April 12, 2021

VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
United States Court of Appeals for the Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

RE: Response to Notice of Supplemental Authority, Pamela S. Karlan, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, Civil Rights Division, Memorandum re: Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (Mar. 26, 2021)

ACLU
AMERICAN CIVIL LIBERTIES UNION

National Office
125 Broad Street
18th Floor
New York, NY 10004
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Deborah N. Archer
President

Anthony D. Romero
Executive Director

Dear Mr. Cayce:

Despite Plaintiffs' assertion to the contrary (Pls. Ltr at 1-2), the district court issued a declaratory judgment. The district court's Final Judgment—set forth in a separate document from its opinion—states that the court "now **HOLDS** that Nondiscrimination in Health Programs & Activities ('the Rule'), 81 Fed. Reg. 31376 (May 18, 2016), codified at 45 C.F.R. § 92, violates the APA and RFRA and enters this Final Judgment on those claims." RE 41. That is a declaratory judgment.

Even without an injunction, the district court's declaratory judgment protects Plaintiffs from any attempt by HHS to enforce the 2016 Rule regarding paying or providing for abortion and transition-related care. *Cf. Brackeen v. Haaland*, No. 18-11479, 2021 WL 1263721, at *81 n.19 (5th Cir. Apr. 6, 2021) (en banc) (opinion of Duncan, J.) ("[A] declaratory judgment against the [agency's] Secretary would bind her when it comes to enforcing the department's challenged regulations." (cleaned up)).

Plaintiffs speculate that HHS may take some *new* agency action against them based on the Department of Justice's (correct) belief that Title IX prohibits discrimination based on transgender status. If new final agency action occurs and Plaintiffs are faced with a credible threat of enforcement from that new agency action, Plaintiffs may challenge it. As part of any future litigation, Plaintiffs will be entitled to invoke mutual issue preclusion against the government to the extent it is applicable. *See Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (en banc). If issue preclusion does not apply, Plaintiffs can also seek to demonstrate that the new agency action independently violates RFRA.

Until then, neither Article III nor the Administrative Procedure Act's waiver of sovereign immunity for "final agency action," 5 U.S.C. § 704, provides authority for courts to issue injunctions based on speculation about hypothetical actions an agency may or may not decide to take in the future.

Respectfully submitted,

/s/ Joshua A. Block

Joshua A. Block
Counsel for Intervenors-Appellees

Word count: 319

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