No. 16-11534

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR DEFENDANTS-APPELLANTS UNITED STATES OF AMERICA, et al.

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.2.1, I hereby certify as follows:

(1) This case is *State of Texas, et al. v. United States of America, et al.*, No. 16-11534 (5th Cir.).

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Defendants-Appellants:

United States of America
U.S. Department of Education
John B. King, in his official capacity as U.S. Secretary of Education
U.S. Department of Justice
Loretta Lynch, in her official capacity as Attorney General
Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General
U.S. Equal Employment Opportunity Commission
Jenny R. Yang, in her official capacity as Chair of the U.S. Equal Employment Opportunity Commission
U.S. Department of Labor
Thomas E. Perez, in his official capacity as U.S. Secretary of Labor
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Plaintiffs-Appellees:

State of Texas
Harrold Independent School District (TX)
State of Alabama
State of Wisconsin
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 West Virginia
State of Mississippi, by and through Governor Phil Bryant
Commonwealth of Kentucky, by and through Governor Matthew G. Bevin

Putative Intervenors:

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Charlsa Little
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/s/ Jeffrey E. Sandberg
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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument. The district court issued a "nationwide" preliminary injunction against numerous federal agencies—the Department of Justice; the Department of Education; the Department of Labor, including the Occupational Safety and Health Administration; and the Equal Employment Opportunity Commission—based upon the district court's belief that six non-binding guidance documents issued by those agencies were contrary to law. The preliminary injunction is subject to vacatur on numerous grounds, and defendants believe oral argument would aid the Court in reaching a decision.

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INTRODUCTION

Plaintiffs—eleven States, joined by officials and school districts from another two States—brought suit to challenge six non-binding guidance documents issued by the Department of Education, Department of Justice ("DOJ"), Occupational Safety and Health Administration ("OSHA"), and Equal Employment Opportunity Commission ("EEOC") since 2010. Some of these documents reflect the agencies' understanding that the prohibitions against discrimination "on the basis of sex" or "because of … sex" in Title IX and Title VII encompass discrimination because an individual's gender identity is different than his or her birth-assigned sex (*i.e.*, because the person is transgender). Plaintiffs challenge in particular the agencies' view that transgender students should be permitted to use restrooms and other sex-segregated facilities that correspond to their gender identity.

The district court granted plaintiffs' application for a preliminary injunction, concluding that they would likely succeed on their claims that (1) all the challenged guidance documents (which the court labeled the "Guidelines") required notice-and-comment rulemaking, and (2) the documents' interpretations are contrary to law because a Department of Education regulation interpreting Title IX, 34 C.F.R. § 106.33, purportedly is unambiguous in authorizing schools to separate students based on "biological" sex alone. The court entered a "nationwide" injunction that not only bars the defendant agencies from "enforcing the Guidelines against Plaintiffs," but also from "initiating, continuing, or concluding any investigation based on

Defendants' interpretation that the definition of sex [in Title IX] includes gender identity," and from "using the Guidelines or asserting the Guidelines carry weight" in "any litigation initiated following the date of this Order." ROA.1065-66.

The district court's interpretation of the Title IX regulation is incorrect and conflicts with numerous decisions in other Circuits. Since the preliminary injunction in this case, however, the Supreme Court granted certiorari in *Gloucester County School Board v. G.G.*, No. 16-273, a case that involves the same Title IX regulation. Because the Supreme Court's decision will likely provide guidance as to that regulation's interpretation, defendants do not ask this Court to address that issue at this time.

This Court nonetheless should not await the Supreme Court's decision, because the preliminary injunction should be vacated on grounds entirely independent of the district court's misinterpretation of the Title IX regulation. Plaintiffs purport to bring suit under the Administrative Procedure Act ("APA"). But none of the six guidance documents at issue here constitutes "final agency action"—a prerequisite for APA review—because the guidance documents carry no legal force, but rather simply advise the public of the agencies' understanding of the law. It follows that the documents also did not require notice-and-comment rulemaking. For similar reasons, plaintiffs lack standing to challenge the documents, which cannot be "enforced" against them. And inasmuch as plaintiffs challenge the prospect of Title IX enforcement generally, plaintiffs must assert their challenges within the administrative

process provided by statute and seek judicial review thereafter, and may not circumvent this statutory scheme by suing preemptively.

Even assuming plaintiffs' suit could proceed, they have not demonstrated any imminent irreparable injury warranting a preliminary injunction. Plaintiffs would have a full opportunity to challenge the agencies' legal interpretation when, if ever, the agencies pursue enforcement action against them. Plaintiffs' disagreements about the interpretation of Title IX present no risk of injury that could not be addressed through the statutorily prescribed channels of administrative and judicial review.

The court exacerbated its abuse of discretion by ordering "nationwide" relief affecting the rights of non-plaintiffs—including a dozen States that participated as amici curiae in district court precisely to oppose such an injunction. The court similarly had no basis for policing the conduct of defendants in litigation with third parties in other courts, or from barring the Departments of Education and Justice from "investigat[ing]" certain Title IX violations in schools even if defendants never rely on the guidance documents in conducting those investigations. ROA.1066. And to the extent the injunction is interpreted to extend to Title VII or to activities of EEOC or the Department of Labor (including OSHA), the injunction is a manifest abuse of discretion because plaintiffs have utterly failed to show either standing or irreparable harm related to those activities.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. ROA.268. The district court entered a preliminary injunction on August 21, 2016, ROA.1030-67, which it clarified on October 18, 2016, ROA.1362-68. Defendants filed a notice of appeal on October 20, 2016, within the time allowed by Fed. R. App. P. 4(a)(1)(B). ROA.1389-90. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The questions presented are:

1. Whether plaintiffs' challenges to the guidance documents are not justiciable because plaintiffs lack standing; because none of the documents constitutes final agency action; and because plaintiffs' challenges to Title IX enforcement must be channeled through the review scheme established by Congress.

2. Whether plaintiffs have failed to demonstrate that they would suffer irreparable harm absent a preliminary injunction.

3. Whether the preliminary injunction is overbroad in numerous respects, including by affording relief beyond that authorized by the APA and beyond that necessary to redress the harms alleged by plaintiffs.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Title IX prohibits discrimination "on the basis of sex" in federally funded education programs or activities. 20 U.S.C. § 1681(a). The Departments of Education and Justice share primary responsibility for enforcing Title IX and its implementing regulations. Both agencies' regulations provide that recipients of

federal funds may not provide "different aid, benefits, or services" or "[o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31(b); 28 C.F.R. § 54.400(b). The regulations also provide that recipients may "provide separate toilet, locker room, and shower facilities on the basis of sex" without violating Title IX, so long as the "facilities provided for students of one sex" are "comparable to [the] facilities provided for students of the other sex." 34 C.F.R. § 106.33; 28 C.F.R. § 54.410. Neither Title IX nor the regulations define discrimination "on the basis of sex" or specify how the laws apply to transgender persons.

Title IX includes a comprehensive, multi-stage administrative-enforcement process that may culminate in the withdrawal of federal funds on a prospective (forward-looking) basis. The agency is first required to seek voluntary compliance. 20 U.S.C. § 1682. If agreement is not reached, the agency may pursue enforcement against the fund recipient by providing notice and opportunity for a hearing. *Id.*; 34 C.F.R. § 106.71 (incorporating 34 C.F.R. §§ 100.6-100.11). A recipient is then entitled to an administrative appeal, followed by judicial review in the appropriate court of appeals. 20 U.S.C. § 1683; 34 C.F.R. §§ 100.10-100.11.[1] The agency cannot terminate

[1] Title IX provides that "action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law *for similar action taken by such department or agency on other grounds*." 20 U.S.C. § 1683 (emphasis added). The statute thereby incorporates the "general provision for judicial review of funding

funding until thirty days after reporting the termination to both houses of Congress, and any termination occurs on a prospective basis. 20 U.S.C. § 1682. Alternatively, the agency may refer the matter to DOJ to pursue a civil action. *Id.*; 34 C.F.R. § 100.8(a).

2. Title VII makes it "an unlawful employment practice" for a state, local, or private employer to, *inter alia*, discriminate with respect to the "terms, conditions, or privileges of employment," or "to limit, segregate, or classify [its] employees … in any way which would deprive or tend to … adversely affect [any individual's] status as an employee," on any of several prohibited grounds, including "because of … [the] sex" of the employee. 42 U.S.C. § 2000e-2(a); *see also id.* § 2000e-16(a) (federal-sector provision). Like Title IX, Title VII does not specify how the statute applies to transgender persons.

