APP NO. 24A79

IN THE SUPREME COURT OF THE UNITED STATES

MIGUEL CARDONA, ET AL.,

Applicants,

v.

STATE OF TENNESSEE, ET AL.,

Respondents.

RESPONSE IN OPPOSITION TO APPLICATION FOR A PARTIAL STAY OF THE INJUNCTION

JAMES A. CAMPBELL
JONATHAN A. SCRUGGS
JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

JOHN J. BURSCH
Counsel of Record
ERIN M. HAWLEY
NATALIE D. THOMPSON
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W., Suite 600
Washington, D.C. 20001
(202) 393-8690
jbursch@ADFlegal.org

Counsel for Respondents Christian Educators Association International and A.C., by her next friend and mother, Abigail Cross

CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, Respondents Christian Educators Association International and A.C., by her next friend and mother, Abigail Cross, state that there are no parent corporations and no publicly held stock.

To the Honorable Brett M. Kavanaugh, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Under this Court's Rules 22, 23, and 33.2, Respondents Christian Educators Association International and A.C., by her next friend and mother, Abigail Cross, object to the Application for a Partial Stay of the Injunction Entered by the United States District Court for the Eastern District of Kentucky.

INTRODUCTION

Fifty years ago, Congress revolutionized education by enacting Title IX to help close the gap between women and men, promising equal opportunities for both. The law has been a success. But a different sort of revolution took place a few months ago. Department of Education officials published a new rule that reimagines sex discrimination to cover distinctions Congress never intended, adding concepts like gender identity and sometimes even prioritizing these concepts over sex. The result is that Title IX's primary beneficiaries—women—are denied their promised benefits.

This turns Title IX upside down, exchanging a well-established, biological, and binary concept of sex for a recent, subjective, and fluid concept of identity. This usurps Congress's role, enlarges agency power, and renders Title IX incoherent. For example, under the Department's new rule, women must share showers (but not dorm rooms) with some men; and women must share restrooms and overnight accommodations with some men (but not with men who identify as male or nonbinary). None of this is justified.

This change will harm many, including girls like Intervenor A.C. When a male student, B.P.J., began competing on the girls' track team at A.C.'s middle school,

B.P.J. quickly beat almost 300 different girls, displacing them over 700 times, and taking A.C.'s spot in a championship meet. B.P.J. also shared a locker room with A.C. and sexually harassed her there, using graphic, sexual language about her. The new rule would *authorize* some of this harm by allowing males who identify as female into girl's locker rooms. So girls must choose privacy or opportunity—not both.

The new rule also violates the constitutional rights of educators, like members of Christian Educators Association International. Its members believe sex is immutable. They want to live and speak consistently with this belief. But the new rule forces them to silence those views, to speak inaccurate pronouns, and to use restrooms with students and staff of the opposite sex. Simultaneously, the new rule claims to preempt state laws that protect Intervenors' rights to speak and to privacy.

As for the equities, the Department seeks a multi-phased rollout of the rule, beginning August 1. That would require schools to comply with and train their teachers quickly and partially—creating confusion, headaches, and waste. It would be better and far less burdensome to let schools update their policies and practices and retrain their staff just once, if at all, when this litigation ends. That's especially true because the Department (a) has no answer for how dozens of the new rule's other provisions would apply without the challenged provisions that comprise the rule's foundation and (b) has forfeited its severability arguments by not presenting them below. To prevent these (and other) irreparable harms and preserve the status quo, the district court issued a stay under 5 U.S.C. 705 and a preliminary injunction.

To date, no less than six federal district courts have considered and enjoined the Department's entire Title IX rewrite, staying its effect. *Tennessee* v. *Cardona*, __ F. Supp. 3d __, 2024 WL 3019146 (E.D. Ky. June 17, 2024); *Louisiana* v. *U.S. Dep't of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024); *Kansas* v. *Dep't of Educ.*, No. 5:24-CV-4041, 2024 WL 3273285 (D. Kan. July 2, 2024); *Carroll Indep. Sch. Dist.* v. *U.S. Dep't of Educ.*, __ F. Supp. 3d __, 2024 WL 3381901 (N.D. Tex. July 11, 2024); *Arkansas v. U.S. Dep't of Educ.*, No. 4:24-CV-636, ECF 54 (E.D. Mo. July 24, 2024). None have gone the other way. The Department sought a stay pending appeal in the Sixth and Fifth Circuits, each of which rejected the Department's position, both because it was forfeited below and because it lacks merit. *Tennessee* v. *Cardona*, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024); *Louisiana* v. *U.S. Dep't of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024). No circuit has gone the other way. This Court should retain the injunction below, deny the Department's request, and preserve the status quo that has existed for half a century.

BACKGROUND

Title IX. Congress passed Title IX to ensure equal opportunities for women by prohibiting discrimination in educational opportunities "on the basis of sex." App'x in Supp. of Intervenors-Appellees' Resp. in Opp. to Emergency Mot. for Stay (I.App.) 3. The Act has had resounding success. For example, in 1970, only 66% of working women had high-school diplomas; in 2016, it was 94%.[1] In 1972, only 7% of high-school varsity athletes were women; in 2018, it was 43%.[2] And Title IX achieved that success by consistently defining its protection based on *sex*—nothing else.

The New Rule. The Department has reinterpreted Title IX, citing *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), as cover. Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). In its main part, the Rule redefines sex discrimination to include distinctions based on "gender identity," "sex stereotypes," and other conduct. 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. 106.10). Such distinctions violate Title IX, the Rule says, because they "necessarily" require noticing "a person's sex," even if "sex" means the "physiological or 'biological distinctions between male and female,' as the Supreme Court assumed in *Bostock*." *Id.* at 33,802. Read with other Rule provisions, this change imposes multiple new mandates.

---

[1] U.S. Bureau of Labor Statistics, *A look at women's education and earnings since the 1970s*, TED: The Economics Daily (Dec. 27, 2017), https://tinyurl.com/mrrjr75a.

[2] Women's Sports Found., *50 Years of Title IX* at 12 (May 2022), https://perma.cc/TN74-PJ4S.

For example, the Rule reinterprets Title IX to allow some sex distinctions and forbid others based on whether they cause "more than de minimis harm," *id.* at 33,887 (to be codified at 34 C.F.R. 106.31(a)(2)), a concept nowhere to be found in the statutory text. Unless expressly exempted, any policy or "practice that prevents a person from participating in" a covered "activity consistent with [their] gender identity" causes more than de minimis harm. *Id.* at 33,820. So § 106.10 and § 106.31(a)(2) require student access to sex-specific activities "consistent with [their] gender identity." *Id.* at 33,818.

The Rule also reimagines hostile-environment claims. 89 Fed. Reg. at 33,498. Harassment now need only be severe *or* pervasive. I.App.126–29. Complainants need not "demonstrate any particular harm," or show that the conduct denied them access to the educational program. 89 Fed. Reg. at 33,511. Harassment can be anything the student considers "unwelcome" or that "limits" the student's ability to benefit from an educational program. *Id.* at 33,884 (to be codified at 34 C.F.R. 106.2). The Department concedes that this standard is "broader" than this Court's interpretation of Title IX in *Davis ex rel. LaShonda D.* v. *Monroe County Board of Education*, 526 U.S. 629 (1999). 89 Fed. Reg. at 33,498. As a result, § 106.10 and § 106.2 impose a new mandate, forcing students and staff to use incorrect pronouns and avoid saying sex is binary, among other things. This violates the First Amendment.

These are just two examples. The Rule's new definition of sex discrimination affects how *many* provisions will apply.

Intervenors. A.C. is a female athlete and high-school student. I.App.152 (¶¶ 1–2). A.C. throws shot put and discus, runs track, and plays in the marching band. I.App.152, 161 (¶¶ 2, 63). When A.C. was in middle school, B.P.J., a male student who identifies as a girl, competed on A.C.'s school track team. I.App.153 (¶¶ 7–8). B.P.J. regularly beat A.C. and other girls. I.App.153–57 (¶¶ 9–35). So far, B.P.J. has beat nearly 300 girls in over 700 individual instances. I.App.328–38. B.P.J. has also changed in the girls' locker room and sexually harassed A.C. and her teammates. I.App.157–60 (¶¶ 40–49, 51–61). A.C. does not want to compete with or share private spaces with any male, no matter how he identifies. I.App.161–62 (¶¶ 63–69). But the new Rule threatens her right to privacy and exposes her to other harm.[3]

Christian Educators Association International is a membership organization of Christian educators. I.App.166 (¶¶ 4–7). Some of its members want to express their religious belief that sex is immutable. I.App.182–222. The new Rule compels members to speak inaccurate pronouns, and they fear the Rule will also forbid them from expressing their religious beliefs. *Ibid.* Some fear their schools will open shared restrooms to members of the opposite sex, forcing adult male teachers to share these intimate spaces with young female students. I.App.186–87 (¶¶ 28–32); I.App.220–21 (¶¶ 39–47). The group seeks to protect its members' constitutional and statutory

[3] B.P.J. has challenged West Virginia's law protecting equal athletic opportunities for women and girls. The Fourth Circuit held that the State could not designate sex-specific sports to protect women and girls because it violates equal protection. *B.P.J.* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024). A petition for certiorari has been filed asking this Court to review that decision. Pet. for Writ of Cert., *West Virginia* v. *B.P.J.*, No. 24-43 (U.S. July 11, 2024), https://perma.cc/2HHB-YXSS.

rights to freedom of speech and to use single-sex restrooms without the opposite sex. I.App.177–78 (¶¶ 79–81); Tenn. Code Ann. § 49-6-5102(b)(1) (pronouns); § 49-2-805(a) (restrooms).

Proceedings Below. Intervenors and six states—Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia—challenged the Rule, claiming it violates the APA because it is inconsistent with law, beyond statutory authority, contrary to the Constitution, and arbitrary and capricious. I.App.137–47. They alleged that the Rule redefines sex discrimination and other terms to forbid conduct that Title IX never meant to cover and to require conduct that Title IX prohibits. *Ibid.* They moved to stay and preliminarily enjoin the Rule. The district court granted that motion, forbidding the Department from "implementing, enacting, [or] enforcing" the Rule. I.App.093.

The Department appealed and moved to stay the district court's order as to 34 C.F.R. 106.10's definition of "sex discrimination" and its application beyond 34 C.F.R. 106.31(a)(2) and 34 C.F.R. 106.2's definition of "hostile environment harassment" for discrimination based on gender identity. Both the district court and the Sixth Circuit denied that request. I.App.252–77, 278–92. A Sixth Circuit panel (Chief Judge Sutton and Judges Batchelder and Mathis) unanimously held that the Department likely exceeded its power by misreading *Bostock* to redefine sex discrimination in Title IX because Title VII and Title IX (1) "use materially different" text, (2) serve "different goals," and (3) "have distinct defenses." I.App.282. What's more, because Title IX is spending legislation, Congress "must speak with a clear voice before it imposes new

mandates on the States." I.App.282. For these reasons, the panel refused to "export" *Bostock*'s logic outside Title VII, consistent with Sixth Circuit precedent. I.App.282.

The panel also fully retained the district court's injunction. Chief Judge Sutton and Judge Batchelder agreed that the Department had not shown the new rule is severable. I.App.283. They said the challenged provisions—"particularly the new definition of sex discrimination"—inform and pervade "every substantive provision of the Rule." I.App.283. The Department cited no provision that could apply without covered individuals knowing how to define "sex discrimination." I.App.283–84. And any pre-existing definition wouldn't help because its "meaning" is unclear. I.App.284. What's more, the Department forfeited this argument about the scope of the injunction because it never told the district court which specific provisions "should be severed." I.App.285. Given this failure and uncertainty, the court of appeals upheld the injunction to prevent irreparably harming covered individuals—costing them "loads of time" and trouble for no reason. I.App.285. The Sixth Circuit then expedited merits briefing. I.App.286.

The Department now seeks to stay a portion of the injunction on the same ground the Sixth Circuit found forfeited and lacking merit. This Court should deny the application and preserve the status quo that has existed for half a century.

ARGUMENT

Stays of injunctions are "rarely" proper. *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers). To determine whether to grant one pending appeal, this Court considers (1) the likelihood of success on appeal; (2) whether the applicant will suffer irreparable injury; (3) the hardship a stay inflicts on other parties;

and (4) the public interest. *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). A "strong showing" is required. *Ibid.* Here, the Department has not shown the requested stay is warranted.

I. The Department is unlikely to succeed on the merits.

The Department says the injunction below is "overbroad." Application for a Partial Stay of the Injunction Entered by the United States District Court for the Eastern District of Kentucky (DOE Br.) 18. First, it says the injunction should not cover § 106.10 because *Bostock* requires the redefinition of "sex discrimination" in Title IX, and thus, the Department claims, Title IX and not § 106.10 is the source of the Rule's injury. *Id.* at 28–38. But Title IX differs from Title VII, so *Bostock* does not control. Second, the Department says the Rule can be severed because respondents do not challenge every possible application. *Id.* at 18–28. It says most revisions "have nothing to do with gender identity." *Id.* at 20. But courts need not do a roving severability analysis before preserving the status quo and preventing a proposed rule from going into effect. Nor has the Department shown the Rule is severable. Regardless, the Department forfeited this argument below.

A. Section 106.10 is unlawful and harmful.

The Department says § 106.10's redefinition of sex discrimination should take effect because *Bostock* requires the change, and it does not injure respondents. This argument misses the mark.

Section 106.10 is the Rule's core flaw because it sweepingly applies *Bostock* throughout Title IX even though, as the court below held, Title IX differs from Title VII. I.App.282. And while the Department says this provision ensures equal access

to science fairs, marching band, and student government based on sexual orientation and gender identity, DOE Br. 29, that misses the point. By infusing Title IX with *Bostock*'s logic, the Rule vitiates sex distinctions in situations where sex matters—like showers and locker rooms.

The Department rejects that its reinterpretation causes these results, but it has argued for years that incorporating *Bostock* into Title IX does just that:

- **2016 Department of Education Dear Colleague Letter**: For restrooms and locker rooms, a school "must allow transgender students access to such facilities consistent with their gender identity."

- **2021 Department of Education Fact Sheet**: Listing as an example of unlawful discrimination under Title IX a "transgender girl" being prevented from using "the girls' restroom" and instead being told "to use the boys' restroom."

- **2021 *Roe* v. *Critchfiel*d Statement of Interest**: Arguing that Title IX prohibits preventing "students who are transgender from using the single-sex bathrooms and changing facilities that are consistent with their gender identity."

- **2023 *B.P.J.* v. *West Virginia* Amicus Brief**: Arguing that a state statute that "prohibits transgender girls from participating on girls' sports teams because their sex assigned at birth was male" is "discrimination 'on the basis of' sex."[4]

Even setting these prior statements aside, the Rule must be judged on its own terms, not based on the Department's current litigation positions. See *DHS* v. *Regents*

[4] U.S. Dep't of Educ., Off. for Civ. Rights, *Dear Colleague Letter on Transgender Students* 3 (May 13, 2016), https://perma.cc/G5VG-ZNV9; U.S. Dep't of Justice and U.S. Dep't of Educ., Civ. Rights Div. & Off. for Civ. Rights, *Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families* (Fact Sheet) (June 23, 2021), https://perma.cc/F644-8GBC; U.S. Dep't of Justice, Statement of Interest, *Roe* v. *Critchfield*, Case No. 1:23-cv-315, ECF No. 41 at 12 (D. Idaho Aug. 8, 2023); Br. for the U.S. as Amicus Curiae in Supp. of Pl.-Appellant and Urging Reversal at 27–28, *B.P.J.* v. *W. Va. State Bd. of Educ.*, 98 F.4th 541 (4th Cir. 2024) (Nos. 23-1078, 23-1130), 2023 WL 2859726, at *21–26.

of the Univ. of Cal., 591 U.S. 1, 20 (2020) (explaining that judicial review is "limited to the grounds that the agency invoked when it took the action" (cleaned up)). The Rule's core justification for applying *Bostock* to Title IX is lower court decisions that (wrongly) applied *Bostock* to require gender-identity-based access to school restrooms and athletics. See 89 Fed. Reg. at 33,807 (citing, *inter alia*, *A.C. by M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)); *id.* at 33,818 (incorporating 87 Fed. Reg. at 41,535, which relied on, *inter alia*, *B.P.J.* v. *W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 356 (S.D. W. Va. 2021)). Having used these cases to justify § 106.10, the Department cannot now maintain that § 106.10 is not "the sources of [respondents'] alleged harms." DOE Br. 30. And if the Department has changed its mind about how *Bostock* applies to Title IX, it had to say so and explain why in the Rule itself. *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221 (2016) (agency must "display awareness that it is changing position"). Because the Department didn't do so, the Court should not credit the Government's litigation posturing about the Rule's effect.

Turning next to the statutory text and context, a proper reading and understanding of Title IX show that *Bostock* does not justify the Rule.

1. Title IX forbids treating one sex worse than the other.

Title IX vastly differs from Title VII. Statutory interpretation begins with the text. This Court gives "terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 160 (2021). Courts must not "add to, remodel, update, or detract from old statutory terms" to fit their "own imaginations." *Bostock*, 590 U.S. at 654–55. Title IX states: "No person … shall, on the basis of sex,

be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. 1681(a).

Start with "on the basis of sex." No one disputes that "sex" refers only "to 'biological distinctions between male and female.'" 89 Fed. Reg. at 33,804–05 (citing *Bostock*, 590 U.S. at 655); see DOE Br. 32 (accepting this definition).

Next, consider the word "discrimination." The phrase "be subjected to discrimination," 20 U.S.C. 1681(a), suggests a distinction for the wrong reasons: "a difference in treatment or favor on a class or categorical basis in disregard of individual merit." Webster's Third New International Dictionary 648 (1966) ("Webster's Third"). Here, precedent and dictionaries track. To discriminate means to treat similarly situated individuals differently. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 682–83 (1983).

Title IX focuses on the exclusion or denial of the benefits of an educational program. 20 U.S.C. 1681(a). To "exclude" means to "bar from participation, enjoyment, consideration, or inclusion." Webster's Third 793. And to "deny" here means "to turn down or give a negative answer." *Id.* at 603. These terms help clarify discrimination, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195–98 (2012) (explaining associated-words canon), reinforcing that discrimination is not merely "differential" treatment but "less favorable" treatment based on sex, *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005), where "there is no justification for the difference in treatment," *CSX Transp., Inc.* v. *Ala. Dep't of*

Revenue, 562 U.S. 277, 287 (2011); see *Frontiero* v. *Richardson*, 411 U.S. 677, 686–87 (1973) (Title IX forbids "inferior" treatment).

Finally, these words must be understood in context. Title IX applies to an "education program," like classrooms and sports. This differs from Title VII, which treats an individual's sex like her race and religion in the employment context—a setting where none of those factors are "relevant." *Bostock*, 590 U.S. at 660.

Reading Title IX's constituent parts together, its plain text prohibits differential treatment that disfavors, denies, or treats one sex worse than the other when it comes to the full and equal enjoyment of educational opportunities. See *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (explaining Title IX's "purpose, as derived from its text, is to prohibit sex discrimination in education").

What dictionaries say, "statutory and historical context" confirms. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). As many courts recognize, "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick* v. *Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 704 & n.36 (1979).[5] That means "Title IX's remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women." *Cohen* v. *Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996) (*Cohen II*); *Miami*

[5] "[*W*]*hatever* approach" cases like *McCormick* or *Cannon* "may have used" to deduce Title IX's purpose, we may rely on them as "an integral part of [the] jurisprudence" on Title IX. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 286 n.17 (1993).

Univ. Wrestling Club v. *Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002). Yet the Rule turns Title IX on its head—by taking opportunities and spaces reserved for young women and opening them to young men.

Importantly, where biological differences are relevant, Title IX protects individual boys and girls by "ensur[ing] equal treatment between groups of men and women." Cf. *Bostock*, 590 U.S. at 671. In provision after provision, Title IX and its longstanding regulations, unlike Title VII, require schools to "treat[ ] males and females comparably as groups." *Id.* at 665 (rejecting this reading of Title VII).

Title IX exempts "father-son or mother-daughter activities" if "opportunities for reasonably comparable activities [are] provided for students of [both sexes]." 20 U.S.C. 1681(a)(8). The regulations similarly allow schools to "provide separate housing on the basis of sex," but they must be "[c]omparable in quality and cost to the student." 34 C.F.R. 106.32(b); see also *id.* 106.32(c)(2) (similar). "[T]oilet, locker room, and shower facilities" for the two sexes must also be comparable. 34 C.F.R. 106.33. The list goes on. See, *e.g.*, *id.* 106.31(c) (school assisting with foreign scholarships available to only one sex must make "available reasonable opportunities for similar studies for members of the other sex"); *id.* 106.34(b)(2) (when school provides permissible "single-sex class or extracurricular activity," it "may be required to provide a substantially equal [opportunity] for students of the excluded sex"); *id.* 106.37(c) (athletic scholarships require "reasonable opportunities … for members of each sex in proportion to the number of students of each sex participating …"). And schools must "provide equal athletic opportunity for members of both sexes," *id.* 106.41(c), but need

not provide exactly the same sports or teams to boys and girls, *id.* 106.41(b). Instead, Title IX requires equal opportunities in "the selection of sports and levels of competition" necessary to "effectively accommodate the interests and abilities of members of both sexes." *Id.* 106.41(c)(1). As the Department has said, a school is "required to provide separate teams for men and women in situations where the provision of only one team would not 'accommodate the interests and abilities of members of both sexes.'" Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,127, 24,134 (June 4, 1975) ("1975 rulemaking").

The new Rule effectively mandates co-ed showers and locker rooms. Yet that result is impossible to square with Title IX. Students cannot receive adequate educational benefits if forced to shower or share intimate spaces with the opposite sex. See *United States* v. *Virginia* (*VMI*), 518 U.S. 515, 550 n.19 (1996) (observing that the Virginia Military Institute "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."). A.C. illustrates this. She had to change in separate facilities and single-stall bathrooms to avoid changing in front of a male. I.App.157–59. Worse, that male made vulgar sexual comments to her in the locker room and elsewhere. I.App.159–60. Women cannot obtain equal educational benefits in situations like this.

Similarly, for "equal opportunity" in sports, "relevant [group] differences cannot be ignored." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ.* v. *Ohio High*

Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981). Because of the "average physiological differences" between men and women, "males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark ex rel. Clark* v. *Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982). Indeed, most "females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement" without sex-specific teams. *Cape* v. *Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam).

A.C.'s situation underscores the point. The male athlete at her school consistently beat A.C. during her 8th-grade year, took her spot at her school's conference championships, and displaced nearly 300 other female athletes over 700 times. I.App.155. "When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." *Yellow Springs*, 647 F.2d at 657. Title IX's promise of equal opportunity means little if the statute ignores reality.

2. Title IX does not prohibit all sex distinctions—sometimes it requires them.

a. While Title IX prohibits sex *discrimination*, it does not forbid all sex *distinctions*. And for good reason: men and women are different. "Physical differences between men and women … are enduring: [t]he two sexes are not fungible." *VMI*, 518 U.S. at 533 (citation omitted). When it comes to privacy, for example, "biological sex is the sole characteristic" that determines whether persons are similarly situated for purposes of restrooms. *Adams*, 57 F.4th at 803 n.6. For decades, Title IX rules have

recognized that sex distinctions in many situations advance "the talent and capacities of our Nation's people." *VMI*, 518 U.S. at 533.

This is true for many social benefits. Because "[a] community made up exclusively of one sex is different from a community composed of both," *VMI*, 518 U.S. at 533 (cleaned up), Title IX permits sex-specific spaces like living facilities, social organizations, and events like beauty pageants. Though fraternities, sororities, and pageants may not be critical to ensure educational opportunities, Congress protected them anyway, recognizing that single-sex spaces are *not* discriminatory. This logic applies even more to areas like multi-use restrooms that must be sex-specific to ensure meaningful access to educational programs.

b. Title IX's history confirms its plain meaning. This Court has interpreted Title IX's "postenactment developments" as "authoritative expressions concerning the scope and purpose of Title IX." *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982). When Congress acquiesces to a statute's settled interpretation, courts assume this interpretation is correct. See *Cannon*, 441 U.S. at 686 n.7, 702. "One might even say that the body of law of which a statute forms a part … is part of the statute's context." Scalia & Garner, *supra*, 322–26 (explaining prior-construction canon).

Start with Title IX's implementing regulations born out of the Javits Amendment. Those regulations are codified throughout 34 C.F.R. 106. Compare 1975 rulemaking, 40 Fed. Reg. at 24,139–43, with 34 C.F.R. 106.14–41. They authorize sex-specific spaces like physical-education classes, restrooms, showers, locker rooms, and sports teams. Congress required the Department's predecessor to submit the rules to

Congress for review. 1975 rulemaking, 40 Fed. Reg. at 24,128. After six days of hearings on whether the rulemaking was "consistent with the law" and congressional intent, Congress allowed the regulations to take effect. *N. Haven*, 456 U.S. at 531–32. Courts and administrations (including this one) have long understood these regulations to "accurately reflect congressional intent." *Grove City Coll.* v. *Bell*, 465 U.S. 555, 568 (1984); see also 89 Fed. Reg. at 33,817.

So a long line of administrations understood Title IX to allow and sometimes require sex-specific sports teams. In 1975, for example, the Department's predecessor explained that schools could not eliminate women's teams and tell women to try out for men's teams if "only a few women were able to qualify."[6] And in 1979, the agency issued a guidance document stating that schools who sponsor sports teams "for members of one sex" "may be required … to sponsor a separate team for the previously excluded sex." Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). This makes sense. The athletics regulations sought to overcome "the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges." *Williams* v. *Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993). All of that gives women equal opportunity with men.

[6] Off. for Civ. Rts., Letter from Peter Holmes to Chief State School Officers, Title IX Obligations in Athletics (Nov. 11, 1975), https://perma.cc/7T36-TJCZ.

3. Because Title IX permits and sometimes requires sex distinctions, *Bostock* cannot apply to Title IX.

The Department justifies its redefinition of "sex discrimination" by citing *Bostock*. But that case is inapposite here for at least five reasons.

First, Title IX, unlike Title VII, is Spending Clause legislation. The Rule's redefinition of sex discrimination is not a mere "straightforward application of … *Bostock*." DOE Br. 5. It is a "highly consequential" and "transformative" change to our nation's educational system. *West Virginia* v. *EPA*, 597 U.S. 697, 724 (2022). A groundbreaking new reading of Spending Clause legislation must be supported by a "clear statement" from Congress. See *Davis*, 526 U.S. at 640; *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Clear congressional authorization is required for two additional reasons—the Department has addressed a question of major political significance, *West Virginia*, 597 U.S. at 721; and the Department seeks to disrupt "the balance between federal and state power" in an area traditionally regulated by the states, *Sackett* v. *EPA*, 598 U.S. 651, 679 (2023). *Bostock* has no application here.

Second, *Bostock* did not change the meaning of "sex" in Title VII or Title IX. § II.A.1. Nor does the Rule purport to equate gender identity and sex. *E.g.*, 89 Fed. Reg. at 33,807. By elevating gender identity to the same level as sex, § 106.10 would create a new protected class, as the district court explained. I.App.261. And as applied by the Department, that means that women are deprived of the educational opportunities—like separate bathrooms and sports teams—promised them by Title IX.

Third, Title VII deals with hiring and firing in employment, while Title IX deals with educational opportunities. "[T]he school is not the workplace." *Adams*, 57 F.4th at 808. "Title VII … is a vastly different statute from Title IX." *Jackson*, 544 U.S. at 175. *Bostock* did not "purport to address bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. As other courts have held, including the panel below, *Bostock*'s logic does not change Title IX. I.App.281–82; *e.g. Adams*, 57 F.4th at 808.

Fourth, *Bostock* held that "sex is not relevant to the selection, evaluation, or compensation of employees" under Title VII, which treats sex like race, national, origin, and other protected classifications. 590 U.S. at 660 (cleaned up). But Title IX *only* covers sex, which often *is* relevant to promoting educational opportunities. Indeed, the whole point of the statute was to provide equal academic opportunity to women. Take sports. Under *Bostock*, employers cannot consider sex when hiring or firing. Applied to sports, that logic would mean schools cannot consider sex when creating sports teams. But "athletics programs *necessarily* allocate opportunities separately for male and female students." *Cohen II*, 101 F.3d at 177. Title IX often requires schools to consider sex to protect equal opportunities, particularly for female athletes.

Fifth, *Bostock*'s logic contradicts the Rule's new distinctions. For example, the Rule in theory allows boys' and girls' restrooms, just assigned by gender identity instead of sex. 89 Fed. Reg. at 33,818. But per § 106.10, facilities designated by gender identity still discriminate based on sex: "it is impossible to discriminate against a

person because of their … gender identity without discriminating against that individual based on sex." *Id.* at 33,816 (cleaned up). So on the Department's logic, the Rule draws distinctions forbidden by Title IX's general prohibition.

The Department's logic works only if the rule allowing sex-specific spaces redefines "sex" to mean "gender identity." *E.g.*, 34 C.F.R. 106.33. But the Department has disclaimed that argument, *e.g.*, 89 Fed. Reg. at 33,807, barring the agency from raising it now, see *Regents*, 591 U.S. at 20. So the *statute* forbids schools from considering sex per the Department's reading of *Bostock*, yet the Rule overrides the statute, discards *Bostock*, and allows these forbidden distinctions. Nothing supports this logic.

B. Severance is unwarranted at this stage.

The Department says the district court should have severed the Rule. DOE Br. 18–28. But preliminary injunctions keep the status quo until "a trial on the merits can be held." *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). Severability, by contrast, considers whether "what is left" at final judgment "is fully operative as a law." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). Courts have broad "discretion" to preserve the status quo pending review, even if the final outcome may give narrower relief or no relief at all. *Trump* v. *Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017) (per curiam). Preliminary orders do not "conclusively" decide the case. *Id.* at 580. Here, the district court soundly exercised its discretion. The Department has not shown the Rule is severable. That point is waived in any event. The current injunction is proper.

1. The Department has not shown the Rule is severable.

The Department has not shown the Rule is severable. While a severability clause is informative, "the ultimate determination of severability will rarely turn on" such a clause. *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). Rather, the Department must prove that the unchallenged provisions will still operate as the agency intended. *Alaska Airlines*, 480 U.S. at 685. A coherent balance of remaining provisions is necessary but not sufficient, and the Rule must "function in a *manner* consistent with" the agency's intent. *Id.* at 684–85. Even then, the Department must show it would have enacted the balance without the unlawful provisions. *Ibid.* The Department has not shown that here. The Rule rises or falls as a unit.

a. The challenged provisions are so central to the Rule that it cannot meaningfully operate without them. They redefine "sex discrimination" in 34 C.F.R. 106.10, § I.A, create a new form of discrimination for gender identity in 34 C.F.R. 106.31(a)(2)'s de minimis harm provision, and redefine hostile-environment harassment in 34 C.F.R. 106.2. These provisions—especially the redefinition of "sex discrimination"—inform and pervade the entire Rule. As the panel below explained, "these provisions … appear to touch every substantive provision of the Rule." I.App.283. Because these provisions comprise the Rule's foundation, the Rule cannot function coherently without them.

Consider how new changes affect 34 C.F.R. 106.8, a provision the Department claims is severable. DOE Br. 21. This provision requires Title IX coordinators to "ensure the recipient's consistent compliance with its responsibilities under Title IX and

this part." But without the challenged provisions, the coordinators' responsibilities are unclear.

This provision also requires schools to record "each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination." 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. 106.8(f)(2)). Whether "conduct … reasonably may constitute sex discrimination" turns on the meaning of "sex discrimination," which in turn depends both on the Rule's new definition of sex discrimination and on whether the de-minimis-harm provision applies. A school cannot keep compliant records—much less investigate anything that "*may* constitute sex discrimination"—without knowing what that term means.

The Department's other referenced parts of the Rule are also intertwined. Take the "recipient's response" duty for sex-discrimination claims, 89 Fed. Reg. at 33,888–91 (to be codified at 34 C.F.R. 106.44), the new "parental rights" provision, 89 Fed. Reg. at 33,885–86 (to be codified at 34 C.F.R. 106.6), the new "grievance procedures," 89 Fed. Reg. at 33,891–95 (to be codified at 34 C.F.R. 106.45–106.46), and the new "prohibit[ions on] retaliation," 89 Fed. Reg. at 33,896 (to be codified at 34 C.F.R. 106.2, 106.71). DOE Br. 21. Schools cannot implement these provisions without knowing the *meaning* of sex discrimination and what defines harassment.

Similarly, the new rules on lactation spaces require "actions … to promptly and effectively prevent sex discrimination and ensure equal access." 89 Fed. Reg. at 33,887 (to be codified at 34 C.F.R. 106.40(b)(3)(v)). With no de-minimis-harm provision—which the Department does not seek to release from the injunction—the result

is ambiguous. If § 106.10 went into effect, schools would not know whether they must allow males who identify as women to access private spaces designated for nursing women just as they must allow males who identify as women to access women's restrooms, showers, and locker rooms. No one knows how the new "gender identity" and "sex stereotypes" provisions work with existing law, so women will suffer harm as schools try to avoid accusations of discrimination.

To be sure, the Department says § 106.10 can coherently apply if "gender identity" is simply removed from the definition. DOE Br. 23–26. But to justify including multiple other terms in that definition, like discrimination based on "sex characteristics" or "sex stereotypes," the Department cited cases like *Grimm* v. *Gloucester County School Board*, which treat considering biological sex *as* illegal stereotyping. 972 F.3d at 608–09; 89 Fed. Reg. at 33,802. Allowing those other parts of the definition to take effect would create many of the same harms that the "gender identity" language would. Merely excising "gender identity" does not relieve respondents' harm. And like the panel below held, the pre-existing definition of sex discrimination doesn't help because no one knows what it means. I.App.284.

The Department's suggested alternatives do not provide schools with needed clarity. What the agency really wants is to have its stay and its guidance too. As the Department recognizes, there is no definition in the existing regulations. Without that, the Department attempted to import *Bostock* through guidance documents treating a student's gender identity as the student's sex, including with respect to restrooms and sports teams. See *Texas* v. *Cardona*, __ F. Supp. 3d __, 2024 WL

2947022 (N.D. Tex. June 11, 2024) (holding the guidance documents unlawful and setting them aside). Those are the very harms the Department now claims § 106.10 does not impose. So the stay that the Department envisions would reinstate the interpretation of sex-based discrimination that causes respondents' core injuries.

Finally, the Department tries to downplay § 106.2's threat to respondents. It says respondents "focus their [First Amendment] challenge" only on one application of the new "hostile environment harassment" definition—namely, "gender-identity discrimination." DOE Br. 22. Not so. As the district court held, using correct pronouns and honorifics, for example, may also be considered sex-stereotyping harassment. I.App.265. And the new, "broader" standard defining "sex-based harassment" is unlawful in all its applications, not just when it comes to gender identity. Respondents and the courts below understand the Rule's replacement of this Court's *Davis* standard to be unlawful even beyond the gender identity context. I.App.264–65. An injunction that "almost" protects Respondents is not good enough. DOE Br. 22.

Even if the Department were correct about the scope of respondents' challenge, its requested partial stay is unworkable. The Department would force schools to apply one standard to allegations related to gender identity and another to allegations related to anything else. So if a male student is called "girly" and teased for perceived nonconformity to sex stereotypes, see 89 Fed. Reg. at 33,514, it is hostile environment harassment based on the Rule's new definition, 89 Fed. Reg. at 33,884. But if a female who identifies as a boy is called "girly" and teased, it is harassment only if it meets

Davis's higher threshold. On the Department's logic, that gives the transgender student *less* protection than everyone else.

The absurdity does not stop there. For instance, say a Title IX coordinator receives a report of harassment that might be based on "sex characteristics" (which would fall under the new standard) or might be based on "gender identity" (which would fall under the *Davis* standard). The school won't know which basis applies until it investigates, but the result of the investigation depends on which standard applies. This is not a workable solution. The courts below properly maintained the status quo to avoid this kind of uncertainty and unequal treatment.

In short, the challenged provisions inform and pervade the entire Rule. The Department has shown no workable alternative that remedies the Rule's harm yet allows it to partially apply. Respondents should not bear the risk of this uncertainty.

b. The Department also has not shown it would have enacted the Rule without its unlawful provisions. This Court has said many times that a severability clause is informative but not dispositive. *Jackson*, 390 U.S. at 585 n.27. Such a clause cannot save a rule if the remaining provisions are otherwise unjustified. *Ohio* v. *EPA*, 144 S. Ct. 2040, 2054–55 (2024). The Department does not challenge this Court's severability precedents.

The Court should not assume the Department "would have preferred to apply the [Rule] in as many" situations "as possible" if "key" provisions were invalid. *United*

States v. *Booker*, 543 U.S. 220, 248 (2005).[7] The Rule is "highly complex," containing many "interrelated provisions." *Ibid.* It's one unified policy aiming to ensure equal educational opportunities, see 89 Fed. Reg. at 33,476; *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999). And the Department has said its provision redefining sex discrimination is "essential" to this goal. 89 Fed. Reg. at 33,500. The Department would not have been content without its key provisions.

In fact, the Department justified the Rule and its high costs based on benefits it expects *from implementing the challenged provisions*. 89 Fed. Reg. at 33,861–62. Without those benefits, the Department cannot justify the costs. And the Department relied on *extensive* estimates of costs that the Rule would impose on schools. 89 Fed. Reg. at 33,860–81. A partial rollout would duplicate many of those costs in ways the Department never considered. Cf. *Ohio*, 144 S. Ct. at 2054–55 (staying a rule that imposed different burdens than the agency estimated). The Department does not get what it sought if it's incorrect view of *Bostock* does not revolutionize Title IX.

In sum, the challenged provisions are key, and the Rule's other provisions cannot work without them. The Rule is inseverable.

2. The Department forfeited its severance argument.

Critically, the Department forfeited its severance argument below, making just two passing references in briefing. I.App.250. To preserve an argument, a party must do more than cursorily mention it. Issues mentioned "in a perfunctory manner," without development argument, are "waived." *McPherson* v. *Kelsey*, 125 F.3d 989, 995 (6th

[7] The Department has not asked the Court to overrule this or any other severability precedents.

Cir. 1997); *e.g. Ladner* v. *United States*, 358 U.S. 169, 173 (1958) (declining to address "important and complex" issue based on "short discussion" and "passing reference"); see 36 C.J.S. Federal Courts § 613 ("Perfunctory and undeveloped arguments are waived.").

The Department did not specify in any detail how the Rule could be severed yet still protect respondents. In its opposition to respondents' requests for preliminary relief, the Department devoted exactly two sentences to asking the district court to sever provisions not found unlawful. I.App.250–51. And it did not identify any such provisions, much less explain its new theory that Title IX— not § 106.10—is the cause of the irreparable harm respondents proved. In a challenge to a 1500-page regulation, the agency must do *something* to show the district court how its injunction could be narrowed.

Even when it sought a stay from the lower courts, the Department gave none of the explanation it now offers about how the Rule could function even without § 106.10, § 106.31(a)(2), or the new definition of hostile environment harassment. Compare I.App.369–70, with DOE Br. 23–27. The courts below cannot be faulted for holding the Department to the same party-presentation principles that apply to every other litigant, particularly when seeking the extraordinary relief of staying an injunction pending appeal.

Because the Department's severability point was forfeited below, this Court should "decline[ ] to entertain" it. *Ohio*, 144 S. Ct. at 2057 (quoting *Kingdomware Technologies, Inc.* v. *United States*, 579 U.S. 162, 173 (2016)). Courts should not be

expected to parse the severability of a lengthy regulation when the Department has not even done so. Even now, the Department does not explain what its narrower injunction would say. That is particularly problematic for provisions it does not even seek to implement now, like the definition of hostile environment harassment "as applied to gender-identity discrimination." E.g. DOE Br. 30. As discussed above, schools should not be required to use a different standard for gender identity claims than for everything else, and authorizing the Department to do so invites arbitrary enforcement.

3. The current injunction's scope is proper.

The district court acted within its discretion in granting the § 705 stay and preliminary injunction. The Department says the injunction is overbroad because respondents "have not challenged the vast majority" of the Rule. DOE Br. 18. That's not true. In their motion for a stay and preliminary injunction, respondents said the entire Rule is "arbitrary and capricious." I.App.321–23. And they challenged § 106.10's redefinition of "sex discrimination," I.App.302–24, which pervades the Rule. I.App.253 ("[T]he defects permeate the" entire Rule. (cleaned up)); I.App.283 (Section 106.10 "appear[s] to touch every substantive provision of the Rule"); § I.B.1. That differs from the plaintiffs in *Labrador* v. *Poe*, for example, who admittedly did *not* challenge the entire statute that the lower court enjoined. 144 S. Ct. 921, 922 (2024) (Gorsuch, J., concurring). Here, the injunction fits the challenge.

Take § 106.10's redefinition of "sex discrimination." That provision is "one of a number of [Rule] provisions that, working together," produce an APA violation. *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010); see *Booker*, 543

U.S., at 316–317 (Thomas, J., dissenting) (explaining that "the concerted action" of a statute *and* guidelines *and* procedural rules resulted in the unlawful act). It's inextricably intertwined with other Rule provisions. § I.B.1. Without knowing how to define "sex discrimination," schools cannot apply the Rule. So a line-item injunction is highly impractical, even if the Department had articulated what one would look like. Though the Department wants to implement § 106.10 pending review, DOE Br. 40 (asking to limit injunction to "(i) 34 C.F.R. 106.31(a)(2) and (ii) the hostile-environment harassment standard in 34 C.F.R. 106.2 as applied to discrimination"), that doesn't fully protect respondents, § I.B.1. And though severability clauses may call for severance, they don't help courts pick which provisions to sever. See *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 258 (2020) (Thomas, J., concurring).

This case also differs from *Poe* because it arises under the APA, where vacatur is the likely final remedy at the end of this case. Under the APA, the court must "set aside" agency action found unlawful. 5 U.S.C. 706. This vacatur is normal when the agency action is so contrary to law that the agency cannot show how to "rehabilitate" it. *Long Island Power Auth.* v. *Fed. Energy Regul. Comm'n*, 27 F.4th 705, 717 (D.C. Cir. 2022); see *Humane Soc'y of United States* v. *Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) (courts typically vacate rules with "major shortcomings that go to the heart" of the agency's rulemaking decision). Here, no one disputes that § 106.10's redefinition of "sex discrimination" affects respondents. Because that provision informs and pervades the entire Rule, and the Department has not shown a workable alternative that remedies the rule's harm yet allows it to partially apply, the current injunction is

proper. If anything, its scope could expand as the case proceeds. Because Christian Educators has members in every State, I.App.167, vacating the Final Rule nationwide is the only way to afford it complete relief. *Cf. Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) (order should "provide complete relief to the plaintiffs"). The district court's injunction is thus already more limited than it might have been—and may ultimately be when the case ends. The Department has not shown a basis to narrow it further now.

Because the Department has shown no workable alternative that remedies the Rule's harm yet allows it to partially apply, the current injunction is proper.

II. The remaining factors favor preserving the status quo.

The remaining stay factors favor respondents. A partial rollout would impose heavy compliance costs and confuse educators and students. And delay would not harm the Department, as Title IX's protection would continue as it has for over 50 years.

A. The proposed stay would irreparably harm respondents.

Costs. Unrecoverable compliance costs—like costs to update policies and train educators and students—impose irreparable harm. *Ohio*, 144 S. Ct. at 2053; see *Alabama Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021) (per curiam); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). The Rule accepts that changes related to the maintenance of "records related to sexual harassment"—

to which the new definition of "sex discrimination" is critical—will cost some recipients "approximately $13,022,034 in Year 1." 89 Fed. Reg. at 33,873. Other compliance costs include modifying spaces and hiring more Title IX coordinators. The Department's request for a *partial* stay only *worsens* this irreparable harm. If the Department had its way, schools would have to comply not just once, but *at least* twice. That's a waste.

Title IX has been read one way for over fifty years. Now, the Department would have schools amend their policies and procedures, modify their spaces, and train their employees on some parts of the Rule, all within a matter of days. Schools must do this with no idea how to interpret sex discrimination in 34 C.F.R. 106.10 consistent with Title IX's many permissible sex distinctions. And they must apply the Rule's "broader" harassment provision, but not if the complainant alleges gender-identity harassment, in which case the prior regulations presumably remain in place. That piecemeal approach is troubling enough. But then, the Department would have every school do this all over again when the case ends. It believes the whole Rule is lawful. DOE Br. 17. But here, it does not defend key provisions. So under the Department's approach, schools nationwide must amend and train now to partially enforce the Rule, then re-amend and re-train later to enforce the entire Rule—at twice the compliance costs. This scuttles the Department's own cost estimate, 89 Fed. Reg. at 33860–81, and irreparably injures those affected.

Confusion. The injunction below rightly delays the compliance date for the new rule entirely. It allows schools to avoid wholesale changes to their practices until the

end of this case, sparing teachers and students the confusion and headache of trying to learn and comply with shifting requirements. For example, the Department never explains how schools can comply with § 106.10 if it goes into effect but § 106.31(a)(2) does not. How can schools prevent discrimination based on gender identity under § 106.10 *and* prevent discrimination based on sex in circumstances where they cannot do both? And how can schools decide whether a hostile environment complaint addresses gender identity, sex characteristics, or sex stereotypes? No one knows.

Forcing teachers to enforce such contradictory requirements will mire them in regulatory mud and impede their ability to engage their students. The best approach is to delay the Rule's effective date and enjoin its enforcement entirely until litigation ends—precisely what the district court's order contemplates. *Cf. Ohio State Conf. of NAACP* v. *Husted*, 769 F.3d 385, 389 (6th Cir. 2014) (refusing to stay preliminary injunction when it would create "confusion" among affected individuals and risk placing regulated officials in a "position of trying to communicate" multiple, conflicting instructions). Schools need clarity. The current injunction provides it.

B. The balance of equities and public interest favor retaining the current injunction.

In contrast, the Department has not shown it would suffer *any* harm if the current injunction is kept. And if the public interest merges with the Department's, a stay is not in the public interest either. See *Nken*, 556 U.S. at 435; but see *U.S. Navy Seals 1-26* v. *Biden*, 27 F.4th 336, 353 (5th Cir. 2022) (explaining that the public interest does not so merge when the Government applies for a stay of injunction).

The Department says any time the government "'is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" DOE Br. 39 (quoting *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). But it omits key text from its source: "[A]ny time *a State* is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (brackets in original; emphasis added; citation omitted). The Department isn't a State. Nor is it effectuating a duly enacted statute. It is an agency trying to rewrite a statute contrary to law. There is no sovereign harm if the Rule is enjoined.

The Department also suggests that the injunction may harm others, with wholly imagined situations like barring transgender-identifying students "from participating in the science fair, the marching band, or student government." DOE Br. 29. But the Department provides no evidence this has ever occurred. Such speculation cannot show irreparable harm that warrants a stay. See *Wis. Gas Co.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (bare speculation has "no value since the court must decide whether the harm will *in fact* occur"); *Reynolds Metals Co.* v. *FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (emphasizing the "stringency" of this requirement). On the Department's own theory, the statute has always prohibited such things, so the Rule's new definition in § 106.10 does no work. DOE Br. 38. Either way, the equities favor respondents, not the Department. No one will be harmed if the Department is correct about what § 106.10 requires (though it's not), but respondents will imminently be harmed if the Department is wrong (and it is).

To obtain a stay, the alleged injury "must be both certain and great; it must be actual and not theoretical." *Wis. Gas*, 758 F.2d at 674 (quoting *Connecticut* v. *Massachusetts*, 282 U.S. 660, 674 (1931)). The Department must show that the alleged injury is so imminent that "harm is certain to occur in the near future." *Ibid.* The Department's speculation doesn't show that.

CONCLUSION

The district court properly ordered preliminary relief to preserve the status quo just like every other district court around the country that has considered the new Title IX rule. Two circuits, including the one below, have also rejected the Department's arguments in support of requests for emergency stays pending appeal in similar cases. This Court should do the same and allow the injunction to stand.

Respectfully submitted.

s/ John J. Bursch

JAMES A. CAMPBELL
JONATHAN A. SCRUGGS
JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

JOHN J. BURSCH
Counsel of Record
ERIN M. HAWLEY
NATALIE D. THOMPSON*
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
jbursch@ADFlegal.org

**Practicing under D.C. App. Rule 49(c)(8)*

CERTIFICATE OF SERVICE

A copy of this response was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

Elizabeth B. Prelogar
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530-0001
supremectbrief@usdoj.gov

Whitney Hermandorfer
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
whitney.hermandorfer@ag.tn.gov

s/John J. Bursch
JOHN J. BURSCH
Counsel of Record
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
jbursch@ADFlegal.org

APPENDIX

TABLE OF EXHIBITS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

STATE OF TENNESSEE, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 2: 24-072-DCR
	)	
V.	)	
	)	
MIGUEL CARDONA, in his Official Capacity as Secretary of Education, et al.,	)	**MEMORANDUM OPINION AND ORDER**
	)	
Defendants.	)	

*** *** *** ***

I.

Introduction

There are two sexes: male and female.[1] More than fifty years ago, Congress recognized that girls and women were not receiving educational opportunities that were equal to those afforded to their male counterparts. It attempted to remedy this historical inequity through the passage of the Education Amendments Act of 1972, commonly known as Title IX. And for more than fifty years, educational institutions across the country risk losing federal funding if they fail to comply with the dictates of the statute.

This case concerns an attempt by the executive branch to dramatically alter the purpose and meaning of Title IX through rulemaking. But six states, an association of Christian educators, and one fifteen-year-old girl object. As they correctly argue, the new rule contravenes the plain text of Title IX by redefining "sex" to include gender identity, violates

[1] The defendants made this concession during oral arguments on the plaintiffs' motion for injunctive relief. The parties have agreed to little else.

government employees' First Amendment rights, and is the result of arbitrary and capricious rulemaking. If the new rule is allowed to take effect on August 1, 2024, all plaintiffs will suffer immediate and irreparable harm. Because the plaintiffs are likely to prevail on the merits of their claims, and the public interest and equities highly favor their position, the new rule will be enjoined, and its application stayed.

II.

Title IX's Prohibition on Sex Discrimination

"The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both." *Peters v. Kiff*, 407 U.S. 493, 504 n.12 (1972) (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)). The United States Supreme Court made this observation in 1972—the same year Indiana Senator Birch Bayh introduced an amendment that would become Title IX of the Education Amendments of 1972. *See* 118 Cong. Rec. 5803 (1972).

Title IX was patterned largely after the Civil Rights Act of 1964, which provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Momentum for passing federal legislation prohibiting discrimination on the basis of sex began building later in the 1960s as congressional attention turned to remedying the disparate treatment of women in education and the workforce. *See* Leslie Gladstone and Gary Galemore, Cong. Rsch. Serv. 97-954, Sex Discrimination In Education: Overview of Title IX (1998) ("Title IX grew out of the women's civil rights movement of the late 1960s and early

1970s. In that period, Congress began to focus attention on systemic educational barriers to women and girls.").

In May 1970, Dr. Bernice Sandler of the Women's Equity Action League testified before the Senate Subcommittee on Constitutional Amendments concerning the discrimination women faced in colleges and universities, stating "[w]omen have been discriminated against in many areas of life, of which the university is but one. We need to begin to redress these wrongs." *The Equal Rights Amendment: Hearing Before the S. Subcomm. on Const. Amendments*, 91st Cong. (1970). Congress did just that by shifting focus to the problem of sex-based discrimination in education. The House Special Subcommittee on Education, as part of the Committee on Education and Labor, held seven days of hearings on discrimination against women in education programs receiving federal funding and employment in education. *Discrimination Against Women: Hearings on H.R. 16098 Before the H. Special Subcomm. on Educ. & Labor*, 91st Cong. (1970). Representative Edith Green of Oregon, the chair of the subcommittee, presided over the hearing for Section 805 of 91 H.R. 16098, which sought to prohibit discrimination on the basis of sex in federally funded programs and education. 91st Cong. 1-2 (1970) (statement of Rep. Green).

The testimony before the subcommittee identified the following as examples of differential treatment between males and females:

- Some publicly funded university undergraduate admissions policies did not allow for the admission of women, imposed higher standards for admitting women, or imposed sex-based quotas;
- Some academic programs and courses within publicly funded educational institutions, such as nursing schools, would not admit married women;
- Women generally were found to be less likely to receive financial aid and married women were often excluded from receiving any financial aid;

- Certain school-sponsored activities, such as honor societies, were reserved for male students only;
- Athletic programs for women were funded at significantly lower levels than those for men;
- Women were frequently discouraged from applying to law and medical schools, as well as programs in the hard sciences, such as physics; and
- Women who sought employment at educational institutions with equivalent training and experience to men were hired at lower rates and with lower salaries and upward mobility potential for promotions compared to male counterparts.

Leslie Gladstone and Gary Galemore, Cong. Rsch. Serv. 97-954, Sex Discrimination In Education: Overview of Title IX (1998).

The obvious takeaway is that females were disadvantaged compared to their male counterparts. In agreement, Representative Green observed following the hearing that "[m]any of us would like to think of educational institutions as being far from the maddening crowd, where fair play is the rule of the game and everyone, including women, gets a fair roll of the dice." *Discrimination Against Women: Hearings on H.R. 16098 Before the H. Special Subcomm. on Educ. & Labor*, 91st Cong. (1970). Although her proposed legislative remedy was not included in the Education Amendments of 1971, these hearings were a major step toward the eventual enactment of Title IX.

A short time later, Representative Abner Mikva of Illinois introduced a similar bill to enshrine into law the recommendations of the Presidential Task Force on Women's Rights and Responsibilities. *See* 116 Cong. Rec. 22681–82 (statement of Rep. Mikva). The bill sought to eliminate sex discrimination in several areas, including federally assisted programs, government employment, employment in educational institutions, wages, and housing. *Id.*

Senator Birch Bayh introduced a similar version in the upper chamber, arguing that "our greatest legislative failure relates to our continued refusal to recognize and take steps to eradicate the pervasive, divisive, and unwarranted discrimination against a majority of our citizens, the women of this country." 117 Cong. Rec. 22735 (1971) (statement of Sen. Bayh). On the Senate floor, he stated:

> Let us ensure that no American will be denied access to higher education because of race, color, religion, national origin, or sex. The bill I am submitting today will guarantee that women, too, enjoy the educational opportunity every American deserves.

See 117 Cong. Rec. 22735 (1971).

The legislation stalled, but a report from the House Committee on Education and Labor accompanied a related proposal known as the Higher Education Act by the fall of 1971. The House version included a specific provision, authored primarily by Representative Patsy Mink of Hawaii, prohibiting discrimination on the basis of sex in educational programs or activities receiving federal funds. *See* H.R. Rep. No. 92-554 (1971). Members fiercely debated whether broad coverage of the amendment was appropriate, citing the threat of intrusive government overreach into the sensitive decision-making apparatuses of the country's colleges and universities. 117 Cong. Rec. 39248–63 (1971). They argued that the federal government should not remove private institutions' control over admissions and recommended amending the language to exempt university admissions and recruitment policies from being subject to quotas on the basis of sex. *Id.* To proceed, the committee ultimately adopted an amendment by Representative John Neal Erlenborn of Illinois to exempt private institutions' undergraduate admissions policies from the sex-based discrimination provisions. *Id.*

A similar legislative exercise overflowed in the upper chamber the following year as Senator Bayh continued to stress that economic inequities suffered by women were traceable to educational inequities by emphasizing the link between discrimination in education and subsequent employment opportunities. Amid consideration of the House's language to exempt private undergraduate admissions policies from the prohibition of sex discrimination, a perfecting amendment was adopted to likewise exempt the undergraduate admissions policies of public institutions that had historically been traditionally single sex. *See* 118 Cong. Rec. 5802-5815 (1972).

