IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA; STATE OF ARKANSAS, ARKANSAS DIVISION OF YOUTH SERVICES; STATE OF KANSAS; ATTORNEY GENERAL BILL SCHUETTE, FOR THE PEOPLE OF THE STATE OF MICHIGAN; STATE OF MONTANA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF WYOMING, CALLAWAY PUBLIC SCHOOL DISTRICT; ARNOLD PUBLIC SCHOOL DISTRICT,

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his Official Capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her Official Capacity as Attorney General of the United States; VANITA GUPTA, in her Official Capacity as Principal Deputy Assistant Attorney General; UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; JENNY R. YANG, in her Official Capacity as Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration,

Defendants

Case No. 4:16-CV-03117

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

The State of Nebraska, two Nebraska public school districts, and nine additional States seek a declaration that various federal agencies have violated the Administrative Procedure Act and numerous other federal laws by rewriting the unambiguous term "sex" under Title VII and Title IX to mean or include "gender identity," thereby seeking to control even local school determinations regarding how best to designate locker room and bathroom assignments. Without engaging in any rulemaking procedures—and in violation of the plain text and longstanding meaning of Titles VII and IX— the Department of Education ("ED") issued a joint letter with the Department of Justice ("DOJ") on May 13, 2016, declaring "significant guidance." The letter confirmed that the federal executive branch has formalized its new definition of the term "sex" and threatened enforcement action against any of the more than 100,000 elementary and secondary schools that receive federal funding if those schools choose to provide students with showers, locker rooms, and restrooms designated by biological sex, consistent with one's genes and anatomy.

Plaintiffs include States from all regions of the country that authorize, support, supervise, or operate school systems and other institutions subject to ED's final agency action and enforcement threat. Plaintiffs stand united behind the constitutional principle that it is the duty of Congress to legislate, while it is the duty of the Executive Branch, including its various federal agencies, to administer and enforce the laws that Congress enacts. Defendants lack authority to amend those laws by executive fiat and to threaten Plaintiffs and their

subdivisions with the loss of billions of dollars in federal education funding if Plaintiffs continue to abide by the laws Congress actually passed.

I. PARTIES

A. Plaintiffs

1. Plaintiff State of Nebraska is subject to Title VII as the employer of thousands of people statewide. The State of Nebraska also oversees and controls several agencies that receive federal funding subject to Title IX. For example, the Nebraska Department of Corrections ("NDOC"), the Nebraska Correctional Youth Facility ("NCYF"), Geneva North High School, and Kearney West High School are operated by the State of Nebraska and receive federal funding subject to Title IX. For federal fiscal year 2015-2016, the Nebraska Department of Correctional Services has received to date $125,107 in federal education funds. For federal fiscal year 2015-2016, Geneva North received $59,584.70 in federal education funds and Kearney West received $143,407.45 in federal education funds. Additionally, for federal fiscal year 2015-2016, the Nebraska Department of Education received $328,604,163 in federal funding for K-12 education, of which $308,534,665 was distributed to local school districts in the State of Nebraska. For the federal fiscal year 2016-2017, the Nebraska Department of Education estimates that it will receive federal funding in the amount of $332,421,410, of which $312,215,578, will be distributed to local school districts.

2. Plaintiff Callaway Public School District ("Callaway PSD") is an independent school district located in Callaway, Custer County, Nebraska. Additional information about Callaway Public School District is designated *infra*.

3. Plaintiff Arnold Public School District ("Arnold PSD") is an independent public school district located in Arnold, Custer County, Nebraska. Additional information about Arnold Public School District is designated *infra*.

4. As Title IX has expressly permitted until now, Nebraska law allows for school districts to adopt policies which maintain separate locker room and restroom facilities for different sexes. Neb. Rev. Stat. § 79-2,124 (Reissue 2014) provides: "The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes."

5. Plaintiff States of Arkansas, Kansas, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota and Wyoming are similarly situated to the State of Nebraska in that one or more of the following circumstances is present: (1) they are employers covered by Title VII, (2) their agencies and departments are subject to Title IX, (3) their agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, and/or (4) they have public educational institutions, school districts, departments, or agencies in their State that are subject to Title IX.

6. For instance, Arkansas' Division of Youth Services also operates residential treatment centers for juveniles adjudicated delinquent, including the Mansfield Juvenile Treatment Center, the Mansfield Juvenile Treatment Center for Girls, and the Arkansas Juvenile Assessment and Treatment Center. Additionally, Arkansas operates several other specialized schools, including the Arkansas School

for Mathematics, Science, and the Arts, the Arkansas School for the Blind and Visually Impaired, and the Arkansas School for the Deaf. Those institutions all receive federal funding subject to Title IX.

7. The State of Wyoming, through its Department of Family Services, directly operates residential treatment centers for juveniles adjudicated delinquent, the Wyoming Boys' School and Wyoming Girls' School. Wyoming also plans for and constructs all K-12 public school facilities through a centralized state agency, the school facilities division of the state construction department. These entities are subject to Title IX.

8. The State of South Carolina received approximately $870 million in federal education funds in federal fiscal year 2015-2016.

9. The State of Kansas received $534.7 million in federal education funds during federal fiscal year 2015-2016, of which $511 million was distributed to local school districts in the State of Kansas. For federal fiscal year 2016-2017, Kansas estimates that the amounts received from the federal government and distributed to local school districts will be approximately the same as in the 2015-2016 federal fiscal year. Kansas also operates two specialized schools, the Kansas School for the Deaf and the Kansas State School for the Blind that receive federal funding subject to Title IX. For federal fiscal year 2015-2016, the Kansas School for the Deaf received $325,826 in federal education funds, and the Kansas State School for the Blind received $517,901 in federal education funds. Kansas estimates that both schools will receive approximately the same amount in federal education funds in the 2016-2017 federal fiscal year. In addition, Kansas's Department of Corrections operates

two juvenile correctional facilities, the Kansas Juvenile Correctional Complex and the Larned Juvenile Correctional Facility. The Larned facility houses only males. Both facilities provide education services including high school diploma and general education development ("GED") programs. Each of these facilities receives federal funding subject to Title IX. The Kansas Constitution delegates to the Kansas State Board of Education the "general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents." Kan. Const. art. 6, § 2(a). On June 14, 2016, the Kansas State Board of Education officially opposed the May 13, 2016 "guidance" issued by ED and DOJ, and unanimously adopted a response, which states in part: "The recent directive from the civil rights offices of the United States Department of Education and the U.S. Department of Justice regarding the treatment of transgender students removes the local control needed to effectively address this sensitive issue. We must continue to provide our schools the flexibility needed to work with their students, families and communities to effectively address the needs of the students they serve." Kansas State Department of Education, Kansas State Board of Education statement in response to "Dear Colleague" letter on Title IX federal guidance, *available at* http://bit.ly/28LzQ1Q.

B. Defendants

10. Defendant ED is an executive agency of the United States and responsible for the administration and enforcement of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 ("Title IX").

11. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of ED. He is sued in his official capacity.

12. Defendant DOJ is an executive agency of the United States and responsible for the enforcement of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, known as Title VII. DOJ also has the authority to bring actions enforcing Title IX. Exec. Order No. 12250, 28 C.F.R. Part 41 app. A (1980).

13. Defendant Loretta A. Lynch is the Attorney General of the United States and head of DOJ. She is sued in her official capacity.

14. Defendant Vanita Gupta is Principal Deputy Assistant Attorney General at DOJ and acting head of the Civil Rights Division of DOJ. She is assigned the responsibility to bring enforcement actions under Title VII and Title IX. 28 C.F.R. §42.412. She is sued in her official capacity.

15. Defendant Equal Employment Opportunity Commission ("EEOC") is a federal agency that administers, interprets, and enforces certain laws, including Title VII. EEOC is, among other things, responsible for investigating employment and hiring discrimination complaints.

16. Defendant Jenny R. Yang is the Chair of the EEOC. In this capacity, she is responsible for the administration and implementation of policy within EEOC, including the investigating of employment and hiring discrimination complaints. She is sued in her official capacity.

17. Defendant United States Department of Labor ("DOL") is the federal agency responsible for supervising the formulation, issuance, and enforcement of

rules, regulations, policies, and forms by the Occupational Safety and Health Administration ("OSHA").

18. Defendant Thomas E. Perez is the United States Secretary of Labor. In this capacity he is authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA. He is sued in his official capacity.

19. Defendant David Michaels is the Assistant Secretary of Labor for OSHA. In this capacity, he is responsible for assuring safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. He is sued in his official capacity.

II. JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns Defendants' *ultra vires* revision of the term "sex" under multiple provisions of the United States Code and the new obligations Defendants are imposing on Plaintiffs under Title VII and Title IX. This Court also has jurisdiction to compel an officer of the United States or any federal agency to perform his or her duty pursuant to 28 U.S.C. § 1361.

21. Venue is proper in the Federal District Court of Nebraska pursuant to 28 U.S.C. § 1391 because the United States, several of its agencies, and several of its officers in their official capacity are Defendants, and because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District; and Plaintiffs Callaway Public School District and Arnold Public School District are both

employers subject to Title VII, and recipients of federal monies subject to Title IX restrictions in Custer County, Nebraska.

22. This Court is authorized to award the requested declaratory relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201–2202. The Court is authorized to order corrective action under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 611.

III. STATEMENT OF FACTS

A. State Law

23. Nebraska law allows for school districts to adopt policies which maintain separate locker room and restroom facilities for different sexes. Specifically, Neb. Rev. Stat. § 79-2,124 (Reissue 2014) provides: "The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes." Title IX regulations issued by ED likewise expressly allow recipients of federal funding to "provide separate toilet, locker room, and shower facilities on the basis of sex," provided that the facilities provided for "students of one sex" are "comparable" to the facilities provided for "students of the other sex."

24. Nebraska law provides school districts with the flexibility to fashion policies which weigh the dignity, privacy, and safety concerns of all students, while accommodating the legitimate interests of individuals who self-identify as having a gender that is the opposite of their sex. *See, e.g.*, Neb. Rev. Stat. §§ 79-501 and 79-526(1).

25. Nebraska law also allows employers to provide a bona fide occupational qualification ("BFOQ") on the basis of "sex" (as well as on the basis of "religion," "disability," "marital status," or "national origin" – but *not* "race" or "color") (*See* Neb. Rev. Stat. §§ 48-1104 and 48-1108) including where necessary to avoid litigation, such as for actions based in tortious and constitutional invasions of privacy. Privacy-based BFOQs on the basis of "sex" are rooted in the physiological differences between males and females consistent with their genes and anatomy, not gender identity.

26. The additional Plaintiff states all have similar laws, policies, or practices. Indeed, Arkansas law even provides that there shall be "[s]eparate toilet rooms for males and females" in any "factory, manufacturing establishment, workshop or other place where six (6) or more males and females are employed . . .". Ark. Code § 11-5-112(a).

B. The Meaning of Title VII and Title IX

27. In 1964, Congress enacted Title VII of the Civil Rights Act, making it illegal for employers to invidiously discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

28. There is almost zero legislative history regarding the meaning of "sex" in Title VII. Representative Howard Smith added the term in a last-minute amendment as part of an attempt *to prevent* the Civil Rights Act from passing. *See* Clay Risen, "The Accidental Feminist: Fifty years ago a Southern segregationist made sure the Civil Rights Act would protect women. No joke.", Slate.com (Feb. 7, 2014), *available at* http://slate.me/1kls7oY.

29. Eight years after enacting Title VII, Congress passed Title IX of the Education Amendments of 1972. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681.

30. Title IX defines "program or activity" to include "all the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." *See* 20 U.S.C. §1687(1)(A).

31. Congress added a specific amendment ensuring that regulated entities could maintain separate male and female dormitories. 20 U.S.C. § 1686 ("Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.").

32. The legislative history reveals there were concerns that Title IX would force a school to allow women into intimate facilities designated for men only, and vice versa. After Senator Dominick questioned whether Title IX's sweeping language would forbid female- and male-specific dormitories, Senator Bayh, the bill's sponsor, quelled those concerns:

> Mr. BAYH: I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the [sexual] desegregation of football fields.

> What we are trying to do is provide equal access for women and men to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, *nor that the men's locker room be [sexually] desegregated.*

117 Cong. Rec. 30407 (1971) (emphasis added).

33. Upon final passage, Senator Bayh stated that Title IX grants various federal agencies authority to craft implementing regulations that provide for "differential treatment by sex," but only where "absolutely necessary" – i.e., "where personal privacy must be preserved." *See* 118 Cong. Rec. 5807 (1972).

34. The regulations implementing Title IX provide, in relevant part, that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular…or other education program or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a).

35. The implementing regulations also provide that a funding recipient shall not, on the basis of sex: "Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; … Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; … Deny any person any such aid, benefit, or service; … Subject any person to separate or different rules of behavior, sanctions, or other treatment; …[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R. § 106.31(b).

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

37. These regulations are "legislative" and, accordingly, were promulgated according to the notice-and-comment requirements of the Administrative Procedure Act. *See* Nondiscrimination on the Basis of Sex in Education Programs, 40 Fed. Reg. 24128, 23131 (June 20, 1974).

38. Nothing in Title IX's text, structure, legislative history, or accompanying regulations addresses gender identity.

39. The term "gender identity" does not appear in the text of Title IX.

40. The term "gender identity" does not appear in the regulations accompanying Title IX.

41. The legislative history of Title IX reveals no intent to include "gender identity" within the meaning of "sex."

42. The concept of "gender identity" is not a new one. Dr. John Money, a long-time psychologist at Johns Hopkins University, pioneered the term during the 1950s and 1960s. In 1955, he began formulating his famous anagram, G-I/R ("gender-identity/role"), and in 1966 he helped found the "Gender Identity Clinic" at Johns Hopkins. *See* University of Minnesota, Program in Human Sexuality, "John Money bio: John William Money, PhD, 1921-2006, *available at* http://www.sexualhealth.umn.edu/education/john-money/bio (last visited Sept. 13, 2016). In 1969 he published his well-known work, "Transsexualism and Sex

Reassignment." *See* Benedict Carey, *John William Money, 84, Sexual Identity Researcher, Dies*, The New York Times (July 11, 2006), *available at* http://nyti.ms/1Cfmm10.

