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

STATE OF TEXAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 7:16-cv-00054-O
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants;	)	
	)	
C.L. "BUTCH" OTTER, Governor of the State of Idaho,	)	
	)	
	)	
Movant.	)	
	)	

AMICUS CURIAE BRIEF OF GOVERNOR C.L. "BUTCH" OTTER IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Table Of Contents ii

Table of Authorities iv

Identity and Interest of the *Amicus Curiae* 1

Statement of the Case 2

Argument 4

I. Plaintiff's Injunction Should Apply Nationwide 4

i. This Court has the Authority to Grant a Nationwide Injunction 5

ii. Rules Created in Violation of the APA Should be Vacated 5

iii. District Courts May Define the Scope of an Injunction 7

iv. Non-Parties Will Be Negatively Impacted by Defendants' Actions 8

II. Defendants' Actions Violates the Basic Principles of Federalism 10

ii. States Must have a Clear Choice to Accept Funds Under the Spending Clause 13

iii. Agencies Only have the Authority Delegated to Them by Congress 14

iv. Education Policy is Regulated By States as One of the Police Powers 16

v. States May Not Violate an Individual's Constitutional Rights 18

III. Sex Discrimination 19

i. History of Protections Against Sex Discrimination 19

ii. Title IX is Not Equipped to Protect Students Based on Gender Identity 20

iii. All Levels of Government Treat Gender Identity as a Separate Category 22

iv. Biological Differences Between Sexes are Significant 23

v. Sex Stereotyping is Different than Not Accommodating Gender Identity 24

Conclusion 25

TABLE OF AUTHORITIES

Cases

Atascadero State Hosp. v. Scanlon,
473 U.S. 234, 242 (1985) 12

Barnes v. Gorman,
536 U.S. 181, (2002) 13

Bond v. United States,
564 U.S. 211 (2011) 11, 16

Brown v. Bd. of Educ.,
347 U.S. 483, 493 (1954) 16

Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.,
659 F.2d 695 (5th Cir. 1981 7

Earth Island Institute v. Ruthenbeck,
490 F.3d 697 (9th Cir. 2006) 5

Fed. Energy Regulatory Comm'n v. Mississippi,
456 U.S 742, 769 (1982) 11

Frontiero v. Richardson,
411 U.S. 677, 686 (1973) 20

Georgia v. Tenn. Copper Co.,
206 U.S. 230, 237 (1907) 1

Gregory v. Ashcroft,
501 U.S. 452, 458 (1991) 11, 12

Harmon v. Thornburgh,
878 F.2d 484, 494 (D.C. Cir. 1989). 6

Hedges v. Obama,
2012 WL 2044565, at 2-3 (S.D.N.Y. June 6, 2012) 8

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,
452 U.S. 264,288–289 (1981) 12

Hodgson v. First Fed. Sav. & Loan Ass'n,
455 F.2d 818, 826 (5th Cir. 1972) 5

In re E.P.A.,
803 F.3d 804 (6th Cir. 2015) 6

Lane County v. Oregon,
74 U.S. 71, 76 (1868) 12

Lemon v. Kurtzman,
411 U.S. 192, 200 (1973) 7

Massachusetts v. E.P.A.,
549 U.S. 497 (2007) 8

Massachusetts v. United States,
435 U.S. 444, 461, (1978) 13

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) 20

Milliken v. Bradley,
418 U.S. 717, 741 (1974) 16

Missouri v. Jenkins,
515 U.S. 70, 99 (1995) 16

Mitchell v. Pidcock,
299 F.2d 281, 286 (5th Cir. 1964) 5, 7

Nat'l Fed'n of Indep. Buss. v. Sebelius,
132 S. Ct. 2566, 2577 (2012) 10, 11, 13, 14

Nat'l Mining Ass'n v. U.S. Army Corp of Eng'rs,
145 F.3d 1399, 1409 (D.C. Cir. 1998) 6, 8

New York v. United States,
505 U.S. 144, 162 (1992) 12, 13, 14

Pennhurst State School and Hosp. v. Halderman,
451 U.S. 1 (1984) 12, 13

Price Waterhouse v. Hopkins,
490 U.S. 228, 250 (1989) 24

Printz v. United States,
521 U.S. 898 (1997) 11, 14

Reed v. Reed,
404 U.S. 71 (1971) 20

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218, 230 (1947) 12

Richmond Tenants Org. v. Kemp,
956 F.2d 1300 (4th Cir. 1992) 8

San Antonio Indep. Sch. Dist. v. Rodriguez,
511 U.S. 1, 93 (1973) 16, 18

South Dakota v. Dole,
483 U.S. 203 (1987). 13

Students and Parents for Privacy et al v. U.S. Dep't of Educ. et al,
Case No. 1:16-cv-4945 (N.D. Ill.) 2

Texas v. United States,
Case No. 15-40238, 69 (5th Cir. 2015) 5

United States v. Lopez,
514 U.S. 549, 580 (1995) 16

United States v. Texas,
Case No. 15-674 (2016). 9

United States v.North Carolina et al.,
Case No. 1:16-cv-425 (M.D.N.C.).. 4

United States. v. AMC Entm't, Inc.,
549 F.3d 760, 768 (9th Cir. 2008) 7, 8

Vaqueria Tres Monhitas, Inc. v. Irizarry,
587 F.3d 464, 487 (1st Cir. 2009)... 9

Viriginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n,
263 F.3d 379 (4th Cir. 2001) 8