After years of intense legislative debate premised on the fixed biological dichotomy between males and females, Congress eventually took an affirmative step toward eliminating discrimination based on sex in education. In early 1972, Congress passed Title IX as part of a broader bill expanding civil rights in education once a conference committee reconciled the House and Senate versions. Senator Bayh referred to the legislation, known as the Education Amendments Act, as "[t]he only antidote" to "the continuation of corrosive and unjustified discrimination against women . . . in[] all facets of education." 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh).

President Richard Nixon signed the Education Amendments Act into law on June 23, 1972. As enacted, Title IX prevents discrimination on the basis of sex in educational programs and opportunities that receive federal funding. Title IX's general prohibition on discrimination provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C § 1681.

The enactment of Title IX meant that educational institutions receiving federal funding, as well as non-educational institutions conducting or facilitating educational programs with ancillary federal support, were prohibited from discriminating based on sex in their academic courses or programmatic offerings, scholarships, athletic opportunities, and other matters. Its original goal was to ensure women experienced "full citizenship stature," including the "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *See United States v. Virginia*, 518 U.S. 515, 532 (1996).

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).

In 1974, Congress passed an amendment to Title IX introduced by Senator Jacob Javits of New York, clarifying its application to intercollegiate athletics. *See* 88 Stat. 484, 612 (1974). The amendment directed the Department of Health, Education, and Welfare ("HEW"), the Department of Education's ("the Department") predecessor, to issue a regulation that contained "with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports." Notably, this amendment further cemented that Congress intended Title IX to cover athletics at all levels for both males and females at schools receiving federal funding.

As a general matter, Title IX's antidiscrimination provision has remained unchanged since the statute's enactment. 20 U.S.C. § 1681. And until the last decade, Title IX was

universally understood to equalize female access to educational facilities and programs by barring discrimination "on the basis of sex" at schools receiving federal funds. But then came the administrative state, lacking any real power to rewrite a law that Congress duly passed, with its bureaucratic cudgel.

The initial effort to redefine "sex" through regulatory decree occurred between 2014 and 2016 when the Department issued guidance construing Title IX's implementing regulations to restrict federal funding recipients from treating individuals inconsistently with their gender identity. *See* Jared Cole and Christine J. Back, Cong. Rsch. Serv., LSB10229, *Title IX: Who Determines the Legal Meaning of "Sex"?* (2018). In May 2016, the Department's Office of Civil Rights ("OCR") issued a "Dear Colleague" letter, noting that schools may continue to provide sex-segregated facilities, such as restrooms, locker rooms, and showers, pursuant to existing Title IX regulations, while interpreting the prohibition of sex discrimination to encompass discrimination based on a student's gender identity, including transgender status.[2] The letter warned that schools "generally must treat transgender students consistent with their gender identity" when rendering sex-based distinctions in certain circumstances, such as providing separate facilities for male and female students. *Id.* OCR rescinded the May 2016 Dear Colleague letter in the early days of the Trump administration.[3] However, it neither promulgated further guidance nor issued a rule regarding whether Title IX covers gender identity.

---

[2] *See* Dept. of Justice & Dept. of Education, Dear Colleague Letter on Transgender Students, May 13, 2016, https://www2.ed.gov/about.offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[3] *See* Dept. of Justice & Dept. of Education, Dear Colleague Letter, Feb. 22, 2017, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

On June 15, 2020, the United States Supreme Court issued its decision in *Bostock v. Clayton County*, *Georgia*, 590 U.S. 644 (2020). The Court held that an employer violates Title VII of the Civil Rights Act of 1964 by firing an individual for being homosexual or transgender. On his first day in office, President Joseph Biden issued Executive Order 13988, entitled "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 21, 2021). Citing *Bostock*, President Biden stated that "[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation." According to the President's proclamation, federal laws on the books that prohibit sex discrimination similarly "prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." *Id*.

President Biden subsequently issued Executive Order 14021, captioned "Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity." Exec. Order No. 14,021, 86 Fed. Reg. 13803 (Mar. 8, 2021). Therein, President Biden directed the Secretary of Education, in consultation with the Attorney General, to review agency actions and issue new guidance as needed to comply with the policy set forth in the Executive Order.

The Department subsequently amended the regulations implementing Title IX on April 29, 2024, by issuing a Final Rule: "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" (the "Final Rule" or "Programs and Facilities Rule"). 89 Fed. Reg. 33474 (Apr. 29, 2024). The Final Rule "clarif[ies]" that, for purposes of Title IX, "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related

conditions, sexual orientation, and gender identity." *Id.* at 33476 (to be codified at 34 C.F.R. § 106.10). The bases listed in 34 C.F.R. § 106.10 are not exhaustive and are offered only as examples to clarify the scope of Title IX's coverage, "which includes any discrimination that depends in part on consideration of a person's sex." *Id.* at 33803.

The Final Rule brings another significant change to Title IX by way of a "de minimis harm" standard, which provides:

> [i]n the limited circumstances in which Title IX . . . permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. § 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. § 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

See id. at 33814-26 (to be codified at 34 C.F.R. § 106.31(a)(2)).

The Department declined to provide a specific definition of "gender identity," but understands the term to "describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth." *Id*. at 33809. The Final Rule suggests that recipients of federal funds should rely on a student's "consistent assertion" or "written confirmation" to determine the student's gender identity. *Id.* at 33819. Recipients, however, may not require students to submit to "invasive medical inquiries or burdensome documentation requirements" to determine gender identity. *Id.*

Title IX bans sexual harassment.

Harassment is not mentioned in the text of Title IX, but both the Department and the United States Supreme Court have long recognized that sexual harassment may constitute

discrimination on the basis of sex for purposes of Title IX. *See OCR; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*, 62 Fed. Reg. 12034 (Mar 13, 1997); *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629 (1999). In 2011, OCR issued a Dear Colleague letter regarding a variety of topics, including sexual and gender-based harassment.[4] It followed up in 2014 with additional guidance that defined hostile environment sexual harassment as that which is "sufficiently serious as to limit or deny a student's ability to participate in or benefit from the school's educational program or activity."[5]

In May 2020, the Department exercised its formal rulemaking authority to issue a regulation that defined sexual harassment under Title IX. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30033 (May 19, 2020) (codified at 34 C.F.R. § 106.30). In relevant part, section 106.30 defines "sexual harassment" as "conduct on the basis of sex" that is "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." (Emphasis added.)

The new rule redefines this term as "sex-based harassment," which means "sexual harassment and other harassment on the basis of sex, including on the bases described in [34 C.F.R.] § 106.10 . . . ." 34 C.F.R. 106.2 (effective Aug. 1, 2024). Additionally, hostile

---

[4] Dept. of Education, Dear Colleague Letter, Apr. 4. 2011, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[5] Dept. of Education, Questions and Answers on Title IX and Sexual Violence, Apr. 29, 2014, https://www2.ed.gov.about/offices/list/ocr/docs/qa-201494-title-ix.pdf.

environment harassment is redefined as "[u]nwelcome *sex-based* conduct that, based on the totality of the circumstances, is *subjectively and objectively* offensive and is so severe *or* pervasive that it *limits or denies* a person's ability to participate in or benefit from the recipient's education program or activity. . . ." 34 C.F.R. § 106.2 (effective Aug. 1, 2024) (emphasis added). *See* 89 Fed. Reg. at 33498 (explaining the adoption of the new standard).

It is noteworthy that the Department does not limit harassment to speech that occurs on school campuses and believes a recipient's obligations under Title IX are triggered whenever a school employee "has information about conduct among students that took place on social media or other platforms that reasonably may have created a sex-based hostile environment in the recipient's education program or activity." 89 Fed. Reg. at 33535.

The Final Rule and its accompanying regulations are scheduled to take effect August 1, 2024.

III.

The Plaintiffs and Intervenors

Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia filed a Complaint with this Court on April 30, 2024, seeking to enjoin and invalidate the Final Rule and its accompanying regulations. Each state is obligated through its constitution to provide a free system of public education for primary and secondary school-aged children. Accordingly, the states operate public primary and secondary schools, as well as "special schools," for the hearing and visually impaired, and various public institutions of higher learning. Pursuant to public policy and state law, each of these states' public schools generally require students to use bathrooms and play on sports teams associated with the student's biological sex. [Record No. 1, ¶¶ 206-212] Additionally, the plaintiff-States generally do not require public schools

or their employees to use pronouns that are inconsistent with an individual's biological sex. *Id.* at ¶¶ 213-217] All of these schools receive federal funding under Title IX.

Christian Educators Association International ("Christian Educators") and A.C. were permitted to file an Intervenor Complaint on May 8, 2024. Christian Educators is a religious non-profit organization primarily composed of Christians in the teaching profession from all 50 states. Its mission is to "support, connect, and protect Christians serving primarily in public education." The organization maintains a Statement of Faith that affirms beliefs in core Christian doctrines and all dues-paying members must affirm that they are Christians.

Christian Educators seeks to support its members—particularly educators in K-12 public schools—who wish to "live and work consistent with their shared belief that God created human beings as male and female and that sex is an immutable trait." It objects to policies that would force educators to use pronouns that do not correspond with an individual's biological sex. Christian Educators also takes issue with policies that chill educators from expressing their sincerely held religious beliefs regarding the immutability of sex, and the group supports the rights of educators to discuss these beliefs with students and colleagues at work through informal discussions both inside and outside of the classroom. Further, Christian Educators disputes any policy that would require educators to share private facilities like restrooms or locker rooms with persons of the opposite sex, including their students.

A.C. is a 15-year-old girl who resides in West Virginia and attends Bridgeport High School. She has played and excelled in a variety of sports since an early age. A.C. first began competing in track and field while attending Bridgeport Middle School, and she now competes in these sports as a high school student. B.P.J. is a student who was born male but identifies as female. He also was allowed to compete on the Bridgeport Middle School cross-country

and track teams. B.P.J. was permitted to use the girls' locker room to change clothes, which prompted A.C. to change clothes elsewhere, as A.C. feels uncomfortable dressing and undressing in the presence of biological males and does not want to see biological males undressing.

A.C. asserts that it is apparent that B.P.J.'s status as a biological male gives B.P.J. an advantage over A.C. and other female athletes. And she has tendered significant statistical information from her middle school track and field competitions supporting this opinion. [Record No. 72-3] While A.C. and B.P.J. presently attend different schools, A.C. believes B.P.J. will compete on the high school track team next year.

The plaintiff-States and the Intervenor plaintiffs (collectively, the "plaintiffs") lodge various objections to the Final Rule and its accompanying regulations and seek a declaratory judgment announcing their invalidity. *See* 28 U.S.C. § 2201(a). For now, the plaintiffs seek injunctive relief to prevent the Department from enforcing the Final Rule and regulations. They assert various violations of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), to wit, that the Department acted in excess of its statutory authority and in violation of the United States Constitution, and that its action was arbitrary and capricious.

IV.

The Standard of Review

The APA provides that a district court "may issue all necessary and appropriate process to postpone the effective date of any agency action" to the extent necessary to prevent irreparable injury. 5 U.S.C. § 705. And for purposes of this Court's analysis, a motion for a stay under § 705 is judged by the same standard as a motion for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. *Ohio v. Nuclear Reg. Comm'n*, 812 F.2d 288,

290 (6th Cir. 1987). Accordingly, the Court applies the following factors to the pending motions: (1) whether the movant has shown a strong or substantial likelihood of success on the merits; (2) whether the movant has demonstrated irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction. *Parker v. U.S. Dep't of Agric.*, 879 F.2d 1362, 1367 (6th Cir. 1989).

These factors are not "prerequisites that must be met," but instead, "interrelated considerations that must be balanced together." *Ne. Ohio Coal. for Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). Still, some showing of irreparable harm is required—otherwise preliminary injunctive relief would not be necessary. *See D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019). However, the amount of irreparable harm the plaintiffs must prove is inversely proportional to the probability of success on the merits they are able to demonstrate. *See Blackwell*, 467 F.3d at 1009.

At the outset, the Court acknowledges that a preliminary injunction is "an extraordinary remedy which should only be granted if the movant carries [its] burden of proving the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). The purpose of a preliminary injunction is simply to preserve the relative positions of the parties until a trial on the merits can be held. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (citing *Univ. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981)).

Likelihood of Success on the Merits

Start with the basics. Title IX prohibits educational institutions receiving federal funds from discriminating against individuals "on the basis of sex." 20 U.S.C. § 1681(a). Congress

authorized the Department to issue "rules, regulations, or orders of general applicability" that are "consistent with achievement of the objectives" of Title IX. 20 U.S.C. § 1682. Those objectives are avoiding the use of federal resources to support discriminatory practices and providing individual citizens with effective protection against those practices. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

The APA supplies the standard for judicial review of agency rulemaking. 5 U.S.C. § 706(2). The plaintiffs claim that the Department violated the Act in a variety of ways, including violating its statutory authority under Title IX, acting contrarily to various provisions of the United States Constitution, and by acting arbitrarily and capriciously. The Court addresses these arguments in turn.

The Department's interpretation of "on the basis of sex" exceeds its statutory authority.

The Court accords significant deference to an agency's reasonable interpretation of an ambiguous statute that is within the agency's jurisdiction.[6] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). *See also Nat'l Cable & Telecommc'ns. Ass'n Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (observing that "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."). But an agency has no authority to promulgate a regulation that "undoes the unambiguous language of the statute." *River City Fraternal Order of Police Lodge 614, Inc. v. Ky. Ret. Sys.*, 999 F.3d 1003, 1009 (6th Cir. 2021)

[6] The Court recognizes that *Chevron's* future is uncertain. *See Loper Bright Enters., et al. v. Raimondo*, No. 22-451 (S. Ct. Argued Jan. 17, 2024). However, this uncertainty does not impact the Court's analysis because it does not defer to the Department's interpretation of Title IX under *Chevron*.

(citing *Chevron*, 467 U.S. at 842-43); *see also Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 274 (5th Cir. 2015) (stating that "a broad grant of general rulemaking authority does not allow an agency to make amendments to statutory provisions"); *Texas v. Cardona*,-- F.3d--, 2024 WL 2947022 (N.D. Tex. June 11, 2024) (noting that "the Department lacks the authority to 'rewrite clear statutory terms to suit its own sense of how the statute should operate'") (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014)).

In determining whether *Chevron* deference is warranted, the Court looks first to whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. The Court begins by examining whether discrimination "on the basis of sex" is ambiguous. This inquiry requires the Court to perform a "full interpretive analysis" to fulfill its "emphatic duty to say what the law is." *See Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (alterations and internal quotation marks omitted). Rather than outsourcing this duty to the agency, the Court utilizes the traditional tools of statutory interpretation and spurns administrative constructions that contravene the plain meaning of the statute. *Id.* (citing *Chevron*, 467 U.S. at 843 n.9). Abdicating this obligation constitutes a "misuse of *Chevron*" and would "abrogate[] separation of powers without even the fig leaf of Congressional authorization." *Id.* (quoting *Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 780-81 (5th Cir. 2018) (Ho, J., concurring)).

The starting point for analyzing any statute is the language of the statute itself. *See Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Court begins with the text of Title IX because "a legislature says in a statute what it means and means in a statute what it says there." *Id.* (observing this first, cardinal canon of statutory interpretation). Title IX's general prohibition against discrimination provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a).

Because "sex" is not defined within the statute, the Court looks to its ordinary meaning at the time Title IX was enacted. *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018); *see Keen v. Helson*, 930 F.3d 799, 802-04 (6th Cir. 2019) (noting that, "[w]hen interpreting the words of a statute, contemporaneous dictionaries are the best place to start"). At that time, the term ordinarily was understood to mean "the character of being either male or female." *See The American College Dictionary* 1109 (1970); *see also Webster's Third New International Dictionary* 2081 (1971) ("one of the two divisions of organic esp. human beings respectively designated male or female"); *Webster's Dictionary* 442 (1972) ("the sum total of characteristics, structural and functional, which distinguish male and female organisms, esp. with regard to the part played in reproduction"); *Funk & Wagnalls Standard College Dictionary* 1231 (1973) ("Either of two divisions, male and female, by which organisms are distinguished with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* (1974) ("either of two divisions of organisms distinguished respectively as male or female").

Uncontroversially, "discriminate" means "[t]o make a difference in treatment or favor (of one as compared with others)." *Bostock*, 590 U.S. at 657 (quoting *Webster's New International Dictionary* 745 (2d ed. 1954)). *See also Merriam-Webster's Unabridged Dictionary* ("to make a difference in treatment or favor on a class or categorical basis in

disregard of individual merit)."[7] And as the text of Title IX reveals, "not all differential treatment based on biological sex will qualify as prohibited discrimination" under the statute. *Texas*, 2024 WL 2947022, at *32. Instead, discrimination means treating an individual *worse* than others who are similarly situated. *Id*. (citing *Bostock*, 590 U.S. at 657). 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.

"Statutory interpretation is a 'holistic endeavor'" and, therefore, "the structure and wording of other parts of a statute can help clarify the meaning of an isolated term." *Keen*, 930 F.3d at 803 (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)). Thus, while the meaning of these terms is straightforward, the Court nevertheless examines "the context provided by the rest of the statute." *Keen*, 930 F.3d at 803.

The Court initially considers the various exceptions to the general prohibition on discrimination. Section 1681(a)(1) through (9) lists multiple exceptions to the discrimination ban, which explicitly authorize institutions to treat males and females differently in certain situations. And the language Congress employed presumes that males and females will be separated based on biological sex. For example, section 1681(a)(2) provides a limited exception for educational institutions that had begun the process of changing from being an institution that only admitted students of *one sex* to being an institution that admitted students

[7] "Discriminate." *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, https://unabridged.merriam-webster.com/unabridged/discriminate. Accessed June 11, 2024.

of *both sexes*. Section 1681(a)(5) provides that the prohibition does not apply to any public institution of undergraduate education "that traditionally and continually from its establishment has had a policy of admitting only students of *one sex*."

Additionally, the sex-discrimination prohibition does not apply to membership practices of certain fraternities or sororities or the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth organizations, "the membership of which has traditionally been limited to persons *of one sex* . . . ." § 1681(a)(6)(A)-(B). Likewise, the prohibition does not apply to "boy or girl conferences," or "father-son" or "mother-daughter" activities as those events are defined under the statute. § 1681(a)(8)-(9). And section 1686 permits educational institutions receiving federal funds to maintain "separate living facilities for the different sexes." When Title IX is viewed in its entirety, its various provisions confirm that "sex" means the character of being male or female.

The Final Rule's conclusion that "sex" includes gender identity is based largely on the Supreme Court's decision in *Bostock v. Clayton County, Ga.*, 590 U.S. 644 (2020), a case which did not concern Title IX but, instead, involved claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. Specifically, *Bostock* involved various employers' decisions to terminate employees based solely on their status as homosexual or transgender persons. 590 U.S. at 653. Title VII, of course, prohibits discrimination in the employment context because of an individual's sex. § 2000e-2(a)(1).

The employer-defendants in *Bostock* argued that Title VII does not prohibit discrimination based on sexual orientation or gender identity. Specifically, they asserted that, for purposes of Title VII, "sex" means what it meant in 1964 and refers to "status as either

male or female [as] determined by reproductive biology." *Id.* at 655. The plaintiffs countered that even in 1964, "sex" was defined more broadly and "reach[ed] at least some norms concerning gender identity and sexual orientation." *Id.* The Court concluded that this distinction was not outcome determinative and proceeded on the assumption that "'sex' . . . refer[s] only to biological distinctions between male and female." *Id.*

The Court did not stop there, however. It proceeded to flesh out "what Title VII says about [sex]." *Id.* at 656. Observing that Title VII prohibits employers from taking certain actions "because of" sex, it noted that, "[s]o long as the plaintiff's sex was one but-for cause of [the employer's] decision, that is enough to trigger the law." *Id.* (citing *Burrage v. United States*, 571 U.S. 204, 211-12 (2014)). The Court observed that "homosexuality and transgender status are inextricably bound up with sex." For example, Bostock, who was fired for being gay (i.e., being attracted to men), would not have been fired for that same trait had he been a woman. And Aimee Stephens, who was fired after she informed her employer that she planned to "live and work full-time as a woman," would not have been fired for that trait had she been born female. The Court concluded that "to discriminate on these grounds requires an employer to intentionally treat the individual differently because of their sex" and, therefore, violates Title VII. *Id.* at 660-61.

Justice Alito, with whom Justice Thomas joined, issued a compelling dissent which proclaimed the majority's opinion *de facto* legislation. *Id.* at 683. The dissent first observed that Title VII explicitly lists the statuses that are protected under the statute—sexual orientation and gender identity are not included. The dissent further noted that a court's duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." *Id.* at 685 (emphasis in original). As Justice Alito remarked, "[i]f every single living

American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time." *Id.* The dissent also observed that, "[e]ven as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'" *Id.*

More notably for present purposes, the dissent noted that the majority's decision was "virtually certain to have far-reaching consequences," since "[o]ver 100 federal statutes prohibit discrimination because of sex." *Id.* at 724 (citing, *inter alia*, 20 U.S.C. § 1681(a)). These include transgender or "gender fluid" persons' purported entitlement to use bathrooms and locker rooms that are reserved for persons of the sex with which they identify and the right of transgender persons to participate on a sports team or in an athletic competition reserved for members of one biological sex. *Id.* at 726-27. The dissent also observed that the Court's decision could affect the way teachers and school officials are required to address students, as plaintiffs may begin to claim that the failure to use their preferred pronoun violates federal sex-discrimination laws. *Id.* at 731-32. At the same time, employers may become pressured to suppress employee speech that expresses disapproval of same-sex relationships or sex reassignment procedures. *Id.* at 732.

The majority responded to these real-world concerns by clarifying that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Id.* at 681. And even with respect to Title VII, the opinion said nothing about "bathrooms, locker rooms, or anything else of the kind." *Id.* Instead, the Court's holding was limited to the narrow issue of "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.'" *Id.*

While no Sixth Circuit case following *Bostock* confronts the precise issues at hand, that court has clearly acknowledged the limited nature of *Bostock's* holding. *L.W. by and through Williams v. Skrmetti,* 83 F.4th 460 (6th Cir. 2023) involved a challenge to Tennessee and Kentucky laws prohibiting healthcare providers from administering certain medical procedures to minors for purposes of attempting to alter the appearance or perception of the minor's sex. *See* Tenn. Code Ann. § 68-33-101, Ky. Rev. Stat. § 311.372. Transgender minors and their parents brought suit claiming that the laws violated their constitutional rights to due process and equal protection.

In rejecting the plaintiffs' equal protection claim, the court noted that the state laws were not based on sex and, therefore, were not subject to heightened review. Specifically, it concluded that the laws "treat similarly situated individuals evenhandedly" because the laws "regulate sex-transition treatments for all minors, regardless of sex." *Id.* at 479-80. Such an "across-the-board" regulation lacks the hallmarks of sex discrimination because it does not prefer one sex over the other. *Id.* at 480. In other words, the laws do not "bestow benefits or burdens based on sex" or provide different rules for males and females. *Id.* Further, the plaintiffs did not seek a remedy that would "equalize treatment options"—instead, the requested outcome was that "both sexes get a type of care or neither one does."

The court was not persuaded by the plaintiffs' reliance on *Bostock*. As an initial matter, it acknowledged that *Bostock* is limited to Title VII claims. *Id.* at 484. Further, the court noted that "there is a marked difference in application of the anti-discrimination principle" at issue. *Id.* at 485 (observing that "a case about potentially irreversible medical procedures

available to children falls far outside Title VII's adult-centered employment bailiwick"). The court also pointed to the enduring physical differences between men and women that permit states to make sex-based classifications as long as they do not "perpetuate[] invidious stereotypes or unfairly allocate[] benefits and burdens." *Id.* (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994)). As the Sixth Circuit observed, "recognizing and respecting biological sex differences does not amount to stereotyping—unless Justice Ginsburg's observation in *United States v. Virginia* that biological differences between men and women 'are enduring' amounts to stereotyping." *Id.* at 486 (quoting 518 U.S. 515, 533 (1996)).

Since *Bostock*, the Sixth Circuit also has highlighted the differences between Title VII and Title IX. For example, in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), a public university professor filed suit against his employer after being disciplined for refusing to use a transgender student's preferred pronouns. The university relied on the principles announced in *Bostock* in arguing that it had a compelling interest in stopping discrimination against transgender students. *Id.* at 510 (citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018)). The court noted, however, that Title VII "differs from Title IX in important respects," and "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Id.* at 510 n.4. *See also Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (declining to apply *Bostock* to an ADEA claim, as the Supreme Court "was clear on the narrow reach of its decision and how it was only limited to Title VII itself"). *See also Texas*, 2024 WL 2947022, at *37 ("Title VII focuses exclusively on hiring and firing in employment, whereas Title IX deals with educational opportunities").

The purpose of statutory construction is to give effect to the intent of Congress. *See United States v. Underhill*, 813 F.2d 105, 111 (6th Cir. 1987) (citing *United States v. Am.*

Trucking Ass'ns, Inc., 310 U.S. 532, 542-44 (1940)). While Title VII allows employers to discriminate between the sexes when the employee's sex is a bona fide occupational qualification, 42 U.S.C. § 2000e-2(e), Title IX is rife with instances in which males and females may be separated. *See* 20 U.S.C. §§ 1681(a)(1)-(9), 1686, 34 C.F.R. §§ 106.34, 106.41(b). Title IX's text, coupled with the legislative history discussed at the beginning at this opinion, leaves little doubt that Title IX's drafters meant "male" and "female" when they wrote "on the basis of sex." *See* 118 Cong. Reg. 5807 (Feb. 28, 1972) (Statement of Sen. Bayh) (acknowledging that Title IX "permit[s] differential treatment by sex" in various situations including "in sport facilities or other instances where personal privacy must be preserved"). And this conclusion is bolstered by the regulatory framework the Department leaves intact.

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.

In attempting to justify these inconsistencies, the Department states that it:

> has long recognized that sex 'separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively sex discrimination' because such sex-separate facilities generally impose no more than de minimis harm on students. . . . But consistent with federal court decisions and guidelines published by respected medical organizations, the Department explained that sex separation that prevents a person from participating in a program or activity consistent with their gender identity *does* cause more than de minimis harm—a conclusion that Plaintiffs do not dispute.

[Record No. 73, p. 18 (citing 89 Fed. Reg. at 33816)] The Department attempts to explain away the areas in which sex segregation *is* still allowed by simply stating that Congress has specified a "few limited contexts in which more than de minimis harm is permitted by the statute." *Id.* (citing 20 U.S.C. §§ 1681(a), 1686). But this throwaway reasoning does not reconcile these stark inconsistencies or persuade the Court that this is the result that Congress intended.

The United States Court of Appeals for the Eleventh Circuit considered similar issues in *Adams by and through Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022). In *Adams*, a high school student who was born female, but identified as male, sued the school under 42 U.S.C. § 1983 and Title IX due to the school's policy that prohibited her from using the boys' bathroom. The court declined to apply the holding from *Bostock* in this context, observing that, unlike Title VII, Title IX includes "express statutory and regulatory carve-outs for differentiating between the sexes when it comes to separate living and bathroom facilities, among others." *Id.* at 811. It reasoned that, if "'sex' [was] ambiguous enough to include gender identity," then the various carve-outs would be rendered meaningless." *Id.* at

813. *See Chrysler Corp. v. C.I.R.*, 436 F.3d 644, 654-55 (6th Cir. 2006) (stating that statutory provisions should be interpreted so that other provisions in the statute are not rendered inconsistent, superfluous, or meaningless).

The likely consequences of the Final Rule are virtually limitless. Title IX prohibits discrimination "on the basis of sex." And as noted at the outset of this opinion, the Department acknowledges that "sex is binary and assigned at birth" but it contends that "on the basis of sex" includes gender identity, which describes "an individual's sense of their gender, which *may or may not* be different from their sex assigned at birth." 89 Fed. Reg. at 33809.

With those principles in mind, consider the following hypothetical: Taylor is a biological male student and uses he/him pronouns. Taylor has a hypermasculine self-identity that he feels is essential to his being. But unfortunately for Taylor, his parents gave him a family name that he finds feminine. Taylor feels that the name Bruce is more reflective of how he expresses his gender and has asked his teacher to refer to him by this new name. However, his teacher refuses to do so even after he accuses the teacher of defamation. The teacher's refusal to acknowledge the name that comports with the student's gender expression makes the student feel invisible and emasculated. The student's frustration becomes so severe that he decides to drop out of the class.

This scenario does not implicate the male/female dichotomy or subject the student to discrimination on the basis of his sex. It does, however, arguably reflect discrimination on the basis of gender identity, which *would* result in a violation of the new regulations. This is an impermissible result. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (noting that "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to

adopt regulations to carry into effect the will of Congress as expressed by the statute.") (internal quotation marks omitted).

"Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004). While undercutting that purpose, the Final Rule creates myriad inconsistencies with Title IX's text and its longstanding regulations. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining that "[a]n agency may not . . .depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). Like the district court in Louisiana, the undersigned is not persuaded that the ordinary meaning of sex includes subjective gender identity. *See State of Louisiana, et al. v. U.S. Dep't of Educ., et al.*, 3: 24-CV-00563, 2024 WL 2978786, at *4 (W.D. La. June 13, 2024) (observing that "[t]here is nothing in the text or history of Title IX indicating that the law was meant to apply to anyone other than biological men and/or women"). Accordingly, the plaintiffs are likely to succeed on their claim that the Department exceeded its statutory authority in redefining "on the basis of sex" for purposes of Title IX.

The major questions doctrine counsels against the Department's reading.

For purposes of Title IX, "sex" is unambiguous. Therefore, there is no "implicit delegation from Congress" to the Department to change or expand its meaning. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 159 (explaining that *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"). But even if the word were ambiguous, there would be significant reason for pause before assuming that Congress "had intended such an implicit

delegation." *See id.* Education is one of the most important functions of state and local governments and is an area where states "historically have been sovereign." *Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954); *United States v. Lopez*, 514 U.S. 549, 564 (1995). Accordingly, it is unlikely that Congress would have intended to delegate the authority to deviate from Title IX's original purpose "in so cryptic a fashion." *See West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

The major questions doctrine assumes that Congress speaks clearly when it delegates to an agency the authority to make "decisions of vast economic and political significance." *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014). *See also West Virginia by and through Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1146-47 (11th Cir. 2023) (suggesting that a "major question" is more likely when it "alters the traditional balance of federalism by imposing a condition on a state's entire budget process"). Thus, if an agency's regulatory action "brings about an enormous and transformative expansion in [the agency's] regulatory authority," then there must be "clear congressional authorization" to do so. *Id.*

While Congressional inaction is of limited persuasive value, the Court notes that Congress has refused to expand Title IX to include gender identity. *See* Student Non-Discrimination Act of 2015 ("SNDA"), S. 439 114th Cong. (2015). Just like the Final Rule, the SNDA prohibited discrimination based on actual or perceived sexual orientation or gender identity under any program or activity receiving federal financial assistance. Programs or activities not complying with the SNDA would have faced losing federal funds and/or private lawsuits. However, the SNDA did not receive enough votes in the Senate to proceed. Separation of powers requires that any legislation pass through the legislature, no

matter how well-intentioned the policy may be. *See Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 472-73 (6th Cir. 2021). While not outcome determinative, this factor weighs in the plaintiff-State's favor, as the changes implemented under the Final Rule represent a novel expansion of the Department's power under Title IX. *See State of Louisiana*, 2024 WL 2978786, at *13-14 (concluding that the Final Rule involves a major question pursuant to the major questions doctrine).

The clear statement rule weighs against the Department's reading.

Title IX was enacted as an exercise of Congress' powers under the Spending Clause U.S. Const. Art. I, § 8, cl. 1. The Spending Clause gives Congress broad powers to "set the terms on which it disburses federal funds." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022). And "legislation 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." *Id.* (quoting *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). As with any contract, education institutions cannot "knowingly accept" funds from the federal government unless they would "'clearly understand . . . the obligations' that would come along with doing so." *Id.* at 219 (quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006)). *See also South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (providing that Congress must state the conditions of receipt of federal funds "unambiguously" so that the states may "exercise their choice knowingly, cognizant of the consequences of their participation").

Title IX's language provides no indication that an institution's receipt of federal funds is conditioned on any sort of mandate concerning gender identity. The Spending Clause is an Article I power, so it is likely that Congress, and not the Department or any other agency, must

provide the constitutionally required clarity. *See State v. Yellen*, 539 F. Supp. 3d 802, 816 (S.D. Ohio 2021) (citing *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (en banc) (Sutton, J. concurring). *See also Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985) (acknowledging applicability of agency guidance to clarify the nature of condition but noting that the statute itself provided the constitutionally required level of clarity).

The Department relies on *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) in which the Supreme Court held that Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination. The Eleventh Circuit had dismissed the plaintiff's complaint, reasoning that Title IX did not prohibit retaliation because "the statute makes no mention of retaliation." *Id.* at 174. The Supreme Court remarked that this conclusion ignored the import of its repeated holdings construing Title IX broadly. For instance, although the statute does not mention sexual harassment or a recipient's deliberate indifference to sexual harassment, these acts have been deemed discrimination under Title IX. *Id.* at 174-75.

But *Jackson* did not involve an agency interpretation of Title IX. *See* 544 U.S. at 178. Rather, the Court looked to Title IX and determined, based on its plain language and the relevant case law, that "intentional discrimination on the basis of sex" includes retaliation. *Jackson* indicates that Title IX must be read broadly with respect to the *category* of discrimination that falls under the statute. Neither *Jackson* nor any of the cases it cites indicates the statute should be read to expand the traditional definition of "on the basis of sex."

The Eleventh Circuit explained in *Adams* that "what constitutes 'sex' for purposes of Title IX will have ramifications far beyond the bathroom door at a single high school" and will

"at the very least, generally impact . . . locker rooms, and showers, in addition to bathrooms, at schools across the country—affecting students in kindergarten through the post-graduate level." 57 F.4th at 816. This is particularly true since the Department construes this mandate to protect anyone "participating or attempting to participate" in a recipient's program or activity. *See* 89 Fed. Reg. at 33816. The apparent result is that not only a recipient's students, but virtually anyone who enters a public school, would be entitled to use the facilities consistent with that person's purported gender identity. For all these reasons, it is likely that a clear statement from Congress equating "sex" to "gender identity" or "transgender status" is necessary before states' acceptance of federal funds may be conditioned on such a term. *See Adams*, 57 F.4th at 816; *State of Louisiana*, 2024 WL 2978786, at *16 (concluding that the Final Rule violates the Spending Clause). This consideration weighs in the plaintiffs' favor with respect to their likelihood of success on the merits.

The plaintiffs are likely to succeed on their First Amendment claims.

The First Amendment to the United States Constitution stands as a sentry over one of the Nation's most indispensable freedoms through a proclamation clear and uncompromising: "Congress shall make no law . . . abridging the freedom of speech, ..." U.S. Const. amend. I. Today's Free Speech principles trace back to the democratic ideals of ancient Western Civilization.[8] These early societies understood that the unfettered exchange of ideas was the

[8] *See, e.g.,* Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 S. Ct. Rev. 293, 300 ("The classical Athenians adopted two free-speech concepts that were central to their democracy. The first was isēgoria, which described the equal opportunity of all Athenian citizens to speak in the principal political institution of the democracy, the Assembly. The second was parrhēsia, which described the practice of Athenians to speak openly and frankly once they had the floor." (citations and footnotes omitted)); Cornelius Tacitus, *The Histories* 3 (Kenneth Wellesley III trans., Penguin Books,

lifeblood of a free and vibrant polity. Centuries later, these values were embraced by many Enlightenment thinkers, who viewed them as indispensable to reason and individual rights. *See, e.g.*, John Milton, *Areopagitica* 33 (J.C. Suffolk ed., Univ. Tutorial Press 1968) ("Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."); John Locke, *Two Treatises of Government* 306 (Peter Laslett ed., Cambridge Univ. Press 1988) ("The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of laws, where there is no law, there is no freedom."); 2 The Complete Writings of Thomas Paine 588 (P. Foner ed. 1945) ("He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.").[9]

As the American colonies wrested their independence from British tyranny, the primacy of free speech became even more pronounced. Benjamin Franklin, writing under the pseudonym Silence Dogood, encapsulated the critical nature of free speech in 1722: "Whoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech;" Silence Dogood, Letter to the Editor, No. 8, The New-England Courant (July 9, 1722). The trial of John Peter Zenger in 1735, wherein a jury acquitted him of seditious libel for publishing anonymous political pamphlets attacking the Crown Governor of New York, marked a seminal

---

1995) ("Modern times are indeed happy as few others have been, for we can think as we please, and speak as we think.").

[9] Arguably the most famous "quote" from an Enlightenment thinker is the apocryphal declaration attributed to Voltaire: "I disapprove of what you say, but I will defend to the death your right to say it." *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976) ("The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.").

moment in the American tradition of protecting free expression. *See* J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 9–19 (S. Katz ed. 1972).

The Nation's Founders enshrined these principles in the nascent republic, acutely aware of the profound importance of free speech to a democratic nation and the consequences of its absence. *See* Benjamin Franklin, *On Freedom of Speech and the Press*, Pa. Gazette, Nov. 1737, *reprinted in The Works of Benjamin Franklin, Vol. II*, 285 (Philadelphia, Hilliard, Gray & Co. 1840) ("Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins."); *see also* John Adams, *A Dissertation on the Canon and Feudal Law* (1765), *reprinted in* 3 *The Works of John Adams* 447, 456 (Charles C. Little & James Brown eds., 1851) ("[L]iberty cannot be preserved without a general knowledge among the people, who have a right . . . and a desire to know.").

James Madison, America's fourth President and a chief architect of the Constitution, remarked that "the right of freely examining public characters and measures, and of free communication among the people thereon . . . has ever been justly deemed, the only effectual guardian of every other right." James Madison, *Resolutions of 1798* (Dec. 21, 1798), *in* 6 *The Writings of James Madison*, 1790–1802, at 328–29 (Gaillard Hunt ed., 1900). In his First Inaugural Address, Thomas Jefferson encapsulated the ethos of the First Amendment with the assertion, "[e]rror of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson, *First Inaugural Address*, *in The Papers of Thomas Jefferson: 17 February to 30 April 1801*, at 148 (Barbara G. Oberg ed., 2006). This articulation of the marketplace of ideas remains a cornerstone of Supreme Court jurisprudence. *See Whitney v. California*, 274 U.S. 357, 375 (1927) ("Those who won our independence 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.").

This underlying vision transcends mere tolerance by envisioning a dynamic forum where even the most politically charged and contentious ideas are open for debate. To that end, speech on matters of public importance receive the highest protection under the First Amendment. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

The enduring principle of protecting pure speech is further underscored in *Snyder v. Phelps*, where the Supreme Court protected the right to express even deeply unpopular and offensive viewpoints. *See* 562 U.S. 443, 454 (2011) (holding that the First Amendment protects the right to picket outside military funerals with signs bearing messages such as, "Thank God for Dead Soldiers"). But in a society that is "constantly proliferating new and ingenious forms of expression," *Erznoznik v. Jacksonville*, 422 U.S. 205, 210 (1975), it can be "necessary to protect the superfluous in order to preserve the necessary," *Mahanoy Area Sch. Dist. v. B. L. by and through Levy*, 594 U.S. 180, 193 (2021). The Supreme Court's consistent defense of offensive and even hateful speech demonstrates a profound commitment to the principle that freedom of expression must include the protection of all ideas, no matter how repugnant they may be to some. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of

individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.").

Speech in Schools

Schools are not "enclaves of totalitarianism," where "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 511 (1969). To the contrary, the classroom is the most cherished "marketplace of ideas," where the Nation's future leaders must be exposed to a "robust exchange" of competing viewpoints. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," *id.*, an environment where "[t]eachers and students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding," *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957).

But "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). For example, the First Amendment does not prevent schools from prohibiting vulgar and offensive speech that undermines the school's educational mission. *See id.* at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."). But undermining a school's educational mission must mean "more than a mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint." *Tinker*, 393 U.S. at 509. Where speech constitutes a "substantial disruption" or causes a "material interference

with school activities," its suppression may fall outside the reach of First Amendment protections.[10] *Id.* at 514.

In *Fraser*, the Supreme Court upheld disciplinary action taken against a high school student who gave a speech at a school assembly where he referred to a fellow classmate "in terms of an elaborate, graphic, and explicit sexual metaphor." 478 U.S. at 678. The speech had an immediate and disruptive impact on many of the approximately 600 students in the auditorium; one teacher even felt it necessary to dedicate a portion of the following day's class to discussing the speech. *Id.* ("Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech."). Beyond recognizing the disruptive nature of certain speech, the *Fraser* decision recognizes schools' interest in and ability to "protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684.

Schools' compelling interest in protecting their students may also permit them to regulate speech encouraging illegal activity. *See Morse v. Frederick*, 551 U.S. 393, 410 (2007) (upholding the suspension of a student who unfurled a banner promoting illegal drug use at a school event). So too may schools impose certain restrictions on speech when necessary to maintain student's physical safety. *See Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 336 (6th Cir. 2010) (upholding a ban on displaying the Confederate flag where the school reasonably

[10] Schools also may exercise editorial control "over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

forecasts it will incite disruption in light of past racial violence, tension, and threats). But these limited exceptions do not absolve schools of the need to carefully balance their duty to provide a safe and effective learning environment with students' rights to free expression.

The impact of speech regulation within schools also has a unique impact on institutions themselves as well as the faculty and staff who play a crucial role in fostering an effective learning environment. Academic freedom is a principle recognized by the Sixth Circuit "to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy." *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (quoting *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985)).

While teachers possess certain First Amendment protections over their in-class speech, their "right to academic freedom is not absolute" and may be subject to limitations that ensure the effectiveness of their educational duties and the institution's mission. *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); s*ee Pickering v. Board of Ed. of Tp. High School Dist.*, 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

Whether a public teacher's speech is constitutionally protected depends on whether it is "public" or "private" in nature. *Connick v. Myers*, 461 U.S. 138, 146–47 (1983). This distinction recognizes that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 145 (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)). This form of

speech is "the essence of self-government," *id.* (quoting *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964), "and is entitled to special protection," *id.*

The court looks to the "content, form, and context of a given statement, as revealed by the whole record" in determining whether speech is public in nature. *Id.* at 147–48. "Speech that relates 'to any matter of political, social, or other concern to the community' touches upon matters of public concern." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 678 (2001) (quoting *Connick*, 461 U.S. at 146)). "Thus, a teachers in-class speech about 'race, gender, and power conflicts' addresses matters of public concern." *Meriwether,* 992 F.3d at 508 (quoting *Hardy*, 260 F.3d at 679).

"Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.'" *Hardy*, 260 F.3d at 679 (citing Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach,* 65 N.Y.U. L. Rev. 693, 702 (1990)). But the court must also determine "the *point* of the speech in question . . . because controversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection." *Dambrot v. Cent. Mich. Univ.,* 55 F.3d, 1177–87 (6th Cir. 1995) (emphasis in original) (cleaned up). "The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.* at 1189. This embrace of academic freedom and open dialogue in the classroom is exemplified in the following case.

The Sixth Circuit decision in *Meriwether v. Hartop* addresses the pivotal intersection of academic freedom and free speech within academic settings. 992 F.3d 492, 505 (6th Cir.

2021). Dr. Nicholas Meriwether, a philosophy professor at Shawnee State University, challenged the university's disciplinary actions against him for refusing to refer to a student using pronouns reflecting the student's "self-asserted gender identity." *Id.* at 498. Meriwether, who used the Socratic method for class discussion, addressed his students as "Mr." or "Ms." to instill a sense of formality and seriousness into the academic setting. *Id.* at 499. He found this practice "an important pedagogical tool in all of his classes." *Id.*

In 2018, Meriwether was approached by a transgender student[11] who "demanded that Meriwether refer to [the student] as a woman and use feminine titles and pronouns." *Id.* (quotations omitted). Due to his religious beliefs, Meriwether instead referred to the student by last name—a practice the student and university administration found unacceptable. Meriwether was instead presented with two options: "(1) stop using all sex-based pronouns in referring to students (a practical impossibility that would also alter the pedagogical environment in his classroom), or (2) refer to [the student] as a female, even though doing so would violate Meriwether's religious beliefs." *Id.* at 500. When he failed to abide, the university's Title IX office concluded that Meriwether's "disparate treatment" constituted a "hostile environment." *Id.* After finding no recourse through administrative remedies, Meriwether sued in federal court. After the district court dismissed Meriwether's free-speech and free-exercise claims, the Sixth Circuit reversed the holdings with an opinion that sheds considerable light on the issues presently before this Court.

[11] Meriwether is quoted in the record as stating that "no one . . . would have assumed that [the student] was female" based on outward appearance. *Meriwether,* 992 F.3d at 499.

The Sixth Circuit's opinion expressly recognized that "titles and pronouns carry a message," and compelling someone to use preferred pronouns communicates the message that "[p]eople can have a gender identity inconsistent with their sex at birth." *Id.* at 507. The court found that Meriwether's refusal to use preferred pronouns "*was* the message," one that expressed his belief that "sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." *Id.* at 509 (quotation omitted). "The 'focus,' 'point,' 'intent,' and 'communicative purpose' of the speech in question was a matter of public concern," *id.* at 509 (quoting *Farhat v. Jopke*, 370 F.3d 580, 592 (6th Cir. 2004)), and it addressed "a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes," *id.* at 508 (citation omitted). Plainly stated: "[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id.* at 508.

The opinion also illustrates the profound significance of the First Amendment's protection of a teacher's in-class free speech rights more broadly.

> If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as "comrades." That cannot be.

Id. at 505.

Compelled Speech

Individuals cannot be coerced into affirming messages with which they fundamentally disagree. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak

freely and the right to refrain from speaking at all."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("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 plaintiffs argue that the Final Rule prohibits schools from maintaining certain sex-based distinctions while mandating adherence to "gender-identity notions divorced from sex entirely." [Record No. 19, p. 9] In doing so, private and public institutions, as well as the students, faculty, and staff therein, will be forced to convey a particular message that may contradict moral or religious values. [*Id.* at 24] For example, the Final Rule's definition of harassment will likely compel "students and teachers to use 'preferred' rather than accurate pronouns." [Record No. 19-1, p. 17] Christian Educators reports that some of its members have already declined requests to use "inaccurate pronouns" and "fear the new rules will compel them to speak these words." [Record No. 63-1, p. 11]. In addition to compelling affirmation of gender identity through policy, the Final Rule compels silence of opposing viewpoints. "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

The Department argues that the Final Rule's guidance is clear: "nothing in the regulations requires or authorizes a recipient to violate anyone's First Amendment rights." 89 Fed. Reg. at 33516. Furthermore, the Department argues that the regulations have codified a provision expressly declaring that nothing in the Title IX regulations requires a recipient to "[r]estrict any rights that would otherwise be protected from government action by the First

Amendment of the U.S. Constitution." 89 Fed. Reg. at 33492; *see* 85 Fed. Reg. at 30418, 30573 (adding 34 C.F.R. § 106.6(d)(1) via the 2020 amendments). Despite these assurances, the plaintiffs contend that the text of the regulation and the Department's past action speaks for itself.

The Department's 2016 Dear Colleague Letter noted that schools "must treat students consistent with their gender identity," while noting that prior Title IX investigations were resolved "with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity." Dep't of Just. & Dep't of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016). The Final Rule does not depart from that position.

When commenters questioned whether misgendering could constitute sex-based harassment, the Department indicated that it could, depending on the circumstances. *See* 89 Fed. Reg. at 33516 ("Many commenters, as highlighted above, believe that misgendering is one form of sex-based harassment. As discussed throughout this preamble, whether verbal conduct constitutes sex-based harassment is necessarily fact-specific."); *id.* ("[H]arassing a student—including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on the student's nonconformity with stereotypical notions of masculinity and femininity or gender identity—can constitute discrimination on the basis of sex under Title IX in certain circumstances.").

In a discussion section on "Free Speech," the Department acknowledges that "the First Amendment may in certain circumstances constrain the manner in which a recipient responds to sex-based harassment in the form of speech," but suggests nonetheless that the Final Rule has been narrowly tailored to advance the Department's "'compelling interest in eradicating

discrimination' on the basis of sex." *Id.* at 33503 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984)).

To ascertain the Department's true intention behind the 2020 First Amendment saving clause, 34 C.F.R. § 106.6(d)(2), one needs to look no further than the Amicus Briefs that the Department highlights on a webpage dedicated to "Resources for LGBTI+ Students."[12] In November 2021, after the saving clause had already been adopted, the United States filed an Amicus Brief in a case before the Seventh Circuit Court of Appeals.[13] *See* Brief for the United States, *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir. filed Nov. 8, 2021), ECF No. 34. The question presented was,

> whether a public high school must accommodate a teacher's religious objection to referring to transgender students by names and pronouns that match their gender identities, by permitting him to address all students by their last names only, where the record shows that the accommodation harmed students and undermined the school's policy of providing a supportive learning environment for all students.

Id. at 2–3. As a result of the teacher's accommodation, two transgender students reported that the use of their last names "made them feel isolated and targeted." *Id.* at 6. The students also expressed that they "felt strongly that they wanted others to acknowledge their corrected names, and [the teacher's] refusal to do so hurt them." *Id.* The faculty advisor for the school's Equality Alliance club reported that "the emotional distress and the harm that was being caused . . . was very, very clear." *Id.* The Brief goes on to describe the adverse effects this religious

---

[12] *See* U.S. Dep't of Educ., Resources for LGBTI+ Students (last visited June 11, 2024), https://www2.ed.gov/about/offices/list/ocr/lgbt.html.

[13] The only claims before the Seventh Circuit were grounded in Title VII. The Government's interpretation of Title IX's mandate is nonetheless informative.

accommodation had on students and school operations, citing a report that it was "affecting the overall functioning of the performing arts department," and that a parent referred to the accommodation as "'very disrespectful and hurtful'—even 'bordering on bullying.'" *Id.* at 8 (cleaned up). Ultimately, the school rescinded the accommodation and explained that if the teacher was unwilling to adhere to the school's pronoun policy he could resign or would be fired.

The Brief concludes that the last-name only accommodation "harmed students and increased the school's risk of Title IX liability," after finding undisputed evidence that it "had caused transgender students . . . significant distress and alienation." *Id.* at 12. One of the transgender students decided not to continue in that teacher's class the following year because the teacher's "'refusal to acknowledge his personhood and identity' made him 'miserable' and caused him 'anxiety.'" The Government concludes that "this evidence, if proven, could potentially support a claim that [the student] was 'excluded from participation in,' 'denied the benefits of,' and 'subjected to discrimination under' an education program or activity under Title IX." *Id.* at 29.

The Government further contends that because the teacher "changed his behavior in obvious ways, no longer using honorifics like 'Mr.' and 'Ms.'," it served to "isolate and alienate those students." *Id.* at 29–30 (cleaned up). The Brief cautioned that "practices adopted for discriminatory reasons—even facially neutral practices—can constitute unlawful intentional discrimination." *Id.* at 31. The Government takes the position that because "students correctly recognized that [the teacher's] facially neutral approach was motivated by an aversion to referring to transgender students by names and pronouns that accorded with their gender identity," the otherwise neutral naming practice "does not diminish the

reasonableness of school officials' concern that his conduct could have created a risk of Title IX liability." *Id.* at 31–32.

It is unclear how the Government's articulated position can be seen as anything less than a tacit endorsement of a content-based heckler's veto.[14] So long as the offended individuals complain with sufficient vigor, the refusal to abide by preferred pronouns can be deemed harassment and exposes a recipient of Federal funds to liability under Title IX. Given the Department's apparent interpretation of Title IX's mandate, the saving clause is exposed as little more than a paper tiger.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). "[C]ontent-based restrictions on speech [are] presumed invalid," and matters of public importance receive the highest protection under First Amendment jurisprudence. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). "When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022) (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). With respect to the topic of gender identity, the Biden

[14] The Sixth Circuit has acknowledged the impact of the heckler's veto, quoting an explanation provided by constitutional scholar Harry Kalven: "If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve." *Bible Believers v. Wayne County*, 805 F.3d 228, 234 n.1 (6th Cir. 2015) (quoting Harry Kalven, Jr., *The Negro and the First Amendment* 140 (Ohio St. Univ. Press 1965)).

Administration has taken a clear position.[15] And while the First Amendment does not require "viewpoint-neutrality on government speech," *Matal v. Tam*, 582 U.S. 218, 234 (2017), "[t]he government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed," *R.A.V. v. City of St. Paul,* 505 U.S. 377, 386 (1992). Nor can the Government compel speech "to 'excise certain ideas or viewpoints from the public dialogue.'" *303 Creative LLC v. Elenis*, 600 U.S. 570, 588 (2023) (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U. S. 622, 642 (1994)).

The Department's Final Rule forces the Nation's schools and educators to convey a message ordained in Washington, D.C., while silencing dissenting opinions and undermining state law and the discretion of local school boards. *See Nat'l Rifle Assoc. of Am. v. Vullo*, No. 22-842, slip op. at 1 (U.S. 2024) ("A government entity's 'threat of invoking legal sanctions and other means of coercion' against a third party 'to achieve the suppression' of disfavored speech violates the First Amendment."). In his 2024 Proclamation on Transgender Day of Visibility, President Biden declared that "extremists are proposing hundreds of hateful laws that target and terrify transgender kids and their families—silencing teachers;

---

[15] *See, e.g.*, Exec. Order No. 14075, Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, 87 Fed. Reg. 37189 (June 15, 2022); Exec. Order No. 14021, Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. 13803 (Mar. 8, 2021); Exec. Order No. 14020, Establishment of the White House Gender Policy Council, 86 Fed. Reg. 13797 (Mar. 8, 2021); Exec. Order No. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021); Proclamation No. 10767, Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Pride Month, 2024, 89 Fed. Reg. 48225 (May 31, 2024); Proclamation No. 10724, Transgender Day of Visibility, 2024, 89 Fed. Reg. 22901 (Mar. 29, 2024); U.S. Office of Personnel Management, Guidance Regarding Gender Identity and Inclusion in the Federal Workplace (Mar. 31, 2023) (directing the use of preferred pronouns while noting that failing to do so could contribute to an unlawful hostile work environment).

. . . ." Proclamation No. 10724, Transgender Day of Visibility, 2024, 89 Fed. Reg. 22901 (Mar. 29, 2024). To cite just one example, Tennessee law provides that teachers are not "[r]equired to use a student's preferred pronoun when referring to the student if the preferred pronoun is not consistent with the student's biological sex." Tenn Code Ann. § 49-6-5102(b); *see also* Ky. Rev. Stat. § 158.191(5)(c) (protecting the same). In other words, Tennessee teachers are not compelled to communicate the message that "[p]eople can have a gender identity inconsistent with their sex at birth." *See Meriwether*, 992 F.3d at 507. Under the Final Rule, these teachers will be silenced. The Final Rule only suppresses one side of the debate, strangling the marketplace of ideas in a way that is "uniquely harmful to a free and democratic society." *Nat'l Rifle Assoc. of Am.*, No. 22-842, slip op. at 8.

The Supreme Court has spoken clearly on this issue. In *R.A.V. v. City of St. Paul*, the Court struck down a city ordinance that prohibited speech or symbols one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. 377, 379 (1992). The Court found the ordinance impermissibly engaged in viewpoint discrimination by "impos[ing] special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. Similarly, the Final Rule here attempts to compel speakers to affirm the concept of gender identity, while punishing or silencing those with a different perspective. That is plainly impermissible. *See id.* at 392 ("[The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

The Final Rule compels speech and otherwise engages in viewpoint discrimination. This consideration weighs in the plaintiffs' favor with respect to their likelihood of success on the merits.