Title VII enforcement varies depending on the type of employer. As relevant here, before instituting Title VII litigation against a state or local governmental employer, aggrieved individuals must present their claims to EEOC. 42 U.S.C. § 2000e-5(b). If EEOC finds reasonable cause to believe discrimination has occurred, it attempts informal conciliation. *Id.*; 29 C.F.R. § 1601.24. If conciliation is

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termination decisions in 20 U.S.C. § 1234g(b)." *Board of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, __F. Supp. 3d__, 2016 WL 5372349, at *7 (S.D. Ohio Sept. 26, 2016); *see* 20 U.S.C. § 1234g(b) (authorizing suit in "the United States Court of Appeals for the circuit in which th[e] recipient is located").

unsuccessful, EEOC refers the case to DOJ for possible civil action. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.29.[2] But EEOC has no power to bring suit against state or local governments. And although EEOC may interpret Title VII in adjudicating "federal-sector" disputes involving federal employees, *see* 42 U.S.C. § 2000e-16(b); 29 C.F.R. pt. 1614, interpretations developed by EEOC in adjudicating federal-sector disputes do not bind state or local governments.

B. Factual Background

In non-binding guidance documents and similar materials issued since 2010, defendants have addressed the rights of transgender students and employees under Title IX, Title VII, and other statutes. Six documents are challenged here.

1. Three documents relate to Title IX and were issued in whole or in part by the Department of Education.

First, in 2010, that Department's Office for Civil Rights ("OCR") issued a "Dear Colleague" letter about bullying in schools. ROA.304-313. The letter "remind[s]" schools that "some student misconduct that falls under a school's anti-bullying policy … may trigger responsibilities under one or more of the federal antidiscrimination laws." ROA.304. The letter states that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex

[2] If EEOC dismisses the charge for lack of reasonable cause, or if DOJ declines to pursue enforcement upon referral from EEOC, a right-to-sue letter is issued explaining that the complainant may bring a civil action in federal district court. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(d).

discrimination." ROA.311. The letter otherwise does not address transgender students, and does not discuss sex-segregated facilities at all.

Second, in 2014, OCR issued "Questions and Answers" guidance about Title IX and sexual violence. ROA.314-366. The document states that "Title IX protects all students," including "male and female students" and "straight, gay, lesbian, bisexual and transgender students," from sexual violence. ROA.325. It also states that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." ROA.325. The document specifies that it is merely guidance and "does not add requirements to applicable law." ROA.314 n.1.

Third, in May 2016, the Departments of Education and Justice jointly issued a "Dear Colleague Letter" addressing the application of Title IX to transgender students in various contexts, including access to restrooms and similar facilities. ROA.391-99. The letter states generally that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." ROA.394. The letter makes clear, however, that it "does not add requirements to applicable law," but instead "provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with the[] legal obligations" established by Title IX and its regulations. ROA.392.

2. The three remaining guidance documents do not interpret Title IX, and instead concern Title VII or unrelated statutes.

First, a 2014 internal memorandum issued by the Attorney General addresses DOJ's litigating position under Title VII. ROA.367-68. After reviewing the statute and case law, the memorandum states the opinion that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status." ROA.368. The memorandum thus "clarifi[es] the Department's position" on whether "Title VII's prohibition against discrimination based on sex … encompass[es] gender identity," but it does not "otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case." ROA.368.

Second, in 2015, the Occupational Safety and Health Administration, a Department of Labor component, issued "Best Practices" guidance entitled "A Guide to Restroom Access for Transgender Workers," ROA.369-72, reminding employers that sanitation regulations promulgated under the Occupational Health and Safety Act "require[] that all employers under [OSHA's] jurisdiction provide employees with sanitary and available toilet facilities, so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them." ROA.369; *see* 29 C.F.R. § 1910.141(c). To that end, the document "provides guidance to employers on best practices regarding restroom access for transgender workers,"

and endorses the "[c]ore principle" that "all employees, including transgender employees, should have access to restrooms that correspond to their gender identity." ROA.369. The document explains that it is "not a standard or regulation, and it creates no new legal obligations," but instead "contains recommendations" that are "advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace." ROA.372.

Third, a "Fact Sheet" issued by EEOC in May 2016 summarizes, in relevant part, an administrative decision issued by EEOC in a federal-sector case under Title VII. *See* ROA.386-87. In that case, *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015), EEOC concluded that "denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination" within the meaning of Title VII. ROA.386. As a federal-sector decision, *Lusardi* has no effect on state or local governments. *See supra* pp. 6-7. The Fact Sheet itself does not interpret Title VII or purport to create new legal rights or obligations, whether for federal agencies or other employers.

C. Procedural History

1. The State of Texas—together with ten other States, the Governor of Maine, the Arizona Department of Education, and two school districts—brought this lawsuit in May 2016. As later amended, plaintiffs' complaint alleges that the six guidance documents described above were invalidly issued and that the interpretations of Title

IX and Title VII set forth in some of those documents are erroneous to the extent those interpretations would ensure transgender persons' access to sex-segregated facilities corresponding to their gender identity. *See* ROA.262-303.

Plaintiffs then moved for a preliminary injunction on several APA claims. ROA.509. Plaintiffs requested a "nationwide" injunction that would not only enjoin the guidance documents as to plaintiffs, but would prevent the documents from "having any legal effect" as to other States and third parties, whose rights plaintiffs lack standing to invoke. ROA.301, 544-45.

Defendants opposed the motion, arguing that this lawsuit is not justiciable because plaintiffs lack standing, do not challenge agency action reviewable under the APA, and must channel their objections through the comprehensive review scheme established by Title IX. Defendants also explained that plaintiffs' claims fail on the merits. Among other things, defendants noted that the regulation cited by plaintiffs, 34 C.F.R. § 106.33, does not address how Title IX applies to transgender persons, much less unambiguously authorize schools to prevent those persons from accessing facilities that match their gender identity. Defendants further explained that the guidance documents contain valid interpretations of the laws to which they relate and that those interpretations did not require notice-and-comment rulemaking, as the documents carry no independent force and effect.

Twelve States and the District of Columbia filed an amicus brief in support of defendants. These States attested that they "welcome and support the guidance" issued by the agencies, and strongly contested plaintiffs' assertions "that a policy th[e] States have determined is beneficial is actually harming them." ROA.821. The States urged the district court not to enter any preliminary injunction or, at least, to limit any injunction to plaintiffs alone. ROA.821.

2. On August 21, 2016, the district court granted plaintiffs' application for a preliminary injunction. ROA.1030-67.

First, relying upon this Court's now-vacated decision in *Texas v. EEOC*, 827 F.3d 372 (5th Cir.), *vacated on pet. for reh'g and remanded*, 838 F.3d 511 (5th Cir. 2016), the district court concluded that plaintiffs had standing because they were the "'object"' of the challenged guidance documents and because those documents were "designed to target Plaintiffs' conduct." ROA.1041-42.

Second, again relying on the now-vacated *EEOC* decision, the court concluded that the guidance documents constituted final agency action because they "'ha[d] the effect of committing the agency itself to a view of the law.'" ROA.1046 (quoting *EEOC*, 827 F.3d at 383).

Third, the court ruled that notwithstanding the comprehensive review scheme established by Congress for Title IX enforcement, plaintiffs were not required to channel their enforcement objections through that scheme. ROA.1048.

Fourth, the court concluded that plaintiffs would likely succeed on their APA claims. ROA.1052. The court theorized that the guidance documents, even if not binding when issued, became legislative rules "in practice" after the Departments of Education and Justice undertook investigations or enforcement against other entities under Title IX in a manner consistent with interpretations reflected in the guidance documents. ROA.1056. On that theory, the court concluded that the guidance documents should have proceeded through notice-and-comment rulemaking. ROA.1055-56. The court also concluded that plaintiffs were likely to prevail in claiming that the documents conflicted with 34 C.F.R. § 106.33, a Department of Education regulation under Title IX that generally authorizes the separation of restrooms and similar facilities "on the basis of sex," but does not specify the facilities a transgender person should use. ROA.1056-62. The court did not explain whether, or how, this reasoning extended to the three guidance documents that do not concern Title IX or to defendants other than the Departments of Education and Justice.

Fifth, the court found that plaintiffs had established irreparable harm because "Defendants have conceded [a] conflict between the Guidelines and Plaintiffs' policies" concerning restroom access, thereby placing plaintiffs in the "position of either maintaining their current policies … or changing them to comply with the Guidelines." ROA.1064.

