IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0572

SCARLET VAN GARDEREN, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV 2023–541, the Honorable Jason Marks, Presiding

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Appellants State of Montana, Governor Greg Gianforte, Montana Board of Medical Examiners, Montana Board of Nursing, Montana Department of Public Health and Human Services, and Charlie Brereton submit this Notice of Supplemental Authority pursuant to Mont. R. App. 12(6). Appellants direct the Court to several recent authorities. The first two cases provide important context to the third case, wherein the United States Supreme Court affirmed the two cases on appeal. The fourth case opinion was issued after the opinion by the United States Supreme Court. The final opinion is an order expanding the scope of a stay to nationwide.

I. *Louisiana v. United States Department of Education.*

On June 13, 2024, the United States District Court for the Western District of Louisiana, Monroe Division, preliminarily enjoined the Department of Education's new rule defining "discrimination on the basis of sex" to "includ[e] discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Louisiana v. United States Dep't of Educ.*, No. 3:24-CV-00563, 2024 U.S. Dist. LEXIS 105645, at *5, 57-59 (W.D. La. June 13, 2024) (quoting 34 CFR § 106.10 (2024)). Relevant, here, is the defendants' reliance on *Bostock v. Clayton Cty.*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), to support its new definition of "sex discrimination." *Louisiana*, 2024 U.S. Dist. LEXIS 105645 at *26.

The District Court rejected *Bostock*'s application to Title XI. *Id*. at *26-31. The Court found, among other things, that "the Supreme Court specifically did not determine whether *Bostock* applied to other federal laws." *Id*. at * 27 (citing *Bostock*, 590 U.S.at 681). Moreover, "*Bostock* does not apply because the purpose of Title VII to prohibit discrimination in hiring is different than Title IX's purpose to protect biological women from discrimination in education." *Id*. at *30. "Defendants thus seemingly use *Bostock* in an attempt to circumvent Congress and make major changes to the text, structure, and purpose of Title IX. Such changes are undoubtedly contrary to Title IX and contrary to the Law." *Id*. at *31. *Bostock* would remain constrained to Title VII. *See* Appellants' Op.Br. at 33-34.

The District Court's Order was ultimately upheld on appeal by the United States Court of Appeals for the Fifth Circuit, which rejected the defendants' motion for stay. *See Louisiana v. U.S. Dep't of Educ.*, No. 24-30399, 2024 U.S. App. LEXIS 17886, at *9 (5th Cir. July 17, 2024).

II. *Tennessee v. United States Department of Education.*

Similar to the prior case, on July 15, 2024, the United States District Court for the Eastern District of Tennessee also preliminarily enjoined the Department of Education's rule change to Title XI. *Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 842 (E.D. Tenn. 2022). Like in *Louisiana*, the defendants there relied on

Bostock to support the new rule defining "discrimination on the basis of sex." *Id*. at 833. Relevant here is that District Court's rejection of this reasoning.

"Defendants ignore the limited reach of *Bostock*. The *Bostock* decision only addressed sex discrimination under Title VII; the Supreme Court expressly declined to 'prejudge' how its holding would apply to 'other federal or state laws that prohibit sex discrimination' such as Title IX." *Id*. (quoting *Bostock*, 590 U.S. at 680). "Therefore, in applying *Bostock* to Title IX, the Department overlooked the caveats expressly recognized by the Supreme Court and created new law." *Id*. at 839. Further, like the Department, defendant "[Equal Employment Opportunity Commission]'s Technical Assistance Document goes beyond the holding of *Bostock*" and its "guidance identifies and creates rights for applicants and employees that have not been established by federal law[.]" *Id*. at 840. *Bostock* is limited to Title VII. *See* Appellants' Op.Br. at 33-34.

The District Court's Order was affirmed on appeal by the United States Court of Appeals for the Sixth Circuit. *See Tennessee v. Dep't of Educ.*, 104 F.4th 577, 615 (6th Cir. 2024).

III. *Department of Education v. Louisiana.*

On August 16, 2024, the United States Supreme Court issued a per curium opinion, consolidating the two aforementioned cases and denying the emergency applications for partial stay by the defendants. *Dep't of Educ. v. Louisiana*, Nos.

24A78, 24A79, 2024 U.S. LEXIS 2983, at *3 (Aug. 16, 2024). Relevant here is the unanimous statement by the Court: "Importantly, all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity." *Id*. at *2; *see also, id.* at *4 (Sotomayor, S. dissenting) ("Every Member of the Court agrees respondents are entitled to interim relief as to three provisions of that Rule: 34 CFR § 106.10 (2023) (defining sex discrimination), § 106.31(a)(2) (prohibiting schools from preventing individuals from accessing certain sex-separated spaces consistent with their gender identity), and § 106.2's definition of hostile environment harassment.")

IV. *Alabama v. United States Secretary of Education*.

On August 22, 2024, the United States Court of Appeals for the Eleventh Circuit reversed a lower court's refusal to enjoin the Title IX rule at issue in the prior cases. "Before this action, every court to consider the issue across the nation—seven district courts and two courts of appeals — preliminarily enjoined enforcement of the rule. The district court here, by contrast, refused to enjoin the rule a day before it was supposed to go into effect." *Alabama v. United States Sec'y of Educ.*, No. 24-12444, 2024 U.S. App. LEXIS 21358, at *3-4 (11th Cir. Aug. 22, 2024). The Court then turned to the defendants' reliance on *Bostock*. "In *Bostock*, the Supreme Court

was clear that '[t]he question [wa]sn't just what 'sex' mean[s], but what Title VII says about it,' that its decision did not 'sweep beyond Title VII to other federal or state laws that prohibit sex discrimination,' and that it did not 'purport to address bathrooms, locker rooms, or anything else of the kind.'" *Id*. at *12-13 (quoting *Bostock*, 590 U.S. at 681); *see* Appellants' Op.Br. at 33-34.

The Court continued: "We subsequently reaffirmed, in *Eknes-Tucker v. Governor of Alabama*, that '*Bostock* relied exclusively on the specific text of Title VII' and 'bears minimal relevance' to cases involving 'a different law . . . and a different factual context.'" *Id*. at *13 (quoting 80 F.4th 1205, 1228-29 (11th Cir. 2023); Appellants' Op.Br. at 33-34. "So *Bostock* does not undermine our conclusion that the Plaintiffs have shown a substantial likelihood of success on the merits as to this claim." *Id*. As a result, the Court granted the plaintiffs' request for a rule-wide injunction applying to Alabama, Florida, Georgia, and South Carolina. *Id*. at * 22-23. "In granting injunctive relief, we maintain the status quo along with every other federal court (including the Supreme Court) to rule on this issue." *Id*. at *23.

V. *Texas v. Becerra*

On August 30, 2024, the United States District Court for the Eastern District of Texas granted the motion by the States of Texas and Montana to expand its prior order to a nationwide stay of enforcement of a final rule promulgated by the Department of Health and Human Services. *Texas v. Becerra*, No. 6:24-cv-211-JDK,

(E.D. Tex. Aug. 30, 2024) (**attached as Exhibit A**). "The rule would [have] require[d] healthcare providers and States to perform and pay for so-called 'gender-transition' procedures—or else lose federal funding." *Texas v. Becerra*, No. 6:24-cv-211-JDK, 2024 U.S. Dist. LEXIS 117573, at *1 (E.D. Tex. July 3, 2024) (citing Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024)).

DATED this 4th day of September, 2024.

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