UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Case No. 3:22-cv-00257 District Judge Travis R. McDonough, Magistrate Judge Debra C. Poplin

PLAINTIFF STATES' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Regulations

INTRODUCTION

USDA's motion to dismiss completely ignores this Court's ruling in *Tennessee v. U.S. Department of Education*, No. 3:21-CV-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022).[1] In that decision, this Court preliminarily enjoined the EEOC and U.S. Department of Education from enforcing supposed guidance documents—including one that USDA expressly adopted, *see* Doc. 1-1, Memorandum at 2—against many of the same States in this lawsuit and denied the federal government's motion to dismiss, *Tennessee*, 2022 WL 2791450, at *24.[2] USDA mostly makes the same arguments that this Court rejected point-by-point in *Tennessee*. *See id.* at *9, *12, *18-19, *21. A different judge in this Court decided *Tennessee*, but the result should be the same.

USDA's defiance of the Administrative Procedure Act ("APA") is at least as egregious as in *Tennessee*. Over twenty-two months after the Supreme Court's decision in *Bostock*, USDA ordered "state agencies and program operators" to "expeditiously review their program complaint procedures and make any changes necessary to ensure complaints alleging discrimination on the basis of gender identity and sexual orientation are processed as complaints of discrimination on the basis of sex." Doc. 1-1, Memorandum at 3; *see also* Doc. 1-3, Memorandum Q&A at 2-3. USDA also required State-level SNAP administrators—which include public primary schools, secondary schools, and universities—to "update[]" their "documents, pamphlets, websites, etc." with a new "Nondiscrimination Statement" that defined discrimination on the basis of sex to "include[e] gender identity and sexual orientation" and to order and post new posters using such

[1] The federal government has appealed to the Sixth Circuit. No. 22-5807 (6th Cir.).

[2] Texas, a Plaintiff State in this lawsuit, separately sued EEOC over the same EEOC document challenged in *Tennessee*. The U.S. District Court for the Northern District of Texas similarly denied EEOC's motion to dismiss, *Texas v. EEOC*, No. 2:21-CV-194-Z (N.D. Tex. May 26, 2022), and entered a now final summary judgment in Texas's favor that vacated the EEOC document nationwide, *Texas v. EEOC*, No. 2:21-CV-194-Z, 2022 WL 4835346 (N.D. Tex. Oct. 1, 2022).

language. Doc. 1-4, Supplemental Memorandum at 1-2 (citing Technical Assistance & Guidance, FNS Nondiscrimination Statement (May 5, 2022), https://bit.ly/3nZTc6W ("Nondiscrimination Statement"); *see also* Doc. 1-3, Memorandum Q&A at 2-3.

To provide a fig leaf of cover for its unlawful dictates, USDA refashioned a long discarded proposed rule—originally proposed in November 2016 with a comment period that ended in January 2017, Doc. 1-6, Proposed Rule, 81 Fed. Reg. at 81,015—to include a new requirement that States adopt language in their Federal-State Agreements to "[c]omply with . . . Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) [and] section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2020) . . . to the effect that, no person in the United States shall, on the grounds of sex, *including gender identity and sexual orientation* . . . be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP," Doc. 1-5 Final Rule at 35,857 (emphasis added). This June 2022 requirement is supposedly "based on *Bostock*," Defs.' Memo. of Law 4, but the comment period for the rule expired over three years *before* the Supreme Court's decision in *Bostock*.

The Memoranda and Final Rule's new gender identity and sexual orientation policy does not appear to be limited to "the certification of applicant households" for SNAP benefits. 7 U.S.C. § 2020(c)(1). Instead, USDA requires the States and their SNAP-administering agencies to implement this new policy on the "institution[al]" level, reaching matters well beyond USDA's proper purview. *See* Nondiscrimination Statement. Because USDA's Memoranda and Final Rule require far more than a commitment to "not deny [SNAP] benefits based on a household member's sexual orientation or gender identity," Doc. 1, Compl. ¶ 12, the States have standing to challenge them and claims for relief that are both ripe for review and plausible. Accordingly, this Court should deny Defendants' Motion to Dismiss.

BACKGROUND

SNAP subsidizes nutrition for "low-income households" through cooperative grant agreements between the States and federal government. 7 U.S.C. § 2011. The agreements contain standardized language delineated by statute and regulation. *See* 7 U.S.C. § 2020(d)-(e); 7 C.F.R. § 272.2(b). A State's refusal to agree to, or update, that language as USDA proscribes results in the "withhold[ing]" of "such funds . . . as the Secretary [deems] appropriate." 7 U.S.C. § 2020(g).

USDA Memoranda. Nearly two years after the Supreme Court's decision in *Bostock v. Clayton County* that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII, 140 S. Ct. 1731, 1737-38 (2020), USDA issued a series of memoranda imposing new requirements on States. *See* Doc. 1-1, Memorandum; Doc. 1-2, Cover Letter; Doc. 1-3, Memorandum Q&A; Doc. 1-4, Supplemental Memorandum (collectively, "Memoranda"). The Memoranda misread *Bostock* and "adopt[] the Department of Justice's and Department of Education's analyses concluding that Title IX's prohibition of sex discrimination includes a prohibition of discrimination on the basis of gender identity and sexual orientation." Doc. 1-1, Memorandum at 2 (citing Dep't of Justice ("DOJ"), Memorandum regarding Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://bit.ly/2WpV5zq ("DOJ Memorandum"); Dep't of Educ., Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) ("Department of Education Interpretation")).

As this Court has already ruled, the Department of Education Interpretation unlawfully "alter[ed] the rights and obligations of the regulated entities" the agency "oversees," *Tennessee*, 2022 WL 2791450, at *14, "create[d] rights for students and obligations for regulated entities not

to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX, or its implementing regulations," *id.* at *21, and went "beyond putting the public on notice of pre-existing legal obligations and reminding affected parties of their existing duties," *id.*[3] The brief Title IX analysis in USDA's Memoranda suffers from the same faults as the now-enjoined Department of Education Interpretation. USDA then extends the same faulty reasoning to the Food and Nutrition Act, which also was not at issue in *Bostock*. Doc. 1-1, Memorandum at 2-3.

USDA's Memoranda impose several obligations on States and State-level SNAP administrators.[4] *First*, States and program operators must update their policies to include the new gender identity or sexual orientation policy. Doc. 1-1, Memorandum at 2. *Second*, this new policy "applies to prohibitions against discrimination based on sex in all FNS programs," recognizing that "these changes may impact [State and local] operations." Doc. 1-2, Cover Letter at 1. *Third*, States and program operators must apply the new, expanded definition of sex discrimination to their entire organizational structure. Doc. 1-3, Memorandum Q&A at 1-2 (requiring all "State Agencies and [SNAP] program operators" to post the new Nondiscrimination Statement on various documents, websites, and in physical offices); *see* Nondiscrimination Statement (stating that "this

[3] A fact sheet issued almost simultaneously with the Department of Education Interpretation shows the lengths that the Interpretation reaches to. DOJ & Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools (June 2021), https://bit.ly/3sQjZnM ("Fact Sheet"). According to the now-enjoined Fact Sheet, preventing a transgender high school girl (a biological male) from "try[ing] out for the girls' cheerleading team" would likely constitute discrimination. Fact Sheet at 1. So would failing to use a transgender student's preferred name or pronouns. *Id.*

[4] None of this was voluntary, optional, or subject to negotiation. USDA required that "[w]ebsites *must* be updated within 90 days," "[d]ocuments, pamphlets, brochures, etc., using the 2015 [Nondiscrimination Statement] language *must* be updated," and "[a]ll new printing *must* use the 2022" Nondiscrimination Statement." Doc. 1-4, Supplemental Memorandum at 1 (emphases added). "State Agencies and program operators will *need* to update their Nondiscrimination Statements and order new *And Justice for All* posters that reference gender identity and sexual orientation discrimination." Doc. 1-3, Memorandum Q&A at 2 (emphasis added).

institution is prohibited from discriminating on the basis of . . . sex (including gender identity and sexual orientation)"). *Fourth*, States must order and post new updated posters and materials with the revised Nondiscrimination Statement. Doc. 1-4, Supplemental Memorandum at 1-2.

USDA Final Rule. USDA then recycled a long-dormant proposed rule originally filed in November 2016. *See* Doc. 1-6, Proposed Rule at 81 Fed. Reg. 81,015. The Proposed Rule made no reference to the expanded definition of discrimination based on sex. Indeed, the Proposed Rule did not mention "sexual orientation" or "gender identity." The comment period for the Proposed Rule closed in January 2017 with only five comments, none of which addressed sexual orientation or gender identity. *See* Comments to Proposed Rule, FNS-2016-0078-0002 to -0006 (posted Feb. 5, 2017), https://bit.ly/3v5Iv6Y. USDA let the Proposed Rule remain dormant for over five years.

Then, without providing notice or opportunity to comment, USDA overhauled the long-dormant rule and issued the Final Rule on June 14, 2022. Doc. 1-5, Final Rule at 87 Fed. Reg. 35,855. The Final Rule claims to "finaliz[e] as proposed" the rule's reference to Title IX and "additional civil rights legislation." Doc. 1-5, Final Rule at 87 Fed. Reg. 35,855. Instead, the Final Rule, unlike the Proposed Rule, requires States to adopt language in their SNAP Federal-State Agreements to "[c]omply with . . . Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) [and] section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2020) . . . to the effect that, no person in the United States shall, on the grounds of sex, *including gender identity and sexual orientation* . . . be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP." Doc. 1-5 Final Rule at 35,857 (emphasis added). Defendants now represent to the Court that this change in the Final Rule was "based on *Bostock*." Defs.' Memo. of Law 4. But the Final Rule does not reference *Bostock* (or any other court decision), and the comment period of course closed three years before *Bostock*.

States' Response. On the same day USDA issued the Final Rule, a group of State Attorneys General—including all Plaintiff States—sent a letter to President Biden detailing the procedural and substantive shortcomings in these agency actions. Letter from Herbert H. Slatery III et al. to President Biden (June 14, 2022), https://bit.ly/3PpaWED. After the Biden Administration failed to change course, the States sued on July 26, 2022, Doc. 1, Complaint, and immediately requested a preliminary injunction, Doc. 2, Mot. for Preliminary Injunction, preferably before the Final Rule went into effect on August 15, 2022. The Court denied the States' request for expedited briefing. Doc. 33, Order at 4-5.

In Defendants' telling, seventeen Plaintiff States have since "finalized their new SNAP FSA, adopting the exact language promulgated in the Final Rule." Defs.' Memo. of Law 5. As the States pointed out in their preliminary injunction briefing, USDA has rejected all "propose[d] alternative language," 7 C.F.R. § 272.2(b)(2), to the Federal-State Agreements that would remove the new "including gender identity and sexual orientation" clause and has required States to sign agreements with that objectionable language to continue receiving SNAP funding. *See, e.g.*, Doc. 59-1, Ex. A, Botelho ¶¶ 5-10 (describing Nebraska's experience). Several States, such as Montana and Tennessee, have also signed updated Federal-State Agreements with riders explaining that they do not accept USDA's unlawful attempt to impose the "gender identity and sexual orientation" language on them. Doc. 59-2, Hermanson Decl. ¶ 6; Doc. 59-3, Thaxton Decl. ¶ 4.

USDA further indicated that "the remaining five Plaintiff States (Alabama, Indiana, Mississippi, South Dakota, and Texas) do not yet have fully executed SNAP FSAs." Defs.' Memo. of Law 5. Back in August 2022, Mississippi submitted a Federal-State Agreement without the "including gender identity and sexual orientation" clause. Ex. 1, Anderson Decl. ¶ 4. On December 12, 2022—after Defendants filed their motion to dismiss—USDA finally contacted

Mississippi to require the clause. Ex. 1, Anderson Decl. ¶ 5. Mississippi did not concede its agreement with USDA's new interpretation of Title IX and the Food and Nutrition Act, and its Federal-State Agreement expires at the end of this litigation. Ex. 1, Anderson Decl. ¶ 6. USDA similarly rejected the Federal-State Agreement that South Dakota initially submitted and required South Dakota to sign an agreement with the "including gender identity and sexual orientation" clause that expires at the end of this litigation. Ex. 2, Gill Decl. ¶¶ 3-8. Alabama and Texas also objected and "made no concessions as to the legality, scope, or enforceability of the new nondiscrimination language." Ex. 3, Buckner Decl. ¶ 6; *see also* Ex. 4 Davis Decl. ¶ 4.