3. The district court issued a preliminary injunction enjoining defendants from "enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions." ROA.1066. But the court also extended its injunction beyond the guidance documents and beyond plaintiffs themselves. The court enjoined all defendants from "initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex." ROA.1066. The court also enjoined defendants "from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order." ROA.1066. The court suggested, however, that "states who do not want to be covered by this injunction can easily avoid doing so" by enacting state laws, and that the injunction "should not unnecessarily interfere with litigation currently pending before other federal courts." ROA.1066.

4. In September 2016, defendants moved to clarify the preliminary injunction. ROA.1130-61. Defendants sought clarification whether the injunction applied to their relationships with entities who are not parties here, and whose rights plaintiffs lack standing to invoke. Defendants also sought clarification about, *inter alia*, (1) whether the preliminary injunction extended beyond the context of access to sex-segregated facilities; (2) whether the injunction bars defendants from defending the "Guidelines" or underlying statutory interpretations in litigation with third parties;

(3) whether the injunction's prohibition against "initiating, continuing, or concluding any investigation" related to "Title IX's prohibition against discrimination" concerning transgender persons also extended to investigations under Title VII, ROA.1066; and (4) whether the injunction applies to activities of EEOC and the Department of Labor, including OSHA.

5. On October 18, 2016, the district court entered an order clarifying, in part, the preliminary injunction. ROA.1362-68. The court announced that "[t]he injunction is limited to the issue of access to intimate facilities," and thus does not affect defendants' enforcement of antidiscrimination protections for transgender persons under Title IX and Title VII in other contexts. ROA.1367. As to the application of the injunction beyond plaintiffs, the district court declared that "the scope of this injunction should be and is nationwide." ROA.1364. The court stated that there was a "'substantial likelihood that a geographically-limited injunction would be ineffective,'" ROA.1364, but did not explain why an injunction limited to plaintiffs would not redress their alleged injuries.

Having concluded that the preliminary injunction regulates defendants' relationships with nonparties, the district court then addressed the injunction's application to lawsuits in other federal district courts and in the United States Courts of Appeals. The court announced that "the preliminary injunction attaches to Defendant[s'] conduct in litigation not substantially developed before the August 21,

2016 Order," which the court defined as litigation in which "no responsive pleadings were filed and no substantive rulings issued before August 21, 2016." ROA.1367 n.2. The court announced that although defendants "are enjoined from relying on the Guidelines" in other litigation, defendants may "offer textual analyses of Title IX and Title VII in cases where the Government and its agencies are defendants or where the United States Supreme Court or any Circuit Court request that Defendants file amicus curiae briefing on this issue." ROA.1367-68. The district court did not identify any legal basis for these extraordinary restrictions.

The district court requested further briefing on whether "Defendants' Guidelines are enjoined in total or whether the princip[le] of severability applies to them"; whether "the injunction implicates Title VII in any manner"; and whether "OSHA or DOL activity is implicated by the injunction." ROA.1368. The parties filed supplemental briefing on these issues, but the court has issued no further ruling.

6. Defendants filed a notice of appeal of the August 21 preliminary injunction, as clarified by the October 18 order. ROA.1389-90. Defendants subsequently moved to stay the injunction pending appeal to the extent it applies to entities other than plaintiffs. That motion remains pending as of this date.[3]

[3] Dr. Rachel Tudor, a putative intervenor in the district-court proceedings, has filed a brief on appeal attempting to incorporate defendants' arguments and raising additional challenges to the preliminary injunction. But the district court has not granted Tudor's intervention motion, and she is not a party to this litigation. Nor

SUMMARY OF ARGUMENT

I. Plaintiffs challenge six non-binding guidance documents that do not create any legal obligations or require plaintiffs to modify their conduct in any way. If a federal agency ever brought an enforcement action against any plaintiff, that action would rest on the statutes, not on the non-binding guidance. As to Title IX, such enforcement action would generally occur through multi-stage administrative proceedings, followed by an opportunity for judicial review in the court of appeals. And if an agency seeks to withhold federal funds, any withholding would be prospective only.

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does the narrow exception for non-party appeals apply. *Cf. EEOC v. Louisiana Office of Cmty. Servs.*, 47 F.3d 1438, 1442-43 (5th Cir. 1995). Tudor accordingly may not seek review of the preliminary injunction here. *See, e.g.*, *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (en banc). In seeking intervention below, Tudor cited her involvement in litigation in Oklahoma in which she asserts Title VII claims against her employer. *See* ROA.1167-68. But that case shares no "common question of law or fact" with plaintiffs' challenge to the guidance documents here. Fed. R. Civ. P. 24(b)(1)(B). Tudor has proposed to intervene "for the limited purpose of seeking a declaratory judgment" that issue preclusion prevents Oklahoma (a plaintiff here) from attacking defendants' legal interpretations. ROA.1168, 1180. But the interlocutory ruling on which Tudor relies has no preclusive effect in other courts. *See Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269-72 (5th Cir. 1986) (issue preclusion requires final judgment). Even if Tudor had a legally cognizable interest in this litigation, defendants already adequately represent that interest—as Tudor acknowledged below, ROA.1172—rendering her participation unnecessary. *See New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472-73 (5th Cir. 1984) (en banc) (affirming denial of permissive intervention where existing parties provided adequate representation).

It follows that this dispute is not justiciable. None of the six guidance documents constitutes final agency action subject to review under the Administrative Procedure Act. Nor do plaintiffs have standing to challenge those documents. To the extent plaintiffs dispute the agencies' Title IX enforcement more generally, they must raise their arguments within the comprehensive scheme for administrative and judicial review mandated by Congress, not through a preemptive district-court action.

Those reasons justify vacatur of the preliminary injunction apart from any consideration of the merits. The district court misread the Department of Education regulation, 34 C.F.R. § 106.33, which does not specify the sex-segregated facilities that a transgender person should use, much less dictate that schools may deny transgender persons the ability to access facilities consistent with their gender identity. The district court departed from the reasoning of numerous courts that have accepted the federal agencies' interpretation.[4] The Supreme Court has since granted certiorari in *Gloucester County School Board v. G.G.*, however, and its decision may provide guidance as to this aspect of the district court's ruling, so defendants do not currently raise this issue as a

[4] *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 719-23 (4th Cir.), *cert. granted*, 137 S. Ct. 369 (2016); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, ECF No. 134 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *Board of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, __F. Supp. 3d__, 2016 WL 5372349, at *11 (S.D. Ohio Sept. 26, 2016), *stay denied sub nom. Dodds v. U.S. Dep't of Educ.*, __F.3d__, 2016 WL 7241402 (6th Cir. Dec. 15, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-cv-943, ECF No. 33 (E.D. Wis. Sept. 22, 2016); *Carcaño v. McCrory*, __F. Supp. 3d__, 2016 WL 4508192, at *11-16 (M.D.N.C. Aug. 26, 2016).

basis for reversal. But there is no need for this Court to await resolution of *Gloucester County*, because the injunction should be vacated on the independent grounds addressed here.

II. The district court also erred in concluding that the other prerequisites for preliminary injunctive relief were satisfied. Plaintiffs have not shown that they will suffer irreparable harm absent an injunction. As explained, the challenged guidance documents do not require plaintiffs to alter their conduct; plaintiffs can ignore them without legal consequence. And plaintiffs cannot show irreparable harm based upon the possibility of future enforcement, because any withholding of federal funds under Title IX would occur only prospectively and after administrative review.

III. The court further abused its discretion by entering a preliminary injunction that extends to non-plaintiffs "nationwide"; prohibits defendants from investigating certain alleged violations of Title IX even without reliance on the guidance documents; and restricts the ability of the United States to present its legal interpretations in other litigation. Those provisions of the injunction cannot plausibly be thought necessary to provide full relief to the plaintiffs on their APA claims, and they raise independent constitutional concerns. To the extent the injunction were read to extend even more broadly—by applying to Title VII and EEOC, and by covering activities of the Department of Labor (including OSHA) not addressed in plaintiffs' complaint—the injunction must also be vacated as overbroad.

STANDARD OF REVIEW

"A preliminary injunction is an 'extraordinary remedy' that should not be granted unless its proponent clearly shows: '(1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest.'" *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016). Under that analysis, this Court reviews legal conclusions "de novo," and "the ultimate decision whether to grant relief for abuse of discretion." *Id.* This Court's "review of subject-matter jurisdiction is plenary and de novo." *Id.*

ARGUMENT

I. Plaintiffs' Challenges To The Non-Binding Guidance Documents Are Not Justiciable.

The preliminary injunction must be vacated because the district court lacks jurisdiction over plaintiffs' claims. The challenged guidance documents do not constitute final agency action and do not cause plaintiffs any injury that could form the basis of Article III standing. Moreover, plaintiffs' attacks on the agencies' enforcement of Title IX must be channeled through the review scheme established by Congress, and may not be pursued in this preemptive lawsuit.

