rules), notices, bulletins, directives, news releases, letters, and even blog posts [that] may enact policy while flouting the APA's public

[1] *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C.).

notice and comment requirements for legislative rules."[2] Like the "dark matter and dark energy [that] make up most of the universe," regulatory dark matter "is hard to detect, much less measure."[3]

Unfortunately, this methodology of lawmaking is now all too familiar for our federal agencies, and particularly for the Department of Education ("DOE").[4] While "guidances" and "interpretations," in and of themselves, are not designed to carry legal weight, the many documents and publications at issue here are clear evidence of multi-agency rules, collectively framed and foisted by Defendants upon the public (and Plaintiffs). This regulatory shell game, where the federal government's actions are purposefully designed to dodge accountability and transparency, must be stopped.

Judicial review—along with a nationwide injunction—is the only effective antidote to Defendants' lawless attempt to exceed the bounds of executive power.

II. ARGUMENT

Irrespective of nomenclature, "an agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review." *Indep. Bankers Ass'n v. Smith*, 534 F.2d 921, 929 (D.C. Cir.) (citations omitted), *cert. denied*, 429 U.S. 862 (1976). An agency may not avoid judicial consequences merely by choosing the form of a letter or guidance through which to express its definitive position. *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701 (D.C. Cir. 1971); *see U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("while no administrative or criminal proceeding can be brought for failure to conform to [the jurisdictional directive]," the directive was nonetheless a "final agency

[2] Clyde Wayne Crews, Jr., *Mapping Washington's Lawlessness 2016: A Preliminary Inventory of "Regulatory Dark Matter,"* p. 3 (Competitive Enterprise Institute 2015) (citation omitted).
[3] *Id*.
[4] Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. ___ (forthcoming August 2016) (covering DOE's increasing reliance on purportedly nonbinding statements to demand compliance without a formal rulemaking or judicial scrutiny), at * 24–27, http://bit.ly/29J8Wcb.

determination" because of the associated legal consequences, including "the risk of significant criminal and civil penalties"). And when "administrative reconsideration of [a] ruling seems quite unlikely," that a new rule is expressed through nonbinding means is no basis for postponing review. *Indep. Bankers Ass'n*, 534 F.2d at 929.

A. The New Rules Are Binding Across the Country.

The nation awakened to the fact of Defendants' new rules through its recent lawsuit against North Carolina. And as the veil was pulled back, we now see that for years Defendants have quietly been in enforcement mode at a micro level, sowing the seeds for macro results. They have inspected schools literally down to the locker room curtains, interviewed school officials, and coerced settlements by threatening to withdraw federal funding. Beginning with its 2010 Dear Colleague Letter, where DOE's Office for Civil Rights ("OCR") asserted that "Title IX does protect all students, including . . . transgender (LGBT) students, from sex discrimination," ECF No. 6-1, Defendants have proliferated regulatory dark matter warning of the consequences of noncompliance with their revisions of Titles VII and IX. It is too late for Defendants to dodge judicial review.

1. EEOC Enforcement.

Following DOE's 2010 Dear Colleague Letter, EEOC accelerated Defendants' off-road rulemaking through its enforcement powers. In 2012, EEOC held that "discrimination against a transgender individual because they are transgender" is discrimination based on "sex" within the meaning of Title VII. *Macy v. Dep't of Justice*, 2012 WL 1435995, at *11 (Apr. 20, 2012). In 2015, EEOC elaborated that an employer must provide restroom access corresponding to one's "internal sense of being male or female (or, in some instances, both or neither)." *Lusardi v. McHugh*, 2015 WL 1607756, at *6 (Apr. 1, 2015). And in the latest instance of "government by

blog post,"[5] EEOC issued a "Fact Sheet," citing to *Macy* and *Lusardi* and advising all employers of these new obligations under Title VII. ECF No. 6-8.

As a result, suits may now be brought claiming that employers have not treated employees in accord with their "gender identity." *See*, *e.g.*, *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594 (E.D. Mich. 2015) (alleging "sex" discrimination when an employer fired a male employee who demanded to be treated as a female); *Broussard v. First Tower Loan, LLC*, 135 F. Supp. 3d 540 (E.D. La. 2015) (claiming discrimination on the basis of "gender identity" under Title VII); *Lusardi*, 2015 WL 1607756. With millions of employees, Plaintiffs face the imminent threat of private enforcement actions under EEOC's revision of Title VII.

