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; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH CAROLINA; THE STATE OF SOUTH DAKOTA; THE STATE OF TEXAS; THE STATE OF UTAH; THE COMMONWEALTH OF VIRGINIA; THE STATE OF WEST VIRGINIA, Plaintiffs, 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-cv-00257

MEMORANDUM IN SUPPORT OF THE STATES'
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The federal government is, quite literally, trying to take the States' lunch money. Searching for any possible avenue to effect radical social change, the Biden Administration, acting through the U.S. Department of Agriculture ("USDA"), has announced multiple major revisions to the Supplemental Nutrition Assistance Program ("SNAP"), a cooperative grant initiative that (among other things) helps feed children in need. Each of USDA's new rules springs from the Administration's sweeping and erroneous conclusion that discrimination based on "sex" includes discrimination based on "sexual orientation" and "gender identity" in every setting—even elementary school classrooms and bathrooms. To be clear, the States do not deny benefits based on a household member's sexual orientation or gender identity. But they do challenge USDA's radical regulatory changes that threaten to undermine the States' management of their SNAP programs. Any State that refuses to go along risks losing millions in SNAP funding earmarked for its most vulnerable residents.

This Court recently enjoined the U.S. Department of Education from enforcing the guidance underlying USDA's new rules, *see Tennessee v. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022), and it should do so here as well. Despite the potential of these rules to upend common-sense state laws, USDA declined to publicly vet its rules in any meaningful way. Instead, it rushed them out through a series of memoranda and a surprise final rule bearing little relation to the stale Proposed Rule it purports to codify. USDA's haste is evident: Its edicts are procedurally deficient, substantively unlawful, and inadequately explained. As soon as they take effect, USDA's rules will interfere with the States' sovereign regulatory authority, threaten student and employee privacy, disrupt scholastic athletics, infringe on First Amendment rights, and impair state access to federal funding. The States respectfully request a preliminary injunction to protect them from those irreparable harms while this lawsuit is pending.

BACKGROUND

Mere hours after his inauguration, President Biden directed federal agencies to implement his new policy of "combat[ing] discrimination on the basis of gender identity or sexual orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021). With several of the resulting initiatives tied up in court, *see Tennessee*, 2022 WL 2791450, at *24 (granting States' motion for preliminary injunction and denying federal government's motion to dismiss); *Texas v. EEOC*, No. 2:21-CV-194-Z (N.D. Tex. May 26, 2022) (denying federal government's motion to dismiss), the Administration turned to USDA—specifically the SNAP program—to impose its policies on state public schools.

SNAP subsidizes nutrition for "low-income households" through cooperative grant agreements between the States and federal government. *See* 7 U.S.C. § 2011; 7 C.F.R. § 272.2(a)(2). These Federal-State 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 will result in the "withhold[ing]" of "such funds . . . as the Secretary [deems] appropriate." 7 U.S.C. § 2020(g).

USDA Memoranda. USDA issued a series of memoranda imposing new requirements on States. *First*, USDA issued the memorandum that sets out its misreading of *Bostock* and directs States and program operators to update their policies to reflect this change. USDA, CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022), https://bit.ly/3NuXnSx ("Memorandum"). The Memorandum "adopts 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." 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")). USDA extends this interpretation to the Food and Nutrition Act. *Id.* at 2-3.

Only when one reads the analyses that USDA adopted from the DOJ and the Department of Education—some of the very analyses that States are currently challenging in other lawsuits—does it become clear just how far USDA's Memorandum apparently extends: USDA even seems to have prohibited the States from operating sex-separated bathrooms.

The DOJ Memorandum relies primarily on two post-*Bostock* circuit court decisions where divided panels held that a school district violated Title IX by using sex-separated bathrooms: *Grimm v. Gloucester County School Board*, 972 F.3d 586, 616 (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); and *Adams v. School Board of St. Johns County* (*Adams I*), 968 F.3d 1286 (11th Cir. 2020), *vacated Title IX ruling* (*Adams II*), 3 F.4th 1299 (11th Cir. 2021), *vacated in entirety* (*Adams III*), 9 F.4th 1369 (11th Cir. 2021) (en banc). *Grimm* and *Adams I* are directly contrary to what the DOJ Memorandum's author, Pamela Karlan, told the Supreme Court during oral argument in *Bostock*: that sex separated bathrooms are "not discriminatory because" no one is "subjected to a disadvantage." Tr. of Oral Arg. at 12-13, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

The now-enjoined Department of Education Interpretation that USDA adopted relies on the same two opinions, which appears to signal that USDA understands Title IX and the Food and Nutrition Act to prohibit States from maintaining sex-separated bathrooms. *See* Department of

Education Interpretation, 86 Fed. Reg. at 32,639. 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.* But *Bostock* addressed neither of those issues.

Second, the Cover Letter for the Memorandum stated that USDA's new policy "applies to prohibitions against discrimination based on sex in all FNS programs," recognizing that "these changes may impact [State and local] operations." USDA, Cover Letter to CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022) ("Cover Letter") (Compl. Ex. B).

Third, the questions and answers document attached to the Memorandum directs States to adopt the revised USDA Nondiscrimination Statement, a policy that apparently requires States and program operators to apply the new, expanded definition of sex discrimination to their entire organizational structure. USDA, CRD 02-2022, Questions and Answers Related to CRD 01-2022 Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5. 2022), https://bit.ly/3yzKpyG ("Memorandum Q&A"); *see also* USDA, Food & Nutrition Serv. ("FNS") Nondiscrimination Statement (May 5, 2022), https://bit.ly/3nZTc6W ("Nondiscrimination Statement"). Here, USDA requires all "State Agencies and [SNAP] program operators," Memorandum Q&A at 1, to make the following attestation on various documents, websites, and in physical offices:

> In accordance with federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, this institution is prohibited from

> discriminating on the basis of race, color, national origin, sex (including gender identity and sexual orientation), religious creed, disability, age, political beliefs, or reprisal or retaliation for prior civil rights activity.