A. The Guidance Documents Are Not Final Agency Action And Did Not Require Notice-And-Comment Rulemaking.

1. The APA permits review of "final agency action." 5 U.S.C. § 704. An agency action is "final" only if it both (1) "mark[s] the consummation of the agency's decisionmaking process" and (2) is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks omitted). Courts in this Circuit lack subject matter jurisdiction to review agency action that does not satisfy both of those requirements. *See, e.g.*, *Peoples Nat'l Bank v. Office of Comptroller of Currency*, 362 F.3d 333, 336 (5th Cir. 2004); *American Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999).

The guidance documents challenged by plaintiffs do not determine "'rights or obligations'" or in any way give rise to "'legal consequences.'" *Bennett*, 520 U.S. at 177-78. To the extent they are relevant at all, the documents merely express the agencies' perspectives on what Title IX, its implementing regulations, and Title VII already require.

Five of the six challenged documents set forth (or passingly allude to) the agencies' views that the prohibitions on discrimination "on the basis of sex" or "because of … sex" in Title IX and Title VII, respectively, are properly interpreted to include discrimination against persons whose gender identity does not match their sex assigned at birth (*i.e.*, transgender persons). A document that simply "'communicates the agency's position on a matter,'" and does not "compel[] action by [either] the

recipient [or] the agency," is not final agency action. *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012); *see also Peoples Nat'l Bank*, 362 F.3d at 337 ("[A] non-final agency order is one that 'does not of itself adversely affect complainant[.]'"); *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (agency action is not "final" if "an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party"); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 431-33 (4th Cir. 2010) (agency "questions and answers" were not "final" because they "were not themselves designed to be enforceable rules," but rather to "explain[] the laws, regulations, and rulings").

In determining whether an agency document creates legal consequences, courts also consider "the agency's characterization of the guidance." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). Here, it is clear on the face of the challenged documents that they do not carry legal effect. For example, the May 2016 "Dear Colleague Letter" declares that "[t]his guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations." ROA.392. Other documents carry similar disclaimers. *See* ROA.314 n.1 (Questions and Answers on Title IX and Sexual Violence) (similar); ROA.372 (OSHA "Best Practices Guide") (document "creates no new legal obligations," but provides "recommendations" that are "advisory in nature"). The Attorney General

memorandum coordinates DOJ's litigating position under Title VII without determining the rights of States or other parties. ROA.367-68. And the EEOC Fact Sheet does not even interpret Title VII, but instead simply reports the outcome of an EEOC federal-sector decision—a decision that does not bind plaintiffs, who are not federal agencies. ROA.386-87. *See also infra* pp. 51-55 (further addressing EEOC, Labor, and OSHA).

The district court offered no basis for distinguishing this case from *National Pork Producers Council v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011), in which this Court dismissed a challenge to similar "guidance letters" on finality grounds. This Court explained that the guidance letters were not final because they "neither create[d] new legal consequences nor affect[ed] [petitioners'] rights or obligations," but instead "merely restate[d]" existing legal requirements. *Id.* at 756.

Nor did the district court reconcile its reasoning with *Luminant Generation Co. v. U.S. EPA*, 757 F.3d 439 (5th Cir. 2014), in which the challenged documents not only set forth the agency's interpretations of the Clean Air Act, but specifically notified the petitioners of the agency's view that they were in violation of the statute. This Court concluded that the notices were not reviewable "final action" because it was the Clean Air Act itself, "not the notices," that established "[plaintiffs'] rights and obligations." *Id.* at 442. That principle is fully applicable here: the challenged guidance documents, at most, "'merely express[] [the agencies'] view of what the law requires of a party'"

without in themselves altering plaintiffs' rights or obligations. *Id.* at 442 n.7 (quoting *AT&T*, 270 F.3d at 975). *See AT&T*, 270 F.3d at 976 (no final agency action even though EEOC compliance manual "state[d] the Commission's view that the policy followed by AT&T violates the Act," as the agency "has not inflicted any injury upon AT&T merely by expressing its view of the law").

The challenged guidance documents also do not "mark the 'consummation' of the agency's decisionmaking process," *Bennett*, 520 U.S. at 178, as to whether plaintiffs are in violation of Title IX. That decisionmaking process would typically involve an enforcement action under the comprehensive, multi-stage scheme established by Congress, followed by an opportunity for review in the court of appeals. *See supra* pp. 5-6. Generally, "adverse legal consequences will flow" against plaintiffs "only if the [court of appeals] determines that [plaintiffs] violated the Act." *Luminant*, 757 F.3d at 442.

In any event, enforcement would rest on the statute itself, not on the guidance documents. As a result, plaintiffs "have no new legal obligation imposed on [them]" by virtue of those documents, and "have lost no right [they] otherwise enjoyed." *Luminant*, 757 F.3d at 442. Plaintiffs may simply "ignore [the documents] without facing any legal consequences," *National Mining Ass'n*, 758 F.3d at 252, because plaintiffs' rights would be affected adversely only "'on the contingency of future administrative action,'" *Peoples Nat'l Bank*, 362 F.3d at 337. *See also, e.g.*, *American Tort*

Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387, 395 (D.C. Cir. 2013) ("interpretative rules or statements of policy generally do not qualify" as final agency action "because they are not 'finally determinative of the issues or rights to which [they are] addressed'"); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (no final agency action exists until the agency has "taken the steps required under the statutory and regulatory scheme for its actions to have any *legal* consequences," and not merely "*practical* consequences") (emphasis added).

2. For essentially the same reasons, the agencies were not required to undertake notice-and-comment rulemaking prior to issuing the challenged guidance documents. The APA requires rulemaking only for "legislative" rules, which are ones that carry "'the force and effect of law.'" *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). The rulemaking requirement "'does not apply' to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'" *Id.* at 1204 (quoting 5 U.S.C. § 553(b)(A)).

The guidance documents are not legislative rules. They do not carry the "'force and effect of law.'" *Id.* at 1203. None of the documents may "be the basis for an enforcement action against a regulated entity." *National Mining Ass'n*, 758 F.3d at 252. Instead, they are simply "'statements as to what the [agencies] think[] the statute or

regulation means.'" *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 602 (5th Cir. 1995); *see also Perez*, 135 S. Ct. at 1204.

3. The district court's determination that the guidance documents constitute final agency action—and relatedly, its determination that they required notice-and-comment rulemaking—cannot be reconciled with these principles.

The court relied principally on the now-vacated panel decision in *Texas v. EEOC*, 827 F.3d 372 (5th Cir. 2016), *vacated on pet. for reh'g and remanded*, 838 F.3d 511 (5th Cir. 2016), in which the panel majority concluded that non-binding EEOC guidance constituted final agency action on the theory that "'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law." *Id.* at 383. Invoking that reasoning here, the district court concluded that defendants, by discussing Title IX and Title VII in certain guidance documents, had similarly "committ[ed]" themselves to particular legal interpretations. ROA.1046-47. The district court's reasoning, and that of the now-vacated panel decision in *EEOC*, conflicts with the settled precedent of this Court and other circuits establishing that an agency document does not constitute final agency action if it merely interprets a party's existing legal obligations. *See, e.g.*, *Luminant*, 757 F.3d at 442; *National Pork Producers Council*, 635 F.3d at 755-56; *Holistic Candlers*, 664 F.3d at 944; *AT&T*, 270 F.3d at 975.

The district court underscored its misunderstanding by repeatedly referring to plaintiffs' failures to "comply" with the guidance documents and to the supposed efforts of unspecified agencies to "enforce the Guidelines as binding." ROA.1047, 1055. Where the Departments of Education and Justice have undertaken investigation or enforcement action against other recipients, they have done so because the recipients violated Title IX or its regulations, not because they failed to "comply" with non-binding guidance. Similarly, if enforcement action were ever taken against plaintiffs, it would not be because they "ch[ose] not to comply with Defendants' Guidelines," ROA.1047; the relevant question would be whether plaintiffs violated the statute or regulation itself. *See National Mining Ass'n*, 758 F.3d at 252 (no final agency action where challenged document "may not be the basis for an enforcement action against a regulated entity"). Moreover, as to EEOC, no enforcement action could be taken by the agency at all, as EEOC lacks the power to proceed against state or local governmental employers. 42 U.S.C. § 2000e-5(f)(1).