2. Other Agencies' Enforcements.

Following EEOC's lead, Defendants relied on *Macy* and *Lusardi* to formulate new rules that substitute "gender identity" for "sex" even though these terms meant different things at the time Titles VII and IX were passed—and still do today.[6] *See*, *e.g.*, ECF No. 6-3 (DOJ's *Treatment of Transgender Employment Discrimination Claims*) at 2; ECF No. 6-4 (OHSA's *Best Practices: A Guide to Restroom Access for Transgender Workers*) at 4; ECF No. 6-10 (DOJ/DOE Joint Letter) at 3 nn. 5–6, 9. Further, Defendants are enforcing their new rules as binding law. Judging by these enforcements, Plaintiffs have every reason to conclude that they are threatened with a loss of federal funds or legal action.

When DOE received a complaint from a male student in Illinois who was denied use of a female locker room, DOE promptly dispatched OCR—the enforcement arm of its agency—to commence an investigation, conduct interviews, collect documents, and tour the school. *Students and Parents for Privacy v. U.S. Dep't of*

[5] *See*, *e.g.*, Josh Blackmun, *Government by Blog Post*, 11 FIU L. REV. 389 (2016) (describing implementation of the Affordable Care Act).

[6] Notably, Defendants do not refute Plaintiffs' well-documented history of the meaning of these terms, ECF No. 6 at ¶¶ 22–37, and why they are not superfluous.

Educ., No. 1:16-cv-04945 (N.D. Ill.) (ECF No. 1 ¶ 81; ECF No. 21-10 at 2). OCR even investigated whether students showered naked after swim class and made a special trip "to inspect the new privacy curtains" in the girls' locker room. *Id.* (No. 1:16-cv-04945, ECF No. 21-10 at 2, 10). DOE's objective was not to discuss the budgetary impact of the shower curtains. It was part and parcel with the agency's determination to sanction public schools that do not read "gender identity" into Title IX.

Leaving no doubt that noncompliance with the new rules has immediate, material ramifications, OCR concluded that the Illinois school district violated Title IX and threatened to pull $6 million in funding if it did not grant the male student access to intimate spaces designated for females. *Id.* (No. 1:16-cv-04945, ECF No. 1 ¶ 67; ECF No. 21-10 at 14). The district acceded to OCR's demands, prompting parents and students to sue Defendants. *Id.* (No. 1:16-cv-04945, ECF No. 1 ¶¶ 3, 23). DOJ is steadfastly defending the suit.

In Highland, Ohio, OCR received a complaint from a male student seeking to use the female restroom. *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-cv-524-ALM-KAJ (S.D. Ohio) (ECF No. 1 ¶¶ 97–98). As in Illinois, OCR snapped into enforcement mode, interviewing school employees and demanding class schedules, school records, and the school's communications with the student's legal custodian. *Id.* (No. 2:16-cv-524, ECF No. 1 ¶ 102). OCR repeatedly told Highland that it was legally obligated to change its policies, notwithstanding the fact that the policies were consistent with Title IX and its implementing regulations. During settlement negotiations, OCR stated, incorrectly, that Title IX "encompasses discrimination and harassment based on gender identity and gender nonconformity" *id.* (No. 2:16-cv-524, ECF No. 10-5 at 2), and informed Highland that anything short of letting students use the intimate areas corresponding to their "gender identity" is unacceptable. *Id.* (No. 2:16-cv-524, ECF No. 1 ¶ 117). OCR asserted that the Joint Letter "summarizes a school's Title IX *obligations* regarding transgender students"

and threatened to revoke more than $1 million in federal funds. *Id*. (No. 2:16-cv-524, ECF No. 1 ¶¶ 123, 126–28) (emphasis added). These actions cannot be squared with Defendants' assertion that their guidance documents are nonbinding.

Defendants' opposition to the Gloucester County (Virginia) School Board's policies, and the North Carolina legislature, further confirm the imminence of the harm to Plaintiffs. In the first case, DOJ filed a Statement of Interest and argued that the school board's policy of designating restrooms on the basis of sex somehow violates Title IX. *G.G. v. Gloucester Cnty. Sch. Bd.*, 4:15-cv-00054-RGD-DEM (E.D. Va.) (ECF No. 28). In support, DOJ cited to DOE's 2014 *Questions and Answers on Title IX*, *Id*. (4:15-cv-00054, ECF No. 28 at 9–10, Ex. B), one of the many examples of Defendants' regulatory dark matter. *See* ECF No. 6 ¶ 39 (citing DOE's 2014 document, among others) and ECF No. 11 at 16–17 (same).