Statutes

20 U.S.C. § 1681(a) (2016).. 21

42 U.S.C. § 2000a (2016) 21

Administrative Procedure Act, 5 U.S.C. § 706 (2012) 6

H.R. 1652, 113th Cong. (2013); S.439, 114th Cong. (2015)... 23

Idaho Code § 33-101 (2016) 20

Idaho Code § 33-107 (2016) 20

Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § (k), 92 Stat. 2076, 2076 (1978). 22

U.SC. § 706(2)(B)-(C) (2012) 16

Constitutional Provisions

Idaho Const. art. IV, § 5.. 1

U.S. Const. Amend. X 10

U.S. Const. Art. I § 8, cl 1, 18.. 10

U.S. Const. Art. II, 3, cl. 5. 10

U.S. Const. art. III, § 1 5

U.S. Const. art. VI, Cl. 2 10

Congressional Record

110 Cong. Rec. 2577–2584 (1964) 20

117 Cong. Rec. 30407 (1971) 22

118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh) 21

Other Authorities

Cary Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307 (2012) 21

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

C.L. "Butch" Otter is the Governor of Idaho. As Governor, he has a constitutional duty to see that the laws of Idaho are faithfully executed. Idaho Const. art. IV, § 5. Defendants' guidance for transgender students places unconstitutional restrictions on this responsibility and Idaho's sovereignty by creating a legislative rule without following proper administrative procedures. Governor Otter files an *amicus curiae* brief in this case because he has a strong interest in ensuring that Defendants follow the Tenth Amendment of the U.S. Constitution and the procedural requirements of the Administrative Procedure Act ("APA"). He also has a strong interest in preserving the principles of federalism that formed our nation and in maintaining state authority in areas that the Constitution left to the states. Further, Governor Otter has a stake in protecting Idaho's interests "independent of and behind the titles of its citizens…" *Georgia v. Tenn. Copper Co*., 206 U.S. 230, 237 (1907). Here, Defendants acted outside their authority by expanding the definition of "sex" where Congress and the U.S. Supreme Court have explicitly declined. Idaho, and every other state in the union, will be impacted by the outcome of this lawsuit despite not being a party.

Defendants presume that local school districts cannot handle this sensitive issue on their own. While school districts in Idaho are capable of adequately addressing the needs of transgender students, they are not necessarily capable of making substantial changes to existing facilities that would be required under this guidance to ensure that all students' privacy is protected.

There are 115 school districts and 48 public charter school districts in the state of Idaho. In 2015, Idaho received $161,129,873 in federal education funds. This comprises 34.4% of Idaho's Education budget, making Idaho the 15th state that is most dependent on federal education funding. *Fiscal Years 2015-2017 State Tables for the U.S. Department of Education, State*

Tables by State, U.S. Dept. of Education, (June 19, 2016) http://www2.ed.gov/about/overview/budget/statetables/index.html. Defendants threaten the loss of *all* federal education funds if a school district does not comply with their guidance for transgender students and their definition of "sex" under Title IX. ECF No. 6, Apx. J, 2 ¶ 2. This is an incredible overreach by the federal government. Not only are school districts at risk to lose funding, but Defendants' mandates also threaten civil liability for noncompliance. ECF No. 6, Apx. J, 2 ¶ 4. This creates significant risk to every school district in Idaho. It also threatens funding to the numerous school districts that are accommodating transgender students but may still be found out of compliance with Defendants' guidance documents.

The guidance exposes school districts to civil liability threatened by Defendants and from other students and parents who may feel unsafe under newly mandated policies. As Plaintiffs noted in their brief in support of a Preliminary Injunction, school districts who implement policies allowing transgender students to use facilities based on their gender identity have been sued. ECF No. 11, 7. *See also Students and Parents for Privacy et al v. U.S. Dep't of Educ. et al,* Case No.1:16-cv-4945 (N.D. Ill.). Defendants' "guidance" places school districts in a costly no-win situation. Most importantly, Defendants' "guidance" mandates school districts act in a certain way despite states historically having sovereignty over education policy.

STATEMENT OF THE CASE

Starting in 2010, Defendants slowly began to act outside their authority by expanding the definition of "sex" under Title IX of the 1972 Education Amendments ("Title IX"), to include "gender identity." In their first "Dear Colleague Letter" on the issue, Defendants state that Title IX protects all students, "including….transgender (LGBT) students." ECF No. 6 ¶ 39. In 2014, Defendants published a "Dear Colleague Letter" stating that Title IX prohibited discrimination

based on "gender identity" or "failure to conform to stereotypical norms of masculinity or femininity." *Id.* Finally, in May 2016, Defendants published its most recent "Dear Colleague Letter" which Plaintiffs refer to as the "Joint Letter" because it was sent on behalf of both the Department of Education and Department of Justice. Defendants intended this letter to respond to nationwide inquiries on how to meet the needs of transgender students. The Joint Letter states that if school districts do not create policies that conform to the guidance, they risk losing all federal education funds and expose themselves to civil liability. *See* ECF No. 6, Apx. J, 2. Most notably, the Joint Letter states that the definition of "sex" includes "gender identity" which Defendants define as an "internal sense of gender" and that students may use the bathroom and locker facilities consistent with that identity rather than their biological sex. ECF No. 6 ¶ 46-47.