Nondiscrimination Statement; *see also* Memorandum Q&A at 2. The new Nondiscrimination Statement thus appears to apply the new policy to the entirety of any institution participating in a USDA or SNAP program. The States must adopt this new policy in short order. Tennessee, for example, must adopt it by August 15, 2022, or risk losing over $6 million in SNAP Nutrition Educational Program funding for the next fiscal year. Niknejad Decl., at ¶¶10-12 (attached as Exhibit A). And States must implement the complaint processing policy changes immediately or risk loss of federal funding. Memorandum Q&A at 3.

Fourth, in a Supplemental Memorandum USDA sent on the same day, USDA purports to direct States to update their posters and other materials with the revised Nondiscrimination Statement. USDA, Memorandum Regarding Revised Nondiscrimination Statement and *And Justice for All* Posters; Timelines and Guidance for Implementation (May 5, 2022) ("Supplemental Memorandum") (Compl. Ex. D) (collectively with the Cover Letter, Memorandum, and Memorandum Q&A, the "Memoranda"). States must begin to comply within ninety days of the issuance of the Supplemental Memorandum on May 5, 2022. USDA has already used these imminent deadlines and the threatened withdrawal of federal funds to pressure States such as Alaska to change how they operate SNAP. Crum Decl., at ¶¶ 7-10 (attached as Exhibit B).

USDA Final Rule. To further codify its misapplication of *Bostock*, USDA then recycled a long-dormant proposed rule originally filed one week after the 2016 Presidential election. *See* SNAP: Civil Rights Update to the Federal-State Agreement, 81 Fed. Reg. 81,015 (Nov. 17, 2016) https://bit.ly/3aMNXVf ("Proposed Rule"). The Proposed Rule made no reference to the expanded definition of sex discrimination. And no one thought the rule made such a sweeping policy change; the Proposed Rule only received five comments, none of which addressed sexual

orientation or gender identity. Comments to Proposed Rule, FNS-2016-0078-0002 to -0006, (posted Feb. 5, 2017), https://bit.ly/3v5Iv6Y. Instead of going through the required administrative procedures, USDA overhauled the long-dormant Proposed Rule and issued a final rule. Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement, 87 Fed. Reg. 35,855 (June 14, 2022), https://bit.ly/3bDC4RA ("Final Rule").

This newly recycled Final 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.) . . . 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, denied the benefits of, or be otherwise subject to discrimination under SNAP." Final Rule, 87 Fed. Reg. at 35,857 (emphasis added). USDA provided States with neither notice nor an opportunity to provide public comment on the Final Rule's expansion of Title IX and the Food and Nutrition Act. Yet States must adopt the Federal-State Agreement language by October 14, 2022.

On June 14, 2022, a group of State Attorneys General led by Tennessee's Attorney General Herbert H. Slatery III—and 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. The letter requested that the Administration promptly withdraw the Final Rule and Memoranda. *Id.* at 3. The States received no response. Because USDA declined to reconsider its regulatory actions, the Plaintiff States have sued for declaratory and injunctive relief and now move for a preliminary injunction.

ARGUMENT

The Court has broad discretion to award a preliminary injunction, as guided by four factors: (1) whether the States appear likely to succeed on the merits; (2) whether they will be irreparably harmed in the interim; (3) whether the injunction would harm USDA; and (4) whether the public

interest favors such relief. *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Each factor supports an injunction here.

I. The States Are Likely to Succeed on the Merits.

The States will likely win this lawsuit. This Court must set aside federal administrative action deemed arbitrary, capricious, or unlawful. *See* 5 U.S.C. § 706(2). Here, USDA used unlawful procedures to promulgate unlawful rules that infringe on various constitutional rights and state prerogatives. The States thus have strong, justiciable claims to ultimate relief.

A. The States Raise Justiciable Claims.

The States' complaint asserts justiciable claims. The challenged Memoranda and Final Rule constitute final agency action, and the States have standing to challenge them.

First, USDA's edicts constitute final agency action reviewable in federal court. 5 U.S.C. § 704. A "final" action "mark[s] the consummation of the agency's decisionmaking process," and carries "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation omitted). Courts take a "pragmatic" approach to analyzing finality, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quotation omitted), and that approach yields a clear result here.

USDA cannot dispute that its Final Rule—published in the Federal Register—qualifies as final action. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 625-26 (2018). The Memoranda are also final actions subject to judicial review under the APA because they purport to represent USDA's definitive application of Title IX and the Food and Nutrition Act. *See, e.g.*, Memorandum at 2 (affirming that USDA has "evaluated the statutes it enforces and determined that discrimination based on gender identity and sexual orientation can constitute prohibited sex discrimination under Title IX and the Food and Nutrition Act"). And legal consequences undoubtedly flow from the Memoranda: The States collectively risk the loss of over $28 billion if they do not comply with the USDA's directives to adopt new policies, binding contractual

language, and enforcement procedures contained within the Memoranda. *See* 7 U.S.C. § 2020(g); *cf. Hawkes*, 136 S. Ct. at 1815 (holding that the risk of "significant criminal and civil penalties" constitutes "legal consequence").

Second, the States have established "a substantial likelihood of standing." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020) (quotation omitted). The Supreme Court has made clear that when the federal government threatens enforcement of a law, "an actual . . . enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The States can thus "satisf[y] the injury-in-fact requirement" of standing by "alleg[ing] an intention to engage in" a proscribed "course of conduct" that carries "a credible threat of prosecution." *Id.* at 159 (quotation omitted).