Defendants' actions in North Carolina are even more direct. After the legislature enacted a law ("H.B. 2") affirming the maintenance of separate-sex intimate facilities in government buildings and public schools, DOJ declared that H.B. 2 violates Titles VII and IX, and threatened legal action. ECF No. 6-9. Five days later, DOJ sued North Carolina, asserting that its preservation of distinctive male and female intimate facilities is now impermissible under the Defendants' new standard. *United States v. North Carolina,* No. 1:16-cv-425 (M.D.N.C.).

The latest iteration of regulatory dark matter (the Joint Letter of May 13, 2016, ECF No. 6-10) makes clear that Defendants will treat noncompliance throughout the nation in the same way that they approached *Macy*, *Lusardi*, North Carolina, Illinois, Ohio, and Virginia. It uses the same language that DOE used during its investigations of the Illinois and Ohio schools, *compare* ECF No. 6-10 at 1 (stating that Title IX "encompasses discrimination based on a student's gender identity") *and Bd. of Educ. of the Highland Local Sch. Dist.*, No. 2:16-cv-524-ALM-KAJ, ECF No. 10-5 at 2 (Title IX "encompasses discrimination and harassment based on gender

identity and gender nonconformity"), which is nearly identical to the language in *Macy* and *Lusardi*, as well as OHSA's *Guide* (ECF No. 6-4). The Joint Letter also references several cases where schools agreed to open their sex-designated facilities consistent with a student's "gender identity" after a complaint was filed with OCR. ECF No. 6-10 at 8 n. 9. The Joint Letter "thus transmitted legally operative information with a 'legal consequence' sufficient to render the letter final." *Rhea Lana, Inc. v. Dep't of Labor*, 2016 WL 3125035, at *2–3 (D.C. Cir. June 3, 2016).

Defendants attempt to soften the perceptive blow of their new rules by describing the documents that evidence them as speaking "in largely hortatory and explanatory language." ECF No. 40 at 26. But it is the *entirety* of any document (and, in this instance, the full spectrum of regulatory dark matter) that determines whether an agency rule is binding. *See*, *e.g.*, *Appalachian Power Co. v. E.P.A.,* 208 F.3d 1015, 1022–23 (D.C. Cir. 2000) (declining to credit agency language that the rule was not binding where the "entire" document "commands"). The Joint Letter alone uses "must" 15 times, and "requirement" and "required" 10 times. It gives public schools their "marching orders." *Id.* at 1023. Coupled with the consistent federal enforcement efforts, Defendants' new rules must be viewed as binding. *Id.*

B. Defendants Cannot Avoid Notice and Comment.

There is a growing recognition by scholars and jurists (including members of the Supreme Court) that the doctrine of deference set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), raises grave separation of powers and administrative law concerns. By placing the power to write and interpret law in the same hands, this doctrine encourages vague regulations, ever shifting administrative interpretations, and arbitrary government. In light of these concerns, various members of the Supreme Court—including the late Justice Scalia, the author of *Auer*—have indicated their willingness to reconsider the *Auer*/*Seminole Rock* doctrine in an appropriate case. *See*, *e.g.*, *Talk Am., Inc. v. Mich.*

Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1225 (Thomas, J., concurring in the judgment); *cf. Gonzales v. Oregon*, 546 U.S. 243, 255–58, 263–69 (2006) (Kennedy, J.) (finding *Auer* deference inapplicable and rejecting any deference to an interpretive rule). The present case is a perfect example of the abuses such deference may foster.

1. The Implementing Regulation Is Not Ambiguous.

DOE's implementing regulation, 34 C.F.R. § 106.33,[7] is not ambiguous. As a physiologically-grounded regulation, it covers every human being and therefore all those within the reach of Title IX. And whether a man defines himself as a woman, or vice versa, it is the physical essence of that person, and the nature of the nudity they may display, or bodily functions they may perform in intimate areas that is at the heart of the regulation.