43. Unlike "sex," "gender identity" is not a binary concept. *See* Human Rights Campaign, *Sexual Orientation and Gender Identity Definitions* (last visited Sept. 12, 2016) (defining "gender identity" as one's "innermost concept of self as male, female, *a blend of both or neither* . . .") (emphasis added), *available at* http://bit.ly/2cpRzKc. *See also* Curtis M. Wong, *Facebook Introduces Gender Free-Form Field for Users* (Feb. 26, 2015) (recognizing that Facebook provides users at least 58 pre-set choices when selecting their "gender identity," along with the option of writing in their own identity if none of the pre-set choices are adequate), *available at* http://huff.to/18qCODP.

44. In fact, the term "sex," as used in Title IX and its implementing regulations, means male and female, under the traditional binary conception of sex consistent with one's genes and anatomy. As already discussed, Title IX specifically allows institutions to differentiate intimate facilities *by sex*. *See* 20 U.S.C. § 1686; *see also* 34 C.F.R. § 106.33 (allowing for intimate-facility separation for students of "one sex" and "*the other* sex") (emphasis added).

45. Existing federal law does not forbid schools to provide students with showers, locker rooms, or restrooms designated by biological sex, consistent with one's genes and anatomy. Indeed, in 1996, the U.S. Supreme Court ruled that while the Equal Protection Clause directs that previously all-male state military schools accept qualified female applicants, it nonetheless "*require[s]*" such schools to "afford members of *each sex*

privacy from *the other* sex in living arrangements." *United States v. Virginia*, 518 U.S. 515, 550, n. 19 (1996) (emphases added).

46. Given the accepted physiological meaning of "sex," at least 18 states have added the term "gender identity" or "gender expression" into their applicable non-discrimination statutes, despite having *previously* outlawed discrimination based on "sex." *See* Transgender Law Center, "Equality Maps", *available at* http://bit.ly/2cHK6bT (last visited Sept. 15, 2016). Congress itself added the term into the 2013 reauthorization of the Violence Against Women Act (*see* 42 U.S.C. § 13925(b)(13)(A)), and into the Hate Crimes Prevention Act of 2009 (*see* 18 U.S.C. § 249(a)(2)) – *alongside* the terms "sex" or "gender," respectively.

47. Because Title IX only covers "sex," not "gender identity," various lawmakers have tried – and failed – to add "gender identity" as a separate category of prohibited discrimination. *See* H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015).

48. Congress has also repeatedly considered invitations to expand Title VII to cover "gender identity." *See* H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); and S. 811, 112th Cong. (2011). Just like the proposals to amend Title IX, this legislation has failed to pass every year it has been introduced.

49. Given all of the above, the use of the term "sex" in Title VII and Title IX cannot fairly be construed to mean or include "gender identity."

C. The New Obligations Imposed by Defendants Under Title VII and Title IX.

50. The events and promulgations leading to the new obligations Defendants are imposing under Title VII and Title IX are recent in origin and constitutes a complete reversal of the long-accepted understanding of the term "sex":

- In 2005, DOJ took the position that, as used in Title VII, "sex" unambiguously means male and female, and thus concluded that it prohibits discrimination against men *because they are men* and against *women because they are women.* It expressly determined that "sex" for purposes of Title VII does not include "transgender status" and nor, therefore, gender identity. *See* Defendant's Motion to Dismiss at 6, *Schroer v. Billington*, No. 05-1090 (August 1, 2005).

- In 2010, the ED's Office for Civil Rights ("OCR") stated that Title IX prohibits sexual- and gender-based harassment "regardless of the actual or perceived . . . gender identity of the harasser or target." OCR, *Dear Colleague Letter: Harassment and Bullying*, at 8 (Oct. 26, 2010).

- In 2011, the EEOC stated in an amicus brief that discrimination on the basis of "sex" prohibits employment decisions based on "transgender status", reversing decades of EEOC precedent that deemed "sex" to mean "sex" and not gender identity. *Macy v. Dep't of Justice*, 2012 WL 1435995, Footnote 16 (April 20, 2012)

- In 2014, OCR stated 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." OCR, *Questions and Answers on Title IX and Sexual Violence* B-2 (Apr. 29, 2014).

- Attorney General Eric Holder then issued a memorandum in 2014 concluding that Title VII's prohibition of sexual discrimination "encompasses discrimination based on gender identity, including transgender status." DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* 2 (Dec. 15, 2014).

- Then, in 2015, OSHA announced that it had published "guidance" for employers regarding restroom access for individuals who identify

with the sex opposite their own. Press Release, OSHA, *OSHA publishes guide to restroom access for transgender workers* (June 1, 2015), *available at* https://www.osha.gov/newsrelease/trade-20150601.html. OSHA's so-called guidance concluded that "all employees should be permitted to use the facilities that correspond with their gender identity," which is "internal" and could be "different from the sex they were assigned at birth." OSHA, *A guide to Restroom Access for Transgender Workers* (2015).

- On May 3, 2016, the Equal Employment Opportunity Commission published a "Fact Sheet" stating that Title VII's prohibition of discrimination "because of . . . sex" requires federal agencies to provide bathroom access on the basis of "gender identity." EEOC, *Fact Sheet: Bathroom Access Rights for Transgender Employees under Title VII of the Civil Rights Act* (May 3, 2016), *available at* http://bit.ly/24rtaf0.

51. Defendants' new rules, regulations, and guidance described herein require that access be provided to all showers, locker rooms, and restrooms for individuals who self-identify as the sex designated for use of that intimate facility. There are no limits whatsoever on how or why an individual so identifies.

52. On May 9, 2016, DOJ acted under the Defendant agencies' redefinition of federal law by suing North Carolina and its University System, claiming that they were in violation of Title VII and Title IX based on the new obligations Defendants are imposing under Title VII and Title IX. *United States v. North Carolina et al.*, Case No. 1:16-cv-425 (M.D.N.C.).

D. The DOJ/ED Dear Colleague Letter

53. On May 13, 2016, DOJ and ED issued a joint "Dear Colleague Letter" ("Letter"), which set forth the new obligations Defendants seek to impose under Title IX as applicable to more than 100,000 elementary and secondary schools that receive federal funding. *Dear Colleague Letter on Transgender Students, available at* http://1.usa.gov/1TanAGJ.

54. The letter acknowledged in its opening paragraph that the new obligations apply to every education program or activity covered by Title IX.