LEGAL STANDARDS

When a defendant moves to dismiss a complaint for lack of jurisdiction under Rule 12(b)(1), "the plaintiff has the burden of proving jurisdiction." *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) (quotation omitted). In reviewing the motion, a court "may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction." *Id.* But "where a defendant argues that the plaintiff has not alleged sufficient facts . . . to create subject matter jurisdiction," the district court must "accept the allegations in the complaint as true." *Id.*

In deciding whether a complaint should be dismissed under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff." *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021). The court "must accept the complaint's factual allegations as true and draw all reasonable inferences in [the plaintiff's] favor." *Id.* Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quotation omitted). A plaintiff must only "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

Under the APA, agency action is unlawful and must be "set aside" when (as relevant here)

it is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law. 5 U.S.C. § 706(2).

ARGUMENT

I. This Court Has Jurisdiction to Adjudicate the States' Claims.

USDA cannot evade review by challenging this Court's jurisdiction. The Memoranda and Final Rule regulate the States directly as administrators of the SNAP and SNAP-Ed programs. As a result of that direct regulation, the States have standing to challenge USDA's new policy directives, and their claims ripened the day those directives issued. Because the claims broadly attack USDA's rules and rulemaking process—not some imminent or ongoing administrative adjudication—they fall outside the channeling provisions USDA raises as an obstacle to review.

A. The States have standing to challenge the USDA's rules.

USDA's standing arguments strain credulity. The States' standing is "self-evident" in this case, *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002), because the States are "regulated . . . entit[ies]" challenging "illegal . . . rule[s] under which [they are] regulated," *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992)). Indeed, the States "are 'the object[s] of' [USDA's] requirement" that all SNAP administrators adopt new policies for processing discrimination complaints, *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022) (quoting *Lujan*, 504 U.S. at 561-62); *see* Doc. 1-1, Memorandum at 4, "objects" of USDA's requirement that all Federal-State Agreements and program posters list "gender identity and sexual orientation" as protected characteristics, *see* Doc. 1-2, Cover Letter at 1; and, most importantly, "objects" of USDA's

requirement that all SNAP administrators refrain from gender identity and sexual orientation discrimination on the "institution[al]" level—not just in the administration of SNAP. Nondiscrimination Statement. Each of those requirements carries a "cost" associated with "compliance," *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 262 (6th Cir. 2009), and a burden on State autonomy even after a State has "accepted the funds" from USDA, *Kentucky v. Yellen*, 54 F.4th 325, 342 (6th Cir. 2022). There can thus "be 'little question' that the rule[s] . . . injure the States," *West Virginia*, 142 S. Ct. at 2606, and this Court can redress those injuries by "set[ting] aside" the rules, 5 U.S.C. § 706(2).

USDA nonetheless insists that the States have sued over nothing more than "an abstract disagreement" because the States "affirm that they do not engage in discrimination in the administration of SNAP on the basis of gender identity or sexual orientation." Defs.' Memo. of Law 10-11 (citing Compl. ¶¶ 12, 40). To be clear, the States do not "*deny* [*SNAP*] *benefit*s based on a household member's sexual orientation or gender identity." Compl. ¶ 12 (emphasis added). And if that were the only practice touched by USDA's rules, the States would drop this lawsuit. But that is not what the Memoranda and Final Rule say. Instead, those documents require States to espouse and adopt broader nondiscrimination policies that purportedly stretch beyond SNAP certification of applicant households, and even beyond SNAP administration more generally, to *all* conduct of any SNAP-administering "institution." *See* Nondiscrimination Statement. That expansive sweep does, in fact, give rise to the injuries underlying this suit.

Try as it might, USDA cannot sever those injuries from its own conduct. Although the agency now claims the rules have no "independent legal significance," Defs.' Memo. of Law 11, the record belies that assertion, *see, e.g.*, Doc. 1-5, Final Rule, 87 Fed. Reg. at 35,855 ("The protections included in *this rule* will prevent discrimination . . . ." (emphasis added)). The Final

Rule and Memoranda command state actions not dictated by Congress. Indeed, USDA conducted notice-and-comment rulemaking—albeit improperly—precisely because its new Federal-State Agreement imposes specific language *not* contained in the Food and Nutrition Act or prior Federal-State Agreements. *See, e.g.*, Doc. 1-5, Final Rule, 87 Fed. Reg. at 35,855 (claiming that "[c]odifying civil rights protections" through "update[d]" language "is vital to the success of SNAP"). And that language is *not* negotiable. USDA will not assent to any Federal-State Agreement without the new "gender identity and sexual orientation" clause. *See, e.g.*, Doc. 59-1, Botelho ¶¶ 5-6 (describing Nebraska's experience); Ex. 1, Anderson Decl. ¶¶ 4-5 (Mississippi's experience); Ex. 2, Gill Decl. ¶¶ 6-7 (South Dakota's experience). The clause is now mandatory.

The fact that some States may assent to new language in their Federal-State Agreements is no impediment to this Court's jurisdiction, either. The States have acknowledged that, without a preliminary injunction, they may be forced to yield to USDA's pressure and "make significant changes to" their SNAP programs, Doc. 3-2, Crum Decl. ¶¶ 7-10 (describing Alaska's experience), but that ongoing burden on state autonomy is itself a harm undergirding this lawsuit. Indeed, the States' standing *does not* turn on any "refus[al] to sign the new" Agreements or any commitment to disregard the Memoranda. Defs.' Memo. of Law 10. On the contrary, the States can derive standing from the costs and burdens of *complying* with the Final Rule and Memoranda as "regulated . . . entit[ies]." *State Nat'l Bank of Big Spring*, 795 F.3d at 53; *see Sch. Dist. of Pontiac*, 584 F.3d at 262; *cf. West Virginia*, 142 S. Ct. at 2606 ("There can be 'little question' that the rule[s] . . . injure the States."). Such costs and burdens were imminent "at the time [the States] filed [their] complaint," *Am. Clinical Lab'y Ass'n v. Becerra*, 40 F.4th 616, 622 (D.C. Cir. 2022), because USDA was already demanding that States update their complaint-processing procedures, *see* Doc. 1-1, Memorandum at 1-3, publish the new Nondiscrimination Statement, *see* Doc. 1-4,

Supplemental Memorandum at 1, and adopt USDA's approach to Title IX discrimination on the "institution[al] level," Nondiscrimination Statement. *See* Doc. 3-1, Niknejad Decl. ¶ 14 ("The State of Tennessee would also incur various compliance costs if forced to comply with the requirements of the Memoranda and Final Rule."). The costs and burdens associated with those directives will perpetuate the underlying controversy unless USDA permanently abandons its new rules and "eradicate[s] the[ir] effects," *Zukerman v. USPS*, 961 F.3d 431, 443 (D.C. Cir. 2020).

And those new compliance costs, burdens, and requirements for State SNAP and SNAP-Ed administrators create standing for *all* Plaintiff States regardless of whether a preexisting state law directly conflicts with USDA's new gender identity and sexual orientation policy. The States' previous policies, posters, websites, and agreements before the Memoranda and Final Rule did not include the 2022 Nondiscrimination Language because it was not part of regulations or agreements before 2022. *See, e.g.*, Doc. 1-3, Memorandum Q&A at 3 (requiring States to update their documents, pamphlets, websites, brochures, printing, and posters).

In any case, Plaintiff States have various laws that at least arguably conflict with what the Memoranda and Final Rule seek to accomplish because USDA did not cabin its gender identity and sexual orientation discrimination rules to SNAP certification decision-making. *See* Doc. 3, Br. 24-25; Compl. ¶¶ 130-31. This Court has already ruled that the Department of Education Interpretation of Title IX, which USDA expressly adopted in the Memoranda, at least arguably conflicts with the laws of ten Plaintiff States. *Tennessee*, 2022 WL 2791450, at *7 & nn.8-9 (identifying laws of ten Plaintiff States as arguably conflicting with the Department of Education's similar attempt to redefine Title IX discrimination on the basis of sex). That suffices for standing.

B. The States' claims are ripe for judicial review.

USDA next suggests the States' claims are not ripe for review. That, too, is wrong. *See*

Tennessee, 2022 WL 2791450, at *12. These claims ripened as soon as USDA published its Final Rule and Memoranda containing the mandates at issue. *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380-81 (D.C. Cir. 2002) (holding a challenge to an EPA "guidance document" ripe because the document contained final, legislative rules). To argue otherwise, USDA must reconceive this lawsuit as a preemptive collateral attack on some future administrative order suspending, terminating, or refusing SNAP funding to one or more of the States. That is not accurate. Contrary to USDA's belief, this is a challenge to the new mandates themselves, not some "application of the agency's position to particular facts." *Gen. Elec.*, 290 F.3d at 381. "In this situation, nothing would be gained from delaying review." *Id.* Defendants' ripeness argument fails.

C. The States lack an adequate alternative remedy.

USDA's attempt to channel this lawsuit through an administrative adjudication necessarily fails as well. Relying primarily on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), Defendants argue that the States should raise their grievances in defense of some yet-uninitiated enforcement action. According to USDA, "Congress created exclusive avenues through which Plaintiffs may challenge the enforcement actions they fear will be brought under Title IX and" the Food and Nutrition Act," Defs.' Memo. of Law 14, so the States cannot invoke the APA's more-general review provisions to challenge the Memoranda and Final Rule. Again, the agency's obfuscation buckles under scrutiny. *See Tennessee*, 2022 WL 2791450, at *18-19.

Thunder Basin is irrelevant. In that case, a mine operator sought to short-circuit an administrative adjudication by securing an injunction against the Secretary of Labor in federal district court. 510 U.S. at 204-05. The Supreme Court checked that maneuver, reasoning that the Mine Act vested the Federal Mine Safety and Health Review Commission with "exclusive jurisdiction over challenges to agency enforcement proceedings" and subjected the Commission's

decisions to review in "the [federal] courts of appeals." *Id.* at 208. According to the Supreme Court, "[n]othing in the language [or] structure of the [Mine] Act or its legislative history" could be read "to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings." *Id.* at 216. The lawsuit was thus premature.

Yet, unlike the plaintiff in *Thunder Basin*, the States in this case have brought a "broad-scale attack on the" USDA's new "*regulations*," *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 856 (D.C. Cir. 2002) (emphasis added), not an anticipatory challenge to enforcement proceedings. Administrative law "typically treat[s] . . . regulations" that follow rulemaking "differently from" orders that follow "adjudication[s]." *Nat'l Min. Ass'n*, 292 F.3d at 857 (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973)); *see also* 5 U.S.C. § 551 (distinguishing "rule[s]" of general applicability from "order[s]" applied to a specific party). And only a dispute over the latter could fall within the relevant claim-channeling provisions, which apply to any "final determination," 7 U.S.C. § 2023(a)(13), finding that a State has "fail[ed] . . . without good cause to comply with" its SNAP-implementing obligations, *id.* § 2020(g); *cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991) (reading the phrase "determination" to refer only to an individual adjudication—not a determination made in a regulation).

No such order has issued in this case, and Plaintiff States are not attempting to preempt one. Instead, "[i]n the case at bar," USDA has promulgated regulations "prospective in operation and general in scope," and the States have challenged "all of [those] regulations together as well as the entire rulemaking process." *Nat'l Min. Ass'n*, 292 F.3d at 858 (quoting *Trans-Pac. Freight Conf. of Japan/Korea v. Fed. Maritime Comm'n*, 650 F.2d 1235, 1244-45 (D.C. Cir. 1980)). Under these circumstances, the States' claims are wholly collateral to statutory review processes set out in Title IX and the FNA, and *that* finding clearly supports the conclusion that Congress did not

intend to relegate these types of claims to the USDA. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010); *cf. Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 308 (D.D.C. 2017) (permitting review of "the allegedly unlawful processes and practices" an agency applied to *all* adjudications); *Elk Run Coal Co. v. Dep't of Lab.*, 804 F. Supp. 2d 8, 19 (D.D.C. 2011) (permitting review of "broad facial and systemic challenges" to agency action). Federal district courts have repeatedly exercised jurisdiction over this type of claim. *See, e.g.*, *Dist. of Columbia v. USDA*, 496 F. Supp. 3d 213 (D.D.C. 2020); *Gilliam v. USDA*, 486 F. Supp. 3d 856 (E.D. Pa. 2020); *Hall v. USDA*, 467 F. Supp. 3d 838 (N.D. Cal. 2020). This Court should do the same.