The States satisfy those requirements here, and easily so given the "special solicitude" to which they are "entitled." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *see Texas v. United States*, 809 F.3d 134, 154 (5th Cir. 2015). States, after all, have a sovereign interest in "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). The Final Rule and Memoranda intrude on the States' ability to enforce their own legal codes because USDA has seemingly attempted to preempt numerous State laws governing public education. *See* Compl. at ¶ 131 (compiling effected statutes); *cf. Tennessee*, 2022 WL 2791450, at *5-9 (ruling that States had standing to challenge EEOC and Department of Education guidance for this reason).

The challenged rules also injure the States by threatening over $28 billion in SNAP funding, imposing compliance costs, disrupting logistical planning for the upcoming academic year, and exposing them to potential damages liability. The "loss of even a small amount of money is ordinarily an 'injury'" for "standing purposes." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct.

973, 983 (2017). And that necessarily includes both the costs of complying with an unlawful rule, *Sch. Dist. Of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 261-62 (6th Cir. 2009) (en banc) (plurality opinion), and the potential of punishment for noncompliance, *see Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019). Those injuries trace directly to USDA's actions in this case and can be redressed through a court order vacating the challenged rules.

B. USDA's Rules Are Arbitrary, Capricious, and Unlawful.

The States are likely to succeed on their challenge to USDA's Final Rule and Memoranda because those agency actions (1) failed to satisfy the APA's procedural requirements, (2) contradict both Title IX and the Food and Nutrition Act, and (3) violate the U.S. Constitution.

1. USDA Failed to Follow Proper Rulemaking Procedures.

The APA generally requires agencies to engage in certain notice-and-comment procedures before issuing a rule that carries legal force. *See* 5 U.S.C. § 553(b)-(c); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (summarizing procedures). These procedures enable agencies "to get public input so as to get the wisest rules, to ensure fair treatment for persons to be affected by regulations, and to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage." *United States v. Utesch*, 596 F.3d 302, 308-09 (6th Cir. 2010) (quotation omitted). But, in its haste to rewrite federal antidiscrimination law, USDA has short-circuited the notice-and-comment process: The Final Rule addresses issues not mentioned in the notice of proposed rulemaking—discrimination on the basis of gender identity and sexual orientation—and the Memoranda impose substantive rules on similar issues with no notice at all. Because USDA's rules failed to meet the procedural requirements of the APA, they are unlawful and should be set aside. 5 U.S.C. § 706(2).

Final Rule. USDA enacted its Final Rule without publishing a notice containing "either the terms or substance of the proposed rule or a description of the subjects and issues involved."

Id. § 553(b)(3). An agency's final rule must be a "logical outgrowth" of its proposed rule. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quotation omitted); *see Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 453-54 (6th Cir. 2013). A final rule qualifies as a logical outgrowth "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Chesapeake Climate Action Network v. EPA*, 952 F.3d 310, 319 (D.C. Cir. 2020) (quotation omitted). By contrast, "[a] final rule fails the logical outgrowth test if interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* at 319-20 (quotation omitted).

Here, the Final Rule flunks the logical outgrowth test. The Final Rule adds antidiscrimination requirements based on gender identity and sexual orientation that USDA never mentioned in the previously published notice. *See Chesapeake Climate Action Network*, 952 F.3d at 320. Those requirements "eliminate, rather than retain, the status quo"—imposing new, previously uncontemplated obligations on States. *District of Columbia. v. USDA*, 496 F. Supp. 3d 213, 231 (D.D.C. 2020) (cleaned up). Unsurprisingly, USDA received no "comments with regard to" gender identity and sexual orientation "because the agency failed to give the public any inkling that" these groups would be included in the rule when USDA conducted the comment process over five years ago. *Id.* (quotation omitted); *see Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1376 (Fed. Cir. 2017); Comments to Proposed Rule, FNS-2016-0078-0002 to -0006, (posted Feb. 5, 2017), https://bit.ly/3v5Iv6Y. "The logical outgrowth doctrine does not extend to a final rule that finds no roots in the agency's proposal because something is not a logical outgrowth of nothing." *Env't Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (cleaned up).

Memoranda. USDA also attempted to circumvent fundamental administrative processes

with its Memoranda. "The APA sets different procedural requirements for 'legislative rules' and 'interpretive rules.'" *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (citing 5 U.S.C. § 553). The analysis here turns on the substance of the documents, not what label USDA uses. *Detroit Edison Co. v. EPA*, 496 F.2d 244, 249 (6th Cir. 1974). A legislative rule "create[s] new law, rights or duties," whereas an interpretive rule sets out an interpretation that "only reminds affected parties of existing duties." *Azar*, 908 F.3d at 1042 (quotation omitted). "[T]he former must be promulgated pursuant to notice-and-comment rulemaking; the latter need not." *Id.*

USDA's Memoranda qualify as legislative rules. They "create[] new law," *id.*, by imposing on regulated entities a new obligation not to discriminate on the basis of sexual orientation or gender identity—an obligation that appears nowhere in Title IX or the Food and Nutrition Act and that *Bostock* did not impose either. The Memoranda also implement a number of duties and other "changes" that "impact [State] operations." Cover Letter at 1. The State entities "must" update their Nondiscrimination Statement on websites, documents, pamphlets, and brochures. Supplemental Memorandum at 1. Moreover, "State Agencies and program operators will have to update their program discrimination complaint processing procedures" and "will need to update their Nondiscrimination Statements." Memorandum Q&A at 2. Given the USDA's "mandatory language," "there can be little doubt that" the Memoranda "purported to bind" the States "with the force of law." *Env't Integrity Project*, 425 F.3d at 998 (cleaned up); Memorandum Q&A at 2. Not only that, as with many legislative rules, "failure to comply comes with the risk of penalties," *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022)—like a "finding of noncompliance" that can lead to stripped federal funding, Memorandum Q&A at 3.