Chilled Speech

Chilled speech differs from the overt suppression of speech because it is self-imposed. Laws and regulations imposing broad and vague restrictions on speech can deter individuals from exercising their rights out of fear of punishment. The result is that the avoidance of wrongdoing leads people to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965). "Overbroad laws 'may deter or "chill" constitutionally protected speech,' and if would-be speakers remain silent, society will lose their contributions to the 'marketplace of ideas.'" *United States v. Hansen*, 599 U.S. 762, 769–70 (2023) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). A law or regulation "may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). A regulation can also be impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)).

The plaintiff-States contend that the Final Rule's "broadened harassment definition" will chill the speech of those who object to the gender-identity mandate. [Record No. 19-1, 9]. Christian Educators similarly condemns the Final Rule as both overbroad and vague. [Record No. 63-1, p. 26]. It argues that the Final Rule is vague because the gender-

identity mandate includes undefined "subjective concepts," and is overbroad because the new amorphous harassment standard only requires conduct be "severe *or* pervasive," and is entirely dependent on a claimant's subjective sense of harm. [*Id.*]

The plaintiffs' chilled speech concerns largely coalesce around the interplay of the Final Rule's definitions of "sex," "sex-based harassment," and "hostile environment harassment." The expansive new definition of "sex," includes "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33886 (adding 34 C.F.R. § 106.10 to increase the scope of "discrimination on the basis of sex"). Commenters share the plaintiffs' concerns regarding vagueness.

> Some commenters argued that the term "gender identity" is subjective, unconstitutionally vague, overbroad, and requires "self-identification" of which others may not be aware, or that may change unbeknownst to a recipient. One commenter asserted that the failure to define the term makes it impossible for recipients to determine how to adequately ensure they do not discriminate on that basis.

Id. at 33809. In response to those concerns, the Department stated that it "disagrees that the term 'gender identity' is too vague, subjective, or overbroad . . . . The Department understands gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth." *Id. But the Department's response offers no guidance whatsoever.* Arguably worse, it suggests that this term of vital importance can be subjectively defined by each and every individual based entirely upon his or her own internal sense of self.

The Final Rule takes that expanded—and undefined—characterization of "sex," and places it into a newly defined prohibition on "sex-based harassment."

> *Sex-based harassment* prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:
> (1) *Quid pro quo harassment.* . . . ;
> (2) *Hostile environment harassment.* . . . ; or
> (3) *Specific offenses.* . . .

Id. at 33884 (amending 34 C.F.R. § 106.02). The focus of the plaintiffs' concern pertains to "hostile environment harassment," which is also a newly defined term. It includes the following:

> Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). . . .

Id.

This definition is once again vague, but the entirely fact-dependent and subjective nature of it also makes it overbroad. How does one determine when conduct will be "objectively offensive"? Whose standard is the measure of objectivity? Take the following comments regarding misgendering as an example. "[C]ommenters urged the Department to clarify that misgendering is a form of sex-based harassment that can create a hostile environment, especially for gender-nonconforming and LGBTQI+ students." *Id.* at 33516. And another: "Many commenters, as highlighted above, believe that misgendering is one form of sex-based harassment." *Id.* Contrast those viewpoints with this one: "Some commenters argued that prohibiting misgendering as a form of harassment could lead to compelled speech in violation of the First Amendment and could be used to target people with unpopular viewpoints." *Id.* Considering this is a hotly debated topic of public interest, how can there be an "objective" standard? Unsurprisingly, the Department has no answer other

than to note that it is "fact-specific" and that "a stray remark, such as a misuse of language, would not constitute harassment under this standard." *Id.*

The problem highlighted above is one the Supreme Court has previously addressed in the context of "true threats" and "the danger of deterring non-threatening speech." *Counterman v. Colorado*, 600 U.S. 66, 78 (2023). "An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats 'a wide berth.'" *Id.* (quoting *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)). Concerningly, "that degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.'" *Rogers*, 422 U.S. at 48 (Marshall, J., concurring) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). But in this case, the "objective standard" is inherently not objective at all because the Final Rule imposes a viewpoint consistent with the affirmation of gender identity. So, in the context of misgendering, the offensive conduct must be "subjectively offensive" and "objectively offensive" as viewed through the lens of someone who recognizes sex and gender to be separate and distinct.

Similarly vague, what is required for conduct to be "so severe ***or*** pervasive"? Once again, the Court is not alone in wondering: "One commenter questioned how a recipient would measure whether the conduct was sufficiently severe or pervasive." 89 Fed. Reg. at 33508. The Department responds by once again affirming that "isolated comments" would generally not suffice. *Id.* But it cannot render a *de facto* "ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010). And as Christian Educators rightly points out, "pronoun usage is pervasive given its ubiquity in conversation." [Record

No. 63-1, p. 27] So anyone refusing to use preferred pronouns, be it for moral or religious reasons, would necessarily be engaging in pervasive conduct.

The Final Rule goes on to "clarify" that "conduct meets the 'severe or pervasive' standard of sex-based harassment if it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. at 33508. If the "severe or pervasive" standard derives its definition not from some measurable criteria, but from an entirely fact-dependent consequence, the clause is without meaning. The obviousness of this flaw becomes more apparent after addressing the next question.

What is the threshold for determining when one's participation in or benefit from a program or activity has been limited?

> Some commenters said that the term "limits" is vague and overly broad. Commenters expressed concern that the use of the term "limits" would threaten protected speech, cover conduct that detracts in any way from another student's enjoyment of the recipient's education program, require a recipient to primarily consider the conduct from the complainant's perspective, and expose postsecondary institutions to lawsuits from students alleging they were expelled on arbitrary grounds.

Id. at 33511. The Department reasons that "[w]hether conduct limits or denies a person's ability to participate in or benefit from the recipient's education program or activity is a fact-based inquiry that requires consideration of all relevant and not otherwise impermissible evidence." *Id.* It also recognizes that "individuals react to sexual harassment in a wide variety of ways." *Id.* It further clarifies that "the definition of hostile environment sex-based harassment does not require a complainant to demonstrate any particular harm, ... [but] *some impact* on their ability to participate or benefit from the education program or activity, ..." *Id.* (emphasis added).

To summarize, hostile environment harassment is: (1) unwelcome; (2) sex-based; (3) determined by the totality of the circumstances; (4) subjectively offensive; (5) objectively offensive; (6) so severe or pervasive; and it must (7) limit or deny a person's ability to participate in or benefit from a program or activity. Unwelcomed and subjectively offensive are both determined by the complainant. The objective standard of offensiveness will necessarily depend on the totality of the circumstances and a viewpoint imposed by the Department. Whether it is sex-based is dependent on vague terminology the Department has elected not to define. And whether the conduct is severe or pervasive is entirely measured by whether it limits or denies a person's participation or benefit in a program or activity, and the sufficiency of said limitation will depend, in part, on how the complainant reacts to the conduct.

In other words, students, teachers, States, and Federal funding recipients will all be expected to comply with Department guidance that is as user-friendly and objective as Justice Stewart's obscenity test: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). It is obvious that the public's confusion comes as no surprise to the Department—the Final Rule has entire comment and discussion sections dedicated to addressing "Vagueness and Overbreadth," 89 Fed. Reg. at 33494, "Prohibiting or Chilling Speech," *id.* at 33502, and "Compelled Speech," *id.*, just to highlight a few. The Department was presented with public comment expressing concerns that key terminology was vague. Not only did the Department fail to meaningfully address these First Amendment concerns, *but it also intentionally opted to leave the vague terms undefined*.

Further, the Final Rule authorizes, if not encourages, arbitrary and discriminatory enforcement pursuant to definitions of harassment that are almost entirely fact-dependent. The fact-specific inquiry that recipients are directed to contemplate consider the following factors:

> (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
> (ii) The type, frequency, and duration of the conduct;
> (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
> (iv) The location of the conduct and the context in which the conduct occurred; and
> (v) Other sex-based harassment in the recipient's education program or activity.

Id. at 33884. These factors are inherently flexible and grant extraordinary discretion to whoever may be tasked with interpreting a suspected instance of harassment. While this level of flexibility certainly has administrative benefits, it places far too much discretion over speech protected under the First Amendment. And because the Final Rule mandates an acceptance of gender identity concepts, the discretion only flows in one direction.

The Final Rule also extends to speech outside of the classroom.

> [A] recipient's obligation is to address all forms of sex discrimination, including sex-based harassment that occurs within the recipient's education program or activity, whether the conduct takes place online, in person, or both. Online harassment can include, but is not limited to, unwelcome conduct on social media platforms such as sex-based derogatory name-calling, the nonconsensual distribution of intimate images (including authentic images and images that have been altered or generated by artificial intelligence (AI) technologies), cyberstalking, sending sex-based pictures or cartoons, and other sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

Id. at 33515. The Department suggests that this understanding is consistent with the holding of *Mahanoy*, and more specifically the examples provided in Justice Alito's concurring opinion. But the Department's reading of the concurrence stops curiously short of the opinion's clarifying statements.

> At the other end of the spectrum, there is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection. . . .
> . . . . It is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away such a critical right.

Mahanoy, 594 U.S. at 205–06 (Alito, J., concurring). The problem remains that the Final Rule's underlying terminology is vague and intentionally undefined. In addition to chilling speech in schools, it seeks to root out "all forms of sex discrimination" occurring online, so long as it meets the amorphous and discretionary definition provided. Such a sweeping and subjective standard most certainly chills protected speech.

Because the Final Rule's text is vague and overbroad in a way that impermissibly chills protected speech, this consideration weighs in the plaintiffs' favor with respect to their likelihood of success on the merits.

States' Rights

The States are validly before the Court based on a modern form of the "*parens patriae"* authority allowing them to sue the federal government. The common law authority, which rests primarily in state attorneys general in the United States, traces its origins to the English King's power to sue the government on behalf of the citizenry as the "parent of the country." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601

(1982). The Sixth Circuit recognizes claims pursuant to this authority when a State "seeks to vindicate its own sovereign and quasi-sovereign interests against the United States" without merely "represent[ing] its citizens in a purely third-party . . . capacity." *Kentucky v. Biden*, 23 F.4th 585, 596 (6th Cir. 2022); *but see Texas v. SEC*, 2024 WL 2106183, at *3 (5th Cir. May 10, 2024) (acknowledging the Supreme Court has yet to clarify to "what extent states can still bring a *parens patriae* suit against the federal government when a state asserts its own sovereign or quasi-sovereign interest" following the decision in *Haaland v. Brackeen*, 599 U.S. 255, 295 (2023)). Although states often purport to sue in a "*parens patriae*" capacity by representing the interests of individuals within their states, they are generally asserting some specific injury to their own interests separate and apart from their citizens' interests. In such cases, the Supreme Court has held "the State has an interest independent of and behind the titles of its citizens" to safeguard "its domain" in applicable areas. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

States have a variety of sovereign and quasi-sovereign interests that they can vindicate in court. As a general matter, individual states have an interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son, Inc*, 458 U.S. at 601. Therefore, "states may have standing based on (1) federal assertions of authority to regulate matters they believe they control, (2) federal preemption of state law, and (3) federal interference with the enforcement of state law." *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015). More specifically, "[b]ecause a state alone has the right to create and enforce its legal code, only the state has the kind of direct stake necessary to satisfy standing in defending the standards embodied in that code." *See generally Texas v. Becerra*, 623 F. Supp.

3d 696, 714 (N.D. Tex. 2022). And with critical importance, the Supreme Court for more than half a century has considered "education [as] perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The Court has affirmed the importance of state and local control over education on multiple subsequent occasions.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. Thus, in *San Antonio Independent School District v. Rodriguez*, . . . we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'

Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) (citation omitted).

Indeed, the Court has specifically cautioned that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint," and that "[b]y and large, public education in our nation is committed to the control of state and local authorities." *Goss v. Lopez,* 419 U.S. 565, 578 (1975). Because the federal government's "intrusions [can be] analogous to pressure to change state law" within this domain, States have an independent stake in defending their own educational laws and regulations. *Texas*, 809 F.3d at 153.

States likewise maintain a valid interest in protecting the health and wellbeing of their citizenry. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 605; *see also Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (noting states' interest in "the health and comfort of the[ir] inhabitants"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592, (1923) (concluding that a state could litigate to defend the "health, comfort, and welfare" of its citizens). By extension, state governments have an abiding interest in "preserving and promoting the welfare of the child." *Schall v.*

Martin, 467 U.S. 253, 265 (1984). This interest gives States broad power even to "limit[ ] parental freedom" when the welfare of children is at stake. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). It follows that the States similarly have an interest in protecting the safety and wellbeing of students, faculty, and visitors on property and within facilities belonging to public educational institutions within their domains. *See L.W. by and through Williams v. Skrmetti*, 83 F.4th 460, 474 (6th Cir. 2023).

More than quasi-sovereign and sovereign interests are at stake, however. Each plaintiff-State has independent legal obligations pursuant to their state constitution or state statute to provide a variety of educational services and opportunities that would be impacted if the Final Rule becomes effective. Many would be forced to abandon enforcement of their own laws or risk the loss of federal funding because they operate "education program[s]" and "activities" that "receiv[e] federal financial assistance" within the meaning of Title IX through state level agencies and local subdivisions. 20 U.S.C. § 1681.

Specifically, Tennessee has an obligation to "provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, § 12. Tennessee's legislature also "establish[es] and support[s] . . . postsecondary educational institutions, including public institutions of higher learning," which total 51 in the state. Tenn. Const. art. 11, § 12. The legislature also provides support and direction to 150 "[l]ocal education agencies" in the form of local school districts. Tenn. Code Ann. § 49-1-103.

Directly applicable here, Tennessee law does not require educational institutions to allow students to access bathrooms and facilities "consistent with their gender identity" and provides that public schools may not accommodate a student's desire for greater privacy in multiple-occupancy facilities by allowing access to a restroom or changing facility that is

designated for use by members of the opposite biological sex while members of the opposite sex are present or could be present. *Cf.* 89 Fed. Reg. at 33816, 33818-20, with, Tennessee Accommodations for All Children Act, Tenn. Code Ann. § 49-2-801 et seq.; *see also* Tenn. Code Ann. §§ 49-2-802(2). Tennessee schools could even be exposed to civil liability arising from compliance with the Final Rule's mandate that students be allowed to use facilities associated with their gender identity because Tennessee gives public school students, teachers, and employees a private right of action for monetary damages against a school that "intentionally allow[s] a member of the opposite sex to enter [a] multi-occupancy restroom or changing facility while other persons were present." Tenn. Code Ann. § 49-2-805(a).

Even more, Tennessee law provides that public school teachers and employees are not "[r]equired to use a student's preferred pronoun when referring to the student if the preferred pronoun is not consistent with the student's biological sex." Tenn Code Ann. § 49-6-5102(b). Tennessee also protects by statute the rights of students and faculty to express even "offensive" ideas in the classroom. *See* Tenn. Code Ann. § 49-7-2405.

Similarly, the Commonwealth of Kentucky has a constitutional obligation to "provide for an efficient system of common schools throughout the State." Ky. Const. § 183. Kentucky code also requires local boards to adopt policies that do "not allow students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex." Ky. Rev. Code § 158.189. The Commonwealth operates 1,477 public schools serving primary and secondary school-aged children. There are also twenty-four public postsecondary educational institutions, including sixteen community and technical schools. These institutions are subject to Title IX as recipients of federal funds. With particular relevance here, Kentucky law prohibits the Kentucky Department of Education and its local subdivisions from requiring or

recommending policies for the use of pronouns that do not align with the student's sex as determined at birth. Ky. Rev. Stat. § 158.191(5)(b). Additionally, local school districts cannot require school personnel or students to use pronouns inconsistent with a student's biological sex. *Id*. § 158.191(5)(c).

The State of Indiana which operates 1,769 public schools has a constitutional obligation to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement" and "to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." Ind. Const. art. VIII, § 1. In Indiana, there are seven public institutions of higher education. *See generally* Ind. Code § 21-19 *et. seq*. And state law specifically protects the religious viewpoints of students and their parents that reject the separation of "biological sex" and "gender." *See* Ind. Code § 20-33-12-2 (providing that "[a] public school shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the public school treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject"). Once again, the state would be forced to decide between enforcement of these laws or enforcement of the new Title IX gender identity mandate.

The Commonwealth of Virginia has a constitutional obligation to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth." Va. Const. art. VIII, § 1. There are 1,944 public schools serving elementary and secondary school-aged children in that Commonwealth, as well as fifteen public four-year institutions of higher education, twenty-four public two-year institutions of higher education,

five regional higher education centers, and one semi-public medical school. The Commonwealth of Virginia's state constitution likewise protects the free exercise and free speech rights of its citizens, including the right of an individual to avoid using a person's preferred gender pronouns based on these protections.

West Virginia has fifty-five school districts as created by the state legislature. *See* W. Va. Code § 18-1-3. These districts "are a part of the educational system of the state" and are "established in compliance with article 12, section 1, of [West Virginia's] Constitution." *Krutili v. Bd. of Educ. of Butler Dist.*, 129 S.E. 486, 487 (W. Va. 1925). All districts in West Virginia receive federal funds—administered by the West Virginia Department of Education—and are thus subject to Title IX. West Virginia's legislature has also established at least twenty public institutions of higher learning that are similarly subject to Title IX based on their status as recipients of federal funding. W. Va. Code § 18B-2A-1(b).

And Ohio is constitutionally obligated to "secure a thorough and efficient system of common schools throughout the State," as well as to provide "by law for the organization, administration and control of the public school system of the state." Ohio Const. art. VI, §§ 2-3. 194. Many of its public school systems and postsecondary educational institutions receive federal assistance, subjecting them to Title IX.

The common thread if the Final Rule is enacted is that state officials would be forced to choose between enforcing their own laws, essentially protecting their independent quasi-sovereign and sovereign interests, or violating the Title IX gender identity mandate. Many of these interests focus on protecting student safety in sensitive areas such as bathrooms and other facilities on the grounds of educational institutions. But as a separate court held in *Tennessee v. U.S. Department of Education*, States indeed maintain an undeniable "sovereign interest[]

in enforcing their duly enacted state laws." 615 F. Supp. 3d 807, 841 (E.D. Tenn. 2022). *See also State of Tenn. v. Dep't of Educ.*, --F.4th--, 2024 WL 2984295, at *4-*7 (6th Cir. June 14, 2024) (determining that States have legitimate propriety interests if federal regulations threaten states' coffers and legitimate quasi-sovereign interests in the continued enforcement of their own statutes).

Based on the obvious tension between each of the plaintiff-States' laws and the proposed Final Rule, it appears likely that the States "will continue to face substantial pressure" to disregard their own laws "in order to avoid material legal consequences." *Tennessee*, 615 F. Supp. 3d at 841; *cf. LaShonda v. Monroe County Bd. of Educ.*, 526 U.S. 629, 657-58 (1999) (Kennedy, J., dissenting) ("[M]any school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose on them."). Indeed, certain States could face civil liability in some circumstances for disregarding their own duly enacted laws by complying with the Final Rule's gender identity mandate. Even for those free of this risk, the Final Rule squarely implicates the plaintiff-States' powers and abilities to govern themselves as sovereign and independent entities.

The plaintiffs are likely to succeed on their parental rights claim.

The plaintiff-States claim that the Department has also failed to account for the impact its Final Rule will have on the constitutional right of parents to influence their children's education. A longstanding right recognized by the Supreme Court is the right for parents to raise their own children as they see fit. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (finding that "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Zelman v. Simmons–Harris*, 536 U.S.

639, 680 n.5 (2002) (Thomas, J., concurring) (emphasizing that "[t]his Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children"). Parents' "fundamental right . . . to make decisions concerning the care, custody, and control of their children[,]" *Troxel v. Granville*, 530 U.S. 57, 66 (2000), "is 'far more precious than [any] property right[ ]." *Siefert v. Hamilton County*, 951 F.3d 753, 762 (6th Cir. 2020). It follows that parents retain a constitutionally protected right to guide their own children on matters of identity, including the decision to adopt or reject various gender norms and behaviors.

The plaintiff-States argue that the Department threatens parental rights by requiring school administrators to "take prompt and effective action" to accommodate the stated gender identity of each student, including young students. 87 Fed. Reg. 41571–72 (proposed 34 C.F.R. § 106.44(a)). Indeed, the Final Rule's provisions seemingly bind administrators to treat such children "consistent with [their] gender ident[ies]" on school grounds, even if that conflicts with parental preferences. *Id*. at 41571. Therefore, school personnel would be forced to improperly insert themselves into constitutionally protected family affairs not only to act when gender discrimination is claimed but to "prevent its recurrence and remedy its effects." *Id* 41572. In practice, this translates to policing basic interactions among students, parents, and faculty to compel public accommodation of each person's individualized and unverifiable gender identity. *Id.* at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)). This undermines a meaningful role for parents if the child decides his or her biological gender is not preferential. School personnel would be forced to abide by the student's wishes if the student chooses not to involve his or her parents. As the Sixth Circuit had emphasized, nothing could be more noxious to the "enduring American tradition" that gives a child's parents the

"primary role . . . in the upbringing of their children." *Barrett v. Steubenville City Sch.*, 388 F.3d 967, 972 (6th Cir. 2004) (quoting *Yoder*, 406 U.S. at 232). As such, the forced transferal of this role to school faculty by the Final Rule directly undermines traditional responsibilities reserved for parents.

The Department seeks to subvert this argument, noting that "nothing in the final regulations disturbs parental rights" in response to commenters' concerns about overriding parental choices regarding a child's gender identity. 87 Fed. Reg. 33821. Although the Final Rule gestures at retaining a certain role for parents, it does not provide that parental opposition to their child's selective gender identity requires schools to exempt that student from Title IX's new mandate. To the contrary, it implies that Title IX could supersede parental preferences about a child's treatment depending on the case. 87 Fed. Reg. 33822. Indeed, the Department states that "deference to [parental] judgment . . . is appropriate" when a "parent and minor student disagree about how to address sex discrimination against that student." *Id.* Additionally, the Department contends that the regulations do not prevent a recipient educational institution from "disclosing information about a minor child to their parent who has the legal right to receive disclosures on behalf of their child." *Id.*

But the Final Rule fails to clarify whether the gender-identity mandate requires schools to adopt a student's gender identity based solely on a student's wishes when the parent is not involved in the child's decision to identify as a gender other than his or her biological assignment. It also fails to clarify whether the mandate means schools must adopt their students' gender identity even over a parental objection. This creates uncertainty not only for families but also school personnel who could face liability for discrimination under Title IX if a student's preferred gender identity clashes with parental preferences. The Department must

recognize that "[t]here [is] a 'private realm of family life which the state cannot enter,' that has been afforded both substantive and procedural protection[s]" under our Constitution. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 842 (1977). The Final Rule unduly interferes with these protections.

The Department's actions are arbitrary and capricious.

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). When promulgating a rule, the agency must "'reasonably consider[] the relevant issues' and factors" bearing on the analysis, s*ee Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 595 (D.C. Cir. 2022), and must draw "rational connection[s] between the facts found and the choice made." *Id*. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Any agency action must be "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); *see Michigan v. EPA*, 576 U.S. 743, 750 (2015).

To keep agencies under the Executive branch's control accountable, courts are directed to set aside agency actions if they are "arbitrary" or "capricious." *See* 5 U.S.C. § 706(2)(A); *see also* The Federalist No. 78, at 380 (Alexander Hamilton) (Dover ed., 2014) ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."). Under this narrow standard of review, "a court is not to substitute its judgment for that of the agency," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), but instead is to assess only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.

402, 416 (1971). Therefore, when reviewing an agency's rulemaking, a court "must uphold a rule unless it exceeds the authority vested in the agency by Congress or is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Radio Ass'n on Defending Airwave Rights, Inc. v. Dep't of Transp.*, 47 F.3d 794, 801-02 (6th Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)). An agency acts in an arbitrary and capricious manner when it (1) "has relied on factors which Congress has not intended it to consider"; (2) "entirely fail[s] to consider an important aspect of the [regulatory] problem"; (3) "offer[s] an explanation for" its conduct "that runs counter to the evidence before" it; or (4) reaches a determination that "is so implausible…it could not be ascribed to a difference in view or…agency expertise." *State Farm*, 463 U.S. at 43.

The plaintiff-States claim that the Department spurns its obligation to offer a "reasoned explanation" for departing from its longstanding view on the meaning of "sex" in Title IX. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."); *Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 371 (6th Cir. 2010) (It is an "elemental principle of administrative law that agencies are bound to follow their own regulations" unless an agency dutifully follows established rulemaking procedures for amending them).

The Court's analysis again returns to *Bostock,* 590 U.S. 644 (2020). The Department asserts that there is not "a 'long-standing construction' of the term 'sex' in Title IX to mean 'biological sex.'" *See* 87 Fed. Reg. at 41537. But this argument is severely undermined by the series of congressional amendments and agency regulations since the statute's enactment that consistently have construed "sex" as a male-female binary. Indeed, past regulations from the Department are direct evidence that a definition has been in place. The Department's own

Notice of Proposed Rulemaking even declared that it "now believes that its prior position (i.e., that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity) is at odds with Title IX's text and purpose and the reasoning of the *Bostock* Court and other courts to have considered the issue in recent years—both before and after *Bostock*." *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. § 106). Disagreement with its own past interpretation constitutes a concession that a longstanding interpretation indeed has existed.

The Department's changed position through the Final Rule is based on the Supreme Court's decision in *Bostock*, which interpreted the scope of Title VII's protections for employees facing discrimination. 590 U.S. at 645. The Department argues that the phrase "because of sex" in Title VII and "on the basis of sex" in Title IX mean the same thing, so *Bostock's* analysis concerning discrimination controls. 89 Fed. Reg. at 33806-07. Although Title VII shares some similarity to Title IX, it is arbitrary to rely on *Bostock's* reasoning as a source of support for upending a term's meaning when the text, structure, purpose, and history of the statutes vary considerably. *See Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

The Supreme Court used no small amount of ink clarifying what that decision did not mean as it did in explaining its significance:

> As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them. What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove

> unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, *we do not purport to address bathrooms, locker rooms, or anything else of the kind.*

Bostock, 590 U.S. at 681. Based on this express disclaimer, it is suspect that the Department bases its explanation for changing its interpretation of a term—again, whose meaning has been unchanged since the statute was enacted—by relying on reasoning that the highest court said was inapplicable.

Even more, the Sixth Circuit has explained that "the Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself. The [Supreme] Court noted that 'none of' the many laws that might be touched by their decision were before them and that they 'do not prejudge any such question today.'" *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (quoting *Bostock*, 590 U.S. at 681-82). As a result, the Sixth Circuit properly concluded that "*Bostock* extends no further than Title VII." *Id*; *see also Skrmetti*, 83 F.4th at 484 (holding that *Bostock's* reasoning "applies only to Title VII."). This Court dutifully takes the Sixth Circuit at its word. Ultimately, there is little reason in the Department's purportedly "reasoned explanation" for departing from its longstanding interpretation of sex as a binary construct because *Bostock* did not expand the meaning of "sex" within Title IX. The Final Rule's mistaken reliance on this decision simply led the Department to a determination implausible to fathom by reasonable observers.

The Department's additional justifications for changing its interpretation of "sex" are arbitrary and capricious, as well. *See Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015) (citation omitted). The Final Rule acknowledges that the gender-identity mandate conflicts with several provisions of Title IX, which expressly permit sex-

based segregation in certain facilities and activities. 89 Fed. Reg. at 33818. It also identifies permissible sex-separation in "living facilities" and the exceptions in 20 U.S.C. § 1681(a)(1)-(9)—such as institutions whose primary purpose is for military training, social fraternities, and sororities—to justify omitting such facilities and programs from its gender-identity mandate. 20 U.S.C. § 1686; *see also* 89 Fed. Reg. at 33816, 33818-19. At the same time, the Department arbitrarily applies its gender-identity mandate to bathrooms, toilets, and showers, even though existing regulations allow separation based on sex in those places. Rather than pause at how reading the term "sex" to include gender identity interferes with other portions of Title IX's general scheme, the Department says these exceptions to Title IX's "nondiscrimination mandate" indicate that schools can lawfully inflict more than de minimis discriminatory injury on students in the circumstances covered. *See* 89 Fed. Reg. at 33816, 33818-19. In essence, the Final Rule accommodates a reality in which student housing remains sex-segregated while students are free to choose the bathrooms and locker rooms they use based on gender identity. Of course, the latter would render the purpose of former obsolete in terms of the privacy interests Congress sought to protect by permitting sex-based segregation in sensitive areas where separation has been traditional.

Although there is obvious tension between longstanding regulations and the Final Rule, the Department fails to address whether a recipient institution may require gender verifying documentation for participation in certain activities and programs that it may not require for toilets, locker rooms, showers, classes, and other purposes. Nor does it instruct schools how to determine whether certain spaces—like toilets and showers in the hall of a dorm complex—fall within "housing" facilities that can exclude by sex, or "bathroom" facilities that cannot. *See generally* 89 Fed. Reg. at 33816-17, 33820-21.

Beyond the logic that seemingly distorts previous congressional and regulatory purposes in allowing educational institutions to segregate certain places based on sex, the Department likewise fails to identify a rational basis for allowing activities associated with the American Legion's Girls and Boys State programs to restrict participation based on sex, *see* 20 U.S.C. § 1681(a)(7), while requiring schools to allow males identifying as females to participate in sexual education classes for females. As the States emphasize, "[t]he Final Rule makes no attempt to explain why allowing recipients to enforce sex-separate father-son or mother-daughter activities and not sex-separate sexual-education classes or sex-separate choruses is logically consistent." [Record No. 1, ¶ 150]

Absent too is any material explanation for why the Department's "longstanding athletics regulations" support continuing to allow arbitrary enforcement of sex-separate sports but the equally "longstanding" regulations governing bathrooms and locker rooms no longer merit the same treatment. 89 Fed. Reg. at 33817. In effect, the Department leaves in place certain regulations allowing schools to maintain covered sex-segregated practices. 89 Fed. Reg. at 33818-19. But the Final Rule then specifies that schools may no longer apply the regulations' allowance for sex-separation against males who identify as females or females who identify as males. *Id*. It seems obvious that the Department simply failed to consider these contradictory aspects when promulgating the Final Rule.

As a general matter, courts cannot uphold an administrative decision that fails to build a logical bridge between the agency action and the expected outcomes within the broader area the agency seeks to regulate based on contradictions or missing premises. *See Louisiana v. United States Dep't of Energy*, 90 F.4th 461, 469 (5th Cir. 2024). After all, "[t]he reviewing court should not attempt itself to make up for . . . deficiencies" in the agency's reasoning and

"may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43. Without a clearly articulated explanation regarding why certain parts of an educational institution's campus and activities must comply with the Final Rule's "gender identity" mandate while others do not, the agency's contradictory reasoning constitutes a level of rulemaking arbitrariness prohibited by the APA.

And of serious concern, the Department has not adequately accounted for the potential risks posed to student and faculty safety that were raised by states, educators, and parents during the notice and comment period. Educational institutions at every level have long provided sex-separated facilities—including locker rooms, restrooms, and student housing—to protect individuals on campus and ensure that basic privacy expectations are met. The private characteristics of these places render them susceptible to abuse by bad actors. Public restrooms and locker rooms, for example, have long been designed with isolating features to deliberately obstruct sightlines, limit entrances and exits, and conceal from most forms of surveillance. Individuals using these facilities are not always fully clothed, and the potential for malfeasance is apparent.

But the Final Rule ignores significant evidence offered by commenters regarding the safety and privacy interests at stake. Tennessee, for example, tendered a comment identifying numerous instances of males attacking females in public restrooms that were designated for females only. [Record No. 1-3, p. 11] In Tennessee's view, the new rules would further enable such conduct, as men and boys could then enter restrooms designated for females without restriction. Additionally, girls and women may be subjected to voyeurism against which they would have little recourse because male perpetrators could enter and remain in spaces traditionally reserved for women. *Id.* While Tennessee acknowledged that such activity may

occur with or without sex-segregated spaces, the potential for such abuse increases when boys and men can enter public spaces where girls and women are at their most vulnerable. *Id.*

Ultimately, the law requires the Department to identify "the most critical factual material … used to support" its new rules before they are finalized, specifically for the purpose of "expos[ing]" such material "to refutation" in the public comment process. *See Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984)). But even where the heightened opportunity for sexual misconduct and other nefarious activity is so obvious, the Department similarly declined to provide any credible empirical analysis supporting its new regulation. Instead, it simply says it "does not agree" with commenters who allege there is evidence that transgender students pose a safety risk to other students. *See* 89 Fed. Reg. at 33820. Surely, more is required than a categorical dismissal of serious concerns such as these.

As a practical note, ignoring fundamental biological truths between the two sexes deprives women and girls of meaningful access to educational facilities. In intimate spaces like bathrooms and locker rooms, students retain "a significant privacy interest in their unclothed bodies." *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494, 496 (6th Cir. 2008). This necessarily includes "the right to shield one's body from exposure to viewing by the opposite sex." *Id.* After all, in the words of former Justice Ruth Bader Ginsburg, the integration of an all-male military institution "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). This interest in protecting bodily privacy is sex-specific because of—not in spite of—the different male and female anatomies. *See id.* at

533 ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible.'") (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)); *see also Nguyen v. INS*, 533 U.S. 53, 73 (2001) (Scalia, J.) ("The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each."); Ryan T. Anderson, *Neither Androgyny Nor Stereotypes: Sex Differences and the Difference They Make*, 24 Tex. Rev. L. & Pol. 211, 218 (2019) ("No one finds it particularly difficult—let alone controversial—to identify male and female members of the bovine species or the canine species. It's only recently, and only in the human species, that the very concept of sex has become convoluted and controversial."). To reiterate, the Department says only that it "does not agree."

But at a minimum, students of both sexes would experience violations of their bodily privacy by students of a different sex if the Final Rule became effective. *See Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing that "most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'"); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 626 (1989) ("[E]xcretory function[s are] traditionally shielded by great privacy."); *Grimm v. Glouster Co. Sch. Bd.*, 972 F.3d 586, 633 (4th Cir. 2020) (Neimeyer, J., dissenting) ("[C]ourts have long recognized" that persons' bodily privacy interests are "significantly heightened when persons of the opposite biological sex are present.") (collecting cases). And as the States emphasize, the risk of "inappropriate sexual behavior" toward other students would certainly be heightened too. *See Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 464 (6th Cir. 2022) (addressing allegations of students taking advantage

of semi-private school spaces, including bathrooms, to engage in "unwelcome sexual contact").

Nonetheless, despite society's enduring recognition of biological differences between the sexes, as well as an individual's basic right to bodily privacy, the Final Rule mandates that schools permit biological men into women's intimate spaces, and women into men's, within the educational environment based entirely on a person's subjective gender identity. This result is not only impossible to square with Title IX but with the broader guarantee of education protection for all students. *Nguyen*, 533 U.S. at 73 ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.").

Ultimately, the Department's failure to provide any concrete, contradictory data to the concerns raised by the States, parents, and educators renders it is difficult to fathom how it determined that "the benefits" of the new regulations "far outweigh [their] estimated costs." *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41547 (proposed July 12, 2022) (to be codified at 34 C.F.R. § 106). This miscalculation is underscored by the fact that officials seemingly failed to seriously account for the possibility that abolishing sex-separated facilities would likely increase the incidence of crime and deter large swaths of the public from using public accommodations altogether. *Id.*

Beyond the student-to-student dynamic, the Final Rule requires that nearly "any person" who enters an educational campus would be allowed to use sex-separate facilities consistent with his or her internal sense of gender identity. 89 Fed. Reg. at 33816. Yet, the Department does not explain how a school can continue to "make and enforce rules that protect

all students' safety and privacy," while abiding by the Final Rule's requirement of allowing any person unfettered, unverified access to facilities for the opposite sex. 89 Fed. Reg. at 33820. Notably, it "declines . . . to require" funding recipients to "provide gender-neutral or single-occupancy facilities," in part because it "would likely carry significant cost implications." *Id*. At the same time, the Department also fails to acknowledge that many schools across the country have responded to non-federal gender-identity mandates by building separate facilities for individuals who do not wish to encounter members of the opposite sex. *Id*. Nor does the Department consider cost implications that recipients would incur by restructuring other facilities to comply with the Final Rule's requirements to modify certain facilities for accommodating those with transgender status merely weeks in advance of the Final Rule's effective date. *Id*.

It is an inescapable conclusion based on the foregoing discussion that the Department has effectively ignored the concerns of parents, teachers, and students who believe that the Final Rule endangers basic privacy and safety interests. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (providing that an agency must "consider and respond to significant comments received during the [limited] period for public comment"). Rather than address the evidence provided by the plaintiff-States and others during the commenting period, the Department throws its figurative hands in the air and says, "too bad." But as the United States Court of Appeals for the Fifth Circuit has underscored, "bare acknowledgement" of possible issues a rule will create "is no substitute for reasoned consideration," especially when the regulated subject is one of extraordinary consequence. *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 473 (5th Cir. 2024). The Department has not identified significant evidence indicating that its motivations here are rooted more in sound considerations accounting for the

serious privacy and safety interests than in the political preferences of an outcome-oriented rule. Based on this analysis, the Final Rule is arbitrary and capricious.

The Proposed Athletics Rule

The plaintiffs discuss girls' and women's athletics extensively and A.C.'s portion of the Intervenor Complaint is largely focused on this topic. Title IX's implementing regulations provide that, in general, a person may not be discriminated against with respect to athletics and "no recipient shall provide [athletics] separately" on the basis of sex. 34 C.F.R. § 106.41(a). However, 34 C.F.R. § 106.41(b) provides that recipients *may* operate or sponsor separate athletic teams for members of each sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." The Programs and Facilities Rule leaves § 106.41(b) intact, as 34 C.F.R. § 106.31(a)(2) excepts this provision from the de minimis harm standard. *See* 89 Fed. Reg. at 33816-17 (stating that "§ 106.31(a)(2) does not apply to male and female athletic teams a recipient offers under § 106.41(b)").[16]

West Virginia enacted the "Save Women's Sports Act" in 2021 to address its concerns regarding biological males who may seek to participate in women's sports. W. Va. Code § 18-2-25d. The law essentially provides that athletic teams designated for females shall not be open to students whose biological sex determined at birth is male. *Id.* Shortly after the passage of that law, B.P.J. filed suit in federal court in West Virginia. *B.P.J. by Jackson v. West Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021). B.P.J. alleged, *inter alia*, that the

[16] The intervenor Plaintiffs argue persuasively that Final Rule allows schools to maintain athletics teams that are designated for males or females only but requires them to allow students to participate on the team that is consistent with their self-reported gender identity. [Record No. 99, p. 8] As with many aspects of the rule, educational institutions would struggle to understand their compliance obligations.

Save Women's Sports Act violated Title IX, as applied to B.P.J, who had received puberty blockers and hormone therapy as treatment for gender dysphoria.

B.P.J. was allowed to compete against A.C. in middle school track and field competitions because of court-imposed injunctions during that litigation. Approximately two months ago, B.P.J. prevailed in the United States Court of Appeals for the Fourth Circuit, which held that the Act violated Title IX as applied to B.P.J. *See B.P.J. by Jackson v. West Virginia State Bd. of Educ.*, 98 F.4th 542, 562 (4th Cir. 2024). West Virginia Attorney General Patrick Morrisey has indicated the state will file a petition for a writ of certiorari in the United States Supreme Court. [Record No. 72, ¶ 80]

The Department has issued a Notice of Proposed Rulemaking titled, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams." 88 Fed. Reg. 22860 (Apr. 13, 2023) ("the Proposed Athletics Rule"). If the rule goes into effect, it will alter 34 C.F.R. § 106.41 dramatically as it will provide that public schools may not categorically ban transgender students from playing sports consistent with their gender identity.[17] *Id.* at 22,871.

The plaintiff-States allege that, if the Programs and Facilities Rule goes into effect, its gender-identity mandate will "invalidate scores of States' and schools' sex-separated sports policies." [Record No. 1, ¶ 12] While that may be the inevitable consequence, until the

[17] The Department has stated that limitations based on "more targeted criteria, substantially related to sport, level of competition, and grade or education level, could be permissible." 89 Fed. Reg. at 33817.

Proposed Athletics Rule is finalized and issued, the current regulations on athletics continue to apply and schools may separate athletic teams for the sexes in the same way they always have. *See* 34 C.F.R. § 106.41(b). To the extent A.C. (or any other plaintiff) challenges the Proposed Athletic Rule, the Court lacks jurisdiction to evaluate the claim because the proposed rule does not constitute a final agency action. *See Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1170 (6th Cir. 1983) (citing 5 U.S.C. § 551(13)).

V. Irreparable Injury

a. Compliance Costs

The Final Rule provides cost estimates of implementing the new regulations based on "feedback provided by stakeholders in listening sessions and review of comments received" in response to the proposed rulemaking. *See* 89 Fed. Reg. at 33866-74. The Department has provided various cost estimates including Year 1 training, investigations and adjudications, and recordkeeping. *Id.* The plaintiff-States contend the Department has underestimated these costs, as well as the uptick in Title IX complaints that will result from implementation of the Final Rule.

The States presented the testimony of Christy Ballard, General Counsel for the Tennessee Department of Education ("TDOE"). TDOE oversees Tennessee's local public school districts and administers their federal funding. While TDOE does not control public schools on a day-to-day basis, it provides guidance and oversight in ensuring their compliance with state and federal laws. TDOE is in the process of reviewing the Final Rule and determining what policy changes, student handbook changes, and training requirements will be necessary within Tennessee's public school system to comply with the Final Rule.

Ballard testified that the Final Rule's time of publication—the end of April—is a very busy time within the school system because that is when schools administer state and federally required standardized testing. These tests inform accountability for school districts, individual schools, and teachers. They also determine whether some elementary school children will require supplementary reading instruction during the summer.

In Tennessee, local school districts develop their own unique policies based on the size and type of school and the community values in the area.[18] Before a school can adopt a policy, the school board must draft the policy and conduct a public meeting after giving adequate public notice. Ballard testified that most school boards have meetings in June and August. Additionally, since school is out of session from June to August, most school staff are not working during that time. To implement new policies, staff must prepare and print new student handbooks. Based on these facts, Ballard believes it would be very difficult to ensure that any new policies are in place by August 1.

Ballard also testified that the burdens imposed by the Final Rule are more onerous than those of a typical update to a school's policy or procedure. She acknowledged that schools update their policies based on new laws every year, but they are "usually not based on hundreds of pages of a rule." Ballard noted that most school districts are unlikely to have the expertise

[18] For instance, during cross-examination of Ballard, the Department asked the Court to take judicial notice of the non-discrimination statement of the Metro Nashville Public Schools, which provides: "Metropolitan Nashville Public Schools (MNPS) does not discriminate on the basis of race, religion, creed, sex, gender, gender identity, sexual orientation, national origin, color, age and/or disability in admission to, access to or operation of its programs, services or activities and provides access to the Boy Scouts and other designated youth groups. MNPS does not discriminate in its hiring or employment practices." *Available at* *Handbook - Policies and Procedures - Metro Nashville Public Schools (mnps.org)* (last accessed June 12, 2024).

in-house to fully understand the rule and will likely require the assistance of outside counsel.

Ballard noted that the Final Rule requires training for anyone who might work on a school campus when students are present. Tennessee's public school system serves just under one million students and employs approximately 130,000 people. The required training varies according to the individual's particular role within the institution, so completing this training will require extensive planning. Ballard also anticipates that the training will be expensive, causing the states to incur registration fees, travel costs, and payment for substitute teachers to cover teacher absences.

The Department predicts that recipients of federal funds will see a ten percent increase in Title IX complaints and investigations under the Final Rule. Ballard testified that TDOE is already very busy addressing all matters of civil rights, truancy, and student discipline. Accordingly, she contends, an increased number of Title IX complaints will take attention away from these matters or will require the TDOE to hire additional staff.

Ballard's sentiments are echoed by Shaundraya Hersey, Assistant General Counsel for Civil Rights for the Tennessee Department of Education, and Mark Fulks, University Counsel and Chief Compliance Officer for East Tennessee University. [Record Nos. 92-1; 92-2] And because recipients of federal funds must comply with the new regulations before the next school year begins, the states expect to incur compliance costs in the spring and summer of 2024. [*See* Thompson Declaration, Record No. 19-3; Mason Declaration, Record No. 19-4; Deuth Declaration, Record No. 19-8; Garrison Declaration, Record No. 19-9; Coons Declaration, Record No. 19-11; Trice Declaration, Record No. 19-12.]

Irreparable harm is generally defined as harm that cannot be fully compensated by money damages. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578

(6th Cir. 2002). The States note that, if the preliminary injunction is not granted but they ultimately prevail in this lawsuit, they will not be able to recoup the compliance expenses from the Department due to its sovereign immunity. *See Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) (noting that the federal government's sovereign immunity makes such expenses unrecoverable) (citing *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021)); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (observing that, "[a]bsent a waiver of sovereign immunity, the Court lacks subject matter jurisdiction over claims for money damages against the United States and its agencies.").

Some circuits have concluded that compliance costs do not qualify as irreparable harm because they are an ordinary result of new government regulation. *See New York v. U.S. Dep't of Education*, 477 F. Supp. 3d 279, 303 (S.D.N.Y. 2020). But the Sixth Circuit has declined to hold so broadly, concluding that it depends on the circumstances of the case. *Biden*, 57 F.4th at 556 (noting that "the peculiarity and size of a harm affects its weight in the equitable balance, not whether it should enter the calculus at all"). The plaintiffs have sufficiently demonstrated that the compliance costs here are extraordinary due to the sweeping policy changes they are required to implement and the short timeframe in which they must do so. And because the recovery of these costs would necessarily be barred, this factor weighs in favor of a finding of irreparable harm. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.").

b. Loss of Federal Funding

The States next cite the federal funding they stand to lose if they do not comply with the Final Rule when it goes into effect on August 1. *See* 20 U.S.C. § 1682. The States

presented the testimony of David Thurman, State Budget Director for the Tennessee Department of Finance and Administration (F&A). Thurman explained how Tennessee's yearly budget is developed, including a budget for the Department of Education. Thurman reported that the education budget for fiscal year 2023 was approximately 8 billion dollars, with approximately 1.8 billion dollars comprising federal funds, and approximately 1.5 billion dollars coming from the United States Department of Education.[19]

Thurman testified that agencies submit budget requests for the upcoming fiscal year in September. Following internal hearings with agencies and public hearings with the governor and the agencies, the governor makes a recommendation to the legislature around the end of January or the beginning of February. At that point, local governments and school districts begin their planning process because they get an idea of what funds they will have for the upcoming school year. This allows them to begin considering resources and hiring decisions.

Thurman testified that, given this timeline, it is important to have a sense of certainty regarding the amount of federal funding that is available for the state Department of Education and local school districts. If federal funding is lost after the budget is already set, there is very little flexibility to adjust. In other words, when money is allocated for a specific program, local school districts cannot use the money for another purpose. Thurman also explained that a loss of federal funding would disproportionately impact low-income or other high-risk students.

[19] The remainder of federal funds came from the United States Department of Agriculture, which funded Tennessee's school nutrition program.

Some programs, such as special education and child nutrition, are mandated regardless of funding. Thurman testified that if federal funding was lost, it would be impossible to replace those funds in one fiscal year based on normal growth of the state budget. Without federal funding, the state would likely have to look for state funds by defunding other programs.

Steven Gentile, Executive Director of the Tennessee Higher Education Commission, also testified at the preliminary injunction hearing. Gentile testified that Tennessee's various public institutions of higher learning receive federal funding to support their education programs—in fiscal year 2023, they received approximately 1.5 billion dollars in federal support. This money is used for purposes such as financial aid, scholarships, and research. Gentile testified that a loss of federal funds would have a devastating effect on institutions of higher education in Tennessee, as enrollment inevitably would decline, and research would be adversely impacted. Consistent with Thurman's statements, Gentile testified that higher education institutions plan their budgets well in advance of the school year and rely on the expectation that they will receive federal funding.

The plaintiff-States tendered declarations from various education officials describing the likely impact the loss of federal funds would have on their schools. James Bryson, Commissioner of the Tennessee Department of Finance and Administration, reports that 17.6 percent of the Tennessee Department of Education's total annual budget for fiscal year 2022-2023 came from federal funds. [Record No. 19-2] Christopher Thacker, General Counsel to the Kentucky Office of Attorney General, reports that over 17 percent of Kentucky's education funding comes from the federal government.[20] [Record No. 19-7] Derek Deuth, the Chief

[20] This value appears to reference the 2021-2022 school year. The information for 2022-2023 produces a value of approximately 14.4 percent. *See School Report Card – Financial*

Financial Officer for the Indiana Department of Education, reports that 13.8 percent of Indiana's education budget for 2022-2023 came from federal funds. [Record No. 19-8] Michael Maul, the Director of the Virginia Department of Planning and Budget, reports that federal funds comprised 12.1 percent of the total spending for public education programs in Virginia in 2023. [Record No. 19-10] Melanie Purkey is the Assistant Superintendent for the Division of Federal Programs and Support at the West Virginia Department of Education. [Record No. 19-14] She reports that 26.63 percent of West Virginia's total annual expenditures for public educational programs and activities in fiscal year 2023 came from federal funds. Finally, Jonathan Blanton, the First Assistant Attorney General for the Office of the Ohio Attorney General, reports that Ohio received over $5.2 billion in funding from the United States Department of Education in 2023. [Record No. 19-16]

The plaintiff-States' schools use these federal funds for a variety of purposes including: providing supplemental educational support, materials, and enrichment for students, providing non-academic support for students; providing professional learning opportunities for teachers; providing technology for students; providing food and nutrition for students; supporting special education programs; supporting low-income students, and providing support for English learners, homeless students, and students with disabilities. Public higher education institutions use federal funds for student loans, scholarships, research and services, veterans' affairs, and for funding for historically Black colleges and universities.

Transparency, Kentucky Dep't of Education, https://www.kyschoolreportcard.com/organization/20?year=2023#financial_transparency (last visited June 1, 2024).

If the preliminary injunction is not granted and the States do not comply with the new regulations, they risk losing these substantial amounts of funds. Various officials' declarations indicate that, without federal funding, the plaintiff States will be forced to either eliminate educational programming or seek alternative funding. Further, the programming would likely have to be paused while alternative funding is being sought. David Thurman's testimony indicates that, at least with respect to Tennessee, budget planning would be difficult in the absence of injunctive relief.

The loss of these funds undoubtedly would have a devastating impact on the plaintiff-States' public schools and their students. And while the Department of Education must seek voluntary compliance before terminating any funds that are given to states under Title IX, "the States' injury as alleged has immediate effect on the States' ordering of their own affairs." *See State of Tenn. v. Dep't of Educ.*, --F.3d--, 2024 WL 2984295, at *20 (6th Cir. June 14, 2024) (observing that plaintiffs normally are not required "to bet the farm by taking the violative action before testing the law).[21]

c. Interference with States' Sovereign Interests

States have compelling interests in enforcing their own laws, particularly with respect to matters like education, which have traditionally been reserved to the states. *See Tennessee v. United States Dep't of Education*, 615 F. Supp. 3d 807, 840-41 (2022) (citing *Thompson v.*

[21] During the preliminary injunction hearing, counsel for the Department suggested through cross-examination that the Department of Education has never terminated a recipient's funding in response to a suspected Title IX violation. But even if this assertion is accurate, it is no guarantee that the Department will not do so in the future. *See State of Tenn., et al. v. Dep't of Educ., et al.*, --F.4th.--, 2024 WL 2984295, at *5 n.8 (June 14, 2024) ("Courts are rightly skeptical about taking a party at its word that it will not enforce something when enforcement is within its discretion.").

DeWine, 976 F.3d 610, 619 (6th Cir. 2020)). *See also Abbott v. Perez*, 585 U.S. 579 n.17 (2018) (observing that "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). In many instances, the Final Rule conflicts with the plaintiff-States' own duly enacted laws. *See, e.g.,* Tenn. Code. Ann § 49-2-802; Ky. Rev. Stat. 158.189.[21] But displacement of state statute by federal law is not required. Instead, irreparable harm exists when a federal agency's action places a state's "sovereign interests and public policies at stake." *Tennessee*, 615 F. Supp. 3d at 841 (quoting *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001)). The plaintiffs have sufficiently alleged that the new regulations pose a significant, immediate threat to public policies that have traditionally been left to state determination.

d. Citizen Harms

Finally, the plaintiff-States contend that the Final Rule would cause their citizens to endure a variety of irremediable harms including violations of their bodily privacy by students of the opposite sex. As previously discussed, States can defend their quasi-sovereign and sovereign interests, such as the safety of their populations, in court against the federal government. The Court has no doubts that individual privacy is an important concern for the plaintiff-States, and the Department undoubtedly dismissed many of these concerns raised by the parents, teachers, and other commenters. To the extent the States seek to ensure the safety of their populations, the claims against the federal government may proceed. *See Biden*, 23 F.4th at 596 (discussing states' quasi-sovereign interests).

Turning to the Intervenor plaintiffs, Christian Educators has sufficiently alleged such claims to establish irreparable injury. Irreparable injury is presumed when a moving party shows "that a constitutional right is being threatened or impaired." *Am. Civil Liberties Union*

of Ky. v. McCreary Cnty., Ky., 354 F.3d 438, 445 (6th Cir. 445 (6th Cir. 2003) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Loss of First Amendment freedoms, in particular, even if just for a minimal period of time, "unquestionably constitutes irreparably injury." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

VI. Substantial Harm and the Public Interest

The third and fourth factors—the likely harm to others and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Sixth Circuit has repeatedly recognized that "the public interest lies in a correct application" of the law. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (quoting *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991)). The relevant regulations have been unchanged for approximately 50 years. Therefore, it would be of relatively little harm to others to maintain the status quo pending the resolution of this lawsuit.

VII. Scope of Relief

The Department contends that, even if the Court grants a preliminary injunction, some of the challenged regulations may remain intact. The undersigned, however, disagrees with this assertion. The Court starts with 34 C.F.R. § 106.10, which seeks to redefine the scope of discrimination on the basis of sex under Title IX. It provides: "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." For the reasons previously explained, the text and legislative history of Title IX do not permit a reading of "sex" that includes sex stereotypes and gender identity.

It follows that 34 C.F.R. § 106.2 (Aug. 1, 2024) is invalid, as well. It reads, in relevant part:

> Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is: . . .
>
> (2) Hostile environment harassment. Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
>
> (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
> (ii) The type, frequency, and duration of the conduct;
> (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
> (iv) The location of the conduct and the context in which the conduct occurred; and
> (v) Other sex-based harassment in the recipient's education program or activity.
> . . .

This provision bases actionable sexual harassment on impermissible grounds identified in § 106.10. If discrimination cannot arise from these statuses under Title IX, neither can sexual harassment. *See Foster v. Bd. Of Regents of Univ. of Mich.*, 982 F.3d 960 (6th Cir. 2020) (noting that Title IX covers at least two types of discrimination—a school's direct interference with a student's participation in an education program and a school's deliberate indifference to known acts of student-on-student harassment).

Finally, 34 C.F.R. § 106.31(a)(2) provides:

> In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. § 1681(a)(1) through (9) and the corresponding regulations at §§

> 106.12 through 106.15, 20 U.S.C. § 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

This regulation is arbitrary in the truest sense of the word. As explained above, the Department has failed to demonstrate why recipients are allowed to inflict more than de minimis harm in some situations but not in others when there is no meaningful difference (e.g., living facilities versus showers).

Further, as previously explained, the Department's rulemaking was arbitrary and capricious, resulting in a rule that is invalid in its entirety.

Each subsection in which these provisions appear contains a severability clause that provides: "If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby." 34 C.F.R. §§ 106.9; 106.16; 106.48. The severability clause has little impact on the Court's analysis because the impermissible definition of "discrimination on the basis of sex" in 34 C.F.R. § 106.10 permeates the remaining regulations. Although it could potentially excise the portions of 34 C.F.R. § 106.2 that make any reference to sex discrimination or sexual harassment, the Court is hesitant to do so when rulemaking is exclusively within the purview of the Executive Branch. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (asking whether the legislature would have "preferred what is left of its statute to no statute at all").