Amicus Governor Otter supports Plaintiffs' claims for several reasons. First, Plaintiffs challenge Defendants' authority to change the definition of "sex" for the purposes of discrimination. Second, even if Defendants do have such authority, they still cannot change the definition of "sex" without following proper APA notice and comment procedures. As fellow Amicus *Eagle Forum* states in their brief, the issue is not the subject of the policy. The issue is *who* has the authority to create these policies and *how* these policies are created. Amicus Governor Otter strongly agrees with the Plaintiffs that Defendants do not have this authority. Only Congress can change the definition of "sex" to include gender identity or add a separate class within existing anti-discrimination statutes. And the authority to set policies for school facilities belongs to local school districts. Amicus Governor Otter adopts the Plaintiffs' factual statement. ECF No. 11, 2-11.

Amicus Governor Otter believes that Plaintiffs are entitled to a preliminary injunction and that it should apply nationwide. Defendants did not follow the proper procedures in expanding

the definition of “sex,” and intended this guidance to apply to every school district in the country.

Moreover, Defendants will not be injured by this Court requiring them to follow the law. Only Congress may expand the definition of “sex” to include “gender identity”. But even if Defendants do have the authority to expand the definition of “sex,” they cannot place conditions on existing funds to enforce new policies associated with the new definition. It is for these reasons that Governor Otter submits an amicus curiae brief on behalf of the State of Texas, et al.

ARGUMENT

I. Plaintiff’s Injunction Should Apply Nationwide

Plaintiff’s Preliminary Injunction should apply nationwide. To rule otherwise would create uncertainty for every school district across the country. An injunction that does not bar Defendants’ actions nationwide will not address Plaintiffs’ irreparable injuries. Defendants attempt to impose legally binding mandates, created in violation of the Constitution and the APA, on all school districts in every state and threaten the loss of all federal education funding and civil liability for noncompliance. In fact, Defendant Department of Justice has already filed a lawsuit against the state of North Carolina, arguing that a recently passed state law violated Defendants’ interpretation of the definition of “sex” for the purposes of Title IX. *United States v. North Carolina et al.*, Case No. 1:16-cv-425 (M.D.N.C.).

All school districts nationwide are impacted by the illegal mandates imposed by the Joint Letter and the series of other guidance by Defendants. Thus, all school districts should be released from the consequences of noncompliance through an injunction. All guidance published thus far by Defendants on this issue is nationwide in scope and on their face, affect all school districts the same way.

i. <u>This Court has the Authority to Grant a Nationwide Injunction</u>

This Court has the authority to grant a nationwide injunction. In fact, the APA and the Constitution compels it. The Constitution vests district courts with "the judicial Power of the United States." U.S. Const. art. III, § 1. "That 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*, Case No. 15-40238, 69 (5th Cir. 2015). "The reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…" Administrative Procedure Act, 5 U.S.C. § 706 (2012). *See also Earth Island Institute v. Ruthenbeck*, 490 F.3d 697 (9th Cir. 2006) (aff'd in part & rev'd in part on other grounds by *Summers v. Earth Island Inst.*, 555. U.S. 488 (2009). This means any agency action, whether it was a formal rule or other action, is subject to this standard. When an agency action is challenged, the district court has the authority and discretion to define the scope of the injunction. "Courts should not be loath[] to issue injunctions of general applicability…". "The 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." *Hodgson v. First Fed. Sav. & Loan Ass'n,* 455 F.2d 818, 826 (5th Cir. 1972) *quoting Mitchell v. Pidcock,* 299 F.2d 281, 286 (5th Cir. 1964).

ii. <u>Rules Created in Violation of the APA Should be Vacated</u>

Agency rules found to violate this standard or are otherwise unlawful must be vacated. "When 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 petitioner is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989). And alleging that an agency violated APA procedure is a facial challenge. *Nat'l Mining Ass'n v. U.S. Army Corp of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). When an agency rule or the rulemaking process is facially suspect, a nationwide injunction is proper. *See In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015). In that case, which is still ongoing, the Sixth Circuit weighed whether to affirm and extend a district court injunction on a rule promulgated by the Environmental Protection Agency ("EPA") The Sixth Circuit determined that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *Id*. at 808. The court granted a *nationwide* injunction stating that "…a stay will, consistent with Congress's stated purpose of establishing a national policy, 33 U.S.C § 1251(a), restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review." *Id.*

Plaintiffs in this case present a facial challenge to Defendants' Joint Letter and series of other guidance because Defendants' guidance is actually a legislative rule in violation of APA requirements. Like the plaintiffs demonstrated in *In re. E.P.A.,* here, a nationwide injunction is proper because the Joint Letter and other guidance published by Defendants since 2010 were published without following proper APA Notice and Comment procedure and thus void on their face. Further, like the Rule challenged in *In re E.P.A.,* Defendants' definitional change of the word "sex" will have "ripple effects" nationwide. And it is better to require agencies to follow proper rulemaking procedures than to permit an illegal rule to remain while in litigation. Thus, if this Court grants the preliminary injunction and ultimately grants Plaintiffs' merits claims, relief should not be limited to the district where this case resides. It must be thrown out entirely.