Because the Memoranda impose legislative rules, the APA required USDA to give the States and other interested parties "the chance to participate" in their promulgation. *United States*

v. Cain, 583 F.3d 408, 420 (6th Cir. 2009) (quotation omitted). USDA did not do so, a clear violation of the APA that warrants preliminary relief.

Arbitrary and Capricious. Both the Final Rule and Memoranda are also "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A). For one, a "decision made without adequate notice and comment is arbitrary or an abuse of discretion" as a matter of law. *Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). And, to the extent that USDA intends to use the Final Rule or Memoranda as a mechanism to enforce its bathroom policy and such, *see supra* pp. 3-4, the agency failed to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020). States have designed and constructed countless facilities with separate bathrooms and locker rooms for men and women; had they known USDA would eventually interpret Title IX and the Food and Nutrition Act to prohibit discrimination based on gender identity, they may have offered more single-occupant living facilities. But USDA did not consider these interests at all in enacting the rules at issue.

2. USDA's Rules Run Counter to Title IX and the Food and Nutrition Act.

Additionally, the Final Rule and Memoranda are substantively unlawful because they have no basis in the text, structure, or purpose of Title IX or the Food and Nutrition Act. *Bostock* did not address Title IX or the Food and Nutrition Act and therefore cannot support the Final Rule and Memoranda's rewriting of those statutes. Significant textual differences between those statutes and Title VII preclude the approach that the USDA has attempted to force on the States.

USDA cannot simply point to *Bostock* as justification for its new interpretation of Title IX and the Food and Nutrition Act. As an initial matter, *Bostock* concerned only Title VII; it expressly noted that "other federal or state laws that prohibit sex discrimination"—like Title IX and the Food and Nutrition Act—were not before the Court, and refused to "prejudge any such question" about

what those statutes require. 140 S. Ct. at 1753. Nor is *Bostock*'s analysis necessarily applicable to other statutes. As the Sixth Circuit explained after *Bostock*, "Title VII differs from Title IX in important respects." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). It therefore "does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Id.*; *see also Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself."). The same goes for the distribution of SNAP funds under the Food and Nutrition Act. USDA must justify its interpretation based on Title IX and the Food and Nutrition Act themselves.

a) The statutes contradict USDA's new interpretation.

Those two statutes, in fact, squarely contradict USDA's reinterpretation in the Memoranda and Final Rule. Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). USDA adopts an interpretation of that statute that seems to prohibit sex separated bathrooms and athletics. But, as *Meriwether* emphasized, Title IX—unlike Title VII—also expressly authorizes separation based on sex in certain circumstances. 992 F.3d at 510 n.4. For example, it allows certain single-sex educational institutions and organizations. 20 U.S.C. § 1681(a)(1)-(9). And it makes clear that Title IX's prohibition of sex discrimination does not prevent entities from "from maintaining separate living facilities for the different sexes." *Id.* § 1686; *see* 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh, the chief Senate sponsor of Title IX) (explaining that this protects "personal privacy"). Thus, the text of § 1686 forecloses USDA's reinterpretation of Title IX.

USDA "concurs with and adopts" the Department of Education's now-enjoined Interpretation, Memorandum at 2, but ignores the Department of Education's regulations

implementing Title IX's clear statutory text. For example, the Department of Education's own regulations allow "separate toilet, locker room, and shower facilities on the basis of sex" when the "facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Further, recipients may "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 106.41(b). Universities are even required to consider sex in allocating athletic scholarships. *Id.* § 106.37(c); *see Meriwether*, 992 F.3d at 510 n.4. These regulations underscore how Title IX acknowledges that "[p]hysical differences between men and women . . . are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.). The "two sexes are not fungible" but rather have "inherent differences." *Id.* (quotation omitted).

And even if Title IX mirrored Title VII, USDA unlawfully attempts in the Final Rule and Memoranda to prohibit sex-separated facilities. The DOJ—the other federal agency USDA defers to—concluded in early 2021 (before reversing course) that "*Bostock* does not require any changes to . . . sex-specific facilities or policies," even under Title VII. DOJ, Application of *Bostock v. Clayton County* 4 (Jan. 17, 2021). Sex-separated bathrooms are not "discrimination" because they do not treat any employees "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. And the important interest in protecting privacy justifies separating living facilities based on (biological) sex. *Cf. Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011). 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.

Nor can USDA's interpretation be rooted in the term "sex." Despite USDA's apparent

disregard for biological differences between the two sexes, the Department of Education's other analyses have construed "sex" in Title IX as referring only to (biological) sex, not gender identity. *E.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020) ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification . . . ."). That was the ordinary meaning of "sex" when Title IX was enacted. *See Adams II*, 3 F.4th at 1322 (W. Pryor, C.J., dissenting); *Grimm*, 972 F.3d at 632-33 (4th Cir. 2020) (Niemeyer, J., dissenting).

Statutory context confirms this binary understanding of "sex." For example, 20 U.S.C. § 1681(a)(2) describes how an institution may change "from . . . admit[ting] only students of one sex to . . . admit[ting] students of *both sexes*." (Emphasis added). And 20 U.S.C. § 1681(a)(6)(B) refers to ''Men's'' and ''Women's'' associations and organizations for ''Boy[s]'' and ''Girl[s],'' "the membership of which has traditionally been limited to persons of *one sex*." (Emphasis added); *cf.* 85 Fed. Reg. at 30,178 ("In promulgating regulations to implement Title IX, the Department [of Education] expressly acknowledged physiological differences between the male and female sexes."). Because Title IX expressly authorizes separation based on biological sex in myriad contexts, including athletics and living facilities, USDA unlawfully adopted the Department of Education's now-enjoined rewriting of Title IX to prohibit covered entities from preventing an individual of one sex from using facilities or competing on athletic teams designated for the other sex, or otherwise differentiating between the sexes in contexts where those differences matter.