Finally, the Court recognizes prudential limitations to its determination. The Sixth Circuit has cautioned against granting nationwide injunctions against the federal government. *See Tennessee v. Dep't of Education*, 615 F. Supp. 3d 807, 842 n.18 (E.D. Tenn.

July 15, 2022) (citing *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022)) (Sutton, J., concurring). And clearly there are states that do not want this relief as evidenced by the proposed amicus curiae filing in this case.

The Intervenor plaintiffs have asked the Court to waive any security requirement under Rule 65 of the Federal Rules of Civil Procedure, reporting that no security requirement attends a stay under 5 U.S.C. § 705. Rule 65 provides that the court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). While Rule 65 appears to require a security bond, the Court has discretion over whether to require the posting of security. *Moltan Co. v. Eagle-Pritcher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). Under the facts presented in this litigation, the Court concludes that no security is necessary in this matter due, in large part, to the strength of the plaintiffs' case and the strong public interest favoring the plaintiffs' positions. *See id.*; *Tennessee v. Dep't of Education*, 615 F.3d at 842.

VIII. Conclusion

Title IX of the Education Amendments of 1972 was intended to level the playing field between men and women in education. The statute tells us that no person shall be subjected to discrimination under any education program or activity receiving Federal financial assistance "on the basis of sex." 20 U.S.C. § 1681. However, the Department of Education seeks to derail deeply rooted law with a Final Rule that is set to go into effect on August 1, 2024.

At bottom, the Department would turn Title IX on its head by redefining "sex" to include "gender identity." But "sex" and "gender identity" do not mean the same thing. The

Department's interpretation conflicts with the plain language of Title IX and therefore exceeds its authority to promulgate regulations under that statute. This Court is not persuaded by the Department's reliance on the Supreme Court's decision *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020)—a case that was explicitly limited to the context of employment discrimination under Title VII of the Civil Rights Act of 1964.

The Final Rule also has serious First Amendment implications. The rule includes a new definition of sexual harassment which may require educators to use pronouns consistent with a student's purported gender identity rather than their biological sex. Based on the "pervasive" nature of pronoun usage in everyday life, educators likely would be required to use students' preferred pronouns regardless of whether doing so conflicts with the educator's religious or moral beliefs. A rule that compels speech and engages in such viewpoint discrimination is impermissible.

Additionally, the Department's actions with respect to this rulemaking are arbitrary and capricious. The Department fails to provide a reasoned explanation for departing from its longstanding interpretations regarding the meaning of sex and provided virtually no answers to many of the difficult questions that arose during the public comment phase. Notably, the Department does not provide a sufficient explanation for leaving regulations in place that conflict with the new gender-identity mandate, nor does it meaningfully respond to commentors' concerns regarding risks posed to student and faculty safety.

Based on the foregoing analysis and discussion, it is hereby

ORDERED as follows:

1. The motions for a preliminary injunction/stay filed by Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia [Record No. 19] and Christian Educators Association International and A.C. [Record No. 63] are **GRANTED**.

2. The United States Department of Education and Miguel Cardona, Secretary of the U.S. Department of Education, along with their secretaries, directors, administrators, and employees, are **ENJOINED** and **RESTRAINED** from implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024), which is scheduled to take effect on August 1, 2024.

3. This injunction is limited to the plaintiff-States of Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia and extends to intervening plaintiffs Christian Educators Association International and A.C. in these six states.

Dated: June 17, 2024.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; **and State of West Virginia**,

Plaintiffs,

and

Christian Educators Association International; **A.C.**, by her next friend and mother, Abigail Cross,

Proposed Intervenor-Plaintiffs,

v.

Miguel Cardona, in his official capacity as Secretary of Education; and **United States Department of Education**,

Defendants.

Case No. 2:24-cv-00072-DLB-CJS

PROPOSED INTERVENOR-PLAINTIFFS' COMPLAINT

Fifty years ago, Congress passed Title IX to promote equal opportunities for women and men by prohibiting discrimination "on the basis of sex" in educational programs. But Title IX does not treat men and women as though they were androgynous. Instead, it says schools may—and sometimes must—consider their differences to ensure equal opportunity. So for fifty years, Title IX protected women's-only bathrooms, locker rooms, physical-education classes, and sports. In doing so, Title IX recognized a common-sense reality: "[p]hysical differences between men and women … are enduring" and "remain cause for celebration," not something we have to ignore. *United States v. Virgini*a, 518 U.S. 515, 533–34 (1996) (cleaned up). But that all changed this week when the Department of Education issued final rules reinterpreting Title IX to treat men as if they were women (and vice versa) when they identify as such. This redefinition rewrites federal law and rewires the nation's educational system, hurting the women Title IX was supposed to protect and requiring students and teachers to speak as if biological differences don't exist.

Take Intervenor A.C., a track and field athlete in West Virginia public school. Although her state protects women's-only sports, a male classmate who identifies as female began to compete on A.C.'s middle school girls' track and field team and access the girls' locker rooms. The young male quickly eclipsed A.C. during competitions, forcing her to stay at home while the boy got a spot in the school's conference championships. And the boy's presence in the locker room forced A.C. to change in bathroom stalls to protect her privacy. The boy also made inappropriate sexual and harassing comments to A.C. while they competed together on the girls' sports team. Yet the Department's new rules would multiply A.C.'s experience nationwide—forcing girls to share bathrooms, locker rooms, PE classes, and athletic podiums with boys.

The Department's new rules also harm teachers, like the members of Intervenor Christian Educators Association International. Christian Educators has thousands of members throughout the country who teach at public schools and who believe that sex is binary and people should cherish their sex, not seek to reject it. These members also do not want to share restrooms with colleagues and students of the opposite sex. Yet the new rules force a male teacher to use the restroom alongside middle-school girls. And it mandates this result nationwide—exalting the individual's subjective and internal perception of self over society's respect for the objective and external differences between the sexes.

The new rules also burden free speech by redefining sex to include gender identity and by lowering the standard for harassment to apparently reach good-faith objections to gender ideology. Now, members of Christian Educators face potential punishment for expressing their beliefs at school that men cannot become women or vice versa. And the members must violate their beliefs and use inaccurate pronouns that reflect others' gender identity and contradict their sex, or these members face possible hostile-environment charges. In effect, the new rules create a nationwide speech code that polices teachers' and students' expression of their belief that men and women are different. Not content to trample on protections for women, the new rules seek to undermine every student's and teacher's constitutional rights.

The government cannot rewrite Title IX by executive fiat. The new rules contradict the statute's text, history, and purpose, while ignoring students' and teachers' fundamental constitutional and statutory rights to privacy, freedom of speech, and religious freedom. This Court should hold the rule unlawful and set it aside under the Administrative Procedure Act (APA), 5 U.S.C. § 706.

JURISDICTION AND VENUE

1. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution and federal law.

2. This Court has jurisdiction under 28 U.S.C. § 1346(a) because this is a civil action against the United States.

3. This Court has jurisdiction under 28 U.S.C. § 1361 to compel an officer of the United States or any federal agency to perform his or her duty.

4. The APA waives sovereign immunity and provides jurisdiction and a cause of action to review Defendants' actions and enter appropriate relief. 5 U.S.C. §§ 553, 701–06.

5. This Court has equitable jurisdiction and remedial power to review and enjoin ultra vires or unconstitutional agency action. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689–91 (1949).

6. This Court may grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02; the APA, 5 U.S.C. §§ 701–06; and Federal Rule of Civil Procedure 57.

7. This Court may grant injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65.

8. This Court may award costs and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

9. Venue is proper in this Court and this division under 28 U.S.C. § 1391 because Defendants are agencies of the United States or officers and employees of a United States agency acting in their official capacity or under color of legal authority. Further, (1) Defendants can and do perform official duties in this district; (2) Plaintiff Kentucky resides in this District; (3) Kentucky's agencies and employees subject to the agency actions at issue reside in the District; (4) a substantial part of the events or omissions giving rise to Kentucky's claims occurred

in this district; (5) Intervenors reside or have members who reside in Plaintiff States; (6) Intervenors or their members are protected by laws enacted and enforced by Plaintiff States; and (7) the effects of Defendants' challenged actions are felt in this district.

INTERVENORS

10. Christian Educators Association International ("Christian Educators") is a religious non-profit corporation organized under California law, with its principal place of business in Placentia, California.

11. Christian Educators is a voluntary membership organization comprised of Christians in the teaching profession. It has members in all fifty states, including 1,636 dues-paying professional members in Plaintiff States.

12. A.C. is a fifteen-year-old girl who resides in Harrison County, West Virginia.

13. A.C. currently attends Bridgeport High School.

14. A.C. brings this suit through her next friend and mother Abigail Cross.

DEFENDANTS

15. Defendant Miguel Cardona is sued in his official capacity as Secretary of the United States Department of Education. His address is 400 Maryland Avenue, SW, Washington, D.C. 20202.

16. Secretary Cardona is responsible for the overall operations of the U.S. Department of Education, including the Department's administration of Title IX and its regulations.

17. Defendant United States Department of Education (Department) is an agency under 5 U.S.C. §§ 551 and 701(b)(1). The Department's address is 400 Maryland Avenue SW, Washington, D.C. 20202. The Department implements and enforces Title IX and the rule.

BACKGROUND

I. Title IX

A. Title IX was enacted in 1972 to promote equal educational opportunities for students, particularly women and girls

18. In 1972, Congress enacted Title IX, which states that:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance …." 20 U.S.C. § 1681(a).

19. Title IX protects men and women from discrimination based on sex.

20. Nonetheless, Title IX's purpose was to promote equal opportunities for women and girls—"the class for whose special benefit the statute was enacted." *Cohen v. Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979)).

21. That is because America long suffered from "pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004).

22. Sports are illustrative. Before 1972, many schools and colleges did not field women's and girls' teams that were comparable to men's and boys' teams—if they had any women's teams at all.

23. For example, West Virginia was a forerunner in women's sports and was one of the first three states to start a state-wide girls' basketball tournament in 1919.[1] But many still opposed girls' sports. The annual tournaments ended in 1924, and interscholastic competition largely ended in the 1930s. The girls' basketball tournament did not reappear until 1976.[2]

---

[1] Bob Barnett, *Hillside Fields*, 259 (2013).

[2] *Id.*

24. In other sports, too, boys long enjoyed more opportunities than girls. The West Virginia Secondary School Activities Commission (the governing body for athletic competitions) records the first state-wide boys' track and field championship in 1914.[3] The first girls' track and field championship was in 1975.[4]

25. Title IX played a central role in promoting athletic opportunities for female athletes.

26. Shortly after its enactment Congress passed the Javits amendment directing the Department of Health, Education, and Welfare (the Department of Education's predecessor) to publish regulations implementing the statute, including "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

27. The agency promulgated the statute's implementing regulations requiring federally funded schools that sponsor athletic programs to "provide *equal athletic opportunity* for members of *both* sexes." 34 C.F.R. § 106.41(c) (emphasis added).

28. Title IX has been strikingly successful in accomplishing its goals.

29. For example, between 1972 and 2018, girls' annual participation in high school athletics increased from just under 300,000 to 3.3 million.[5]

B. Title IX gives the federal government and private parties myriad enforcement mechanisms

30. As a condition of receiving federal funds, institutions must adopt policies that comply with Title IX and the implementing regulations. They may not maintain policies that violate Title IX and the implementing regulations.

---

[3] https://bit.ly/3wsdFsO.

[4] Barnett, *supra* n.1, at 274.

[5] National Federation of State High School Associations, 2022–23 High School Athletics Participation Survey, https://bit.ly/3JLBRtp.

31. Any member of the public may file a complaint about an educational institution that he or she believes is not complying with Title IX or the implementing regulations.

32. The Department's Office of Civil Rights can investigate complaints alleging that an institution has violated Title IX and its implementing regulations or initiate an investigation on its own.

33. If the Office of Civil Rights finds a covered institution is noncompliant, the Department may require the institution to take remedial action at the risk of losing federal funding.

34. Title IX also provides for a judicially implied private right of action, including a right of action for damages. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992); *Cannon*, 441 U.S. at 709.*Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

35. The Attorney General on behalf of the Justice Department may also bring an enforcement action against an educational institution that is not in compliance with Title IX and its implementing regulations.

II. The increasing numbers of males seeking to access women's-only spaces and competitions

36. While Title IX has achieved remarkable success in promoting opportunities for women on and off the field, some men have opposed its equal-opportunity mandate since the statute's inception. *E.g.*, *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615–16 (6th Cir. 2002) (holding elimination of men's programs to remedy inequitable athletic opportunities did not violate Title IX because it "does not bestow rights on the historically overrepresented gender"); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994) (upholding elimination of men's swimming program to remedy inequitable athletic programs).

37. A new crop of men—those who identify as female—are seeking to benefit from Title IX's protections by claiming it grants them access to women's-only spaces and competitions.

A. Men in women's private spaces

38. An increasing number of individuals who identify as transgender are seeking access to sex-specific spaces like bathrooms, locker rooms, and showers belonging to the opposite sex.

39. For example, individuals identifying as transgender have challenged laws and policies that protect men's-only and women's-only facilities in many states. *E.g.*, *Grimm v. Gloucester Cnty., Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Roe v. Critchfield*, No. 23-cv-00315, 2023 WL 7109822 (D. Idaho Oct. 27, 2023); *Women in Struggle et al. v. Bain et al.*, No. 23-cv-01887, 2023 WL 6541031; (M.D. Fla. Oct. 6, 2023); *D.H. v. Williamson Cnty. Bd. of Educ.*, No. 22-cv-00570, 2023 WL 6302148 (M.D. Tenn. Sept. 27, 2023); *Bridge v. Okla. State Dep't of Educ.*, No. Civ-22-00787, 2022 WL 20689557 (W.D. Okla. Dec. 20, 2022); *see also Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 22-cv-337, 2023 WL 348272 (S.D. Ohio Jan. 20, 2023).

40. This has caused serious violations of people's rights to bodily privacy.

41. In 2023, an 18-year-old male student who identified as female allegedly exposed his male genitals to a 14-year-old female student in the girls' shower room of a Wisconsin school.[6]

[6] Corrine Hess, *U.S. Dep't of Educ. Is Opening an Investigation into Sun Prairie Locker Room Incident*, Wisconsin Public Radio, Nov. 30, 2023, https://bit.ly/3t5ao0W.

42. And a school in Colorado tried to force an 11-year-old girl to share a bed with a male student who identified as female on an overnight trip.[7]

43. In 2017 both male and female high school students filed a lawsuit against the Boyertown School District in Pennsylvania after it enacted a policy (without telling parents and students) allowing students who identify as transgender to utilize bathrooms and locker rooms belonging to the opposite sex. This caused students to encounter students of the opposite sex in their locker room, sometimes while they were in their underwear. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018).

44. Allowing members of the opposite sex into private spaces also threatens people's safety.

45. In 2021, a male student wearing a skirt sexually assaulted a 15-year-old girl in a girls' restroom.[8]

46. Women have also spoken publicly about their concerns about biological males in women-only spaces. Riley Gaines, a female athlete who competed on the University of Kentucky Women's swim team, testified before the Senate Judiciary Committee that she and her teammates were traumatized when forced to use a locker room with biological male Lia Thomas.[9] Gaines is also part of a class action against the NCAA for their Title IX violations, including for breaches of privacy and loss of athletic opportunities for women.[10]

---

[7] Melissa Koenig, *Parents Claim Daughter, 11, Was Forced to Sleep in Bed with Transgender Student on Sch. Trip*, N.Y. Post, Dec. 6, 2023, https://bit.ly/46LskLZ.

[8] Salvador Rizzo, *Victim of Sch. Bathroom Sexual Assault Sues Va. Sch. Dist.*, Wash. Post, Oct. 5, 2023, https://bit.ly/4181FrB.

[9] https://bit.ly/3ybpnsg.

[10] https://bit.ly/4dns4Hn.

47. In her testimony, Gaines explained, "the NCAA forced me and my female swimmers to share a locker room with Thomas, a 6'4" 22-year-old male equipped with and exposing male genitalia …. I truly hope you can see how this is a violation of our right to privacy and how some of us have felt uncomfortable, embarrassed, and even traumatized by this experience."[11]

B. Men in women's sports

48. Increasing numbers of boys and men are trying to compete in women's sports, depriving girls and women of athletic opportunities and accomplishments.

49. For example, male athletes seeking to compete in women's sports have challenged laws in Idaho, Indiana, Utah, West Virginia, and Florida that require or permit schools to maintain sex-designated sports teams according to biological sex.

50. In Connecticut, two biological males competing in female athletics won 15 women's state championship titles in girls' high school track and field (titles previously held by nine different girls).

51. At the University of Montana, June Eastwood, a male who previously competed on the men's track and cross-country teams, began competing on the women's track and cross-country teams after being treated for a year with testosterone suppression medication.

52. Eastwood placed first in the women's mile at the 2020 National Collegiate Athletic Association (NCAA) Big Sky Indoor Track and Field Championships, a Division I conference championship meet, and won the race by more than 3.5 seconds.

53. CeCe Telfer, a male who ran as Craig Telfer throughout high school and the first two years of college, eventually began competing in female track events for the 2019 indoor and outdoor track and field seasons.

[11] https://bit.ly/4dl2Ole.

54. Telfer took the Division II national championship in women's 400-meter hurdles in 2019 by almost two seconds.[12]

55. In March 2022, Lia Thomas—who, as mentioned above, is a biological male who identifies as female—became the first male to win an NCAA Division I women's national championship while competing at the 2022 Swimming and Diving Championships. Thomas won the women's 500-yard freestyle event, beating out Olympic medalist Emma Weyant who finished second.

56. The Connecticut athletes, Eastwood, Telfer, and Thomas displaced women and prevented women from earning championships.

57. In addition to displacing women from earning higher achievements, men competing against women have caused significant injuries to women.

58. In September of 2022, Payton McNabb, a female athlete in North Carolina, was severely injured when a biological male on the opposing high school team spiked a volleyball that hit McNabb in the face.[13]

59. McNabb suffers from "impaired vision, partial paralysis on [her] right side, constant headaches, as well as anxiety and depression" as a result of the injuries. Due to her traumatic injuries, McNabb was also unable to complete her senior volleyball season.

60. A similar event transpired in Massachusetts in 2023, when a female field-hockey athlete was severely injured by a biological male whose corner shot resulted in the puck striking the female athlete in the face. The female athlete was sent to the hospital for "serious facial and dental issues."[14]

---

[12] Results listed are available online at Track & Field Results Reporting System: https://bit.ly/4a3aHcj.

[13] Valerie Richardson, *N.C. on verge of transgender sports ban after hearing from injured female athlete,* Nov. 23, 2023, https://bit.ly/4b04Eq1.

[14] https://bit.ly/4djDEU1e/.

61. This year, the fear of further injury by a biological male caused a Massachusetts school to forfeit a basketball game because of a biological male on the opposing team who was six feet tall with facial hair. [15] The school forfeited after losing two of its female athletes to injuries in plays involving the male athlete.

62. Meanwhile, multiple sources report that the percentage of children identifying as transgender has multiplied rapidly within just the last few years.

C. States like Tennessee, Kentucky, Ohio, Indiana, and West Virginia pass laws to protect women's-only spaces and competitions

63. In response to efforts to open sex-specific facilities to people of the opposite sex, more than ten states (including Kentucky and Tennessee) have passed laws or policies protecting sex-specific spaces like bathrooms, locker rooms, and overnight accommodations. *See*, *e.g.*, Ala. Code § 16-1-54; Ark. Code Ann. § 6-21-120; Fla. Stat. § 553.865; Idaho Code Ann. § [33-6703]33-6603; Iowa Code § 216.9A, 280.33; Kan. Stat. Ann. § 72–6286; Ky. Rev. Stat. Ann. § 158.189; N.D. Cent. Code §§ 15.1-06-21, 15-10-68; Okla. Stat. tit. 70 § 1-125; Tenn. Code Ann. § 49-2-802; Utah Code Ann. § 63G-31-301.

64. In response to the increasing number of males displacing females in athletic competitions, around 24 states (including Kentucky, Tennessee, and West Virginia) have passed laws or adopted policies providing that sex designations for school-sponsored athletic teams in high school, and sometimes middle school, must be based on biological sex. Ala. Code § 16-1-52(b)(2); Ariz. Rev. Stat. Ann. § 15-120.02; Ark. Code § 6-1-107(b)-(c); Fla. Stat. Ann. § 1006.205(3)(a); Idaho Code § 33-6203; Ind. Code § 20-33-13(4); Iowa Code § 261I.2; Kan. Stat. Ann. § 60-5601–60-5606; Ky. Rev. Stat. Ann. §§ 156.070(g), 164.2813; La. Stat. Ann. § 4:444; Mo.

[15] https://bit.ly/3JGipOP.

Ann. Stat. § 163.048; Mont. Code Ann. § 20-7-1306; Miss. Code. Ann. § 37-97-1; N.C. Gen. Stat. Ann. § 115C-407.59; N.D. Cent. Code Ann. § 15-10.6-02; Okla. Stat. tit. 70, § 27-106; S.C. Code Ann. § 59-1-500; S.D. Codified Laws § 13-67-1; Tenn. Code Ann. §§ 49-6-310, 49-7-180; Tex. Educ. Code § 33.0834; Utah Code Ann. § 53G-6-902; W. Va. Code Ann. § 18-2-25d; Wyo. Stat. Ann. § 21-25-204.

65. These laws do little to protect women and girls if Title IX requires schools to open up men's and women's spaces and competitions to individuals of the opposite sex.

III. A.C.

66. A.C. is a 15-year-old girl, athlete, and student at Bridgeport High School, a public high school in Harrison County, West Virginia subject to Title IX. She is currently in 9th grade.

67. A.C. has submitted a declaration as an attachment to this Complaint as Exhibit A.

68. A.C. competes on the track and field team in the discus and shot-put events. She also participates in the marching band.

69. Sports have been a part of A.C.'s life since she was a toddler. She's played a variety of sports including soccer, gymnastics, swimming, and Brazilian jiu-jitsu. She was especially good at Brazilian jiu-jitsu, and from early on was at the top of her class.

70. A.C. first began competing in track and field while she attended Bridgeport Middle School, competing mainly in the 100-meter dash, pole vault, shot put, and discus.

71. A.C. enjoys the comradery of sports and plans to continue in track throughout high school.

A. West Virginia's Save Women's Sports Act

72. In 2021, West Virginia enacted a statute, colloquially dubbed the "Save Women's Sports Act" (the Act). It provided that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." W. Va. Code § 18-2-25d(b)(3) & (c)(2).

73. The Act was passed to promote safety and fairness in athletic opportunities for women and girls like A.C.

74. Before the Act became effective, B.P.J.—a male who identifies as female—challenged the Act's provisions as applied to B.P.J.

75. In July 2021, a district court entered a preliminary injunction, prohibiting the state from enforcing the Act against B.P.J.

76. A year and a half later, the district court lifted the injunction, holding that the Act is constitutional and complies with Title IX.

77. B.P.J. appealed to the Fourth Circuit Court of Appeal, which enjoined the Act's application to B.P.J. again.

78. Recently, on April 16, 2024, the Fourth Circuit ruled that West Virginia's Act violates Title IX as applied to B.P.J. and does so even if B.P.J. has physiological advantages over female athletes.

79. West Virginia and its schools may still apply the Act to stop other males from competing on female sports teams.

80. And the West Virginia Attorney General's office has announced that it plans to appeal the Fourth Circuit's decision to the Supreme Court.[16]

[16] Leah Willingham and John Raby, *W. Va. says it will appeal ruling that allowed transgender teen athlete to compete*, Associated Press, Apr. 24, 2024, https://bit.ly/3Umi6xm.

81. In the meantime, the various injunctions have allowed B.P.J. to compete on the Bridgeport middle school cross-country and track teams—displacing nearly 300 different girls in over 600 separate instances.

82. Records of the competitions in which B.P.J. has displaced female athletes are attached to this Complaint as Exhibit B.

B. B.P.J. accesses women's-only spaces and sports, undermining A.C.'s privacy and equal athletic opportunity.

83. One day, A.C. was surprised to see a male—B.P.J.—join the Bridgeport middle school girls' track and field team.

84. A.C. is one class above and nearly two years older than B.P.J.

85. When B.P.J. joined the team, B.P.J. began changing in the girls' locker room before practice. This prompted A.C. to change in the girls' restroom (a separate facility from the locker room) to preserve her privacy.

86. The school later closed the girls' locker room, and the entire team—including B.P.J.—began changing in the girls' restroom. This prompted A.C. to change clothes in a bathroom stall.

87. A.C. feels uncomfortable changing and/or appearing in a state of undress in front of a male. Nor does A.C. want to see a male changing and/or in a state of undress.

88. A.C. and B.P.J. both participated in shot put and discus.

89. Initially, A.C. could beat B.P.J. in both events, but by the end of A.C.'s seventh grade year, B.P.J. could match A.C. in shot put.

90. And by the last meet of the 2021–22 season, B.P.J. repeatedly beat A.C. in discus.

91. By the next school year, B.P.J. was noticeably taller, had a distinctly lower voice than the prior season, and was one of the top three athletes in both shot put and discus.

92. By late spring of 2023, B.P.J. was throwing 16-feet farther than B.P.J. did at the outset of the season—an improvement that is almost unheard of in girls' discus.

93. B.P.J. soon took coveted spots in competitions.

94. In the past, A.C. consistently placed in the top three for discus and in the top three or four for shot put at her school.

95. While everyone can compete early in the track season, usually only the top three athletes in each sport get to compete in later-season competitions like the conference championships.

96. As B.P.J. matured, B.P.J. frequently displaced A.C. in events.

97. B.P.J. would even mock A.C. and would say she "just needed to get stronger."

98. Despite being nearly two years younger, B.P.J. began to surpass A.C. in shot put by almost three feet and in discus by over ten feet.

99. A.C. later learned that B.P.J. displaced her from competing in discus at the conference championships—bumping A.C. out of the top three spots that got to participate from her team.

100. A.C. wanted to tell her coach that losing her place in the competition to a male was unfair to her and to her teammates.

101. But A.C. felt at first that she could not speak up for herself or her teammates because the adults in charge did not seem to care that a male had displaced over a hundred female athletes over the course of one season.

102. A.C.'s teammates sympathized with A.C. but also knew they were not supposed to say anything.

103. For the remainder of A.C.'s eighth-grade season, A.C. did not get to compete in any meets except the eighth-grade invitational where no seventh graders, including B.P.J, were allowed to compete.

104. To date, B.P.J. has displaced nearly 300 female athletes in over 600 separate instances.

105. Given the length of time it normally takes to complete an appeal to the Supreme Court, the Fourth Circuit's ruling will almost certainly permit B.P.J. to continue competing in track and field with A.C. during the 2024–2025 season, when B.P.J. reaches Bridgeport High School.

C. B.P.J. makes sexual remarks to female athletes while competing on the girls' track team.

106. B.P.J. regularly made explicit and inappropriate sexual comments to and about A.C. and other female athletes.

107. A.C. felt disgusted and threatened after hearing these remarks.

108. B.P.J. would usually make these sexual comments in the pit or on the track, in the locker room, or while they were walking to track practice at the high school.

109. A.C. reported the vulgar comments to her school and the school administrators.

110. She was told the school was investigating, but nothing changed while A.C. was there.

D. A.C.'s future interactions with B.P.J.

111. While A.C. and B.P.J. are at different schools this year, they still see one another up to three times a week because Bridgeport Middle School shares a track with the high school.

112. B.P.J. will likely compete on the high school track team next year.

113. Given B.P.J.'s recent growth spurt—despite being on cross-sex hormones—A.C. believes B.P.J.'s competitive advantage will continue to grow.

114. A.C. will likely also participate in the marching band with B.P.J. Both B.P.J. and A.C. play the trumpet.

115. B.P.J. and A.C. will begin attending the frequent marching band practices together beginning in July 2024.

116. Through marching band, they will likely travel together to overnight competitions, where students share hotel rooms.

117. On these trips, girls are assigned to rooms with other girls, and boys share rooms with other boys.

118. A.C. would not feel comfortable sharing a room with a male student, particularly a student who has repeatedly made sexual comments to her.

119. The band members also sometimes change on the bus on these trips. When this occurs, girls and boys are given separate opportunities to change.

120. But A.C. is not comfortable changing in front of a male classmate.

121. When A.C. heard that the Fourth Circuit had ruled to let B.P.J. compete on the girls' sports team, she felt frustrated because this meant that B.P.J. would continue to take competitive spots away from her and other girls.

122. On its face, the Fourth Circuit ruling kept the West Virginia Act intact so that other males should not flood into girls' sports, take opportunities away from girls, or invade women's-only spaces.

123. But under the new Title IX rules, West Virgnia can no longer apply the Act to stop males who identify as female from accessing women's sports teams or private spaces.

124. A.C. knows what it feels like to lose to a boy and have a boy enter her private, intimate spaces. She wants to make sure that doesn't happen again.

IV. Christian Educators Association International

125. Founded in 1953, Christian Educators is a voluntary membership organization of Christians serving educators in American schools.

126. David Schmus, Executive Director of Christian Educators, has attached a declaration to this Complaint as Exhibit C.

127. Christian Educators' mission is to support, connect, and protect Christians serving primarily in public education. Its membership is composed of school employees like teachers, counselors, students studying to become teachers, retired educators, or anyone who has an interest in the organization's mission.

128. Christian Educators' core membership consists of approximately 8,000 dues-paying members throughout the United States.

129. The majority of dues-paying members are "professionals," like teachers and counselors, employed in K-12 public schools that are subject to Title IX.

130. Christian Educators has 1,636 professional members in Plaintiff States, of which 1,556 work in public schools.

a. 501 professional members in Tennessee, of which 481 work in public schools;

b. 451 professional members in Kentucky, of which 439 work in public schools;

c. 312 professional members in Ohio, of which 297 work in public schools;

d. 189 professional members in Virginia, of which 162 work in public schools;

e. 124 professional members in Indiana, of which 120 work in public schools; and

f. 59 professional members in West Virginia, of which 57 work in public schools.

131. Christian Educators maintains a Statement of Faith that affirms beliefs in core Christian doctrines, and all dues-paying members must affirm that they are Christians.

132. Christian Educators seeks to support its members—particularly its educators in K-12 public schools—who want to live and work consistent with their shared belief that God created human beings as male and female and that sex is an immutable trait.

133. To this end, Christian Educators objects to policies forcing educators to use pronouns that do not accord with a person's biological sex.

134. Christian Educators also objects to policies that chill educators from expressing their sincerely held religious beliefs about the immutability of sex, and the group supports the rights of educators to discuss these beliefs with students and colleagues at work through informal discussions in and out of the classroom.

135. Christian Educators objects to policies requiring educators to share private facilities like restrooms and locker rooms with persons of the opposite sex.

136. Christian Educators seeks to assist in multiple ways members who are trying to serve in public schools without violating their consciences or religious beliefs on these issues.

137. For example, Christian Educators has sought to educate its members on how to navigate issues involving gender identity that arise in the school setting without compromising their faith and beliefs as Christians.

138. Christian Educators has addressed the issue at an annual conference and in regular publications and newsletters.

139. Christian Educators also provides a dedicated resources page on its website devoted to topics involving gender-identity issues, including an article from Executive Director Schmus on handling requests to use inaccurate pronouns.[17]

[17] https://bit.ly/3WpeoG2.

140. Christian Educators members have increasingly faced on-the-job issues related to school officials punishing or threatening to punish members for refusing to use inaccurate pronouns.

141. Christian Educators anticipates that its members will increasingly ask the organization for guidance and help navigating these issues at their schools, and the organization has already expended resources answering members' questions and strategizing how to help its members faithfully live out the Christian walk while serving as educators.

142. Some Christian Educators members fear that the new Title IX rules will punish them for their speech, deprive them of statutory free-speech protections, and infringe on their privacy rights by forcing them to share sex-specific facilities with students and teachers of the opposite sex.

143. Brett Campbell, Michelle Keaton, Amy McKay, Silvia Moore, and Joshua Taylor are members of Christian Educators who teach at public high schools subject to Title IX in Tennessee.

144. Each of these members has attached a declaration to this Complaint. *See* Exs. D–H.

145. Each of these members is Christian.

146. Each of these members believes that God created mankind as male and female and that sex is an immutable characteristic that cannot be changed.

147. Accordingly, each of these members avoids using pronouns that do not accurately reflect a person's biological sex. They cannot refer to a male student as "she" or "they," nor can they refer to a female student as "he" or "they."

148. Each of these members desires to express—during informal conversations with students and colleagues when these topics naturally arise—their view that biological sex is immutable, that males should not enter women's spaces or competitions, and that females should not enter men's spaces.

149. Because each of these members wants to speak consistent with their beliefs by using words that accurately reflect biological reality, the new rules threaten to harm them.

150. Each member's school conducts training on Title IX, tells teachers they must comply with Title IX, publishes and distributes a Title IX policy or similar harassment policy, and maintains a website advising the public of the school's Title IX policies and obligations.[18]

151. Several of these schools conduct Title IX training for employees at the beginning of each school year.

152. Several of these schools require employees aware of sexual harassment, or allegations of sexual harassment, to immediately report that to the district's Title IX coordinator.[19]

153. Several of these districts maintain policies that define sexual harassment consistent with the previous Title IX regulations to include sexual remarks or actions but do not say anything about gender identity.[20]

154. Several of these districts maintain policies that define hostile environment harassment consistent with the previous Title IX regulations as unwelcome conduct that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access" to educational programs.[21]

---

[18] https://bit.ly/3WbHFnr (Arlington Community Schools Title IX policy); https://bit.ly/3UrDYsp (Bartlett City Schools Title IX policy); https://bit.ly/3y2Bubl (Coffee County School District Title IX policy); https://bit.ly/49YVEjD (Knox County Schools); https://bit.ly/4bbBow7 (Warren County Schools Title IX policy)

[19] *See supra* n.18; *see also* https://bit.ly/3JCSur0 (Arlington Community Schools training explaining employees "MUST ***immediately*** inform the ACS Title IX Coordinator" of sexual harassment).

[20] *See supra* n.18.

[21] *See supra* n.18.

155. None of the schools have a specific policy requiring staff to use inaccurate pronouns or restricting staff members from sharing their views on issues related to gender identity with students or colleagues.

156. Further, Campbell, Keaton, McKay, Moore, and Taylor have had students who identify or identified as transgender.

157. Some of them currently have students in their class who identify as transgender or non-binary.

158. Some of them have received requests that they use inaccurate pronouns. Those members respectfully declined, and their schools did not discipline or punish them in any way for so declining.

159. Each of these members informally interacts with students and colleagues throughout the school day, including in the hallways, in teacher's lounges, in meetings, and during after-school programs and activities.

160. Some of them have had informal conversations with their colleagues about gender identity and have shared their religious and scientific view that men and women are different and that males should not be allowed to compete in women's sports, regardless of their claimed gender identity.

161. At least one of them has used social media to express their views on gender identity.

162. Each of them desires to speak consistent with their beliefs by politely sharing their view that sex is immutable, posting their beliefs on social media, or declining to say anything they don't believe.

163. But they fear that the new rules will prevent them from speaking consistent with their faith and prohibit them from sharing their views.

164. Some of them will censor their speech to avoid punishment under the new rules when they go into effect on August 1, 2024.

165. These members want to explain and defend their view that sex is immutable, but they fear that the new rules will be used to punish them.

166. Further, some of the members work in schools where students and teachers frequently share the same restroom.

167. For example, Campbell and Taylor work at schools in which students and faculty share the men's restroom.

168. These members want to avoid utilizing restrooms in the presence of students or teachers of the opposite sex. They believe that males and females have the right to use sex-specific intimate spaces.

V. The Department tries to rewrite Title IX.

169. At the President's direction, the federal administrative branch is attempting to implement a whole-of-government agenda to redefine "sex" to mean "gender identity."

A. President Biden directs the executive branch to add gender identity to federal laws.

170. In *Bostock v. Clayton County*, 590 U.S. 644 (2020), the U.S. Supreme Court held that under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of … sex[.]" *Id.* at 681.

171. The Court assumed that "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id.* at 655.

172. The Court also recognized that "transgender status" and "sex" are "distinct concepts." *Id.* at 669.

173. The Court emphasized that "other federal or state laws that prohibit sex discrimination," such as Title IX, were not "before" the Court. *Id.* at 681.

174. The Court did not compare Title IX's text with the distinct text of Title VII. *Compare* 42 U.S.C. § 2000e-2(a) (Title VII), *with* 20 U.S.C. § 1681(a) (Title IX).

175. Nor did *Bostock* address Title IX's safe harbor for sex-separated living facilities or any of the other distinctions between the two sexes that Title IX recognizes and permits.

176. Even so, on his first day in office, President Biden declared that *Bostock*'s analysis applies to all federal laws on sex discrimination, including Title IX, by prohibiting gender-identity discrimination "so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

177. The executive order specifically mentioned school restrooms, locker rooms, and sports.

178. Shortly thereafter, the Department of Justice's (DOJ) Civil Rights Division issued a memorandum instructing all federal agencies that "*Bostock* applies to Title IX." U.S. Dep't of Just. C. R. Div., The Application of *Bostock v. Clayton County* to Title IX of the Educ. Amends. of 1972 (Mar. 26, 2021), https://perma.cc/TUL5-9GAN.

B. The Department attempts to implement a gender-identity mandate through "guidance" documents.

179. Even before promulgating the new Title IX rules, the Department engaged in other agency action to implement President Biden's Executive Order.

180. *First*, the Department published in the Federal Register its "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 (June 22, 2021) ("Interpretation").

181. The Department concluded that the phrase "on the basis of sex" in Title IX has the same meaning as the phrase "because of … sex" in Title VII and

that this interpretation "is most consistent with the purpose of Title IX." 86 Fed. Reg. at 32,638–39.

182. Relying on *Bostock*, the Department pledged to enforce its Title IX interpretation and declared that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department." 86 Fed. Reg. at 32,639.

183. *Second*, Acting Assistant Secretary Suzanne B. Goldberg issued a "Dear Educator" letter notifying Title IX recipients of the Interpretation and reiterating that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." U.S. Dep't of Educ. Office for C.R., Letter to Educators on Title IX's 49th Anniversary, (June 23, 2021), https://perma.cc/J5V4-EGYA.

184. The Dear Educator letter included a "fact sheet" issued by the Civil Rights Division of the DOJ and the Office for Civil Rights at the Department of Education. U.S. Dep't of Just. & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://perma.cc/KA47-U9LJ ("Fact Sheet").

185. A federal court preliminarily enjoined enforcement of the Interpretation and the Fact Sheet in 20 states, including Kentucky, Tennessee, and West Virginia. *See Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 838 (E.D. Tenn. 2022), *appeal docketed* No. 22-5807 (6th Cir. June 13, 2022). That court concluded that the challengers were likely to show that the Interpretation was a legislative rule under the APA that required notice and comment, which was not conducted.

C. The Department redefines "sex" to mean "gender identity" in the final Title IX rules.

186. In 2022, the Department issued a notice of proposed rulemaking proposing new Title IX regulations. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022) ("2022 NPRM").

187. On April 29, 2024, the Department finalized those rules, titled: "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." 89 Fed. Reg. 33,474 (Apr. 29, 2024).

1. The Department's new definition of discrimination "on the basis of sex"

188. Under the rules, "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* at 33,886 (to be codified at 34 C.F.R. § 106.10).

189. The Department's rationale for its definition comes straight from *Bostock*: "discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological or 'biological distinctions between male and female,' as the Supreme Court assumed in *Bostock*." *Id.* at 33,802.

190. The rules provide for discriminatory-intent liability, disparate-impact liability, hostile-environment liability, harassment liability, and other theories of liability on all of these bases.

191. As the Department's notice of proposed rulemaking explained it, this provision is intended to codify the Department's view that "Title IX's broad prohibition on discrimination 'on the basis of sex' … encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or

previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming." 2022 NPRM, 87 Fed. Reg. at 41,390–01.

192. Nothing on this point changed in the final rules. The rules state that Title IX applies to "discrimination against an individual based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity" because "[a]ll of these classifications depend, at least in part, on consideration of a person's sex." 89 Fed. Reg. at 33,493.

193. The new regulatory provisions do not define "sex." According to the rules, "it is not necessary to resolve the question of what 'sex' means in Title IX for the Department to conclude that no statutory provision permits a recipient to discriminate against students … in the context of maintaining certain sex-separate facilities or activities." *Id.* at 33,821. But in the notice of proposed rulemaking, the Department said that "sex can encompass many traits."

194. The rules also fail to define "gender identity," though the rules' preamble says that "gender identity … describe[s] an individual's sense of their gender, which may or may not be different from their sex assigned at birth." *Id.* at 33,809.

195. The revised version of the rules codified at 34 C.F.R. § 106.10 treats the new enumerated bases of liability—sex stereotyping and the like—as overlapping ways in which Title IX addresses gender identity.

196. For example, the rules define gender-identity discrimination to be sex discrimination, but the rules also define "sex-stereotypes" discrimination to be sex discrimination, and also considers "sex-stereotypes" discrimination to encompass gender-identity discrimination. *E.g.*, 89 Fed. Reg. at 33,807 ("A person's nonconformity with expectations about . . . the sex with which they should identify implicate one's sex, and discrimination on that basis is prohibited.").

197. Built on this framework, the rules implement Title IX to prohibit educational institutions from distinguishing between persons based on sex in a vast set of circumstances. At the same time, the rules implement Title IX to require educational institutions to ignore sex in favor of a person's "sense of their gender"—requiring schools to treat a boy who identifies as a girl as if he were a girl (and vice versa). *Id.* at 33,809.

198. When this Complaint refers to the rules and Defendants' actions prohibiting discrimination based on gender identity, Intervenors intend to encompass any alternative theory that Defendants may use to achieve these ends.

2. The new "de minimis harm" standard: gender identity controls over sex

199. The rules revised 34 C.F.R. § 106.31(a)(2) to say:

> In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b).

89 Fed. Reg. at 33,887 (to be codified at 34 C.F.R. § 106.31(a)(2)).

200. The rules then specify that "a policy or … practice that prevents a person from participating in an education program or activity ***consistent with the person's gender identity*** subjects a person to more than de minimis harm on the basis of sex." *Id.* (emphasis added).

201. The Department explains its view that *any* consideration of sex presumptively causes harm, but when the statute allows sex-based separation, sex differentiation is permissible even though (the Department claims) it causes more than *de minimis* harm. *Id.* at 33,816; *see* 2022 NPRM, 87 Fed. Reg. at 41,390–01

(explaining that "regardless of whether some students might experience more than de minimis harm if excluded from a particular sex-separate living facility on the basis of sex, Congress has nonetheless permitted that exclusion").

202. The rules declare that these new standards apply to—and thus prohibit sex separation when applied to students who profess a gender identity different than their sex for "sex-separate restrooms and locker rooms," "single-sex classes or portions of classes," and "dress and grooming codes." 89 Fed. Reg. at 33,819, 33,816.

203. The rules' preamble states that "§ 106.31(a)(2) does not apply to male and female athletic teams a recipient offers under § 106.41(b)." *Id.* at 33,816 (discussing provision to be codified at 34 C.F.R. § 106.31(a)(2)). In other words, the Department claims that separating athletic teams by sex (ignoring gender identity) might be permissible even if it causes "more than de minimis harm." *Id.*

204. This caveat does not protect women's sports because the rules elsewhere say that gender-identity discrimination is a kind of sex discrimination, which requires schools to treat a boy who identifies as a girl as if he *were* a girl.

205. Section 106.31(a)(2)'s gender-identity mandates exempt subsection (b) of 34 C.F.R. § 106.41, but not subsection (a). Subsection (a) says, "[n]o person shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a) (emphasis added); *see* 89 Fed. Reg. at 33,887 (to be codified as 34 C.F.R. § 106.31(a)(2)).

206. That means a school risks sex-discrimination liability if a student is excluded from athletics "on the basis of [gender identity]," or "on the basis of [sex stereotypes]." The upshot of the rules is that schools may have separate boys' and

girls' teams but must let a male play on the girls' team if the male identifies as a girl. Thus, in practice under the rules, schools cannot maintain teams that are truly separated by sex.

207. This tracks what the Biden administration has elsewhere stated about Title IX's requirements. DOJ has recently and repeatedly argued that, under Title IX, student athletes must be able to participate based on their gender identity rather than their sex. *E.g.*, Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant and Urging Reversal at 24–27, *B.P.J. v. W. Va. State Bd. of Educ.*, Nos. 23-1078, 23-1130 (4th Cir. Apr. 3, 2023); Statement of Interest of the United States at 1, 7, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021), ECF No. 42.

208. Moreover, the new § 106.31(a)(2) does not exempt P.E. classes from its gender-identity mandates. Indeed, the rules do not even mention P.E. except to observe that "some sex-based distinctions may be appropriate in the protective gear or uniforms a recipient expects students to wear when participating in certain physical education classes or athletic teams." 89 Fed. Reg. at 33,824.

209. Sex-specific P.E. classes have been permissible for decades. *See* 34 C.F.R. § 106.34(a). And girls are exposed to the same safety risks when competing against males in P.E. class as they are in sports.

3. The new, lower, standard for hostile-environment claims

210. The new rules expand Title IX's sexual harassment provisions to cover any form of sex-based harassment. *See* 89 Fed. Reg. at 33,491 ("[S]ex discrimination refers to any discrimination based on sex, including, but not limited to, sex-based harassment.").

211. Specifically, the new rules replace the previous provision on "sexual harassment" (§ 106.30) with a provision defining "sex-based harassment" (to be codified at § 106.2).

212. Sex-based harassment "is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10," 89 Fed. Reg. at 33,884 (to be codified at § 106.2), which includes "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity," *id.* at 33,886 (to be codified at § 106.10).

213. As the Department explained in its 2020 rule proposal, the rules clarify that harassment claims, including "hostile environment harassment" claims, cover "all forms of sex-based harassment, as opposed to only sexual harassment." 2022 NPRM, 87 Fed. Reg. at 41,410.

214. These new rules also create a "broader standard" for evaluating hostile environment harassment. 89 Fed. Reg. at 33,498.

215. According to the new rules, Title IX prohibits harassment tied to a complainant's gender identity or sex characteristics, as opposed to just sexual harassment like "unwelcome sexual conduct" or sexual assault. 34 C.F.R. § 106.30(a).

216. The Department's new rules also adopt a lower standard for evaluating what constitutes a hostile environment.

217. In *Davis v. Monroe County Board of Education*, the Supreme Court held that a person could bring a Title IX damages claim for peer-to-peer harassment if the harassment was "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." 526 U.S. 629, 633 (1999).

218. Diverging from the "*Davis* standard" for hostile environment claims, the new rules define harassment sufficient to create a hostile environment as:

> Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment).

89 Fed. Reg. at 33,884 (emphasis added).

219. According to the Department, "a single serious incident—even if not pervasive—may be so severe as to create a hostile environment. And based on the specific circumstances in which it occurs, pervasive conduct—even if no single occurrence of the conduct, taken in isolation, is severe—may likewise create a hostile environment." *Id.* at 33,500.

220. The rules also state that "the definition of hostile environment sex-based harassment does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes." *Id.* at 33,511. Instead, "some impact on their ability to participate or benefit from the education program or activity" is enough. *Id.*

221. Indeed, the Biden Administration has already taken the position that teachers' failure to use inaccurate pronouns can trigger liability under Title IX. Brief for the United States as Amicus Curiae in Supporting Defendant-Appellee and Urging Affirmance at 27–30, *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir. 2023), 2021 WL 5405970.

222. The new rules' preamble also states that *Bostock*'s reasoning applies to Title IX because of Title IX's parallels to Title VII. 89 Fed. Reg. at 33,807 ("Title IX's prohibition on sex discrimination must be read similarly to Title VII's prohibition."). And the Biden Administration has taken the position that "misgendering" can prove a hostile work environment under Title VII. U.S. Equal Emp. Opportunity Comm'n, Enf't Guidance on Harassment in the Workplace, https://bit.ly/3Qsliqh.

D. The new rules contradict Title IX's text, history, and purpose.

223. Although Title IX does not define "sex" or "on the basis of sex," Title IX's plain text, history, and past application all prove that these terms refer to sex according to *biology*, not "gender identity."

224. The dictionary definition of the term "sex" has never—including when Title IX was enacted in 1972—meant "gender identity" as that term is used in the rules. Instead, the word "sex" refers to the biological binary of male and female, or to the physiological and biological differences between male and female.

225. For decades, Title IX has been understood to allow distinctions by sex. Recognizing the biological fact of differences between males and females is necessary to achieving Title IX's policy goal of promoting educational opportunity for women.

226. Title IX specifies that it cannot be construed to prevent sex separation in "living facilities." 20 U.S.C. §1686. That rule has long been implemented in the Department's regulations to permit "separate housing," 34 C.F.R. § 106.32(b)(1), as well as "separate toilet, locker room, and shower facilities," *id.* § 106.33.

227. The rules eviscerate Title IX's respect for the biological differences between male and female by requiring schools to categorize students in line with their "gender identity" while ignoring their sex.

228. The rules also erase Title IX's longstanding recognition that sex in the human species is binary. *See*, *e.g.*, 20 U.S.C. § 1681(a)(2) ("both sexes"); 34 C.F.R. § 106.32(c)(2) (referring to "housing … provided to students of one sex, when compared to that provided to students of the other sex").

229. For example, the rules revise 34 C.F.R. § 106.21 by replacing the statutory term "both sexes" with the term "all applicants." 89 Fed. Reg. at 33,887. The notice of proposed rulemaking said that this change was "in recognition of the fact that some applicants may have a nonbinary gender identity." 2022 NPRM, 87

Fed. Reg. at 41,517, 41,528. The final preamble to the rules continues to refer to the concept of a "nonbinary" gender. *See* 89 Fed. Reg. at 33,818 (referring to "nonbinary" students).

230. That reasoning conflicts with the statute. Title IX's statutory text and its implementing regulations—until now—have used "sex" to mean the biological binary of male and female.

231. Redefining discrimination "on the basis of sex" to include "gender identity" will preclude school policies and practices that recognize sex to equalize opportunity, ensure privacy, or safeguard students, such as separating P.E. classes, locker rooms, and school sports teams based on biological sex.

VI. The new rules will eviscerate protections for women's-only spaces and competition, privacy, free speech, and religious freedom.

232. The rules take effect on August 1, 2024. They will impose immediate harms on Intervenors.

A. The rules prohibit sex-specific spaces and preempt state laws protecting Intervenors' privacy and safety.

233. The rules prohibit schools from limiting access to men's or women's restrooms or locker rooms according to biological sex rather than gender identity.

234. In other words, the rules require that schools grant males who identify as girls access to women's restrooms, locker rooms, and other privacy facilities. And schools must grant females who identify as boys access to men's restrooms, locker rooms, and other privacy facilities.

235. This undermines Title IX's guarantee of equal educational opportunities and prohibits schools from safeguarding people's privacy.

1. Tennessee and Kentucky

236. In 2021, Tennessee passed a law creating civil liability for any school that fails to designate multi-occupancy restrooms by sex because failure to do so

would allow a teacher or student to encounter members of the opposite sex in a multi-occupancy facility. Tenn. Code Ann. § 49-2-805(a).

237. Kentucky passed a similar law, prohibiting public schools from allowing "students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex." Ky. Rev. Stat. Ann. § 158.189.

238. The Tennessee law protects Christian Educators members in Tennessee from being forced to share a restroom with teachers or students of the opposite sex.

239. The new Title IX regulations, however, would force public schools in Tennessee and Kentucky to ignore these state laws and permit students and teachers to use opposite-sex restrooms based on their claimed gender identity.

240. The new Title IX regulations thus injure Christian Educators members in Tennessee and Kentucky by depriving them of the protection of Tennessee's and Kentucky's laws ensuring they can use multi-occupancy restrooms without encountering a person of the opposite sex.

2. West Virginia

241. Under West Virginia's Act, Bridgeport Middle School likely could not legally allow males like B.P.J. to access women's-only locker rooms because the Act requires schools to designate "athletic teams or sports"—of which locker rooms are a vital part—by sex and because the Act gives a cause of action to "[a]ny student aggrieved by a violation of" the law. W. Va. Code § 18-2-25d(c)(1), (d)(1).

242. The Fourth Circuit enjoined West Virginia from applying the Act to B.P.J., and that ruling is still being litigated. But the Fourth Circuit did not enjoin West Virginia from applying the Act to other male students.

243. Under the new rules, however, the Harrison County school district must allow any male who identifies as a girl to access women's-only spaces, preempting West Virginia's Act.

244. A.C. faces the prospect of sharing a restroom or locker room with B.P.J. in high school.

245. A.C. also faces the prospect of sharing an overnight room with B.P.J. during trips for marching band.

246. Requiring schools to allow males in women's-only spaces (and vice-versa) deprives children like A.C. of privacy and threatens their personal sense of safety and security.

247. Forcing young women (or men) to share intimate spaces like restrooms and locker rooms with the opposite sex would likely cause some young athletes to quit sports or other extra-curricular activities entirely.

248. And because Title IX applies to employees of educational institutions, the rules require schools to allow adults, such as teachers and coaches, to access opposite-sex bathrooms and locker rooms too.

249. In this way, the rules deprive children like A.C. of the equal educational opportunities that Title IX guarantees.

B. The rules will dismantle Save Women's Sports laws and preempt state laws protecting Intervenor A.C.

250. West Virginia's Act still protects girls from competing against other males in women's sports because the Fourth Circuit ruling granted as-applied relief only to B.P.J.

251. But under the new rules, the Harrison County school district must allow any male who identifies as a girl to play women's sports, preempting West Virginia's Act.

252. Nullifying women's-sports laws like West Virginia's will harm female athletes like A.C. by destroying women's-only competitions and allowing males to continue to injure and displace the women and girls that Title IX was meant to benefit.

253. Forcing young women to compete against males will likely cause some young female athletes to quit sports entirely because they view such competition as inherently unfair.

254. In fact, five female athletes recently refused to compete against B.P.J. during an April 18 track meet—refusing to throw the shot put in protest and forfeiting their chance to place or to score points for their team.[22]

255. Harrison County School Board subsequently punished the girls by suspending them from competing in a subsequent track meet on April 27.[23]

C. The rules compel and restrict protected speech and preempt state law and school policies protecting Intervenors.

256. The new rules will also likely infringe on Intervenors' First Amendment rights.

257. In 2023, Tennessee and Kentucky passed laws protecting teachers from school-district policies requiring them to use inaccurate pronouns to refer to students. Tenn. Code Ann. § 49-6-5102(b)(1); Ky. Rev. Stat. Ann. § 185.191(5)(c).

258. These laws protect Christian Educators members in Tennessee and Kentucky public schools who have faith-based objections to using inaccurate pronouns.

259. But the new Title IX rules threaten to force these teachers to use words (including pronouns) to communicate messages they disagree with while

[22] https://bit.ly/3UqPPpg.

[23] https://bit.ly/3WnNiip.

requiring them to refrain from expressing messages they want to speak in several ways.

260. First, the new rules overrule Tennessee's and Kentucky's laws, depriving Christian Educators members of their protections. 89 Fed. Reg. at 33,508 ("[A] recipient's obligation to comply with Title IX and these final regulations is not obviated or alleviated by a conflicting State law that governs speech that is not protected by the First Amendment.")

261. Second, the new rules deprive Christian Educators members of school-district harassment policies that are more protective of speech compared with the new rules.

262. Some Christian Educators work at schools that define harassment more narrowly than the new rules; they define hostile environment claims under Title IX as sexual harassment that is so pervasive *and* severe as to limit a student's educational opportunities. *E.g.*, *supra* ¶ 150 n.18.

