MOUNTAIN STATES LEGAL FOUNDATION
FREE COUNTRY. FREE PEOPLE.

2596 South Lewis Way | Lakewood, CO 80227 | Tel: 303.292.2021

Date: September 12, 2022

RIN: RIN 1870-AA16

Re: *Comment Objecting to the Department of Education's Proposed Amendments to Title IX*

Introduction

The Department of Education (Department) should scrap its Proposed Rule and instead preserve the Title IX regulations as they currently exist. Imposing the proposed regulations, as they stand now, on American society would have disastrous effects on the right to due process, the right to freedom of speech, and the rule of law. Moreover, the proposed regulations would confuse stakeholders, cause unneeded expenses for schools and students, and create regulatory whiplash as the regulations are either struck down or rescinded soon after their enactment.[1] Separately, the Department fundamentally misreads *Bostock* by attempting to sweep in gender identity discrimination; to do so is not just arbitrary and capricious, but would also violate the Major Questions doctrine, and the *Pennhurst* doctrine.

Background

Title IX's essential mandate is contained in 37 simple words: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

[1] We previously offered live comment during the Department's listening session on June 10, 2021. Subsequently, we met with Department and Office of Management and Budget (OMB) officials on March 21, 2022. The Department's proposed regulations indicate that it declined to heed our prior comments, and has instead opted to pursue a dangerous and mistaken course of action.

subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

Enacted in 1972, Congress provided that the Department may promulgate regulations enforcing its key non-discrimination mandate. 20 U.S.C. § 1682. But in attempting to regulate under Title IX, the Department has breached its duty to act in a manner that is not arbitrary and capricious, and is in accordance with law. The Proposed Rule, if adopted as it stands, would violate these limitations.

I. The Proposed Rule Would Abrogate Critical Due Process Protections.

In 2020, Title IX protections against sexual harassment were enshrined into federal regulations for the first time. Prior to that, the Department engaged in "rule by letter" efforts through mere sub-regulatory guidance. The 2020 regulations balanced the interests of ensuring that schools respond to sexual harassment, while also ensuring that students, faculty, and others were guaranteed due process rights prior to discipline.[2]

While it is commendable that the Biden Administration has finally recognized the need to engage in formal notice-and-comment rulemaking, the Proposed Rule does significant damage to the balance set in place by the 2020 regulations.

A. The Proposed Rule is arbitrary and capricious because it charges schools with responding to sexual harassment that they do not know about.

In the Proposed Rule, under 34 C.F.R. § 106.11, the Department purports to require that recipients address a sex-based hostile environment, regardless of the genesis of the conduct at

[2] Note that the Obama-era guidance documents triggered numerous successful lawsuits and pointed criticism by judges. *See* Samantha Harris and KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2019). The proposed rules largely bring back the worst parts of those guidance documents, making the rule arbitrary and capricious and not in accordance with law.

issue. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390, 41,571 (July 12, 2022) ("Proposed Rule").[3] In other words, the recipient has a duty to respond to conduct that occurred in other countries, in the years before two students attended school together, and in contexts in which the recipient lacks control over the environment. *See contra*, *Chisholm v. St. Marys City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 352 (6th Cir. 2020) ("Title IX does not protect against all sex discrimination."); Proposed Rule 34 C.F.R. § 106.44(a)("A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.").

For instance, a swim meet where two students competing for different teams have a history from a separate context, could potentially impose a duty on both schools to prevent either student from competing, regardless of the fact that neither school had control over the incidents that occurred that gave rise to the hostile environment, and despite the fact that the hostile environment is not part of their daily school life. This is contrary to established law. *See Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629, 652 (1999) ("Moreover, the *provision [of Title IX]* that *the discrimination occur* 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.") (emphasis added); *see also id.* at 648 ("School administrators will continue to enjoy the *flexibility they require* so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the

[3] The Proposed Rule can be found at https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

harassment or lack thereof is clearly unreasonable in light of the known circumstances.") (emphasis added).

Indeed, at the postsecondary level, schools are generally expected to exercise less control over their students than in the K-12 level. *Davis*, 526 U.S. at 649 ("A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims."). Yet the rule seems to envision that both Elementary and Secondary schools, as well as Postsecondary schools, will be equally as subject to conduct that was entirely outside of their control.

Similarly, under the Proposed Rule, an individual could bring a complaint with the Office for Civil Rights outlining how sexual harassment occurred under Title IX, with the school learning of the matter for the first time. The school would then be in the position of responding not to school-level complaints of sexual harassment, but rather to the letters sent by OCR opening a complaint for investigation and resolution. Such would be contrary to *Davis*. 526 U.S. at 648 ("We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.").

Thus, the Proposed Rule, if it lacks some kind of notice requirement for schools, embraces this strange strict-liability standard for schools, and would be arbitrary and capricious. *Id.* at 648–49 ("The dissent consistently mischaracterizes this standard to require funding recipients to 'remedy' peer harassment, and to 'ensure that students conform their conduct to certain rules. *Title IX imposes no such requirements*. On the contrary, the recipient must merely respond to known

peer harassment in a manner that is not clearly unreasonable. This is not a mere 'reasonableness' standard, as the dissent assumes.") (internal citations and quotation marks omitted) (emphasis added); *see also id.* at 653 ("The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.").

Moreover, the standard creates perverse incentives for schools to have their Title IX Coordinators roam about on campus, looking for sexual harassment incidents to respond to. Any reasonable school would prefer to chill conduct rather than be subjected to the public sanction of having a civil rights investigation opened against it. This is especially troubling in the speech context, as discussed below.

Indeed, the Proposed Rule is particularly strange, because it seems to make it less likely that schools will investigate sexual harassment as part of a normal campus complaint process. Notably, the Proposed Rule, under 34 C.F.R. § 106.2, requires schools only to treat a student's information as a "complaint" when the student expressly "initiate[s] the recipient's grievance procedures." A student providing information without this express request has not filed a "complaint" at all.

B. The Proposed Rule is arbitrary and capricious because it permits schools to discipline and exclude students and faculty with inadequate due process measures.

The present Title IX regulations encourage schools to abide by constitutional due process limitations. Moreover, since the Office for Civil Rights lacks the power to encourage schools not

to provide due process, the current Title IX regulations carefully protect the duties of schools to act legally and in accordance with law.

Not so for the Proposed Rule. For the Elementary and Secondary Education provisions, the Proposed Rule provides practically no clear guidelines on what is required, in contrast to the Current Rule. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, (May 19, 202) ("Current Rule").[4]

The Proposed Regulation has similar flaws at the Postsecondary level. In one proposed regulation, the Department includes the idea that each party in the postsecondary context must be provided with certain evidence. However, the Department does not require schools to provide the evidence itself. Rather, schools need merely provide a description of the evidence that the school itself deems relevant to the allegations of sex discrimination. Worse, the description *need not even be in writing*, and can be provided *merely orally*. Of course, the school itself must keep a written record of how it complied with the provision, meaning that the school may have a written summary of the evidence, and yet only provide an oral summary to the parties to a Title IX investigation. *Compare* Proposed Rule, at 41,576 (34 C.F.R. § 106.45(f)(4)) *with* Proposed Rule, at 41,570 (34 C.F.R. § 106.8(f)(1)) ("For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.").