USDA correctly concludes that there is no reason to interpret the Food and Nutrition Act differently from Title IX, but that is because the term "sex" had the same binary biological meaning when Congress enacted the Food and Nutrition Act. The very dictionary that USDA uses to define terms in that statute, *see* Memorandum at 2, defines "sex" as "either of the two major forms of

individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures," *Sex*, Merriam-Webster (last visited July 19, 2022), https://bit.ly/2K62Vm5.

b) The use of "on the basis of sex" differs from the text of Title VII.

Even if Title VII were to prohibit sex-separated bathrooms, athletics, and such—which it does not—the texts of Title IX and the Food and Nutrition Act differ from Title VII in a significant way: Title IX prohibits discrimination "on the *basis of* sex," 20 U.S.C. § 1681(a) (emphasis added), rather than "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1). The Food and Nutrition Act uses the same "on the basis of . . . sex" language in the portion of the statute that sets the terms that a State must ensure tribal organizations use in "the operation of the program," which indicates "on the basis of sex" is the relevant requirement. 7 U.S.C. § 2020(d).

This distinction proves significant. *Bostock* concluded that Title VII's prohibition on discrimination "because of" sex imposed a but-for causation requirement, which "can be a sweeping standard." 140 S. Ct. at 1739. It followed from that standard that "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred," even if the primary reason for the termination was the employee's homosexual or transgender status. *Id.* at 1741-42 ("When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies)."). Title IX and the Food and Nutrition Act, by contrast, prohibit only discrimination "on the basis of sex" in those provisions. That makes clear that biological sex must be the sole reason for the discrimination. "A statutory provision's use of the definite article 'the,' . . . indicates that Congress intended the term modified to have a singular referent." *SEC v. KPMG LLP*, 412 F.

Supp. 2d 349, 387-88 (S.D.N.Y. 2006); *accord Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004).

c) USDA's justifications for its new interpretation fall short.

Against all this, USDA's attempts to justify its interpretation of Title IX and the Food and Nutrition Act prove unavailing. USDA begins by concluding that the texts of those two statutes are "sufficiently similar to the language in Title VII." Memorandum at 2; *see* Department of Education Interpretation, 86 Fed. Reg. at 32,638. As explained above, however, the two statutes, in fact, contain language materially different from that in Title VII. The Department of Education, in the now-enjoined analysis USDA adopted, asserted that the *Bostock* opinion used "because of" and "on the basis of" interchangeably. *Id.* 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's use of different language in Title IX and in 7 U.S.C. § 2020(d)—the provision of the Food and Nutrition Act that sets the terms that a State must ensure tribal organizations use in "the operation of the program"—indicates that it intended "to convey a different meaning." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 398 (2016) (Thomas, J., concurring in the judgment).

It is true that 7 U.S.C. § 2020(c)(1) states that "[i]n the certification of applicant households for the supplemental nutrition assistance program, there shall be no discrimination *by reason* of . . . sex." (Emphasis added); *see* Memorandum at 2. But that provision, at most, means that an agency cannot deny certification of an applicant household because of the household members' sex. Even if the Title VII reasoning of *Bostock* applied to this certification provision, 7 U.S.C. § 2020(c)(1) would merely prohibit denying certification because a household member is homosexual or transgender—a practice the States do not engage in. Section 2020(c)(1), even under that reading, would not prohibit States from maintaining sex-separated bathrooms or

engaging in other non-certification practices that USDA, DOJ, and the Department of Education have apparently targeted. If anything, the "on the basis of" language in 7 U.S.C. § 2020(d) might inform a proper reading of 7 U.S.C. § 2020(c)(1)'s "by reason of" language or, at least, restrict its application outside the certification decision itself. USDA's own Nondiscrimination Statement uses "*on the basis of* . . . sex (including gender identity and sexual orientation)." (Emphasis added); *see also* Final Rule, 87 Fed. Reg. at 35,857 (using "on the grounds of").

Next, USDA asserts that, like Title VII, the Food and Nutrition Act "focuses on protecting individuals from discrimination." Memorandum at 2. The adopted Department of Education Interpretation makes the same observation for Title IX. *See* 86 Fed. Reg. at 32,638. True enough. But the relevant question is what constitutes prohibited discrimination under each statute. Even if Title VII had the same meaning as the two statutes USDA does enforce, *Bostock* expressly did not "purport to address bathrooms, locker rooms, or anything else of the kind." 140 S. Ct. at 1753.

The Department of Education Interpretation that USDA adopted for Title IX makes some additional arguments. But none overcomes the text of Title IX, and this Court has now enjoined the Department of Education from enforcing its Interpretation because the Interpretation attempted to "create[] 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." *Tennessee*, 2022 WL 2791450, at *21.

Plus, the Department of Education and DOJ analyses—adopted in USDA's Memoranda—ignore developments over the past year. *Adams I*, one of the two circuit court opinions the agencies relied upon, was initially replaced by a narrower decision that "d[id] not reach the Title IX question." *Adams II*, 3 F.4th at 1304. The Eleventh Circuit then granted rehearing en banc and vacated even the narrower opinion. *Adams III*, 9 F.4th at 1372. That USDA neither acknowledged

that development nor considered additional circuit court decisions distinguishing Title IX from Title VII, such as *Meriwether*, shows that caselaw is not driving USDA's rewriting of Title IX.

USDA may wish, as a policy matter, that Title IX and the Food and Nutrition Act gave it authority to prohibit States from maintaining sex-separated bathrooms and locker rooms, offering sex-separated athletic teams, or using biologically accurate pronouns. But Congress gave USDA no such power. USDA's Final Rule and Memoranda, therefore, are contrary to law.