iii. <u>District Courts May Define the Scope of an Injunction</u>

A trial court has broad discretion in defining the scope of an injunction. "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). A district court's entry of a nationwide injunction is reviewed "for an abuse of discretion, or an erroneous application of legal principles. *United States. v. AMC Entm't, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008). "[A] trial court abuses its discretion by fashioning an injunction which is overly broad." *Id*. However, even between non-government parties, a nationwide injunction is not necessarily overly broad. For example, the Fifth Circuit directed the district court to issue a nationwide injunction against defendant dress maker convicted of unfair competition. *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695 (5th Cir. 1981). The court noted that a broad injunction was not intended to be something burdensome, but rather required defendants to obey the law. *Id.* The Fifth Circuit recognized this purpose for broad injunctions countless times. When injunctions are granted to require defendants to merely comply with the law, there is no penalty or hardship. *Mitchell,* at 287.

Here, a nationwide injunction would not be overly broad, despite only some states challenging the guidance. Defendants' mandates impose liability and threaten loss of *all* federal education funding for every school district in the country. Relief should also apply nationwide. The guidance also threatens civil liability for failure to comply. The consequences associated with an injunction narrowly tailored to the parties in this case are significant, particularly until courts can rule on the merits of this issue. While school districts across the country face uncertainty about existing funding and new risks for civil liability, Defendants are not injured by a nationwide injunction. A nationwide injunction would provide certainty for everyone affected

by the guidance while these cases are decided. And if this Court determines that the guidance was created in violation of the Tenth Amendment along with other constitutional requirements and the APA, Defendants merely have to follow the proper procedures to achieve their regulatory goals. Further, a nationwide injunction does not injure transgender students, because school districts can still provide tailored accommodations. It will only prevent Defendants from imposing mandates that violate the Constitution and APA procedures.

iv. Non-Parties Will Be Negatively Impacted by Defendants' Actions

Courts routinely recognize that procedural failures invalidate executive action "nationwide," for "plaintiffs and non-parties alike," *Nat'l Mining Ass'n,* at 1408-10. This is particularly true when plaintiffs are located throughout the country and represent interests of similarly situated individuals who are not a party to the case. *See Hedges v. Obama,* 2012 WL 2044565, at 2-3 (S.D.N.Y. June 6, 2012). The Fourth Circuit similarly held that a nationwide injunction was appropriate if "necessary to afford relief to the prevailing party." *Viriginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n,* 263 F.3d 379 (4th Cir. 2001). That case cited another case where a nationwide injunction prohibiting the eviction of public housing tenants was appropriate because plaintiffs were from across the country. *See Richmond Tenants Org. v. Kemp,* 956 F.2d 1300 (4th Cir. 1992)And in fact, "[o]nce a court has obtained personal jurisdiction over a defendant, the court has the power to enforce the terms of the injunction outside the territorial jurisdiction of the court, including issuing a nationwide injunction." *United States v. AMC Entm't, Inc.*, at 770. Courts can also order that a remedy applies nationwide, despite a non-party's opposition. *Massachusetts v. E.P.A.,*549 U.S. 497 (2007). More recently, the Fifth Circuit, in a ruling upheld in a 4-4 vote by the Supreme Court, held that an injunction on an executive order on immigration policy applied nationwide. *United States v. Texas,* No. 15-

674 (2016). Plaintiffs in that case, were, similar to this case, twenty-six states challenging a federal action that violated the APA and the Take Care Clause of the Constitution. *See Texas v. United States,* 86 F.Supp 3d 591 (S.D. Tex 2015)(*Texas v. United States*, Case No. 15-40238, 69 (5th Cir. 2015). A nationwide injunction was proper because the executive order dealt with immigration, a policy area both Congress and the U.S. Supreme Court describe as a "unified system" that should be enforced "uniformly". *Id.*

Here, Plaintiffs represent a percentage of the states in the Union and are located in several appellate circuits. Furthermore, Plaintiff and non-plaintiff states alike are similarly interested in and situated toward actions of the federal executive branch and its agencies. And every state is at risk for losing federal funding if school districts do not comply with Defendants' mandate. Additionally, there are several other lawsuits around the country. Staying the implementation of this guidance would allow these lawsuits to proceed without uncertainty for all litigants and non-litigants that will ultimately be affected by the outcomes.

District courts are in the best position to tailor the scope of injunctive relief to the factual findings. *Vaqueria Tres Monhitas, Inc. v. Irizarry,* 587 F.3d 464, 487 (1st Cir. 2009). It is entirely appropriate to base "the scope of preliminary injunctive relief" on both the "likelihood of success and [the] showing of irreparable harm." *Id.* In Plaintiff's Application for Preliminary Injunction, they demonstrate that Defendants unlawfully passed a legislative rule without following APA notice and comment procedure. Expanding the definition of "sex" "affects the rights and obligations of employers, public schools and students across the country." ECF No. 11, 13. Defendants exceeded their authority by expanding the definition of "sex" where Congress has explicitly declined. A nationwide injunction is the only way to prevent Defendants'

unprecedented violation of the Tenth Amendment, the separation of powers and APA requirements.