Moreover, even if this case were construed as a "pre-enforcement" challenge to some administrative punishment, it would not matter. "[A] long line of precedent allow[s]" such challenges, and rightfully so. *Tennessee*, 2022 WL 2791450, at *9. Indeed, "[a]s the Supreme Court recognized in both *Sackett*[*v. EPA*, 566 U.S. 120 (2012)] and *U.S. Army Corps of Engineers*[*v. Hawkes Co.*, 578 U.S. 590 (2016)], helplessly awaiting the initiation of enforcement proceedings . . . and risking potential liability in the interim is not an adequate remedy under the APA." *Tennessee*, 2022 WL 2791450, at *18. The Court has jurisdiction to decide the merits of this case.

II. USDA Failed to Follow Proper Rulemaking Procedures.

Upon reaching the merits, the Court should curb USDA's flouting of the APA's mandatory rulemaking procedures. The Final Rule announced new requirements conspicuously missing from the Proposed Rule, and the Memoranda imposed legislative rules without providing any notice at all. Those defects require this Court to set aside USDA's rules. *See* 5 U.S.C. § 706(2).

Final Rule. USDA enacted its Final Rule without providing fair notice or opportunity for public comment. *See* Doc. 3, Br. 9-10; 5 U.S.C. § 553(b)(3). The agency does not deny that its Proposed Rule "lack[ed] of any mention" of gender identity or sexual orientation. *Chesapeake*

Climate Action Network v. EPA, 952 F.3d 310, 320 (D.C. Cir. 2020). Nor does it dispute that the new language "eliminates, rather than retains, the status quo" by imposing new obligations on States. *Dist. of Columbia v. USDA*, 496 F. Supp. 3d at 231. Instead, it briskly maintains that the Final Rule's expansion was "entirely foreseeable" because (1) the proposal referenced discrimination "on the grounds of sex," and (2) parties in pending litigation had argued that such language extends beyond biological sex. Defs.' Memo. of Law 18. That is no defense.

To begin with, Defendants offer no authority for their novel conception of notice. That should come as no surprise. Adopting USDA's approach would require the public to scour federal dockets to divine an agency's thinking, all but eliminating the agency's obligation to provide "fair notice" itself. *Leyse v. Clear Channel Broad.*, 545 F. App'x 444, 454 (6th Cir. 2013).[5]

This case amply illustrates what would result from that arrangement. USDA's initial proposal elicited only five comments, not one of which addressed sexual orientation or gender identity. By contrast, a recent notice that expressly proposed expanding Title IX to discrimination based on gender identity and sexual orientation received over 240,000 comments—many of which directly address those issues. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Regulations.gov (Sept. 14, 2022).[6] This disparity shows that USDA "failed to give the public any inkling" that these groups would be included in the Final Rule. *See Dist. of Columbia v. USDA*, 496 F. Supp. 3d at 231.

On this record, USDA cannot credibly deny its attempt to sneak in new anti-discrimination requirements through a long-dormant rulemaking proposal—removing the public from the process

[5] The only circuit court decision USDA now points to was stayed for the entire comment period, *Gloucester Cnty. Sch. Bd. v. G.G.*, 579 U.S. 961 (Aug. 3, 2016), and then vacated by the U.S. Supreme Court, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (Mar. 6, 2017).
[6] https://www.regulations.gov/document/ED-2021-OCR-0166-0001.

entirely. This Court should not allow that blatant disregard of mandatory administrative procedure.

Memoranda. With respect to the Memoranda, USDA failed to even attempt a public comment process. The agency claims it did not have to comport with the APA's notice-and-comment requirements because the Memoranda qualify as mere interpretive documents that do not constitute final agency action. That argument mixes the final-agency-action inquiry with the interpretive-or-legislative-rule determination. Regardless, the Memoranda satisfy both inquiries by imposing binding obligations on regulated parties. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (agency action is final if it imposes "obligations"); *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (rule is legislative if "create[s] new . . . duties"). Indeed, "[l]egislative . . . rules are, by definition, final agency action." *Doe v. U.S. Customs & Border Protection*, No. 20-672, 2021 WL 980888, at *9 (D.C. Cir. Mar. 16, 2021), and the Memoranda contain legislative rules.

Contrary to USDA's contentions, the Memoranda do far more than "simply state[] what the administrative agency thinks the statute means." Defs.' Memo. of Law 16-17 (quoting *Azar*, 908 F.3d at 1042). In addition to creating "new law," *Tennessee*, 2022 WL 2791450, at *21, the Memoranda impose concrete obligations and other "changes" that "impact [State] operations." Doc. 1-2, Cover Letter at 1. For example, State agencies "must" publish the new Nondiscrimination Statement on their websites "within 90 days" and must update "[d]ocuments, pamphlets, brochures, etc., . . . when current supply on hand is exhausted or by September 30, 2023." Doc. 1-4, Supplemental Memorandum at 1. The Memoranda list "steps [that] must be taken by State Agencies and program operators" to effectuate USDA's new policy: they must "update their . . . complaint processing procedures," Doc. 1-3, Memorandum Q&A at 2, and ensure that "[a]ll new printing" contains the new Nondiscrimination Statement, Supplemental Doc. 1-1, Memorandum at 1. These obligations are far more than a non-binding interpretation that States

are "free to ignore." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). The Memoranda "read[] like a ukase": they "command[]," they "require[]," they "order[]," and they "dictate[]." *Id.* (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)). Defendants themselves suggest that USDA "could even bring an enforcement action" for violation of these new obligations, which confirms their legislative nature. Defs.' Memo. of Law 16; *see Appalachian Power*, 208 F.3d at 1021. USDA was not merely informing the public of its interpretation. Rather, it was "giv[ing] the States their 'marching orders' and . . . expect[ing] the[m] to fall in line." *Id.* at 1023. Such "mandatory language" imposed concrete obligations subject to judicial review. *Env't Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005).

Because USDA "attempt[ed] to issue . . . legislative rule[s] without abiding by the APA's procedural requirements," the States have plausible procedural claims. *Azar*, 908 F.3d at 1042.

III. USDA's Actions were Arbitrary and Capricious.

Even if the Final Rule and Memoranda had sprung from appropriate procedures, the States would still have plausible claims that they are "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A). For one, as a matter of law, an agency decision made "without adequate notice and comment is arbitrary or an abuse of discretion"—a point USDA does not dispute. *See Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). Moreover, USDA failed to consider the reliance interests associated with banning sex-separated facilities. Whether mentioned directly or not, the new rules do implicate facilities and other sex-based policies by banning gender identity discrimination on the "institution[al]" level, Nondiscrimination Statement, and adopting the Department of Education's Interpretation, which this Court has preliminarily enjoined precisely because it reaches issues such as bathrooms. *Tennessee*, 2022 WL 2791450, at *16. And the fact that a rule arguably comports with precedent, which these do not, does not immunize an agency

from having to consider reliance interests. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020). USDA's failure to "'reasonably consider[]" that "relevant issue[]" plausibly renders its rules arbitrary and capricious. *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 595 (D.C. Cir. 2022) (quotation omitted).

IV. USDA's Rules are Contrary to Title IX and the Food and Nutrition Act.

Even if USDA's rules had been well-reasoned and properly promulgated, the States would still have plausible claims on the merits because the rules violate governing law.[7]

A. The Final Rule and Memoranda are Contrary to Title IX.

This Court has already ruled that "nowhere in *Bostock*, Title IX, or its implementing regulations" is there an obligation for Title IX "regulated entities not to discriminate based on sexual orientation or gender identity." *Tennessee*, 2022 WL 2791450, at *21. Defendants have no way to distinguish that ruling or the Sixth Circuit's post-*Bostock* precedent. Instead, Defendants repeat the same Title IX arguments that were unsuccessful in *Tennessee* and encourage this Court to follow out-of-circuit decisions rather than the text of Title IX.

Defendants' assertion that there is an "absence of any substantial linguistic or structural distinction between the non-discrimination mandates in Title VII [and] Title IX," Defs.' Memo. of Law 19, requires them to ignore the text of Title IX. Most notably, despite claiming the States "have conjured up a fear of their own imagining" about the Final Rule and Memoranda prohibiting sex-separated bathrooms, Doc. 54, Opp. 30, they rely on a divided Fourth Circuit opinion holding that schools violate Title IX if they do not allow transgender students to use the bathrooms of the

[7] At points, Defendants slip into the "unlikely to succeed" standard of the preliminary injunction briefing. *E.g.*, Doc. 71, Defs.' Memo. of Law at 18, 24. For Plaintiff States to succeed in opposing the Motion to Dismiss, their claims must only be plausible, accepting the States' factual allegations as true and drawing all reasonable inferences in the States' favor

opposite biological sex, *id.* at 29 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. 2878 (with Justices Thomas and Alito noting that they would have granted the petition for writ of certiorari)).

That approach to Title IX essentially erases 20 U.S.C. § 1686 from the statute. In enacting Title IX, Congress specified that "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." 20 U.S.C. § 1686; *see Tennessee*, 2022 WL 2791450, at *21 (ruling that "Title IX does allow for sex-separation in" such circumstances). The Sixth Circuit identified this very statutory provision in *Meriwether v. Hartop* as one of several "important . . . differ[ences]" between Title IX and Title VII. 992 F.3d 492, 510 n.4 (6th Cir. 2021). USDA's construction of Title IX, in contrast, apparently prohibits institutions from maintaining separate living facilities for the different sexes when an individual's gender identity does not align with (biological) sex.

The Final Rule and Memoranda are, at their foundation, an attempt to convert Title IX's prohibition of discrimination "on the basis of sex," 20 U.S.C. § 1681(a), into a prohibition of all forms of sexual orientation or gender identity discrimination. If Congress had wanted the latter prohibition, it would not have used the word "sex." That word has a binary biological definition—a point Defendants do not dispute—and it does not mean sexual orientation or gender identity. *Bostock* held only that firing "someone simply for being homosexual or transgender" is discrimination "because of such individual's sex" under Title VII, 140 S. Ct. 1731, 1753 (2020). That this *one type* of sexual orientation or gender identity discrimination is also discrimination because of sex under Title VII does not mean that either Title VII or Title IX prohibits *all forms*

of sexual orientation or gender identity discrimination. *Tennessee*, 2022 WL 2791450, at *21-22.[8]

Even if this Court retreated from its interpretation of Title VII discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1), Title IX uses distinct "on the basis of sex" language that makes clear biological sex must be the sole reason for the discrimination, 20 U.S.C. § 1681(a). USDA now concedes that "there are practical and linguistic differences" between these phrases but insist that *Bostock* used them similarly. Defs.' Memo. of Law 18. But "the language of an opinion is not always to be parsed as though' it were 'the language of a statute.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). The dispositive question is what *Congress* intended, and Congress chose to use different language in the two statutes.

After *Bostock*, the Sixth Circuit has repeatedly advised that "that principles announced in the Title VII context" do not "automatically apply in the Title IX context." *Meriwether*, 992 F.3d at 510 n.4. Obeying the Supreme Court's instruction in *Bostock*, the Sixth Circuit has held that "the rule in *Bostock* extends no further than Title VII and does not stretch to the" Age Discrimination in Employment Act ("ADEA"). *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). That the ADEA uses similar "because of" language and protects individuals from discrimination made no difference in the Sixth Circuit's analysis. *Id.* Nor should the reasoning of *Bostock* extend to Title IX, which does not even use the "because of" language.[9]

[8] For example, while "[a]n individual's homosexuality or transgender status *is not relevant* to employment decisions" about hiring and firing, *Bostock*, 140 S. Ct. at 1741 (emphasis added), sex is relevant to decisions about locker rooms, showers, and other contexts where biological differences between the two sexes matter.

