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June 28, 2023

Deborah S. Hunt, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: *State of Tennessee, et al. v. Department of Education, et al.*, No. 22-5807

Dear Ms. Hunt:

Plaintiffs-Appellees, other than Arizona, respectfully submit this response to Defendants' new Rule 28(j) letter. Neither case Defendants cite is remotely comparable to their attempt to rewrite Title IX and implementing regulations in a way that would supersede State education laws and impose on State schools and universities a "responsibility to investigate and address" discrimination "because of" students' "perceived or actual sexual orientation or gender identity." Fact Sheet, Compl. Ex. C, R 1-4, PageID#73.

For *Haaland v. Brackeen*, Defendants elide a highly relevant reason the Supreme Court decided Texas lacked standing: The Indian Child Welfare Act "is not a Spending Clause statute." 143 S. Ct. 1609, 1640 (2023). Title IX *is* a Spending Clause statute. Federal funds are "conditioned on compliance with" Title IX. *Id.*

For *United States v. Texas*, the Supreme Court ruled Texas and Louisiana lacked standing to sue to order the Federal Executive to "make[] more arrests or initiate[] more prosecutions" of noncitizens under federal immigration law. 2023

WL 4139000, at *3-4. Those States’ suit was “not the kind redressable by a federal court,” *id.* at *5, because a plaintiff “lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution,” *id.* at *1 (quotation omitted). In contrast, State schools and universities *are* subject to Title IX enforcement by Defendants. The challenged documents also purport to confer “legal benefits” to students by imposing new obligations not to discriminate based on sexual orientation or gender identity. *Id.* at *8.

Defendants’ commitment to strategically enforce supposed obligations not to discriminate based on gender identity is evident from federal maneuvering on the day of oral argument in this case. The United States waited until after argument concluded before notifying Tennessee that the United States was intervening *that same day* in a case challenging enforcement of a Tennessee law protecting minors from experimental surgeries, cross-sex hormones, and puberty blockers. Contrary to Defendants’ positions here, the United States seeks “Statewide Relief” to enjoin enforcement against parties and nonparties alike. U.S. Reply, No. 3:23-cv-00376, Doc. 157, PageID#2616-18 (M.D. Tenn. June 12, 2023).

Respectfully submitted,

/s/ Clark Lassiter Hildabrand

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CERTIFICATE OF SERVICE

I, Clark Hildabrand, counsel for Plaintiffs-Appellees other than the State of Arizona and a member of the Bar of this Court, certify that, on June 28, 2023, a copy of the foregoing Rule 28(j) letter was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Clark Lassiter Hildabrand

Clark Lassiter Hildabrand
Senior Counsel