APPENDIX TO TITLE IX LETTER TO DISTRICTS/CHARTERS

Many states have challenged successfully these new regulations with several federal courts issuing preliminary injunctions stopping enforcement. As it stands now, there are court injunctions in Louisiana, Mississippi, Montana, Idaho, Tennessee, Kentucky, Ohio, Indiana, Virginia, West Virginia, and Texas.

As for Arizona, it is a plaintiff in an August 30, 2021, lawsuit with 19 other states that successfully sued to enjoin USDOE guidelines issued in 2021 and 2022 that set forth the very same sexual orientation and gender identity policies forming the basis for the August 1 rule. That decision was upheld on appeal just two weeks ago. *Tennessee v. Dept. of Education,* Civ. No. 22-5807 (6th Cir. June 14, 2024).

The lawsuit sought to prevent schools from being forced to have biological males using the girls' restroom, from trying out for the girls' cheerleading team, and to prevent individuals to be in violation for refusing to use a transgender student's preferred name or pronoun.

At the time of the filing of that lawsuit, Mark Brnovich was still Arizona's Attorney General, and Arizona joined as a plaintiff. Given the change in Attorney General, Arizona did not participate in the appeals, but the Court of Appeals construed Arizona as continuing to be one of the plaintiffs. The decision in that case, although occurring in a Circuit other than the Circuit in which Arizona is located, still applies to Arizona as a plaintiff in the case. Arizona remains bound by the injunction.

This decision applied to the guidance rather than the regulation that is to take affect August 1. But other federal courts have attacked the proposed regulations directly.

In *Tennessee v. Cordona*, a federal district court, addressed Congressional intent for Title IX. It states:

> Title IX carves out exceptions for a number of traditional male-only or female-only activities, as long as similar opportunities provided for "one sex" are provided for "the other sex." See 20 U.S.C. § 1681(a)(1)-(8). However, Senator Bayh, one of the proposal's architects, stressed that Title IX "provide[d] equal

> access for women and men students to the educational process," but did not "desegregate" spaces and activities that have long been sex-separated. 117 Cong. Rec. 30407 (1971).

The Court stated further:

> The drafters of Title IX recognized that "[s]afeguarding equal educational opportunities for men and women necessarily requires differentiation and separation" of the sexes at times. Texas, 2024 WL 2947022, at *32.

The Court stated that the proposed regulation "wreaks havoc" on Title IX as follows:

> The Department's new definition of "discrimination on the basis of sex" wreaks havoc on Title IX and produces results that Congress could not have intended. Under the new rules, recipients of federal funds will still be permitted to separate the sexes for all the reasons listed in 20 U.S.C. § 1681(a)(1)-(9) and § 1686. However, recipients must permit individuals access to private facilities and course offerings consistent with the individual's gender identity. See 34 C.F.R. §§ 106.31(a)(2), 106.33, 106.34. For example, the new rules provide that recipients may separate students for purposes of fraternities and sororities, but not for purposes of utilizing bathrooms. Compare 20 U.S.C. § 1681(a)(6)(A) and 34 C.F.R. § 106.33. Likewise, recipients of federal funds may require children to participate in the Boy Scouts or Girl Scouts consistent with the student's biological sex but may not require the same for sex education or physical education classes. Compare 20 U.S.C. § 1681(a)(6)(B) and 34 C.F.R. § 106.34(a). In yet another example, recipients of federal funds may still provide separate living facilities for the different sexes but may not require students to use the shower or locker room associated with their biological sex. Compare 20 U.S.C. § 1686 and 34 C.F.R. § 106.33.

The USDOE claimed to rest its new regulation on a United States Supreme Court decision called *Bostock v. Clayton* County, 590 U.S. 644

(2020). But this Court quoted other courts as pointing out that *Bostock* applies only to Title VII, not Title IX.

The Court noted specific harm that results from the proposed regulation.

In another case, *State of Louisiana v. U.S. Dept of Education*, a separate federal court enjoined enforcement of the August 1 rule, stating:

> Together, the ordinary meaning of "sex discrimination" at the time of enactment and the 1975 regulations of Title IX indicate that "sex discrimination" included only biological males or females. The Court finds no support in either the ordinary meaning or the 1975 regulations that *Bostock*'s interpretation of "sex" should apply to Title IX.
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> The Court further finds that Defendants use of *Bostock*'s interpretation of "sex" to Title IX would essentially reverse the entire premise of Title IX, as it would literally allow biological males to circumvent the purpose of allowing biological females to participate in sports that they were unable to participate in prior to 1975.

On July 11, a Texas District judge issued an order with a prohibition against enforcement of the proposed title nine regulation. Here is the first paragraph of that order:

> The Final Rule undermines over fifty years of progress for women and girls made possible by Title IX. Worse still, the Final Rule endangers not only women and girls, but all students. Just like the subjective nature of ever-changing gender identity, the Department of Education picks and chooses which "niche" group to prioritize regardless of the consequences for everyone else and regardless of its authority. Functionally displacing Title IX's understand of "sex" while refusing to define it, the Department of Education's Final Rules has "[n[o basis in reality". This cannot be.

He asked the parties to submit briefs by July 18, as to whether his order should apply to the entire country. From the wording of the order, it sounds likely that that is the way he will rule.

An Arizona district and an Arizona charter school ready to be plaintiff in a specific Arizona action to obtain an injunction in Arizona. We are in discussions with certain legal organizations to see if they can get representation without charging a fee. Those discussions are ongoing.

I will attempt to keep you informed of any further developments.