3. USDA's Rules Violate the Constitution.

USDA's Final Rule and Memoranda are also contrary to law because they violate the Spending Clause; First Amendment; Tenth Amendment and Anticommandeering Doctrine; and the Separation of Powers and Non-Delegation Doctrine.

Spending Clause. Congress enacted Title IX and the Food and Nutrition Act pursuant to its Spending Clause authority. "The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (quotation marks omitted). If "Congress intends to impose a condition on the grant of federal moneys," as it did under Title IX and the Food and Nutrition Act, "it must do so unambiguously." *Id.*

As explained above, these two statutes do not unambiguously prohibit discrimination based on sexual orientation or transgender status. With Title IX, for example, the statute expressly allows sex-separated facilities, 20 U.S.C. § 1686, undermining the very foundation of USDA's interpretation. Because Congress did not "provide[] clear notice to the States of their [purported] obligation" to treat individuals according to their gender identity rather than their (biological) sex, USDA may not impose that obligation under the guise of a regulatory "interpretation." *Sch. Dist. of Pontiac*, 584 F.3d at 271 (plurality opinion) (citing *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).

The Final Rule and Memoranda violate the Spending Clause for an additional reason: they use the threat of withholding substantial federal funding to coerce States into adopting USDA's preferred policies. Crum Decl., at ¶¶ 8-10. Threatening to withhold a State's federal funding if it fails to prohibit discrimination based on sexual orientation or gender identity (a requirement that appears nowhere in Title IX or the Food and Nutrition Act) "is much more than 'relatively mild encouragement'—it is a gun to the head." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

First Amendment. The Final Rule and Memoranda also appear to violate the First Amendment in at least three ways. *First*, by adopting the Department of Education's analyses and requiring States to affirm that their institutions will not discriminate on the basis of gender identity or sexual orientation, Memorandum at 2, USDA appears to have imposed the Department of Education's position that the use of biologically accurate pronouns could constitute unlawful discrimination. That runs headlong into the First Amendment. In *Meriwether*, the Sixth Circuit held that a state university "flouted" the First Amendment and "violated [a professor's] free-speech rights" by punishing the professor for declining to use a student's "preferred pronouns." 992 F.3d at 511-12; *cf. United States v. Varner*, 948 F.3d 250, 256-57 (5th Cir. 2020) (denying motion to require use of a transgender litigant's preferred pronouns and noting the wide variety of preferred pronouns). Even at the high school level, teachers retain some First Amendment free-speech rights. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022).

Second, the Final Rule and Memoranda also conflict with religious liberty. *Bostock* emphasized that the First Amendment, the Religious Freedom Restoration Act, and federal antidiscrimination laws all provide robust protections for religious employers and employees. 140 S. Ct. at 1754. USDA did not even acknowledge in the Final Rule the potential conflict between

its interpretation of the statutes and the religious-freedom rights of the entities and individuals that the statutes regulate. That conflict provides an additional reason to set aside the unlawful actions.

Congress's spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. By threatening to withhold funds from States unless they adopt policies or engage in conduct that, at least in some circumstances, 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.

Third, the USDA's actions violate the First Amendment rights of States. Plaintiff States have First Amendment rights, which include the right not to express messages they do not want to express. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219-20 (2015). "[T]eachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages." *Kennedy*, 142 S. Ct. at 2423. Yet the Final Rule and Memoranda seek to dictate the messages that the States convey to students and the public through State employees. USDA requires States to broadcast in revised policies, posters, and websites that their institutions do not discriminate on the basis not just of sex—what the States agreed to when they accepted federal funding—but also on the basis of gender identity or sexual orientation.

What is particularly troubling about this infringement of the First Amendment is that free speech rights are supposed to be strongest regarding speech on controversial topics, which surely include sexual orientation and gender identity. *See Bongo Prods., LLC v. Lawrence*, No. 3:21-cv-00490, 2022 WL 1557664, at *1, 16-17 (M.D. Tenn. May 17, 2022). For example, "[w]hether to use an individual's preferred pronouns, rather than those consonant with one's biological sex, presents ontological and moral questions about our identity as human beings." *In re C.G.*, 2022 WI 60, ¶ 99 (Hagedorn, J., concurring in denial of transgender sex offender's request to legally

change name). Related policy questions are best resolved at the State level, not in hastily issued pronouncements from USDA. If anything, forcing States to propagate the USDA's biologically inaccurate moral dogma in public schools seems to do exactly what the Supreme Court has previously prevented States from doing—"require that teaching and learning must be tailored to the principles or prohibitions of" a biologically inaccurate "dogma." *See Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (prohibiting restrictions on the teaching of evolution).

Tenth Amendment and Anticommandeering Doctrine. USDA's Final Rule and Memoranda also violate structural constitutional safeguards in the Tenth Amendment and Anticommandeering Doctrine and thus are "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A)-(C). Congress must make "clear and manifest" its purpose to supersede powers historically reserved to the States, such as the management of their public schools. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). USDA turns that federalism principle on its head. According to USDA, one courageous federal entity may, if its bureaucrats choose, risk the entire country as a laboratory for novel social experiments.

In carrying out its social experiment, USDA errs as well by commandeering States and their employees. The Tenth Amendment and structure of the Constitution deprive Congress of "the power to issue direct orders to the governments of the States," *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018), and forbid the federal government from commandeering state officers "into

administering federal law," *Printz v. United States*, 521 U.S. 898, 928 (1997). But the Final Rule and Memoranda apparently commandeer States and their employees into rewriting policies, replacing posters, updating websites, and affirming non-discrimination policies that would require reorganizing athletic programs and living facilities to avoid all distinctions between the two sexes.