To create legal room to undo what Congress (and preceding regulators) had done, Defendants manufacture an ambiguity, claiming that "these regulations do not address how they apply when a transgender student seeks to use those facilities—that is, how a school should determine a transgender student's sex when providing access to sex-segregated facilities." ECF No. 40 at 31–32. But the regulations have always addressed what to do in such an instance. For no matter how any person may identify themselves, they nonetheless possess the physical attributes covered by both the language of Congress and the implementing regulations.

In enacting Title IX, Congress was concerned that women receive the same opportunities as men. Thus, Congress utilized "sex" in an exclusively biological

[7] "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

context.[8] "[T]he two sexes are not fungible." *Ballard v. United States*, 329 U.S. 187, 193 (1946). But for the *biological* differences between men and women, there would be no basis for Congress to express concern about separating the sexes in intimate areas. *See*, *e.g.*, 117 Cong. Rec. 30407 (1971) ("I do not read this as requiring integration of dormitories between the sexes, . . . nor that the men's locker room be [sexually] desegregated."). Indeed, Congress was clear that "[t]hese regulations would allow enforcing agencies to permit differential treatment by sex only . . . where personal privacy must be preserved." 118 Cong. Rec. 5807 (1972). In like manner, there would be no basis for DOE to approve "separate toilet, locker rooms, and shower facilities on the basis of sex," 34 C.F.R. § 106.33, or any basis for the Supreme Court to conclude that educational institutions must "afford members of each sex privacy from the other sex," *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).

This is one of many things that the Fourth Circuit got wrong in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 723 (4th Cir. 2016).[9] While it agreed "that 'an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts' are not involuntarily exposed," *Gloucester*, 822 F.3d at 723 (quoting Niemeyer, J., dissenting), the Court then digressed into making a policy judgment about the importance of those interests. *Gloucester*, 822 F.3d at 724 n.10. However, the Fourth

[8] "Congress had a narrow view of sex in mind when it passed the Civil Rights Act." *Hively v. Ivy Tech Cmty. Coll.*, 2016 WL 4039703, at *1 (7th Cir. July 28, 2016). The plaintiff in *Hively* alleged discrimination on the basis of sexual orientation, but the court did not accept her claim because of the narrow meaning of "sex" that Congress intended. *Id*. The court maintained that Congress sought to make it "unlawful to discriminate against women because they are women and against men because they are men," further demonstrating that Title VII should applies only to the biological nature of the person. *Id*. (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

[9] The Supreme Court stayed the Fourth Circuit's mandate. *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 579 U.S. ___ (U.S. Aug. 3, 2016). In a 5-3 decision, the Court granted the petition, which argued that *Auer* deference was misapplied, and that Title IX's prohibition on "sex" discrimination does not extend to "gender identity." Pet'r's Application for Stay and Recall, No. 16A52 (U.S. July 13, 2016), https://www.aclu.org/legal-document/gg-v-gloucester-county-school-board-petitioners-application-recall-and-stay-fourth and Pet'r's Reply, http://www.scotusblog.com/wp-content/uploads/2016/07/SCt20Stay20Reply2020282016-07-29-Final29.pdf.

Circuit was obliged to interpret the regulation in light of what it is, and not what it would it have it to be, for "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

Since its promulgation in 1975, the regulation has been clearly understood and applicable to *every* student. Not until Defendants contrived their ambiguity did one purportedly exist, but an ambiguity cannot be discovered by "contrasting the regulation's language with the [agency]'s interpretation." *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003). Such an approach is "backwards":

> The presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered "ambiguous" merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.

Id.

Defendants' revision does violence to the notion of physical privacy—the essence of 34 C.F.R. § 106.33—by advancing an understanding that *requires* the mixing of the sexes in intimate areas. Under Defendants' view, 34 C.F.R. § 106.33 is functionally meaningless, for any institution that uses 34 C.F.R. § 106.33 to maintain separate intimate spaces for the sexes simultaneously violates Title IX by maintaining separate intimate spaces for the sexes. The pretense within Defendants' position is staggering, not just in the ill-obtained power they wield to rewrite Congressional text, but in their accompanying implicit assertion that no one within the reach of the laws they purport to rewrite needs or is entitled to the personal privacy, dignity, and separation from the opposite sex in intimate areas that the laws are designed to provide.