II. <u>Defendants' Actions Violates the Basic Principles of Federalism</u>

Through the Supremacy Clause, the Constitution sets itself as the ultimate law of the land. U.S. Const. art. VI, Cl. 2. All laws, whether federal or state, must not violate it. And from the Constitution flows the specifically enumerated powers to each branch of the federal government. For example, the Constitution directs Congress to, "…pay the debts and provide for the common Defence and general Welfare of the United States…" and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers…"U.S. Const. Art. I § 8, cl 1, 18. The Constitution also directs the President to "take care that the laws be faithfully executed." U.S. Const. Art. II, 3, cl. 5. However, the Tenth Amendment states that "...powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively…" U.S. Const. Amend. X.

i. <u>Congress Only has the Authority Enumerated to it By the Constitution</u>

This principle does not work both ways. The Supreme Court stated explicitly that "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." *Nat'l Fed'n of Indep. Buss. v. Sebelius,* 132 S. Ct. 2566, 2577 (2012). (hereinafter, "NFIB"). Thus, the Constitution is the source of the federal government's power but it is not the source of the States.' The Constitution does impose some restrictions on states; but the states do not need express Constitutional authorization to take action. *Id.* at 2578.

As James Madison stated, "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961). The State thus performs "many of the vital functions of modern government-punishing street crime, running public schools, and zoning property for development…" despite the fact that the Constitution doesn't enumerate this power at all. *NFIB,* at 2578. These powers are collectively called the "police powers." And the benefit of these powers being left to the states ensures that the governing that "touch[es] on citizens' daily lives [is] normally administered by smaller governments closer to the governed." *Id.* A decentralized government is more sensitive to the needs of society and it allows for more participation by in the democratic process. However, the Supreme Court stated that the federalist system's "principal benefit" is a "check on abuses of government power." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id., quoting Bond v. United States,* 564 U.S. 211 (2011). "This distinction between state and federal authority is one of the most important facets of our system of government." *Printz v. United States*, 521 U.S. 898 (1997).

In addition to being limited in what Congress may regulate instead of the states, Congress is also limited in how it regulates activities undertaken by the states. The first limitation is that powers delegated to Congress are intended to regulate *individuals*. Thus, Congress may not directly compel states to exercise their sovereign powers. *Fed. Energy Regulatory Comm'n v. Mississippi,* 456 U.S 742, 769 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n,*

Inc., 452 U.S. 264,288–289 (1981); *Lane County v. Oregon,* 74 U.S. 71, 76 (1868). Nor can Congress dictate how a state exercises its sovereign powers. The Supreme Court held:

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the states, the Constitution has never been understood to confer upon Congress the ability to require the state to govern according to Congress' instructions. *New York v. United States,* 505 U.S. 144, 162 (1992).

Further, Congress cannot require states to address particular problems, nor command states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. Such commands are fundamentally incompatible with our constitutional system of dual sovereignty. *Id.*

However, if Congress "intends to alter the 'usual constitutional balance between the States and the Federal Government' it must make its intention to do so 'unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985); see also *Pennhurst State School and Hosp. v. Halderman,* 451 U.S. 1 (1984). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, at 461. Additionally, historic powers reserved to the States cannot be superseded by a federal act, "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). However, Congress may use authority under the Spending Clause to encourage states to enact certain policies.

ii. <u>States Must have a Clear Choice to Accept Funds Under the Spending Clause</u>

Congress may use the spending clause to achieve objectives outside their enumerated legislative fields, but it must be in the pursuit of the general welfare. They must also do so unambiguously, "enabling states to exercise their choice knowingly, cognizant of consequences of participation." *Pennhurst*, at 17. Congress "may not compel the States to enact or administer a federal regulatory program." *New York,* at 177. Finally, conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States,* 435 U.S. 444, 461, (1978). The Supreme Court has regularly viewed Spending Clause legislation in the same way it views a contract. *Barnes v. Gorman,* 536 U.S. 181, (2002) (*See also Pennhurst, supra).* "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *NFIB,* at 2602 *quoting Pennhurst,* at 17. The Supreme Court views this as critical in ensuring that the Spending Clause does not undermine the "status of the States as independent sovereigns in our federal system." *Id.* "the Federal Government can achieve its objectives without accountability..." if states do not have a legitimate choice whether to accept funding. *NFIB* at 2603.

For example, the Supreme Court upheld a federal statute that conditioned states' receipt of a portion of federal high funds upon adopting a minimum drinking age of 21. *South Dakota v. Dole*, 483 U.S. 203 (1987). In that case, the Supreme Court held that enacting the law remained the "prerogative of the States not merely in theory, but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly…" *Id.* at 211-12. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208. However, Congress did not restrict how the highway funds—set aside for specific highway improvement and maintenance efforts—were to

be used. The states were free to reject the offer of federal highway funds if they wished to keep a lower drinking age.

Conversely, the Supreme Court has struck down legislation that *coerces* through the Spending Clause instead of encourages, particularly if Congress could not command states to act directly. Congress is "not free to . . . to penalize States that choose not to participate in that new program by taking away their existing . . . funding. *NFIB at* 2607. In *NFIB,* the Supreme Court held that the Medicaid expansion of the Patient Protection and Affordable Care Act was unconstitutional as a result of the application of the anti-coercion principle. *Id.* Chief Justice Roberts' opinion "relied on three principal factors: (1) the dramatic size of the Act's Medicaid expansion . . . ; (2) states' long-term reliance on federal funds they had been receiving under the preexisting Medicaid program; and (3) the enormous size of the grants the Act threatened to withdraw from nonparticipating states." Looking at these factors, states did not have a true choice whether to expand Medicaid. They risked losing out on Medicaid funding altogether since most states cannot afford to fund the program on their own.