The district court similarly erred in inquiring into possible practical consequences of the guidance documents' issuance. By providing notice of the agency's interpretations and priorities, guidance documents may have the practical effect of encouraging some entities to voluntarily alter their conduct. But that does not mean that the documents transformed "in practice" into binding, enforceable rules. ROA.1056. Even if plaintiffs may "feel pressure to voluntarily conform their

behavior because the writing is on the wall about what will be needed" under the statute, final agency action does not exist if "there has been no 'order compelling the regulated entity to do anything.'" *National Mining Ass'n*, 758 F.3d at 253; *see also Center for Auto Safety v. NHTSA*, 452 F.3d 798, 811 (D.C. Cir. 2006) ("[*D*]*e facto* compliance is not enough to establish that [agency guidance] [has] *legal* consequences."); *Independent Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (distinguishing practical and legal consequences); *Reliable Automatic Sprinkler Co.*, 324 F.3d at 732 (same). And the district court's assumption that guidance documents require notice and comment not only contradicts the text of the APA, which exempts interpretative rules and policy statements from rulemaking, but also would "muzzle any informal communications between agencies and their regulated communities," thereby defeating Congress's intent to benefit regulated parties by encouraging advance notice and transparency about agencies' legal interpretations. *Independent Equip. Dealers Ass'n*, 372 F.3d at 428.

B. Plaintiffs Lack Standing To Challenge The Guidance Documents.

To establish standing, plaintiffs must show they have suffered an injury that is "(1) concrete, particularized, and actual or imminent (so-called injury 'in fact'); (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling." *McCardell v. U.S. Dep't of Hous. & Urban Dev.*, 794 F.3d 510, 517 (5th Cir. 2015). Plaintiffs satisfy none of these requirements.

1. The guidance documents do not carry the force of law and do not alter plaintiffs' existing rights or duties. The documents therefore have caused plaintiffs no legally cognizable injury. To the extent plaintiffs claim injury from the possibility of enforcement, plaintiffs have not alleged that they are currently subject to relevant enforcement action or that any deprivation of federal funds is "certainly impending" against them. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Plaintiffs therefore have suffered no "invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks omitted).

Plaintiffs also fail to satisfy the two remaining requirements for standing. Because the agencies' enforcement authority rests on the statutes, not on the guidance documents, there is no "causal connection" between the threat of enforcement and the existence of those documents. *Lujan*, 504 U.S. at 560. For the same reasons, vacating the challenged documents—the sole agency actions over which the district court found jurisdiction—would afford plaintiffs no relief from any future enforcement under Title IX, Title VII, or other statutes. *See id.* at 561 (claimed injury must likely be "'redressed by a favorable decision'").

2. The district court failed to apply these principles. Relying principally on its interpretation of the now-vacated *Texas v. EEOC* decision, the court concluded that plaintiffs had standing because they were the "object" of the guidance documents,

reasoning that "Defendants' Guidelines are clearly designed to target Plaintiffs' conduct" and that "[w]hen 'a plaintiff can establish that it is an 'object' of the agency regulation at issue, 'there is ordinarily little question that the action or inaction has caused [the plaintiff] injury.'" ROA.1041-42 (quoting *EEOC*, 827 F.3d at 378 (quoting *Lujan*, 504 U.S. at 561-62)).

But a plaintiff does not automatically gain Article III standing simply by showing that it was part of the audience for a particular agency communication. ROA.1041. In ruling otherwise, the court misunderstood *Lujan* and this Court's decisions. *Lujan* recognized that it is generally more straightforward for a regulated party—*i.e.*, the "object" of government action—to prove standing than it is for persons whose "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan*, 504 U.S. at 561-62. But *Lujan* did not offer this observation as a freestanding, alternative test for standing, and this Court's decisions similarly hold that the three elements of standing articulated in *Lujan* must be independently satisfied. *See, e.g.*, *Contender Farms LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 264-67 (5th Cir. 2015).

The district court also suggested that plaintiffs had standing because the guidance documents "spur [an] added regulatory compliance analysis" by "forc[ing] Plaintiffs to consider ways to build or reconstruct restrooms, and how to accommodate students who may seek to use private single person facilities."

ROA.1042. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms*, 779 F.3d at 266—such as where an agency promulgates binding "[r]egulation[s]" that impose new, "harsher, mandatory penalties" on regulated parties, *id.*—the guidance documents here do not have any legal force and effect, and therefore do not create any "regulatory burden."

That "other school districts and employers" have been subject to enforcement action, or have voluntarily changed their policies, also does not mean that plaintiffs have standing. ROA.1042; *cf., e.g.*, ROA.1039, 1045 (noting United States' pending lawsuit against North Carolina). Plaintiffs must show that they themselves have suffered an injury or that future harm is "certainly impending." *Clapper*, 133 S. Ct. at 1147. The plaintiff States have not enacted laws similar to North Carolina's, nor have they identified any relevant pending or imminent action against them. In any event, plaintiffs would not lose their federal funding unless and until administrative review proceedings were exhausted, and even then, any loss of funding would be prospective only. Thus, plaintiffs cannot rely on the potential "den[ial of] federal funds" as a basis for standing to bring this lawsuit. ROA.285.

C. Congress Has Channeled Title IX Enforcement Disputes Through A Comprehensive Scheme Of Administrative And Judicial Review.

1. To the extent plaintiffs challenge not only the guidance documents, but also the prospect of future Title IX enforcement against them, the district court also plainly lacked jurisdiction.

Where Congress has established a comprehensive scheme for administrative and judicial review of enforcement-related disputes, and where it is "fairly discernible" that Congress intends that scheme to be exclusive, a plaintiff is not permitted to circumvent that exclusive scheme by filing a preemptive district-court action, but must instead present its claims or defenses through the structure established by Congress. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994); *Elgin v. Department of Treasury*, 132 S. Ct. 2126, 2132-33 (2012). In determining whether Congress intends an enforcement scheme to be exclusive, courts consider the statute's language, structure, purpose, and legislative history. *Thunder Basin*, 510 U.S. at 207.[5]

In *Thunder Basin*, the Supreme Court held that a district court lacked authority to enjoin enforcement proceedings of the Mine Safety and Health Administration,

[5] Because these principles concern the timing—not the availability—of judicial review, they do not implicate the APA's "presumption" in favor of reviewability. *Thunder Basin*, 510 U.S. at 207 n.8; *see also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 19-20 (2000) (emphasizing relevance of distinction between "a total preclusion of review and postponement of review"). The district court thus was mistaken in applying a "presumption of reviewability for all agency actions" in rejecting defendants' reliance on *Thunder Basin*. ROA.1050.

explaining that the comprehensive review structure established by the Mine Act, which provided for direct review of agency action in the court of appeals, implicitly "demonstrate[d] that Congress intended to preclude" pre-enforcement challenges in district court before the completion of agency proceedings. 510 U.S. at 208, 215. The Court reasoned that the Mine Act provided a "detailed structure" for review of enforcement disputes, noting that the sanctioned party could challenge any future citation before an administrative law judge; the ALJ's determination could then be appealed within the agency; and an adverse administrative decision could then be "meaningfully addressed in the Court of Appeals." *Id.* at 207-08, 215. The Court concluded that the Act barred district-court jurisdiction over a regulated party's pre-enforcement claims even though the Act did not expressly prohibit such claims.

The review scheme created by Congress under Title IX contains the same features that the Supreme Court highlighted in *Thunder Basin* as barring pre-enforcement challenges. First, even before administrative review, the agency must seek voluntary compliance, 20 U.S.C. § 1682, and often resolves investigations of complaints informally, 34 C.F.R. § 100.7(d)(1). If a voluntary resolution cannot be reached, the Department proceeds by providing notice and an opportunity for a hearing before a Departmental hearing officer. 20 U.S.C. § 1682; 34 C.F.R. § 106.71 (incorporating 34 C.F.R. §§ 100.6-100.11). The recipient is entitled to an administrative appeal, discretionary review by the Secretary of Education, and judicial

review in the appropriate court of appeals. *See* 20 U.S.C. §§ 1682-1683; 34 C.F.R. §§ 100.10(a), (b), (e).[6] That review scheme demonstrates Congress's intent to channel enforcement-related disputes through the agency, followed by judicial review in the court of appeals.