"To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). Here, deferring to Defendants' position

permits them, under the guise of "interpretation," to remove from the reach of the regulation individuals that are covered by it. The regulation (34 C.F.R. § 106.33) is unambiguous and clear. Therefore, there is no basis for deference under *Auer/Seminole Rock*.

2. Defendants' New Policies Are Not "Interpretations."

Although Defendants' regulatory dark matter generally alters the meaning of "sex" and "gender identity" within the context of public school bathrooms and other intimate spaces, their Joint Letter retains a proper understanding of "sex" when it comes to athletics, to wit:

> Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.

ECF No. 6 at ¶¶ 47–48; ECF No. 6-10 at 4; ECF No. 11 at 21. Thus, Defendants' redefinition of "sex" is inconsistent. Because Defendants' interpretations of "sex" throughout the regulatory scheme are conflicting, they are not entitled to deference.

Agencies do not receive deference where a new interpretation conflicts with a prior interpretation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). Defendants assert that the term "sex" in Title IX's implementing regulation could be interpreted to be synonymous with "gender identity." ECF No. 40 at 31–33. Under this view, schools must provide separate toilets, locker rooms, and shower facilities on the basis of "gender identity." *See* 34 C.F.R. § 106.33. In the Joint Letter, however, Defendants maintain that "gender identity" is *not* synonymous with statutory term "sex" in Title IX with regard to athletics and therefore schools *may* "operate or sponsor sex-segregated athletic teams" irrespective of the "gender identity" of the participants. ECF No. 6-10 at 4. Defendants' treatment of "sex"—sex-specific intimate facilities are not allowed, but sex-specific sports teams are—amounts to a new policy,

not an interpretation.[10] Thus, Defendants may not promulgate it without notice and comment. *Hemp. Indus. Ass'n v. DEA*, 333 F.3d 1082, 1091 (9th Cir. 2003) (holding that the agency cannot change a legislative rule retroactively "through the process of disingenuous interpretation").

C. Defendants Violate the Spending Clause.

Defendants argue that their new rules concerning Title IX funding does not violate the clear notice and anti-coercion principles of the Spending Clause. ECF No. 40 at 24–26. Neither contention is persuasive.

In support of their clear notice argument, Defendants rely primarily on *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) and *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656 (1985). *Id.* at 25. Neither case assists their cause. *Davis* addressed whether student-on-student harassment was in fact "discrimination" under Title IX, thus providing the basis for an implied private right of action against a school district. In *Davis*, the focus was on whether the breadth or extent of liability for "discrimination" extended to malfeasance initiated by third parties. The Supreme Court never concerned itself or attempted to address the definition or meaning of "sex" under Title IX. *Davis*, 526 U.S. at 639–44.

Defendants fare no better under *Bennett*, a case addressing Title I, a law with "general goals." *Bennett*, 470 U.S. at 667. "[T]he statute and the initial regulations did not precisely outline the permissible means for implementing those goals." *Id.* "Given the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of

[10] *See* Mark Pulliam, *Dear Colleague's Letter of the Law, Library of Law and Liberty*, July 26, 2016 (commenting that the "exception seems transparently calculated to placate the supporters of girls' and women's sports (which Title IX has done much to promote)," http://www.libertylawsite.org/2016/07/26/dear-colleagues-letter-of-the-law/; Bobby Soave, *Title IX Is a Dangerous Tool for Extending Transgender Kids' Rights*, REASON, May 16, 2016 (questioning the legality of the sports exception for athletics in light of Defendants' "extremely gender-flexible" redefinition of Title IX), http://reason.com/blog/2016/05/16/title-ix-is-a-dangerous-tool-for-extendi.

the requirements of Title I." *Id.* at 669. In other words, the law in *Bennett* was clear about its ambiguity. Here, unlike *Bennett*, the question surrounds the meaning of a single word—sex—and not the large undefined boundaries of a federal program "involve[ing] multiple levels of government in a cooperative effort." No State possessed clear notice in 1972 that Title IX-linked funds related, in any way, to "gender identity." Thus, Defendants' clear notice arguments should be rejected.