Separation of Powers and Non-Delegation Doctrine. USDA's Final Rule and Memoranda are also contrary to law and exceed statutory authority because they stray so far beyond any reasonable reading of Title IX and the Food and Nutrition Act that they amount to an unconstitutional exercise of legislative power. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in . . . Congress."). Congress must "speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted); *see West Virginia v. EPA*, 142 S. Ct. 2587, 2607-10 (2022). And when Congress does delegate power, that delegation comports with the Constitution only if "Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (cleaned up).

Here, Congress neither spoke clearly to authorize USDA to resolve such a major question as whether States may maintain sex-separated athletic programs, bathrooms, and locker rooms nor provided an intelligible principle by which USDA could redefine "on the basis of sex" in Title IX and the Food and Nutrition Act. Congress must offer "specific restrictions" that "meaningfully constrain[]" the agency's exercise of authority. *Touby v. United States*, 500 U.S. 160, 166-67 (1991). If USDA really had the power to rewrite Title IX and the Food and Nutrition Act in a way that makes something as commonplace as sex-separated bathrooms illegal, then there would be no meaningful constraint on USDA's discretion. Such a decision of "deep . . . political significance"

must be made by Congress. *King v. Burwell*, 576 U.S. 473, 486 (2015) (quotation marks omitted).

II. The States Will Suffer Irreparable Harm Absent a Preliminary Injunction.

Absent a preliminary injunction, USDA's new Final Rule and Memoranda will irreparably harm the States. The rules present the States with a Hobson's choice: either forfeit sovereign prerogatives or give up critical funds used to educate students and feed families in need. Either path leads to an imminent, unrecoverable loss that justifies equitable relief.

Under our Constitution, "[t]he States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Hill v. Curtin*, 792 F.3d 670, 675 (6th Cir. 2015) (en banc) (quoting *Burt v. Titlow*, 571 U.S. 12, 19 (2013)). "Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022). And a State necessarily "suffers a form of irreparable injury" any time it is prevented from "effectuating statutes enacted by representatives of its people." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam) (quotation omitted).

Moreover, like private parties, "States generally cannot collect money damages from the federal government under the APA." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (citing 5 U.S.C. § 702). The costs of complying with an unlawful regulation, and lost revenues linked to its violation, qualify as "irreparable harm[s]" in this unique context. *Id.*; *see BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021); *New York v. DHS*, 969 F.3d 42, 86 (2d Cir. 2020).

If USDA's Final Rule and Memoranda take effect while this lawsuit remains pending, they will force the States to choose between their sovereignty and education and lunch money for children. Tennessee, for example, requires that "[a] student's gender for purposes of participation in" middle and high school sports "must be determined by the student's sex at the time of . . . birth," not their later-chosen gender identity. Tenn. Code Ann. § 49-6-310. Tennessee has also

granted a private right of action against public schools that "intentionally allow[s] a member of the opposite sex to enter [a] multi-occupancy restroom or changing facility while other persons [are] present." *Id.* § 49-2-805. Further, Tennessee guarantees that "no faculty" at any state-run college "will face adverse employment action for classroom speech," including the refusal to use biologically inaccurate pronouns. *Id.* § 49-7-2405(a)(10). These acts, which regulate Tennessee's own institutions, fall within the State's traditional sovereign purview. But if the Administration deems them a form of "discrimination . . . under SNAP," Final Rule at 35,857, it will cause irreparable harm. Tennessee would have to disregard State law or else risk a "finding of noncompliance," Memorandum Q&A at 3, and withholding of SNAP funds "as the Secretary determines to be appropriate," 7 U.S.C. § 2020(g); *see also* Final Rule at 35,857-58. Neither sacrifice is reversible through a final judgment that will come months, if not years, from now.

III. The Equities and Public Interest Favor Preliminary Relief.

All remaining considerations favor preliminary relief. Federal courts generally weigh the potential harm to the defendant and the public interest before issuing a preliminary injunction. *See City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc). But when the injunction would run against the federal government, "[t]hese factors merge," *Nken*, 556 U.S. at 435, and typically turn on a lawsuit's merit. Indeed, when a "plaintiff shows a substantial likelihood" that government action will be deemed unlawful, "no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't*, 274 F.3d 377, 400 (6th Cir. 2001). That is the case here. The States seek to maintain the status quo and prevent the unlawful new rules from disrupting state-run schools and other state agencies.

CONCLUSION

The Court should enjoin USDA from implementing its Final Rule and Memoranda against the Plaintiff States (and entities within those States) while this action remains pending

Dated: July 26, 2022

Respectfully Submitted,

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***Application for Pro Hac Admission Forthcoming**

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2022, a true and exact copy of the foregoing document was forward, by certified mail, to the parties identified below:

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EXHIBIT A

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; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH 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. _____

DECLARATION OF N. ANTONIO NIKNEJAD

Pursuant to 28 U.S.C. § 1746, I, N. Antonio Niknejad 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 Policy Director to Bill Lee, Governor of the State of Tennessee. In this role, I serve as a member of the Governor's cabinet and am responsible for leading the development of the Governor's policy agenda, which includes social services, spending, the State's response to federal policies, and the State's other interactions with the federal government, including federal funding programs.

3. I have reviewed the various memoranda and proposed final rule issued by the U.S. Department of Agriculture ("Department"), including: USDA, CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022), https://bit.ly/3NuXnSx ("Memorandum"); USDA, Cover Letter to CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022) ("Cover Letter"); USDA, CRD 02-2022, Questions and Answers Related to CRD 01-2022 Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5. 2022), https://bit.ly/3yzKpyG ("Memorandum Q&A"); USDA, Memorandum Regarding Revised Nondiscrimination Statement and "And Justice for All" Posters; Timelines and Guidance for Implementation (May 5, 2022) ("Supplemental Memorandum") (collectively "Memoranda"); and Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement, 87 Fed. Reg. 35,855 (June 14, 2022), https://bit.ly/3bDC4RA ("Final Rule").