55. ED has communicated this Letter to school districts nationwide.

56. The Letter directs that Title IX's use of the word "sex" now means or includes "gender identity." Further, the Letter threatens that schools and covered entities that interpret Title IX as it has been understood by regulators and courts alike since 1972 will face legal action and the loss of federal funds. The Letter concerns "Title IX *obligations* regarding transgender students" and recites the manner in which ED and DOJ will evaluate how schools "are complying with their legal *obligations*" (emphasis added). It refers to an accompanying document collecting examples from school policies and recommends that school officials comb through the document "for practical ways to meet Title IX's *requirements*" (same). Indeed, the Letter amounts to "*significant guidance*" (emphasis in original).

57. According to the Letter, schools and covered programs or activities must now treat a student's "gender identity" as the student's "sex" for purposes of Title IX compliance. "Gender identity," the Letter explains, refers to a person's "internal sense of gender," without regard to sex (i.e., anatomy or genetics). Gender identity can be the same as a person's sex, or different, and it can change over time.

58. ED—the agency with primary enforcement authority over Title IX—has concluded that, although recipients may provide separate showers, locker rooms, and restrooms for males and females, when a school does so, it must treat

individuals consistent with their gender identity, rather than their biological or genetic sex, with no regard for how or why the individual has so identified.

59. Importantly, the letter forbids a school or covered entity from accommodating students by enabling them to use a single-user facility if their gender identity does not correspond with their assigned group facilities.

60. Defendants are treating these new rules, regulations, and guidance as binding on all schools and covered programs or activities that are subject to Title IX.

61. Defendants' new rules, regulations, and guidance constitute final agency action. *E.g., Bennett v. Speaker*, 520 U.S. 154, 177-78 (1997) (an agency action is final when it "mark[s] the 'consummation' of the agency's decision making process" and [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[.]"); *Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986) ("[A]n agency may not avoid judicial review merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation.").

62. Defendants' new rules, regulations, and guidance are not committed to pre-enforcement review.

63. Defendants' new rules, regulations, and guidance were not conditioned on the basis of site-specific facts.

64. Defendants' new rules, regulations, and guidance impose new obligations that never previously existed.

65. Defendants' new rules, regulations, and guidance were enacted without following the notice and comment procedures that the APA requires.

E. Callaway Public School District

66. On August 8, 2016, members of Callaway PSD School Board ("the Board") convened a regular meeting. At the meeting, the Board adopted a policy ("the Policy") consistent with its current practice, to provide separate toilet, locker room, and shower facilities on the basis of anatomical sex.

67. Callaway PSD does not factor a student's gender identity into determining the student's sex for purposes of determining the shower, locker room or restroom available to the student.

68. It is the intent of Callaway PSD to follow the Policy to protect the dignity, privacy, and safety of all School District students by continuing to determine facility usage based on a student's anatomical sex as provided in Neb. Rev. Stat. §79-2,124.

69. Callaway PSD is subject to Title VII and receives federal funding subject to Title IX.

70. Defendants have indicated they will enforce their new rule against entities, such as Callaway PSD, that do not obey the novel obligations unlawfully imposed against them. The Joint Letter states that Title IX and its implementing regulations apply to "educational programs and activities operated by recipients of Federal financial assistance" and that schools must comply with these new rules "as a condition of receiving federal assistance." According to its website, ED "vigorously enforces Title IX to ensure that institutions that receive federal financial assistance

from [ED] comply with the law." ED, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html. And federal regulations provide for mandatory investigations into recipients of Title IX-linked funds who discriminate on the basis of "sex." 34 C.F.R. §§ 100.7(a), 100.8, 106.71 (incorporating Title VI procedures).

71. Thus, the federal government possesses the ability to deny federal funds that comprise a substantial portion of Callaway PSD's budget if Callaway PSD chooses to follow its Policy instead of the new rules, regulations, and guidance of Defendants. As a result, Callaway PSD must budget and reallocate resources now in order to prepare for the prospective loss of federal funding.

F. Arnold Public School

72. On August 9, 2016, members of Arnold PSD School Board ("the Board") convened a regular meeting. At the meeting, the Board adopted a policy ("the Policy") consistent with its current practice, to provide separate toilet, locker room, and shower facilities on the basis of anatomical sex.

73. Arnold PSD does not factor a student's gender identity into determining the student's sex for purposes of determining the shower, locker room or restroom available to the student.

74. It is the intent of Arnold PSD to follow the Policy to protect the dignity, privacy, and safety of all School District students by continuing to determine facility usage based on a student's anatomical sex as provided in Neb. Rev. Stat. §79-2,124.

75. Arnold PSD is subject to Title VII and receives federal funding subject to Title IX.

76. Defendants have indicated they will enforce their new rule against entities, such as Arnold PSD, that do not obey the novel obligations unlawfully imposed against them. The Joint Letter states that Title IX and its implementing regulations apply to "educational programs and activities operated by recipients of Federal financial assistance" and that schools must comply with these new rules "as a condition of receiving federal assistance." According to its website, ED "vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from [ED] comply with the law." ED, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html. And federal regulations provide for mandatory investigations into recipients of Title IX-linked funds who discriminate on the basis of "sex." 34 C.F.R. §§ 100.7(a), 100.8, 106.71 (incorporating Title VI procedures).

77. Thus, the federal government possesses the ability to deny federal funds that comprise a substantial portion of Arnold PSD's budget if Arnold PSD chooses to follow its Policy instead of the new rules, regulations, and guidance of Defendants. As a result, Arnold PSD must budget and reallocate resources now in order to prepare for the prospective loss of federal funding.

G. Federal Education Funding

78. The Letter bluntly states that allowing students to use intimate facilities consistent with their gender identity, irrespective of their sex, is "a condition of receiving federal funds." This loss of all federal funding for State and local education programs would have a major effect on State education budgets. All 50 States receive a share of the $69 *billion* in annual funding that the Federal Government directs to State and local education. ED, *Funds for State Formula-*

Allocated and Selected Student Aid Programs, U.S. Dep't of Educ. Funding, available at http://1.usa.gov/1BMc2yb (charts listing the amount of federal education funding by program nationally and by state).

79. ED estimates that the federal government will spend over $36 billion in State and local elementary and secondary education, and over $30 billion in State and local postsecondary education programs in 2016.

80. Not counting funds paid directly to state education agencies, or funds paid for non-elementary and secondary programs, the national amount of direct federal funding to public elementary and secondary schools alone exceeds $55 billion on average annually—which amounts to 9.3% of the average State's total revenue for public elementary and secondary schools, or $1,128 per pupil.

H. Current and impending federal enforcement against Plaintiffs.

81. The State of Nebraska operates Nebraska Department of Corrections, NCYF, Geneva North High School, and Kearney High West School.

82. The Nebraska Department of Corrections is a self-operating school district that provides educational services in accord with inmates' individual needs. Its services include high school accredited courses, Adult Basic and Secondary Education, English as a Second Language, life skills, parenting courses, along with pre-vocational and vocational training. To the extent the Nebraska Department of Corrections receives federal funds, all of its educational programs and activities are subject to Title IX. *See* 20 U.S.C. § 1687(1)(A).