Here, it is "fairly discernible" that Congress intends its review scheme to be exclusive, and none of the "additional factors" the Supreme Court has considered in determining whether district-court review is permitted counsel in favor of preemptive review in this case. *Elgin*, 132 S. Ct. at 2136; *see also Thunder Basin*, 510 U.S. at 212 (inquiring whether litigant's claims are "of the type Congress intended to be reviewed within [the] statutory structure"); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010). Plaintiffs' core contention is that defendants' interpretations of Title IX are incorrect, and that plaintiffs should not be subject to enforcement for non-compliance. Adjudication of that objection is not "wholly collateral" to, but rather falls squarely within, Title IX's review structure. *Elgin*, 132 S. Ct. at 2136; *see, e.g.*, *Doe v. FAA*, 432 F.3d 1259, 1262-63 (11th Cir. 2005) (applying *Thunder Basin* and rejecting attempt to "avoid the statutorily established administrative-review process by rushing to the federal courthouse for an injunction preventing the

[6] Alternatively, the agency may refer the matter to the Department of Justice for a civil action. 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a). That Congress has afforded agencies "the option to pursue violations in district court," however, does not change the *Thunder Basin* analysis. *Jarkesy v. SEC*, 803 F.3d 9, 17 (D.C. Cir. 2015).

very action that would set the administrative-review process in motion"). The district court's injunction does precisely what *Thunder Basin* prohibits: it enjoins "investigat[ions]" (*i.e.*, the precursor to statutory enforcement) under Title IX itself. ROA.1066.

Requiring adherence to the statute's review structure also would not "'foreclose all meaningful judicial review.'" *Elgin*, 132 S. Ct. at 2135. Plaintiffs risk no penalties by not "complying" with the guidance documents in the interim. As noted, any termination of federal funding pursuant to Title IX would occur prospectively and after the review mandated by Congress. And Title IX "provides review" of any determination to terminate federal funding "in [an appropriate court of appeals], an Article III court fully competent to adjudicate [plaintiffs'] claims." *Id.* at 2137. The scheme thus ensures not only that the agency may pass upon disputes "within [its] expertise," such as the interpretation of Title IX, but also that recipients' disagreements with the agency's interpretation will be "'meaningfully addressed in the Court of Appeals.'" *Id.* at 2132, 2140. Indeed, other courts have found that funding recipients' challenges to the agencies' interpretations of Title IX must be channeled through the statutory review scheme. *See Board of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, __F. Supp. 3d__, 2016 WL 5372349, at *6-9 (S.D. Ohio Sept. 26, 2016) ("*Highland*") (concluding that *Thunder Basin* precluded similar challenge by

recipient to federal agencies' interpretation of Title IX in the context of restroom access by transgender individuals).

2. The district court fundamentally misapprehended this inquiry. It summarily concluded that Title IX's review scheme is not "elaborate" enough to preclude district-court jurisdiction, ROA.1049, but gave no reasoning to support this conclusion. *See Highland*, 2016 WL 5372349, at *7 (concluding that district court's "analysis" here "can charitably be described as cursory"). It is unclear what the district court intended by imposing this "elaborate[ness]" requirement, which *Thunder Basin* does not contain. Regardless, as explained above, the inference that Congress intended its review scheme to be exclusive is "fairly discernible" here to the same extent that inference was warranted in *Thunder Basin*.

The district court's misunderstanding is further reflected in its assumption that because Title IX permits a private right of action for an individual pursuing a discrimination claim against recipients, those recipients (including plaintiffs) must be permitted preemptively to challenge federal enforcement in district court. But the existence of a cause of action under Title IX for discrimination victims says nothing about whether Congress intended to channel the enforcement-related claims of regulated parties. *See Highland*, 2016 WL 5372349, at *7 (reaching same conclusion). To the contrary, Congress may permissibly channel disputes between the federal government and regulated parties within an exclusive administrative scheme, even as

it provides opportunities for persons who are not regulated parties to pursue relief through other means. *Compare, e.g.*, *Jarkesy v. SEC*, 803 F.3d 9, 12, 15-30 (D.C. Cir. 2015) (holding that *Thunder Basin* precluded district-court jurisdiction over regulated person's challenge to "securities fraud" liability under Exchange Act of 1934), *with Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (reaffirming existence of implied "private cause of action" for securities-fraud victims under Exchange Act of 1934).

II. Plaintiffs Have Not Demonstrated Irreparable Harm Warranting A Preliminary Injunction.

Even if this lawsuit were justiciable, plaintiffs have not demonstrated that injunctive relief is appropriate. A preliminary injunction is an "extraordinary remedy" available only where plaintiffs have "clearly" shown a "substantial threat that [they] will suffer irreparable injury if the injunction is not granted." *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 20-22 (2008) (preliminary injunction permitted only where it is "likely," not merely "possib[le]," that plaintiff will suffer irreparable harm). Plaintiffs have not come close to making that showing.

1. As discussed, the challenged guidance documents merely express the agencies' views as to what the law already requires. Plaintiffs are under no obligation to do anything, or refrain from doing anything, because the guidance documents exist. The documents cause plaintiffs no harm at all, much less "irreparable" harm. Indeed,

five of the six challenged documents (*i.e.*, all but the May 2016 "Dear Colleague Letter") do not even address the "issue of access to intimate facilities" under Title IX at all, ROA.1367—the context upon which plaintiffs have premised their claimed need for an injunction.[7]

To the extent plaintiffs claim irreparable injury because of possible future enforcement against them, plaintiffs' arguments also fail at multiple levels. First, as explained, any enforcement would rest upon the statutes themselves, not upon the guidance documents. Second, plaintiffs have identified no "substantial" risk of impending action against them in any event. *See Google*, 822 F.3d at 228 (no irreparable harm where "the prospect of [an enforcement action] is not sufficiently imminent or defined to justify an injunction"); *cf. Winter*, 555 U.S. at 20-21 (similar).

Third, the possibility of future enforcement does not demonstrate "irreparable" harm now. Plaintiffs' abstract disagreements with legal views espoused by the Departments of Education and Justice do not affect their current federal funding. In the event of future enforcement, plaintiffs could contest the agencies' interpretations, and an adverse decision would be subject to judicial review. And any withholding of

[7] Moreover, to the extent the guidance documents address matters not challenged by plaintiffs, the documents are severable and should not be enjoined in their entirety. *See North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (severability doctrine applies unless "there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted").

funds pursuant to Title IX would be purely prospective. The agencies would not recoup funds already paid to plaintiffs, including funds disbursed during the pendency of enforcement proceedings. Moreover, the prospective withholding of federal funds would be subject to additional procedural safeguards, including advance notice to Congress. 20 U.S.C. § 1682.

Those considerations confirm the absence of irreparable harm. Where a party has the ability to defend itself in litigation before any adverse consequences would materialize, there is no irreparable harm in the interim. *See Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (""The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, [weighs] heavily against a claim of irreparable harm."'). That is especially true where, as here, any withholding of funds would be purely prospective.

2. The considerations cited by the district court do not establish irreparable harm. The mere existence of a "conflict between the Guidelines and Plaintiffs' policies," ROA.1064, does not demonstrate that the legal disagreement is the source of irreparable injury. Neither uncertainty over the proper resolution of that disagreement, nor the possible costs of litigation to resolve that disagreement, constitute irreparable harm. *See, e.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980)

("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").[8]

The district court's assertion that a State "'suffers a form of irreparable injury'" any time that it is "'enjoined by a court from effectuating statutes enacted by'" its legislature, ROA.1063, likewise does not suffice. Plaintiffs' statutes have not been enjoined by any court, and the guidance documents do not purport to supersede state law or otherwise require States to "cede their authority" over educational matters. ROA.1064. To the contrary, the documents merely state the agencies' interpretations of laws to which plaintiffs have long been subject. A plaintiff cannot show irreparable harm simply by identifying disagreements about the meaning of federal law.

3. The two remaining equitable requirements for a preliminary injunction—the balance of hardships and the "public interest," *Google*, 822 F.3d at 220—also do not favor plaintiffs. The guidance documents, to the extent they address Title IX at all, provide advice to federal-funding recipients about ways to address the needs of transgender and non-transgender students alike. Cutting off that advice does nothing to redress any harm to plaintiffs, yet it disrupts the ability of federal agencies to offer their interpretations and guidance to the public in the manner authorized by federal

[8] Nor do the perceived costs of reviewing the guidance documents constitute irreparable harm. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("[O]rdinary compliance costs are typically insufficient to constitute irreparable harm.").

law—guidance that many States and schools actively desire. *See* 5 U.S.C. § 553(b)(A) (recognizing that federal agencies may issue "interpretative rules" and "general statements of policy"). Indeed, inasmuch as the preliminary injunction not only enjoins the challenged "Guidelines," but also suspends defendants' "investigation[s]" under Title IX itself, ROA.1066, it undeniably causes hardship to the States, schools, and students who rely on the federal government's assistance in preventing and remedying discrimination, ROA.821, 1502.