263. But the new rules lower the standard for proving sex-based harassment under Title IX, while simultaneously expanding its scope to reach alleged harassment related to a person's gender identity. *Supra* § V.C.3.

264. Because the new rules control any school district policies to the contrary, the new rules will require local school districts to adopt the new regulatory approach to hostile environment claims.

265. So the new rules will subject Christian Educators members to sex-based harassment policies that are less protective of speech.

266. This threatens to chill the speech of Christian Educators members because the new policies seemingly cover their speech about the immutability of sex.

267. Third, Christian Educators face a credible threat of punishment under the new rules for declining to use a student's pronouns or sharing their views on the immutability of sex with students or other school-district employees.

268. The new rules instruct school districts to implement policies prohibiting sex-based harassment, including harassment based on gender identity.

269. As already explained, the new rules say that harassment causing a hostile environment need only be severe *or* pervasive and does not require "any particular harm, such as reduced grades or missed classes." 89 Fed. Reg. at 33,511.

270. So under the new rules, a teacher who politely declines to use a student's inaccurate pronouns may cause a hostile educational environment so long as the student "demonstrate[s] some impact on their ability to participate or benefit from the education program or activity." *Id.*

271. School districts governed by Title IX must comply with these regulations. Indeed, Christian Educators members work at schools that regularly instruct their teachers on Title IX obligations.

272. School districts will likely implement policies requiring Christian Educators members to speak messages with which they disagree (like inaccurate pronouns) and to refrain from speaking their sincerely held beliefs about the immutability of biological sex.

273. These school districts have, consistent with Title IX, implemented several enforcement mechanisms, including mandated reporting by employees and anonymous complaints.

274. Christian Educators members face a credible threat of receiving a request from one or more students requesting that they use inaccurate pronouns, either inside or outside of class. Indeed, Campbell, Keaton, McKay, Moore, and Taylor are each aware of multiple students in their respective schools who identify

as transgender and several of the teachers have received requests to use inaccurate pronouns.

275. Because these and other Christian Educators members will decline to use inaccurate pronouns, Christian Educators face a credible threat of punishment. They fear that the new, lower standard for harassment claims, combined anonymous complaint procedures and mandatory reporting requirements (*supra* ¶ 273), will subject them to Title IX complaints for their speech.

276. In this way, the rules injure them by compelling them to speak words like pronouns to communicate a message that they believe is false.

277. Fourth, the rules also injure them by prohibiting them from sharing their views on the immutability of sex with colleagues, students, or even during their personal time away from school.

278. The new rules state that schools have a responsibility to police behavior that occurs "outside the recipient's education program or activity or outside the United States." *Id.* at 33,886.

279. Under the new rules, Christian Educators members fear that they will be subject to Title IX complaints for expressing their sincerely held beliefs during informal conversations at their school and even for their speech occurring outside of school with students and colleagues, whether at their church, on social media, or in other conversations.

280. For example, one Christian Educators member was accused of "hate speech" by a colleague in the school hallway just for voicing her support for a Tennessee law prohibiting drag shows for minors. The colleague became visibly upset, yelled, and attacked the sincerity of the member's religious beliefs.

VII. Intervenors' need for judicial relief

281. All the acts of Defendants described above, and their officers, agents, employees, and servants, were executed and are continuing to be executed by Defendants under the color and pretense of the policies, statutes, ordinances, regulations, customs, and usages of the United States.

282. The rules are "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

283. No statute precludes judicial review of the rules, and the rules are not committed to agency discretion by law under 5 U.S.C. § 701(a).

284. The Department declares that the rules have the full force of law, and the rules are definitive and determine the rights and obligations of persons.

285. Intervenors can only receive adequate relief through judicial review.

286. The rules will harm A.C. and Christian Educators members by denying them Title IX's educational benefits.

287. The rules also deprive A.C. of the protection of West Virginia's Save Women's Sports Act, which ensures A.C. does not have to compete against and share a locker room with males, absent a court-granted exception.

288. The rules will harm Christian Educator members by infringing on their free-speech rights and their religious-exercise rights to speak and act consistent with their faith.

289. The rules will harm students and teachers like A.C. and Christian Educators members by infringing on their substantive due-process right to privacy and to access intimate, sex-designated spaces.

290. The rules also deprive Christian Educators members of the protection of Tennesse's and Kentucky's laws protecting their right to avoid using inaccurate pronouns.

291. The rules also deprive Christian Educators members of school-district harassment policies that are more protective of their speech rights as compared to the new rules.

292. Absent injunctive and declaratory relief, Intervenors will be harmed by the rules' mandates, and Intervenors have no adequate remedy at law.

CLAIM I
Violation of APA, 5 U.S.C. § 706(2)(A), (C)
Agency Action Not in Accordance with Law and in Excess of Statutory Authority

293. Intervenors incorporate by reference all other paragraphs.

294. The Department is a federal agency under the APA.

295. Under the APA, a court must "hold unlawful and set aside agency action" if the agency action is "not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "contrary to constitutional right, power, privilege, or immunity" under 5 U.S.C. § 706(2)(A)–(C).

296. The new rules rewrite Title IX to create novel rights and obligations inconsistent with the language of the statute itself.

297. The rules exceed statutory jurisdiction, authority, and limitations.

298. Title IX uses the word "sex" to mean the biological, binary distinction between male and female and has always allowed and sometimes required schools to consider physical differences between the sexes.

299. But the rules promulgate a "nonbinary" approach to sex discrimination and sex differences, expanding Title IX's nondiscrimination clause to cover discrimination "on the basis of gender identity," and requiring educational institutions to disregard sex differences.

300. This is irreconcilable with Title IX's text and purpose.

301. This contradicts Title IX's permissive approach to considering biological differences between the sexes in settings like physical education classes, living facilities, and sports teams.

302. This also contradicts Title IX's mandatory approach to considering biological differences between the sexes in settings like showers, locker rooms, and competitive and contact sports.

303. By prohibiting educational institutions from considering sex differences in certain settings, the new rules nullify the statute's text and aim of promoting equal opportunity.

304. The statute does not permit educational institutions to *ignore* sex in favor of gender identity.

305. And the Department's "de minimis harm" standard is not found in the statutory text.

306. Congress has not delegated to Defendants the authority to prohibit gender-identity discrimination under Title IX.

307. Substantive canons of statutory construction preclude reading Title IX's references to "sex" to include "gender identity" that differs from a person's physiology.

Federalism Clear Statement Rule

308. A clear and manifest statement is necessary for a statute to preempt the historical police powers of the states, to abrogate state sovereign immunity, or to permit an agency to regulate a matter in areas of traditional state responsibility. This is especially true when Congress conditions federal funding in such a way that it tips the balance of federal and state power.

309. The rules purport to override state laws, including West Virginia's Save Women's Sports Act (W. Va. Code § 18-2-25d), Tennessee's and Kentucky's

laws preserving men's and women's private spaces (Tenn. Code Ann. § 49-2-803; Ky. Rev. Stat. Ann. § 158.189(3)), and Tennessee's and Kentucky's laws protecting educators' free-speech rights (Tenn. Code Ann. § 49-6-5102(b); Ky. Rev. Stat. § 185.191(5)(c)).

310. A clear statement is needed to displace the states' traditional authority over public education, which includes separating the sexes in physical education class and sports, as well as in school restroom facilities, locker room facilities, and shower facilities. When Title IX was enacted in 1972, the public lacked clear notice that Title IX would apply in the way mandated by these rules. The federalism clear statement rule therefore precludes the Department from interpreting Title IX to include the rules' redefinition of "sex."

Major Questions Doctrine

311. The major questions doctrine also precludes reading "on the basis of sex" in Title IX to include the gender-identity mandates created by the rules.

312. If Congress wanted to require schools to ignore biological differences for students who identify themselves with a different gender identity, it would have said so openly. Title IX, which is filled with references to the inherent biological differences between male and female, cannot be read to give administrative agencies like the Department authority to mandate that schools ignore the biological distinctiveness of girls and boys.

Spending Clause

313. When Congress imposes conditions on the acceptance of federal funds under the Spending Clause, the Constitution limits the states and the public's obligations to those requirements "unambiguously" set out on the face of the statute. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

314. No funding recipient could unmistakably know or clearly understand that Title IX would impose the gender-identity mandates created by the rules as a condition of accepting federal funds from the Department.

315. The public lacked the constitutionally required clear notice that the Act would apply in this way when Title IX was passed or when funding grants were made. *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985).

Religious Freedom Restoration Act

316. In addition to violating all these clear-statement principles of construction, the rules are also contrary to the Religious Freedom Restoration Act ("RFRA").

317. RFRA protects Intervenors and other Christian Educators members' right to speak consistent with their faith and to refrain from saying anything inconsistent with their faith. 42 U.S.C. § 2000bb-1.

318. These members' speech expressing their faith-based views about gender and their decisions to refrain from using words to communicate a message they believe to be false are protected within the meaning of RFRA.

319. The rules substantially burden these members' right to speak or refuse to speak in a manner motivated by sincerely held religious belief teachers by compelling the teachers to speak words that violate their beliefs and to refrain from speaking their faith-based views.

320. RFRA prohibits the government from substantially burdening a sincerely held religious belief unless it is a narrowly tailored means to furthering a compelling government interest.

321. The rules do not employ the least restrictive means for achieving the government's interest, nor do they further a compelling or even valid interest by burdening the teachers' rights.

322. As applied to Christian Educators' members, the rules infringe on their statutorily protected rights to religious freedom.

* * *

323. As a result, the rules must be set aside under 5 U.S.C. § 706.

324. The rules must also be enjoined and declared unenforceable under 5 U.S.C. § 705 in order to preserve status and rights pending review of this Court.

CLAIM II
Violation of APA, 5 U.S.C. § 706(2)(A), (C)
Agency Action Contrary to the U.S. Constitution

325. Intervenors incorporate by reference all other paragraphs.

326. The Department is an "agency" under the APA. 5 U.S.C. § 701(b)(1).

327. Under the APA, a court must "hold unlawful and set aside agency action" if the agency action is "contrary to constitutional right, power, privilege, or immunity" under 5 U.S.C. § 706(2)(B).

328. A court has equitable jurisdiction to review and enjoin ultra vires or unconstitutional agency action. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689–91 (1949).

First Amendment - Free Speech

329. The First Amendment prohibits laws "abridging the freedom of speech." U.S. Const. amend. I.

330. The First Amendment protects educators' speech on matters of public concern.

331. The rules restrict and compel educators' speech on an issue of public concern by requiring them to use words like inaccurate pronouns and to refrain from expressing their view that sex is binary and cannot be changed.

332. The rules regulate educators' speech based on content and viewpoint: prohibiting them from expressing disfavored viewpoints and requiring them to speak the government's preferred views on an issue of public concern.

333. The rules are so vague and overbroad that they will chill protected expression that disagrees with the Department's view about the meaning of sex.

334. The rules deprive Intervenors of the protection of Tennessee and Kentucky laws prohibiting schools from requiring educators to use inaccurate pronouns. They also subject Intervenors to school policies that threaten free speech more than current school policies in place.

Fourteenth Amendment - Vagueness

335. Statutes and regulations that condition the receipt of benefits must provide fair notice of what is prohibited and explicit standards for enforcement.

336. The new rules are unconstitutionally vague as applied to Intervenors because they fail to define relevant terms, fail to provide Plaintiffs with fair notice of what is prohibited, and encourage discriminatory enforcement against religious viewpoints.

Fourth Amendment and Fourteenth Amendment - Right to Privacy

337. Citizens have a fundamental right to privacy that is deeply rooted in this nation's history and tradition and implicit in the concept of ordered liberty.

338. This protects individuals' right to shield their undressed body from a person of the opposite sex and to avoid seeing a person of the opposite sex in a state of undress. *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) ("[T]he constitutional right to privacy … includes the right to shield one's body from exposure to viewing by the opposite sex[.]").

339. The new rules deprive Intervenors of single-sex spaces like restrooms, showers, locker rooms, and overnight accommodations, making it likely that they

will encounter persons of the opposite sex while they appear in a state of undress or while a person of the opposite sex appears in a state of undress.

340. The new rules deprive Intervenors of state statutory protections for single-sex spaces like restrooms, showers, and locker rooms.

* * *

341. As a result, the rules must be set aside under 5 U.S.C. § 706 and the Court's inherent equitable power to enjoin ultra vires and unconstitutional actions.

342. The rules must also be enjoined and declared unenforceable under 5 U.S.C. § 705 to preserve status and rights pending review of this Court.

CLAIM III
Violation of APA, 5 U.S.C. § 706(2)(A), (C)
Arbitrary and Capricious Agency Action

343. Intervenors incorporate by reference all other paragraphs.

344. Under the APA, a reviewing Court must "hold unlawful and set aside agency action" if the agency action is "arbitrary," "capricious," or "an abuse of discretion." 5 U.S.C. § 706(2)(A).

345. Agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

346. The rules fail to define the key terms "sex," "gender identity," "sexual orientation," "sex stereotypes," "sex characteristics," "transgender," and "sex assigned at birth."

347. In drafting and promulgating the rules, the Department failed to undertake reasoned decision-making in many respects.

348. *First*, the rules act irrationally by explicitly resting its gender-identity regime on *Bostock*, even though *Bostock* said it did not encompass other civil-rights statutes that address sex discrimination (as Title IX does) or circumstances implicating intimate or physical contact (as Title IX does). 590 U.S. at 681. The Department's explicit and pivotal reliance on *Bostock* represents a fundamental error at the heart of the rules and renders them arbitrary and capricious on their face.

349. *Second,* the rules' gender-identity mandates are vague and impossible to apply. The rules describe "gender identity" as "an individual's sense of their gender." This is undefinable and unworkable. Schools cannot know what it means or how to apply it consistently. It has no basis in the statutory text. It rejects Title IX's biological binary and therefore undermines the statute's purposes.

350. The rules also impose inconsistent requirements. For example, the rules require schools to let males who identify as girls into girls' P.E. classes and locker rooms even though limiting males from girls' programs is not a gender-identity distinction.

351. 34 C.F.R. §§ 106.10 and 106.31(a)(2) mandate gender-identity discrimination despite purporting to prohibit it. For example, under the rules, schools must let students use a locker room based on the sex with which they identify, meaning that a male who identifies as a boy cannot use the girls' locker room, but a male who identifies as a female can. The rules require the school to treat the two males differently based on gender identity, even as the rules purport to prohibit discrimination based on gender identity. The rules fail to consider this important aspect of the problem. Such unexplained inconsistency is arbitrary and capricious.

352. The Department's inclusion of "sex stereotypes" as a type of sex discrimination is also unreasoned. "[B]iological differences between males and

females" are "not stereotypes associated with either sex." *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023); *accord L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023). The Department fails to explain why it considers biological differences to be sex stereotypes within the meaning of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality). That is a failure of reasoned decision-making.

353. *Third*, the rules fail to address its impact on interscholastic athletics by asserting that it does not impact sports even though that contradicts other provisions of the rules and Department positions. *Supra* ¶¶ 203–09. The Department cannot redefine "sex" as "gender identity" without affecting sex-specific sports programs, but the rules never explain why Title IX purportedly permits more than de minimis harms in the sports context.

354. *Fourth*, the rules ignore their effect on P.E. classes. 34 C.F.R. § 106.31(a)(2) requires that schools enroll male students in girls' P.E. classes (and vice-versa). P.E. classes regularly include contact sports, such as basketball and soccer, and the Department's longstanding regulations allow separation by sex in those classes. *See* 34 C.F.R. § 106.34(a)(1). But the rules now require schools to allow students to participate in P.E. according to their gender identity instead of their sex. *See* 89 Fed. Reg. at 33,887 (to be codified at 106 C.F.R. § 106.31(a)(2)). The rules ignore the harms this will cause girls. The Department's failure to address this problem is a lack of reasoned decision-making.

355. *Fifth*, the rules do not consider the privacy interest in not exposing one's unclothed body to persons of the opposite sex. Students and teachers have a constitutionally protected privacy interest in preventing persons of the opposite sex from seeing their unclothed or partially clothed body. *See, e.g.*, *Brannum*, 516 F.3d at 495. This interest in bodily privacy, which is protected even in prisons, *see, e.g.*, *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993), applies to public-school

students in housing as well as restrooms, locker rooms, and shower facilities. By putting persons of the opposite sex into these sex-specific spaces, the rules create a serious risk that students and teachers will be forced to expose their bodies to the opposite sex against their wishes. Children and teachers alike will reasonably hesitate to object lest the objection be taken as discriminatory harassment based on gender identity. The Department's failure to consider these privacy interests lacks reasoned decision-making.

356. *Sixth*, the rules do not explain the Department's reversal of its previous position that "restroom, locker room, and shower facilities" are "living facilities" subject to 20 U.S.C. § 1686.

357. *Seventh*, the Department's inclusion of "sex stereotypes" as a version of sex discrimination is unreasoned. If a school separates sports teams or locker rooms based on sex, instead of gender identity, it is not applying a harmful sex stereotype. "[B]iological differences between males and females" are "not stereotypes associated with either sex." *Eknes-Tucker*, 80 F.4th at 1229; *accord Skrmetti*, 83 F.4th at 484. The Department fails to address this obvious problem with its "sex stereotyping" theory. That is a failure of reasoned decision-making.

358. *Eighth*, the rules do not adequately explain how they proscribe discrimination against non-binary students or justify its inconsistent use of the de minimis harm standard to students who identify as transgender, as non-binary, and as consistent with their sex. The rules' preamble states that schools cannot exclude a student from using bathrooms or locker rooms "consistent with that student's gender identity" because that "imposes more than de minimis injury." 89 Fed. Reg. at 33,818. The rules' preamble also says that discrimination based on sex, "including when they access sex-separate facilities … applies with equal force to all students, including … nonbinary students." *Id.* at 33,818; *see also id.* at 33,807. But the rules simultaneously do "not specify how a recipient must provide access to sex

separate facilities for students who do not identify as male or female." *Id.* at 33,818. These contradictions and non-explanations show a failure of reasoned decision-making.

359. *Ninth*, the Department failed to consider any alternative policies, such as (1) taking no action; (2) creating rules to protect privacy and girls' equal access to athletic programs, including P.E. classes, under the correct understanding of Title IX; (3) grandfathering existing categories of programs and practices covered by Title IX; or (4) creating or expanding existing exemptions for those with safety concerns or other reliance on past policies.

360. *Tenth*, the Department failed to consider reasonable reliance interests, such as students' and teachers' longstanding interest in accessing sex-specific facilities and teams that are separated based on biological sex.

361. As a result, the rules must be set aside under 5 U.S.C. § 706.

362. The rules must also be enjoined and declared unenforceable under 5 U.S.C. § 705 to preserve status and rights pending review of this Court.

PRAYER FOR RELIEF

Intervenors respectfully ask this Court for the following relief:

A. Enter a stay of the rules' effective date under 5 U.S.C. § 705 and a preliminary injunction enjoining Defendants, and any other agency or employee of the United States, from enforcing or implementing the portions of the rules that violate Title IX, the APA, and the U.S. Constitution;

B. Enter a judgment declaring, pursuant to 28 U.S.C. § 2201 and 5 U.S.C. § 706, that (i) the rules' interpretation of Title IX is unlawful and (ii) the rules are arbitrary and capricious;

C. Set aside and vacate the rules on the basis that they violate Title IX, the APA, and the U.S. Constitution, pursuant to 5 U.S.C. § 706;

D. Permanently enjoin Defendants from enforcing the portions of the rules that violate Title IX, the APA, and the U.S. Constitution;

E. Award attorneys' fees, costs, and other expenses of this action to Intervenors under any applicable federal statute, including 28 U.S.C. § 2412;

F. Grant the requested injunctive relief without a condition of bond or other security being required of Intervenors;

G. Retain jurisdiction over this matter for the purpose of enforcing its orders; and

H. Grant any and all other relief the Court deems just and proper.

Respectfully submitted this 3rd day of May, 2024.

s/ Edward L. Metzger III

Edward L. Metzger III
Kentucky Bar No. 94138
OMEGA LAW PLLC
P.O. Box 559
Union, KY 41091
(859) 898-2140
Lee@nkylaw.net

Jonathan A. Scruggs*
Arizona Bar No. 030505
Henry W. Frampton, IV*
South Carolina Bar No. 75314
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
jscruggs@ADFlegal.org
hframpton@ADFlegal.org

Rachel A. Rouleau*
Virginia Bar No. 97783
Alliance Defending Freedom
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707-2119
(571) 707-4790 Fax
rrouleau@ADFlegal.org

Natalie D. Thompson**
TX Bar No. 24088529
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
(202) 393-8690
(202) 347-3622 Fax
nthompson@ADFlegal.org

Counsel for Plaintiffs

**Motion for pro hac vice admission filed concurrently*

***Motion for pro hac vice admission filed concurrently; practice supervised by one or more D.C. Bar members while D.C. Bar application is pending.*

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**,

Plaintiffs,

and

Christian Educators Association International; **A.C.**, by her next friend and mother, Abigail Cross,

Proposed Intervenor-Plaintiffs,

v.

Miguel Cardona, in his official capacity as Secretary of Education; and **United States Department of Education**,

Defendants.

Case No. 2:24-cv-00072-DLB-CJS

DECLARATION OF A.C.

I, A.C., under penalty of perjury, declare as follows:

1. I am a 15-year-old resident of Bridgeport, West Virginia, in Harrison County, and have personal knowledge of the information below.

2. I am a female ninth-grade student at Bridgeport High School (BHS) where I compete on the girls' track and field team. I currently compete in discus, shot put, and the 4 x 100 relay. I fully expect to continue attending BHS throughout high school, and right now I plan to compete on the track and field team throughout high school, as I have done for my ninth-grade year.

3. I started playing sports when I was two or three years old. I have competed in different club, youth, and school sports since that time, including soccer, gymnastics, swimming, and Brazilian jiu-jitsu.

4. I was good at Brazilian jiu-jitsu. I started training when I was eight years old and from early on was at the top of my class. Sometimes, I even threw boys around. But after three or four years of competing, the boys in my class started hitting puberty and became much stronger than me. I quickly learned that there is a stark difference in strength and stamina between boys and girls. I eventually quit jiu-jitsu because even though I was good with the technical elements, I was competing against boys who were bigger and stronger than me, and I could not win. It was no longer fun.

5. I started playing sports because sports and physical health are important to my family. I enjoy the camaraderie and competitiveness of it.

Competing against a male athlete in girls' sports

6. In sixth through eighth grade, I attended Bridgeport Middle School (BMS). In seventh grade (the 2021–22 school year), I joined the girls' track and field team. I competed in the 100-meter dash, pole vault, shot put, and discus. Sometimes

I filled in for my teammates in other events, too, like the 200-meter dash and relay events.

7. To my surprise, another BMS student named B.P.J. joined the girls' track and field team. B.P.J. is almost two years younger than me, and one year behind me in school. Because I know B.P.J.'s older brother from school, I knew at the beginning of the 2021–22 school year that B.P.J. is a male who identifies as a girl.

8. During those two years in middle school, I competed against B.P.J. in both shot put and discus, and I saw B.P.J. almost every weekday at practices and meets during the outdoor season.

9. When I first competed against B.P.J., I typically beat B.P.J in shot put and discus. At the beginning of the season, B.P.J. was not throwing very well. It was B.P.J.'s first year trying these sports, and it can take a while to learn the skills needed to excel in throwing events. I had also just started throwing shotput and discus, and was learning the skills, but I was almost two years older. By the end of my seventh-grade season, B.P.J. threw about the same distance as I did in shot put—around 18–20 feet.

10. In discus, I typically beat B.P.J.: I threw around 40 feet while B.P.J. threw closer to 30 feet. But in the last meet of the 2021–22 season, B.P.J. suddenly threw almost 20 feet farther: 49' 7".

11. By the next school year (2022–23), I could tell that B.P.J. had grown a lot. B.P.J. got taller and threw farther. B.P.J. got a deeper and more masculine voice.

12. Before the 2022–23 school year, B.P.J. was never one of the top athletes at BMS. But during the 2022–23 school year, B.P.J. suddenly became one of the top three throwers in shot put and discus at BMS. On May 13, 2023, B.P.J. threw 16 feet farther in discus than B.P.J. had thrown at the beginning of the

season. It is incredibly rare to see that big of an increase in throwing distance in such a short time.

13. There are usually ten meets in discus and shot put each season. The meets earlier in the season allow more athletes: a school can send several athletes from their team to each event. But as the year goes on, the events become more restricted, and often only the top three or four ranked athletes from a school in each event compete.

14. Rankings depend on an athlete's personal record in each event. At the beginning of each school year, we have a scrimmage to establish baseline times and distances in each event, and the coach uses those times to establish each athlete's ranking. Rankings can change during the season if a student sets a new personal record better than someone else's. And sometimes, if a coach sees that an athlete is working really hard in practice and improving, then that athlete might move up in the rankings.

15. Until April 2023, I was in the top three on my team for discus in both 7th and 8th grade. I was usually in the top three or four for shot put as well.

16. But that changed as B.P.J. started beating me.

a. In March 2023, B.P.J. beat me at the Connect Bridgeport Invitational in shot put and in discus.

b. Then in April, B.P.J. beat me at the Pioneer MS Invitational in discus.

c. Later in April, B.P.J. beat me at the Bobcat MS meet in shot put and discus.

17. When I lost to B.P.J., B.P.J. would sometimes say to me, "you just need to get stronger" A.C. Or B.P.J. would say, "you have more testosterone than I do, and I am still beating you." I find it offensive for a male to say that to a girl.

18. The one bright spot was the Harrison County Championships girls' discus event in April 2023, where I threw farther and earned a higher placement than B.P.J.

19. One of the biggest meets of the season is the Mid Mountain 10 MS Championships. It is a conference meet, and only the top three ranked athletes from our school in each event get to compete. In the past, I got to compete at this event.

20. But after practice the night before our conference championship meet, my coach pulled me aside and said that I had been "knocked out" of the conference meet. I was upset.

21. At that point, B.P.J.—a male almost two years younger than me—had passed my personal record in shot put (24' 1") by almost three feet (27'). And B.P.J. had passed my personal record in discus (55' 2") by more than 10 feet (66' 0").

22. Because B.P.J. now ranked in the top three in shot put and discus, I was pushed out of the top three to fourth place at BMS in those events. And it meant that I did not get to compete in shot put or discus in the Mid Mountain 10 MS Championships on April 29, 2023.

23. It felt strange to be kicked out of my events, because I had always gotten to compete before. I felt angry and discouraged that B.P.J. took my spot. But I also felt like I couldn't say anything about it. If I complained, I would be unfairly labeled as "transphobic," even though that is not true. It felt unfair. I felt like I had to suck it up and live with it. I felt unheard and unseen.

24. Other girls on my team were upset, too. They were shocked to hear that I didn't get to compete in shot put and discus.

25. At the conference championships on April 29, 2023, B.P.J. ultimately took 4th overall in girls' discus and 6th overall in girls' shot put. A lot of girls placed lower than they should have because B.P.J. participated in the girls' events.

26. After I missed out on competing in discus and shot put in the conference championship, one of my coaches pulled me aside and tried to encourage me. My coach agreed that what happened to me was unfair, and I felt a little better having my coach's support.

27. Because B.P.J. pushed me down in the rankings, I did not get to compete in discus or shot put for the rest of the season, except for an 8th grade-only invitational that B.P.J. (as a 7th grader) was not eligible to compete in.

28. It is not fair to force me and other girls to compete against males in sports. As I have experienced with B.P.J., it is extremely frustrating to know that no matter how hard I work, I will not be able to throw farther than B.P.J.

29. Being excluded from the competition before it even begins is discouraging because I am not as strong and athletic as boys my age. It makes me so angry that I do not have a chance to even win. It makes me want to scream, "Why am I even here?"

30. I want girls to have an opportunity to compete on a level and safe playing field, and I know that will never happen if boys are allowed to compete on girls' sports teams.

31. It seems that people have forgotten the whole point of making girls' sports separate. It was impossible for girls to compete in boys' sports safely and competitively. Letting biological males into women's sports defeats the whole purpose of even having them in the first place. We simply cannot compete with men.

32. B.P.J.'s athletic records show that B.P.J. beat over 50 different female athletes in the 2021–22 school year, displacing several of the female athletes more than once.

33. These records show that B.P.J. beat over 100 different female athletes in the 2022–23 school year, displacing them almost 300 times. I also lost to B.P.J. on four separate occasions that school year. For example, on April 20, 2023, I would

have been 3rd place at BMS in the 1 kg discus. Instead, I received 4th place, while B.P.J. took 2nd place.

34. The same thing happened in shot put on April 20, 2023. I took 5th place at BMS, while B.P.J. received 4th place.

35. I have not competed against B.P.J. this year as B.P.J. competes in middle school and I am in high school. But during the 2023–24 school year, B.P.J. has already beaten almost 100 female athletes, displacing them over 250 times.

36. Overall, during the last two years while B.P.J. competed in women's sports, B.P.J. has displaced almost 300 different female athletes over 600 times.

37. These records about B.P.J.'s athletic competitions are available at https://www.athletic.net/.

38. A copy of these records is attached to the complaint as Exhibit B.

39. These records in part reflect B.P.J. displacing me from my shotput and discus events.

Privacy concerns when male athletes compete in girls' sports and male students use girls' facilities

40. B.P.J. was not just another girl on our team. B.P.J. was very open about being on puberty blockers. I and other girls on the BMS girls' track and field team have always known that B.P.J. is male.

41. This whole experience of having B.P.J. on the girls' team was very hard for me, and my teammates told me that they found it hard, too.

42. When B.P.J. was first put on the girls' team, I decided to change clothes in the girls' restroom instead of the locker room to have more privacy. But when my school closed the gym locker rooms, the entire girls' team had to change in the girls' bathrooms.

43. I have never minded changing clothes in front of other girls. We are the same. But when B.P.J. started changing clothes with us girls in the girls'

bathroom, I felt uncomfortable and decided that I should change in the bathroom stall whenever I could for more privacy.

44. In my high school, where B.P.J. will attend next year, we change in the locker room by the field for track and field practice. The locker room has three private stalls and some showers with curtains. Most of the locker room area is an open space with lockers where girls can change.

45. Before practice or a track and field meet, we only have so much time to change before we need to begin warming up. There is not enough time for all the girls to change in a private space, and many girls change in the open area of the locker room.

46. I also have to change in the girls' locker room for physical education class. As a Bridgeport High School freshman, I must participate in P.E. class every other day for the whole year. We change clothes before we begin every P.E. class. We use the locker room inside the gymnasium for P.E. and all of the indoor sports. Similarly to the outdoor locker room, the indoor locker room is mainly just a wide-open area in a room where we change in front of lockers. There are three bathroom stalls, and three showers with curtain areas.

47. There is not enough time for every girl to change in a private area for P.E. class. I would not want to change for P.E. class if there was a boy in our locker room even if that boy identified as a girl. When we are in P.E. class, we will play some sports with the boys. But girls and boys play separate games whenever we play any contact sports. We have played volleyball, basketball, and football in P.E., but each time, we only played with the girls.

48. I don't want to use a restroom or locker room to change, or use a restroom generally, with a boy in there. When I use a restroom or when I change my clothes in the locker room for a meet, I don't want to be seen by a person of the

opposite sex. I don't want to change in front of a boy or want a boy to change in front of me.

49. I also do not want to shower in a locker room with a male nearby. It would make me feel extremely unsafe, anxious, and embarrassed to shower in the girls' locker room if males are allowed in.

50. The same goes for when I go on overnight trips, whether with my sports teams or for a field trip. Normally the band goes on one overnight trip a year. This year the band went to Disney World with only a few parent chaperones. In track and field, the top three finishers in meets advance to the next level of competition, and those competitions are usually out of town. Those competitors will stay in hotel rooms with their teammates. I haven't placed in the top three as a freshman, but I hope to improve next year. I don't want to stay in a room or sleep in a room with a boy, especially when no adult is present. It doesn't matter to me if the boy considers himself to be a girl.

Enduring inappropriate sexual comments

51. B.P.J. made several offensive and inappropriate sexual comments to me. At first, it did not occur often, and I tried my best to ignore it.

52. But during my final year of middle school, B.P.J. made inappropriate sexual comments a lot more often; it increased throughout that year; and the comments became much more aggressive, vile, and disturbing.

53. Sometimes B.P.J.'s comments were just annoying, like commenting that I have a "nice butt."

54. But other times, I felt really embarrassed, and I didn't want to repeat the gross things B.P.J. said to me.

55. During the end of that year, about two to three times per week, B.P.J. would look at me and say "suck my d***." There were usually other girls around who heard this. I heard B.P.J. say the same thing to my other teammates, too.

56. B.P.J. made other more explicit sexual statements that felt threatening to me. At times, B.P.J. told me quietly "I'm gonna stick my d*** into your pu***." And B.P.J. sometimes added "and in your a**" as well. These comments were disturbing and caused me deep distress.

57. B.P.J. made these vulgar comments towards me in the locker room, on the track, and in the throwing pit for discus and shotput.

58. I felt confused and disgusted when I heard these vulgar and aggressive comments. It was especially confusing because I was told that B.P.J. was on the girls' team because B.P.J. identifies as a girl, but the girls on the team never talked like that.

59. Most of the time, B.P.J. made these sexual comments at girls' track practice. Our team walked from Bridgeport Middle School to the High School for track practice, where we would train on the high school track. B.P.J. often popped up beside me as we walked and said these things. Other times, B.P.J. made comments as our team was sitting in the endzone waiting for coaches to get practice going. At least one time, it happened in the girls' locker room.

60. Middle school kids can have foul mouths. The kids at my middle school sometimes said raunchy things, but they were not as explicit or aggressive as the things B.P.J. said.

61. I reported B.P.J.'s sexual comments to my coach and middle school administrators. Initially, the administrators told me that they were investigating, but we never heard back, and nothing changed. From what I saw, B.P.J. got very little or no punishment for saying things that no other student would get away with.

62. I was glad to move into high school in the Fall of 2023 so that I would not have to deal with B.P.J.'s harassment since B.P.J. is still in middle school. But because the middle school and high school share the same track and have overlapping practice times, I still see B.P.J. up to three times per week at girls' discus and shot-put practice.

Future fears

63. Both B.P.J. and I play the trumpet in the marching band, and we will have a lot of practices together starting in late July 2024 and lasting until late December 2024. In marching band, we have many band trips that require overnight stays, where students share hotel rooms without an adult staying in the room with them.

64. I am hesitant to continue playing in the band because I am uncertain whether I will be forced to share a hotel room or be exposed to B.P.J. on these trips.

65. B.P.J. will start high school in the Fall of 2024, and I dread being on the same sports team again. I plan to continue competing in track and field in the 2024–25 school year. I fully expect B.P.J. to continue competing in track and field like B.P.J. has done in the past. When B.P.J. begins competing in track and field again, I will again be competing directly with B.P.J.

66. I am reluctant to keep competing on a team that exposes me to these inappropriate comments. I'm also reluctant to continue in track and field if I have to compete against boys. I'm unable to fully enjoy sports in this environment.

67. I also worry about the little 6th-grade girls who are on the same team as B.P.J. right now. If I were in 6th grade and had to deal with sexual comments from a biological male two years older than me who was changing in the same locker room as me, I wouldn't even play sports. It wouldn't be worth it.

68. My younger sister will be a freshman in high school when B.P.J is a senior. She is a good athlete, but she is very shy, and I can't imagine how she would feel if B.P.J. said those sexual comments to her while they were competing in sports or changing in the locker room. I do not want that to happen.

69. I believe that girls' sports should be for girls only. Males, even those who identify as girls, do not belong on girls' sports teams or in girls' locker rooms.

DECLARATION UNDER PENALTY OF PERJURY

I, A[redacted] C[redacted], a citizen of the United States and a resident of the State of West Virginia, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 1 day of May, 2024 at Bridgeport, W.V.

A[redacted] C[redacted]
A.C.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**,

Plaintiffs,

and

Christian Educators Association International; **A.C.**, by her next friend and mother, Abigail Cross,

Proposed Intervenor-Plaintiffs,

v.

Miguel Cardona, in his official capacity as Secretary of Education; and **United States Department of Education**,

Defendants.

Case No. 2:24-cv-00072-DLB-CJS

DECLARATION OF DAVID SCHMUS, EXECUTIVE DIRECTOR OF CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL

I, David Schmus, under penalty of perjury, declare as follows:

1. I am over the age of 18, of sound mind, and otherwise competent to sign this declaration. I have personal knowledge of the information below.

2. I am the Executive Director of Christian Educators Association International, also known as Christian Educators.

3. As the Executive Director of Christian Educators, I am the organization's Chief Executive Officer, accountable to the Board of Directors. I direct all the ministry and association activities.

Christian Educators' Background

4. Christian Educators is a Christian educational association that primarily serves member individuals who teach and support public schools.

5. Christian Educators' mission is to support, connect, and protect Christians serving in public education. Christian Educators supports teachers who want to make a difference in their students, parents, and coworkers' lives and throughout the broader community.

6. At Christian Educators, we want to support Christian teachers and help them through discipleship and spiritual development. To support our teachers, we create content, host events, prepare trainings, and distribute materials all geared toward spurring our teachers on in their faith and explaining how that carries over to their classrooms.

7. Christian Educators' members consist of a group of educators, counselors, administrators, aides, and even bus drivers and custodians who serve as thriving ambassadors for Christ in our public schools.

8. Christian Educators is a non-profit corporation organized under California law with its principal place of business in Placentia, California.

9. Christian Educators serves educators in all fifty states, with approximately 15,000 members. And of those members, approximately 8,000 of them are paying members whose dues fund our services and ministry. There are dues-paying members in all fifty states.

10. Based on our members' stage in teaching, we have four different types of dues-paying membership: professional, student, retired, and associate.

11. Professional members must be W-2 employees of an educational institution. As part of their membership, they receive professional liability insurance negotiated and purchased by Christian Educators for the benefit of its professional members. In addition, Christian Educators' professional liability insurance policy and benefits cover the cost of an attorney if a professional member faces an adverse job action, and it provides access to free legal and educational advice on personnel and religious issues.

12. While professional members may serve at the K-12 or college level, approximately 98% of them serve at the K-12 level.

13. Similarly, although professional members may serve in any educational institution, approximately 96% of them serve in traditional public schools.

14. Thus, the majority of Christian Educators' dues-paying members are "professionals" employed in public schools at the K-12 level.

15. Christian Educators has approximately 6,043 professional members across the country.

16. Student members may be college students and may not be paid as educators. These students receive professional liability insurance negotiated and purchased by Christian Educators for the benefit of its student members, as well as access to free legal advice on religious issues.

17. Christian Educators has around 1,560 student members.

18. Retired members are retired educators. They do not receive any insurance benefits. Anyone who supports the mission and vision can be eligible for associate membership. Those members also do not receive any professional liability insurance benefits. Christian Educators has 365 retired and associate members.

19. In addition to dues-paying members, Christian Educators has 7,000 "movement members" who are included in the mailing list, but do not pay dues or receive insurance benefits.

20. There are 501 professional members in Tennessee, and 481 of those members are employed at public schools.

21. There are 451 professional members in Kentucky, and 439 of those members are employed at public schools.

22. There are 312 professional members in Ohio, and 297 of those members are employed at public schools.

23. There are 59 professional members in West Virginia, and 57 of those members are employed at public schools.

24. There are 189 professional members in Virginia, and 162 of those members are employed at public schools.

25. There are 124 professional members in Indiana, and 120 of those members are employed at public schools.

26. Christian Educators has 1,666 paying members with coverage in the Sixth Circuit. There are 1,390 professional members in the Sixth Circuit, and 1,340 of those members work at public schools.

27. Christian Educators was founded in 1953 when several Los Angeles educators and school administrators met to create a coalition of like-minded individuals who work in public schools. The coalition's goal was to reach students across America and provide them with caring teachers concerned for their moral and spiritual well-being.

28. Over the last 70 years, Christian Educators has grown and now has members nationwide. Christian Educators provides training and resources to its member educators, enhancing their professional and personal development while offering membership benefits.

29. We publish content, host events, plan trainings, and distribute materials all geared toward the spiritual development of our members. Some of our training and materials are designed to educate our members on issues such as their First Amendment rights and responsibilities and the current law governing union representation of teachers.

30. Christian Educators offers several benefits to its members.

31. For example, Christian Educators offers members $2 million in professional liability insurance, a local attorney to represent members in possible job actions against the members, unlimited consultations with attorneys and educational experts, and all the support provided from a biblical worldview.

32. Our members consult attorneys and educational experts on several different professional categories and areas.

33. Our members consult attorneys and experts to discuss issues like allegations about harassment or about members expressing their views and in turn offending someone who complains. They also discuss contract and employment issues, which usually pertain to issues such as non-renewal of contracts, involuntary transfer, suspension, or termination of employment.

34. They discuss their educational practices, such as the best practices for developing or managing Individualized Education Programs and observations by supervisors. Our members receive consultation from attorneys and experts on faith challenges, like how to deal with the worldview clash over gender identity or whatever the issue of the day is. We encourage our members to respond humbly,

prayerfully, and consistent with their religious beliefs while seeking to love and respect others.

35. Members receive consultations on peer conflicts, which could involve issues with teachers' aides, union representatives, or even hostility towards our members because of their faith.

36. The attorneys help our members with professional associations. We help our members with their teachers' unions and discuss issues such as opting out, receiving fair representation or benefits under the collective bargaining agreement, or even if the members are excluded from bargaining unit meetings. The attorneys also help the members with supervisor conflicts, where the supervisor lacks support for a teacher and disciplines them or is hostile toward the teacher.

37. Our members also consult with attorneys about their religious freedoms. Most often, these issues concern what teachers can and can't do regarding sharing about their faith, praying, having a Bible at work, advising Christian clubs, posting scripture at or near their desks, and any religious accommodation requests. This also includes any parent/student conflicts. Increasingly these issues are students wanting to identify as another gender socially at school without informing their parents.

38. Christian Educators also provides a broad spectrum of resources to equip our members to live out their faith in public schools. One of the ways we do that is through our online national conference called the Rise Up Summit, attended by approximately 10,000 educators each year. We co-host the Summit with Teach 4 the Heart and we have hosted well-known Christian leaders like Francis Chan, Mark Batterson, David Platt, Sean McDowell, and others. Our other in-person events help encourage and equip teachers to best help their students.

39. We host our events to provide encouragement to our members. The primary focus of our events is to teach our members how to think biblically about

who we are and who God is and how to show God's love to others in their work. We encourage them to model their beliefs in all aspects of their lives. We teach our members how to see challenges at their schools and in their classrooms as opportunities to trust and represent Christ. We help our members connect Christian educators with each other to build and sustain the local community. We equip our members to share about our Christian Educators organization with their colleagues and others. We also teach our members what teachers can and cannot do to respect the rights of their students and the school community.

40. We publish an award-winning magazine called Teachers of Vision, which has three editions a year. We also publish a monthly column focused on public policy issues called Free to Teach. We send out a monthly email newsletter called "In the Know" that informs our members about current events, resources, and opportunities. For encouragement, we send a daily devotional to all our members.

41. Our website is full of free resources for our members to use when needed. Our "Resource Center" houses many of our materials for our members. We have resources tackling topics such as articles of interest for Christian educators, professional development webinars, encouragement, campus ministry, parent engagement, prayer and bible study, benefits of membership, insurance, legal advice, and union issues. Each topic has webinars, videos, and publications that our members can access freely.

42. For example, our website has documents explaining our professional liability plan for our members. At Christian Educators we want to provide our members with peace of mind that, even if their school does not have coverage to defend a teacher, Christian Educators provides a back-up plan.

43. Christian Educators helps its members while also abiding by its own Statement of Faith, which explains some of Christian Educators' religious beliefs on topics including the Trinity, the Bible, Jesus Christ, and the need for redemption.

44. Christian Educators also maintains a mission and vision statement that underscores the idea of empowering Christian educators "to serve as thriving ambassadors for Christ in our schools."

45. Christian Educators also has a set of moral and religious standards for employees and volunteers entitled the Kingdom Living Standards for Staff/Volunteers. This includes upholding "the understanding of gender that affirms the goodness of God's creation of humankind as male and female and recognizes the blessing of living in congruence with His created order—a created order demonstrated in this context through biological sex."

46. To become a member of Christian Educators, an educator visits the website, completes a form, and pays a membership fee. Many members opt to resign from teachers' unions before they join Christian Educators. We will assist potential members in that process.

47. There is a faith requirement to joining Christian Educators. The membership form has a "Faith Agreement" and requires an affirmative response to the statement, "I am a Christian."

48. Christian Educators works to educate its members on how to navigate issues involving gender identity that come up in the school setting without compromising on their beliefs as Christians.

49. Christian Educators members generally object on religious, scientific, and philosophical grounds to referring to a student by pronouns that do not align with a student's biological sex.

50. Christian Educators has addressed the issue at our Rise Up Summit, as well as in our Teachers of Vision magazine and the monthly Free to Teach columns.

51. Christian Educators also has a page on its website dedicated to gender-identity issues, including an article I wrote on handling requests to use a student's self-selected pronouns. *See* David Schmus, *Gender Pronouns: Navigating a Difficult Landscape*, available at https://magazine.ceai.org/stories/navigating-gender-pronouns.

52. Christian Educators regularly advocates for the right of its members, at school and related school functions, to use biologically accurate pronouns consistent with their religious beliefs and for the right of its members to express their religious beliefs in appropriate settings at school and school functions.

53. These beliefs held by our members and their expression of their rights are encouraged to be reflected with integrity in their everyday interactions with others as an exercise of their sincerely held religious beliefs.

My Role as Executive Director

54. I submit this declaration on my own behalf as Christian Educators' Executive Director and on behalf of Christian Educators as its corporate representative.

55. I have my bachelor's degree in political science from Pepperdine University, a master's degree in biblical studies and theology from Biola University, and a secondary teaching credential from Biola University. I was an adjunct professor at Biola University teaching Christian Worldview and Biblical Studies courses for 13 years. I became a member myself of CEAI in 2005, and then began volunteering as seminar/workshop speaker/leader with CEAI in 2010. I began working for CEAI in 2015, and was promoted to Executive Director in 2017.

56. Given my frequent interactions with all aspects of the organization and its members, I know our organization's operations and membership. As Executive Director, I participate in all CEAI Board of Directors activities as a voting member. I help ensure that Christian Educators' leaders implement Christian Educators' mission and values and help ensure that local members share the mission and values. I am responsible for increasing Christian Educators' membership and for advocating for our members. I supervise the member admission and ensure the members share Christian Educators' positions.

57. I have observed the operations and circumstances of Christian Educators' members related to their commitment to living their Christian examples in their classrooms and supporting Christian Educators' values in their workplaces.

58. As Executive Director of Christian Educators, I know the concerns of Christian Educators' members. Based on my experience and interactions with members, I know that educators are gravely concerned about the effects that these Title IX changes will have on them and how the changes will clash with their constitutional rights and the statutory protections that they may lose.

59. Many members are expressing their reservations to our consultants and indicating they are not likely to speak out publicly for fear of retaliation and they are concerned with coerced self-censoring due to the chilling nature of the Title IX changes. And under the new rules, members fear that they will be subject to Title IX complaints for expressing their sincerely held beliefs during informal conversations at their school and even for their speech occurring outside of school with students and colleagues, whether at their church, on social media, or in other conversations.

60. For example, I know educators who have faced pushback and ridicule in their jobs because they failed to use a student's chosen pronouns in class or for opposing the school's gender ideology. Decent and honorable teachers who want to

follow their religious convictions while providing a safe and respectful environment for children to learn are at risk because of these changes.

61. Christian Educators recently conducted an email survey of its members, and of the 637 members that responded, more than half of the members reported that students requested the teachers use pronouns or other identifiers that communicate the student identifies as a gender identity that is different from their biological sex.

62. And twenty-three respondents related circumstances in which school officials and others have punished or threatened to punish educators for refusing to use these inaccurate names or pronouns.

63. And other members expressed situations where they are in schools or can invoke state laws or school policies that protect their rights to use pronouns consistent with students' biological sex.

64. We have had members accused of harassment because other teachers in their schools were offended by what our members said about gender identity or believed generally about their faith.

65. For example, a teacher member in Virginia received a Title IX complaint from another teacher in their school because our member expressed disapproval of using pronouns for students that do not align with the student's sex. The teacher was offended by this view and filed a complaint against our member.

66. In Colorado, one of our members was accused of bullying a student and causing the student severe mental harm for failing to use the student's chosen pronouns that did not align with the student's sex. Our member would not use this student's chosen pronouns, and the member was accused of discriminatory and offensive remarks toward the student.

67. Another member in Colorado was fired from a substitute teacher position because the member told a student that there is more to life than this student's gender identity.

68. One of our members is the Bible Club sponsor at this member's school in California. The member was accused of harassment for hosting different events and discussing biblical issues, even though this member and the Bible Club followed the school's policies for hosting events and speaking about their beliefs.

69. These are just a few examples of the harassment our members face at their schools when they speak according to their religious beliefs. The teacher colleagues at our members' schools are often easily offended, especially about gender identity issues. This offense causes some of our members to be afraid to speak their religious views. It causes other members to chill their speech about their views, as they do not want to be falsely accused of harassment or bullying simply for sharing a belief about gender identity that is unpopular.

70. I anticipate that, when the new Title IX rules go into effect, Christian Educators will receive many more calls and questions from our members about how to handle situations like using inaccurate pronouns, speaking about religious beliefs on gender identity without incurring liability, and accessing single-sex intimate spaces (like restrooms) with members of the opposite sex. We help our teachers with numerous issues in the schools and the classrooms. If the Title IX rules go into effect, we will have reduced bandwidth for our current operations.

71. Christian Educators has already received inquiries about these topics and expended resources answering those questions as they come up under local school policies. But because the new Title IX rules create a nationwide policy, I fully expect, based on past inquiries, that Christian Educators will receive many more inquiries about the new Title IX rules as they relate to these topics.

The effect of new Title IX rules on Christian Educators' members

72. Christian Educators' members are harmed by the Biden Administration's recent changes to the Title IX regulations.

73. Christian Educators' members teach from a foundation of their Christian faith, which means their faith informs how they communicate with students and conduct themselves in the classroom. They want to show dignity and respect for all their students.

74. The vast majority of our members teach at schools that must comply with Title IX. This means that the schools comply with the Title IX prohibition on sex discrimination. It is standard for schools to have a process for Title IX violations.

75. Compliance with Title IX in public schools is expected for teachers and other employees.

76. Because of this compliance with Title IX, Christian Educators has thousands of members who are teachers in schools that are impacted by the Biden Administration's changes to Title IX.

77. Approximately 96% of our members teach or work at schools that are in traditional public schools and will be impacted by the changes to Title IX.

78. The Biden Administration's changes will require Christian Educators' members to use pronouns that do not align with their students' biological sex. If they refuse to use pronouns that violate their faith, they will be subject to discipline at their individual schools and even face termination.

79. The Title IX changes will also apply to interactions in classrooms, outside of classrooms, between employees, and even online when the teachers may post something that students and teachers see.

80. Christian Educators' members Silvia Moore, Michelle Keaton, Amy McKay, Brett Campbell, and Joshua Taylor have filed declarations in this case, and

I can affirm that, based on my interactions with other members, the statements and experiences of these specific teachers are similar to those of other members of Christian Educators.

81. Based on my interactions with and knowledge of Christian Educator members, I anticipate that the new Title IX rules will lead to teachers being required to use pronouns that violate their religious beliefs and/or coerced into silence by the chilling effect of these changes in order to remain in good standing with their employers. Either way, they are forced to choose between staying silent about their beliefs or speaking according to their beliefs and facing possible discipline at their schools.

82. Based on my interactions with and knowledge of Christian Educator members, I anticipate the new Title IX rules will lead to teachers being falsely accused of harassment for expressing their biblical views on sex, gender-identity, and human sexuality. The fear of government persecution is a reality.

83. Christian Educators joined this suit to ensure its members will not face discipline, investigation, or any other negative repercussions, official or social, for exercising their constitutional and statutory rights.

The effect of new Title IX rules on Christian Educators

84. In addition, Christian Educators joined this suit to ensure that the organization can focus on its primary mission of developing professionals as Christian educators—instead of diverting its limited resources in response to Defendants' unlawful Title IX actions.

85. Christian Educators exists to support, connect, and protect our members and spur them on toward greater spiritual development they use in their daily lives, at their schools, and in their classrooms.

86. Daily, we as an organization are busy responding to service requests from our members, managing memberships, developing and distributing online and printed content, producing live and virtual events, praying for and with our members, and developing our membership, mission, and service offerings.

87. In response to Defendants' Title IX actions, Christian Educators will need to reduce our work on creating content, preparing for our annual events, and managing our memberships with current members. Instead, we will be consumed by answering calls from members regarding how they can remain faithful Christians while implementing the new Title IX rules as teachers. That is because these questions are not easily answered about how our members can follow the Title IX rule changes while staying true to their faith convictions.

88. The difficulty of these questions means that we cannot simply push out standard content to answer our members' questions. Instead, we will have to walk through these challenges with our members in prayer and discernment as they weigh whether to quit, risk violating their faith, or risk being charged with violations and prosecuted. It will be a very time-consuming process.

89. These efforts will remove our ability to consult with our members on their professional association questions or supervisor conflicts. We will not be able to operate normally due to these strenuous Title IX rule changes and the burden they place on our members.

90. Also, if these Title IX changes were to go into effect, we anticipate that many of our members would either resign or retire early and lose their positions at their schools due to non-compliance with the rules. This would shrink the number of members who participate with Christian Educators, and it would be a direct harm.

91. Over the years, we have heard from many of our members that they will not comply with rules that require them to communicate messages that violate their faith, particularly about gender identity. These members work in public

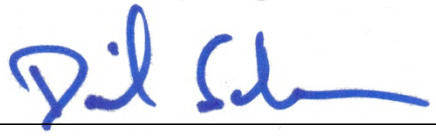
schools and will not comply with the Title IX rule change. If those members were terminated from their schools and the membership of Christian Educators diminished, it would cause us as an organization to lay off our staff and limit our ministry initiatives.

92. If Defendants are not enjoined and the Title IX actions are not set aside, Christian Educators will continue to suffer organizational harm and redirect its limited resources in response to Defendants' unlawful actions.

DECLARATION UNDER PENALTY OF PERJURY

I, David Schmus, a citizen of the United States and a resident of the State of California, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 2nd day of May, 2024 at Washington, D.C.



David Schmus

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**, *Plaintiffs,* *and* **Christian Educators Association International**; **A.C.**, by her next friend and mother, Abigail Cross, *Proposed Intervenor-Plaintiffs*, v. **Miguel Cardona**, in his official capacity as Secretary of Education; and **United States Department of Education**, *Defendants*.	**Case No.** 2:24-cv-00072-DLB-CJS

DECLARATION OF BRETT CAMPBELL

I, Brett Campbell, declare as follows:

1. I am over the age of 18, of sound mind, and otherwise competent to sign this declaration. I have personal knowledge of the information below.

2. I am a Christian and a current member of the Christian Educators Association International. I have been a member since 2023.

3. Christian Educators is a professional association that provides legal and spiritual resources for teachers.

4. When I first began teaching, I needed to get insurance coverage. I decided to get insurance from Christian Educators because it shares my convictions and seeks to equip and protect educators in ways that align with my values.

5. Since high school I have felt called to teach. My own teachers were incredible. I wanted to help students reach their potential and do my best to set an example for them as my teachers did for me.

6. In May 2023, I received my degree in Secondary Education with a focus in History from Tennessee Technological University.

7. In the fall of 2023, I began teaching 7th grade social studies at Warren County Middle School in Warren County, Tennessee.