83. The Nebraska Department of Corrections and the NCYF provide access to multi-user intimate facilities according to sex, consistent with inmates'

genes and anatomy, not gender identity, and are thus in violation of Defendants' new rules, regulations, and guidance.

84. Kearney West High School operates as an all-male special purpose junior/senior high school at the Youth Rehabilitation and Treatment Center at Kearney.

85. Geneva North High School operates as an all-female special purpose school at the Youth Rehabilitation and Treatment Center at Geneva.

86. At Kearney West and Geneva North, accommodations are made for students who self-identify as a gender other than their biological sex. Such students are provided private shower, locker room, and restroom facilities. Defendants' new rules, regulations, and guidance do not permit such accommodations.

87. The State of Nebraska, as employer, provides access to multi-user intimate facilities on the basis of sex according to genes and anatomy (i.e., male or female), not gender identity.

88. The United States Attorney General has indicated the Department of Justice will enforce the new obligations under Title VII and Title IX.

89. In 2012, EEOC ruled that Title VII's prohibition of discrimination "because of . . . sex" forbids employer decisions based on an employee's gender identity. *Macy v. Dep't of Justice*, 2012 WL 1435995 (Apr. 20, 2012). And in 2015, EEOC extended this ruling to require that employers provide access to intimate facilities on the basis of "gender identity" – i.e., one's "internal sense of being male or female (or, in some instances, both or neither.)" *Lusardi v. McHugh*, 2015 WL 1607756 (Apr. 1, 2015).

90. On May 9, 2016, the Department of Justice sued the State of North Carolina, alleging violations of Title VII and Title IX where the state provides access to intimate facilities on the basis of sex according to genes and anatomy, not gender identity.

91. Defendants have indicated they will enforce these new obligations under Title IX by direct and immediate action against entities, such as the Nebraska Department of Corrections, NCYF, Geneva North High School, and Kearney West High School that do not adhere to its new obligations.

92. Indeed, ED has already enforced these new obligations under Title IX (in addition to the above-referenced pending action in North Carolina) on numerous occasions. ED's Office of Civil Rights has included on its Web site a List of OCR Case Resolutions and Court Filings. *See* http://1.usa.gov/1YpXbFa. Two of these enforcement actions have occurred in Plaintiff states.

93. For instance, on June 21, 2016, ED determined that a public elementary school (Dorchester County School District Two) in South Carolina violated Title IX when it refused to allow a biologically male student who identified as female to use the school's multiple-occupancy girls' restrooms, even though the elementary school made special accommodations for the student to use several single-occupancy restrooms throughout the building. ED concluded that the school discriminated against the student on the basis of sex in contravention of Title IX, including its implementing regulations that allow covered entities to provide separate restrooms on the basis of sex. Because ED determined that "sex" means "gender identity" for purposes of Title IX compliance, and therefore that the student

was similarly situated to any other student who *identified* as female, it required the school to enter a Resolution Agreement promising to allow the biological male student to use the girls' restrooms – and to participate in all of the schools programs and activities – in accord with that student's gender identity.

94. In 2014, the OCR began investigating Highland Public School District in Ohio for refusing to open up its female restrooms to a biological male student who identified as female. On March 30, 2016, the OCR sent Highland a Proposed Resolution Agreement requiring that the school provide access to "sex-specific facilities" (including "restrooms, locker rooms, and overnight facilities") based on gender identity. It required that Highland revise all of its policies and practices to provide that decisions based on "gender identity" constitute "sex" discrimination. It also required that Highland "conduct mandatory training on issues related to gender nonconformance . . . for all District administrators", and to provide annual training to all faculty and staff who interact with students regarding "gender-based discrimination" – including with respect to the use of "sex-specific facilities." Highland refused to accept the Resolution Agreement and is now challenging the enforcement action in federal court. *See Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dept. of Educ., et al.*, Case No. 2:16-cv-00524 (Complaint for Declaratory and Injunctive Relief, ECF 1, ¶¶ 99-118); (Plaintiffs' Motion for preliminary injunction denied, and Intervening Third-Party Plaintiffs' preliminary injunction granted, ECF 95) (appeal pending).

95. ED and DOJ have informed Plaintiffs and their school districts that failure to conform to the executive branch's new mandate will bring adverse consequences, including a loss of federal education funding.

96. Because of the final agency action and threat of enforcement from the federal government, various Plaintiffs are impelled immediately and significantly to modify behavior that was lawful before the new obligations, but are deemed unlawful by the federal government under the new obligations.

97. Defendants' new rules, regulations, and guidance directly and immediately interfere with Plaintiffs' ongoing interest in providing for individual governmental bodies or institutions to make the most appropriate determinations to protect employee and student dignity and privacy, and for guarding against the perpetuation of stereotypes including those that may be inculcated by "mechanistic" classifications that deny the objective, physiological differences between males and females. *See Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 72 (2001).

98. Because of the final agency action, threat of enforcement from the federal government, and immediate interference with current policies and practices, various Plaintiffs are coerced to either maintain the status quo and live under the specter of impending federal action, or else give in to the mandate and thus violate employee and student privacy, thereby remaining under the threat of liability via private actions sounding in violations of tort and constitutional law. *See, e.g., Students and Parents for Privacy et al. v. U.S. Dep't of Educ. et al.*, 1:16-cv-4945 (N.D. Ill.).

IV. CLAIMS FOR RELIEF

COUNT ONE

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Being Imposed Without Observance of Procedure Required by Law

99. The allegations in paragraphs 1 through 98 are reincorporated herein.

100. The APA requires this Court to hold unlawful and set aside any agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

101. Defendants are "agencies" under the APA, *id.* § 551(1), and the new rules, regulations, and guidance described herein are "rules" under the APA, *id.* §§ 551(4), 701(b)(2), and constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." *Id.* § 704.

102. Defendants have promulgated new rules, regulations, and guidance, unilaterally declaring that Title IX's term, "sex," means, or includes, "gender identity."

103. Defendants have given these rules the full force of law.

104. The new rules, regulations, and guidance impose new obligations on Plaintiffs.

105. With exceptions that are not applicable here, the APA requires that any "rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding

must comply with the APA's notice-and-comment requirements, regardless of how they initially are labeled." 72 Fed. Reg. 3433.

106. The Supreme Court has held that all legislative rules—which are those having the force and effect of law and are accorded weight in agency adjudicatory processes—must go through the notice-and-comment requirements. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1204 (2015).

107. A rule that "effectively amends" a prior legislative rule is itself legislative, and is thus subject to notice-and-comment requirement. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

108. To "amend" means, *inter alia*, to "'formally alter . . . by . . . inserting or substituting words.'" *Perez*, 135 S.Ct. at 1207 (quoting Black's Law Dictionary 98 (10th ed. 2014)).

109. An agency's characterization of its own rule is relevant but hardly dispositive. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th. Cir. 2003).