Congress may not commandeer a State's legislative or administrative apparatus for federal purposes. *NFIB,* at 2602 *quoting Printz,* at 933. In *Printz,* the Court struck down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers. *Id.* Likewise, in *New York,* the Court invalidated a requirement that states take title to nuclear waste or enact certain waste regulations. At 174-175. These decisions were important checks on the federal Spending Clause authority.

iii. <u>Agencies Only have the Authority Delegated to Them by Congress</u>

The Office of Civil Rights ("OCR") enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the

Department of Education. *About OCR*, U.S. Department of Education (June 14, 2016) http://www2.ed.gov/about/offices/list/ocr/aboutocr.html. Congress granted enforcement authority to this office which means it has discretion to withhold funds if it determines a school violated a federal anti-discrimination law. This includes Title IX of the Education Amendments of 1972 ("Title IX"). However, OCR's authority is limited to what Congress delegated to it. The APA states that agencies may not act "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." U.SC. § 706(2)(B)-(C) (2012). And Congress may not delegate authority it does not have itself. The states have relied on federal assistance for all educational programs since the passage of the Morrill Act in 1890. *About OCR*, U.S. Department of Education (June 14, 2016) http://www2.ed.gov/about/overview/fed/role.html. Furthermore, Title XI requirements have clearly outlined the class of protected individuals – those discriminated against on the basis of sex – since the legislation's enactment in 1972.

The Joint Letter and the series of other guidance documents issued by Defendants on this issue since 2010 constitute a serious overreach of federal authority. The letter claims that *all* existing federal education funding is conditioned upon following this "significant guidance" that expands the definition of "sex" and requires new accommodations for the new members of this class. The guidance also threatens civil liability. This guidance does not give states or local school districts a true choice whether or not to comply because it jeopardizes all existing funding. In fact, many school districts in Idaho state they will enact new policies for fear of losing federal funds. *Local School Districts Lack Transgender Bathroom Policies*, Meridian Press (June 14, 2016) http://www.mymeridianpress.com/meridian/local-school-districts-lack-transgender-bathroom-policies/article_db2ec11e-98bd-507e-acb3-f8ccaf01323e.html. Just as the

Supreme Court invalidated Congress's attempt to condition all Medicaid funding on accepting a new definition of who qualified for it, this Court should also invalidate Defendants' attempts to condition all education funding on a new definition of "sex." If Congress does not have the authority to condition funds in this way, an agency, whose authority is limited to what was delegated by Congress, does not either.

iv. Education Policy is Regulated By States as One of the Police Powers

Federalism protects the individual from having "all the concerns of public life" governed exclusively by one central government. *Bond,* at 211. Education policy has also historically been regulated by the States as one of the police powers. The Supreme Court recognizes that "education is perhaps the most important function of *state and local governments." Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954) (emphasis added.) The Supreme Court reiterated that education is a traditional concern of the states in a concurring opinion in *United States v. Lopez,* 514 U.S. 549, 580 (1995). The Supreme Court further believes that local control is crucial. "No single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). Twenty years later, the Supreme Court still found that "local autonomy of school districts is a vital national tradition…" *Missouri v. Jenkins,* 515 U.S. 70, 99 (1995). Local control is important because it "affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Indep. Sch. Dist. v. Rodriguez,* 511 U.S. 1, 93 (1973).

Here, Defendants completely cut out local school districts and communities from finding solutions to accommodate their transgender students. This is in spite of the fact that many school

districts in Idaho have already undertaken this issue and were working out practical solutions in collaboration with their communities.

For example, Idaho's West Ada School District works with students and their families on an individual basis. Many of their schools have single occupant restrooms for any student to use. In a recent news article, their district spokesperson stated that "oftentimes (the restroom) isn't even…part of the plan for the student, because that's…not something the student expresses as a need to be successful at school." *Local School Districts Lack Transgender Bathroom Policies,* Meridian Press (June 14, 2016) http://www.mymeridianpress.com/meridian/local-school-districts-lack-transgender-bathroom-policies/article_db2ec11e-98bd-507e-acb3-f8ccaf01323e.html. He went further, stating that their motivation is to "make sure that we are taking care of all our kids to the best of our ability." *Id.* The Nampa School District also works with students on a case-by-case basis "according to how the student would like to proceed." *Id.* The Boise School District expressed concerns about implementing a policy that conforms to the federal mandate saying, "Gender identity is not a fluid concept. A student may not choose to identify as a male one day and female the next. School districts elsewhere that have implemented these policies require that the gender identification be both persistent and consistent over time." *Id.* Blaine County is also having discussions about creating a policy that addresses the needs of transgender students. In accordance with their district policies and procedure, they invited Blaine County residents to testify on the issue at a regular school board meeting in May. Kevin Richert, *Blaine County Hears Divided Testimony on Transgender Policy*, Idaho Ed News (July 15, 2016) http://www.idahoednews.org/kevins-blog/blaine-county-hears-divided-testimony-transgender-policy/.