8. This is my first position as a teacher, and it has already been incredibly rewarding.

9. Middle school is a challenging time for many students and a time of growth and maturing.

10. Getting to walk with students during this season of life is a privilege. I try to convey the subject matter to them but also to help them develop important life skills like communication, time management, and a healthy sense of self.

11. Social studies covers a broad range of historical topics and themes. The students enjoy trying to better understand the past and how we can learn from it.

12. My faith impacts my work. It is my source of hope and pervades my approach to teaching and my interactions with others, in and out of the classroom.

13. Love is at the heart of the Christian faith. My beliefs inspire me to reflect authentic love in my interactions with students, faculty, and staff.

14. As part of my religious beliefs, I also believe that God created every person to reflect Him. Therefore, I believe everyone deserves to be treated with dignity, kindness, and compassion. I strive to do that with my colleagues and students.

15. I also believe that God created two distinct sexes, male and female, and that people cannot change their sex and should not try to change their sex. According to my beliefs, God determines each person's sex and that is something we should accept as a gift, rather than reject. So I believe that people should seek to accept their bodies and live consistent with their sex because this allows them to flourish.

16. I teach five classes of 25-30 students. Each day, I interact with about 150 students.

17. In addition to my classes, I speak with students outside of class in hallway conversations or when they stop by my classroom.

18. Students have requested that I refer to them using different names than their given names because they identify as the opposite sex or as non-binary.

19. Currently 3 students in my classes identify as transgender. Outside of class, I also interact with several other students who identify as transgender. Overall, about 7 students at Warren County Middle School identify as transgender.

20. While I call students by their requested name, I do not and will not call them by pronouns that differ from their sex because doing so violates my religious beliefs.

21. I believe that by using inaccurate pronouns—pronouns that reflect people's gender identity and contradict their sex—I am lying to them and accepting and promoting views contrary to my religious beliefs. Specifically, I believe doing so contradicts my beliefs about humanity, God's creation of two sexes, and God's design for human flourishing. Not only that, I also believe that using inaccurate pronouns is inconsistent with my duty as a teacher to tell the truth.

22. I could not use inaccurate pronouns when referring to students or colleagues without violating my faith.

23. Some of my students are aware that I am a Christian, so it would be especially harmful for me to speak and act in a way that my students know violates my beliefs. It would make me look like a hypocrite.

24. My faith and duty as a witness to my students compel me to live with integrity—consistent with my convictions on and off campus.

25. To my knowledge, Warren County does not require teachers to use inaccurate pronouns. No official or administrator at the school has ever told me I must use pronouns inconsistent with someone's sex.

26. As I understand it, Tennessee law protects public school teachers from being compelled to use pronouns not consistent with someone's sex.

27. I also understand that, under another Tennessee state law, students and staff must use restrooms consistent with their sex, without regard to gender identity.

28. Our school does not have separate restrooms for the teachers. We use the same school restrooms as the students.

29. The restrooms are designated for males and females and are multi-use.

30. I would not be comfortable and do not want to use the same restroom as a female student or staff member. It would be awkward and embarrassing for me

to do so. I especially do not want to share this space all alone with a girl, someone who could be as young as 12 years old, while I go to the restroom.

31. The male restrooms have both stalls and urinals. The stalls are standard metal frames with a latch between the doors and the wall panels. The panels end more than a foot above the ground and only are about 6.5 feet high.

32. The restrooms are not set up to provide much privacy, which is why they are separated by sex.

33. Getting to know the other teachers through conversations in the teachers' lounge is a fun part of being a teacher.

34. Sometimes during the lunch break or in our classrooms when we are not teaching, other teachers and I discuss the challenges facing educators today. This helps me to learn from my colleagues and to better support them.

35. Some of our conversations have been about gender-identity issues. This topic inevitably comes up. For example, teachers discuss how students have asked teachers to refer to them by certain pronouns or names and how teachers have to update their class rosters and student profiles. Teachers have also discussed whether it's in the best interest of children to be treated like they are the opposite sex.

36. During those conversations, I have conveyed that my faith teaches that sex is immutable and is based on biology. I have also discussed that I believe it is harmful for students to be treated as the opposite sex. In these conversations with other teachers, I have affirmed that I believe it is in the best interest of students to be treated consistent with their sex as recorded on their original birth certificate.

37. No school official has ever told me to stop discussing my views on gender identity with other teachers and staff.

38. If the Title IX rule requires all teachers to use preferred pronouns, I will not be able to do that because I cannot speak contrary to my religious beliefs.

39. I am also afraid that the new Title IX rule will prevent me from discussing my views with other teachers or responding honestly if a student asks me my views on gender identity.

40. Warren County Board of Education has a policy requiring that all employees are trained in complying with federal laws including Title IX. We are required to report any behavior that we reasonably believe constitutes a Title IX violation to the district's Title IX Coordinator.

41. In the Title IX training that employees receive, we are told to immediately report conduct that we think may constitute a violation. The training tells us that if we are unsure whether certain behavior qualifies as a Title IX violation, we should report the conduct to the Title IX Coordinator immediately without seeking further information.

42. It is my understanding that the new Title IX rule takes effect on August 1, 2024. Starting then, I will avoid talking about these issues at school for fear of the repercussions. I will not share my beliefs on issues like gender identity on campus for fear of being reprimanded by the school or violating the regulation. I don't want to risk exposing myself to punishment, and it's better that I avoid speaking my views than take that risk.

43. For example, I will no longer tell staff or students that a boy who identifies as a girl is still a boy (or vice versa), that there are only two sexes, that people can't change their sex, and that people are better off living consistent with their given sex. If the topic comes up after August 1, I will simply say I can't talk about that right now.

DECLARATION UNDER PENALTY OF PERJURY

I, Brett Campbell, a citizen of the United States and a resident of the State of Tennessee, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 1 day of May, 2024 at McMinnville, Tennessee.

Brett Campbell

Brett Campbell

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**,

Plaintiffs,

and

Christian Educators Association International; **A.C.**, by her next friend and mother, Abigail Cross,

Proposed Intervenor-Plaintiffs,

v.

Miguel Cardona, in his official capacity as Secretary of Education; and **United States Department of Education**,

Defendants.

Case No. 2:24-cv-00072-DLB-CJS

DECLARATION OF MICHELLE KEATON

I, Michelle Keaton, declare as follows:

1. I am over the age of 18, of sound mind, and otherwise competent to sign this declaration. I have personal knowledge of the information below.

2. I am currently a member of the Christian Educators Association International. I have been a member of Christian Educators since 2021.

3. I am a Christian, and I joined Christian Educators because its mission aligns with my own Christian faith and beliefs. When I became a teacher, I looked for an educational association that would not only provide the insurance coverage I needed, but that also aligned with my values. Christian Educators does not fund causes that violate my religious beliefs.

4. I also joined Christian Educators to get legal advice on how to handle any situations that might come up in the school context.

5. Teaching is my opportunity to show God's love to others; it provides me with a platform through which I can have a positive impact on children. Christian Educators supports this goal and provides me with the resources necessary to do my job from a biblical perspective.

6. I currently work as a business teacher in Dr. Paul Kelley Volunteer Academy, a public school in Knox County Schools in Tennessee. In our public school, we primarily teach juniors and seniors from surrounding schools who are in danger of not graduating high school. We provide more intensive instructional support and alternative teaching methods to ensure these students can graduate on time and become college and career ready.

7. I was hired at Dr. Paul Kelly Academy in 2016. I have been a teacher for 22 years, and for almost all 22 of those years, I have taught in Knox County.

8. Knox County Schools has established Title IX policies that say the school complies with Title IX. My county is committed to following the Title IX policies.

9. During my time as a teacher, I have received training on Title IX.

10. At the beginning of this year, I attended a staff training on all the pertinent regulations we need to abide by in our classrooms. There were two slides that discussed Title IX requirements. We have this meeting at the beginning of every school year. I attended this meeting at the start of the 2023–24 school year.

11. Once my school provides me the information on the pertinent regulations, we sign a document attesting that we have received the information about school-required policies.

12. My school district takes Title IX compliance very seriously.

13. We have a process for Title IX violations at our school. When there are Title IX violations or complaints, there is a chain of command that flows up to the school superintendent. There is also a self-reporting requirement for Title IX violations in my school district.

14. Each year, I have regular contact with about 30–45 students through my classes.

15. This year, I had one student who was gender-confused and identified contrary to their sex. This student was in my class and requested that I use pronouns that did not align with the student's sex. The principal brought up the issue with me. Thankfully, the situation resolved itself, and I was never required to use inaccurate pronouns. I would not have done so if ordered to.

16. In the 2021–2022 school year, I experienced a similar situation. A student in my class requested that I use pronouns that didn't match the student's sex. I did not want to use the inaccurate pronouns, and the student expressed

concern to my principal. Thankfully, the situation was resolved without me having to use inaccurate pronouns.

17. No school administrator or principal has ever informed me that I must use a student's pronouns that do not align with the student's sex.

18. That was not the only interaction over gender-identity issues that I had with that student who this year wanted me to use inaccurate pronouns. One day, three students were out talking in the hallway, and class was about to start. At first, I told the group they needed to go to class. A few minutes later, they still had not gone to class, so I asked the students to go to class. I referred to each student according to their sex, not their gender identity. One of the students was the student who asked me to use inaccurate pronouns, and I referred to that student according to the student's sex.

19. The students were upset that I did not refer to the student according to the student's gender identity. One of those students expressed distress about how I referenced the student. That same student reported false allegations against me to my principal.

20. I care deeply for my students, and I do not want to lie to them or encourage them into a situation that will only make their lives more difficult. I believe that God created each person in his image, that God created two distinct sexes, male and female, and that sex is immutable. Because of my religious beliefs, I will not lie to my students, and I will not promote the view that people can change their sex, or that people should live contrary to their sex. If I were forced to use pronouns that do not match someone's sex, it would violate my religious beliefs and express views I disagree with.

21. Given the many students I teach and interact with regularly, I expect the number of requests I receive for using different pronouns to increase.

22. I do not want to devalue the God-given worth of a person by perpetuating what I believe is a lie. To affirm or use a pronoun contrary to someone's sex would be inconsistent with my beliefs and what I believe is God's design for that person. I simply cannot affirm that a boy is a girl or vice versa, and I cannot, consistent with my religious beliefs, participate in a process of encouraging students to live contrary to their sex. I believe that the "social transition" process will harm them.

23. I am aware that using pronouns a student requests as part of expressing a new gender identity is called "social transition." It is my understanding that this "social transition" process often leads to children then undergoing dangerous medical procedures, like taking puberty blockers or cross-sex hormones and undergoing surgeries, in an effort to make them look like the opposite sex. I do not want to encourage students to go down that road of making potentially irreversible and life-changing decisions they may later regret. So I will not lie to my students by using pronouns that conflict with their sex.

24. I would object to using inaccurate pronouns of teachers, staff, or students based on my conscience because that policy would force me to violate my deeply held religious beliefs and force me to communicate ideas contrary to my beliefs.

25. I also do not want to stop expressing my beliefs about gender identity in school even if others disagree with me.

26. I have experienced issues with my colleagues when I express my religious beliefs. For example, one day in the hallway, I was talking with a fellow teacher when she received a notification that Tennessee's law protecting children from drag shows passed and would go into effect. I told her that I was happy it passed. A teacher who was walking by heard my comment, turned around, and began to yell at me. She told me that she did not understand why I would be happy

about that law, and she attacked the sincerity of my religious beliefs because of my views on the law. She even told me that my expressing my opinion on the Tennessee law passing was the equivalent of using hate speech.

27. She was yelling at me so loudly that other teachers came out of their rooms to see what the commotion was. She was visibly upset and offended by what I had said.

28. But even when others disagree with my beliefs, I do not want to be forced to stop discussing my beliefs on topics that are important to me.

29. I also do not want to have to censor my speech with others.

30. One day, one of my students came to me outside of class time to express his distress that another teacher was negatively discussing Florida's law that would protect young children from hearing about sexual orientation and gender identity. He wanted to know what I thought about it and knew I would welcome a conversation with him. We briefly discussed the matter.

31. I want to continue expressing my views in appropriate settings during the school day, such as when I'm interacting with my colleagues during lunch or in the hall, as I have done in the past. I fear that if the Biden Administration's Title IX rule changes go into effect, I will be kept from speaking the truth about religious and controversial topics, particularly as they relate to gender ideology.

32. Specifically, I want to be free to tell my colleagues about my religious beliefs when asked and when the topic comes up and explain how God created two distinct sexes and how gender ideology is inconsistent with common sense and my religious beliefs. I want to explain why I am participating in this lawsuit and why I think it's important to reject the false idea that people can or should try to change their sex. I want to explain that a boy is not a girl or vice versa and that it is a lie to say otherwise.

33. Many of my colleagues disagree with me on topics of gender identity, women's sports, and even medical transition efforts. Some colleagues have scolded me and asked me who am I to judge others on what they want to be called. Other colleagues have said they will use a student's preferred pronoun when a student requests it because they do not care. Many of my colleagues disagree with my views on human sexuality. The principal wants everyone to feel comfortable in the school.

34. I will not be able to comply with any new Title IX rule changes or new school policies that require me to use pronouns that do not align with someone's biological sex. If that happens, I fear I will be fired, or I will have to quit my job.

35. I also know I will not be able to abide by the school district's requirement that I report myself or others for violating these new changes to the Title IX rules. I will not use a pronoun that does not align with a student's biological sex, and I will not self-report that violation or report that Title IX violation if I hear other teachers referring to students only using pronouns that align with a student's sex.

36. It is my understanding that the new Title IX changes go into effect August 1. To avoid violating those regulations and to avoid being punished by my school for expressing my beliefs, I may have to quit my job if I know I will be forced to speak and convey messages that I disagree with.

DECLARATION UNDER PENALTY OF PERJURY

I, Michelle Keaton, a citizen of the United States and a resident of the State of Tennessee, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 02 day of May, 2024 at 9:00 A.M.

Michelle Keaton

Michelle Keaton

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**, *Plaintiffs,* *and* **Christian Educators Association International**; **A.C.**, by her next friend and mother, Abigail Cross, *Proposed Intervenor-Plaintiffs*, v. **Miguel Cardona**, in his official capacity as Secretary of Education; and **United States Department of Education**, *Defendants*.	**Case No.** 2:24-cv-00072-DLB-CJS

DECLARATION OF AMY MCKAY

I, Amy McKay, declare as follows:

1. I am over the age of eighteen and competent to testify. I have personal knowledge of the information below.

2. I am a Christian and a resident of Shelby County, Tennessee.

3. I have been teaching in public schools for twenty-four years.

4. I have been a member of the Christian Educators Association International for one year.

5. Christian Educators provides me insurance coverage and also supports me as a teacher in ways that reflect my beliefs.

6. I learned about Christian Educators from my sister, who is also a member. In the past, I had received liability coverage from an organization that supported causes I disagreed with. I knew I needed to look for coverage elsewhere. Finding Christian Educators has been a blessing.

7. With Christian Educators, I know my contributions go toward causes that I support. I enjoy getting insurance coverage from an organization that I feel represents me well.

8. My faith impacts how I teach. Because of my faith, I treat everyone with love and compassion and try to set an example for students and colleagues.

9. My faith teaches that people are created by God and deserve to be treated with dignity and respect. I also believe that God created everyone male or female and that someone's sex cannot be changed. I believe that people should live consistent with their God-given sex.

10. I do not believe that a male can be a woman and likewise don't think a female can be a man.

11. I believe that a person's sex is a central part of who they were created to be.

12. I cannot speak or act in a way that goes against my faith.

13. I currently teach 7th grade English at Arlington Middle School in Shelby County, Tennessee, a public school in Tennessee.

14. This is my first year teaching at Arlington Middle School.

15. Before teaching at Arlington Middle, I taught English for ten years to 9th through 11th graders at Arlington High School.

16. Both Arlington Middle School and Arlington High School are part of the Arlington Community Schools District.

17. I greatly enjoy teaching students in Arlington Community Schools.

18. When I taught at the high school, I also coached girls' softball.

19. When I went to college, I participated in college athletics and played softball. Women's sports are extremely important to me. I worked hard as an athlete to get a college scholarship for softball, and I love working with high school athletes to achieve their dreams.

20. I try to be approachable to students. Students inside and outside of class often strike up conversations with me about various topics. I know not all students will agree with my perspectives about everything, but I believe teachers should be someone students know they can trust to be genuine with them.

21. Several of the students I taught at Arlington High School identify as transgender.

22. As far as I know, the high school has between 10 and 15 students who identify as transgender. And as far as I know, Arlington Middle School has around 4 students who identify as transgender.

23. On about 5 occasions, students have requested that I use inaccurate pronouns—that is pronouns that are inconsistent with the students' sex and instead reflect a contrary gender identity.

24. On a few occasions, a student's classmate will push me to use inaccurate pronouns when interacting with their friends who identify as transgender.

25. My religious beliefs do not allow me to address students in a way that indicates that they are a member of the opposite sex.

26. Using pronouns that do not align with a student's sex violates my beliefs.

27. When I have called students who identify as transgender in a way that reflects their sex not their gender identity, the student often responds by giving me a bad look. Frequently, they and their friends will roll their eyes.

28. I have often been afraid students would complain to school officials that I was not referring to them in the way they wanted.

29. Arlington Community Schools District does not require that I use inaccurate pronouns, meaning pronouns that do not reflect a person's sex. No administrator has ever said that I must use inaccurate pronouns.

30. Arlington Community Schools likewise has students participate in sports based on their sex rather than their gender identity.

31. When I was coaching softball, an incoming male student expressed interest in joining the female softball team. The athletic director told the student that only females were allowed on the girls' sports teams at Arlington High.

32. I was relieved because I would not have been comfortable having a male athlete on the girls' team when I coached. I didn't want to participate in taking away opportunities from female athletes on the team.

33. As this example shows, issues related to gender identity frequently come up at the schools where I have worked. In fact, I have often spoken with other teachers about this topic in the teachers' lounge. I have shared my beliefs that

people cannot change their sex and that I believe it is harmful to tell students that they are the opposite sex.

34. Differences between boys are girls are particularly clear in athletics. I have told my colleagues that I do not believe men who identify as women should be able to compete in women's sports. I have shared how hard I worked to play softball in college and how unfair it would've been to allow a man to take my place on the team.

35. I have told them that I would never let my son, a student-athlete about to begin playing college baseball, decide he wanted to play women's softball because that would be unfair.

36. The differences apply off the field as well. I have expressed to my colleagues that males cannot be girls, and females cannot be boys. I have shared my religious belief that God made man and woman distinct. This is very clear in the Bible. I have voiced my belief that regardless of people's preferences, they cannot change their sex and that changes to outward appearance do not alter someone's sex.

37. When I have shared my opinion, other teachers have pushed back, saying that it is respectful to use the pronouns requested by students. I have shared that I believe that teachers' rights also must be respected, and that teachers cannot be required to refer to students based on gender identity rather than sex.

38. I think it is important that teachers and staff have the freedom to discuss their views on controversial topics like this, as it helps us to support one another and to talk through the best way to respect and support students.

39. As an educator, I also feel that it is important for me to advocate for students in my personal capacity.

40. I have posted numerous times on social media about the importance of protecting women's sports.

41. As a female athlete myself, the former coach of a girls' softball team, and the mother of a female athlete, I believe it is critical that males not be permitted to compete against women. Allowing males to compete on women's teams jeopardizes safety and fairness in women's sports.

42. Some of my colleagues follow me on social media.

43. On two occasions, I have had the school administration talk to me about something I posted. In one instance, I removed the post after they spoke to me about it. I know that the school administration is aware of my expression on social media.

44. Arlington Community Schools abide by Title IX.

45. Under the Arlington Community Schools Board Policies, all employees must receive annual training on how to identify and report Title IX violations to the district's designated Title IX Coordinator.

46. The district's Title IX policy is posted on the Arlington Community Schools website and printed in every student handbook.

47. As a teacher, if I am informed of or if I witness something that qualifies as sexual harassment under Title IX, the Arlington Community Schools Title IX policy requires that I report this immediately.

48. From what I understand, the new Title IX rule changes the definition of sexual harassment to include words and actions that previously would not constitute a violation.

49. I am now afraid about sharing my views at school and on social media about issues related to gender identity because I worry that I may violate the new rules. For example, I want to continue to express my beliefs to colleagues and students who ask whether men who identify as women should participate in women's sports, whether they are in fact men, and whether they should be able to access women's sports teams and women's private areas like bathrooms. I want to

continue to share that I think living contrary to your sex is harmful and that boys cannot become girls and girls cannot become boys. I want to explain to others why I don't use inaccurate pronouns and why I believe doing so would constitute lying and require me to speak views contrary to my faith.

50. Beginning August 1, 2024, when these rules go into effect, I will no longer speak openly about my views on gender identity at school for fear that the school will punish me or that I will be found to have violated federal law. I will also limit what I post on social media on these topics for fear of being reported. I would rather stop speaking my views on these topics and avoid the risk of being punished. This certainly will affect how I interact with students and colleagues. I will not bring up topics that I would have, and I will avoid engaging in conversations on topics related to gender identity until I know I won't be punished for expressing my views.

51. For example, after August 1, I will no longer tell students or staff at school that there are only two sexes. If I am asked directly to say that or what I think about it, I will simply say, I can't talk about that right now.

52. I also will not report myself or other teachers merely for speaking views critical of gender ideology or for declining to use inaccurate pronouns. But I am afraid that come August 1, I will be required to do so because of school policy once combined with the new Title IX changes.

53. I think that requiring teachers to report themselves and one another for expressing their views on topics like gender identity will be harmful to inter-faculty, staff, and student relationships and prevent us from supporting one another. I fear it will substantially affect how we teach and interact with others. It will prevent me from having open and honest discussions about gender identity as I have done in the past.

DECLARATION UNDER PENALTY OF PERJURY

I, ___Amy McKay_____, a citizen of the United States and a resident of the State of ___Tennessee____, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this _2_ day of __May_, 2024 at ___Arlington___, Tennessee.

Amy McKay

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana; Commonwealth of Virginia**; and **State of West Virginia**, *Plaintiffs,* *and* **Christian Educators Association International**; **A.C.**, by her next friend and mother, Abigail Cross, *Proposed Intervenor-Plaintiffs*, v. **Miguel Cardona**, in his official capacity as Secretary of Education; and **United States Department of Education**, *Defendants*.	**Case No.** 2:24-cv-00072-DLB-CJS

DECLARATION OF SILVIA MOORE IN SUPPORT OF MOTION TO INTERVENE

I, Silvia Moore, declare as follows:

1. I am a 52-year-old resident of Arlington, Tennessee, and have personal knowledge of the information below.

2. I am a Christian, a public-school teacher, and a member of the Christian Educator's Association. I have been a member of Christian Educators for the last two years.

3. I joined Christian Educators because it reflects my Christian values. It does not use my membership dues to fund causes that I disagree with. It represents me and my interests well. And it offers teacher's insurance at affordable rates.

4. My Christian faith impacts how I teach in the classroom. I try to be kind to my students and show dignity and respect to everyone I interact with.

5. I was first hired by Bartlett City Schools in 2016 to teach Spanish to middle schoolers. I currently teach around 100 students.

6. My school has a policy that says it complies with Title IX's prohibition on sex discrimination. Each year, at the beginning of the school year, we have online training and professional development that includes training on Title IX.

7. According to school policies, all forms of sexual harassment and discrimination on the basis of sex are prohibited. For that prohibition, the school policy cites 34 CFR §106.1, the prior version of the Title IX regulations.

8. According to these policies, I am expected to report any Title IX violations to my school.

9. My school also has a code of conduct that requires all teachers to comply with all applicable federal and state laws and to report anyone who violates this code within 30 days. Failure to report is considered a violation of the code. And according to this code, failure to comply with the code will result in disciplinary

action up to and including dismissal. Every teacher must agree to sign this code of conduct to continue working at the school.

10. Every year my school conducts multiple trainings on different topics, including sexual harassment and discrimination. Every year teachers must complete online trainings. Teachers can test out of some trainings, but not every training. Teachers are given the option to answer questions regarding sexual harassment and discrimination instead of sitting for the trainings every year.

11. School administrators have communicated to me that they expect me and other school employees to comply with Title IX.

12. To my knowledge, my school does not have a policy about students who identify as the opposite sex or who ask to be referred to by inaccurate pronouns, meaning pronouns contrary to their sex. In fact, no school administrator has ever communicated to me that I must use inaccurate pronouns. It is my understanding that Tennessee state law currently protects my right to use pronouns consistent with someone's sex.

13. I do not object to using nicknames if the students request them. But I will not use inaccurate pronouns—such as referring to a female student with he/him pronouns, or a male student with they/them pronouns—because to me, that would be lying. That would violate my conscience and my religious beliefs about God's design for humanity. I cannot say whatever words I am asked to say, especially if it would entail communicating false information.

14. I believe that God created two distinct sexes and that God created humans to live consistent with their sex. So I cannot affirm the opposite, by using pronouns to communicate to people that their sex is irrelevant or that it's ok to try to change their sex or that there are more than two sexes.

15. Two years ago, I had a female student who came to me at the beginning of the school year and asked me to call her by a different name. I agreed

to do so. The female student also asked me to use male pronouns to refer to her. I said that I could not do that. The student is registered in our school system as female, and I know the student to be female based on my years of teaching in that school. The student did not press the issue.

16. There continue to be students in our school system who identify as transgender. I have had students in the past who identify as transgender, and I expect to have students in the future who do, too. So far, that has not been an issue because my school has not required me to use inaccurate pronouns.

17. I also interact with students outside the classroom in the hallway or after school in the Spanish club that I sponsor. If there are students who identify as transgender who attend Spanish club or interact with me outside of class, I will not be able to use pronouns that do not align with their biological sex.

18. I would also like to share my beliefs on gender and sexuality with my colleagues and students in appropriate settings. I have expressed my beliefs about biological sex and gendered language in my classroom with my students. For example, I talked with my students about the Spanish language and how all the nouns have gender, either male or female. One of my students mentioned a peer and said that the student did not have a male or female gender. The student asked how we should refer to that student. I responded that there are only two genders, male and female, and we should refer to the student accordingly.

19. In another class, we read a story written in Spanish that emphasized the differences between men and women. The students read the story about a family with a mom, a dad, and some of their children. One of my students commented that some people who are not women can have surgery, and then give birth to a child. I told this student that only women can have babies.

20. I interact with my fellow colleagues daily on an informal basis. I sometimes eat with other teachers in the school's teachers' lounge. I also speak with

other educators between classes in the halls, during school breaks, in meetings, and in the many trainings we have every year.

21. Because of my faith, I want to express my beliefs on gender identity and the immutability of sex. However, I fear that the new Title IX rules will keep me from having these conversations with my colleagues.

22. I also fear that when the Title IX rules change, my school district will be forced to require me, and other teachers, to use inaccurate pronouns to address students who identify contrary to their sex. I also fear I will be punished for expressing views that align with common sense and my religious beliefs about biology, human sexuality, and gender. I fear that my school will punish me if I will not tell students that there are more than two distinct sexes or that a man can be a woman or vice versa. I also fear that I will violate my school's policy for not reporting myself and others for violating the new Title IX rules. All of this will put me in a very difficult position and leave it unclear what I can and cannot say to comply with state, local, and federal laws.

23. If I am forced to use inaccurate pronouns or to speak in a way contrary to my religious beliefs, I will have to quit my job. I cannot lie and speak views contrary to my beliefs.

DECLARATION UNDER PENALTY OF PERJURY

I, Silvia Moore, a citizen of the United States and a resident of the State of Tennessee hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 2 day of May, 2024 at Arlington, TN.

Silvia Moore

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**, *Plaintiffs,* *and* **Christian Educators Association International**; **A.C.**, by her next friend and mother, Abigail Cross, *Proposed Intervenor-Plaintiffs*, v. **Miguel Cardona**, in his official capacity as Secretary of Education; and **United States Department of Education**, *Defendants*.	**Case No.** 2:24-cv-00072-DLB-CJS

DECLARATION OF JOSHUA TAYLOR

I, Joshua Taylor, declare as follows:

1. I am over the age of eighteen and competent to testify. I have personal knowledge of the information below.

2. I am a Christian and a resident of Coffee County, Tennessee.

3. I am in my tenth year of teaching in public schools and my fifth year of teaching at Coffee County Central High School, a public school in Tennessee.

4. For over five years, I have been a member of Christian Educators Association International, which has provided my insurance coverage. I appreciate the liability protection, but I am also very grateful to Christian Educators for the way it equips Christian teachers to serve in public schools.

5. Christian Educators helps us to understand the role of faith in the workplace and the legal parameters that govern public school teachers. This helps me to be confident in who I am as a Christian and also that I am following the law.

6. I currently teach 10-12th graders at Coffee County Central High.

7. I teach statistics, geometry, and the Bible as Literature.

8. I deeply believe in the value of public education. It sets students up for success and a bright future.

9. As a Christian, I deeply believe in the dignity and value of each and every person. I strive to reflect this to my students and to witness to them a life of hope and meaning.

10. I believe God has a plan for each person and that He has created every person and has equipped each person with particular traits, gifts, and talents.

11. I also believe that God has created every person either male or female. I do not believe that a male can be a girl or a female can be a boy. I think when people accept who they are, they pursue the best path for them and increase their opportunity to flourish.

12. Coffee County Central High has about 50 students that I know of who identify as transgender, meaning that they present and ask to be referred to as non-binary or in a way that indicates they are the opposite sex.

13. In my time teaching, I have taught about 10 students who identify as transgender.

14. I currently have one student in class who identifies as transgender, and I regularly interact with students, including students who identify as transgender, outside of class.

15. Over the course of teaching, I have been asked by students about ten times to use pronouns that do not reflect the student's sex.

16. Students have even requested to be referred to based on gender identity rather than their sex when I am doing roll call as the proctor for a standardized test like the ACT.

17. I am not able to use pronouns that indicate that someone is a member of the opposite sex.

18. Doing so would violate my belief that God created everyone as either male or female and that people are meant to live in accord with their sex.

19. It is my understanding that Tennessee has a law that protects teachers from having to use pronouns contrary to a student's sex.

20. On one occasion, though, I was in parent-teacher conferences and was speaking to the parents about how their child was performing. I referred to their child as their "daughter," and they emphatically corrected me by speaking about their "son" and "his" experience in the class.

21. This was an extremely uncomfortable experience for me.

22. Because our school system does not require that teachers use pronouns contrary to a student's sex, I am able to speak consistently with my beliefs.

23. The topic of gender identity has also occasionally come up in class.

24. In the Bible as Literature class I teach, I cover the first book of the Bible, which states "male and female He created them." Genesis 1:27.

25. I also talk to the other teachers between classes and in the teachers' lounge about gender-identity issues.

26. I usually eat lunch with the other math teachers. The topic of gender identity comes up most often at the beginning of the year since teachers are navigating student requests to use pronouns different from the sex on file with the school.

27. I have told the other teachers that it is my policy to call students by "what they are," and that I don't agree with using inaccurate pronouns, meaning pronouns that do not accurately reflect someone's sex.

28. For example, I have discussed with my colleagues, including those who teach biology, that sex is based on biology and is not something that is chosen based on other factors, like someone's perceptions of their gender identity.

29. Outside of class, I moderate Refuge 305, a Christian student club that meets before school. Meetings are run by the students, but I attend as a supervisor.

30. Because I teach the Bible as Literature, my students have occasionally asked me outside of class what the Bible teaches on certain topics.

31. Although I do not ever proselytize any students at school, many of the students are aware that I am Christian because of my roles in supervising the Christian club and in teaching the Bible as Literature class.

32. I believe this makes it especially important that I not violate my faith. I do not want a student, religious or non-religious, to think they need to compromise their beliefs in the school setting.

33. My school takes Title IX compliance very seriously. Every year the district distributes the Title IX policy to all students, staff, and parents or guardians.

34. The school trains all employees in how to comply with Title IX requirements and with federal law. The employee handbook states that Title IX compliance is required by the district's policy.

35. Under the district's policy, any individual who is aware of conduct that could constitute a Title IX violation is to report that possible violation to the Title IX Coordinator.

36. Currently, our school does not require me to use inaccurate pronouns. No school official has ever told me that I have to use inaccurate pronouns. Nor has my school ever threatened to punish me for expressing my religious views on gender identity, whether to other teachers or when asked by students.

37. But under the new Title IX rules as I understand them, I would be required to use pronouns that do not reflect an individual's sex if they identify as transgender.

38. I could also be required to report myself and other teachers for not using these inaccurate pronouns or for sharing our beliefs about gender identity in various settings, such as over lunch in the teachers' lounge, if those beliefs criticized gender ideology and sufficiently offended someone. That will make it a hard place for me to work given my religious beliefs.

39. At my school, teachers use the same restrooms as students. That is just standard practice for most teachers given the layout of the school.

40. There are male and female-designated teacher-only restrooms, but they are farther from my classroom and usually not convenient for me and many other teachers to use.

41. Because of this, I generally use the male restroom near my class, which is open to male students and teachers.

42. Under the new Title IX rules, it would also be open to female students and teachers if they identify as male.

43. There are currently female students in the school who identify as male.

44. It would be inappropriate, embarrassing, and uncomfortable for me to be in the male restroom with a female student.

45. The restrooms have minimal privacy. In the restroom nearest to my classroom, there are several urinals and metal stalls, none of which lock and one of which does not have a door.

46. I do not want and should not be forced to share a restroom with a female student, including a student who could be as young as 14.

47. But under the new rules, I would be required to do so.

48. It is my understanding that the rules take effect on August 1. Starting then, I will not be as open to sharing my views on gender identity with my colleagues and with students who ask for my opinion because I fear I will be punished for violating the new rules. For example, I will no longer express my belief that there are only two sexes and that people can't change their sex. I will no longer be willing to share my opinion that a boy is not and cannot become a girl no matter how he identifies. I will try to avoid the topic or say, I can't talk about that.

49. I don't think it is worth the risk of expressing my beliefs if there could be serious repercussions. I don't want to be punished or exposed to possible punishment and maybe lose my job for expressing my views.

50. Come August 1, I also will be forced to walk to a farther restroom or be forced to share a restroom with female students and teachers if they identify as male.

DECLARATION UNDER PENALTY OF PERJURY

I, Joshua Taylor, a citizen of the United States and a resident of the State of Tennessee, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 2nd day of May, 2024 at Manchester, Tennessee.

Joshua Taylor

Joshua Taylor

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

STATE OF TENNESSEE, et al.,

Plaintiffs,

v.

MIGUEL CARDONA, *in his official capacity as Secretary of Education*, et al.,

Defendants.

No. 2:24-cv-00072

DEFENDANTS' OPPOSITION TO INTERVENOR-PLAINTIFFS' MOTION FOR A § 705 STAY AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

Like the State Plaintiffs, Intervenors fail to demonstrate that they are entitled to preliminary relief in their challenge to the Final Rule. Much of Intervenors' Motion is devoted to Intervenors' concerns about sex separation in athletics, but the Rule does not affect the Department's regulations regarding sex-separate athletic teams, which are the subject of a separate rulemaking. Instead, the Department is currently considering a separate proposed rule that would address athletics; as the Department has unambiguously stated, "[u]ntil that rule is finalized and issued, the current regulations on athletics continue to apply." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33,817 (Apr. 29, 2024) (the Final Rule or Rule). Intervenors' focus on athletics rests on a basic misunderstanding of the Rule, *see infra* Part I.C.2, and many of their arguments and assertions are thus simply irrelevant to the issues before the Court. The applicable regulations regarding the eligibility criteria a school can use for sex-separate sports teams remain the same now as they were last year, and will continue to remain the same on August 1, 2024, regardless of the outcome in this case. Because the Rule does not govern this issue, Intervenors' claims regarding sex-separate athletic teams cannot be redressed through this case and are not properly before the Court.

As for Intervenors' challenges to the actual provisions of the Rule, Intervenors are unlikely to succeed on the merits because the relevant portions of the Rule—namely the provisions to be codified at 34 C.F.R. §§ 106.10 and 106.31(a)(2)—are grounded in the text of Title IX, are not arbitrary and capricious, and are consistent with the Constitution. In particular, Intervenors fail to demonstrate that the de minimis harm standard to be codified at 34 C.F.R. § 106.31(a)(2)—the focus of virtually all of their arguments—is inconsistent with Title IX or arbitrary and capricious, or that it violates a purported fundamental right to "bodily privacy." Moreover, Intervenors

mischaracterize the Final Rule's harassment standard as sweeping so broadly that it infringes on First Amendment rights. Thus, like the State Plaintiffs, the Intervenors fail to show that they are likely to succeed on the merits and their motion for preliminary relief can and should be denied on that basis alone.

Intervenors also have not met their high burden to satisfy the other requirements for a stay or preliminary injunction. Intervenors' alleged harms are speculative at best, or otherwise not legally cognizable, and thus cannot establish irreparable injury justifying preliminary relief. Moreover, the public interest and balance of equities weigh against granting Intervenors' Motion, as enjoining the Rule would substantially harm the Government's interests in preventing discrimination in federally funded education programs and activities.

Accordingly, the Court should deny the motion for a § 705 stay or preliminary injunction.

BACKGROUND

Defendants incorporate by reference the Background Section of the Opposition, *see* Defs.' Opp'n to Pls.' Mot. for a § 705 Stay and Prelim. Inj. 3-4, ECF No. 73, filed in response to Plaintiff States' Motion for § 705 Stay and Preliminary Injunction, *see* ECF No. 19.

PROCEDURAL HISTORY

On April 30, 2024, Plaintiff States ("States") filed their Complaint. ECF No. 1. On May 3, 2024, States filed their Memorandum in Support of a Motion for § 705 Stay and Preliminary Injunction ("States Mem."). ECF No. 19.

Also on May 3, 2024, Intervenors filed a Motion to Intervene, ECF No. 21, which was granted by the Court on May 8, 2024, ECF No. 50. On May 16, 2024, Intervenors filed a separate Motion for a § 705 Stay and Preliminary Injunction, ECF No. 63, and a memorandum in support ("Intervenors Mem."), ECF No. 63-1. On May 24, 2024, Defendants filed an Opposition to the States' Motion ("Defs.' Opp'n"). ECF No. 73.

LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy" that should "never [be] awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (citation omitted); *see Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). A plaintiff may obtain this "extraordinary remedy" only "upon a clear showing" that it is "entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In determining whether a preliminary injunction is warranted, the Court considers four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 590–91 (6th Cir. 2012) (citation omitted).

ARGUMENT

I. Intervenors Are Unlikely to Succeed on the Merits of Their Challenges to the Rule.

A. No Dispute About Athletics Regulations Is Properly Before the Court Because the Rule Does Not Change the Status Quo Regarding Eligibility for Sex-Separate Athletic Teams.

Intervenors state that the Rule will "harm many, especially females like Intervenor A.C.," by allowing other students to participate on athletics teams consistent with their gender identity. Intervenors Mem. 2, 11–14, 17–18, 23. This concern is unfounded because the Rule makes explicit that it does not amend or affect the Department's regulation regarding sex-separate participation on athletic teams, given that the eligibility criteria a school can use for its male and female athletic teams remain unchanged by the Rule. 89 Fed. Reg. at 33,817. The section of the current athletics regulations that addresses this issue is § 106.41(b), which sets forth an exception to the regulations' general nondiscrimination mandate for § 106.41(a) for "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact

sport." 34 C.F.R. § 106.41(b). The Rule makes no changes to § 106.41(b). *See* 89 Fed. Reg. at 33,893.[1]

Indeed, the Rule expressly states that the Department will address sex-separate athletic teams in a separate rulemaking. *Id.* That proposed rulemaking issued in April 2023, addresses eligibility for male and female athletic teams, and has not yet been finalized. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22,860 (proposed Apr. 13, 2023) [Athletics NPRM]. In the Rule, the Department further made explicit that "[u]ntil that rule is finalized and issued, the current regulations on athletics continue to apply." 89 Fed. Reg. at 33,817. Because the applicable regulations regarding the eligibility criteria a school can use for sex-separate sports teams remain unchanged by the Rule, any dispute about the proper scope of such regulations is not properly before this Court.

As a result, none of the Intervenors has standing to raise claims based on the sex-separation of athletic teams. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) ("[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek."). Intervenor A.C. lacks standing to raise any claims arising out of her experience competing against a transgender female student on her school sports teams. Intervenors Mem. 2–3, 10, 18. That aspect of A.C.'s athletics experience was required by an injunction in an unrelated court case, *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024), that had nothing to do with, and pre-dated, the Rule. It is thus not traceable to the Rule, nor would it be redressed by any injunction from this Court. And Christian Educators Association

[1] To the extent Intervenors insist that sex-separate athletic teams are nonetheless impacted by the Rule—notwithstanding the fact that the Rule explicitly states otherwise—they are incorrect as discussed further *infra* in Part I.C.2.

International has not alleged that it or any of its members faces a concrete or particularized injury associated with sex-separate athletics teams, let alone an athletics-related harm purportedly tied to the Rule.

B. The Final Rule's Provision that Title IX Prohibits Discrimination on the Basis of Gender Identity Is Compelled by the Statutory Text and Not Arbitrary or Capricious.

1. The Scope of Sex Discrimination in § 106.10 Is Consistent with the Text of Title IX and Supreme Court Precedent.

Like the States, the Intervenors argue that the Final Rule is contrary to Title IX because the Department incorrectly applied *Bostock*'s reasoning in interpreting the scope of sex discrimination under Title IX. *See* Intervenors Mem. 13–15. As Defendants explained in their Opposition, that interpretation—"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," Final Rule, 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.10)—faithfully interpreted Title IX's antidiscrimination provision, applying the logic and reasoning of *Bostock*. *See* Defs.' Opp'n 5–10. To summarize, *Bostock v. Clayton County* concluded that "sex is necessarily a but-for cause" of discrimination on the basis of transgender status "because it is impossible" to discriminate against a person for being transgender "without discriminating against that individual based on sex." 590 U.S. 644, 660-61 (2020). That reasoning applies with equal force to Title IX's prohibition on discrimination "on the basis of sex," 20 U.S.C. § 1681(a), which employs a causation standard indistinguishable from Title VII's "because of . . . sex" language, 42 U.S.C. § 2000e-2(a)(1).

The Intervenors largely echo the States' reasons why, in their view, *Bostock*'s reasoning should not be applied to Title IX. For example, both the Intervenors and States argue that Title IX prohibits discrimination based on "the biological binary of male and female," Intervenors Mem.

5; *see id.* at 5–15, 22–24; *see* States Mem. 12–16. But the Supreme Court in *Bostock* proceeded under a similar assumption, as the Department explained in the Final Rule; one cannot discriminate based on gender identity without considering the individual's sex, "even if that term is understood to mean only physiological or 'biological distinctions between male and female.'" 89 Fed. Reg. at 33,802; *see also* Defs.' Opp'n 9. Similarly, both the Intervenors and States argue that *Bostock* did not concern "the lawfulness of sex-specific places." Intervenors Mem. 22; States Mem. 19. But again, as the Department has explained, neither does § 106.10 purport to address "the lawfulness of sex-specific places"; it explains only that discrimination on the basis of sex includes discrimination on the basis of gender identity. *See* Defs.' Opp'n 9–10.

Intervenors do cite two additional cases—*Adams v. Sch. Bd. of St. John's County*, 57 F.4th 791, 799 (11th Cir. 2022), and *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)—in support of their view that *Bostock*'s reasoning does not apply to Title IX. *See* Intervenor Mem. 13. But those cases are, in fact, inapposite.

Intervenors take the quoted language from *Jackson* out of context. In evaluating whether Title IX, like Title VII, permitted a cause of action for retaliation, the *Jackson* Court stated that Title VII and Title IX are "vastly different." 544 U.S. at 175. But the differences the Court highlighted—that "Title IX's cause of action is implied" and that Title VII "spells out in greater detail the conduct that constitutes discrimination," including by expressly prohibiting retaliation, *id.*—are not relevant here. Title IX's prohibition against discrimination "on the basis of sex" is equivalent to the text the Court interpreted in *Bostock*, and neither *Jackson* nor any other decision of the Court suggests that it should be interpreted differently.

Intervenors' reliance on *Adams* fares no better. In *Adams*, the Eleventh Circuit held that a school district policy preventing a transgender boy from using the boys' restroom did not violate

Title IX because "the School Board's policy fits squarely within [Title IX's] carve-out" allowing educational institutions to "'maintain[] separate living facilities for the different sexes'" and relevant implementing regulations. 57 F.4th 791, 811 (2022) (en banc) (quoting 20 U.S.C. § 1686); *see* pp. 17–18, *infra* (discussing Section 1686). But the Final Rule's provision setting forth the scope of sex discrimination (§ 106.10) does not address restrooms, *see* 89 Fed. Reg. at 33,886, which are instead addressed by a separate provision of the Rule (§ 106.31(a)(2)). Nothing in *Adams* contradicts the Final Rule's clarification in § 106.10 that discrimination based on gender identity necessarily constitutes discrimination "on the basis of sex" under Section 1681 of Title IX, read in light of *Bostock*. *See Adams*, 57 F.4th at 808-09 (recognizing that "*Bostock* held that 'discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex'" and maintaining that this "statement is not in question in this appeal" (citation omitted)).

Last, Intervenors argue, without explanation, that *Bostock* does not apply to statutes passed under the Spending Clause. *See* Intervenors Mem. 15. As Defendants have explained, the Rule does not create a Spending Clause violation (which is a limitation on statutes anyway). *See* Defs.' Opp'n 19–20. And at any rate, *Bostock*'s holding was built on the Supreme Court's determination that Title VII's antidiscrimination provision is unambiguous and clear. *See Bostock*, 590 U.S. at 674. Title IX's parallel text is no less clear. Any clear statement rule is therefore satisfied.

Accordingly, neither the Intervenors nor States have rebutted the Department's straightforward application of *Bostock*'s reasoning to Title IX.

2. **Intervenors Do Not Show that the Interpretation in § 106.10 Is Arbitrary or Capricious.**

Intervenors also argue that the Department's explanation for § 106.10 is arbitrary and capricious. *See* Intervenor's Mem. 22–24. Because, as explained above, the interpretation reflected

in § 106.10 is compelled by Title IX's unambiguous terms, Intervenors would not be entitled to relief even if their challenges to the Department's explanation were correct. *See Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 545 (2008) ("That [an agency] provided a different rationale for the necessary result is no cause for upsetting its ruling.").

In any event, Intervenors' challenges lack merit. As the Supreme Court has emphasized, judicial review under the arbitrary-and-capricious standard is "deferential" and "simply ensures that the agency has acted within a zone of reasonableness." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). Intervenors fail to meet this burden. They argue that § 106.10 is arbitrary and capricious because it does not "explain how *Bostock*'s 'but-for test' can apply to students who don't identify as male or female." Intervenors Mem. 23–24. To the contrary, the Rule explains that discrimination against a person because they are nonbinary is "inextricably bound up with sex." Final Rule, 89 Fed. Reg. at 33,807 (quoting *Bostock*, 590 U.S. at 660–61). The Rule continues, "A person's nonconformity with expectations about the sex of the person to whom they should be attracted or the sex with which they should identify implicate one's sex, and discrimination on that basis is prohibited." *Id.*

C. The Final Rule's Delineation of Title IX's Limits on Sex Separation and Differentiation Is Properly Derived from the Statutory Text, Not Arbitrary and Capricious, and Constitutional.

Like the States, Intervenors raise various objections to the Final Rule's provision that, with limited exceptions, a recipient may not carry out different or separate treatment on the basis of sex in a manner that subjects a person to more than de minimis harm, which includes preventing a person from participating in an education program or activity consistent with the person's gender identity. *See* 89 Fed. Reg. at 33,887 (to be codified at 34 C.F.R. § 106.31(a)(2)). Intervenors argue that this provision is inconsistent with Title IX, unreasonable in its articulation of a de minimis harm standard, arbitrary and capricious, and unconstitutional. These arguments fail.

1. **The De Minimis Harm Standard in § 106.31(a)(2) Is Properly Derived from the Statutory Text and Fully Consistent with Supreme Court Precedent.**

The de minimis harm standard to be codified at § 106.31(b)(2) correctly interprets Title IX's prohibition on sex-based "discrimination" and is fully consistent with Supreme Court precedents interpreting that term. Contrary to Intervenors' argument, *see* Intervenors Mem. 14, 15–17, § 106.31(b)(2) is a straightforward application of a central element of Title IX's prohibition of sex-based discrimination—that different or separate treatment based on sex is prohibited, i.e., discriminatory, only when it causes harm.

As set forth in Defendants' opposition to the States' Motion, the provision to be codified at § 106.31(a)(2) explains how recipients may carry out separate or different treatment on the basis of sex in certain contexts without running afoul of the statute's nondiscrimination mandate. *See* Defs.' Opp'n 10–12. In short, the Rule provides, consistent with Supreme Court precedent, that save for limited instances allowed by statute, Title IX prohibits "distinctions or differences in treatment [on the basis of sex] that injure protected individuals." 89 Fed. Reg. at 33,814 (brackets in original) (quoting *Bostock*, 590 U.S. at 681). Thus, except in certain contexts explained below, a recipient must not provide sex-separate facilities or activities in a manner that subjects any person to legally cognizable injury. *Id.*

As Intervenors acknowledge, it is well established that a statute prohibiting discrimination bars differential treatment only when it causes "some injury." Intervenors Mem. 16 (quoting *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 977 (2024)). Intervenors suggest that § 106.31(b)(2) is somehow in tension with the Supreme Court's recent holding in *Muldrow*, a Title VII case in which the Court held that a plaintiff claiming discrimination must demonstrate some harm, but need not establish a "significant" injury or meet "an elevated threshold of harm." 144 S. Ct. at 974. But this is precisely the standard articulated in § 106.31(a)(2)—that separate or different treatment

based on sex constitutes discrimination when it causes some harm (*i.e.*, a harm that is "more than de minimis"). 89 Fed. Reg. at 33,887.

The specification in § 106.31(a)(2) that, except in certain contexts explained below, recipients may not engage in sex separation or differentiation in a manner that prevents a person from participating in an educational program or activity consistent with the person's gender identity, is a straightforward application of that standard. As Intervenors note, the Department has regulations that allow sex-separate "toilet, locker room, and shower facilities." Intervenors Mem. 24 (quoting 34 C.F.R. §106.33). The Department has long recognized that, even without any specific statutory language permitting it, sex "separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination" because such sex-separate facilities generally impose no more than de minimis harm on students. 89 Fed. Reg. at 33,818. But consistent with federal court decisions and guidelines published by respected medical organizations, the Department explained that sex separation that prevents a person from participating in a program or activity consistent with their gender identity *does* cause more than de minimis harm. 89 Fed. Reg. at 33,818 (citing *Grimm v. Gloucester Cnty Sch. Bd.*, 972 F.3d 586, 617–18 (4th Cir. 2020), *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045–46, (7th Cir. 2027); *id.* at 33,819 n.90 (citing guidelines published by medical organizations). Because preventing a student from using sex-separate restrooms or participating in single-sex classes consistent with their gender identity causes more than de minimis harm on the basis of sex—*i.e.*, is discrimination on the basis of sex—it is prohibited by the plain text of Title IX. *Id.* at 33,814.

2. **Intervenors Do Not Show that the Department's Consideration of § 106.31(a)(2) Was Unreasonable, or Arbitrary and Capricious.**

Intervenors also contend that the Department's consideration of § 106.31(a)(2) was

otherwise unreasonable, and arbitrary and capricious. These arguments also lack merit.

First, Intervenors do not show that the Department was unreasonable in deciding to address athletics through a separate rulemaking, and in specifying that the de minimis harm rule in § 106.31(a)(2) does not apply to male and female athletic teams that a recipient offers under § 106.41(b). *See* 89 Fed. Reg. at 33,816. As Intervenors acknowledge, Intervenors Mem. 23, the Rule states expressly that it does not address the Department's regulations concerning separate male and female athletic teams, 89 Fed. Reg. at 33,816–17. As discussed *supra* in Part I.A, the Department issued a separate notice of proposed rulemaking regarding the athletics regulations, which will be finalized in a separate rulemaking. *See* Athletics NPRM, 88 Fed. Reg. 22,860. And the Department has made explicit that "[u]ntil that rule is finalized and issued, the current regulations on athletics continue to apply." 89 Fed. Reg. at 33,817.

Intervenors nonetheless insist that the Rule does not mean what it says on this point. Intervenors Mem. 23. Intervenors' argument appears to hinge on the fact that § 106.31(a)(2) specifies that it applies to the "limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex," except for certain specified statutory and regulatory provisions. *See* Intervenors Mem. 23. Those specified provisions include 34 C.F.R. § 106.41(b), which permits sex-separate athletic teams under some circumstances, but not 34 C.F.R. § 106.41(a), which is the general provision prohibiting discrimination on the basis of sex in athletics. Intervenors argue that the omission of § 106.41(a) shows that the Rule covertly applies to recipients' policies regarding separate male and female athletics teams. *Id*. The problem with this argument is that § 106.41(a) is not one of the "limited circumstances in which Title IX or this part *permits different treatment or separation on the basis of sex*," 89 Fed. Reg. 33,887 (to be codified at § 106.31(a)(2)). Rather, § 106.41(a) is a general nondiscrimination provision, and states

that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." As such, it is simply not implicated by § 106.31(a)(2).

Contrary to Intervenors' suggestion, Intervenors Mem. 23, the Final Rule thoroughly and logically explains why the de minimis harm standard in § 106.31(a)(2) does not apply to the Department's regulation permitting sex-separate athletic teams, and why this is consistent with the Department's longstanding approach to athletics. 89 Fed. Reg. at 33,816–19. *See* Defs.' Opp'n 13. As noted in Defendants' Opposition to the States' motion, *see id*., the decision to address athletics separately makes sense, given that Congress provided by statute that athletics is a special context, *see* 89 Fed. Reg. at 33,816; Education Amendments of 1974, Section 844, and the Department's athletics regulations have always tracked this statutory determination by recognizing that the unique circumstances of athletics merit a different approach, "governed by an overarching nondiscrimination mandate and obligation to provide equal athletic opportunities for students regardless of sex," 89 Fed. Reg. at 33,816 (citing 34 C.F.R. § 106.41(a), (c)).

Second, Intervenors argue in various ways that § 106.31(a)(2) is unreasonable because it treats cisgender individuals differently from individuals whose gender identities do not match their sex assigned at birth, and thereby conflicts with Title IX's prohibition on sex-based discrimination, as stated in § 106.10. Intervenors Mem. 14–15 (arguing that § 106.31(a)(2) "draw[s] distinctions forbidden by Title IX's general non-discrimination text"); *id.* at 16 (arguing that § 106.31(a)(2) is "illogical" because it recognizes that individuals whose gender identities do not match their sex assigned at birth, but not cisgender individuals, may be harmed by sex separation in certain

circumstances); *id.* (asserting that § 106.31(a)(2) "elevat[es] gender identity above Title IX's protections for sex"). This argument is meritless. The Department had no basis to conclude that excluding cisgender students and employees from sex-separate facilities inconsistent with their gender identity causes cognizable harm. 89 Fed. Reg. at 33,820. In contrast, as explained in the Final Rule, sex separation that prevents a person from participating in a program or activity consistent with the person's gender identity does cause such harm. *Id*. at 33,816.

While Intervenors object to the Rule's recognition of this distinction, Intervenors Mem. 16-17, they do not cite any evidence or authority contradicting the Department's determination regarding a general lack of harm to cisgender students and employees as a result of sex separation or differentiation in the limited contexts permitted by the regulations. Contrary to Intervenors' suggestion, *see id*., the Department's determination regarding harm suffered by transgender individuals due to sex-based different or separate treatment did not rely on defining "sex" as "gender identity," nor did it constitute a decision that "gender identity trumps sex-based protections." Section 106.31(a)(2) does not violate Title IX's prohibition on sex discrimination because the provision merely articulates and applies the well-established principle that separation on the basis of sex is discriminatory—and thus unlawful—only if such separation causes cognizable harm.