III. The District Court Abused Its Discretion By Extending The Preliminary Injunction To Entities And Circumstances With No Bearing On Plaintiffs' Interests.

In any event, the district court manifestly abused its discretion in extending the preliminary injunction well beyond the scope of its lawful authority.

A. The District Court Abused Its Discretion By Issuing A "Nationwide" Injunction That Applies Beyond Plaintiffs.

First, the preliminary injunction impermissibly extends beyond plaintiffs and regulates defendants' relationships with third parties not before the court.

1. A preliminary injunction is an equitable tool designed to "preserve the relative positions *of the parties* until a trial on the merits can be held." *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added). And a preliminary injunction, like all equitable relief, "'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702

(1979)). "'The desire to obtain sweeping relief cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (alteration omitted); *accord Lewis v. Casey*, 518 U.S. 343, 358 (1996) (explaining that anything "not … found to have harmed any plaintiff in th[e] lawsuit" is "not the proper object of th[e] District Court's remediation," and must be "eliminate[d] from the proper scope of th[e] injunction").

This Court, too, has repeatedly recognized that injunctive relief should extend no further than necessary to afford relief to the moving party. *See, e.g.*, *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (holding that court abused its discretion by imposing injunction that was "broader and more burdensome than necessary to afford [plaintiff] full relief"); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (modifying injunction that regulated defendants' interactions with non-plaintiffs to "apply to [plaintiff] only," because such "breadth … [was] not necessary to remedy the wrong suffered by [plaintiff]"); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam) (vacating preliminary injunction as overbroad because "[i]n this case, which is not a class action, the injunction against the School District from enforcing its regulation against anyone other than [plaintiff] reaches further than is necessary to serve [the] purpose" of preserving status quo among the parties).

Other courts of appeals have applied the same principles. *See Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011) (affirming district court's stay of non-plaintiff aspect of injunction, because "[i]njunctive relief generally should be limited to apply only to named plaintiffs when there is no class certification.") (quotation marks omitted); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating preliminary injunction against federal policy insofar as injunction applied beyond plaintiff); *see also, e.g.*, *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 170 (3d Cir. 2011); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012).

The rule that preliminary injunctions must be tailored to plaintiffs' alleged harm applies with full force in suits under the Administrative Procedure Act. The APA provides that "to the extent *necessary to prevent irreparable injury*, the reviewing court" in an APA action "may issue all necessary and appropriate process … to preserve status or rights *pending conclusion of the review proceedings*." 5 U.S.C. § 705 ("Relief pending review") (emphasis added). In allowing preliminary injunctions only "to the extent necessary to prevent irreparable injury," *id.*, the APA codifies the principle that preliminary injunctions are not designed to "'enjoin all possible breaches of the law,'" but rather to "remedy the specific harms" allegedly suffered by plaintiffs themselves, *Zepeda v. U.S. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983); *see also id.* (preliminary

injunctions exist for the "'limited purpose' of maintaining the status quo" and must be "particularly" tailored to plaintiffs).

These principles are informed by concerns of constitutional dimension. Because a court may not award relief that a plaintiff lacks standing to seek, Article III instructs that federal courts should "ensure the framing of relief no broader than required by the precise facts." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000) (quotation marks omitted); *see also Lewis*, 518 U.S. at 357 (scope of injunction "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established"). Here, plaintiffs indisputably lack standing to assert injuries to States, schools, or others besides themselves.

2. The district court erred in accepting plaintiffs' invitation to have its preliminary injunction apply well beyond what was necessary to address the alleged injuries to plaintiffs. A preliminary injunction that extends beyond the named plaintiffs to a lawsuit may be appropriate where an injunctive class action has been certified, *see* Fed. R. Civ. P. 23(b)(2); *Hollon*, 491 F.2d at 93, or where broader relief is "necessary to remedy the wrong suffered by [plaintiff]." *Hernandez*, 91 F.3d at 781. This Court found such an interest in *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015), where it concluded that there was "a substantial likelihood that a partial injunction would be ineffective" in providing relief to the plaintiff States because individual aliens could migrate across state lines. Here, however, there has been no

showing that non-plaintiff relief is required to protect plaintiffs' own interests, and the district court offered no basis for its assumption that "limit[ing] the injunction to the plaintiff states" would render that injunction "ineffective" as to plaintiffs. ROA.1365.

The district court also asserted that defendants "are a group of agencies and administrators capable of enforcing their Guidelines nationwide, affecting numerous state and school district facilities across the country." ROA.1365. But interactions between defendants and non-plaintiff states and school districts are not injuries to plaintiffs, and enjoining defendants' cooperation with those willing entities affords plaintiffs no relief. Similarly, the district court's reliance on the principle that the "judicial Power of the United States … extends across the country," ROA.1364, simply confuses the question of a court's territorial jurisdiction with the availability of non-plaintiff relief.

The scope of the preliminary injunction is particularly anomalous because twelve other States and the District of Columbia participated as amici curiae in district court to explain that they "welcome and support" the challenged guidance. ROA.821. "It would be absurd," the States urged, "for this Court, in the name of 'federalism,' to tell the Amici States that a policy those States have determined is beneficial is actually harming them." ROA.821. Texas cannot seek to enjoin the federal government's interactions with New York any more than New York may seek to enjoin the federal government's interactions with Texas.

B. The District Court Abused Its Discretion By Enjoining Agency Activities Under Title IX Itself.

The district court further abused its discretion by enjoining the defendant agencies, as to "the issue of access to intimate facilities," ROA.1367, from "initiating, continuing, or concluding any investigation" based on their interpretation that Title IX's prohibition against sex discrimination includes discrimination on the basis of gender identity. ROA.1066. That prohibition prevents the agencies from "investigati[ng]" *any* alleged discrimination against transgender individuals in the use of sex-segregated facilities. ROA.1066. In other words, the agencies are enjoined from undertaking investigation or enforcement consistent with their interpretation of Title IX even without reference to the challenged guidance documents—indeed, even if those documents had never existed.[9]

The district court had no authority to enter such an injunction. Plaintiffs' claims arise under the APA, which allows review only of final agency action. 5 U.S.C. § 704. Here, the only alleged "final agency action[s]" over which the court claimed jurisdiction were the six challenged guidance documents. Once the court enjoined the

[9] In denying defendants' partial-stay motion, the district court stated that the injunction does not "prevent Defendants from continuing their core mission of enforcing the federal civil rights laws," ECF No. 100, at 4, and "only restricts Defendants from enforcing or relying on the Guidelines," *id.* at 3. That assertion overlooks that the injunction bars defendants not only "from using the Guidelines," but also "from initiating, continuing, or concluding any investigation based on Defendants' interpretation" of Title IX. ROA.1066.

"enforce[ment]" of those challenged documents, it had no authority to go any further. *See John Doe #1 v. Veneman*, 380 F.3d 807, 818-19 (5th Cir. 2004) (injunction is overbroad if it "exceed[s] the scope of judicial review permitted under the APA" or "exceeds the legal basis for the lawsuit"); *Scott v. Schedler*, 826 F.3d 207, 214 (5th Cir. 2016) (similar).

By acting beyond the bounds of its lawful authority, and purporting to police enforcement of Title IX itself, the district court caused substantial harm to schools, entities, and students in other States. As the dozen States who participated as amici curiae below explained, States and schools frequently work collaboratively with the federal government to tackle self-identified problems and combat discrimination. Those States welcome cooperation with the defendant agencies—cooperation that they believe "overwhelmingly benefit[s] the public," ROA.801—yet the district court's injunction precludes defendants from providing resources and expertise to achieve those desired outcomes.

Even after entry of the preliminary injunction, the Department of Education has "continue[d] to receive many requests for technical assistance from schools, state education agencies, students, and parents." ROA.1502. As a result of "the uncertainty created by the preliminary injunction," however, the Department and its Office for Civil Rights must "decline[] to answer … requests, including hundreds of letters and emails," insofar as they relate to agency "investigations" prohibited by the

injunction, ROA.1502. Thus, "even recipients who would be entirely willing to work with OCR to find ways to accommodate the needs of their transgender students consistent with federal law are unable to obtain OCR's assistance." ROA.1502; *see* ROA.1494-1500 (identifying numerous examples of positive outcomes no longer possible because of preliminary injunction). The district court did not identify any legal basis whatsoever for interfering with defendants' cooperation with the States, localities, and schools that welcome their involvement in preventing and remedying discrimination under Title IX.