[9] Because USDA's rewriting of Title IX conflicts with how this Court and the Sixth Circuit have approached Title IX after *Bostock*, the agency points the Court to *Grimm* and district court opinions from outside the Sixth Circuit. Those scattered opinions are no reason to sideline *Tennessee*, *Meriwether*, and *Pelcha*.

B. The Final Rule and Memoranda are Contrary to the Food and Nutrition Act.

Just as *Bostock*'s Title VII ruling does not extend to Title IX or the ADEA, *Bostock* also does not extend to 7 U.S.C. § 2020(c)(1) (prohibiting discrimination "by reason of . . . sex" "[i]n the certification of applicant households for" SNAP benefits); *see also id.* § 2020(c)(2) (prohibiting discrimination on the basis of *age*, *disability*, and *race* in SNAP "administration"). To be sure, the States have not tried to "impose any other standards of eligibility as a condition for participating in the program." *Id.* § 2014(b). But to the extent the agency is relying on the Food and Nutrition Act to prohibit gender identity and sexual orientation discrimination throughout all SNAP-administering "institution[s]," Nondiscrimination Statement, it is undisputedly violating the law. *Pelcha*, 988 F.3d at 324 (holding that "the rule in *Bostock* extends no further than Title VII").

V. The Final Rule and Memoranda Violate the U.S. Constitution.

USDA's new assertions of authority are also plausibly contrary to law because they violate the U.S. Constitution in myriad ways. Despite Defendants' repeated attempts to wave away these constitutional defects by invoking *Bostock*, the only constitutional provision that the Supreme Court even referenced in *Bostock* was the First Amendment, but "how these doctrines protecting religious liberty interact with Title VII are questions for future cases too." 140 S. Ct. at 1754.

Spending Clause. USDA's rules violate the Spending Clause for at least two reasons. First, Title IX and the Food and Nutrition Act—at the time of their enactment and initial acceptance by Plaintiff States—did not "unambiguously" prohibit discrimination based on gender identity and sexual orientation. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Defendants' insistence that *Bostock*'s Title VII ruling or USDA rules and guidance issued decades after Congress enacted Title IX and the Food and Nutrition Act somehow should have put the States on notice that USDA "would inform states that the agency would assess compliance in a

manner consistent with" *Bostock*, Defs.' Memo. of Law 21-22, runs headlong into the Sixth Circuit's recent ruling that, "when such a clear-statement rule is in play" under the Spending Clause, "it is insufficient merely that an agency reasonably liquidated ambiguities in the relevant statute" through rulemaking, *Kentucky*, 54 F.4th at 354.[10]

Second, the Final Rule and Memoranda leverage billions of dollars in SNAP and SNAP-Ed funding to coerce States into adopting USDA's newly preferred policies. Defendants do not deny that the Final Rule and Memoranda are designed to coerce States. Nor could they. USDA's new rules have already put "a gun to the head" of each State, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.), and succeeded in getting States such as Alaska to comply, *see* Doc. 3-2, Crum Decl., ¶¶ 8-10. And yet, USDA maintains that the rules are not "*improperly*" or "*unlawful[ly]*" coercive. Defs.' Memo. of Law 22 (emphases added).

To justify that claim, Defendants try two maneuvers. They start by citing two cases where courts rejected Spending Clause arguments. In *Gruver v. Louisiana Board of Supervisors for LSU Agricultural & Mechanical College*, the Fifth Circuit reaffirmed a twenty-year-old decision holding that Louisiana waived "immunity against suits alleging sex discrimination," not sexual orientation or gender identity discrimination, by accepting Title IX funding. 959 F.3d 178, 180

[10] The Sixth Circuit's divided, pre-*Bostock* motions panel decision in *Dodds v. U.S. Department of Education*, 845 F.3d 217 (6th Cir. 2016) (per curiam), also did not provide notice. *Dodds* said nothing about the meaning of Title IX, and it most certainly "did not conclusively hold that discrimination against transgender individuals would constitute sex discrimination under Title IX." *Am. Coll. of Pediatricians v. Becerra*, No. 1:21-cv-195, 2022 WL 17084365, at *13 n.2 (E.D. Tenn. Nov. 18, 2022). *Dodds* did not definitively address whether the school district had violated Title IX; it only declined to stay an injunction. 845 F.3d at 221-22. As now-Chief Judge Sutton pointed out in dissent, the Supreme Court reached exactly the opposite conclusion when it granted a similar stay request. *Id.* at 222 (Sutton, J., dissenting). Defendants also misstate the year of *Dodds* as 2015. *Dodds* was issued on December 15, 2016. Significantly, that places *Dodds* after USDA published the Proposed Rule in November 2016. Those distinctions are likely why Defendants do not otherwise rely on *Dodds* as justification for the Final Rule and Memoranda.

(5th Cir. 2020) (citing *Pederson v. LSU*, 213 F.3d 858, 876 (5th Cir. 2000)). There was no new funding condition. And *Tennessee v. U.S. Department of State* was a situation where the district court ruled the State already had an independent obligation due to constitutional requirements and a preexisting statute based on Congress's enumerated powers. 329 F. Supp. 3d 597, 623-25 (W.D. Tenn. 2018), *aff'd on alternative grounds sub nom. State by & through Tenn. Gen. Assembly*, 931 F.3d 499 (6th Cir. 2019). Defendants do not make those same arguments here.

Instead, Defendants retreat to the proposition that USDA's rules *cannot* be unconstitutionally coercive because "simply applying the existing provisions of Title IX and the FNA to [USDA's] longstanding nutrition programs . . . based on an interpretation of those statutes that has been recognized as valid under analogous circumstances in *Bostock*" is not really a new funding condition. Defs.' Memo. of Law 22. That roundabout explanation for why the Memoranda and Final Rule supposedly do nothing mistakenly conflates the Spending Clause's prohibition of federal coercion with its unambiguous-statement-of-conditions rule. Even if a statute's funding conditions are obvious from the get-go, they can still be coercive. *See Kentucky v. Yellen*, 563 F. Supp. 3d 647, 658 (E.D. Ky. 2021) (ruling the American Rescue Plan Act unconstitutionally coercive regardless of whether the funding provisions were unambiguous), *merits ruling affirmed on other grounds*, 54 F.4th 325 (6th Cir. 2022). And if the statutes really meant what Defendants now say the laws mean, then those statutes would no doubt be coercive.

First Amendment. Defendants insist that neither the Final Rule nor the Memoranda say anything about the use of biologically accurate pronouns. But requiring the States to prohibit gender identity discrimination at least arguably does so. The EEOC already tried to force that understanding of Title VII on the States until this Court enjoined the purported guidance. *Tennessee*, 2022 WL 2791450, at *3, *24. The Sixth Circuit held in *Meriwether* that an Ohio

university attempting to enforce a supposed prohibition in Title IX against gender identity discrimination "violated [a professor's] free-speech rights" by punishing the professor for declining to use a student's "preferred pronouns." 992 F.3d at 512.[11]

Even worse, Defendants completely ignore Plaintiff States' concern that Congress's spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). By requiring the States to engage in conduct that would violate the First Amendment rights of their students and employees, the Final Rule and Memoranda impose unconstitutional conditions on the receipt of federal funds. The States thus "seek to assert their own 'sovereign' and 'quasi-sovereign' interests against the federal government." *Kentucky v. Biden*, 23 F.4th 585, 597-99 (6th Cir. 2022).

And of course the First Amendment protects States from USDA turning them into federal mouthpieces. The First Amendment begins by declaring that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I (emphasis added). That language is object-neutral; the First Amendment protects *all* from the federal government. The States and their officials have First Amendment rights "just as" private citizens do. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219-20 (2015); *see Nat'l Rifle Ass'n of Am. v. Vullo*, 49 F.4th 700, 714-15 (2d Cir. 2022). At a minimum, a state "government, just like a private employer, retains" the right to control its own speech. *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 342 (6th Cir. 2010) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). State employees cannot "speak on the" state "government's behalf and convey its intended messages" if the *federal* government can

[11] The exemption for educational institutions that are controlled by religious organizations will provide no protection for state employees or public-school students.

dictate their every pronouncement. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022).

Tenth Amendment and Anticommandeering Doctrine. Defendants have little to say about how USDA has violated the Tenth Amendment and Anticommandeering Doctrine. They gesture at *New York v. United States*, 505 U.S. 144 (1992). But that case held that "the Constitution does not confer upon Congress the ability simply to compel the States" to "provide for the disposal of the radioactive waste generated within their borders" even though the State of New York, which brought the suit, had previously "complied with the Act's requirements." *Id.* at 149, 154, 188. State consent cannot justify federal commandeering. *See* Doc. 3, Br. 22-23.

Separation of Powers and Non-Delegation Doctrine. If the Final Rule and Memoranda pronounced an across-the-board prohibition of gender identity and sexual orientation discrimination, then USDA lacked the authority to resolve such a major question of "great political significance," that "regulates a significant portion of the American economy," impacts "billions of dollars" of funding, and intrudes into an area that is "traditionally regulated by the States." *West Virginia*, 142 S. Ct. at 2621 (2022) (Gorsuch, J., concurring) (cleaned up).

Bostock is no justification for what USDA has done. Defendants cannot identify any intelligible principle in the text of Title IX or the Food and Nutrition Act justifying their redefinition of "sex" to include "gender identity and sexual orientation." Defendants thus rewrite *Bostock* to include USDA's preferred language in brackets because that phrasing appears nowhere in the opinion. *See* Defs.' Memo. of Law 24 (turning "that employers are prohibited from firing employees on the basis of homosexuality or transgender status," *Bostock*, 140 S. Ct. at 1753, into "on the basis of [sex, including. . . sexual orientation] or transgender status").

CONCLUSION

Plaintiff States respectfully request that this Court deny Defendants' Motion to Dismiss.

Dated: December 30, 2022

Respectfully submitted,

/s/ Clark Hildabrand (BPR # 038199)
JONATHAN SKRMETTI
Attorney General and Reporter of Tennessee
BRANDON J. SMITH
Chief of Staff
CLARK LASSITER HILDABRAND
Assistant Solicitor General
J. MATTHEW RICE*
Special Assistant to the Solicitor General
Office of the Tennessee Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202
(615) 253-5642
Clark.Hildabrand@ag.tn.gov
Counsel for State of Tennessee

/s/ Melinda Holmes
THEODORE E. ROKITA
Attorney General of Indiana
THOMAS M. FISHER*
Solicitor General
MELINDA HOLMES*
Deputy Attorney General
Office of the Indiana Attorney General
IGC-South, Fifth Floor
302 West Washington St.
Indianapolis, IN 46204
(317) 232-6255
Melinda.Holmes@atg.in.gov
Counsel for State of Indiana

/s/ Edmund G. LaCour Jr.
STEVE MARSHALL
Attorney General of Alabama
EDMUND G. LACOUR JR.*
Solicitor General
KATHERINE G. ROBERTSON
Chief Counsel
Office of the Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov
Counsel for State of Alabama

/s/ Charles E. Brasington
TREG R. TAYLOR
Attorney General of Alaska
CHARLES E. BRASINGTON*
Assistant Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811
(907) 465-3600
Charles.Brasington@alaska.gov
Counsel for State of Alaska

/s/ Anthony Napolitano
MARK BRNOVICH
Attorney General of Arizona
ANTHONY NAPOLITANO*
Outside Counsel
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 848-5449
anapolitano@bfsolaw.com
Counsel for State of Arizona

/s/ Nicholas J. Bronni
LESLIE RUTLEDGE
Attorney General of Arkansas
NICHOLAS J. BRONNI*
Solicitor General
Office of the Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6307
nicholas.bronni@arkansasag.gov
Counsel for State of Arkansas