This also puts schools in the position to make a judgment call about relevance before any hearing or other testing of the evidence occurs, and act to take a first cut of evidence that isn't "relevant." This is absurd, and cannot be effectuated reliably or consistently. On this basis alone,

[4] The Current Rule is at https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal#footnote-88-p30036.

the Department has announced an arbitrary and capricious Proposed Rule. But even a perfectly complete written description creates a major gap in the evidence, forcing parties to take notes or memorize what is being said to them does not afford the accused due process. It cannot truly be said that such procedures are adequate to protect students and others in the Title IX complaint process.

Separately, the Proposed Rule removes from the written notice requirements the fact that the Respondent must be informed that he or she is presumed innocent. To have this presumption as a required portion of the grievance process, and yet exclude it from the written notice, lacks reason. *See* Proposed Rule at 41,575 (34 C.F.R. § 106.45(c)).

C. The Proposed Rule is arbitrary and capricious because it establishes significant burdens to maintaining live hearing procedures.

That rule provides several *disadvantages* to schools that must choose between providing due process to students in the middle of a Title IX investigation and adjudication.

While a single-investigator model is technically optional, the Proposed Rule turns that choice into *fait accompli*. Unless a school is required by law to conduct a hearing, few will bear the numerous headaches conducting a hearing. This is unfortunate, because courts have already established that the most appropriate process is a hearing and cross-examination. *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) ("Due process requires cross-examination in circumstances like these because it is 'the greatest legal engine ever invented' for uncovering the truth."); *id.* at 582 ("Time and again, this circuit has reiterated that students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct."). Even one court that has held that cross-examination is not *per se* required by Title IX noted that an alternative robust process must occur. *See Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) ("This is not to say that a university can fairly adjudicate a serious disciplinary charge without any

mechanism for confronting the complaining witness and probing his or her account."); *see also Doe v. Allee*, 30 Cal.App.5th 1036, 1066 (Cal. Ct. App. 2019) ("[W]here credibility is central to a university's determination, a student accused of sexual misconduct has a right to cross-examine his accuser, directly or indirectly, so the fact finder can assess the accuser's credibility."). Thus, the Proposed Rule essentially pressures schools into adopting a single-investigator model.

Even if a school does opt to have a live hearing, the procedures for such a hearing under the Proposed Rule are confusing and ambiguous. The Proposed Rule at 41,578 (34 C.F.R. § 106.46(f)(4)) apparently only applies to parties, and not witnesses. It's not clear what happens if a witness, as opposed to a party, refuses to answer any credibility questions. This will also raise significant ambiguities as to whether a statement "supports" a party's "position." A statement by a party that they never drank alcohol, followed by a refusal to answer any credibility questions, will leave decisionmakers in doubt as to whether to credit the statement. These sorts of ambiguous procedures, when implemented improperly, can themselves have a discriminatory effect based on sex. *See Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 222 (D. Mass. 2017) ("Courts increasingly see claims brought pursuant to Title IX by male students who have been found responsible and disciplined for violating the sexual misconduct policies colleges use to deter and respond to sexual misconduct."). Leaving such ambiguities in the Proposed Rule would arbitrarily and capriciously work to the disadvantage of men, in particular.

II. The Proposed Rule Would Undermine Constitutional Protections Related to Free Speech.

A. Departing from the *Davis* standard violates the First Amendment, and is not in accordance with law.

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. CONST. amend. I. The prohibition extends to the Executive Branch and

covers instances where the Executive Branch either chills or compels speech. *See Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—[b]ecause First Amendment freedoms need breathing space to survive.") (internal quotation and citation omitted); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men."); *id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

The Supreme Court's standard for what constitutes harassment under Title IX in the judicial context is conduct "that is so severe, pervasive, *and* objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added). The preamble of the Current 2020 Rule discusses the specific dangers of a standard any less than *Davis*:

> [T]he *Davis* definition of sexual harassment as "severe, pervasive, and objectively offensive" comports with First Amendment protections, and the way in which a broader definition, such as severe, persistent, or pervasive (as used in the 1997 Guidance and 2001 Guidance), *has led to infringement of rights of free speech* and academic freedom of students and faculty.

Current Rule, at 30,036 n.88 (emphasis added).

Nevertheless, under the Proposed Rule, sex-based conduct that is severe *or* pervasive would be covered by Title IX. Proposed Rule, at 41,569. But such a standard would have negative consequences so drastic that adopting it would be arbitrary and capricious. The precise reason that *Davis*'s three-pronged test works for schools would thus be undermined and replaced with essentially one prong—*either* severe *or* pervasive. This is especially problematic when the lens

with which to view this discrimination is "evaluated *subjectively* and objectively[.]" *Id.* (emphasis added).

The Proposed Rule asserts that "Title IX protects individuals from sex discrimination and does not regulate the content of speech as such[,]" and "the protections of the First Amendment must be considered." But these are empty promises. Using subjectivity as a harassment standard imperils free speech, creates an environment of fear in a school setting, and sets up a heckler's veto.[5] Proposed Rule, at 41,415. To be clear, "federal anti-discrimination law has never been a federal code of civility. It doesn't ban any and all 'offensive' speech[.]"[6] The Department's effort to expand the definition of sexual harassment harkens back to the Obama-era version of Title IX—it is not only unfaithful to the statute's original purpose, but chills speech. Worse, in many cases, it may even charge schools with compelling certain speech from students.

1. Chilling speech does not protect students from discrimination "on the basis of sex."

With a harassment standard where "subjectivity" is the guide, a Title IX violation lurks behind every corner. Speech in the school setting is *already* chilled due to the prevalence of safe spaces, trigger warnings, manuals on "microaggressions," diversity, equity, and inclusion trainings, and other Orwellian measures. But the proposed regulatory changes codify such restrictions as required by Title IX.

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[5] "Without the requirement that the conduct be objectively offensive, *anything* can be a form of harassment, if you happen to find an unreasonable enough student." Greg Lukianoff and Adam Goldstein, *Speech Codes and "Twisting Title IX*," FIRE (Sept. 13, 2018); https://www.thefire.org/speech-codes-and-twisting-title-ix/; *see also* Madeleine Kearns and Jennifer C. Braceras, *Weaponizing Title IX to Punish Speech*, NATIONAL REVIEW, (Aug. 6, 2022), https://www.nationalreview.com/2022/08/weaponizing-title-ix-to-punish-speech/.

[6] Madeleine Kearns and Jennifer C. Braceras, *Weaponizing Title IX to Punish Speech*, NATIONAL REVIEW, (Aug. 6, 2022), https://www.nationalreview.com/2022/08/weaponizing-title-ix-to-punish-speech/.