This is exactly how these policies should be developed. As the Supreme Court stated in *San Antonio*, a process that allows public participation, followed by a decision by the local school board-all of whom are elected by their community- is the best way to foster democracy, innovation and to address the needs of the community. This is how local school districts in Idaho have addressed every important education policy. Local school districts are ultimately responsible for the decisions that directly impact the students in their community. If the voters in that district are unhappy with the decisions made, they can remove the board members from office. This is the best way to ensure that the power to make education policy remains at the most local level where it is addressed most effectively.

v. States May Not Violate an Individual's Constitutional Rights

There are certainly limits to State authority. Even in areas historically reserved to the states, laws may not violate an individual's Constitutional rights. The Supreme Court applies strict scrutiny when a state law appears to affect or disadvantage a suspect class or interfere with fundamental rights protected by the Constitution. *San Antonio,* at 19. Specifically, states cannot pass laws, for education or otherwise, that violate the 14th Amendment. However, the Supreme Court has been very cautious in the way it addresses state authority over education policy. For example, declining to hold that education was a constitutionally protected right and in fact acknowledged they did not have the authority or ability to guarantee such a right. *San Antonio* at 31.

The Supreme Court has never determined "gender identity" to be a protected class nor has it expanded the definition of "sex" to include "gender identity". And Congress has explicitly declined to expand the class protected under the definition of "sex" or create a protected class

based on gender identity in anti-discrimination laws relevant to this case. Nevertheless, Defendants are trying to expand this definition and an existing protected class by circumventing constitutional requirements. Defendants cannot, through a "guidance document," change who belongs in a protected class.

Running public schools encompasses a wide variety of areas including acquiring real property, building and funding the facilities, setting curriculum, making recommendations to the state legislature and setting standards for teachers. *See* Idaho Code § 33-101 (2016), Idaho Code § 33-107 (2016). But Defendants' guidance directly interferes with that authority by mandating local school districts take certain actions. While states are not permitted to craft education policy that discriminates based on sex or against other protected classes, the two branches of the federal government that *can* create policies in this area have specifically declined. Thus, this authority remains with the states. As mentioned above, there are important reasons for the separation of powers and checks on federal authority. This Court should not permit Defendants to disregard these foundational elements of our government. If both Congress and the Supreme Court have declined to expand the definition of "sex" to include "gender identity," an executive agency cannot do so on its own initiative.

III. Sex Discrimination

i. History of Protections Against Sex Discrimination

In 1964, Congress enacted the Civil Rights Act, which prohibited discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000a (2016). Notably, this monumental legislation outlawed racial segregation and required equal treatment for all by public accommodations, schools and employers. "Sex" was added at the last minute on the floor of the House of Representatives. There is some speculation that it was added to kill the entire

bill, but regardless it passed quickly as amended. 110 Cong. Rec. 2577–2584 (1964), *See also Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57 (1986). However, because of this, there is little legislative history of this Act to determine what Congress intended.

In 1971, the U.S. Supreme Court struck down an Idaho law that gave preference to men over women to be administrators of a decedent's estate. *Reed v. Reed*, 404 U.S. 71 (1971). The Court determined that

> giving mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment…

Id. at 76. This ruling meant that states were also prohibited from passing laws that discriminated by treating similarly situated people differently on the basis of sex. Two years later, the Supreme Court recognized that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth…" *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Congress passed Title IX of the Education Amendments in 1972 to address invidious discrimination on the basis of sex in federally funded education programs and facilities. 20 U.S.C. § 1681(a) (2016).

ii. Title IX is Not Equipped to Protect Students Based on Gender Identity

Title IX was passed in response to widespread academic discrimination against women. Congressional discussions of Title IX focused on the widespread belief that once women married, their primary role and desire was to be in the home. Cynthia Harrison, On Account of Sex: The Politics of Women's Issues, 1945-1968, at 122 (1988) (quoting Rep. Celler). Thus, the

federal government wanted to ensure that women, specifically, were treated equal to men under the law. Congress believed that there were some significant differences between men and women that created historical disparity between them. Title IX was enacted specifically to protect women from being denied the same educational and extracurricular opportunities as men. Today, it prevents discrimination against women in all aspects of education including: admissions, recruitment, course offerings, counseling, financial assistance, student health, insurance benefits, housing, marital and parental status of students, harassment and athletics. *Title IX and Sex Discrimination*, U.S. Department of Education. (June 14, 2016) http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

Legislative history demonstrates that Title IX was meant to provide comprehensive protection for women. It states that Title IX was to be "a strong and comprehensive measure [which would] provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh). Further, Title VII, Title IX and later, the Pregnancy Discrimination Act, demonstrate that the discrimination women experienced were based on the historical perception that women's primary role in society was homemaking. Cary Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307 (2012). *See also* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § (k), 92 Stat. 2076, 2076 (1978).

Shortly after Title IX became law, Defendants created a three part test to ensure that universities provided the same *opportunities* specifically to women as they were to men. A university must show one of the following: (1) substantial proportionality, (2) historical and continuing practice of program expansion for the underrepresented sex, or (3) fully and

effectively accommodating the interests of *women.* Pub. L. No. 93–380, § 844, 88 Stat. 612 (1974). In fact, legislative history shows Congress's intention to provide equal access to educational opportunities and not to legislate beyond that. Senator Birch Bayh stated, "…What we are trying to do is to provide equal access for women and men students to the education process and the extracurricular activities in school…We are not requiring that…the men's locker room be [sexually] desegregated." 117 Cong. Rec. 30407 (1971).