Finally, Defendants contend that there is no coercion because the federal government is not leveraging to one program to induce Plaintiffs to make an unrelated policy choice. ECF No. 40 at 36–37. Defendants create a false standard. The anti-coercion principle does not depend on whether Congress plays one federal program off another. As the Fifth Circuit has noted, the *Dole* Court required "that the condition not be coercive: [I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 278–79 (5th Cir. 2005) (internal quotations omitted). The degree of the pressure—the issue that matters in *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) and *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602–05 (2012)—clearly demonstrates unconstitutional coercion. Texas stands to surrender more than 19 percent of its primary and secondary public education budget under Defendants' new rules. Belew Decl. Ex. V at ¶ 6. Other jurisdictions have comparable percentages. ECF No. 11 at 33. Thus, the federal pressure amounts to compulsion contrary to "our system of federalism." *NFIB*, 132 S. Ct. at 2602.

D. A Nationwide Injunction Is Warranted.

The judicial power "is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). Indeed, "courts should not be loathe to issue injunctions of general applicability," *Hodgson v. First Fed. Sav. & Loan Ass'n of Broward Cnty.,*

Fla., 455 F.2d 818, 826 (5th Cir. 1972), as "[t]he injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a public policy judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium." *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962).

Even though an injunction can be too broad, *see*, *e.g.*, *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733 (5th Cir. 1977) (rejecting injunction where harm was isolated), "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed," *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). Under the APA, successful challenges impact the entirety of an agency initiative. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990).

A nationwide injunction is appropriate for the irreparable harms incurred by Plaintiffs, who are similarly situated to all like entities nationwide. The facts established by Plaintiffs are clear that Defendants' regulatory dark matter usurps their promulgated authority to manage educational facilities, including physical control over restrooms, locker rooms, and other intimate areas. ECF No. 11 at 21–23 nn. 8–21. Neither Defendants nor their supporting amici take issue with this universal fact, which binds together all sovereigns across the country and is easily distinguished from circumstances involving the private rights of private litigants. *See*, *e.g.*, *United States v. Mendoza*, 464 U.S. 154, 159 (1984).

Although Defendants prefer the Court to look only at "plaintiffs in the Fifth Circuit," ECF No. 40 at 28–30, "[t]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *California v. Yamaski*, 442 U.S. 682, 702 (1979). Every State and school district are subject to Defendants' new rules. And Defendants' concern for "the sovereignty of other federal courts," ECF No. 40 at 40, proves their new rules apply everywhere.

In light of the Supreme Court's stay of the mandate in *Gloucester*, *see* n.9, *supra*, principles of comity are unavailing. And notwithstanding the stay, principles of comity do not extend to Plaintiffs' Spending Clause claims. Thus, not only did the dispute in *Gloucester* predate the Defendants' May 13, 2016 Joint Letter (ECF No. 6-10), but the Fourth Circuit did not entertain or address Spending Clause arguments. *Gloucester*, 822 F.3d at 715. Thus, this Court can issue a nationwide injunction on the basis of Plaintiffs' Spending Clause claims without implicating the Fourth Circuit's or any other court's adjudication.

That some jurisdictions support Defendants' rules does not mitigate against a nationwide injunction. Nineteen States and the District of Columbia have laws like those provided by Defendants' new rules. ECF No. 34 at 13. If the Court enjoins Defendants' new rules, those jurisdictions are not harmed.[11] But if the Court doesn't enjoin Defendants' new rules, the authority of all sovereigns is irreparably harmed.

Finally, equity requires nationwide relief, as all schools nationwide return to school shortly. The uncertainty faced by Plaintiffs herein is faced by everyone.

III. CONCLUSION

For the reasons stated herein and in Plaintiffs' Application for Preliminary Injunction, the Court should enter a nationwide injunction against Defendants, preventing the enforcement of their revisions of Titles VII and IX, which are articulated in the numerous pieces of "regulatory dark matter" identified herein.

[11] Defendants' amici allude that a nationwide injunction would somehow undercut existing law in non-federal jurisdictions. ECF No. 34 at 35; ECF No. 36 at 15; ECF No. 38 at 14, 20. Not so. Plaintiffs seek only to enjoin the enforcement of Defendants' new, unlawful rules. An injunction preserves the right of Plaintiffs, and all states, to adopt appropriate policies for their jurisdictions apart from the suffocating influence of Defendants' regulatory dark matter.

Respectfully submitted this the 3rd day of August, 2016,

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CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 3rd day of August, 2016, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks
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