Chilling protected speech—even if it is offensive speech related to sex—not only violates the First Amendment, but harms students. The Department of Education has forgotten the principle that "given the nature of academic inquiry, only an open, robust and critical environment for speech will support the quest for the truth."[7]

One way speech will be chilled under the Proposed Rule, if adopted, is through scaring students about the use of sex-based "microaggressions" or "microinvalidations."[8] "Microaggressions are verbal, behavioral, or environmental actions (whether intentional or unintentional) that communicate hostility toward oppressed or targeted groups including people of color, women, LGBTQ persons, persons with disabilities, and religious minorities. People may demonstrate their biases and prejudices in more subtle ways, otherwise known as microaggressions."[9] Importantly,

> The inherent *subjectivity* and elasticity of the concept of microaggressions make a clear, objective definition all but impossible in practice. And without a shared understanding of what speech or action may constitute a microaggression, students and faculty run the risk of being reported for speech protected by the First Amendment that nevertheless crosses an invisible line*, drawn by and known only to the offended party*. What's more, policing microaggressions and free speech threatens to *shut down the sort of conversations from which college students might learn the most*. One person's microaggression is another's earnest attempt to discuss different life experiences.[10]

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[7] David L. Hudson, *Free Speech on Public College Campuses Overview*, FREEDOM FORUM INSTITUTE, https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/ (last visited Sept. 12, 2022).

[8] "Microassaults are overt forms of discrimination in which actors deliberately behave in discriminatory ways. … Microinsults are statements or behaviors in which individuals unconsciously communicate discriminatory messages to members of target groups. … Microinvalidations are verbal statements that deny, negate, or undermine the realities of members of target groups." *A Guide to Responding to Microaggressions*, UNIVERSITY OF ILLINOIS URBANA-CHAMPAIGN, https://wie.engineering.illinois.edu/a-guide-to-responding-to-microaggressions/ (last visited Sept. 12, 2022).

[9] *Id.*

[10] *What are Microaggressions?*, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (FIRE) (June 12, 2019), https://www.thefire.org/issues/microaggressions/ (emphasis added).

Fear of discipline for exhibiting a "microaggression" effectively chills speech as this type of speech will undoubtedly be a factor of Title IX compliance unless the Department of Education explicitly says otherwise. *See A Guide to Responding to Microaggressions*, UNIVERSITY OF ILLINOIS URBANA-CHAMPAIGN, https://wie.engineering.illinois.edu/a-guide-to-responding-to-microaggressions/ (last visited Sept. 12, 2022) ("Microassaults are overt forms of discrimination. . . . [W]hen someone says, 'That's so gay!' to connote that something is weird, the person is aware of the words that they choose; however, they may not realize that using such language is considered offensive."); *but see Chisholm*, 947 F.3d at 350 ("Of course, Plaintiffs cannot be faulted for finding [the coach's] use of the term 'pussy' offensive, even in a football setting. . . . Yet the mere use of an offensive or gendered term does not in itself rise to the level of discrimination on the basis of sex.").[11]

Self-censoring in the interest of decency and politeness is one thing; however, "from the 1950s (the height of McCarthyism in the U.S.) to 2019, self-censorship has actually *tripled*."[12] Interestingly, "those with more formal education self-censor at much higher rates."[13] This is not by coincidence. "A 2013 report issued by UCLA, for example, characterized the resulting chill on speech as a *desirable* outcome of investigating alleged microaggressions."[14] UCLA's report noted

[11] It's unclear how derogatory speech will be handled by recipients of federal funds. The Proposed Rule says, "although the First Amendment may prohibit a recipient from restricting the rights of students to express opinions about one sex that may be considered derogatory, the recipient can affirm its own commitment to nondiscrimination based on sex and take steps to ensure that competing views are heard." Proposed Rule, at 41,415. What measures must the school take to "ensure that competing views are heard?" Does this involve telling students what the "right" view is on certain topics? And about what topics? All in the name of airing out all competing views?

[12] Matthew Legge, *The Rise of Self-Censorship*, PSYCHOLOGY TODAY (July 5, 2021), https://www.psychologytoday.com/us/blog/are-we-done-fighting/202107/the-rise-self-censorship.

[13] *Id.*

[14] *What are Microaggressions?*, FIRE (June 12, 2019), https://www.thefire.org/issues/microaggressions/.

that "investigations might deter those who would engage in such conduct, even if their actions would likely not constitute a violation of university policy."[15]

Using departmental regulations to chill speech by scaring students out of vocalizing their actual beliefs undermines the First Amendment. Moreover, it arbitrarily and capriciously harms every individual under Title IX's reach. Now, "[p]rofessors and educators, the very people entrusted to expand the minds of their students, are among those expected to self-censor. . . . It is primarily through exposure to words and ideas that cause anxiety and discomfort, and sometimes even anger, that individuals foster critical thinking skills, wisdom, and understanding."[16]

What happens when the victims of "microaggressions" graduate and encounter a world that looks nothing like their safe space, anti-hate speech, everyone-gets-a-medal bubble of weak-minded soon-to-be adults? What happens when students confront the real world? Life can be offensive, heartbreaking, and at times, cruel.

The Department of Education must answer these questions. How does subjecting students to what will become *federally mandated censorship* create productive members of society? "This attempt to shield young people from anything uncomfortable is pure madness. We are setting kids up for a lifetime of pain."[17] And this all stems from controlling the language on campuses around the United States through Title IX. Controlling language, in and of itself, does not truly halt discrimination on the basis of sex. Instead, a more informed debate about contested issues be more

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[15] Susan Kruth, *UCLA Report Suggests Chilling Speech Is the Answer to Offensive 'Microaggressions,'* FIRE (Jan.8, 2014), https://www.thefire.org/ucla-report-suggests-chilling-speech-is-the-answer-to-offensive-microaggressions/.

[16] Ryan Chae, *The Tyranny of Microaggression*, BERKELEY POLITICAL REVIEW (Dec. 21, 2018), https://bpr.berkeley.edu/2018/12/21/the-tyranny-of-microaggression/.

[17] Suzanne Venker, *The Snowflake Culture is Killing Our Kids*, WASHINGTON EXAMINER (Oct. 9, 2018), https://www.washingtonexaminer.com/opinion/the-snowflake-culture-is-killing-our-kids.

productive than forced silence. The Department of Education cannot squash free speech and offend the Constitution in favor of its progressive policy.

The harm to students goes even further than shielding students' ears from "uncomfortable" conversations. This Proposed Rule, similar to the Obama-era Title IX regulation, affects what students can tell teachers or professors. One article published under Obama-era Title IX regulations recognized that:

> Victims of sexual assault were able to confide in [one particular] professor about extremely delicate and emotional information . . . before [the university] found itself under investigation by OCR. Since OCR's enforcement and the references placed on [the] syllabus [regarding Title IX reporting responsibilities], [the] professor report[ed] that *not one student* has come to her to discuss past experiences of sexual assault.[18]

The article went on:

> Forcing an unwanted investigation on students that do speak out will cause many students to feel uncomfortable discussing their experiences, which will end the conversation. If a victim does not want to report an incident, but finds comfort in discussing the misconduct with a professor who is empathetic and experienced with issues of sexual assault, why should the university demand an investigation? Universities should be encouraging victims to discuss their trauma in a healthy and progressive manner, but instead they are teaching students how to be afraid and silent.[19]

Students seeking guidance after traumatic sexual assaults have nowhere to turn for fear of bureaucratic meddling into sensitive affairs.