/s/ Stephen J. Petrany
CHRISTOPHER M. CARR
Attorney General of Georgia
STEPHEN J. PETRANY*
Solicitor General
Office of the Georgia Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334
(404) 458-3378
spetrany@law.ga.gov
Counsel for State of Georgia

/s/ Kurtis K. Wiard
DEREK SCHMIDT
Attorney General of Kansas
KURTIS K. IARD*
Assistant Solicitor General
Office of the Kansas Attorney General
120 S.W. 10t Ave.
Topeka, KS 66612
(785) 296-2215
kurtis.wiard@ag.ks.gov
Counsel for State of Kansas

/s/ Marc Manley
DANIEL CAMERON
Attorney General of Kentucky
MARC MANLEY*
Assistant Attorney General
Office of the Kentucky Attorney General
700 Capital Ave., Suite 118
Frankfort, KY 40601
(502) 696-5300
Marc.Manley@ky.gov
Counsel for Commonwealth of Kentucky

/s/ Elizabeth B. Murrill
JEFF LANDRY
Attorney General of Louisiana
ELIZABETH B. MURRILL*
Solicitor General
J. SCOTT ST. JOHN*
Deputy Solicitor General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6766
emurrill@ag.louisiana.gov
stjohnj@ag.louisiana.gov
Counsel for State of Louisiana

/s/ Justin L. Matheny
LYNN FITCH
Attorney General of Mississippi
JUSTIN L. MATHENY*
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205
(601) 359-3680
justin.matheny@ago.ms.gov
Counsel for State of Mississippi

/s/ D. John Sauer
ERIC S. SCHMITT
Attorney General of Missouri
D. JOHN SAUER*
Solicitor General
Office of the Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
John.Sauer@ago.mo.gov
Counsel for State of Missouri

/s/ Christian B. Corrigan
AUSTIN KNUDSEN
Attorney General of Montana
CHRISTIAN B. CORRIGAN*
Deputy Solicitor General
Office of the Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620
(406) 444-2707
Christian.Corrigan@mt.gov
Counsel for State of Montana

/s/ James A. Campbell
DOUGLAS J. PETERSON
Attorney General of Nebraska
JAMES A. CAMPBELL*
Solicitor General
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
Jim.Campbell@nebraska.gov
Counsel for State of Nebraska

/s/ Benjamin Flowers
DAVE YOST
Attorney General of Ohio
BENJAMIN FLOWERS*
Solicitor General
Office of the Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-8980
Benjamin.Flowers@OhioAGO.gov
Counsel for State of Ohio

/s/ Bryan Cleveland
JOHN M. O'CONNOR
Attorney General of Oklahoma
BRYAN CLEVELAND*
Deputy Solicitor General
Oklahoma Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105-4894
(405) 521-3921
Bryan.Cleveland@oag.ok.gov
Counsel for State of Oklahoma

/s/ J. Emory Smith Jr.
ALAN WILSON
Attorney General of South Carolina
J. EMORY SMITH, JR.*
Deputy Solicitor General
Office of the South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3680
esmith@scag.gov
Counsel for State of South Carolina

/s/ Paul Swedlund
MARK VARGO
Attorney General of South Dakota
Office of the South Dakota Attorney General
PAUL SWEDLUND*
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215
Jason.Ravnsborg@state.sd.us
Counsel for State of South Dakota

/s/ Aaron Rietz
KEN PAXTON
Attorney General of Texas
AARON RIETZ*
Deputy Attorney General
Office of the Attorney General of Texas
P.O Box 12548
Austin, TX 78711-2548
(512) 936-1989
Aaron.Rietz@oag.texas.gov
Counsel for State of Texas

/s/ Melissa A. Holyoak
SEAN D. REYES
Attorney General of Utah
MELISSA A. HOLYOAK*
Solicitor General
Office of the Utah Attorney General
350 N. State Street, Suite 230
Salt Lake City, UT 84114
(801) 366-0260
melissaholyoak@agutah.gov
Counsel for State of Utah

/s/ Andrew N. Ferguson
JASON S. MIYARES
Attorney General of Virginia
ANDREW N FERGUSON*
Solicitor General
LUCAS W.E. CROSLOW*
Deputy Solicitor General
Office of the Attorney General of Virginia
Richmond, VA 23219
(814) 786-7704
AFerguson@oag.state.va.us
LCroslow@oag.state.va.us
Counsel for Commonwealth of Virginia

/s/ Lindsay S. See
PATRICK MORRISEY
Attorney General of West Virginia
LINDSAY S. SEE*
Solicitor General
Office of the West Virginia Attorney General
State Capitol Bldg. 1, Room E-26
Charleston, WV 25305
(681) 313-4550
Lindsay.S.See@wvago.gov
Counsel for State of West Virginia

***Admitted Pro Hac Vice**

CERTIFICATE OF SERVICE

I hereby certify that, on December 30, 2022, a true and exact copy of the foregoing Response in Opposition to Defendants' Motion to Dismiss was served on all counsel of record through the Court's Electronic Filing System.

/s/ Clark Hildabrand
CLARK LASSITER HILDABRAND
Assistant Solicitor General

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	**Case No. 3:22-cv-00257**
	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,	)	
	)	
	)	
Defendants	)	

DECLARATION OF ROBERT G. ANDERSON

Pursuant to 28 U.S.C. § 1746, I, Robert G. Anderson, duly affirm under penalty of perjury as follows:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to make this Declaration.
2. I serve as the Executive Director of the Mississippi Department of Human Services ("MDHS"). In this role, I review and submit various agreements with the federal government to administer the Supplemental Nutrition Assistance Program ("SNAP").
3. USDA required the State of Mississippi, to continue receiving SNAP funding, to submit an updated Federal-State Agreement.
4. Because, as argued in the above-captioned case, the State of Mississippi objects to the USDA's interpretation and extension of Title IX of the Education Amendments of 1972 and the Food and Nutrition Act related implementing regulations, on or about August 23, 2022, Shenetta Drone, Deputy Executive Director – Economic Programs

for MDHS, submitted a signed State of Mississippi's Federal-State Agreement as revised (Ex. "A") which included a provision that "Mississippi makes no concession as to the scope of the terms 'sex' or 'discrimination' as they appear in Title IX of the Education Amendments of 1972 and the Food and Nutrition Act or implementing regulations. Mississippi does not concede that the USDA's extension of those Acts of Congress to issues pertaining to sexual orientation and gender identity is a valid funding condition . . . ."

5. On December 12, 2022, the Supplemental Nutrition Assistance Program, Regional Director contacted MDHS proposing new alternate language to the Mississippi Federal-State Agreement. To my knowledge USDA had not contacted MSDH prior to December 12, 2022.

6. On December 19, 2022, MDHS Deputy Executive Director Drone resubmitted a signed State of Mississippi's Federal-State Agreement as further revised and amended to confirm that "[b]y signing this agreement, Mississippi does not concede it is in agreement with USDA's interpretation of Title IX of the Education Amendments of 1972 or section 11(c) of the Food and Nutrition Act of 2008, as amended and incorporates by reference its arguments asserted in State of Tennessee, et al v. USDA, Case No. 3:22-cv-00257. " (Ex. "B").

Robert G. Anderson

Robert G. Anderson
Executive Director, MSDH

December 20, 2022

Date

Anderson Exhibit A

Federal-State Agreement

The SNAP State agency of Mississippi and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food and Nutrition Act of 2008, as amended, implementing regulations and the FNS approved State Plan of Operation. The State agency and FNS USDA further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

PROVISIONS

The State agrees to:

1. Administer the program in accordance with the provisions contained in the Food and Nutrition Act of 2008, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

See Below for Paragraph 2

2. Assurance of Civil Rights Compliance. Comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020), Title II and Title III of the Americans with Disabilities Act (ADA) of 1990 as amended by the ADA Amendments Act of 2008 (42 U.S.C. 12131-12189) as implemented by Department of Justice regulations at 28 CFR part 35 and 36; Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000), and all requirements imposed by the regulations issued by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, including gender identity and sexual orientation, race, color, age, political belief, religious creed, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP. This includes program specific requirements found at 7 CFR part 15 *et seq.* and 7 CFR 272.6.

initial

This assurance is given in consideration of and for the purpose of obtaining any and all Federal assistance extended to the State by USDA under the authority of the Food and Nutrition Act of 2008, as amended. Federal financial assistance includes grants, and loans of Federal funds; reimbursable expenditures, grants, or donations of Federal property and interest in property; the detail of Federal personnel; the sale, lease of, or permission to use Federal property or interest in such property; the furnishing of services without consideration; or at a nominal consideration, or at a consideration that is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale, lease, or furnishing of services to the recipient; or any improvements made with Federal financial assistance extended to the State by USDA. This assistance also includes any Federal agreement, arrangement, or other contract that has as one of its purposes the provision of cash assistance for the purchase of food; cash assistance for purchase or rental of food service equipment or any other financial assistance extended in reliance on the representations and agreements made in this assurance.

By accepting this assurance, the State agency agrees to compile data, maintain records, and submit records and reports as required, to permit effective enforcement of nondiscrimination laws and permit authorized USDA personnel during hours of program operation to review and copy such records, books, and accounts, access such facilities and interview such personnel as needed to ascertain compliance with the nondiscrimination laws. If there are any violations of this assurance, USDA, FNS, shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the State agency, its

Exhibit "A"

successors, transferees and assignees as long as it receives assistance or retains possession of any assistance from USDA. The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the State agency.

JTR initial

3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

FNS agrees to: 1. Pay administrative costs in accordance with the Food Stamp Act, implementing regulations, and an approved Cost Allocation Plan.

2. Carry-out any other responsibilities delegated by the Secretary in the Food and Nutrition of 2008, amended.

Date _____

Signature _____ August 18, 2022

(Chief Executive Officer of a State or Authorized Designee)

Date _____

Signature _____

(Regional Administrator, FNS)

Paragraph 2

JTR initial

2. Comply with the antidiscrimination requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000, *et seq.*); Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, *et seq.*); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*); Section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020); Title II and Title III of the Americans with Disabilities Act (ADA) of 1990 as amended by the ADA Amendments Act of 2008 (42 U.S.C. 12131-12189); "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000) and all requirements imposed by implementing regulations issued by the Department of Agriculture consistent with these Acts of Congress in connection with the administration of the SNAP. By making this assurance, Mississippi makes no concession as to the scope of the terms "sex" or "discrimination" as they appear in Title IX of the Education Amendments of 1972 and the Food and Nutrition Act or implementing regulations. Mississippi does not concede that the USDA's extension of those Acts of Congress to issues pertaining to sexual orientation and gender identity is a valid funding condition, and Mississippi reserves the right to challenge that condition in any appropriate forum. Mississippi expressly incorporates by reference any arguments raised in its pending litigation against the USDA. *See Tennessee v. USDA*, No. 3:22-CV-257 (E.D. Tenn.). Mississippi notes that, in imposing requirements related to sexual orientation and gender identity, USDA relied on an interpretation by the U.S. Department of Education that was enjoined from implementation by a federal court. *See Tennessee v. Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *1 (E.D. Tenn. July 15, 2022).

Anderson Exhibit B

The SNAP State agency of Mississippi and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food and Nutrition Act of 2008, as amended, implementing regulations and the FNS approved State Plan of Operation. The State agency and FNS USDA further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

The State agrees to:

1. Administer the program in accordance with the provisions contained in the Food and Nutrition Act of 2008, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

2. Assurance of Civil Rights Compliance: Comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020), Title II and Title III of the Americans with Disabilities Act (ADA) of 1990 as amended by the ADA Amendments Act of 2008 (42 U.S.C. 12131-12189) as implemented by Department of Justice regulations at 28 CFR part 35 and 36, Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000), and all requirements imposed by the regulations issued by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, including gender identity and sexual orientation, race, color, age, political belief, religious creed, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP. This includes program-specific requirements found at 7 CFR part 15 et seq. and 7 CFR 272.6.