110. Defendants have effectively redefined the word "sex" in Title VII and Title IX and their implementing legislative regulations to mean or include "gender identity," inserting or substituting the latter into or in lieu of the former. Thus, Defendants' new rules, regulations, and guidance effectively amend prior legislative rules, and therefore are themselves legislative. As such, they are invalid for failing to comply with notice-and-comment rulemaking.

111. At minimum, notice-and-comment rulemaking requires that ED (1) issue a public notice of the proposed rule, most often by publishing notice in the Federal Register, (2) give all interested parties a fair opportunity to submit

comments on the proposed rule as well as evaluate and respond to significant comments received, and (3) include in the final rule's promulgation a concise statement of the rule's basis and purpose.

112. Under Title IX, all final rules, regulations, and orders of general applicability that ED issues must be approved by the President of the United States. 20 U.S.C. § 1682.

113. In creating new obligations under Title VII and Title IX, Defendants failed to properly engage in notice-and-comment rulemaking, and they promulgated their new rules without the President's signature. Accordingly, the new rules, regulations, and guidance are invalid.

COUNT TWO

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Unlawful by Exceeding Congressional Authorization

114. The allegations in paragraphs 1 through 113 are reincorporated herein.

115. The new rules, regulations, and guidance described herein constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

116. Defendants are "agencies" under the APA, *id.* § 701(b)(1), and the new rules, regulations, and guidance described herein are "rules" under the APA. *Id.* § 701(b)(2).

117. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in

excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(B)–(C).

118. Defendants' actions in promulgating and enforcing its new obligations are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," because they redefine the unambiguous term "sex" in Title VII and Title IX, add gender identity to Titles VII and IX, and impose new obligations without Congressional authorization. In other words, Defendants have effectively amended the relevant statutory language via unilateral administrative action.

119. Congress has not delegated to ED the authority to define, or redefine, unambiguous terms in Title VII or Title IX.

120. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination..." 20 U.S.C. § 1681(a).

121. The term "sex" as used in Title IX means male and female, under the traditional binary conception of sex consistent with one's anatomy and genes.

122. The meaning of "sex", as used in Title IX, is not ambiguous.

123. The meaning of "male" and "female," as used in Title IX, are not ambiguous.

124. Title IX makes no reference to "gender identity" in the language of the statute.

125. The enacting regulations, which interpret Title IX, likewise make no reference to "gender identity."

126. Title IX's implementing regulations are not ambiguous in their instruction that a school district may separate showers, locker rooms, and restrooms on the basis of sex.

127. The regulations implementing Title IX state that schools receiving federal funding "may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilitates provided for students of the other sex." 34 C.F.R. § 106.33.

128. Title IX does not require that covered entities cease providing showers, locker rooms, and restrooms designated by biological sex.

129. Title VII's use of the word "sex" is just as unambiguous as Title IX's use of the word.

130. Defendants' unilateral decree that "sex" in Title VII and Title IX means, or includes, "gender identity," is contrary to Title VII's and Title IX's text, implementing regulations, and legislative history.

131. The Constitution provides Congress the power and responsibility to make law, while providing the Executive Branch, including federal agencies, the power and responsibility to administer and enforce the law. The new rules, regulations, and guidance described herein change the plain meaning of Title VII and Title IX, imposing new statutory obligations that Congress did not enact. Thus, the new rules, regulations, and guidance functionally exercise lawmaking power reserved only to Congress. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in ... Congress").

132. Because the new rules, regulations, and guidance are not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

133. Even if Defendants' new rules, regulations, and guidance were interpretive, they would still be in excess of statutory authority and should be declared unlawful and set aside.

COUNT THREE

Relief Under 5 U.S.C. § 706 (APA) that new Rules, Regulations, and Guidance at Issue Are Arbitrary and Capricious

134. The allegations in paragraphs 1 through 133 are reincorporated herein.

135. The APA requires this Court to hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

136. Congress requires that whenever an agency takes action, it do so after engaging in a process by which it "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n. v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (quotation omitted).

137. An agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

that it could not be ascribed to a difference in view or product of agency expertise.

138. Defendants gave no explanation for their redefinition of the term "sex" in Title VII or Title IX, whereby Defendants unilaterally decreed that the term "sex" in Title VII and Title IX means, or includes, gender identity.

139. Nor did Defendants give any explanation of the relevant factors that were the basis of their actions.

140. Defendants failed to consider important aspects of the dignity and privacy issues implicated for schools and other institutions caused by redefining the word "sex" in these statutory schemes, including the language and structure of Title VII and Title IX and their regulations, the congressional and judicial histories of Title VII and Title IX and their regulations, or the practical and constitutional harms created by Defendants' unlawful application of Title VII and Title IX.

141. Defendants' actions were also taken without a rational explanation for usurping the local choices federal statutory law permits.

142. Defendants' actions departed from explicit Title IX statutory text that allows schools to maintain private showers, locker rooms, and restrooms separated by sex; and, it rested on considerations related to "gender identity," despite the fact that the plain statutory language and legislative history indicates Congress did not intend "sex" to mean anything other than biological sex, i.e., sex as indicated by an individual's anatomy and genes.

143. Defendants' actions are also impermissibly implausible. Their new rules, regulations, and guidance indicate that "sex" means "gender identity" for some purposes, and "sex" for others. *See Dear Colleague Letter on Transgender Students* at pg. 3, *available at* http://1.usa.gov/1TanAGJ (stating that "sex"-segregated restroom and locker room access must be according to "gender identity," but that participation in athletics may still be according to "sex" (not "gender identity") when based on competitive skill or the activity involves a contact sport. However, in this context, "sex" cannot mean one thing for one purpose, and another thing for another purpose, without being arbitrary and capricious).

144. Furthermore, if "sex" is taken to mean *both* "sex" *and* "gender identity," then "sex"-segregated showers, restrooms, and lockers could not be divided *solely* on the basis of "gender identity," as dictated by Defendants' new rules, regulations, and guidance. Access would have to be allowed based on both "sex" *and* "gender identity," meaning that a transgender student would have a legal right to use either the restroom corresponding to his or her gender identity, or that corresponding to his or her physiology. Such unfettered access would render absurd Title IX's express allowance for schools and covered entities to "maintain[ ] *separate* living facilities for the different sexes" (20 U.S.C. § 1686) and to "provide *separate* toilet, locker room, and shower facilities on the basis of sex" (34 C.F.R. § 106.33) (emphases added).

145. Defendants' actions are therefore arbitrary and capricious and not otherwise in accordance with the law.

146. Defendants' new rules, regulations, and guidance would be unlawful if they were interpretive, instead of legislative, because they would still be arbitrary, capricious, an abuse of discretion, and not in accordance with law, and so should be declared unlawful and set aside.

COUNT FOUR

Relief Under 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Unlawful by Exceeding Congressional Authorization

147. The allegations in paragraphs 1 through 146 are reincorporated herein.

148. The new rules, regulations, and guidance described herein constitute "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

149. Defendants are "agencies" under the APA, *id.* § 701(b)(1), and the new rules, regulations, and guidance described herein are "rules" under the APA. *Id.* § 701(b)(2).

150. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(B)–(C).

151. Defendants' actions in promulgating and enforcing its new rule are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," because they redefine the unambiguous terms "discriminate" and "discrimination" and impose new obligations without the authorization of Congress.

152. Congress has not delegated to Defendants the authority to define, or redefine, unambiguous terms in Title VII or Title IX.

153. Title VII makes it unlawful for employers to "*discriminate* against any individual . . . because of such individual's . . . sex." 42 U.S.C. s. 2000e-2(a) (emphasis added). Title IX states that "[n]o person in the United States shall, on the basis of sex, be . . . subjected to *discrimination* . . . ." 20 U.S.C. s. 1681(a) (emphasis added).

154. The term "discriminate," as used in Title VII, means to treat persons differently on the basis of a protected characteristic listed in the statute. The term "discrimination," as used in Title IX, means differential treatment of persons on the basis of a protected characteristic listed in the statute. *See Krauel v. Iowa Methodist Medical Center,* 95 F.3d 674, 680 (8th Cir.1996) (stating that liability for intentional discrimination under Title VII "'depends on whether a protected trait . . . actually motivated the employer's decision.'" (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). In other words, under Title VII and Title IX, discrimination occurs when a protected characteristic, listed in the applicable statute, is made a basis for determining how persons are treated with regard to a matter encompassed by the statutes. Conversely, discrimination does not occur when a protected characteristic, listed in the applicable statute, is not taken into account for determining how persons are treated.

155. The definitions of "discriminate" and discrimination," as used in Title VII and Title IX, are not ambiguous.

156. Defendants' new rules, regulations, and guidance make clear that for purposes of separating showers, restrooms, and locker rooms, "sex" essentially *means*

"gender identity." *See Dear Colleague Letter on Transgender Students*, pg. 3, *available at* http://1.usa.gov/1TanAGJ (requiring that access be provided to restrooms and locker rooms on the basis of "gender identity," while maintaining that contact sports may be "segregated" by "sex" and not "gender identity"); *See also DOJ Memorandum in Support of Plaintiff United States Motion for Preliminary Injunctive Relief* (July 5, 2016), at pg. 4, *United States of America v. State of North Carolina, et al.*, Case No. 1:16-cv-425 (M.D. N.C.) (stating that "[f]or purposes of determining whether a person is a man or a woman, gender identity is the critical factor because it is the underlying basis for how one presents oneself to others in society in ways that typically communicate what sex one is in our culture.") (internal quotations omitted).

157. However, in the provision of separate showers, restrooms, and locker rooms, institutions traditionally have considered only "sex" consistent with genes and anatomy – not gender identity. Yet such actions not considering the newly specified gender identity characteristic are still deemed "discrimination" under Defendants' new rules, regulations.

158. Therefore, with respect to at least showers, restrooms, and locker rooms, Defendants have unlawfully redefined "discrimination" under Title VII and Title IX insofar as they forbid even policies and practices that do *not* consider gender identity for purposes of using such facilities.

159. The Constitution provides Congress the sole power and responsibility to make law, while providing the Executive Branch, including federal agencies, the power and responsibility to administer and enforce the law. The new rules, regulations, and guidance described herein change the meaning of Title VII and Title

IX, imposing new statutory obligations that Congress did not enact while eliminating choices over the designation of intimate facilities that Congress affirmatively protected. Thus, the new rules, regulations, and guidance functionally exercise lawmaking power reserved only to Congress. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in ... Congress").

160. Because the new rules, regulations, and guidance are not in accordance with the law articulated above, they are unlawful, violate 5 U.S.C. § 706, and should be set aside.

161. Even if Defendants' new rules, regulations, and guidance were interpretive, they would still be in excess of statutory authority and should be declared unlawful and set aside.

COUNT FIVE

Relief Under 28 U.S.C. §§ 2201 and 2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Unlawful and Violate Constitutional Standards of Clear Notice

162. The allegations in paragraphs 1 through 161 are reincorporated herein.

163. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

164. When Congress exercises its Spending Clause power, principles of federalism require that Congress speak with a clear voice so that the recipient can "clearly understand," from the language of the law itself, the conditions to which they are agreeing to when accepting the federal funds. *Arlington Cent. Sch. Bd. of Educ.*

v. Murphy, 548 U.S. 291, 296 (2006). "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously*." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). Further, any interpretation of a federal law tied to State funding should be based on its meaning at the time the States opted into the spending program. *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985) (providing that a state's obligation under cooperative federalism program "generally should be determined by reference to the law in effect when the grants were made").

165. Neither the text nor the legislative history of Title IX supports an interpretation of the term "sex" as meaning anything other than one's sex as determined by anatomy and genetics, which was the meaning assigned "sex" by the leading dictionaries at the time Congress enacted the statute. This reality is reinforced by the fact that Congress has specifically used the phrase "gender identity" when it intended to use that concept to identify a protected class in *other* pieces of legislation. *See, e.g.*, 18 U.S.C. § 249(a)(2)(A); 42 U.S.C. § 13925(b)(13)(A). In such legislation, Congress specifically included the phrase "gender identity" along with the term "sex," thus evidencing its understanding that the phrase and term mean different things and demonstrating its intent for the term "sex" to retain its original and only meaning— sex determined by anatomy and genetics.

166. Furthermore, Defendants' justify their new rules, regulations, and guidance on the theory that the word "sex" in Title IX and Title VII is "ambiguous." *See G.G. ex rel. Grimm v. Gloucester County School Bd.*, 822 F.3d 709, 719 (4th Cir. 2016) (noting that "[t]he United States contends" that its new rules defining "sex"

to mean or include gender identity "clarifies a statutory *ambiguity* . . .") (emphasis added). Thus, Defendants' own theory renders their new rules, regulations, and guidance constitutionally invalid, insofar as the Spending Clause requires grant conditions on federal moneys to be "*unambiguous*."

167. Defendants' new rules, regulations, and guidance change the meaning of Title IX, and so changes the terms for funding. This violates the constitutional requirements for legislation enacted pursuant to the Spending Clause power and so is unconstitutional.

COUNT SIX

Relief Under 28 U.S.C. §§ 2201 and 2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Unlawful and Violate Constitutional Standards Required For Legislation Promulgated Under Section 5 of the Fourteenth Amendment

168. The allegations in paragraphs 1 through 167 are reincorporated herein.

169. Defendants also run afoul of the Constitution by redefining "sex" in Title VII. Indeed, because Congress passed Title VII pursuant to its powers under Section 5 of the Fourteenth Amendment (and to the extent it did so with regard to Title IX) (*see Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997)), the provisions thereof may not be altered to change the meaning of the Constitution itself. "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Congress may only "enforce" – not redefine – constitutional protections when acting pursuant to Section 5 of the Fourteenth Amendment. For this reason, there must be a "congruence and

proportionality" between the statutory provisions at issue and an authorized purpose – i.e., ether the prevention of, or remedy for, a violation of the Constitution. *Id.* at 508.