Under the Current Rule, "§ 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation." Current Rule, at 30,071. Interestingly, the Proposed Rule removes that provision, which "expressly prohibit[s] retaliation against any individual exercising rights

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[18] *How the Pressures of Title IX Compliance Have Chilled My College Campus*, FIRE (June 26, 2015), https://www.thefire.org/how-the-pressures-of-title-ix-compliance-have-chilled-my-college-campus/ (emphasis added).
[19] *Id.*

under Title IX, specifically protecting any individual's right to participate or refuse to participate in a Title IX grievance process." Current Rule, at 30,053 n.257. The Proposed Rule claims the provision is redundant. Proposed Rule, at 41,543. Removal of this anti-retaliation claim effectively chills speech by not securing protections for First Amendment rights. Teachers and students are already being punished under Title IX even though "the department has long made clear that it enforces Title IX consistent with requirements of the First Amendment." Proposed Rule, at 41,543.

George Washington famously said, "if freedom of speech is taken away, then dumb and silent we may be led like sheep to the slaughter." "Where we stand now is at the juncture of OldSpeak (where words have meanings, and ideas can be dangerous) and Newspeak (where only that which is 'safe' and accepted' by the majority is permitted)."[20] The notion that chilling speech actually makes schools safer is wildly uninformed, and resembles Big Brother control tactics. The Department of Education must explain why its policies are more valuable than the Constitution.

2. The Proposed Rule's provisions compel speech and are not in accordance with law.

Without changes to the Proposed Rule, (1) public schools will violate the First Amendment in implementing the Title IX regulations; and (2) the Department's Office for Civil Rights will be charged with violating the First Amendment—even with respect to private schools—as to enforce the regulations. Both are not in accordance with law.[21] For instance, the Supreme Court has recognized that "where the State's interest is to disseminate an ideology, no matter how acceptable

[20] John W. Whitehead, *Death of Free Speech: When You Control the Words, You Control the Narrative*, BLAZE MEDIA (June 29, 2015), https://www.theblaze.com/contributions/death-of-free-speech-when-you-control-the-words-you-control-the-narrative.

[21] Should the Department interpret Title IX to force students, teachers, and staff to address one another using preferred pronouns inconsistent with biological sex, the Department should anticipate being sued by groups like Mountain States Legal Foundation to vindicate Americans' First Amendment rights.

to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). The First Amendment ensures the government is not the puppet master of the American people. "[T]here's a big difference between privately negotiated modes of address and legislatively demanded, compelled speech."[22]

The expanse of the Proposed Rule is made worse by including gender identity within its scope. By reading Title IX's coverage more broadly than "on the basis of sex," the Department has blown way past *Bostock*[23] to include any number of subjective, undefined gender identities. At the very least, the Department needs to affirm that the Proposed Rule *does not require* schools to shirk the First Amendment and force all persons under Title IX's regime to use non-biological pronouns to address individuals. Many schools forget that compelled speech is largely unconstitutional and cite Title IX as granting permission to thumb their nose at the First Amendment.[24] The Department must clear up the uncertainty that plagues schools and denigrates constitutional rights.

Pronoun policies do violence to the Constitution. The Founders "'believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660–61 (2000) (quoting *Whitney v.*

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[22] John Stossel, *Pronoun Trouble*, INVESTOR'S BUSINESS DAILY (June 13, 2018), https://www.investors.com/politics/columnists/jordon-peterson-pronouns-compelled-speech-protests/.

[23] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

[24] One of these courts is the Supreme Court of Virginia. It will be instructive for the Department to read two *amicus* briefs Mountain States Legal Foundation has written on the issue of Title IX. Title IX cannot be used to infringe on our First Amendment protected rights. The *amicus* briefs can be found here: https://mslegal.org/wp-content/uploads/2022/05/Amicus-Curiae-Brief-In-the-Supreme-Court-of-Virginia-Vlaming-v.-West-Point-School-Board-May-23-2022.pdf; https://mslegal.org/wp-content/uploads/2022/05/Reply-Brief-of-Amicus-Curiae-MSLF-in-support-of-Plaintiff-Appellant-In-the-Supreme-Court-of-Virginia-1.pdf.

California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). At least one circuit court has deemed the firing of a university professor for refusing to use preferred pronouns to be a First Amendment violation. *See Meriwether v. Hartop*, 992 F.3d 492, 511–512 (6th Cir. 2021) ("[The University's purported interest in complying with Title IX is not implicated by [the professor's] decision to refer to [the student] by name rather than [the student's] preferred pronouns. . . . [W]e hold that the university violated [the professor's] free-speech rights."). The Department should unmistakably affirm the Sixth Circuit's constitutionally rooted reasoning and ensure that schools are clear that Title IX does not interact with pronoun policies.

A quick internet search for "college pronoun policies" uncovers too many policies to count.[25] For instance, Stanford's Title IX page provides a list of examples of gender discrimination, one of which being "[m]isgendering or mispronouning (purposefully using the wrong gender identity or pronouns to address someone)[.]"[26] Similarly,

> At the University of the Pacific, a private college in Stockton, Calif[ornia], the Title IX coordinator released a statement explaining that while "unintentional misgendering is usually resolved with a simple apology," "intentional misgendering is inconsistent with the type of community we hold ourselves to be." The coordinator warned that "intentional deadnaming," i.e., using a trans-identifying person's given name, "could be a form of bullying, outing, or otherwise harassing an individual."[27]

[25] Recently, the Foundation for Individual Rights and Expression put out free speech rankings, surveying "208 colleges and universities in the United States." *2022–2023 College Free Speech Rankings*, FIRE, https://rankings.thefire.org/rank/methodology (last visited Sept. 12, 2022). Title IX should not contribute to a school's low free speech ranking by purporting to mandate pronoun policies.

[26] *Gender Discrimination*, STANFORD UNIVERSITY, https://share.stanford.edu/get-informed/learn-topics/gender-discrimination (last visited Sept. 12, 2022).

[27] Madeleine Kearns and Jennifer C. Braceras, *Weaponizing Title IX to Punish Speech*, NATIONAL REVIEW, (Aug. 6, 2022), https://www.nationalreview.com/2022/08/weaponizing-title-ix-to-punish-speech/.