Third, Intervenors argue that the Department failed to consider how the de minimis harm standard "hurts women and girls," Intervenors Mem. 17. Intervenors' argument appears not to be based on the Final Rule at all, but rather on their speculation about what the Department will say in its forthcoming rulemaking regarding the athletics regulations. *See id*. As explained above, the Rule does not address the Department's athletics regulations. Regardless, Intervenors identify no evidence that the de minimis harm standard in § 106.31(a)(2) "hurts women and girls," *id*., let

alone show that the Department failed to adequately address such information in the Final Rule.

Fourth, despite Intervenors' allegation to the contrary, *see* Intervenors Mem. 23, the Department adequately addressed how § 106.31(a)(2) applies to individuals whose gender identity is nonbinary. The Department explained that "a recipient may, for example, coordinate with the student, and the student's parent or guardian as appropriate, to determine how to best provide the student with safe and nondiscriminatory access to facilities, as required by Title IX." 89 Fed. Reg. at 33,818. Intervenors do not acknowledge this explanation, let alone identify any way in which it is unreasonable.

Fifth, Intervenors argue that the de minimis harm provision is inconsistent with 34 C.F.R. § 106.33, which states that "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex." Intervenors Mem. 24. But the Department cogently explained why there is no conflict. The Final Rule states that 34 C.F.R. § 106.33 must be read to comply with the Title IX's nondiscrimination mandate—in short, funding recipients must operate sex-separate facilities addressed in § 106.33 in a manner that does not cause more than de minimis sex-based harm. Thus, as the Department further explained, "[r]ecipients continue to have discretion under these regulations to provide sex-separate facilities consistent with Title IX's nondiscrimination mandate; making Title IX's protections against sex-based harms explicit does not change that." 89 Fed. Reg. at 33,820. Rather, the de minimis harm provision at § 106.31(a)(2) addresses how to effectuate such sex separation, "simply prohibit[ing] a recipient from adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity when that person seeks to participate consistent with their gender identity." *Id.*

Sixth, contrary to Intervenors' suggestion, Intervenors Mem. 24, the Department addressed

commenters' concern that allowing individuals to use single-sex restrooms consistent with their gender identity poses a threat to privacy. As the Rule states, the Department "strongly agrees that recipients have a legitimate interest in protecting all students' safety and privacy." 89 Fed. Reg. at 33,820. The Department reasonably concluded, however, that there is no "evidence that transgender students pose a safety risk to cisgender students, or that the mere presence of a transgender person in a single-sex space compromises anyone's legitimate privacy interest." *Id*. The Final Rule notes, for example, that federal courts have rejected "unsubstantiated and generalized concerns that transgender persons' access to sex-separate spaces infringes on other students' privacy or safety." *Id.* (citing cases).

Seventh, the distinction § 106.31(a)(2) draws between restrooms or locker rooms and other "sex-specific spaces" such as living facilities and military schools is not "implausibl[e]," Intervenors Mem. 16, or "arbitrary and capricious," *id.* at 22. Rather, as set forth in Defendants' Opposition to the State Plaintiffs' Motion, Defs.' Opp'n 12, § 106.31(a)(2) faithfully implements both Title IX's prohibition on different or separate sex-based treatment that causes harm and Title IX's carve-out of certain contexts from its general prohibition on sex discrimination, such as membership practices of certain social fraternities or sororities, 20 U.S.C. § 1681(a)(6); institutions focused on military training, *id.* § 1681(a)(4); and an educational institution's maintenance of "separate living facilities for the different sexes," *id.* § 1686. As Congress did not except restrooms and locker rooms from the general prohibition on sex discrimination, the Department reasonably determined that recipients may engage in sex separation in such contexts consistent with Title IX—but only to the extent that any sex-based harm imposed is de minimis, *i.e.*, not discriminatory. 89 Fed. Reg. at 33,816; *see id.* at 33,821.

In sum, Intervenors do not show that, in its consideration of § 106.31(a)(2), the Department

"relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that r[an] counter to the evidence before the agency, or [was] so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). Thus, the Department's consideration of § 106.31(a)(2) was neither unreasonable, nor arbitrary and capricious.

3. **Intervenors Do Not Show that § 106.31(a)(2) Violates a Constitutional Right to Bodily Privacy.**

Intervenors also fail to show that § 106.31(a)(2) is facially unconstitutional on the ground that it violates their "right to bodily privacy"—specifically, their asserted interest in not sharing restrooms, showers, and locker rooms with transgender students and employees who use facilities consistent with their gender identity. Intervenors Mem. 21. Intervenors identify no case—let alone a Supreme Court decision—that has recognized any such fundamental right. To the contrary, all the constitutional cases on which Intervenors rely involved an asserted right to be free from invasive searches or surveillance by government actors, not a right to prevent other students and individuals from using facilities consistent with their gender identity. *See Brannum v. Overton County School Board*, 516 F.3d 489, 494-96 (6th Cir. 2008) (recognizing a right not to be videotaped in a school locker room by the government); *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987) (addressing claim that "surveillance by female prison guards of plaintiff's person in various states of undress" violated the Fourth Amendment); *Doe v. Luzerne County*, 660 F.3d 169, 175–76 & n.5 (3d Cir. 2011) (recognizing female deputy sheriff's right not to be videotaped while in a state of undress by another law enforcement officer and noting that "the contours of [this] right . . . appear[ed] to be the same" as those in *Brannum*). And indeed, more than one court has specifically rejected the assertion that there exists a "right to privacy that protects against any

risk of bodily exposure to a transgender student in school facilities." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020) (rejecting claim under the Fourteenth Amendment's Due Process Clause); *see also Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018) (rejecting claim that students' "constitutional right to privacy is necessarily violated because they are forced to share bathrooms and locker rooms with transgender students whose gender identities correspond with the sex-segregated space, but do not do not align with their birth sex"). Because Intervenors have failed to show that § 106.31(a)(2) violates any fundamental right, their "bodily privacy" claim cannot succeed on the merits.

D. The Rule's Clarification of the Definition of Sex-Based Harassment Is Not Overbroad or Vague, and it Does Not Restrict or Compel Speech in Violation of the First Amendment.

Intervenors seem to challenge the Rule's definition of hostile environment sex-based harassment, and specifically the conclusion that sex stereotyping can constitute sex-based harassment that creates a hostile environment. *Compare* Intervenors Mem. 19 *with* 89 Fed. Reg. at 33,515–16. Intervenors further argue that the harassment standard is overbroad and vague, and so both compels and suppresses speech in violation of the First Amendment. Intervenors Mem. 19. *Id.* Intervenors make a facial challenge. A plaintiff bringing a facial challenge must "establish that no set of circumstances exists under which the [Rule] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In certain First Amendment contexts, courts "have recognized a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (citation omitted). Intervenors have not met their burden under either standard.

As Defendants explained in their opposition to the States' motion, the Rule's definition of hostile environment sex-based harassment is a lawful exercise of the Department's authority. *See*

Defs.' Opp'n 15–18. "By its own terms, the Final Rule "maintain[s] the language from . . . the 2020 amendments that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment." 89 Fed. Reg. at 33,503. The definition in the Final Rule is consistent with "relevant judicial precedent, and . . . with congressional intent and the Department's longstanding interpretation of Title IX and resulting enforcement practice prior to the 2020 amendments." *Id.* at 33,490. In addition, this language "closely tracks longstanding case law defining sexual harassment," *id.* at 33,494 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)), and aligns with the definition used by the EEOC. *Id.* at 33,516. *See* Defs.' Opp'n. 17.

Intervenors' reliance on *Janus* is misplaced. Intervenors Mem. 19–20. *Janus* presented the question of "speech subsidies in support of third parties." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 908 (2018). *Janus* specifically did not apply *Garcetti v. Ceballos,* 547 U.S. 410 (2006) and other public-employee-speech cases because *Janus*, "by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree." *Janus,* 585 U.S. at 907. "Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message." *Id*. at 908 (citing *Garcetti*, 547 U.S. at 421–22, 425–26).

Neither are intervenors correct to rely on *Kennedy v. Bremerton Sch. Dist*, 597 U.S. 507, 529–30 (2022). *See* Intervenors Mem. 19. The speech at issue was a football coach's post-game prayers. Applying *Garcetti* and other cases governing the speech of government employees, the Supreme Court determined that the coach's prayers were "private speech, not government speech." *Kennedy*, 597 U.S. at 529–30. The Court explained this was for several reasons, including: the speech was not "ordinarily within the scope" of the coach's duties; the coach "did not speak

pursuant to government policy;" and he "was not seeking to convey a government-created message." *Id*. (citing *Lane v. Franks*, 573 U.S. 228, 240 (2014), and contrasting *Garcetti*, 547 U.S. at 421). In *Kennedy*, the Court was not asked—and did not decide—the constitutionality of the hostile-environment standard in the education context. By contrast, the Supreme Court has routinely concluded that schools may constitutionally prohibit harassment when those prohibitions "are directed at speech that materially and substantially disrupts school activities[.]" 89 Fed. Reg. at 33,504 (citing *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503, 509 (1969)). Although public employees may speak on matters "of public concern," the government may also limit that speech where "necessary. . . to operate efficiently and effectively." *Garcetti v. Ceballos*, 547 U.S. 410, 419-20 (2006). *Accord Meriwether*, 992 F.3d 492, 508 (6th Cir 2021) (noting a coach may constitutionally be prohibited from "using racial epithets to motivate his players"). Intervenors also err in asserting that the Final Rule is overbroad. Intervenors Mem. 21 (citing *Speech First Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022)). As the Rule explains, the case Intervenors rely on for this point is inapposite. In *Speech First*, as that court described it, the university's policy defined "discriminatory harassment" to prohibit "a wide range of 'verbal, physical, electronic, and other' expression concerning any of (depending on how you count) some 25 or so characteristics." *Speech First*, 32 F.4th at 1125. The panel concluded that this definition "reache[d] not only a student's own speech, but also her conduct 'encouraging,' 'condoning,' or 'failing to intervene' to stop another student's speech." *Id.* "The policy, in short, [was] staggeringly broad," *id.*, and it was not "tailored to harms that have long been covered by hostile environment laws," 89 Fed. Reg. at 33,505 (discussing *Speech First*).

By contrast, the Final Rule reaches no more broadly than necessary. In response to concerns about the Rule's interaction with the First Amendment, the Department "revised the

definition to retain the 2020 amendments' reference to offensiveness," and so the definition "covers only sex-based conduct that is unwelcome, both subjectively and objectively offensive, and so severe or pervasive that it limits" a person's ability to participate in the recipient's education program or activity. 89 Fed. Reg. at 33,505. The Supreme Court has upheld Title VII's anti-harassment provisions that apply a similar standard "without acknowledging any First Amendment concern." *Id.* at 33,505 (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993)). Further, the Final Rule "only prohibit[s] conduct that meets all the elements" set forth in the definition. *Id*. at 33,506. The Rule's "reference to the totality of the circumstances derives from these very specific and required elements and is meant to ensure that no element or relevant factual consideration is ignored." *Id*.

The Rule carefully adheres to longstanding caselaw defining hostile environment sex-based harassment. For these reasons, Intervenors are not likely to succeed on the merits of their argument that the Rule is overbroad or vague.

II. Intervenors Have Not Established Irreparable Harm.

Intervenors also fail to establish an imminent and irreparable harm justifying a preliminary injunction against any portion of the Rule. "Irreparable harm is an 'indispensable' requirement for a preliminary injunction, and 'even the strongest showing' on the other factors cannot justify a preliminary injunction if there is no 'imminent and irreparable injury.'" *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (citation omitted).

Intervenors claim that they will suffer irreparable harm to their right to "free speech" and "constitutional right to privacy." Intervenors Mem. 24–25. But this is just a conclusory repetition of Intervenors' meritless constitutional claims, *see supra* Part I.C.3, and does not come close to demonstrating injuries "both certain and immediate, rather than speculative or theoretical." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991).

Notably, a substantial portion of the purported harm alleged by A.C. throughout her declaration and the Intervenors' Memorandum pertains to her purported "lost opportunity to participate in. . . athletics." *See* Intervenors Mem. 25 (citation omitted). But, as explained above, these alleged injuries do not flow from the Rule, nor could they because the Rule does not address athletics, *see supra* Part I.A; so, any purported harm stemming from those allegations is misplaced in this lawsuit. Rather, A.C.'s harms are attributable to an injunction in a separate litigation, *see B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024), that cannot be affected by any relief the Court may grant in this suit. The remainder of Intervenors' skeletal irreparable harm argument relies entirely on a handful of highly speculative statements from their declarants. *See, e.g.*, A.C. Decl. ¶ 64, ECF No. 21-5 ("I am hesitant to continue playing in the band because I am uncertain whether I will be forced to share a hotel room or be exposed to B.P.J. on these trips."); Taylor Decl. ¶ 48, ECF No. 21-12 ("Starting [August 1], I will not be as open to sharing my views on gender identity with my colleagues and with students who ask for my opinion because I fear I will be punished for violating the new rules."). Such "speculative [and] theoretical" allegations of harm do not satisfy the irreparable-harm requirement. *Mich. Coal. of Radioactive Material Users,* 945 F.2d at 154. Moreover, even if the hypothetical situations feared by Intervenors' declarants counted as cognizable injuries, Intervenors fail to show that any of such feared injuries are "immediate." *See Fischer v. Thomas*, 78 F.4th 864, 868 (6th Cir. 2023) (holding that the risk of "chill[ed]" speech during a future campaign was not "immediate" because there was no ongoing election nor any indication that one would occur before final judgment). "If the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019).

III. The Equities and Public Interest Weigh Against Preliminary Relief.

The balance of equities and the public interest "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Intervenors rely exclusively on States' arguments regarding these two prongs of the preliminary-injunction inquiry for the proposition that "these factors weigh decisively in Intervenors' favor." Intervenors Mem. 25.

As Defendants explained in their Opposition, the Government has a significant interest in effectuating the statutory directive in Title IX to prevent sex discrimination in education programs and activities. *See* Defs.' Opp'n 23–24. When weighed against the Intervenors' speculative harms, *see supra* Part II, the Government's interest strongly counsels against issuing the requested preliminary relief.

IV. Any Relief Afforded by the Court Should Be Limited in Accordance with the Administrative Procedure Act and Equitable Principles.

As Defendants outlined in their Opposition, any relief afforded must be appropriately limited. *See* Defs.' Opp'n 24–25. To summarize, this Court should not issue injunctions that provide relief to non-parties, or that enjoin more than is "necessary to remedy the harm at issue." *United States v. Miami Univ.*, 294 F.3d 797, 816 (6th Cir. 2002). As such, if this Court grants a preliminary injunction, it should limit that relief to the parties and specific portions of the Rule as to which the Court has found that Intervenors have established both a likelihood of success and the requisite threat of irreparable harm absent relief. *See, e.g. Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021) (holding that "redressability in the present case is properly limited to the parties before the Court"), *aff'd as modified*, 57 F.4th 545 (6th Cir. 2023). Finally, the Final Rule is severable. *See* 89 Fed. Reg. at 33,848 ("[R]emov[ing] any 'doubt that it would have adopted the remaining provisions of the Final Rule' without any of the other provisions, should any of them be deemed unlawful."). Intervenors have challenged only certain provisions of the Rule as

discussed above; the remainder should be permitted to go into effect, as intended, on August 1, 2024. *See* Defs.' Opp'n. 25.

CONCLUSION

For the foregoing reasons, the Court should deny Intervenors' motion for a § 705 stay and preliminary injunction.

Dated: June 6, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

EMILY B. NESTLER
Assistant Branch Director

/s/ Hannah M. Solomon-Strauss
ELIZABETH TULIS
REBECCA KOPPLIN
BENJAMIN TAKEMOTO
HANNAH SOLOMON-STRAUSS
PARDIS GHEIBI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box No. 883, Ben Franklin Station
Washington, DC 20044
Phone: 202-616-8198
Fax: (202) 616-8470
E-mail: Hannah.M.Solomon-Strauss@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2024, I electronically filed this document with the Court by using the CM/ECF system, and that this document was distributed via the Court's CM/ECF system.

/s/ Hannah M. Solomon-Strauss

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

STATE OF TENNESSEE, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 2: 24-072-DCR
	)	
V.	)	
	)	
MIGUEL CARDONA, in his Official Capacity as Secretary of Education, et al.,	)	**MEMORANDUM OPINION AND ORDER**
	)	
Defendants.	)	

*** *** *** ***

I. Introduction

On June 17, 2024, the Court enjoined enforcement of the Department of Education's (the "Department") newly promulgated rule implementing Title IX (the "Final Rule"). [*See* Record No. 100.] The Memorandum Opinion and Order entered that date outlined the substantive and procedural failings of the Final Rule while explaining how the plaintiffs had carried their burden of demonstrating the immediate and irreparable harm they would suffer in the absence of an injunction.

The Department filed a Notice of Appeal one week later and has moved this Court for a partial stay of the preliminary injunction pending the outcome of the Department's appeal to the United States Court of Appeals for the Sixth Circuit. [Record No. 104] The Department argues that the Court's injunction is overly broad, improperly enjoining provisions that were not challenged by the plaintiffs and for which no finding of harm was made. [*Id*. at 1] More specifically, it asserts that the allegations of harm raised in the motion for injunction concerned only two provisions—34 C.F.R. § 106.31(a)(2) and the definition of "hostile environment

harassment" within 34 C.F.R. § 106.2—and that the Court's injunction needlessly prevents the implementation of critical regulations that do not cause irreparable harm to the plaintiffs. [*Id.*] The Department, therefore, contends that the injunction should be limited to those specific provisions.

The preliminary injunction was issued after a comprehensive review of the Final Rule, which fundamentally alters the meaning of "discrimination on the basis of sex" under Title IX by improperly relying on the Supreme Court's holding in *Bostock v. Clayton County*, 590 U.S. 644 (2020).[1] The undersigned found that the Final Rule's provisions and embedded interpretations would most likely to cause significant and irreparable harm to the plaintiffs by compelling immediate and potentially conflicting changes in policy and practice, leading to widespread confusion and an enormous waste of resources. The Court further concluded that the Final Rule's severability clauses offered no remedy because the defects "permeate[]" the otherwise innocuous regulations—a position the Department refutes. [*See* Record No. 100, p. 90; *see also* Record No. 113, p. 2.]

After thorough consideration of the Department's motion, responsive filings, and the relevant legal standards, the motion for a partial stay of the injunction pending appeal will be denied. The injunction, as issued, is necessary to prevent immediate harm to the plaintiffs while the legality of the Final Rule is fully adjudicated. The Department has not demonstrated

[1] Throughout this Memorandum Opinion and Order, the phrase "discrimination on the basis of sex" may be referred to more broadly as "sex discrimination" or "sex-based discrimination." The use of these abbreviated phrases is not intended to suggest that the terms are inherently synonymous. Any relevant terms of art will appear in quotation marks with an appropriate citation, where applicable.

a sufficient likelihood of success on the merits of its appeal, nor has it shown that the balance of harms and consideration of the public interest weigh in favor of granting the stay.

II. Legal Standard

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States,* 272 U.S. 658, 672 (1926)). The decision to grant such a request is "an exercise of judicial discretion," *Virginian Ry. Co.,* 272 U.S. at 672, and "[t]he party requesting the stay bears the burden of showing that the circumstances justify an exercise of that discretion," *Nken*, 556 U.S. at 433–34. Courts are accorded "wide latitude" in their discretion to grant or deny stays "to avoid piecemeal, duplicative litigation and potentially conflicting results." *IBEW, Loc. Union No. 2020 v. AT&T Network Sys.*, 879 F.2d 864, 1989 WL 78212, at *8 (6th Cir. July 17, 1989) (table) (citing *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817–20 (1976)).

When evaluating a motion for a stay pending appeal, the Court evaluates four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay." *Dalh v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 730 (6th Cir. 2021) (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). The third and fourth factors—the likely harm to others and the public interest—"merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

These factors are not prerequisites. Instead, they are "interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). While no one factor is dispositive, the Sixth Circuit has

recognized that "the likelihood of success on the merits often will be the determinative factor." *Thompson v. DeWine*, 959 F.3d 804, 807, 812 (6th Cir. 2020) (per curiam); *see Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). This is particularly so where First Amendment concerns are implicated. *See Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012).

III. Analysis

The standard for granting a stay pending appeal mirrors the considerations for issuing a preliminary injunction but is viewed through a lens that seeks to maintain the status quo. *See United States v. Texas*, 144 S. Ct. 797, 798 n.2 (U.S. 2024). The Court remains mindful of this principle while observing that it is the Court's injunction that maintains the status quo by preserving a half-century's worth of interpretive consensus regarding the mandate of Title IX. But even without that consideration, a review of the relevant factors reinforces the undersigned's belief that enjoining the Final Rule in full is necessary to maintain regulatory stability and prevent irreparable harm during the pendency of this litigation.

A. Likelihood of Success on Appeal

The Department must put make a "strong showing" of its likelihood of success on the merits of its appeal to justify the requested stay. *Nken*, 556 U.S. at 434; *see Griepentrog*, 945 F.2d at 153 (requiring a stay applicant to "demonstrate more than the mere 'possibility' of success"). The Court addresses this factor by examining several key issues raised in the instant motion: the Department's case for maintaining 34 C.F.R. § 106.10, enjoining 34 C.F.R.

§ 106.2 in its entirety, enjoining "unchallenged" provisions of the Final Rule, and the effectiveness of the Final Rule's severability clauses.[2]

1. Section 106.10

The Department challenges the injunction regarding § 106.10, arguing that this provision, which redefines "discrimination on the basis of sex" to include sex-adjacent characteristics, does not harm the plaintiffs and should not be enjoined. [Record No. 104, pp. 5–6] It characterizes this provision as a straightforward application of the Supreme Court's reasoning in *Bostock*, further arguing that it "is not the cause of Plaintiffs' claimed harms." [*Id.* at 5] But the Department's contention ignores entirely the plaintiffs' underlying arguments, this Court's findings, and prior observations of the Supreme Court and Sixth Circuit.

a. *Bostock*'s Inapplicability

The Department accepts that "sex is binary and assigned at birth." [*See* Motion Hearing Transcript, p. 129.] And it acknowledges that Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). But it fails to recognize is that *Bostock*'s holding is entirely irreconcilable with the text and purpose of Title IX. By relying so heavily on this *Bostock* reasoning, the Final Rule was constructed on a foundation of quicksand.

In *Bostock*, the Supreme Court began its analysis by noting that Title VII prevents discrimination "because of" an individual's sex. 590 U.S. at 656. The Court found that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 360 (2013)). These three phrasal prepositions

[2] While there is considerable overlap in some of these topics, the Court will address them separately to facilitate review on appeal.

express a straightforward relationship of cause-and-effect. Expressed in legal terms, "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* (quoting *Nassar*, 570 U.S. at 346, 360).

The majority opinion offers a useful illustration to help understand Title VII's but-for test in action.

> Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies).

Id. at 661. But, as outlined below, discrimination "because of such individual's sex" is not, and cannot, be the same as discrimination "on the basis of sex."[3]

Just as the Supreme Court did in *Bostock*, this Court begins by ascertaining the plain meaning of the words at issue: "on the basis of". *See Garland v. Cargill*, 602 U.S. 406, 415–16 (2024). The root word "basis" is of Latin origin, meaning "foundation" or "support." *Basis, Oxford Dictionary of English Etymology* 77 (C. T. Onions, ed., 1966); *see also Basis*, *Black's Law Dictionary* 185 (11th ed. 2019) ("A fundamental principle; an underlying fact or condition; a foundation or starting point."); *Basis, Mirriam-Webster's Dictionary of Law* 45 (Linda Picard Wood ed. 2016) ("1: something on which something else is established[;] . . . 2:

[3] In the Memorandum Opinion and Order enjoining the Final Rule, the undersigned concluded that "on the basis of sex" was not ambiguous and that the Department was not entitled to *Chevron* deference. [Record No. 100, p. 16 n.6] While the undersigned's position has not changed, the Supreme Court's recent overruling of the *Chevron* doctrine further reinforces this Court's constitutional and statutory obligation to reject an agency interpretation at odds with the Court's independent judgment. *See Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360, at *22 (U.S. 2024).

a basic principle or method."); *Basis, Mirriam-Webster's Collegiate Dictionary* 72 (7th ed. 1973) ("1: Foundation; 2: the principal component of anything; 3: something on which anything is constructed or established; 4: the basic principle."). Rather than indicating cause-and-effect, "on the basis of" is a preposition that indicates a foundational criterion upon which distinctions are made. In the context of Title IX, that criterion is sex—male or female.

This reading is further reinforced by observing that Title VII's prohibition is victim-centric, whereas Title IX's makes a broad categorical distinction. Title VII bars discrimination "because of *such individual's*" sex—calling for a but-for analysis focused on the individual victim's sex. 42 U.S.C. § 2000e–2(a)(1) (emphasis added). Title IX imposes no such requirement, speaking instead in broad categorical terms: "*No person* in the United States shall, on the basis of sex, be excluded . . . ."[4] 20 U.S.C. § 1681(a) (emphasis added). This distinction reflects prior observations from the Supreme Court and Sixth Circuit that "Title VII . . . is a vastly different statute from Title IX." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *see also L.W. by and through Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023) (noting that *Bostock*'s "text-driven reasoning applies only to Title VII"); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("Title VII differs from Title IX in important respects . . . Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context."). Giving meaning to these distinctions is

[4] The Supreme Court has acknowledged that Title IX's meaning would be altered if it instead prohibited discrimination "on the basis of *such individual's* sex." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 (2005) (emphasis in original); *see also Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) (noting in the context of Title VI and the Fourteenth Amendment: "That such differently worded provisions should mean the same thing is implausible on its face.").

necessary under Title IX's framework, where imposing Title VII's but-for test or victim-centric focus would entirely undermine the statute's purpose.

The Department acknowledges that "[s]ome courts have declined to extend the Supreme Court's reasoning in *Bostock* to Title IX by concluding that prohibitions on discrimination 'because of sex' and discrimination 'on the basis' of sex do not mean the same thing." 89 Fed. Reg. 33806. But it simply "disagrees" with those determinations, instead concluding that "[b]oth phrases simply refer to discrimination motivated *in some way* by sex." *Id.* (emphasis added). As explained below, such a reading is unworkable.

The Final Rule proclaims that "sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination." *Id.* at 33818. However, when sex separation "denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity," it violates Title IX's general nondiscrimination mandate. *Id.* This is a necessary result of adopting *Bostock*'s but-for test. But such a reading would also require schools to permit a non-transgender student to access the locker room or shower facility of his or her choosing: *But for* the high school quarterback being male, he would be able to access the female showers. Yet the Department would presumably reject such a claim, referring to the scenario as a "permissible sex separation or differentiation." *Id.* at 33816 (citing 34 C.F.R. § 106.33).

The Department uses the *Bostock* holding as a rationale for its entirely new reading of Title IX—one which creates a series of new protected classes not contemplated by the drafters of Title IX. The Department's "more than de minimis harm standard" serves as a clever, albeit transparent, attempt to neutralize the resulting absurdities—ensuring the new protections apply to some and not to others. Take for example the Final Rule's declaration that it causes "more

than de minimis injury" to prevent a transgender student from using the sex-separate facility consistent with the student's gender identity. *Id.* at 33818. When commenters pointed out that this "elevates protections for transgender students over other students, especially cisgender girls and women," *id.* at 33817, the Department explained that it was "unaware of instances in which cisgender students excluded from facilities inconsistent with their gender identity have experienced the harms transgender students experience as a result of exclusion from facilities consistent with their gender identity," *id.* at 33820. So to clarify, yes; the Department's Final Rule expressly grants preferential treatment to transgender students.

Under Title IX's framework, the adoption of *Bostock*'s but-for test would be contrary to statute and entirely unworkable. The Department's apparent remedy was to create regulatory carveouts aimed at limiting *Bostock*'s reasoning to the select class of individuals the Department set out to protect. In doing so, it created an impermissible litmus test that discriminates against those that Title VII's but-for test would otherwise protect (e.g., the quarterback). But because Title VII and Title IX combat discrimination in textually distinct ways, the Department's integration of *Bostock* is fatally flawed.

b. Unauthorized Statutory Expansion

Another obvious flaw with § 106.10 is found in its drafting. Title IX expressly authorizes the promulgation of rules prohibiting discrimination "on the basis of sex." 20 U.S.C. §§ 1681(a), 1682. The Department relies on *Bostock* to argue that "on the basis of" is expansive of the term "sex," to include things "inextricably bound up with sex." [Record No. 73, p. 16] (quoting *Bostock*, 590 U.S. at 660–61). Therefore, the Department reasons that "discriminating against someone based on their gender identity necessarily constitutes

discrimination 'on the basis of' the sex that they were assigned at birth." [*Id.*] However, § 106.10 takes it one step further.

The Final Rule declares that 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." 89 Fed. Reg. 33886 (adding 34 C.F.R. § 106.10). By preceding these new classifications with "on the basis of," a plain reading of § 106.10 coupled with the Department's *Bostock* interpretation would necessarily lead to the conclusion that Title IX also prohibits all things "inextricably bound up" with "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." The Department admits as much when it acknowledges that one's gender identity "may or may not be different from their sex assigned at birth." *Id.* at 33809. It also announces that it "interprets 'sex characteristics' to include 'intersex traits,'" and that "gender norms" and "gender expression" are "rooted in one or more of the bases already represented in § 106.10." *Id.* at 33803.

The Administrative Procedure Act ("APA") requires courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The Department's interpretation of Title IX transforms the familiar prohibition of sex-based discrimination into a sweeping anti-discrimination mandate, capable of regulating conduct that neither implicates the male/female dichotomy nor relates to sex at all. [*See* Record No. 100, p. 27.] After utilizing "all relevant interpretive tools," the undersigned concluded that the Department exceeded its legislative authority by expanding the plain meaning of discrimination "on the basis of sex." *See Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360, at *16 (U.S. 2024).

This extraordinary departure from Title IX's purpose—equality of educational opportunity for girls and women—becomes even more evident when considering the following hypotheticals.

Section 106.10 of the Final Rule proscribes discrimination on the basis of *sex stereotypes*, which the Department concludes reaches "discrimination based on others' expectations regarding a person's pregnancy or related conditions and assumptions about limitations that may result." 89 Fed. Reg. 33756. Section 106.2's definition of "*Pregnancy or related conditions*" includes "medical conditions related to . . . lactation." *Id.* at 33883. Accordingly, the Department reads Title IX to prohibit discrimination based on others' expectations regarding a person's medical conditions related to lactation and assumptions about any limitations that may result. Would this provision be violated if a recipient failed to accommodate a biological male in his pursuit of lactation? The Final Rule notes that "being able to live consistent with one's gender identity is critical to the health and well-being of transgender youth." *See id.* at 33819 n.90 (citing World Professional Association for Transgender Health ("WPATH"), *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health S1 (2022)). The very authority cited in the Final Rule reports that "many" transgender biological males "express the desire to chest/breast feed." WPATH, *supra* at S161 (identifying a case in which a biological male was successful in "lactating and chest/breast feeding").

Similarly, § 106.10 bars discrimination on the basis of *sex characteristics*, which "is intended to refer to physiological sex-based characteristics," including, but not limited to "a person's anatomy, hormones, and chromosomes associated with [being] male or female." 89 Fed. Reg. 33811. The Final Rule announces that no "medical diagnosis" is required and that the provision covers discrimination "based on physiological sex characteristics that differ from

or align with expectations generally associated with male and female bodies." *Id.* Like the definition before, it is clear to see how this intentionally undefined definition could capture situations never remotely conceived by Title IX's authors. If a male with a high-pitched voice is denied the ability to sing a traditionally male part in the school choir, has the school's choir director impermissibly discriminated against him by assigning him to a traditionally female part that falls within his vocal range? The number of possible scenarios is limitless given the Department's refusal "to make definitive statements about examples." *Id.*

Given the way § 106.10 was written and the Department's insistence on using vague terms—often defined by their nested and equally undefined subterms—the provision far exceeds the that which is authorized under Title IX. The plaintiffs argue, and the undersigned agrees, that the Department's redefinition of sex discrimination in § 106.10 drastically and impermissibly alters the obligations of educational institutions under Title IX. [*See* Record Nos. 110, p. 3; 111, p. 4.] This expansive interpretation introduces considerable uncertainty and complexity, necessitating comprehensive changes in school policies, training, and enforcement mechanisms. The claim that this expansion "does not cause Plaintiffs any injury" is plainly without merit. [Record No. 113, p. 1]

c. Procedural Defects

Aside from the substantive issues already addressed, the injunction identifies significant concerns about the procedural validity of § 106.10. [*See* Record No. 100, pp. 66–77.] The Department's redefinition of discrimination "on the basis of sex" appears to have been implemented without adequate notice and comment, raising substantial questions under the APA. [*See id.* at 76.] ("It is an inescapable conclusion based on the foregoing discussion that the Department has effectively ignored the concerns of parents, teachers, and

students . . . ."). The Department's responses to concerns of bias, vagueness, and overbreadth often fell woefully short of that demanded by the APA. *See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to "examine the relevant data and articulate a satisfactory explanation for its action"); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("[W]here the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.").

Given these substantial legal and procedural issues, the Department has not shown a strong likelihood of success on the merits regarding the Court's decision to enjoin § 106.10. The provision's sweeping changes and the procedural deficiencies in its adoption support the decision to include it in the preliminary injunction.

2. Enjoining Section 106.2 in its Entirety

The Department contends that the Court's injunction improperly enjoins § 106.2 of the Final Rule in its entirety, arguing that the plaintiffs only challenged its definition of "hostile environment harassment" as applied to gender identity discrimination. It maintains that "hostile environment harassment" applies outside the context of gender identity and that the injunction improperly enjoined more than was necessary to mitigate the plaintiffs' alleged harms. [*See* Record No. 104, p. 6.]

This argument fails to recognize the extent to which other applications of "hostile environment harassment," and in fact other definitions in § 106.2 more broadly, have been irreparably tainted by overarching procedural defects and *Bostock* reasoning. This Court's Memorandum Opinion and Order explains, in some detail, how the Final Rule's definition of "hostile environment harassment" is likely to "compel[] speech and otherwise engage[] in

viewpoint discrimination." [Record No. 100, p. 48] The opinion also clear explains that the provision's reliance on amorphous and undefined terms make it "vague and overbroad in a way that impermissibly chills protected speech." [*Id.* at 56] Despite the Department's argument to the contrary, the plaintiffs' criticisms of the "hostile environment harassment" provision—and this Court's analysis—were not limited to the context of gender identity. [*See, e.g., id.* at 43 (discussing misgendering and compelled speech due to sex stereotyping).] The definition itself suffers from both procedural defects under the APA and constitutional deficiencies that are implicated regardless of the metric being used to define sex-discrimination. [*See id.* at 54.] The Court maintains that it is necessary to enjoin enforcement of the Final Rule's "hostile environment harassment" provision in its entirety.

The plaintiffs also have adequately demonstrated that other definitions and obligations found within § 106.2 are meaningless without first determining the meaning of sex discrimination. [*See* Record No. 110, p. 5.] For example, § 106.2 defines "relevant" to mean "related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46." 89 Fed. Reg. 33884. This necessarily depends on the scope of sex discrimination and the applicability of *Bostock*. Similarly, § 106.2's definition of "supportive measures" may or may not have to account for protections against discrimination based on gender identity and more. Depending on the meaning of sex discrimination, these definitions will influence the obligations of the Title IX coordinators and the procedures they must follow, thereby affecting the entire grievance process outlined in §§ 106.44 and 106.45. *See id.* at 33885. These changes are directly tied to key definitions and cannot function independently without creating significant regulatory confusion or an extraconstitutional judicial rewrite.

The Supreme Court has consistently recognized that when a statutory or regulatory provision is fundamentally flawed, its interconnected provisions cannot be severed without causing substantial disruption. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (noting that invalid provisions may be dropped where the remainder "is left fully operative as law"). Here, the challenged importation of *Bostock*'s reasoning is so central to the Final Rule that severing expressly challenged provisions is not a viable option. The Department's suggested remedy would require this Court to scour the Final Rule's more than four-hundred pages of text and make sweeping cuts in a manner that would impermissibly depart from the Court's judicial function and wade into the realm of executive rulemaking. *See infra* Section III.A.3. Absent such an endeavor, the Final Rule would be incoherent.

Moreover, the procedural deficiencies identified in the adoption of these definitions, like those addressed above, raise significant questions under the APA. The lack of adequate reasoned response to these substantial changes undermines the validity of the entire provision. *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) ("Unexplained inconsistency . . . [may be] a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.").

In summary, the definitions within § 106.2 are integrally connected to the redefinition of sex discrimination derived from *Bostock*, appearing in § 106.10, and articulated in the Final Rule's stated "Purpose". *See* 89 Fed. Red. 33476 (purporting "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"). The plaintiffs have convincingly argued that these definitions cannot be salvaged without causing significant disruption, regulatory confusion, and compliance cost. Thus, the Court's decision to enjoin § 106.2 in its entirety is justified.

3. Enjoining Other Sections of the Final Rule

The Department also challenges the injunction as it pertains to many other sections of the Final Rule, particularly those not expressly named by the plaintiffs. It contends that these sections should not be enjoined as they "have nothing to do with gender identity," and plaintiffs have not demonstrated imminent injury absent the injunction. [Record No. 104, p. 3] The Department provides the following examples:

> [P]rovisions regarding the role of Title IX coordinators, 89 Fed. Reg. at 33,885 (34 C.F.R. § 106.8(a)); recipients' notice and record-keeping obligations, *id.* at 33,885-86 (34 C.F.R. § 106.8(c), (f)); access to lactation spaces, *id.* at 33,888 (34 C.F.R. § 106.40(b)(3)(v)); a recipient's response to sex discrimination, *id.* at 33,888-91 (34 C.F.R. § 106.44); and grievance procedures for claims of sex discrimination, *id.* at 33,891-95 (34 C.F.R. §§ 106.45, 106.46).

[*Id.* at 3–4]

First, the Court must consider the broader context of these provisions and their interplay with the Final Rule's interpretive guidance and the provisions more directly at issue (i.e., §§ 106.2, 106.10, and 106.31(a)(2)). As observed previously, the Department's adoption of *Bostock* alone necessarily embeds a new meaning of sex discrimination into the entire Final Rule. *See, e.g.*, 89 Fed. Reg. 33802 (noting that the Department believes Title IX's prohibition on sex discrimination includes things which "necessarily involves consideration of a person's sex"). This impermissible expansion of Title IX's mandate is not confined to the creation of § 106.10—it directly flows from the Department's importation of *Bostock*'s Title VII-based reasoning.

For example, the Department suggests that provisions regarding the role of Title IX coordinators were improperly enjoined. [Record No. 104, p. 3] But this ignores the fact that the scope of these regulations is unascertainable without first resolving the central dispute arising under *Bostock*. Section 106.8(a) currently requires that a Title IX Coordinator be designated "to coordinate [the recipient's] efforts to comply with its responsibilities under [Part 106]." The Final Rule appears significantly more exacting, further insisting a Title IX Coordinator "ensure the recipient's consistent compliance with its responsibilities under Title IX and [Part 106]." 89 Fed. Reg. 33885. But that mandate necessarily calls for "consistent compliance" with responsibilities that the Final Rule defines in light of *Bostock*. *See, e.g.*, *id.* at 33569 (describing training obligations under § 106.8(d)(1), which require all employees to be trained "on the scope of conduct that constitutes sex discrimination under Title IX, including sex-based harassment").

The same issue presents itself when reviewing the recordkeeping obligations outlined in the Final Rule's § 106.8(f). The Department acknowledges that "§ 106.8(f) broadens the existing scope of the recordkeeping requirements . . . because the final recordkeeping requirement applies to all notifications to the Title IX Coordinator about conduct that reasonably may constitute sex discrimination and all complaints of sex discrimination." *Id.* at 33873 (estimating "that modifications to recipients' recordkeeping systems will cost approximately $13,022,034 in Year 1"). But this requirement is once again rendered meaningless without first determining the meaning of sex discrimination—the central focus of the plaintiffs' legal challenge.

The provisions identified by the Department as being captured in the Court's overbroad injunction impose new duties on recipients, all of which hinge on the Department's adoption

of an entirely new understanding of sex discrimination. [*See* Record No. 104, pp. 3–4.] Allowing these provisions to take effect while enjoining the definitions and interpretations from which they derive their meaning would require educational institutions to guess as to the provisions' scopes, creating an inconsistent and unmanageable regulatory framework.

The Supreme Court has emphasized the importance of regulated parties knowing what is required of them. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *see also Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). The plaintiffs have convincingly argued that the Final Rule, *in its entirety*, fails to provide such clarity, and the piecemeal enforcement suggested by the Department would only exacerbate this problem.

Moreover, the potential constitutional issues raised by the plaintiffs similarly extend to these remaining provisions. The Department's redefined sex discrimination standard and vague guidance implicates the same First Amendment protections on speech and religious expression that exist elsewhere. *See, e.g.*, 89 Fed. Reg. 33493 (declaring that "Title IX's broad prohibition on sex discrimination encompasses, at a minimum, discrimination against an individual based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"). If the remaining provisions are preserved, the viewpoint discrimination inherent in the Final Rule remains likely to impose an impermissible constraint on an individual's ability to freely express certain religious and/or philosophical

viewpoints. [*See* Record No. 100, pp. 41–56.] Enjoining § 106.2's definitions of "sex-based harassment" and/or "hostile environment harassment" still leaves the existing "sexual harassment" standard in full force. *See* 34 C.F.R. § 106.30(a). Permitting the Department's redefinition of "on the basis of sex" to act through existing regulations is no remedy at all.

The Department has not demonstrated a likelihood of success on the merits regarding the indirectly contested provisions of the Final Rule, which inherently impose the same harms as those challenged with more specificity. This Court's injunction is not an overreach but a necessary measure to maintain regulatory coherence and prevent piecemeal implementation that could lead to significant administrative challenges and legal uncertainties.

4. Severability Clauses

Though sufficiently addressed in the preceding discussion, the undersigned will nonetheless directly address the Department's severability argument. It argues that the preliminary injunction is overly broad because the contested provisions of the Final Rule were expressly severable and intended to operate independently of each other.[5] [*See* Record No. 104, p. 4. *See also supra* Section III.A.2–3.] But "a severability clause is an aid merely; not an inexorable command." *Reno v. ACLU,* 521 U.S. 844, 884–85, n.49 (1997); *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."). Severability clauses do not function

[5] The Final Rule notes that "the severability clauses in part 106, . . . continue to be applicable," and identifies them by Subpart: § 106.9 (Subpart A—"Introduction"), § 106.16 (Subpart B—"Coverage"), § 106.24 (Subpart C—"Discrimination on the Basis of Sex in Admission and Recruitment Prohibited"), § 106.46 (Subpart D—"Discrimination on the Basis of Sex in Education Programs or Activities Prohibited"), § 106.62 (Subpart E—"Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited"), § 106.72 (Subpart F—"Retaliation"), and § 106.82 (Subpart G—"Procedures"). *See* 89 Fed. Reg. 33848.

as a get out of jail free card—redeemable by an Executive agency seeking to recruit the Court into the rulemaking process. *See Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 625 (2016) (quoting *Ayotte v. Planned Parenthood of N. New Eng.,* 546 U.S. 320, 329 (2006)) ("A severability clause is not grounds for a court to 'devise a judicial remedy that . . . entail[s] quintessentially legislative work.'").

Courts are not required "to proceed in piecemeal fashion," going "application by conceivable application" to effectively rewrite regulations in an effort to save them from their statutory and unconstitutional defects. *Id.* at 625–26. And even when severing a discrete provision is possible, "making distinctions in a murky constitutional context, or where line-drawing is inherently complex," may require an improper judicial excursion into the legislative domain. *Ayotte,* 546 U.S. at 330.

The doctrine of severability imposes a two-step inquiry on courts. First, a court must determine "whether the [regulation] will function in a *manner* consistent with the intent of [the agency]." *Alaska Airlines,* 480 U.S. at 685. *But see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 692 (2012) (Scalia, J., dissenting) ("Even if the remaining provisions will operate in some coherent way, that alone does not save the statute."). Second, the reviewing court must determine whether the agency would have promulgated the rule in the absence of the severed provisions. *Alaska Airlines,* 480 U.S. at 685.

Here, the challenged provisions and embedded interpretive guidance is so integral to the Final Rule that attempting to salvage provisions through severance would leave an incoherent regulatory framework. The Department's melding of Title VII jurisprudence with the Title IX framework is not something that can be severed as a discrete, isolated provision. Instead, it fundamentally redefines the scope and application of Title IX across multiple

contexts. The inescapable interconnectedness of the Department's slew of new interpretations supports the undersigned's initial determination that a broad injunction is necessary to prevent irreparable harm and ensure regulatory coherence.

Because the Final Rule would fail to function in the absence of necessarily severed provisions, the Court need not determine whether the Department would have promulgated the Final Rule absent its glaring defects.[6] The Department's argument that the Final Rule's provisions can be meaningfully severed does not hold up under scrutiny, and thus, the Department has not demonstrated a substantial likelihood of success on this point.

B. Likelihood of Irreparable Harm

The Department also contends that it will suffer irreparable harm if the preliminary injunction is not partially stayed pending appeal. But to justify this assertion, it must demonstrate that the harm is "both certain and immediate, rather than speculative or theoretical." *Griepentrog*, 945 F.2d at 154.

The Department argues that "[e]very time the federal government 'is enjoined by a court from effecting statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" [Record No. 104, p. 6] (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). This is a most curious citation for the Department to lean on. The full quotation recognizes the irreparable injury that occurs "any time a *State*" is prevented from effectuating statutes enacted *through the legislative process*. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). And in this case, the Plaintiff States far more convincingly make that very claim. [*See* Record No.

[6] The Department makes quite clear its view that the severability provisions refute any suggestion to the contrary. [Record No. 113, p. 3]

1, p. 68.] They argue persuasively that the Final Rule undermines legislatively enacted State statutes with federal regulations imposed by unelected bureaucrats in Washington, D.C. [*See id.* ¶ 22.]

The Department also suggests that the injunction prevents the Final Rule from effectuating "Title IX's twin goals of 'avoiding the use of federal resources to support discriminatory practices and providing individual citizens effective protection against those practices.'" [Record No. 104, p. 7] (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)) (cleaned up). It goes on to suggest the injunction "*could* prematurely impair the rights of individuals" by preventing the Department from taking steps to ensure that, *inter alia*, "students are not being punished for being pregnant, gay, or transgender." [*Id.*] However, it offers no evidence or support that such acts are occurring and even acknowledges that the plaintiffs "nowhere suggest that they intend to engage in discrimination against students for being pregnant or gay at all." [*Id.* at 5] In short, to the extent such delayed enforcement would constitute a harm to the Department, it is premised on the entirely theoretical notion that students within the Plaintiff States *are* being punished for being pregnant, gay, or transgender.

The Department also suggests a stay would restore provisions that prohibit things like "forcing a student to sit in the back of a classroom because he is gay, excluding a student from the lunchroom because he is transgender, sexually harassing a cisgender woman in a manner that meets the regulatory definition of hostile environment harassment, or requiring a breastfeeding student to express breastmilk in a bathroom stall." [Record No. 113, p. 6] But once again, the Department provides no evidence of such things occurring within the Plaintiff States' jurisdictions.

The Department's arguments are unpersuasive for two clear reasons. First, the preliminary injunction does not eliminate protections against discrimination; it merely maintains the status quo pending a thorough judicial review of the Final Rule's legality. As the Supreme Court noted in *Nken*: "A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result.'" 556 U.S. at 427 (first quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'm,* 259 F.2d 921, 925 (D.C. Cir. 1958) (*per curiam*); and then quoting *Virginian Ry. Co.,* 272 U.S. at 672).

Second, the Department has not demonstrated that the delay in implementing the Final Rule will cause immediate and irreparable harm. The protections under the *existing* regulatory framework remain in place, continuing to provide a mechanism for addressing discrimination. The speculative nature of the Department's claimed harm is insufficient to meet the rigorous standard required for a stay. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (standing for the proposition that a stay pending appeal must be supported by more than "a possibility of irreparable harm").

The Department has not met its burden of demonstrating that, absent a stay, it will suffer irreparable harm. The speculative nature of the claimed harms and the continued protection under existing regulations all weigh against the issuance of a stay.

C. Harm to Others and the Public

The third and fourth factors in determining whether to grant a stay pending appeal look to the potential harm that will be imposed upon others and the public if the stay is granted. In this case, the Court considers the harm that the plaintiffs, other interested parties, and the public will likely suffer if the preliminary injunction is stayed, thereby allowing portions of the Final

Rule to take effect in less than one month's time. These considerations are weighed against any potential harm faced by the Department. *See Winter*, 555 U.S. at 20 (noting that the balance of equities must weigh in favor of the party suffering the greater harm).

The plaintiffs argue that, should a stay be granted, the immediate burdens placed on educational institutions and their staff will be considerable. First, the implementation of the Final Rule without a clear resolution of its legality will create substantial administrative and operational challenges for schools. [*See* Record No. 110, p. 7.] Requiring schools to comply with some provisions, including those which derive meaning from enjoined provisions, will require schools to embark on the highly speculative and costly endeavor of overhauling existing policies and training programs while attempting to predict the Final Rule's ultimate form. [*See id.* at 8.] The harm to schools, measured in terms of time and money, has been well established by the plaintiffs and is neither trivial nor speculative. [*See* Record No. 100, Part V.]

Second, the risk of legal conflict is considerable. A partial stay would force States to navigate a complex and potentially contradictory regulatory landscape, attempting to reconcile existing state laws and policies with the Final Rule's mandates. [*See* Record No. 19-1, p. 31.] This uncertainty would likely result in inconsistent enforcement and could expose schools to additional litigation risks, arising under both Title IX and state law. [*See* Record No. 100, p. 63.] Such a scenario undermines the very purpose of regulatory clarity and stability that Title IX aims to achieve.

Third, the potential harm extends to students and staff who would be directly affected by the immediate changes in policies and practices. This includes infringement on religious freedoms and free speech rights, either through compelled or chilled speech. *See Sorrell v.*

IMS Health Inc., 564 U.S. 552, 566 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.") (citation omitted); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). The plaintiffs have presented credible arguments that the Final Rule's enforcement will likely lead to violations of these constitutional rights. [*See* Record No. 100, pp. 41–56.]

Fourth, beyond students and staff, the public has a significant interest in the evenhanded application of laws and regulations. This requires they be drafted in such a way as to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When a vague regulation "abuts upon sensitive areas of basic First Amendment freedoms," uncertainty will inevitably "inhibit the exercise of those freedoms." *Id.* at 109 (citations omitted). The Final Rule raises those very concerns.[7] Allowing the Final Rule to take effect while its legal validity is still in question will disrupt existing clarity and likely leading to inconsistent application and enforcement across different states and educational institutions. [*See* Record No. 100, Part VI.]

The immediate harm to the plaintiffs will likely be substantial if a stay is granted. The administrative burdens, legal uncertainties, and potential constitutional violations underscore the need for maintaining the injunction until a final decision is issued. The injunction maintains the status quo and prevents the immediate and significant harm that would result

[7] In the Final Rule, the term "vague" appears thirty-two times; "vagueness," fourteen times; "overbroad," twenty-one times; and "First Amendment," two hundred sixty-nine times. *See generally* 89 Fed. Reg. 33474.

from the Final Rule's premature enforcement. The balance of equities clearly favors maintaining the preliminary injunction to prevent these significant harms while this matter is pending a final determination.

IV. Conclusion

The Department fails to demonstrate a substantial likelihood of success on the merits. Likewise, it fails to rebut the myriad substantive and procedural flaws with the Final Rule as discussed at length by the plaintiffs. Next, the Department's purported claim of irreparable harm is speculative at best, especially in light of the existing protections which remain in place. Conversely, the plaintiffs have made a strong showing that granting a stay would result in substantial and immediate harm to the States, their educational institutions, and all those who rely on the services they provide. Finally, the public interest in upholding regulatory clarity, protecting constitutional rights, and avoiding unnecessary upheaval in schools favors the plaintiffs.

Based on the foregoing analysis and discussion, it is hereby

ORDERED that the Motion for a Partial Stay Pending Appeal filed by the United States Department of Education and Miguel Cardona, Secretary of the U.S. Department of Education [Record No. 104] is **DENIED**.

Dated: July 10, 2024.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

No. 24-5588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF TENNESSEE, et al.,

Plaintiffs-Appellees,

and

CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL, et al.,

Intervenors-Plaintiffs-Appellees,

v.

MIGUEL CARDONA, in his official capacity as Secretary of Education, et al.,

Defendants-Appellants.

O R D E R

Before: SUTTON, Chief Judge; BATCHELDER and MATHIS, Circuit Judges.

SUTTON, Chief Judge. Secretary of Education Miguel Cardona and the U.S. Department of Education (collectively, the Department) seek a stay of parts of the district court's preliminary injunction with respect to an administrative rule promulgated under Title IX. For the reasons elaborated below, we deny the motion for a stay and expedite the appeal.

I.

The Rule. "No person in the United States," Title IX says, "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statute empowers the Department to promulgate rules "consistent with achievement of the

objectives of" Title IX. *Id.* § 1682. On April 29, 2024, the Department promulgated a Rule under Title IX entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33474 (Apr. 29, 2024) (to be codified at 34 C.F.R. § 106). The Rule is scheduled to go into effect on August 1, 2024. *Id.* at 33476.

The Rule provides a new definition of "[d]iscrimination on the basis of sex" under 34 C.F.R. § 106.10. As amended, the Rule covers "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. 33886. The Rule also amends 34 C.F.R. § 106.2 to add a prohibition on "[h]ostile environment harassment," defined as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)." *Id.* at 33884. In view of the new scope of sex-based discrimination under § 106.10, this addition to § 106.2 covers the refusal to use a student's preferred pronoun. *See id.* at 33516. In addition, the Rule amends 34 C.F.R. § 106.31(a)(2) to clarify that schools may not "prevent[] a person from participating in an education program or activity consistent with the person's gender identity." *Id.* at 33887. As a result, § 106.31(a)(2) applies to "restrooms and locker rooms, access to classes and activities, and policies such as appearance codes (including dress and grooming codes)." *Id.* at 33816 (internal citations omitted).

Procedural history. Four States (Indiana, Ohio, Tennessee, and West Virginia) and two Commonwealths (Kentucky and Virginia) filed this lawsuit against the Department to block enforcement of the Rule. They claim that § 106.10 "contravenes Title IX's text and the meaning of the Department's own regulations," that § 106.2 runs afoul of the First and Fourteenth Amendments, and that the Rule generally violates the Spending Clause, exceeds the agency's authority, and turns on arbitrary and capricious rulemaking. R.1 at 70. Soon after the States filed this lawsuit, the Christian Educators Association International, a voluntary membership

organization comprised of Christians in the teaching profession, intervened to support the action. So too did A.C., a fifteen-year-old middle school student in West Virginia. She complained that a student who was assigned male at birth but identifies as female was allowed to compete against, and share facilities with, A.C. and the rest of the girls' track and field team. The intervenors challenged § 106.2 on First Amendment grounds and § 106.31(a)(2)'s inclusivity mandate as violating students' and school employees' rights to bodily privacy, safety, and sporting integrity.

The plaintiffs moved the district court for a preliminary injunction preventing the Department from enforcing the Rule. In a thorough 93-page opinion, the district court granted the motion and enjoined the Rule in its entirety. The Department appealed.