This assurance is given in consideration of and for the purpose of obtaining any and all Federal assistance extended to the State by USDA under the authority of the Food and Nutrition Act of 2008, as amended. Federal financial assistance includes grants, and loans of Federal funds; reimbursable expenditures, grants, or donations of Federal property and interest in property; the detail of Federal personnel; the sale, lease of, or permission to use Federal property or interest in such property; the furnishing of services without consideration, or at a nominal consideration, or at a consideration that is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale, lease, or furnishing of services to the recipient; or any improvements made with Federal financial assistance extended to the State by USDA. This assistance also includes any Federal agreement, arrangement, or other contract that has as one of its purposes the provision of cash assistance for the purchase of food, cash assistance for purchase or rental of food service equipment or any other financial assistance extended in reliance on the representations and agreements made in this assurance.

By accepting this assurance, the State agency agrees to compile data, maintain records, and submit records and reports as required, to permit effective enforcement of nondiscrimination laws and permit authorized USDA personnel during hours of program operation to review and copy such records, books, and accounts, access such facilities and interview such personnel as needed to ascertain compliance with the nondiscrimination laws. If there are any violations of this assurance, USDA, FNS, shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the State agency, its successors, transferees and assignees as long as it receives assistance or retains possession of any

Exhibit "B"

assistance from USDA. The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the State agency.

By signing this agreement, Mississippi does not concede it is in agreement with USDA's interpretation of Title IX of the Education Amendments of 1972 or section 11(c) of the Food and Nutrition Act of 2008, as amended and incorporates by reference its arguments asserted in *State of Tennessee, et al v. USDA,* Case No. 3:22-cv-00257. Mississippi maintains that it administers the SNAP program in compliance with the antidiscrimination provisions of Title IX and the Food and Nutrition Act, as they are properly interpreted.

3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's Plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

4. FNS agrees to:

1. Pay administrative costs in accordance with the Food and Nutrition Act of 2008, implementing regulations, and an approved Cost Allocation Plan.

2. Carry out any other responsibilities delegated by the Secretary in the Food and Nutrition Act of 2008, as amended.

5. This agreement, utilizing alternative language, shall only be valid during the pendency of the aforementioned litigation including any appeals. If USDA's interpretation of Title IX or the Food and Nutrition Act of 2008, as amended is upheld, the State will need to submit a new agreement subject to further information from USDA communicated following any resolution of the aforementioned litigation.

Date 12/19/22

Signature

(Chief Executive Officer of a State or Authorized Designee)

Date _____

Signature _____

(Regional Administrator, FNS)

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE, et al., Plaintiffs,	)	
v.	)	Case No. 3:22-cv-00257
UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants.	)	

DECLARATION OF LAURIE GILL

I, Laurie Gill, hereby depose and declare as follows:

1. I am over the age of 21, and make this Declaration based on my own personal knowledge.

2. I am the Secretary of the South Dakota Department of Social Services which is the SNAP state agency for South Dakota.

3. For FY23 the State of South Dakota was required by the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) to sign a Federal-State Agreement (FSA) that contained the following language: "[N]o person in the United States shall, on the grounds of sex, including gender identity and sexual orientation, race, color, age, political belief, religious creed, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP."

4. The State of South Dakota is a party Plaintiff in the instant lawsuit that was filed on July 26, 2022, which, inter alia, challenges the inclusion of the phrase, "including gender identity and sexual orientation" in the FSA for FY23.

5. Because South Dakota objected to that language in the FSA for FY23, on August 15, 2022, South Dakota submitted the FSA that was used in FY22 that contained the following language: "[N]o person in the United States shall, on the grounds of sex, race, color, age, political belief, religion, handicap, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP." (Exhibit A)

6. On August 16, 2022, South Dakota DSS was informed that a new signed FSA was needed that included the "updated non-discrimination statement."

7. On December 12, 2022, Cheryl Kennedy, Regional Administrator of the Food and Nutrition Service, Mountain Plains Region, forwarded a revised FSA for FY23 that contained additional language specifically addressing South Dakota's participation in the instant lawsuit. However, the revised FSA still retained the phrase "including gender identity and sexual orientation." (Exhibit B)

8. To avoid any risk of losing federal funding for SNAP in FY23, on December 13, 2022, I signed the version of the FSA for FY23 that had been modified by FNS, and submitted it with a letter that reiterated South Dakota's objection to the "updated non-discrimination statement" contained in the FY23 FSA, as well as any corresponding changes South Dakota would have to make to SNAP forms, posters, and other materials. (Exhibit C)

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

Executed this 29th day of December, 2022.

Laurie Gill
Cabinet Secretary
South Dakota Department of Social Services

Gill Exhibit A

Item number and name: 1 - Federal-State Agreement
Date of last update: August 15, 2022
State Agency point of contact: Amy Gorham, SNAP Administrator

Federal-State Agreement

The State of South Dakota and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food and Nutrition Act of 2008, as amended, implementing regulations and the FNS-approved State Plan of Operation. The State and FNS (USDA) further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

PROVISIONS

The State agrees to: 1. Administer the program in accordance with the provisions contained in the Food and Nutrition Act of 2008, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

2. Comply with Title VI of the Civil Rights Act of 1964 (Pub. L. 88-352), section 11(c) of the Food and Nutrition Act of 2008, as amended, the Age Discrimination Act of 1975 (Pub. L. 94-135) and the Rehabilitation Act of 1973 (Pub. L. 93-112, sec. 504) and all requirements imposed by the regulations issued pursuant to these Acts by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, race, color, age, political belief, religion, handicap, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP.

3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's Plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

FNS agrees to: 1. Pay administrative costs in accordance with the Food Stamp Act, implementing regulations, and an approved Cost Allocation Plan.

2. Carry-out any other responsibilities delegated by the Secretary in the Food and Nutrition Act of 2008, as amended.

Date: August 15, 2022

Signature: Laurie R. Gill

Laurie R. Gill, Cabinet Secretary, Department of Social Services
(Governor or Authorized Designee)

Date:
Signature
(Regional Administrator, FNS)

Addendum

Clarification of SNAP Civil Rights Requirements - Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency (LEP)," and Title II and III of the Americans with Disabilities Act

This addendum clarifies core civil rights requirements to ensure meaningful access to programs, services, and information for persons with Limited English Proficiency (LEP) and persons with disabilities in accordance with Federal law, regulations and current guidance from the Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA).

Meaningful Access for LEP Individuals

State agencies that participate in the Supplemental Nutrition Assistance Program (SNAP) must take reasonable steps to ensure that LEP persons have meaningful access to programs, services, and benefits. This includes the requirement to provide bilingual program information and certification materials and interpretation services to single-language minorities in certain project areas. SNAP State agencies that do not provide meaningful access for LEP individuals risk violating prohibitions against discrimination based on National Origin in the Food and Nutrition Act of 2008, as amended, Title VI of the Civil Rights Act of 1964 (Title VI), and SNAP program regulations.

Federal LEP regulations and guidance include:

- SNAP regulations provided by 7 CFR Part 272.4(b), "Bilingual requirements";
- Executive Order 13166 of August 11, 2000, "Improving Access to Services for Persons with Limited English Proficiency," reprinted in 65 FR 50121, 50122 (August 16, 2000);
- DOJ policy guidance titled, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," published in 67 FR 41455, 41457 (June 18, 2002); and
- USDA policy guidance titled, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons", published in 79 FR 70771 - 70784 (November 28, 2014).

Four Factor Analysis for Assessing LEP Needs

To be in compliance, the Title VI guidance provided by DOJ and USDA instructs State Agencies to assess the LEP needs of the population served and determine the LEP services required by balancing four factors:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered within the area serviced by the recipient;
2. The frequency with which LEP individuals come in contact with the program;
3. The nature and importance of the program, activity, or service to people's lives; and
4. The resources available to the recipient and costs.

SNAP State Agencies must also comply with the specific requirements established by 7 CFR Part 272.4(b) and should include these obligations in the LEP assessment.

Developing an LEP Plan

After completing an assessment of LEP needs, SNAP state agencies should develop an implementing plan to address the LEP needs of the population served. This may include contracting for oral interpretation services, hiring bilingual staff, arranging telephone interpreters and/or language lines, coordinating community volunteers, translating vital documents, and providing written notice that language services are available in appropriate languages. Quality and accuracy of the language service is critical in order to avoid serious consequences to the LEP person and to the recipient. LEP needs should be considered in developing State and local budgets and front line staff should understand how to obtain LEP services.

USDA's 2014 policy guidance includes detailed information on assessing LEP needs, identifying practices for translating documents that will be seen as strong evidence of compliance. For additional assistance and information regarding LEP matters, please also visit http://www.lep.gov. The website includes online LEP mapping tools designed to help assess the language needs of the population served by a particular program or facility.

Ensuring Equal Opportunity Access for Persons with Disabilities

SNAP State agencies must also ensure equal opportunity access for persons with disabilities. This includes ensuring that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with people without disabilities. State Agencies that do not provide persons with disabilities equal opportunity access to programs may risk violating prohibitions against disability discrimination in the Rehabilitation Act of 1978, the American with Disabilities Act (ADA), and SNAP program regulations.

DOJ published revised final regulations implementing Title II and Title III of the ADA on September 15, 2010. These regulations are codified at 28 CFR Part 35 "Nondiscrimination on the Basis of Disability in State and Local Government Services" and 28 CFR Part 36, "Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities". In accordance with the implementing regulations, State Agencies must providing auxiliary aids and services where necessary to ensure effective communication and equal opportunity access to program benefits for individuals with disabilities. The type of auxiliary aids and services required will vary, but a State agency may not require an individual with a disability to bring another individual to interpret, and may rely on a person accompanying a disabled individual only in limited circumstances. When a State agency communicates with applicants and beneficiaries by telephone, it must provide text telephone services (TTY) or an equally effective electronic telecommunications system to communicate with individuals who are deaf, hard of hearing, or hearing impaired. State agencies must also ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities. For more information, please visit the ADA website: http://www.ada.gov.

Gill Exhibit B

Federal-State Agreement

The SNAP State agency of _____ and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food and Nutrition Act of 2008, as amended, implementing regulations and the FNS approved State Plan of Operation. The State agency and FNS USDA further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

Provisions

The State agrees to:

1. Administer the program in accordance with the provisions contained in the Food and Nutrition Act of 2008, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

2. Assurance of Civil Rights Compliance: Comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020), Title II and Title III of the Americans with Disabilities Act (ADA) of 1990 as amended by the ADA Amendments Act of 2008 (42 U.S.C. 12131-12189) as implemented by Department of Justice regulations at 28 CFR part 35 and 36, Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000), and all requirements imposed by the regulations issued by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, including gender identity and sexual orientation, race, color, age, political belief, religious creed, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP. This includes program-specific requirements found at 7 CFR part 15 *et seq.* and 7 CFR 272.6.

This assurance is given in consideration of and for the purpose of obtaining any and all Federal assistance extended to the State by USDA under the authority of the Food and Nutrition Act of 2008, as amended. Federal financial assistance includes grants, and loans of Federal funds; reimbursable expenditures, grants, or donations of Federal property and interest in property; the detail of Federal personnel; the sale, lease of, or permission to use Federal property or interest in such property; the furnishing of services without consideration, or at a nominal consideration, or at a consideration that is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale, lease, or furnishing of services to the recipient; or any improvements made with Federal financial assistance extended to the State by USDA. This assistance also includes any Federal agreement, arrangement, or other contract that has as one of its purposes the provision of cash assistance for the purchase of food, cash assistance for purchase or rental of food service equipment or any other financial assistance extended in reliance on the representations and agreements made in this assurance.

By accepting this assurance, the State agency agrees to compile data, maintain records, and submit records and reports as required, to permit effective enforcement of nondiscrimination laws and permit authorized USDA personnel during hours of program operation to review and copy such records, books, and accounts, access such facilities and interview such personnel as needed to ascertain compliance with the nondiscrimination laws. If there are any violations of this assurance, USDA, FNS, shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the State agency, its successors, transferees and assignees as long as it receives assistance or retains possession of any assistance from USDA. The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the State agency.

By signing this agreement, the State does not concede it is in agreement with USDA's interpretation of Title IX of the Education Amendments of 1972 or section 11(c) of the Food and Nutrition Act of 2008, as amended. Regardless, the State agrees to administer SNAP in accordance with this section while State of Tennessee, et al v. USDA, Case No. 3:22-cv-00257, including any appeal, is pending.