Missouri State recommends correcting the "mistake" of calling someone by the wrong pronoun, and immediately using the proper preferred pronoun.[28] These policies represent a one-sided viewpoint, downplaying a biological fact that has been true from time immemorial, and has been recognized by Title IX since 1972—sex is binary. One university displays charts on its LGBTQ+ resource center of unintelligible words that are meant to be pronouns:

1	2	3	4	5
(f)ae	(f)aer	(f)aer	(f)aers	(f)aerself
e/ey	em	eir	eirs	eirself
he	him	his	his	himself
per	per	pers	pers	perself
she	her	her	hers	herself
they	them	their	theirs	themself
ve	ver	vis	vis	verself
xe	xem	xyr	xyrs	xemself
ze/zie	hir	hir	hirs	hirself

[29]

Similarly, a growing list of genders exists. One medical website states, "[b]esides male and female, there are 72 other genders," which means any gender additional to male and female *must* have accompanying pronouns, right?[30] Additionally, a school in Michigan installed a litter box in a bathroom "for children who identify themselves as 'furries[.]'"[31] Under the proposed regulation,

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[28] *Gender Pronoun Guide*, MISSOURI STATE, https://www.missouristate.edu/TitleIX/gender-pronoun-guide.htm (last visited Sept. 12, 2022) (The best thing to do if you use the wrong pronoun for someone is to say something right away, like: 'Sorry, I meant (insert pronoun).' If you realize that you made a mistake after the fact, apologize in private and move on.").

[29] *Gender Pronouns*, UNIVERSITY OF WISCONSIN—MILWAUKEE, https://uwm.edu/lgbtrc/support/gender-pronouns/ (last visited Sept. 12, 2022).

[30] *What Are the 72 Other Genders?*, MEDICINENET (Feb. 2, 2022), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm; *68 Terms That Describe Gender Identity and Expression*, HEALTHLINE, https://www.healthline.com/health/different-genders (last visited Sept. 12, 2022).

[31] *Creature Comforts: School accused of installing litter boxes for students who identify as cats hits back after parents' outrage*, THE U.S. SUN (Jan. 22, 2022), https://www.the-sun.com/news/4520035/school-litter-boxes-furries-students-cats-outrage-parents/.

to the extent that a student self-identifies their "gender" as "feline," it would be a Title IX violation for refusing to call a student a cat.[32]

The madness does not stop there. Earlier this year, "[a] Wisconsin school district [] filed sexual harassment complaints against *three middle schoolers* for calling a classmate by the wrong pronoun."[33] Numerous teachers have been fired for referring to use preferred pronouns or for pushing back on concepts of gender fluidity. *See Vlaming v. West Point Sch. Bd.*, 10 F.4th 300, 304 (4th Cir. 2021) ("[The teacher] told [the principal] that using male pronouns to refer to someone who was born a female violated his religious beliefs because it was untruthful. [The principal] reiterated that he should use male pronouns to refer to [the student] . . . [and] failure to do so could result in his termination."); *see also Loudoun Cty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021) (educator placed on administrative leave for speaking out at a school board meeting about a transgender policy stating, "I will not affirm that a biological boy can be a girl and vice versa because it is against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God.").

It is time thar the Department explicitly states that Title IX and the First Amendment do not collide. The Department must add a specific provision to the Proposed Rule acknowledging that pronoun policies are not necessary for Title IX compliance, and that speech, no matter how

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[32] Although this news came from Australia, this is not too far fetched for American schools. A student is permitted to act like a cat—"[t]he school will also allow the unnamed girl to avoid at least one behaviour which is distinctly human: talking." Cortney Weil, *School reportedly allows teen girl to identify as a cat in class: "No one seems to have a protocol for students identifying as animals'*, BLAZE MEDIA (Aug. 29, 2022), https://www.theblaze.com/news/school-reportedly-allows-teen-girl-to-identify-as-a-cat-in-class-no-one-seems-to-have-a-protocol-for-students-identifying-as-animals.

[33] *Keil, Wisconsin school district charges kids for using wrong pronouns*, NEW YORK POST (May 14, 2022), https://nypost.com/2022/05/14/kiel-wisconsin-school-charges-kids-for-using-wrong-pronouns/ (emphasis added).

offensive, is not covered by Title IX. *See also Meriwether*, 992 F.3d at 511 ("But [the professor's] decision not to refer to [the student] using feminine pronouns did not have any such effect. As we have already explained, there is no indication at this stage of the litigation that [the professor's] speech inhibited [the student's] education or ability to succeed in the classroom.").

B. The Proposed Rule's provision addressing gender identity misreads *Bostock* and Title IX, such that it is arbitrary and capricious.

The Proposed Rule's adoption of a prohibition on all forms of gender identity is not consistent with the statutory text of Title IX. Any effort to include the Proposed 34 C.F.R. § 106.10—which notably, does not itself contain a definition of "gender" or "gender identity"—would be grounds to set aside the rule as outside the scope of the statute.

The text of Title IX itself is not ambiguous. It disallows recipients of federal funds like schools from discriminating on the basis of sex, and treats sex as limited to the binary categories of male and female, both objective and fixed. *See Neese v. Becerra*, No. 2:21-cv-163, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'"); *see also*, *e.g.*, 20 U.S.C. § 1681(a)(2) ("[T]his section shall not apply . . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*[.]") (emphasis added); *id.* (referring once again to "one sex" and "the other sex"); *see also* 20 U.S.C. § 1681(a)(8) ("[T]his section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*[.]") (emphasis added).

Moreover, from the beginning, Title IX regulations confirmed this textual reading, establishing a binary, objective, and immutable meaning of sex within the statute's terms. *See*,

e.g., 34 C.F.R. § 106.34(a)(3) ("Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for *boys and girls*.") (emphasis added); 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of *one sex* shall be comparable to such facilities provided for students of the *other sex*.") (emphasis added); 34 C.F.R. § 106.54(b) ("A recipient shall not make or enforce any policy or practice which, on the basis of sex . . . [r]esults in the payment of wages to employees of *one sex* at a rate less than that paid to employees of *the opposite sex* for equal work…") (emphasis added); *cf.* 34 C.F.R. § 106.37(c)(1) ("To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of *each sex* in proportion to the number of students of *each sex* participating in interscholastic or intercollegiate athletics.") (emphasis added).

The idea of nonbiological gender identity is not found in the text of Title IX, nor is it consistent with decades of interpretation of that statute. Indeed, in its 2020 regulations on the topic of sexual harassment in schools, the Department once again properly emphasized this point: "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition." Current Rule, at 30,178.

1. Even after *Bostock*, the Department of Education recognized that Title IX's treatment of sex differed from Title VII.

Even after *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020), where the Supreme Court held that sex discrimination prohibitions in Title VII provided protection against employment discrimination on the basis of transgender status, the Department of Education noted important distinctions that limited *Bostock*'s application to Title IX. As noted in the preamble to the Proposed

Rule, following *Bostock*, the Department of Education's Office for Civil Rights ("OCR") queried its Office of the General Counsel, asking for answers regarding the impact of the Supreme Court's analysis. The Office of the General Counsel responded with a memorandum dated January 8, 2021. *See* U.S. DEP'T OF EDUC., OFFICE OF THE GENERAL COUNSEL, MEMORANDUM FOR KIMBERLY M. RICHEY, ACTING ASSISTANT SECRETARY OF THE OFFICE FOR CIVIL RIGHTS RE: *BOSTOCK V. CLAYTON CTY.*, 140 S. CT. 1731 (2020) (2021).[34]

In the context of Title IX and pronoun usage, the document noted that Title IX, unlike Title VII often *requires* consideration of a student's biological sex. (Equal athletic opportunities, for instance). Thus, it would be inappropriate to suggest that a recipient of federal funds such as a public school could ever affirmatively violate Title IX when using its discretion to merely *consider* biological sex in the use of a student's pronouns.