Title IX's intention to create educational opportunities for women is in sharp contrast to Defendants' guidance documents over the last six years. Here, Defendants attempt to create a presumption of a protected class and an expanded definition of "sex" where Congress and the Supreme Court declined. Congress explicitly declined to extent Title VII and Title IX protections based on sexual identity and sexual orientation. When Congress has discussed the issue, it always treated sexual orientation and gender identity as categories separate from sex. There have been several attempts to add these *new* categories but Congress has declined to do so. *See* H.R. 1652, 113th Cong. (2013); S.439, 114th Cong. (2015).

iii. <u>All Levels of Government Treat Gender Identity as a Separate Category</u>

Additionally, when state and local governments have prohibited discrimination on the basis of sexual orientation or gender identity, they are always separate categories. In fact, seventeen states already expressly extend protections to students based on gender identity and sexual orientation. *Maps of State Laws and Policies*, Human Rights Campaign (June 14, 2016) http://www.hrc.org/state_maps. These states do not merely combine two classes into one as Defendants did, but rather addressed the distinct needs of each group. Sixteen states and Washington D.C. also banned employment discrimination on the basis of gender identity or expression. Again, these states created a separate category for transgender individuals rather than

expanding the definition of "sex." Further, nearly 150 localities across the country specifically provide protection from discrimination based on gender identity. *Non-Discrimination Laws that Include Gender Identity and Expression,* Transgender Law and Policy Institute (June 14, 2016) http://www.transgenderlaw.org/ndlaws/.

The discrimination experienced by students based on gender identity is outside the scope of Title IX. The type of discrimination Defendants intend to protect against through the last six years of policy documents suggest vastly different needs than those based on sex as anticipated by the drafters of Title IX. Transgender students feel discriminated when they are not permitted to live in a way that reflects their internal sense of gender. And many experience bullying when they do live in a way that demonstrates their internal sense of gender. The Joint Letter states that "a school must not treat a transgender student differently from the way it treats other students of the same gender identity." ECF No. 6, Apx. J, 2. Title IX requires that all students receive the same educational opportunities regardless of sex.

But transgender students are not barred from certain classes based on their transgender status, nor are they prohibited from attending college. Transgender students may participate in extracurricular activities and try out for athletic programs. Title IX does not mandate that schools must provide separate bathroom and locker facilities for both sexes, but rather, permits schools to segregate based on sex for this purpose. The mandates Defendants outlined in their policy documents on gender identity go outside the scope of protections that Title IX is able to provide. Thus, if Defendants wish to provide additional protections to students on a nationwide scale based on gender identity, they must petition Congress to act.

iv. <u>Biological Differences Between Sexes are Significant</u>

Defendants at once presume that biological differences are insignificant when using bathroom and locker room facilities but not for participating in athletics. The Joint Letter focuses on how students present themselves at school and what bathroom and locker room facilities they will use, but does not extend to choosing athletic programs based on gender identity. The Joint Letter states that Title IX permits schools 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, Apx. J, 3. This demonstrates that Defendants do recognize that biological differences are significant enough to separate sexes for athletic programs but not for student privacy in bathrooms and locker rooms.

v. **Sex Stereotyping is Different than Not Accommodating Gender Identity**

Sex stereotyping is prohibited by Title IX. While the Supreme Court has refined the notion of stereotyping, Title IX and other anti-discrimination laws get to the heart of assumptions of suspect classes. As detailed above, Title IX intended to prohibit policies based on assumptions about women's primary role in society. The Supreme Court has further defined when unlawful sex stereotyping occurs. Unlawful sex stereotyping occurs when an employer or school official treats someone differently because they behave or look differently than traditional gender norms. For example, an accounting firm could not deny a woman a partnership based on assumptions that she was too "aggressive" or was described by coworkers as being "macho." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). Additionally, sex stereotyping occurs when an employer states that a female employee with an "aggressive" personality needs a "course at charm school." Further, an employer cannot suggest "an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick." *Id.* at 256.

While Defendants' Joint Letter and other guidance does not require schools to allow transgender students to participate in athletic programs based on their gender identity, it does prohibit gender stereotyping in athletic programs. Again, Title IX requires schools to provide *opportunities* for participation. It does not mandate that students must make the teams for which they try out. But, denying a student a spot on a boys' football team because they do not display stereotypically "male" behaviors is much different than denying a biologically male student permission to use the female locker room facilities.

Defendants' guidance goes above and beyond prohibiting schools from mere sex stereotyping. Instead, Defendants attempt to suggest that biology itself is an improper stereotype. But making policies based on perceived societal and cultural differences about femininity and masculinity are different than making policies based on biology to protect the privacy of all students. As Defendants and many others have stated, biological sex is an immutable characteristic with which each person is born. Many argue that *gender* is based on cultural and societal influence and is fluid. And schools requiring students to conform to traditional gender stereotypes to use the corresponding bathroom and locker facilities is much different and more subjective than delineating these facilities based on anatomy and biology.

CONCLUSION

It is for these reasons and those argued by the Plaintiffs that this Court should grant a preliminary injunction against the policies proposed by Defendants.

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Respectfully submitted,

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