3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's Plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

FNS agrees to:

1. Pay administrative costs in accordance with the Food Stamp Act, implementing regulations, and an approved Cost Allocation Plan.

2. Carry-out any other responsibilities delegated by the Secretary in the Food and Nutrition Act of 2008, as amended.

3. This agreement, utilizing alternative language, shall only be valid during the pendency of the aforementioned litigation. If USDA's interpretation of Title IX or the Food and Nutrition Act of 2008, as amended is upheld, the State will need to submit a new agreement subject to further information from USDA communicated following any resolution of the aforementioned litigation.

_____ _____

Signature (Chief Executive Officer of a State or Authorized Designee) Date

Date

Signature

(Regional Administrator, FNS)

Gill Exhibit C

Federal-State Agreement

The SNAP State agency of South Dakota and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food and Nutrition Act of 2008, as amended, implementing regulations and the FNS approved State Plan of Operation. The State agency and FNS USDA further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

Provisions

The State agrees to:

1. Administer the program in accordance with the provisions contained in the Food and Nutrition Act of 2008, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

2. Assurance of Civil Rights Compliance: Comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020), Title II and Title III of the Americans with Disabilities Act (ADA) of 1990 as amended by the ADA Amendments Act of 2008 (42 U.S.C. 12131-12189) as implemented by Department of Justice regulations at 28 CFR part 35 and 36, Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000), and all requirements imposed by the regulations issued by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, including gender identity and sexual orientation, race, color, age, political belief, religious creed, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP. This includes program-specific requirements found at 7 CFR part 15 *et seq.* and 7 CFR 272.6.

This assurance is given in consideration of and for the purpose of obtaining any and all Federal assistance extended to the State by USDA under the authority of the Food and Nutrition Act of 2008, as amended. Federal financial assistance includes grants, and loans of Federal funds; reimbursable expenditures, grants, or donations of Federal property and interest in property; the detail of Federal personnel; the sale, lease of, or permission to use Federal property or interest in such property; the furnishing of services without consideration, or at a nominal consideration, or at a consideration that is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale, lease, or furnishing of services to the recipient; or any improvements made with Federal financial assistance extended to the State by USDA. This assistance also includes any Federal agreement, arrangement, or other contract that has as one of its purposes the provision of cash assistance for the purchase of food, cash assistance for purchase or rental of food service equipment or any other financial assistance extended in reliance on the representations and agreements made in this assurance.

By accepting this assurance, the State agency agrees to compile data, maintain records, and submit records and reports as required, to permit effective enforcement of nondiscrimination laws and permit authorized USDA personnel during hours of program operation to review and copy such records, books, and accounts, access such facilities and interview such personnel as needed to ascertain compliance with the nondiscrimination laws. If there are any violations of this assurance, USDA, FNS, shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the State agency, its successors, transferees and assignees as long as it receives assistance or retains possession of any assistance from USDA. The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the State agency.

By signing this agreement, the State does not concede it is in agreement with USDA's interpretation of Title IX of the Education Amendments of 1972 or section 11(c) of the Food and Nutrition Act of 2008, as amended. Regardless, the State agrees to administer SNAP in accordance with this section while State of Tennessee, et al v. USDA, Case No. 3:22-cv-00257, including any appeal, is pending.

3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's Plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

FNS agrees to:

1. Pay administrative costs in accordance with the Food Stamp Act, implementing regulations, and an approved Cost Allocation Plan.

2. Carry-out any other responsibilities delegated by the Secretary in the Food and Nutrition Act of 2008, as amended.

3. This agreement, utilizing alternative language, shall only be valid during the pendency of the aforementioned litigation. If USDA's interpretation of Title IX or the Food and Nutrition Act of 2008, as amended is upheld, the State will need to submit a new agreement subject to further information from USDA communicated following any resolution of the aforementioned litigation.

Signature (Chief Executive Officer of a State or Authorized Designee)

12/13/2022
Date

Date

Signature

(Regional Administrator, FNS)

South Dakota Department of Social Services

OFFICE OF THE SECRETARY
DIVISION OF LEGAL SERVICES
700 GOVERNORS DRIVE
PIERRE, SD 57501-2291
PHONE: 605.773.3305
FAX: 605.773.7223
dss.sd.gov

December 13, 2022

Ms. Cheryl Kennedy
Regional Administrator
Food and Nutrition Service, Mountain Plains Region
1244 Speer Blvd., Ste 903
Denver, CO 80204-3581
Cheryl.kennedy@usda.gov

Dear Ms. Kennedy:

Enclosed is South Dakota's FY23 SNAP State Plan Federal Agreement (containing the alternative language you proposed on Friday, December 9, 2022), which has been signed under protest. The State of South Dakota is one of 22 plaintiff States in a federal lawsuit, *State of Tennessee et al v. USDA et al* (Case number 3:22-cv-257). The action, brought in the U.S. District Court for the Eastern District of Tennessee, seeks declaratory and injunctive relief against the USDA and other defendant parties. By signing this agreement, South Dakota makes no concessions as to the scope of the terms "sex" or "discrimination" as they appear in the Title IX of the Education Amendments of 1972 and the Food and Nutrition Act or implementing regulations. South Dakota does not concede that USDA's extension of those statutes to issues pertaining to sexual orientation and gender identity is a valid funding condition, and the State reserves the right to challenge that condition in any appropriate forum. The State expressly incorporates by reference any arguments raised in its pending litigation against the USDA. *State of Tennessee et al v. USDA et al* (Case number 3:22-cv-257). The protest expressed in this letter extends not only to the signing of the FY23 FSA but also to any corresponding changes the Agreement requires the State of South Dakota to make to SNAP forms, SNAP posters, and all other materials.

To avoid the conflict regarding the nondiscrimination language that the State of South Dakota is challenging in the above-referenced case, the State originally signed and submitted FY22 FSA as the FY22FSA did not contain the misstated nondiscrimination language. But this submission was rejected by the USDA/FNS on August 16, 2022.

By signing the Agreement, South Dakota does not concede that the Agreement contains a valid or enforceable interpretation of the Title IX of the Education Amendments of 1972 and the Food and Nutrition Act or implementing regulations. South Dakota does not discriminate in its implementation of the SNAP program and maintains that it administers the SNAP program in compliance with the antidiscrimination provisions of Title IX and the Food and Nutrition Act, as they are properly interpreted.

Sincerely,

Laurie R. Gill
Cabinet Secretary
South Dakota Department of Social Services

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE STATE OF INDIANA; THE STATE OF ALABAMA; THE STATE OF ALASKA; THE STATE OF ARIZONA; THE STATE OF ARKANSAS; THE STATE OF GEORGIA; THE STATE OF KANSAS; THE COMMONWEALTH OF KENTUCKY;THESTATEOF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THESTATEOFNEBRASKA;THE STATE OF OHIO; THE STATE OF OKLAHOMA;THESTATEOFSOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF TEXAS; THE STATE OF UTAH; THE COMMONWEALTH OF VIRGINIA; THE STATE OF WEST VIRGINIA, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS VILSACK, in his official capacity as Secretary of Agriculture; CINDY LONG, in her official capacity as Administrator of Food and Nutrition Service at the United States Department of Agriculture; ROBERTO CONTRERAS, in his official capacity as Director of the Food and Nutrition Service Civil Rights Division at the United States Department of Agriculture, Defendants.	)	Case No. 3:22-cv00257

DECLARATION OF NANCY T. BUCKNER

Pursuant to 28 U.S.C. §1746, I, Nancy T. Buckner, declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to make this Declaration.

2. I serve as Commissioner for the Alabama Department of Human Resources. The Department maintains a food assistance division that administers the Supplemental Nutrition Assistance Program (SNAP) in Alabama. Included in the Department's administrative duties related to SNAP is the regular review and execution of federal-state agreements.

3. On May 5, 2022, the U.S. Department of Agriculture (USDA) published a guidance document directing state agencies and program operators to expand their nondiscrimination language to include "gender identity and sexual orientation" within ninety days.

4. On June 14, 2022, a final rule was promulgated by the USDA "updating" the SNAP federal-state agreement to include the new nondiscrimination language. As stated by the USDA, "Within these changes, [USDA] proposed to add that the state agency agreeing to follow civil rights requirements in the federal-state agreement is made *in consideration of and for the purposes of obtaining federal financial assistance.*"

5. The Department's SNAP federal-state agreement was due back to USDA on December 13, 2022.

6. As of December 12, 2022, the date that I signed Alabama's SNAP federal-state agreement, to my knowledge no state had been granted a modification to the newly mandated "gender identity and sexual orientation" nondiscrimination language. As such, I signed the agreement and penned a separate disclaimer letter to reiterate the State of Alabama's legal position

and to explain that, by signing, I made no concessions as to the legality, scope, or enforceability of the new nondiscrimination language. (Exhibit A).

7. As stated in my letter of December 12, 2022, the State of Alabama does not discriminate against qualified SNAP applicants for any reason.

Nancy T. Buckner

Nancy T. Buckner

12-22-2022

Date

Buckner Exhibit A

Kay Ivey
Governor

State of Alabama
Department of Human Resources
Gordon Persons Building
50 N. Ripley St.
P.O. Box 304000
Montgomery, AL 36130-4000
(334) 242-1310
dhr.alabama.gov

Nancy T. Buckner
Commissioner

December 12, 2022

Thomas J. Vilsak, Secretary
U.S. Department of Agriculture
1400 Independence Avenue, Southwest
Washington, DC 20250

Dear Secretary Vilsak:

Enclosed is the FY2023 SNAP federal-state agreement signed by the State of Alabama. As you are likely aware, the State of Alabama is a plaintiff-state in *State of Tennessee et. al. v. United States Department of Agriculture et. al.,* Case No. 3:22-cv-257. Our Attorney General, Steve Marshall, has reviewed the USDA's opposition to the states' motion for preliminary injunction. He has informed me that the State of Alabama continues to object to the updated non-discrimination language contained in the federal-state agreement. Please be advised that my signing this agreement in no way changes Alabama's legal position.

As outlined in its filings in the aforementioned case, Attorney General Marshall continues to advise me that the State of Alabama finds the USDA's mandate on gender identity and sexual orientation to be legally unsound—both textually and procedurally—and an unconscionable term of the SNAP federal-state agreement. Further, the litigating states and the USDA appear to have divergent understandings of the new nondiscrimination language and the breadth of its application, demonstrating the ambiguity of this provision and the lack of clarity as to what the State of Alabama has been asked to agree to. By submitting the enclosed signed agreement, the State makes no concession as to the legality, scope, or enforceability of the new nondiscrimination language.

Please know that the State of Alabama remains committed to its partnership with the USDA and to serving as a diligent steward of the Supplemental Nutrition Assistance Program (SNAP). The State administers SNAP in compliance with the plain meaning of the antidiscrimination provisions of Title IX and the Food and Nutrition Act and further does not discriminate against SNAP applicants on any basis.

Respectfully,

Nancy T. Buckner
Commissioner

Federal-State Agreement

The SNAP State agency of Alabama and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food and Nutrition Act of 2008, as amended, implementing regulations and the FNS approved State Plan of Operation. The State agency and FNS USDA further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

PROVISIONS

The State agrees to:

1. Administer the program in accordance with the provisions contained in the Food and Nutrition Act of 2008, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

2. Assurance of Civil Rights Compliance: Comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020), Title II and Title III of the Americans with Disabilities Act (ADA) of 1990 as amended by the ADA Amendments Act of 2008 (42 U.S.C. 12131-12189) as implemented by Department of Justice regulations at 28 CFR part 35 and 36, Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000), and all requirements imposed by the regulations issued by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, including gender identity and sexual orientation, race, color, age, political belief, religious creed, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP. This includes program-specific requirements found at 7 CFR part 15 *et seq.* and 7 CFR 272.6.