> **Question 3: How should OCR view allegations that a recipient targets individuals for discriminatory treatment on the basis of a person's transgender status or homosexuality?**
>
> **Answer:** Although *Bostock* expressly does not decide issues arising under Title IX or other differently drafted laws, the logic of *Bostock* may, in some cases, be useful in guiding OCR's understanding as to whether the alleged discrimination on the basis of a person's transgender status or homosexuality necessarily takes into account the person's biological sex and, thus, constitutes discrimination on the basis of sex. Depending on the facts, complaints involving discrimination on the basis of transgender status or homosexuality might fall within the scope of Title IX's non-discrimination mandate because they allege sex discrimination. *See Bostock*, 140 S. Ct. at 1741, 1737 ("Sex plays a necessary and undisguisable role in the decision" to fire an employee because of the employee's homosexual or transgender status).
>
> However, we emphasize that Title IX and its implementing regulations, unlike Title VII, may *require* consideration of a person's biological sex, male or female. 20 U.S.C. §§ 1681(a), 1686; 34 CFR §§ 106.32(b), 106.33, 106.34, 106.40, 106.41,

[34] https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf. The memorandum was later withdrawn but remains available online in OCR's Correspondence portal. Its analysis is attentive to and consistent with the text and purpose of Title IX, and therefore persuasive on the issue of Title IX and pronoun usage after *Bostock*.

> 106.43. 106.52, 106.59, 106.61. Consequently, we believe a recipient generally would not violate Title IX by, for example, recording a student's biological sex in school records, *or referring to a student using sex-based pronouns that correspond to the student's biological sex*, or refusing to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status or homosexuality.

Id. at 4 (emphasis in original) (second emphasis added); *see also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OCR LETTER TO CONGRESSMAN MARK GREEN, at 1 (2020) ("By itself, refusing to use transgender students' preferred pronouns is not a violation of Title IX and would not trigger a loss of funding or other sanctions. To the extent any prior OCR sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative.").[35]

Notably, the Department of Education's Office of the General Counsel also pointed out that contrary opinions in the Fourth and Eleventh Circuits—including *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020)—failed to address the language articulated in the preamble to the 2020 Title IX rule.

Now, the Proposed Rule relies in part on *Grimm*. But even a cursory review of *Grimm* confirms the Office of the General Counsel letter's analysis. For instance, the *Grimm* court seemed to understand that gender and sex were distinct concepts. *See id.* at 593 ("Grimm's birth-assigned sex, or so-called 'biological sex,' is female, but his gender identity is male."); *id.* at 594 ("But there have always been people who 'consistently, persistently, and insistently' express a gender that, on a binary, we would think of as opposite to their assigned sex."); *id.* at 595 ("Incongruence between gender identity and assigned sex must be manifested by at least two of the following markers[.]"). Yet, by *ipse dixit*, the court concluded that Grimm's Title IX claim succeeded because he was denied access to a bathroom that was consistent with his gender identity, even though the school

[35] https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20200309-title-ix-and-use-of-preferred-pronouns.pdf

district in that case had afforded him access to a bathroom consistent with his sex. *Id.* at 618 ("Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his *gender*.") (emphasis added); *id.* ("But Grimm does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his *gender identity*.") (emphasis added).

The dissent in *Grimm* thus properly criticized the majority for missing this basic fact. Noting that Plaintiff Grimm had not challenged the constitutionality of Title IX, or the appropriateness of its regulations separating students based on sex, it stated the obvious: "As several sources make clear, the term 'sex' in this context must be understood as referring to the traditional biological indicators that distinguish a male from a female, not the person's internal sense of being male or female, or their outward presentation of that internally felt sense." *Id.* at 632 (Niemeyer, J., dissenting); *see id.* at 634 ("Grimm's argument, however, is facially untenable. While he accepts the fact that Title IX authorizes the separation of restrooms—indeed, he seeks to use the male restrooms so separated from female restrooms—the implementation of his position would allow him to use restrooms contrary to the basis for separation.").

The Department of Education Office of General Counsel, like the dissent in *Grimm*, found fault with *Grimm* and similar cases. *See* MEMORANDUM FOR KIMBERLY M. RICHEY, at 11 ("*Adams* and *Grimm* were decided more than two months after publication of the Title IX rule and its interpretative preamble. Yet neither discussed the Department's interpretation."); *id.* at 4 ("[W]e must give effect to the ordinary public meaning at the time of enactment and construe the term 'sex' in Title IX to mean biological sex, male or female. Congress has the authority to rewrite Title IX and redefine its terms at any time."); *see also Grimm v. Gloucester Cty. Sch. Bd.*, 976 F.3d 399,

401 (4th Cir. 2020) (mem.) (Niemeyer, J., concurring in the denial of rehearing *en banc*) (opining that the panel decision in *Grimm* "failed to apply Title IX and its regulations").

Thus, thoughtful analysis of Title IX from OCR's Office of the General Counsel and elsewhere, consistent with the text and history of Title IX, explains why broad gender identity protections are not encompassed within the statute.

2. Sweeping gender identity into Title IX would hinder the statutory purpose.

Title IX was meant to prevent sex discrimination and protect educational opportunities, but interpreting "sex" in Title IX to encompass each and every gender identity would hinder that purpose. Pronouns, for instance, have far eclipsed traditional male, female, and even plural pronouns, and often become a distraction unto themselves. *See*, *e.g.*, *United States v. Varner*, 948 F.3d 250, 257 (5th Cir. 2020) ("If a court orders one litigant referred to as 'her' (instead of 'him'), then the court can hardly refuse when the next litigant moves to be referred to as 'xemself' (instead of 'himself')."); *see id.* (referring to University of Wisconsin-Milwaukee chart that includes "perself," "eirself," and "xyrs" as usable pronoun options).

In other contexts, a holding that Title IX truly required full nondiscrimination across every gender identity would cause chaos. For instance, if the Department of Education compelled schools across the country to equally support and maintain separate athletic teams for students who do not identify as either male or female, there is no shortage of the number of separate athletic teams that schools may be compelled to sponsor. By the same token, would students who identify as gender-fluid compete as both male and female, and be counted as athletes on both athletic teams for Title IX purposes?

At the postsecondary level, in addition to athletics and school-sponsored single-sex activities such as sororities or fraternities, wrapping gender identity into Title IX would force

colleges to create new separate and equal facilities, such as dormitories, each for men, women, intersex individuals, pansexual individuals, bi-gender individuals, and members of each of the many other currently published genders. *See Grimm*, 972 F.3d at 621 (Wynn, J., concurring) ("Yet the Board has offered no set of physical characteristics determinative of its 'biological gender' classification in the five-year pendency of this case. Nor could it, given that transgender individuals often *defy binary categorization* on the basis of physical characteristics alone.") (emphasis added).[36] Every school in the United States would be torn between trying to fully integrate all facilities—bathrooms, dormitories, and more—without regard to sex, or having numerous equal facilities as new genders emerged.