4. The State of Tennessee, through its agencies and its political subdivisions, engages in various agreements with the federal government to administer the Supplemental Nutrition Assistance Program ("SNAP").

5. In Fiscal Year 2020-21, Tennessee received approximately $2,600,264,708 in federal funding from the Department to administer the SNAP programs and distribute SNAP benefits in Tennessee. This includes approximately $102,192,555 for SNAP administration and $2,498,072,153 for SNAP benefits.

6. SNAP benefits hundreds of thousands of Tennesseans by providing vital nutritional assistance to some of our most vulnerable citizens. Over the past year, the average number of Tennessee households per month to receive benefits through SNAP was 424,151.

7. The State of Tennessee works with approximately sixty-two (62) partners in executing SNAP programs. This includes direct recipients and subrecipients funded through agreements with the Tennessee Department of Human Services and the Tennessee Department of Labor.

8. SNAP remains an important program to Tennessee because it provides temporary support and needed nutrition benefits to supplement the food budget of low-income Tennessee families so that they can purchase healthy food to remain healthy and to become self-sufficient. The primary goals of the SNAP program are to alleviate hunger and to improve nutrition and health in eligible households.

9. The State of Tennessee expects to continue in its cooperative-federalist agreements with the Department to maintain and administer SNAP programs and SNAP benefits for Tennesseans.

10. For example, the State of Tennessee has been preparing to resubmit the 2023 SNAP Nutrition Education (SNAP-ED) Comprehensive State Plan by the required deadline of August 15, 2022. SNAP-ED facilitates the SNAP nutrition education and information delivery to low-income SNAP recipient families in multiple community settings such as farmers markets, schools, community centers, and parks, with the purpose of assuring maximum exposure to nutrition information and increasing the likelihood that SNAP recipients improve their well-being through making health food choices and physical activity.

11. In Tennessee, the University of Tennessee Extension: Tennessee Nutrition and Consumer Education Program and the Tennessee State University SNAP-ED Community Nutrition Education Delivery program facilitate the SNAP-ED program. In Fiscal Year 2022, the Department allocated $6,049,977.00 for SNAP-ED.

12. However, given the Proposed Rule and Memoranda, Tennessee must adopt the Department's revised nondiscrimination statement in the coming days or risk losing its federal funding. *See* Technical Assistance & Guidance, FNS Nondiscrimination Statement (May 5, 2022), https://bit.ly/3nZTc6W ("Nondiscrimination Statement").

13. The Proposed Rule and Memoranda arguably conflict with Tennessee's laws. *See, e.g.*, Tenn. Code Ann. § 49-6-310 (providing that "[a] student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth"); *id.* § 49-2-805 (giving public school students, teachers, and employees a private right of action against a school that "intentionally allow[s] a member of the opposite sex to enter [a] multi-occupancy restroom or changing facility while other persons [are] present"); *id.* § 49-6-2904(b)(2) (providing students a right to "[e]xpress religious viewpoints in a public school"); *id.* § 49-7-2405(a)(2), (a)(10)

(providing, with certain limitations, that public higher educational institutions in Tennessee "shall be committed to giving students the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue" and that "no faculty will face adverse employment action for classroom speech").

14. The State of Tennessee would also incur various compliance costs if forced to comply with the requirements of the Memoranda and Final Rule.

15. The State of Tennessee also plans to continue its management of the SNAP program for households and beneficiaries.

16. As a result, Tennessee must choose between its sovereignty in enforcing its own laws or risk losing federal funding that benefits hundreds of thousands of families and children who need nutrition assistance.

Tony Niknejad

N. Antonio Niknejad

07/25/22

Date

EXHIBIT B

IN THE 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; THE STATE OF LOUISIANA; THE STATE OF MISSISSIPPI; THE STATE OF MISSOURI; THE STATE OF MONTANA; THE STATE OF NEBRASKA; THE STATE OF OHIO; THE STATE OF OKLAHOMA; THE STATE OF SOUTH 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.

DECLARATION OF ADAM CRUM

1. My name is Adam Crum, and I am Commissioner of the Alaska Department of Health. I am also a resident of Alaska and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. The State of Alaska has entered into a Federal-State Agreement to operate the Supplemental Nutrition Assistance Program ("SNAP") within Alaska.

3. In administering its SNAP program, the State of Alaska does not discriminate against any person on the basis of gender identity or sexual orientation.

4. Alaska operates programs and activities that receive funding and are thus subject to the Food and Nutrition Act. 7 U.S.C. §§ 2011–2036.

5. In fiscal year 2021 – 2022, Alaska received $13 million in funding to operate the SNAP under the Food and Nutrition Act.

6. In state fiscal year 2021, Alaska provided SNAP benefits to 50,964 households.

7. On May 5, 2022, the U.S. Department of Agriculture (USDA) issued a memorandum updating the Food and Nutrition Services complaint-processing policy related to claims of discrimination based on gender identity or sexual orientation.

8. On May 5, 2020, USDA contacted the State of Alaska, Department of Health, Division of Public Assistance, notifying the State that it must update its program pursuant to the memorandum and associated documents within ninety days.

9. The State of Alaska felt that it had no choice but to make significant changes to its program or risk losing funding essential to providing nutritional assistance to Alaska families in need.

10. The State of Alaska, Department of Health, Division of Public Assistance made

the following changes to its program in order to comply with the new discrimination requirements:

a. Updated the nondiscrimination statement on its website.

b. Ordered revised "And Justice for All" posters from the acting Western Region Civil Rights Officer.

c. Began updating documents, pamphlets, brochures, etc. with the 2022 nondiscrimination statement as applicable before September 30, 2023.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this the 25 day of July 2022.

Adam Crum
Commissioner
State of Alaska Department of Health