This assurance is given in consideration of and for the purpose of obtaining any and all Federal assistance extended to the State by USDA under the authority of the Food and Nutrition Act of 2008, as amended. Federal financial assistance includes grants, and loans of Federal funds; reimbursable expenditures, grants, or donations of Federal property and interest in property; the detail of Federal personnel; the sale, lease of, or permission to use Federal property or interest in such property; the furnishing of services without consideration, or at a nominal consideration, or at a consideration that is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale, lease, or furnishing of services to the recipient; or any improvements made with Federal financial assistance extended to the State by USDA. This assistance also includes any Federal agreement, arrangement, or other contract that has as one of its purposes the provision of cash assistance for the purchase of food, cash assistance for purchase or rental of food service equipment or any other financial assistance extended in reliance on the representations and agreements made in this assurance.

By accepting this assurance, the State agency agrees to compile data, maintain records, and submit records and reports as required, to permit effective enforcement of nondiscrimination laws and permit authorized USDA personnel during hours of program operation to review and copy such records, books, and accounts, access such facilities and interview such personnel as needed to ascertain compliance with the nondiscrimination laws. If there are any violations of this assurance, USDA, FNS, shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the State agency, its successors, transferees and assignees as long as it receives assistance or retains possession of any assistance from USDA. The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the State agency.

3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's Plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

FNS agrees to: 1. Pay administrative costs in accordance with the Food Stamp Act, implementing regulations, and an approved Cost Allocation Plan.

2. Carry-out any other responsibilities delegated by the Secretary in the Food and Nutrition Act of 2008, as amended.

Date 12-12-2022

Signature Nancy T. Buckner
Nancy T. Buckner, Commissioner
(Chief Executive Officer of a State or Authorized Designee)

Date

Signature
(Regional Administrator, FNS)

Exhibit 4

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

THE STATE OF TENNESSEE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:22-cv-00257
	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,	)	
	)	
	)	
Defendants.	)	

DECLARATION OF HILARY DAVIS

I, Hilary Davis, hereby depose and declare as follows:

1. I am over the age of 21 and make this declaration based on my own personal knowledge.

2. I am employed by the Texas Health and Human Services Commission (Texas HHSC) as the Deputy Associate Commissioner for Access and Eligibility Services Program Policy. Texas HHSC is the Supplemental Nutrition Assistance Program (SNAP) State Agency for the State of Texas. As part of my employment at Texas HHSC, I am a State Agency point-of-contact for SNAP.

3. On December 13, 2022, Texas HHSC submitted its signed Federal-State Agreement for Fiscal Year 2023. A true and correct copy of the agreement that Texas HHSC signed and submitted on December 13, 2022, is attached as Exhibit A to this declaration. Texas HHSC is one of the custodians of this document.

4. In addition to its signed Federal-State Agreement, and in light of this pending litigation, Texas HHSC submitted a protest letter on December 13, 2022. A true and correct copy of that protest letter is attached as Exhibit B to this declaration. Texas HHSC is one of the custodians of this document.

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

Executed in Travis County, Texas, on the 30th day of December, 2022.

HILARY DAVIS

Davis Exhibit A

Item number and name: 1 - Federal-State Agreement
Date of last update:
State Agency point of contact:
Sheila.Craig@hhs.texas.gov and
Hilary.Davis@hhs.texas.gov

Federal-State Agreement

The SNAP State agency of Texas and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food and Nutrition Act of 2008, as amended, implementing regulations and the FNS approved State Plan of Operation. The State agency and FNS USDA further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

PROVISIONS

The State agrees to:
1. Administer the program in accordance with the provisions contained in the Food and Nutrition Act of 2008, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

2. Assurance of Civil Rights Compliance: Comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), section 11(c) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2020), Title II and Title III of the Americans with Disabilities Act (ADA) of 1990 as amended by the ADA Amendments Act of 2008 (42 U.S.C. 12131-12189) as implemented by Department of Justice regulations at 28 CFR part 35 and 36, Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency” (August 11, 2000), and all requirements imposed by the regulations issued by the Department of Agriculture to the effect that, no person in the United States shall, on the grounds of sex, including gender identity and sexual orientation, race, color, age, political belief, religious creed, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under SNAP. This includes program-specific requirements found at 7 CFR part 15 *et seq.* and 7 CFR 272.6.

This assurance is given in consideration of and for the purpose of obtaining any and all Federal assistance extended to the State by USDA under the authority of the Food and Nutrition Act of 2008, as amended. Federal financial assistance includes grants, and loans of Federal funds; reimbursable expenditures, grants, or donations of Federal property and interest in property; the detail of Federal personnel; the sale, lease of, or permission to use Federal property or interest in such property; the furnishing of services without consideration, or at a nominal consideration, or at a consideration that is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale, lease, or furnishing of services to the recipient; or any improvements made with Federal financial assistance extended to the State by USDA. This assistance also includes any Federal agreement, arrangement, or other contract that has as one of its purposes the provision of cash assistance for the purchase of food, cash assistance for purchase or rental of food service equipment or any other financial assistance extended in reliance on the representations and agreements made in this assurance.

By accepting this assurance, the State agency agrees to compile data, maintain records, and submit records and reports as required, to permit effective enforcement of nondiscrimination laws and permit authorized USDA personnel during hours of program operation to review and copy such records, books, and accounts, access such facilities and interview such personnel as needed to ascertain compliance with the nondiscrimination laws. If there are any violations of this assurance, USDA, FNS, shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the State agency, its successors, transferees and assignees as long as it receives assistance or retains possession of any assistance from USDA. The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the State agency.

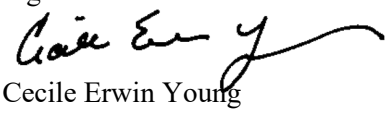
3. (For States with Indian Reservations only). Implement the Program in a manner that is responsive to the special needs of American Indians on reservations and consult in good faith with tribal organizations about that portion of the State's Plan of Operation pertaining to the implementation of the Program for members of the tribe on reservations.

FNS agrees to:

1. Pay administrative costs in accordance with the Food Stamp Act, implementing regulations, and an approved Cost Allocation Plan.

2. Carry-out any other responsibilities delegated by the Secretary in the Food and Nutrition Act of 2008, as amended.

Date: 12/13/2022
Signature:



Cecile Erwin Young
Executive Commissioner
Texas Health and Human Services Commission

Date:
Signature:
(Regional Administrator, FNS)

Addendum

Clarification of SNAP Civil Rights Requirements - Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency (LEP)," and Title II and III of the Americans with Disabilities Act

This addendum clarifies core civil rights requirements to ensure meaningful access to programs, services, and information for persons with Limited English Proficiency (LEP) and persons with disabilities in accordance with Federal law, regulations and current guidance from the Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA).

Meaningful Access for LEP Individuals

State agencies that participate in the Supplemental Nutrition Assistance Program (SNAP) must take reasonable steps to ensure that LEP persons have meaningful access to programs, services, and benefits. This includes the requirement to provide bilingual program information and certification materials and interpretation services to single-language minorities in certain project areas. SNAP State agencies that do not provide meaningful access for LEP individuals risk violating prohibitions against discrimination based on National Origin in the Food and Nutrition Act of 2008, as amended, Title VI of the Civil Rights Act of 1964 (Title VI), and SNAP program regulations.

Federal LEP regulations and guidance include:

- SNAP regulations provided by 7 CFR Part 272.4(b), "Bilingual requirements";
- Executive Order 13166 of August 11, 2000, "Improving Access to Services for Persons with Limited English Proficiency," reprinted in 65 FR 50121, 50122 (August 16, 2000);
- DOJ policy guidance titled, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," published in 67 FR 41455, 41457 (June 18, 2002); and
- USDA policy guidance titled, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons", published in 79 FR 70771 - 70784 (November 28, 2014).

Four Factor Analysis for Assessing LEP Needs

To be in compliance, the Title VI guidance provided by DOJ and USDA instructs State Agencies to assess the LEP needs of the population served and determine the LEP services required by balancing four factors:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered within the area serviced by the recipient;
2. The frequency with which LEP individuals come in contact with the program;
3. The nature and importance of the program, activity, or service to people's lives; and
4. The resources available to the recipient and costs.

SNAP State Agencies must also comply with the specific requirements established by 7 CFR Part 272.4(b) and should include these obligations in the LEP assessment.

Developing an LEP Plan

After completing an assessment of LEP needs, SNAP state agencies should develop an implementing plan to address the LEP needs of the population served. This may include contracting for oral interpretation services, hiring bilingual staff, arranging telephone interpreters and/or language lines, coordinating community volunteers, translating vital documents, and providing written notice that language services are available in appropriate languages. Quality and accuracy of the language service is critical in order to avoid serious consequences to the LEP person and to the recipient. LEP needs should be considered in developing State and local budgets and front line staff should understand how to obtain LEP services.

USDA's 2014 policy guidance includes detailed information on assessing LEP needs, identifying practices for translating documents that will be seen as strong evidence of compliance. For additional assistance and information regarding LEP matters, please also visit http://www.lep.gov. The website includes online LEP mapping tools designed to help assess the language needs of the population served by a particular program or facility.

Ensuring Equal Opportunity Access for Persons with Disabilities

SNAP State agencies must also ensure equal opportunity access for persons with disabilities. This includes ensuring that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with people without disabilities. State Agencies that do not provide persons with disabilities equal opportunity access to programs may risk violating prohibitions against disability discrimination in the Rehabilitation Act of 1978, the American with Disabilities Act (ADA), and SNAP program regulations.

DOJ published revised final regulations implementing Title II and Title III of the ADA on September 15, 2010. These regulations are codified at 28 CFR Part 35 "Nondiscrimination on the Basis of Disability in State and Local Government Services" and 28 CFR Part 36, "Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities". In accordance with the implementing regulations, State Agencies must provide auxiliary aids and services where necessary to ensure effective communication and equal opportunity access to program benefits for individuals with disabilities. The type of auxiliary aids and services required will vary, but a State agency may not require an individual with a disability to bring another individual to interpret, and may rely on a person accompanying a disabled individual only in limited circumstances. When a State agency communicates with applicants and beneficiaries by telephone, it must provide text telephone services (TTY) or an equally effective electronic telecommunications system to communicate with individuals who are deaf, hard of hearing, or hearing impaired. State agencies must also ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities. For more information, please visit the ADA website: http://www.ada.gov.

Davis Exhibit B

December 13, 2022

The Honorable Thomas J. Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Dear Secretary Vilsack,

The State of Texas has submitted its Fiscal Year 2023 Supplemental Nutrition Assistance Program (SNAP) Federal-State Agreement. By making this submission, Texas makes no concessions, including as to (1) the scope of the terms "sex" or "discrimination" as they appear in Title IX of the Education Amendments of 1972 and the Food and Nutrition Act or implementing regulations; (2) whether the U.S. Department of Agriculture (USDA) regulations purporting to redefine sex discrimination, published at 87 Federal Register 35855 (June 14, 2022) were validly promulgated; and (3) whether various documents issued by USDA on the subject were validly issued guidance documents.

Texas does not concede that USDA's extension of those statutes to issues pertaining to sexual orientation and gender identity is a valid funding condition, and Texas reserves the right to challenge that condition in any appropriate forum.

Further, Texas expressly incorporates by reference any arguments raised in its pending litigation against the USDA. *See Tennessee v. USDA*, No. 3:22-CV-257 (E.D. Tenn.). Texas notes that, in imposing requirements related to sexual orientation and gender identity, USDA relied on an interpretation by the U.S. Department of Education that was enjoined from implementation by a federal court. *See Tennessee v. Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *1 (E.D. Tenn. July 15, 2022).

By signing this agreement, Texas does not concede that the Agreement contains a valid [or enforceable] interpretation of Title IX or section 11(c) of the Food and Nutrition Act. Texas does not discriminate in its implementation of the SNAP program and maintains that it administers the SNAP program in compliance with the anti-discrimination provisions of Title IX and the Food and Nutrition Act, as those provisions are properly interpreted.

Please let me know if you have any questions or need additional information. Wayne Salter, Deputy Executive Commissioner of Access and Eligibility Services, serves as the lead staff on this matter and he can be reached by telephone at (512) 206-5321 or by email at Wayne.Salter@hhs.texas.gov.

Sincerely,

Cecile Erwin Young