Separately, not all "recipients" of federal funds are traditional schools. Some are juvenile justice facilities. *See* U.S. DEP'T OF JUSTICE & DEP'T OF EDUC., DEAR COLLEAGUE LETTER, GUIDANCE ON PROTECTING CIVIL RIGHTS IN JUVENILE JUSTICE RESIDENTIAL FACILITIES (2014).[37] The benefits that Title IX was meant to protect would in fact be eroded, were the Department of Education to have to force juvenile justice facilities around the country to either integrate their facilities without regard to sex, or to establish new and separate wings of their facilities for each new gender identity, as they emerge.

[36] It is far from clear how the *Bostock* majority would have handled a plaintiff who identified as gender non-binary, such as bi-gender or pangender. In such a fact pattern, the case's hypothetical employer who treats two employees who identify as female differently—one because the employee was born male—crumbles quickly, so long as the employer treats all bi-gender or pangender employees equally, regardless of biological sex. *Accord Neese*, 2022 WL 1265925, at *14 ("The Court finds Plaintiffs plausibly plead Section 1557 and *Bostock* do not prohibit healthcare providers from discriminating on the basis of [sexual orientation or gender identity] — 'as long as they would have acted in the exact same manner if the patient had been a member of the opposite biological sex.'").

[37] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-residential-facilities-201412.pdf

Moreover, pregnancy discrimination protections are within the scope of Title IX, only if they relate to sex discrimination. *See* 34 C.F.R. § 106.40(b)(1) ("A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy . . ."). If men and members of other gender identities may become pregnant, those regulations likely exceed the Department's permissible regulatory power. *See*, *e.g.*, MEMORANDUM FOR KIM RICHEY, at 3–4 ("These regulations are valid only because they effectuate Title IX's prohibition against sex discrimination. *See* 20 U.S.C. § 1682. Courts have recognized, quite correctly in our view, that discrimination on the basis of pregnancy constitutes discrimination on the basis of female physiology and is therefore prohibited under Title IX."). Interpreting Title IX to extend to gender identity would, at a minimum, weaken the legal rationale underlying such regulations implemented to prevent sex discrimination.

Despite this, on June 22, 2021, the Department of Education published a Notice of Interpretation, purporting to rely on *Bostock* for the proposition that Title IX encompasses all claims of discrimination based on sexual orientation or gender identity. *Compare Bostock*, 140 S. Ct. at 1754 (holding that Title VII's coverage encompasses firing employees who are gay or born male but identify as female) *with 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, 32,637 (June 22, 2021) (codified at 34 C.F.R. ch. 1) ("The Supreme Court in *Bostock* held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity.").

However, the Department's June 2021 Notice was, on its face, far too broad. *Bostock* was based on the assumption that sex was binary, and biologically determined. It was not based on a broad conception of "gender identity."

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

140 S. Ct. at 1741–42; *see also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS, at 27 (2021) ("The Court's holding stated that it was assuming that sex referred to an employee's biological sex, but in fact the Court's holding in *Bostock* relies on that assumption…").[38] For this reason, the Department's NOI has been enjoined in 20 states. *See Tennessee v. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, *21 (E.D. Tenn. July 15, 2022) ("True, Title IX does allow for sex-separation in certain circumstances; and the Department's guidance, specifically the Fact Sheet, appears to suggest such conduct will be investigated as unlawful discrimination.").

Additionally, *Bostock* was never about whether employers had to adopt, internalize, and affirmatively endorse an employee's representations about their gender identity. It was about termination of employment alone. *Bostock*, 140 S. Ct. at 1753 ("Under Title VII . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

[38] https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf

Put simply, the text and purpose of Title IX do not counsel in favor of an overexpansive adoption of *Bostock.*

3. The Proposed Rule violates the major questions doctrine.

The Department's proposed broadening of the scope of Title IX runs afoul of the major questions doctrine. If Congress wanted the Department to interpret the word "sex" to include all forms of gender identity, it would have said as much. The major questions doctrine establishes that "administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance." *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (internal citation and quotations omitted); *see also* 142 S. Ct. at 1628 (Kagan, J., dissenting) (the Court rejected Justice Kagan's alternative view, that "[a] key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems").

A judicial rule that Congress must speak clearly on "major questions" ensures a strict separation of powers between the Executive and Legislative branches. *Id.* at 2617. Most recently, in *West Virginia v. EPA*, the Supreme Court emphasized, "[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." *Id.* at 2609 (majority opinion) (internal quotation and citation omitted). The same principles utilized in *West Virginia v. EPA* would invalidate the Proposed Rule if it were adopted in its present form.

Our democracy depends on vesting power with the people, in the form of elected representatives, rather than with bureaucracies. *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) ("It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely

unaccountable 'ministers.'"); *id.* at 2618 ("Powerful special interests, which are sometimes 'uniquely' able to influence the agendas of administrative agencies, would flourish while others would be left to ever-shifting winds.").

Congress authorized the Department to carry out provisions of the Education Amendments of 1972. Encompassed within these Amendments is Title IX. The Department is not authorized to create sweeping new interpretations of terms in derogation of Congress's intent, particularly when such interpretations have vast economic and political impact. If Congress intended for sex to be non-binary, it wouldn't have "hid[den] elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Compare* Proposed Rule at 41,571 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.") *with Wilcox v. Lyons*, 970 F.3d 452, 459 (4th Cir. 2020) ("[S]ex, like race and national origin, is an *immutable characteristic* determined solely by the accident of birth, therefore the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system[.]") (emphasis added) (internal quotations and citation omitted).

Justice Gorsuch dives deeper in his concurrence in *West Virginia v. EPA*.[39] Justice Gorsuch elucidates a few ways the Supreme Court has historically flagged major questions doctrine issues. Importantly, "th[e] Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great 'political significance,' or end an 'earnest and profound debate across the country[.]'" *Id.* at 2620 (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022); *Gonzales v.*

[39] "[O]ur precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

Oregon, 546 U.S. 243, 267 (2006)). Also, if the content of bills rejected by Congress are now the content of the agency's regulation, that can be a telling sign. *Id.* at 2620–21.