170. Thus, under Section 5 of the Fourteenth Amendment, "the means" (i.e., a duly-enacted statute) must be "congruent" with and "proportional" to a proper "end" (i.e., a *harm* forbidden by the Fourteenth Amendment). Even though the "means" may prohibit even constitutionally valid conduct (e.g., discrimination by certain *private* actors), the statute is valid so long as it is directed at, and proportional to, a constitutional *violation*. *Id.* at 516, 530.

171. However, separating showers, restrooms, and locker rooms on the basis of sex in accord with genes and anatomy has long been *permitted* under the Fourteenth Amendment. While the Equal Protection Clause forbids invidious discrimination on the basis of "sex," it allows, and sometimes may require, covered entities to separate intimate facilities on the basis of "inherent" "physiological differences between male and female individuals" in order to protect the "privacy" of the "members of each sex". *United States v. Virginia*, 518 U.S. 515, 550 n. 19 (1996) (internal quotations omitted).

172. Defendants' new rules, regulations, and guidance are wholly incongruent with, and out proportion to, a Fourteenth Amendment harm. This is because separate showers, restrooms, and locker rooms on the basis of sex according to genes and anatomy (i.e., "inherent" "physiological differences" between men and women) have been expressly upheld by the U.S. Supreme Court under the Fourteenth Amendment. In other words, such practice is not a constitutional harm.

Therefore, Defendants' rules, regulations, and guidance prohibiting such practices by even private actors are not in way directed at a violation of the U.S. Constitution. *See, e.g.*, *Carcano v. McCrory*, Case No. 1:16-cv-236 (M.D. N.C.) (Memorandum Opinion, Order and Preliminary Injunction, Aug. 26, 2016) (ruling that transgender Plaintiffs challenging North Carolina law requiring separate public restrooms on the basis of physiological sex are not likely to succeed on their claims that the law violates the Equal Protection Clause, given Supreme Court and other substantial precedent deeming such a practice to satisfy the U.S. Constitution).

173. Therefore, Defendants have redefined – not enforced – the constitutional protections of the Fourteenth Amendment.

174. Thus, Defendants new rules, regulations, and guidance redefining "sex" in Title VII and Title IX are unlawful exercises under Section 5 of the Fourteenth Amendment and therefore violate the DJA and the APA.

COUNT SEVEN

Declaratory Judgment Under 28 U.S.C. §§ 2201 and 2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules, Regulations, and Guidance at Issue Are Unlawful and Unconstitutionally Coercive

175. The allegations in paragraphs 1 through 174 are reincorporated herein.

176. By placing in jeopardy a substantial percentage of Plaintiffs' budgets if they refuse to comply with the new rules, regulations, and guidance of Defendants, Defendants illegally coerce Plaintiffs to acquiesce in such policy. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2605 (2012) ("The threatened loss of over 10

percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce . . . .").

177. "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the [entity] voluntarily and knowingly accepts the terms of the 'contract.'" *NFIB*, 132 S. Ct. at 2602 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). "Congress may use its spending power to create incentives for [entities] to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism." *Id.* (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Id.*

178. When conditions on the receipt of funds "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the states to accept policy changes. *Id.*; *cf. South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

179. Furthermore, the Spending Clause requires that the entities "voluntarily and knowingly accept[]" the conditions for the receipt of federal funds. *NFIB*, 132 S. Ct. at 2602 (quoting *Halderman*, 451 U.S. at 17).

180. Because Defendants' new rules, regulations, and guidance change the conditions for the receipt of federal funds *after* the states had already accepted Congress's original conditions for many decades, this Court should declare that the new rules, regulations, and guidance are unconstitutional because they violate the Spending Clause.

COUNT EIGHT

Declaratory Judgment Under 28 U.S.C. §§ 2201 and 2202 (DJA) and 5 U.S.C. § 611 (RFA) that the new Rules, Regulations, and Guidance Were Issued Without a Proper Regulatory Flexibility Analysis

181. The allegations in paragraphs 1 through 180 are reincorporated herein.

182. Before issuing any of the new rules, regulations, and guidance at issue, Defendants failed to prepare and make available for public comment an initial and final regulatory flexibility analysis as required by the RFA. 5 U.S.C. § 603(a). An agency can avoid performing a flexibility analysis only if the agency's top official certifies that the rule will not have a significant economic impact on a substantial number of small entities. *Id.* § 605(b). The certification must include a statement providing the factual basis for the agency's determination that the rule will not significantly impact small entities. *Id.*

183. Defendants have not even attempted such a certification. Thus, the Court should declare Defendants' new rules, regulations, and guidance unlawful and set them aside.

II. DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief from the Court:

184. A declaration that the new rules, regulations, and guidance are unlawful and must be set aside as actions taken "without observance of procedure required by law" under the APA;

185. A declaration that the new rules, regulations, and guidance are substantively unlawful under the APA;

186. A declaration that the new rules, regulations, and guidance are arbitrary and capricious under the APA;

187. A declaration that the new rules, regulations, and guidance are Invalid because Defendants failed to conduct the proper regulatory flexibility analysis required by the RFA.

188. A vacatur, as a consequence of each or any of the declarations aforesaid, as to the Defendants' promulgation, implementation, and determination of applicability of the "significant guidance" document, and its terms and conditions, along with all related rules, regulations, and guidance, as issued and applied to Plaintiffs and similarly situated parties throughout the United States, within the jurisdiction of this Court.

189. A final, permanent injunction preventing the Defendants from implementing, applying, or enforcing the new rules, regulations, and guidance; and

190. All other relief to which Plaintiffs may show themselves to be entitled, including attorney fees and costs.

Respectfully submitted,

STATE OF NEBRASKA; STATE OF ARKANSAS, ARKANSAS DIVISION OF YOUTH SERVICES, STATE OF KANSAS, ATTORNEY GENERAL BILL SCHUETTE, FOR THE PEOPLE OF THE STATE OF MICHIGAN, STATE OF MONTANA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF WYOMING, Plaintiffs.

By: DOUGLAS J. PETERSON
Attorney General of Nebraska

By: *s/ David Bydalek*
David Bydalek, NE #19675
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
Dave.Bydalek@nebraska.gov

For Callaway Public School District and Arnold Public School District

By: *s/ Gregory H. Perry*
Gregory H. Perry, 17775

Perry, Guthery, Haase& Gessford, P.C., L.L.O.
233 South 13th Street, Suite 1400
Lincoln, NE68508
(402)476-9200

LESLIE RUTLEDGE
Attorney General of Arkansas

DEREK SCHMIDT
Attorney General of Kansas

BILL SCHUETTE
Attorney General of Michigan

TIM FOX
Attorney General of Montana

WAYNE STENEHJEM
Attorney General of North Dakota

MIKE DEWINE
Attorney General of Ohio

ALAN WILSON
Attorney General of South Carolina

MARTY JACKLEY
Attorney General of South Dakota

PETER MICHAEL
Attorney General of Wyoming