C. The District Court Abused Its Discretion By Regulating Defendants' Conduct In Other Litigation.

The district court also enjoined defendants from "using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order." ROA.1066. The district court later clarified that this restriction upon defendants' litigation authority applies "regardless of whether plaintiff states are involved," and "attaches to Defendant[s'] conduct in litigation not substantially developed before the [district court's] August 21, 2016 Order." ROA.1367 n.2. The court also suggested that its injunction applies not only to litigation concerning the challenged "Guidelines," but also to litigation concerning the underlying statutes themselves. The court announced that defendants "may offer textual analyses of Title IX and Title VII" in certain cases: "cases where the Government and its agencies are

defendants or where the United States Supreme Court or any Circuit Court request that Defendants file amicus curiae briefing on this issue." ROA.1367-68.

These provisions of the preliminary injunction represent an extraordinary interference with the Executive Branch's constitutional and statutory powers. The Constitution directs the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and pursuant to that responsibility, Congress has empowered the Attorney General to "attend to the interests of the United States" by participating in litigation in state and federal courts across the nation. *See* 28 U.S.C. §§ 516-519. Those powers necessarily include the authority to determine what arguments to present in litigation and when to participate as amicus curiae.

The injunction's provisions are also irreconcilable with Supreme Court precedent. The Supreme Court has squarely held that courts may not preclude the federal government from relitigating a particular legal issue—*e.g.*, the validity of an alleged rule—in successive cases involving different parties. *See United States v. Mendoza*, 464 U.S. 154, 162 (1984) (holding that the federal government is not bound by offensive collateral estoppel "in a case involving a litigant who was not a party to the earlier litigation"). The preliminary injunction disregards this precedent by attempting to impose the district court's legal ruling on the federal government's legal filings in every case throughout the entire country, "regardless of whether plaintiff states are involved." ROA.1367 n.2.

The preliminary injunction is also inconsistent with a proper regard for comity toward other federal courts. "The federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs." *West Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 728 (5th Cir. 1985); *see, e.g.*, *Georgia-Pacific Consumer Prod. LP v. von Drehle Corp.*, 781 F.3d 710, 715-17 (4th Cir. 2015) (vacating, on comity grounds, injunction that "'encroache[d] on the ability of other circuits to consider' an important legal question"). The district court cited no legal authority for imposing restrictions upon the arguments that the United States may make in litigation with other parties, and defendants are unaware of any precedent that allows a district court to control the contents of briefs that a litigant files in other courts.

The injunction's provisions concerning amicus participation only underscore the dramatic extent of the district court's departure from governing legal principles. If the district court meant to preclude the Department of Justice or EEOC from participating as amicus curiae in other litigation absent an express invitation from "the United States Supreme Court or any Circuit Court," ROA.1367-68—at least in Title IX or Title VII cases involving "the issue of access to intimate facilities," ROA.1367—the court seemingly arrogated to itself the power to supersede those Courts' own rules. *See* Sup. Ct. R. 37(4) (authorizing Solicitor General to file briefs in

the Supreme Court on behalf of the United States without leave of Court); Fed. R. App. P. 29(a)(2) ("The United States or its officer or agency … may file an amicus-curiae brief without … leave of court."). Even plaintiffs acknowledge the inappropriateness of such a restriction, as they have urged this Court to interpret the injunction as permitting defendants to "file amicus briefs that do not rely on the Guidelines" even without express invitation from a court. Pls. Opp'n Stay Mot. at 19 n.13 (5th Cir. Dec. 5, 2016). But contrary to plaintiffs' argument, the fundamental problem with this aspect of the injunction is not that it distinguishes between "request[ed]" and "[un]request[ed]" amicus participation; it is that it attempts to control the conduct of the federal government's litigation in other courts at all.

D. The Preliminary Injunction Also Constitutes An Abuse Of Discretion To The Extent It Applies To Title VII Or To The Activities Of EEOC Or The Department Of Labor, Including OSHA.

The district court's clarification order declined to resolve whether—and if so, to what extent—the preliminary injunction applies to Title VII or to the activities of EEOC and the Department of Labor, including OSHA. ROA.1363. Plaintiffs are not entitled to equitable relief with respect to any of these activities, and to the extent the injunction is interpreted to include them, it is overbroad and must be vacated.

1. Plaintiffs have entirely failed to demonstrate either standing or irreparable harm with respect to defendants' interpretation or enforcement of Title VII. The overwhelming focus of plaintiffs' presentation below was access to sex-segregated

restrooms and similar facilities by transgender individuals in public schools. The district court's determination that plaintiffs had standing rested on alleged harm to plaintiffs' "control of their educational premises and facilities." ROA.1039 & n.8. And the court's holding that plaintiffs would likely succeed on the merits of their substantive APA claims rested exclusively on Title IX and its implementing regulations. *See* ROA.1050-62. Thus, even if plaintiffs had shown that a preliminary injunction were appropriate as to the "Guidelines" interpreting Title IX, they have entirely failed to show that any injunction was appropriate as to Title VII. *See Scott*, 826 F.3d at 214 (reaffirming that an "injunction may not encompass more conduct than was requested"); *John Doe #1*, 380 F.3d at 818 ("The district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order."); *Garrido v. Dudek*, 731 F.3d 1152, 1159-60 (11th Cir. 2013) (partially vacating injunction that enjoined conduct beyond "what was actually decided").

Two of the challenged guidance documents relate solely to Title VII: (1) the 2014 DOJ memorandum stating that "the best reading" of Title VII is that "it encompasses discrimination based on gender identity, including transgender status," ROA.367-68, and (2) a May 2016 EEOC "Fact Sheet" noting the agency's federal-sector decision in *Lusardi v. McHugh*, which concluded that "denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination," ROA.386-87.

Plaintiffs have not shown that these documents cause them any harm at all, much less irreparable harm. Neither document bears any legal force and effect for States or other regulated parties, let alone any connection to the availability of federal funding for plaintiffs' schools. The "clarification of the Department's position" in the DOJ memorandum was meant to "foster consistent treatment of [Title VII] claimants throughout the government." ROA.368. And the EEOC Fact Sheet simply contains a bullet-point squib summarizing the agency's federal-sector *Lusardi* decision. *See* ROA.386. That decision causes plaintiffs no injury: EEOC does not adjudicate disputes involving state governmental employers, and neither plaintiffs here nor courts generally are bound by EEOC's federal-sector decisions.[10] Accordingly, the preliminary injunction must be vacated to the extent it applies to Title VII, the 2014 DOJ memorandum, the 2016 EEOC Fact Sheet, or the activities of EEOC.

2. Plaintiffs similarly have not shown any entitlement to a preliminary injunction with respect to the activities of the Department of Labor or its sub-agency, OSHA. Plaintiffs' district-court filings did not challenge any Labor activities or programs, much less explain how such activities or programs have caused plaintiffs

[10] EEOC's Fact Sheet also necessarily cannot constitute a legislative rule because EEOC lacks authority to issue substantive regulations that would bind plaintiffs. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). And the *Lusardi* decision itself is not a "rule" requiring notice-and-comment rulemaking. *Cf. Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001) ("There is no notice and comment requirement for an agency adjudication.").

any irreparable harm. The only Labor or OSHA document invoked by plaintiffs is a 2015 OSHA "Best Practices Guide" that clearly disclaims any legal force and effect. *See supra* pp. 9-10; ROA.372. The Best Practices Guide simply notes that OSHA rules implementing the Occupational Safety and Health Act require employers to provide their employees with access to sanitary toilet facilities. *Cf.* 29 C.F.R. § 1910.141(c). Those rules do not prohibit discrimination on the basis of sex, and the Best Practices Guide does not purport to interpret Title IX's or Title VII's prohibitions against sex discrimination. Indeed, OSHA has no authority to enforce either of those statutes.

Given the absence of any such enforcement authority, it cannot reasonably be argued that OSHA's Best Practices Guide constitutes a binding interpretation of either Title IX or Title VII. The district court manifestly erred in equating the Best Practices Guide with the other "Guidelines," and vacatur of the preliminary injunction as to the Department of Labor (including OSHA) is warranted on this basis alone.

Even if the injunction somehow were proper as to OSHA's Best Practices Guide, however, the district court clearly would have no basis to extend its injunction to Labor programs more broadly. Such a restraint upon programs never challenged by plaintiffs, or addressed by defendants, would violate fundamental fair-notice requirements. *See* Fed. R. Civ. P. 65(a)(1); *Harris Cty. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 326 (5th Cir. 1999) ("[A] preliminary injunction granted without

adequate notice and a fair opportunity to oppose it should be vacated and remanded to the district court.").

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated, and the case should be remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2017, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.2 because it contains 12,996 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

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