To address the "history and breadth of the authority that [the agency] has asserted," *id.* at 2608, the idea of nonbiological, non-binary gender identity is not found in the text of Title IX, nor is it consistent with decades of interpretation of that statute. *Accord Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("[O]nly women can become pregnant[.]"); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2346 (2022) (dissenting opinion of JJ. Sotomayor, Kagan, and Breyer) ("Withdrawing a *woman's* right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from *women* and given it to the States.") (emphasis added); *see also Doe v. Hamilton Cty. Bd. of Educ.*, 329 F. Supp. 3d 543, 580 (E.D. Tenn. 2018) (Title IX is designed to protect against "insidious forms of discriminatory harassment that occurs on the basis of some *immutable characteristic*, such as biological sex").[40]

From the beginning, Title IX regulations have confirmed the textual reading, establishing a binary, objective, and immutable meaning of sex within the statute's terms. Furthermore, Title IX's Proposed Rule would end an earnest and profound policy debate across the country about the

[40] The School Board admits that "no court has squarely confronted whether a secondary school teacher's failure to use pronouns that conform with a student's gender identity constitutes a Title IX violation[.]" Appellee Br. at 39. But even the idea of a "failure" to use preferred pronouns is ambiguous. Some sources say that an accidental instance of "misgendering" ought to be followed by an immediate succinct apology and correction. *See* Sabara L. Katz-Wise, *Misgendering: What it is and why it matters,* HARVARD MEDICAL SCHOOL, HARVARD HEALTH PUBLISHING (Jul. 23, 2021), https://www.health.harvard.edu/blog/misgendering-what-it-is-and-why-it-matters-202107232553 ("Misgendering will happen. What's most important is how you handle it when it does. The best way to handle misgendering someone who is present is to apologize and try harder next time ('I'm sorry, I meant [correct name/pronoun/honorific]'). Keep your apology brief so that it doesn't become about you and your mistake."). But in the absence of a perfectly succinct apology and promise to do better, does the accidental misgendering become malicious?

meaning of "sex" discrimination. *Bostock* merely addressed whether a biological man who identifies as a woman can be fired for such identification consistent with Title VII; it is too much, however, to suggest that sex discrimination includes all forms of gender identify discrimination, when the Court expressly disclaimed any such holding. *See Tennessee v. Dep't of Educ.*, 2022 WL 2791450, *1 ("The Court was careful to narrow the scope of its holding.").

The Proposed Rule also follows in the wake of failed legislation; Congress unsuccessfully attempted to pass the Equality Act, which "prohibits discrimination based on sex, sexual orientation, and gender identity in areas including . . . education[.]" Equality Act, H.R. Res. 5, 117th Cong. (as passed by House, Feb. 25, 2021); *see also West Virginia*, 142 S. Ct. at 2610 ("And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."); *id.* at 2620–21 ("[T]his Court has found it telling when Congress has considered and rejected bills authorizing something akin to the agency's proposed course of action. . . . That [] may be a sign that an agency is attempting to work [a]round the legislative process to resolve for itself a question of great political significance.") (internal quotations and citations omitted). Thus, even if the Proposed Rule were enacted in its present form, it would violate the major questions doctrine.

4. The Department did not adhere to basic contract principles under Spending Clause jurisprudence, thus violating the *Pennhurst* doctrine.

All schools that receive federal funds must adhere to Title IX or risk losing funding. Accordingly, "Congress has broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds. '[L]egislation enacted pursuant to the spending power is much in the nature of a *contract*: in return for federal funds, [the recipients] agree to comply with federally imposed conditions.'" *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568 (2022) (emphasis added) (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S.

1, 17 (1981)). "Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress's power to legislate under the spending power rests on whether the recipient voluntarily and knowingly accepts the terms of the 'contract.'" *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (internal brackets, ellipses, and quotation marks omitted).

But the Proposed Rule, if it were adopted as is, would breach this contractual arrangement. In the same way that forcing schools to pay out emotional damages is an unpredictable result of a contractual bargain, so too would be the liability for not enacting strict preferred pronoun policies. *See Cummings*, 142 S. Ct. at 1570–71 ("[T]o decide whether emotional distress damages are available under the Spending Clause statutes . . . we [] ask . . . [w]ould a prospective funding recipient, at the time it engaged in the process of deciding whether [to] accept federal dollars, have been aware that it would face such liability?") (internal quotation and citation omitted).

Most importantly, when terms of great magnitude such as "gender identity" remain undefined, and a school can be liable for hostile environment harassment based on a complainant's *subjective* feelings of harassment. Proposed Rule, at 41,569. No school district could predict the terms of its contract. *See Barnes,* 536 U.S. at 188 ("Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages liability was a required condition.").

The Proposed Rule suggests that "the current regulations should be amended to provide greater clarity regarding the scope of sex discrimination, including obligations not to discriminate based on . . . sexual orientation[] and gender identity." Proposed Rule, at 41,390.

But it is one thing to say that schools must allow biological females to use the men's restroom. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 n. 18 (4th Cir. 2020) ("[T]he

Board knew or should have known that the separate facilities regulation did not override the broader statutory protection against discrimination."). It is quite another to say that a school must strictly compel all teachers (and students) to use every student's preferred pronouns—no matter what those pronouns are or how frequently they vary—or violate federal civil rights laws. *Loudoun Cty. Sch. Bd.*, 2021 WL 9276274, *8 ("In *Meriwether v. Hartop*, the Sixth Circuit emphatically held that a university professor stated viable free speech and free exercise claims based on his university's disciplining him for refusing, based on his Christian faith, to use a student's preferred pronouns.") (citing *Meriwether*, 992 F.3d at 509–17).[41]

Indeed, a rule relying on "gender identity" for preferred pronouns poses a hopelessly in-administrable rule; students can change their identities numerous times, with little or no warning, and with no limit to the types of gender identities available.[42] Additionally, it would be strange to argue that Title IX always requires preferred pronoun usage, when students may vacillate multiple times between preferences. *See* Kate Jerkovich, *"'Nobody's Perfect': Disney Star Demi Lovato Explains Why She's Going Back to 'She/Her' Pronouns"*, Daily Wire (Aug. 2, 2022), https://www.dailywire.com/news/nobodys-perfect-disney-star-demi-lovato-explains-why-shes-going-back-to-she-her-pronouns ("Everyone messes up pronouns at some point[.]"). Against this

[41] Commentators, too, have noticed that the Proposed Rule would apply to pronoun usage. *See* Steven McGuire, *Title IX, Pronouns, and Campus Freedom*, REAL CLEAR POLICY (Aug. 12, 2022), https://www.realclearpolicy.com/articles/2022/08/12/title_ix_pronouns_and_campus_freedom_847586.html#! ("Is refusing to use someone's preferred pronouns harassment or free speech? The courts have so far sided with free speech, but the Biden administration seems determined to push the issue and threaten free expression on American campuses by applying Title IX to gender identity.").

[42] Claimed gender identities extend far beyond traditional "male" and "female" monikers. *See*, *e.g.*, *Cakegender*, LGBTA+ WIKI, https://www.lgbtqia.wiki/wiki/Cakegender (last visited Sept. 12, 2022) ("Cakegender is a gastrogender that is related to cake which is soft and fluffy like cake. . . . One who is cakegender may also feel their gender, or 'flavors,' are layered, similar to a layered cake. Similar genders include cakeinac.").

backdrop, schools could never have predicted the terms of the Title IX "contract" to change so dramatically.

Conclusion

The phrase "on the basis of sex" has been understood to encompass sex discrimination, and the term "sex" was recently expanded by the Biden Administration. Proposed Rule, at 41,390 ("The Department therefore proposes that the current regulations should be amended to provide greater clarity regarding the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."). Ironically, this drastic change from the Biden Administration came around Title IX's 50th anniversary—effectively doing violence to the statute's intended purpose.

Respectfully submitted, this 12th of September, 2022

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