The Department moved the district court for a stay of one aspect of its merits ruling and a partial stay of the scope of the injunction pending appeal. As to the merits, the Department challenged the court's decision that § 106.10's new definition of sex discrimination violated the statute. As to the court's other legal conclusions—the Rule's provisions, for example, regarding "sex-separated bathrooms" and "sex-specific pronouns"—the Department accepted them for the time being, namely during the pendency of the appeal. R.104 at 1. In addition, the Department maintained that the district court should have issued a narrower injunction, one that enjoined just (i) 34 C.F.R. § 106.31(a)(2), and (ii) 34 C.F.R. § 106.2's definition of "hostile environment harassment" as applied to "discrimination on the basis of gender identity." R.104 at 2. The Department asked the district court to stay the preliminary injunction as to all other provisions of the Rule, including § 106.10's new definition of sex discrimination. In yet another thorough opinion, this one 26 pages long, the district court rejected the motion for a partial stay. It did not have any second thoughts about its § 106.10 ruling, making it inappropriate to limit the preliminary injunction to §§ 106.2 and 106.31(a). And it reasoned that the only way to address the plaintiffs' harms given the interconnected nature of the definition of sex discrimination with respect to the other key provisions was to enjoin the Rule in its entirety.

The Department now seeks similar relief from us on an expedited basis.

II.

Four factors guide the stay inquiry: (1) likelihood of success on the merits; (2) irreparable harm to the plaintiffs; (3) harm to others; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Granting a stay pending appeal is always "an exercise of judicial discretion," and "not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (quotation omitted).

Likelihood of success. With respect to the first factor, the Department premises its stay motion on (1) one aspect of the district court's analysis of the underlying claims and (2) the scope of the injunction. As for the underlying legal claim, the Department argues that the district court likely erred in assessing the validity of § 106.10's definition of sex discrimination. As for the scope of the injunction, it claims that the district court likely erred in extending the injunction beyond § 106.2 and § 106.31(a). We consider each argument in turn.

Start with the definition of sex discrimination under Title IX. As we see it, the district court likely concluded correctly that the Rule's definition of sex discrimination exceeds the Department's authority. In defining "discrimination on the basis of sex" in Title IX to extend to discrimination on the basis of "gender identity," among other categories, § 106.10, 89 Fed. Reg. 33886, the Department mainly relied on *Bostock v. Clayton County*, 590 U.S. 644, 669 (2020). But *Bostock* is a Title VII case. As many jurists have explained, Title VII's definition of discrimination, together with the employment-specific defenses that come with it, do not neatly map onto other areas of discrimination. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 290, 308 (2023) (Gorsuch, J., concurring) (distinguishing the Equal Protection Clause from Titles VI and VII); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808 (11th Cir. 2022) (en banc)*; Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023); *Brandt ex rel. Brandt v. Rutledge*, No. 21-2875, 2022

WL 16957734, at *1 n.1 (8th Cir. Nov. 16, 2022) (Stras, J., dissenting from denial of rehearing en banc). Title VII's definition of sex discrimination under *Bostock* simply does not mean the same thing for other anti-discrimination mandates, whether under the Equal Protection Clause, Title VI, or Title IX.

As to the relationship between Title VII and Title IX, the statutes use materially different language: discrimination "because of" sex in Title VII and discrimination "on the basis of" sex in Title IX. *See* 42 U.S.C. § 2000e–2(a)(1); 20 U.S.C. § 1681(a). In addition, the two statutes serve different goals and have distinct defenses. For these reasons, "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). No less importantly, Congress enacted Title IX as an exercise of its Spending Clause power, U.S. Const. Art. I, § 8, cl. 1, which means that Congress must speak with a clear voice before it imposes new mandates on the States. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The same is not true of Title VII. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–453 & n.9 (1976). All of this explains why we have been skeptical of attempts to export Title VII's expansive meaning of sex discrimination to other settings. *See, e.g.*, *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir.), *cert. granted sub nom. United States v. Skrmetti*, No. 23-477, 2024 WL 3089532 (U.S. June 24, 2024) (Equal Protection Clause); *Gore v. Lee*, No. 23-5669, __ F.4th __, 2024 WL 3385247, at *5 (6th Cir. July 12, 2024) (same); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (Age Discrimination in Employment Act).

All three members of the panel, it bears emphasis, agree that these central provisions of the Rule should not be allowed to go into effect on August 1. Our modest disagreement turns on the question, in this emergency setting, of whether the other parts of the Rule can be separated from these central provisions.

Turn, then, to the scope of the preliminary injunction. As just shown, we disagree with the key premise of the Department's scope-of-the-injunction argument: its position that the court should not have extended the injunction to § 106.10's new definition of sex discrimination. Our reasoning shows at a minimum that the preliminary injunction properly extends to three central provisions of the Rule: §§ 106.10, 106.2's definition of hostile environment harassment, and 106.31(a).

After that, the problem is that these provisions, particularly the new definition of sex discrimination, appear to touch every substantive provision of the Rule. It is thus unsurprising, as the Department fairly acknowledges, that there are "numerous" references to sex discrimination throughout the Rule. Dep't Supp. Br. 3. In reality, each of the remaining provisions that the Department seeks to implement on August 1 implicates the new definition of sex discrimination. Take the Rule's record-keeping provision, § 106.8(f), which requires schools to preserve any notice sent to the Title IX coordinator of "conduct that reasonably may constitute sex discrimination," as well as the investigation and grievance records for "each complaint of sex discrimination." 89 Fed. Reg. 33886. Or § 106.2's definition of sex-based harassment, which amounts to "a form of sex discrimination . . . including on the bases identified in § 106.10, that [includes] . . . [h]ostile environment harassment." *Id.* at 33884. Or § 106.8, which imposes various new obligations on schools to comply with the new sex discrimination requirements: appointing Title IX coordinators, requiring training on the new scope of sex discrimination, and the like. *Id.* at 33885. Or § 106.11, which clarifies that the Rule generally requires schools to respond to sex discrimination in the United States and sometimes to sex discrimination elsewhere. *Id.* at 33886. Or § 106.40, which requires Title IX coordinators to "promptly and effectively prevent sex discrimination" by taking actions like ensuring access to lactation spaces. *Id.* at 33887–88. Or § 106.44, which requires any funding recipient "with knowledge of conduct that reasonably may constitute sex discrimination" to respond promptly with a series of corrective

measures. *Id.* at 33888. Or the Rule's grievance procedures and retaliation provision, §§ 106.45–.46, .71, which impose new rules for dealing with complaints of sex discrimination, sex-based harassment, and retaliation for reporting the same. *Id.* at 33891–96.

Through it all, each of the provisions that the Department wishes to begin enforcing on August 1 implicates the new definition of sex discrimination. It is hard to see how all of the schools covered by Title IX could comply with this wide swath of new obligations if the Rule's definition of sex discrimination remains enjoined. Harder still, we question how the schools could properly train their teachers on compliance in this unusual setting with so little time before the start of the new school year.

The Department resists this conclusion. It argues that the schools could enforce these provisions by relying on the prior definition of sex discrimination under its rules and regulations. If we denied the stay only as to the three core provisions identified above, the Department thus hypothesizes, the pre-existing definition could govern the rest of the Rule on August 1. We see a few problems with this argument. One is that we do not know the meaning of that pre-existing definition. As the Department points out, even that definition is "the subject of separate litigation." Dep't Supp. Br. 3 n.1 (citing *Tennessee v. Dep't of Educ.*, 104 F.4th 577 (6th Cir. 2024)). Another problem is that the Department has not identified any evidence that it contemplated, during the rulemaking process, how the remainder of the Rule would apply without any of its core provisions. Yes, there are severability provisions that would apply to the Rule, and the Department considered the possibility that a court might sever § 106.10 from the rest of the Rule. 89 Fed. Reg. 33848. But it did not contemplate enforcement of the Rule without *any* of the core provisions. Nor is there any suggestion that the cost-benefit analyses underlying the Rule contemplated the idea of allowing these provisions to go into effect with a *different* definition of sex discrimination.

In addition, it bears emphasizing how the Department framed its arguments below. The Department, to be sure, did identify the severability provisions. But it mainly used them to permit

the new definition of sex discrimination to go into effect, not to allow other provisions to go into effect under the prior definition of sex discrimination. In fact, the Department mentioned severability below in just a few lines of its briefs without telling the district court which other provisions should be severed. At least in the context of this emergency stay motion, we are uncomfortable granting more relief than the Department sought below. As shown, all of the provisions the Department now asks to go into effect implicate the new definition of sex discrimination.

The other stay factors. The equities, too, favor this approach. From an equitable perspective, educators should not be forced to determine whether this or that section of the new Rule must be followed when the new definition of sex discrimination might or might not touch the Rule. The States presented evidence that rolling out hundreds of pages of a new rule on August 1, just before the start of the school year, will place an onerous burden on them—loads of time and lots of costs that will only escalate if we leave confusion over the States' obligations under the Rule. That is particularly problematic given that the new definition of sex discrimination affects each provision of the Rule that the Department asked to go into immediate effect.

The States, to be sure, have acknowledged that some technical provisions of the Rule do not necessarily implicate the new definition of sex discrimination and are not already covered by prior regulations. But the Department did not identify these provisions in its request for relief. And with good reason, it appears. The provisions merely include definitions of four terms ("parental status," "party," "pregnancy or related conditions," and "student with a disability"), as well as eight technical amendments to existing Title IX regulations. *See* States' Supp. Br. 25 (citing § 106.3 [Amended]; § 106.15 (amending existing § 106.15); § 106.16 [Removed]; § 106.17 [Removed]; § 106.18 [Redesignated as § 106.16]; § 106.41 [Amended] (removing existing § 106.41(d)); § 106.46 [Redesignated as § 106.48]; and § 106.51 [Employment] (amending existing § 106.51(b)(6))). Although a merits panel is free to consider whether the scope of the

injunction should be narrowed to permit these technical provisions to go forward, the Department at this stage has not identified any harms that come from the preliminary injunction's coverage of these particular provisions. For that reason, and with the goal of avoiding any confusion that would come from enjoining all but the most technical portions of the Rule on the eve of a new school year, we will not exercise our "judicial discretion" to grant a stay on these points. *Nken*, 556 U.S. at 433.

We therefore deny the motion to stay the district court's preliminary injunction. To mitigate any harm to the Department, we will expedite its appeal of the district court's issuance of a preliminary injunction and direct the Clerk's Office to set a briefing schedule so that the case may be heard by a randomly assigned argument merits panel during the October sitting.

MATHIS, Circuit Judge, dissenting. The U.S. Department of Education promulgated an administrative rule under Title IX called "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33474 (Apr. 29, 2024). The Rule, which is set to take effect on August 1, 2024, adds or revises dozens of Title IX regulations. The State and Intervenor Plaintiffs take issue with three provisions that they say constitute a "gender-identity mandate" and have sought, among other things, injunctive relief. The district court preliminarily enjoined the entire Rule. The Department seeks to stay part of the preliminary injunction pending appeal. Because I would grant the Department's motion in part, I respectfully dissent.

For decades, Title IX has stood as a bulwark against discrimination in education. It states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with few exceptions. 20 U.S.C. § 1681(a). Congress has

authorized the Department to issue rules and regulations that are "consistent with achievement of the objectives of" Title IX. *Id.* § 1682. The Department passed the Rule pursuant to that authority.

The Rule "amends the regulations implementing Title IX of the Education Amendments of 1972." 89 Fed. Reg. at 33474. In addition to changes like revising the record-keeping requirements in 34 C.F.R. § 106.8(f), 89 Fed. Reg. at 33886, and adding a requirement in 34 C.F.R. § 106.40 that schools provide accommodations and facilities for breastfeeding students and employees, 89 Fed. Reg. at 33887–88, the Rule made amendments intended to address discrimination based on gender identity.

Plaintiffs focused their requests for injunctive relief on three provisions in the Rule. One provision defines "[d]iscrimination on the basis of sex" to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 34 C.F.R. § 106.10. The second provision defines "[s]ex-based harassment" as:

> a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:
> . . .
>
> (2) Hostile environment harassment. Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

Id. § 106.2. The third provision prohibits sex separation or differentiation that causes more than de minimis harm:

> In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a

> practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

34 C.F.R. § 106.31(a)(2). These provisions, according to Plaintiffs, constitute the Rule's gender-identity mandate.

The Department included severability statements in each of the subparts where the three above-mentioned provisions are located. Those statements provide: "If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or applications of its provision to any person, act, or practice shall not be affected thereby." *Id.* §§ 106.9, 106.16, 106.48.

The Department appeals and moves for a partial stay of the injunction to allow the Rule to take effect except as to the three provisions expressly challenged by Plaintiffs. This court considers four factors when deciding whether to stay a district court's injunction: (1) the likelihood that the movant will succeed on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable harm absent a stay; (3) whether a stay will cause substantial harm to others; and (4) whether a stay serves the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Still, the first two factors "are the most critical." *Nken*, 556 U.S. at 434. The movant must show more than a "possibility" of irreparable injury, *id.* at 434–35, and even if a movant can demonstrate irreparable harm, "he is still required to show, at a minimum, serious questions going to the merits," *Griepentrog*, 945 F.2d at 153–54 (internal quotation marks omitted).

I would grant the Department's motion and limit the injunction to the provisions Plaintiffs challenge. The Department is likely to succeed on the merits for those provisions that Plaintiffs have not challenged. The Supreme Court has cautioned lower courts that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 585 U.S. 48, 73

(2018), and "limited to the inadequacy that produced the injury in fact that the plaintiff has established," *id*. at 68 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). To that end, "a federal court may not issue an equitable remedy 'more burdensome to the defendant than necessary to [redress]' the plaintiff's injuries." *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 923 (2024) (mem.) (Gorsuch, J., concurring) (alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). An injunction can "stray[] from equity's traditional bounds" by barring the enforcement of provisions that do not harm the plaintiffs. *Id.* That is precisely what has happened here.

The parties and the district court spend considerable time discussing whether § 106.10 is consistent with the Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644, 669 (2020), which held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." But we need not resolve that debate to determine that the district court's preliminary injunction preventing enforcement of the entire Rule is broader than necessary to prevent Plaintiffs' alleged irreparable harms. *Gill*, 585 U.S. at 68; *Poe*, 144 S. Ct. at 923 (Gorsuch, J., concurring). Enjoining only those provisions targeted by Plaintiffs' injunction motions would be sufficient.

Is the Department irreparably harmed by an enjoining the Rule even though Plaintiffs only challenge three provisions of the Rule? I believe so. The purpose of the Rule was "to fully effectuate Title IX's sex discrimination prohibition." 89 Fed. Reg. at 33476. Through their motions for preliminary injunctions, Plaintiffs challenged the lawfulness of the three supposed gender-identity-mandate provisions. The Department is irreparably harmed by the interference with its rule-making authority, which it uses to protect students from sex discrimination. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

The harm to Plaintiffs is lessened because the provisions of the Rule that they have challenged would remain enjoined. Thus, a partial stay would advance Title IX's core purpose of

eliminating sex-based discrimination in education while still preventing the irreparable harms enumerated by Plaintiffs. As it relates to the Rule's definition of sex discrimination in § 106.10, there is no reason the Department could not use its pre-Rule understanding of what constitutes sex discrimination under Title IX.

I am cognizant of Plaintiffs' argument that the benefits of enacting the Rule's unchallenged provisions are outweighed by the expense or confusion of phased implementation. But most of the expense is attributable to provisions that Plaintiffs neither directly challenge nor cite as a source of harm.

Injunctive relief should be tailored, specific, and no broader than necessary. The district court's preliminary injunction does not satisfy those requirements. Therefore, I would stay the injunction except for prohibiting the Department from enforcing the three provisions Plaintiffs have challenged. Because the majority holds otherwise, I respectfully dissent.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 07/17/2024.

Case Name: TN, et al v. Miguel Cardona, et al
Case Number: 24-5588

Docket Text:
ORDER filed - We therefore deny the motion to stay the district courtís preliminary injunction. To mitigate any harm to the Department, we will expedite its appeal of the district courtís issuance of a preliminary injunction and direct the Clerk's Office to set a briefing schedule so that the case may be heard by a randomly assigned argument merits panel during the October sitting. Jeffrey S. Sutton, Chief Circuit Judge; Alice M. Batchelder, Circuit Judge and Andre B. Mathis, (DISSENTING) Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

A copy of this notice will be issued to:

Ms. Virginia Adamson
Mr. James A. Barta
Mr. John J. Bursch
Mr. James A. Campbell
Mr. Robert R. Carr
Mr. James Patrick Davy
Mr. Thomas Elliot Gaiser
Mr. Kevin Michael Gallagher
Ms. Pardis Gheibi
Mr. Steven James Griffin
Ms. Whitney D. Hermandorfer
Ms. Lindsey Keiser
Mr. Matthew Franklin Kuhn
Mr. Edward L. Metzger III
Mr. Brian Daniel Mounce
Steven A. Myers
Ms. Melissa N. Patterson
Mr. David Peters
Mr. James Matthew Rice
Mr. Jonathan Andrew Scruggs

Ms. Mathura Jaya Sridharan
Mr. Jack Starcher
Mr. Jacob P. Warner
Mr. Michael Ray Williams
Mr. Charles P. Wisdom Jr.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**,

Plaintiffs,

and

Christian Educators Association International; and **A.C.**, by her next friend and mother, Abigail Cross,

Intervenor-Plaintiffs,

v.

Miguel Cardona, in his official capacity as Secretary of Education; and **United States Department of Education**,

Defendants.

Case No. 2:24-cv-00072-DLB-CJS

District Court Judge Danny C. Reeves

INTERVENOR-PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Fifty years ago, Congress revolutionized our educational system. In 1970, nearly 34% of working women lacked high-school diplomas. In 2016, it was 6%.[1] In 1972, 7% of high-school varsity athletes were women. In 2018, it was 43%.[2] The change occurred because the people's representatives balanced various interests and produced legislation centered on 37 words in 20 U.S.C.§ 1681(a): no person shall be excluded from, denied benefits of, or subjected to discrimination in educational programs on the basis of sex.

A different sort of revolution took place a few weeks ago. On April 29, unelected Department of Education officials published Title IX rules that add the concept of gender identity—"an individual's sense of their gender." The new rules sometimes even prioritize this subjective concept over someone's objective sex, requiring schools to allow some men to use women's restrooms, to change in women's locker rooms, to shower in women's showers, and to compete in women's sports. The result is that Title IX's primary beneficiaries are denied the privacy, dignity, equality, and fairness needed to benefit from our educational system.

All this turns Title IX's text, structure, and purpose upside down, exchanging a well-established, biological, and binary concept of sex for a recent, subjective, and fluid concept of identity. This usurps Congress's role, enlarges the Department's power, and makes Title IX incoherent. Indeed, under the Department's new reading, women must share showers with some men (but not share dorm rooms or programs like the Boy Scouts); women must compete in sports against some men (but not in beauty pageants or sororities); and women must share restrooms and overnight accommodations with some men (but not with men who identify as male or non-binary). None of this is justified—or justifiable.

---

[1] https://perma.cc/EH4F-2CYD.
[2] https://perma.cc/TN74-PJ4S.

This interpretative mishmash will harm many, especially females like Intervenor A.C. When a male student began competing on the girls' track team at A.C.'s middle school, that male student quickly beat almost 300 different girls, knocking them down the leaderboard over 700 times. That male student took A.C.'s spot in a championship meet and forced her to leave her locker room to avoid the humiliation of changing in front of a male. And that male student even sexually harassed A.C. in the locker room, using graphic, sexual language about her. The new Title IX rules would mandate many of these harms nationwide.

These new rules will also violate the constitutional rights of educators across the country, like members of Christian Educators Association International. Its members believe that sex is an immutable characteristic. They want to live and speak consistent with this belief. But the new rules force them to use inaccurate pronouns, to self-censor to avoid harassment complaints, and to use restrooms with students and staff of the opposite sex. At the same time, the new rules preempt many state laws that protect Intervenors' rights to speak, to access intimate spaces without those of the opposite sex, and to compete in fair athletic competitions.

The net result is that the new Title IX rules irreparably harm Intervenors while violating the Constitution, contradicting Title IX, and supplanting state laws protecting privacy, free speech, and fair athletic competitions. This Court should therefore stay the effective date of—and preliminary enjoin—these new rules because they are contrary to law and arbitrary and capricious.

STATEMENT OF FACTS

The new Title IX rules. Congress passed Title IX to remedy historical discrimination against women by prohibiting discrimination "on the basis of sex." Memo. in Supp. of the States' Mot. for a § 705 Stay and Prelim. Inj. (States' Br.) 3–5, Doc. 19-1. Now, the Department is trying to interpret Title IX to cover gender-

identity discrimination, citing *Bostock v. Clayton County*, 590 U.S. 644 (2020), as justification. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (April 29, 2024); *see generally* States' Br. 7–10.

The new rules impose a gender-identity mandate through two key provisions. First, the rules state that "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes … and gender identity." 89. Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.10). "[S]ex discrimination" is "any discrimination that depends" even "in part on consideration of a person's sex." *Id.* at 33,803. Under the new rules, Title IX prohibits gender-identity discrimination because it "necessarily involves consideration of a person's sex, even if [the word "sex"] is understood to mean only physiological or 'biological distinctions between male and female,' as the Supreme Court assumed in *Bostock*." *Id.* at 33,802.

Second, the rules craft a new "de minimis harm" standard that permits certain sex distinctions and forbids others depending on whether they cause more than de minimis harm. *Id.* at 33,887 (to be codified at 34 C.F.R. § 106.31(a)(2). Any policy or "practice that prevents a person from participating in an education program or activity consistent with the person's gender identity" causes more than de minimis harm absent some statutory (20 U.S.C. § 1681(a)(1)–(9)) or regulatory (34 C.F.R. § 41(b), (c)) exception. 89 Fed. Reg. at 33,818.

Together, sections 106.10 and 106.31(a)(2) create a gender-identity mandate: while "sex separation … is not presumptively unlawful," sex distinctions cannot deny "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity." 89 Fed. Reg. at 33,818; States' Br. 8–10.

Intervenors. A.C. is a female athlete and high-school student in West Virginia. Decl. of A.C. ¶¶ 1–2, Doc. 21-5 ("A.C."). A.C. throws the shot put and discus, runs the 4 x 100 relay, and plays in the marching band. *Id.* ¶¶ 2, 63. When

A.C. was in middle school, a boy who identified as a girl named B.P.J. competed on her school track team. *Id.* ¶¶ 7–8. B.P.J. regularly beat A.C. and other girls. *Id.* ¶¶ 9–35. So far, B.P.J. has displaced nearly 300 girls in over 700 individual instances. *Id.* ¶ 36. B.P.J. also changed in the girls' locker room and sexually harassed A.C. and her teammates. *Id.* ¶¶ 40–49, 51–61. A.C. does not want to compete against or share private spaces with any boy, no matter how they identify. *Id.* ¶¶ 63–69. But the new rules purport to preempt a West Virginia law that prohibits males from competing on women's sports teams. W. Va. Code § 18-2-25d.

Christian Educators Association International ("Christian Educators") is a membership organization for Christian teachers and educators. Decl. of David Schmus ¶¶ 4–7, Doc. 21-7 ("Schmus"). Some of its members want to express their religious belief that sex is an immutable characteristic. *See generally*, Decl. of Brett Campbell, Doc. 21-8 ("Campbell"); Decl. of Michelle Keaton, Doc. 21-9 ("Keaton"); Decl. of Amy McKay, Doc. 21-10; Decl. of Silvia Moore, Doc. 21-11; Decl. of Joshua Taylor, Doc. 21-12 ("Taylor"). These members have received requests to use inaccurate pronouns, and they fear the new rules will compel them to speak these words while prohibiting them from expressing their religious beliefs. *Id.* Some members also fear that their schools will open up shared restrooms to members of the opposite sex. Campbell ¶¶ 28–32; Taylor ¶¶ 39–47. Christian Educators seeks to protect its members' constitutional and statutory rights to speak, to use only accurate pronouns, and to access single-sex restrooms. Schmus ¶¶ 79–81; *see* Tenn. Code Ann. § 49-6-5102(b)(1) (pronouns); Tenn. Code Ann. § 49-2-805(a) (restrooms).

ARGUMENT

To obtain a stay or preliminary injunction, Intervenors must show (I) likely success on the merits, (II) irreparable harm, and (III) both balance of equities and public interest favoring a stay. States' Br. 11. Intervenors meet each factor.

I. Intervenors will likely succeed on the merits.

Intervenors are likely to succeed because the rules contradict Title IX, contravene the Constitution, and are arbitrary and capricious. 5 U.S.C. § 706(2).

A. The rules are contrary to Title IX.

Title IX prohibits schools from treating one sex worse than the other sex. This does not prohibit all sex distinctions. In fact, Title IX sometimes requires them. That makes *Bostock* inapposite, and the Department's new de-minimis-harm standard inconsistent with Title IX's text and purpose.

1. Title IX prohibits treating one sex worse than the other.

Statutory interpretation begins with the text. We give "terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021). Courts must not "add to, remodel, update, or detract from old statutory terms" to fit their "own imaginations." *Bostock*, 590 U.S. at 654–55. Title IX states: "No person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 § U.S.C. 1681(a).

Start with "on the basis of sex." As the States explain, this refers to the biological binary of male and female. States' Br. 12–13. The rules also "assum[e] that 'sex' refers to 'biological distinctions between male and female.'" 89 Fed. Reg. at 33,804–05 (citing *Bostock*, 590 U.S. at 655).

Next, consider the word "discrimination." Sometimes, it means "to make a distinction," Webster's Third New International Dictionary 648 (1966) ("Webster's Third"), or to treat someone "differently," *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (citing Webster's Third 648). But to "be subjected to discrimination," 20 U.S.C. § 1681(a), suggests a distinction for the wrong reasons: "a difference in treatment or favor on a class or categorical basis in disregard of individual merit." Webster's Third 648. Here, "precedent and dictionaries row in

the same direction." *Threat*, 6 F.4th at 677. "To discriminate … means to treat similarly situated individuals differently." *Id.*

Title IX also prohibits excluding from or denying benefits of an educational program. 20 U.S.C. § 1681(a). These nearby terms help clarify discrimination. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195–98 (2012) (explaining associated-words canon). To "exclude" means to "bar from participation, enjoyment, consideration, or inclusion." Webster's Third 793. And to "deny" here means "to turn down or give a negative answer." *Id.* 603. These words reinforce that discrimination is not merely "differential" treatment but "less favorable" treatment based on sex, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005), where "there is no justification for the difference in treatment," *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 287 (2011).

Finally, these words must be understood within the context of an "education program," like classrooms and sports. Putting these parts together shows that Title IX prohibits differential treatment that disfavors, denies, or treats one sex worse than the other sex when it comes to the full and equal enjoyment of educational opportunities. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811 (11th Cir. 2022) (explaining Title IX's "purpose, as derived from its text, is to prohibit sex discrimination in education").

What dictionaries say, "statutory and historical context" confirms. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). As many courts have recognized, "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 & n.36 (1979).[3] That means "Title IX's remedial focus

[3] "[*W*]*hatever* approach" cases like *McCormick* or *Cannon* "may have used" to deduce Title IX's purpose, we may rely on them as "an integral part of [the]

is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women." *Cohen v. Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996) (*Cohen II*); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) (making the same point).

2. Title IX does not prohibit all sex distinctions.

a. While Title IX prohibits sex *discrimination*, it does not forbid all sex *distinctions*. That is because men and women are different. "[P]hysical differences between men and women are … enduring: [t]he two sexes are not fungible." *United States v. Virginia* (*VMI*), 518 U.S. 515, 533 (1996). When it comes to privacy, for example, "biological sex is the sole characteristic" that determines whether persons are similarly situated for purposes of restrooms. *Adams*, 57 F.4th at 803 n.6.

Courts apply the same principle elsewhere. Employers may consider physiological differences and use physical fitness standards tailored to each sex. *Bauer v. Lynch*, 812 F.3d 340, 350–51 (4th Cir. 2016) (permitting sex-specific FBI training requirements under Title VII). And states may consider a child's sex when regulating harmful, sex-specific medical procedures. *L. W. ex rel. Williams v. Skrmetti,* 83 F.4th 460, 481 (6th Cir. 2023) (upholding law that "confirms … a lasting feature of the human condition" as not "presumptively invalid").

"A community made up exclusively of one sex is different from a community composed of both." *VMI*, 518 U.S. at 533 (cleaned up). Title IX therefore permits sex-specific spaces like living facilities, social organizations, and events like beauty pageants. States' Br. 13. Though fraternities, sororities, and pageants may not be necessary to ensure educational opportunities, Congress protected them anyway, recognizing that traditional single-sex spaces are not discriminatory. This logic

---

jurisprudence" on Title IX. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 286 n.17 (1993).

applies even more so for areas like multi-use restrooms that must be sex-specific to ensure meaningful access to educational programs.

b. Title IX's history confirms its plain meaning. The Supreme Court has interpreted Title IX's "postenactment developments" as "authoritative expressions concerning the scope and purpose of Title IX." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (citation omitted). That is because when Congress acquiesces to a statute's settled interpretation, courts assume this interpretation is correct. *See Cannon*, 441 U.S. at 687 n.7, 702. "One might even say that the body of law of which a statute forms a part … is part of the statute's context." Scalia & Garner, *supra*, 322–26 (explaining prior-construction canon).

Start with Title IX's implementing regulations born out of the Javits Amendment. States' Br. 4. Those regulations are codified throughout 34 C.F.R. § 106. *Compare Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance,* 40 Fed. Reg. 24,127, 24,139–43 (June 4, 1975) ("1975 rulemaking"), *with* 34 C.F.R. § 106.14–41. They permit sex-specific spaces like physical-education classes, restrooms, showers, locker rooms, and sports teams. States' Br. 5. Congress required the Department of Education predecessor agency ("HEW") to submit the rules to Congress for review. 1975 rulemaking, 40 Fed. Reg. 24,128. After six days of hearings on whether the rulemaking was "consistent with the law" and Congressional intent, Congress allowed the regulations to take effect. *N. Haven*, 456 U.S. at 531–32.

Courts and federal administrations (including this one) have long understood these regulations to "accurately reflect congressional intent." *Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984); States' Br. 5; *see also* 89 Fed. Reg. at 33,817. Unlike situations where Congress merely fails to act, refusing "to overrule an agency's construction" that Congress was aware of provides "some evidence of the reasonableness of that construction." *United States v. Riverside Bayview*

Homes, Inc., 474 U.S. 121, 137 (1985). It's more probative still because Congress mandated congressional review of the regulations before they took effect, which is why courts have given Title IX's implementing regulations a "high" degree of deference. *E.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (*Cohen I*); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994).

Congress ratified this construction and widespread judicial understanding when it amended Title IX through the 1987 Civil Rights Restoration Act, 20 U.S.C. § 1687(2)(A). That Act reversed *Grove City College* to ensure that Title IX applied to all education programs at federally funded schools, including programs like sports. *Id.* Congress did this to ensure "equal opportunities for female athletes." *McCormick*, 370 F.3d at 287; *Cohen I*, 991 F.2d at 894. This amendment was not unrelated to sex-specific distinctions. *See AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 81 (2021) (dismissing "isolated amendments" that "tell [the Court] nothing about the words" in question). Rather, "Congress considered … the '*precise* issue' presented" here. *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality) (citation omitted). That is "convincing" evidence that Congress adopted this statutory understanding. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys. Project, Inc.*, 576 U.S. 519, 537–38 (2015) (amendments to Fair Housing Law that "assume[d] the existence of disparate-impact claims" showed "that Congress ratified disparate-impact liability"). Congress thus adopted the legal consensus since 1972 that Title IX allows schools to consider biological sex.

3. Title IX sometimes requires sex-specific spaces.

a. While Title IX permits some sex distinctions, other times it requires them. Again, start with the text. "Students are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity[.]'" *Davis ex rel. LaShonda D. v.*

Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)). That could be harassment that prevents "female students from using … an athletic field." *Id.* at 650–51. In analogous contexts under disability statutes, it means any action "that unintentionally results in exclusion," *Knox Cnty. v. M.Q.*, 62 F.4th 978, 1002 (6th Cir. 2023), or precludes "meaningful access" to the sought-after benefit, *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

Here too, "the yardstick for measuring the adequacy of the education that a school offers" depends on results and reality. *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 167 (2017). Consider showers and locker rooms. Students retain "a significant privacy interest in their unclothed bodies," including "the right to shield [their] body from exposure to viewing by the opposite sex." *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494, 496 (6th Cir. 2008). As Justice Ginsburg said, integrating the Virginia Military Institute "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *VMI*, 518 U.S. at 550 n.19. But the new rules partially mandate co-ed showers and locker rooms. That result is impossible to square with Title IX. Students cannot receive adequate educational benefits if forced to shower or share intimate spaces with the opposite sex. A.C. illustrates why. She lost educational benefits when she had to change in separate facilities and single-stall bathrooms to avoid changing in front of a male. A.C. ¶¶ 40–49. Adding insult to injury, that male made vulgar sexual comments in the locker room and elsewhere. *Id.* ¶¶ 51–61. Women and men simply cannot obtain true educational benefits in situations like this.

Similarly, for "equal opportunity" in sports, "relevant differences cannot be ignored." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657 (6th Cir. 1981). Because of the "average physiological differences" between men and women, "males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark ex*

rel. Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982). Indeed, "the great bulk of the females would quickly be eliminated from participation and denied any *meaningful* opportunity for athletic involvement," without sex-specific teams. *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam) (emphasis added).

"[F]ailing to field women's varsity teams … certainly creates a barrier for female students" to achieve equal athletic opportunities. *Pederson v. La. State Univ.*, 213 F.3d 858, 871 (5th Cir. 2000). For example, after one college eliminated its women's varsity wrestling team, the school allowed female wrestlers to continue wrestling, "conditioned on their ability to beat male wrestlers in their weight class, using men's collegiate wrestling rules." *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 962 (9th Cir. 2010). But this resulted in "female students [being] unable to participate on the wrestling team and [losing] the benefits associated with varsity status, including scholarships and academic credit." *Id.*

A.C.'s situation underscores the point. The male athlete at her school deprived hundreds of females of meaningful athletic competition. That athlete consistently beat A.C. during her 8th-grade year, took her spot at her school's conference championships, and displaced nearly 300 other female athletes. A.C. ¶¶ 19–24, 33; *see also* Decl. of Rachel Rouleau 2–3 (Doc. 63-2). "When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." *Yellow Springs*, 647 F.2d at 657. Title IX's promise of equal opportunity means little if the statute ignores reality.

b. While the Department pretends biological differences are "artificial," the old regulations recognized that sex distinctions in many situations advance "the talent and capacities of our Nation's people." *VMI*, 518 U.S. at 533. Along with allowing sex-specific teams for contact sports and sports that involve "competitive

skill," they also require "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(b), (c). This includes equal opportunities in "the selection of sports and levels of competition" necessary to "effectively accommodate the interests and abilities of members of both sexes." *Id.* at § 106.41(c)(1). As the agency said, a school is "required to provide separate teams for men and women in situations where the provision of only one team would not 'accommodate the interests and abilities of members of both sexes.'" 1975 rulemaking, 40 Fed. Reg. at 24,134.

Likewise, a long line of administrations understood Title IX to permit and sometimes require sex-specific sports teams. In 1975, for example, HEW explained that schools could not eliminate women's teams and tell women to try out for men's teams if "only a few women were able to qualify."[4] And in 1979, the agency issued a guidance document stating that schools who sponsor sports teams "for members of one sex" "may be required … to sponsor a separate team for the previously excluded sex." *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (Dec. 11, 1979). This makes sense too. The athletics regulations sought to overcome "the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993). The solution was to give women their own playing field because men would otherwise displace women in head-to-head competition.

Athletes like A.C. have benefited from "real opportunities, not illusory ones." *Id.* at 175. "[T]he mere opportunity for girls to try out" for a team is not enough if they don't stand a realistic chance of making the roster because of competition from men. *Id.* And the mere opportunity to participate isn't enough if women cannot realistically win scholarships or "enjoy the thrill of victory" in sports dominated by

[4] Off. for Civ. Rts., Letter from Peter Holmes to Chief State School Officers, Title IX Obligations in Athletics (Nov. 11, 1975), https://perma.cc/7T36-TJCZ.

men. *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 773 (9th Cir. 1999). Schools must field women's-only teams so that women have the chance to compete, win, and become champions in their sport.

4. Because Title IX permits and sometimes requires sex distinctions, *Bostock* cannot apply to Title IX.

The Department justifies its gender-identity mandate by citing *Bostock*, but that case is inapposite here for at least five reasons.

First, *Bostock* did not change the meaning of "sex" in Title VII or Title IX. States' Br. 6, 15. Nor do the new rules purport to equate gender identity and "sex." *E.g.*, 89 Fed. Reg. at 33807. That is fatal because *Bostock* said that gender-identity discrimination is a form of sex-based discrimination; *Bostock* did not say that all sex-based distinctions are a form of gender-identity discrimination.

Second, *Bostock* dealt with hiring and firing in employment, while Title IX deals with educational opportunities. "[T]he school is not the workplace." *Adams*, 57 F.4th at 808. And "Title VII … is a vastly different statute from Title IX." *Jackson*, 544 U.S. at 175. That was why *Bostock* did not "purport to address bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. As the Sixth Circuit has repeatedly held, *Bostock*'s reasoning does not translate into other contexts, including Title IX. States' Br. 15.

Third, *Bostock* held that "sex is not relevant to the selection, evaluation, or compensation of employees" under Title VII, which treats sex like race, national, origin, and other protected classifications. 590 U.S. at 660 (cleaned up). But Title IX *only* covers sex, which often *is* relevant to promoting educational opportunities. *Supra* §§ I.A.2–3. Take sports. Under *Bostock*, employers cannot consider sex to hire or fire employees. Applied to sports, that logic would mean schools cannot consider sex to create any sports team. But "athletics programs *necessarily* allocate opportunities separately for male and female students." *Cohen II*, 101 F.3d at 177.

"Unlike most employment settings, athletic teams are gender segregated[.]" *Neal*, 198 F.3d at 772 n.8. Applying *Bostock* here would require schools to allow boys to compete against girls, allowing males to displace females and limiting women's opportunities. So here, "only one" interpretation "produces a substantive effect that is compatible with the rest of the law." *Sackett v. EPA*, 598 U.S. 651, 676 (2023) (citation omitted). That is why courts distinguish athletics and employment, each of which "requires a different analysis in order to determine the existence *vel non* of discrimination." *Cohen II*, 101 F.3d at 177; *Neal*, 198 F.3d at 772 n.8 (Title VII "precedents are not relevant in the context of collegiate athletics.").

Plenty of plaintiffs have tried, and failed, to show that Title IX prohibits schools from noticing sex. When some schools began cutting men's sports teams to bring themselves into compliance with Title IX, male athletes sued for sex discrimination. *E.g.*, *Miami Univ. Wrestling Club*, 302 F.3d at 615; *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1049 (8th Cir. 2002) (collecting cases). Like the Department, they argued that any action "taken 'but for' the sex of the participants" facially violated Title IX. *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636 (7th Cir. 1999); 89 Fed. Reg. at 33,807 (incorporating "but-for causation test"). But Title IX does not prohibit schools "from making gender-conscious decisions to reduce the proportion of roster spots assigned to men." *Neal*, 198 F.3d at 765.

Fourth, *Bostock*'s logic contradicts the very distinctions drawn by the new rules. For example, the rules in theory allow men's and women's restrooms—just separated by gender identity instead of sex. 89 Fed. Reg. at 33,818. But even facilities separated by gender identity still discriminate based on sex under the new rules; "it is impossible to discriminate against a person because of their … gender identity without discriminating against that individual based on sex." *Id.* at 33,816 (cleaned up). So under the Department's reading, the rules draw distinctions forbidden by Title IX's general non-discrimination text.

The Department's logic works only if the rule permitting sex-specific intimate spaces in fact redefines "sex" to mean "gender identity." *E.g.*, 34 C.F.R. § 106.33 (allowing "separate toilet, locker room, and shower facilities on the basis of [gender identity]"). But the Department has already disclaimed that argument. *E.g.*, 89 Fed. Reg. at 33807. So the *statute* prohibits schools from considering sex under the Department's reading (per *Bostock*), while the new rules sometimes override the statute, discard *Bostock*, and permit these forbidden distinctions. In other words, "sex" means "sex," except when it means gender identity. Nothing in the statute's text supports this illogic. *See DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (explaining judicial review is "limited to the grounds that the agency invoked when it took the action" (cleaned up)).

Fifth, *Bostock* has no application to spending-clause statutes like Title IX. They demand a "clear statement" that gives funding recipients notice of their obligations. States' Br. 16. That is doubly so when the Department asserts "highly consequential" and "transformative" power to remake the nation's educational system. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (applying major-questions doctrine). And it is triply so when an agency "significantly alter[s] the balance between federal and state power" in an area traditionally regulated by the state (like education). *Sackett*, 598 U.S. at 679.

5. The rules' de-minimis-harm standard overrides Title IX's sex-based protections.

Because *Bostock* cannot apply to Title IX, the Department concocts a new de-minimis-harm standard to achieve its desired ends. 89 Fed. Reg. at 33,887 (codified soon at 34 C.F.R. § 106.31(a). But this standard flouts Title IX's text and purpose.

Once again, start with that text. It never mentions de minimis harm. It prohibits schools from excluding, denying benefits, or discriminating—meaning to "treat worse." *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024); *see supra*

§ I.A.1. "But neither that phrase nor any other says anything about how much worse." *Muldrow*, 144 S. Ct. at 974.

The Supreme Court addressed this issue in Title VII—the statute the Department cites to justify its new standard. 89 Fed. Reg. at 33815. But as *Muldrow* clarified, nothing in Title VII's text requires plaintiffs to show "an elevated threshold of harm." 144 S. Ct. at 974. Instead, a plaintiff need only show "some injury," *id.* at 977, not one that is "serious, or substantial, or any similar adjective suggesting that the disadvantage … must exceed a heightened bar," *id.* at 974. Title IX has no such bar either.

Moving from the extratextual to illogical, the Department's de-minimis-harm rule creates enormous inconsistencies. For example, the Department insists that sex distinctions *always* cause more than de minimis harm, but only when applied to persons with certain gender identities. *E.g.*, 89 Fed. Reg. at 33,887; *see also id.* at 33,815 (explaining "stigmatic injuries" are per se harmful). So sex-specific rules for restrooms cause de minimis harm when applied only to men who identify as men but more than de minimis harm when applied to men who identify as women. *Id.* at 33,820. On this logic, gender identity trumps sex-based protections—the very thing the statute explicitly protects. *Adams*, 57 F.4th at 814.

Meanwhile, the new rules implausibly exempt many sex-specific spaces from its gender-identity mandate, including living facilities, single-sex colleges, military schools, fraternities, sororities, boys' and girls' clubs, and beauty pageants. 89 Fed. Reg. at 33,818–19. This means schools can enforce biology-based standards for dorms but not locker rooms; colleges but not sports; beauty pageants but not showers. That makes little sense. Privacy matters at least as much in showers and locker rooms as it does in dorms.

By elevating gender identity above Title IX's protections for sex, the new rules define harms ideologically rather than biologically. This causes bizarre

results, like women's colleges accepting both females and males—unless the males identify as men.[5] The rules also take a fluid approach to sex distinctions. For example, sometimes the rules lament "harms associated with being treated consistent with a gender identity that differs from one's sex," like forcing females who identify as male to compete on the men's athletic team.[6] *Id.* at 33,819–20. But elsewhere the rules discourage schools from forcing students to abide by their gender identity. *Id.* (explaining that individuals can "weigh … for themselves" whether to participate in programs according to their gender identity or their sex). In the end, the rules permit persons who identify as transgender to abide by biological sex distinctions—or not. It's a choose-your-own adventure.

The Department also claims that "transgender students experience" real harm from sex-based distinctions, but it's "unaware" of analogous harms to "cisgender students." *Id.* at 33,820. Yet schools have often excluded students who identify with their sex from opposite-sex teams *because of their sex*. *E.g.*, *O'Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1306 (1980) (Stevens, J., in chambers) (girl excluded from boys' basketball team); *Clark*, 695 F.2d at 1131 (boy excluded from girls' volleyball team). Title IX allows these types of sex *distinctions* despite a ban on sex *discrimination*. *See supra* 14 (citing cases allowing schools to eliminate men's teams to comply with Title IX). Surely, the statute also allows sex distinctions in intimate spaces regardless of alleged harms based on gender identity, a trait Title IX never mentions.

The Department also misses how its de-minimis-harm standard hurts women and girls—the group Title IX is supposed to protect. Just look where the

---

[5] Barnard College, *Transgender Policy*, https://perma.cc/5KXR-KJJW.
[6] *Cf.* Isaac Henig, *I Chose to Compete as My True Self. I Win Less, but I Live More*, N.Y. Times, Jan. 5, 2023, https://perma.cc/88LD-KE6D (describing female athlete's experience on both the women's and men's teams while identifying as a man).

Department's interpretation leads. This administration supported one male's efforts to compete against girls at A.C.'s middle school. Intervenor-Plaintiffs' Compl. ¶ 207, Doc. 21-3 ("Intervenors' Compl."). That male beat girls hundreds of times during track and field competitions and accessed sex-specific spaces like locker rooms. A.C ¶¶ 40–61. The Department may view the harm these girls suffered as "de minimis," but Title IX disagrees—it ensures equal educational benefits *regardless of sex*. By "giv[ing] the de minimis rule too broad a reach," the Department has "den[ied] proper effect to [the] statute." *Threat*, 6 F.4th at 679 (warning about overbroad definitions of de minimis harm in Title VII). Simply put, the Department has redefined de minimis harm to mean particular ideological harms—picking and choosing which injuries matter, usurping Congress' right to identify statutory violations, and inflicting new harms on women and girls in the process. In so doing, this invented standard "convert[s]" Title IX's "ultimate message into something quite different from the original message—indeed sometimes into the opposite message." *Id.* (cleaned up). This Court should reject this effort to rewrite Title IX.

B. The rules are contrary to constitutional rights.

Besides contradicting Title IX, the rules also violate the Constitution in at least two ways. They compel and restrict speech through vague and overbroad standards and infringe people's constitutional right to bodily autonomy.

1. The rules are unconstitutionally vague and overbroad, restricting and compelling Intervenors' speech based on viewpoint.

A law is overbroad if it "chills speech outside the purview of its legitimate regulatory purpose." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 387 (6th Cir. 2001). And a restriction is unconstitutionally vague if it "fail[s] to 'give the person of ordinary intelligence a

reasonable opportunity to know what is prohibited.'" *Entm't Prods., Inc. v. Shelby Cnty.*, 588 F.3d 372, 379 (6th Cir. 2009) (citation omitted).

The rules are overbroad and vague for two reasons. First, the gender-identity mandate expands the definition of "sex" to include subjective concepts like "gender identity" and "sex stereotypes." 89 Fed. Reg. at 33,886. The rules don't even define "gender identity," except to say it "describe[s] an individual's sense of their gender." *Id.* at 33,809. Second, the rules create a "broader standard" for hostile-environment claims that is amorphous. *Id.* at 33,498. Harassment need only be severe *or* pervasive. Intervenors' Compl. ¶¶ 216–29. A complainant need not "demonstrate any particular harm," or conduct that denies access. 89 Fed. Reg. at 33,511. Harassment can be anything the student considers "unwelcome" or that "limits" the student's ability to benefit from an educational program. *Id.* at 33,884 (to be codified at 34 C.F.R. § 106.2).

Put these together and the new rules implicate educators' rights to speak as citizens on matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Schools cannot "treat[] everything teachers … say in the workplace as government speech subject to government control." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 509 (2022). Plus, the government bears a "heavier burden" to justify a regulation that compels speech. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 907 (2018).

The rules falter because they force teachers to speak inaccurate pronouns and to avoid stating that sex is binary. The rules say that schools must treat people according to their gender identity and failure to do so imposes "more than de minimis harm." 89 Fed. Reg. at 33,887. So failing to use someone's inaccurate pronouns causes more than de minimis harm, which likely explains why the Department says that "misgendering" can be harassment. *Id.* at 33516. Plus, the harassment need not be severe. *Id.* at 33,498. Pervasiveness is enough, and

pronoun usage is pervasive given its ubiquity in conversation. *Id.* Additionally, the rules applauded punishing a student for wearing a t-shirt saying, "THERE ARE ONLY TWO GENDERS," because that speech "invades the rights of others." *Id.* at 33,504 (citing *L.M. v. Town of Middleborough*, No. 23-cv-11111, 2023 WL 4053023 (D. Mass. June 26, 2023)). This tracks the administration's position elsewhere. *See* States' Br. 18; Intervenors' Compl. ¶¶ 183–185; 221.

This confirms that the rules seek to punish certain speech about gender identity—a matter "of profound value and concern to the public" that "merits special protection." *Janus*, 585 U.S. at 913–14 (cleaned up). And words like "[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021); *accord Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 740 (Va. 2023).

Since schools must institute policies consistent with the new rules, this puts Christian Educators members at risk. Some members believe that sex is a binary, immutable characteristic. *E.g.*, Campbell ¶ 15; Keaton ¶ 20; Taylor ¶ 11. They want to speak consistent with this belief by avoiding inaccurate pronouns and by sharing their religiously informed views during informal conversations with students and colleagues in the hallway, after school, or in the teacher's lounge. *E.g.*, Campbell ¶¶ 21–24; 34–39; Keaton ¶¶ 22–25, 28–32; Taylor ¶¶ 17–18, 24–32.

But they fear their speech will trigger harassment complaints. Indeed, one teacher accused a Christian Educators member of "hate speech" just because the member told someone in the hallway that she supported a Tennessee law banning drag shows for minors. Keaton ¶ 26. If a teacher politely expressed that view more than once on social media, that speech might be pervasive. 89 Fed. Reg. at 33,498; *see also id.* at 33,886 (requiring schools to monitor speech outside of school).

Some members have also received requests to use inaccurate pronouns in the past and will likely receive such requests in the future *See, e.g.*, Keaton ¶¶

15–19. These teachers have declined to speak inaccurate words without being punished. *Id.* Tennessee law protects that decision. Tenn. Code Ann. § 49-6-5102(b)(1). Now they reasonably fear that the rules will preempt their statutory free-speech protections, force them to use inaccurate pronouns, and prevent them from expressing their views. *E.g.*, Campbell ¶¶ 39–41; Keaton ¶ 34; Taylor ¶¶ 33–38; *see also Meriwether*, 992 F.3d at 499–502 (detailing university's attempt to punish professor for avoiding inaccurate pronouns).

Courts regularly hold that policies chilling speech on controversial subjects are unconstitutionally overbroad. For example, the Eleventh Circuit in *Speech First, Inc. v. Cartwright* condemned a school's hostile-environment harassment policy that mirrored the Department's new rules. 32 F.4th 1110, 1114–15 (11th Cir. 2022). That policy prohibited harassment "so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education." *Id.* That was "fatally overbroad," the court explained, because it chilled protected statements like "a man cannot become a woman because he 'feels' like one." *Id.* at 1125.

The rules are vague for the same reason. Nearly any statement about gender identity could subject a teacher to a harassment claim. To avoid investigation and punishment, reasonable educators will chill their speech. *E.g.*, Campbell ¶¶ 42–43; Taylor ¶¶ 48–49. That creates an "impermissible risk of suppression of ideas." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129–30 (1992).

2. The rules violate Intervenors' right to bodily privacy.

The Sixth Circuit has recognized a fundamental right "to be free from forced exposure of one's person to strangers of the opposite sex." *Kent v. Johnson*, 821 F.2d 1220, 1226 (6th Cir. 1987). This right applies in intimate spaces like school restrooms, showers, and locker rooms where students appear in their "underwear."

Brannum, 516 F.3d at 495; *accord Doe v. Luzerne Cnty.*, 660 F.3d 169, 175–76 n.5 (3d Cir. 2011) (noting Fourteenth Amendment right to bodily privacy from persons of the opposite sex); *Adams*, 57 F.4th at 805 (collecting cases).

But the new rules burden this right by requiring schools to admit students to intimate spaces by gender identity rather than sex. 89 Fed. Reg. at 33,820–21. This harms A.C. and Christian Educators' members who use restrooms or locker rooms that will be (or have been) accessed by students of the opposite sex. *See, e.g.*, A.C. ¶¶ 48–49; Campbell ¶¶ 28–32; Taylor ¶¶ 39–47.

The government lacks a compelling interest to do this. As the Supreme Court recognized in *VMI*, stopping sex discrimination does not vitiate the need "to afford members of each sex privacy from the other sex in living arrangements." 518 U.S. at 550 n.19. Indeed, designating intimate spaces by sex "advances [an] important governmental objective": protecting people's interests in "using the bathroom away from the opposite sex and shielding one's body from the opposite sex." *Adams*, 57 F.4th at 804–07; a*ccord D.H. ex rel. A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821, 834–35 (M.D. Tenn. 2022) (recognizing constitutional interest in bodily privacy in sex-designated bathrooms). Constitutional rights thus cut *against* the gender-identity mandate.

C. The rules are arbitrary and capricious.

The rules are arbitrary and capricious for at least eight reasons.

First, the gender-identity mandate irrationally hinges on *Bostock*, even though *Bostock* did not change the meaning of "sex" under Title IX (or other statutes) or resolve the lawfulness of sex-specific spaces and athletics. States' Br. 19.

Second, the gender-identity mandate applies arbitrarily. For example, the rules allow biology-based standards for beauty pageants, girls and boys clubs, and admissions, but not for restrooms, showers, locker rooms, or physical-education

classes where biological differences play at least an equal role. *Id.* at 20. Under the Department's implausible read, Congress in 1972 cared more about ensuring Camp Fire Girls' clubs were women-only than protecting women's privacy in showers.

Third, the rules fail to grapple with the impact on sports—a central part of Title IX's purpose. The rules first pretend that the gender-identity mandate does not apply to sports. 89 Fed. Reg. at 33817. But they do. Intervenors' Compl. ¶¶ 203–07. At most, the new rules claim to exempt one provision regulating sports (34 C.F.R. § 106.41(b)) from the mandate. 89 Fed. Reg. at 33,887 (to be codified at 34 C.F.R. § 106.31(a)(2)). But the new rules do not exempt the other sports provision (§ 106.41(a)) from this mandate. *Id.* And DOJ has repeatedly told courts that § 106.41(a)—not just § 106.41(b)—requires schools to admit males who identify as women into women's sports. Br. for the U.S. as Amicus Curiae in Supp. of Pl.-Appellant and Urging Reversal at 24–27, *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 541 (4th Cir. 2024) (Nos. 23-1078, 23-1130), 2023 WL 2859726. If § 106.41(a)'s older version required this, § 106.41(a)'s new version must as well; the new rules merely expand § 106.41(a)'s reach to *explicitly* include gender identity. So the demand to include males in women's sports has only become clearer now. *See also* States' Br. 9–10 (explaining how the Department's attempt to distinguish sports from restrooms by citing deference afforded implementing regulations fails because sports and restrooms provisions were part of the same rulemaking).

Fourth, the gender-identity mandate is vague and fails to adequately explain the who, what, when, where, or why of how it applies in different contexts. For example, the rules purport to exempt sports but as just explained, they don't fully do so. The rules also say that the gender-identity mandate "applies with equal force to … nonbinary students," but fails to explain "how a recipient must provide access to sex separate facilities for students who do not identify as male or female." 89 Fed. Reg. at 33,818. The rules do not even explain how *Bostock*'s "but-for test" can

apply to students who don't identify as male or female. *Bostock*, 590 U.S. at 656; *see* States' Br. 19.

Fifth, the rules apply the gender-identity mandate coyly, haphazardly, and inconsistently. For example, the rules say that schools may continue to provide sex-specific facilities consistent with the implementing regulations. 89 Fed. Reg. at 33820. But the rules also say schools can't maintain *sex-specific* places (based on biology) to ensure women's-only bathrooms or locker rooms. Rather than adjust the regulations to make this explicit, the new rules arbitrarily leave the implementing regulations in place. *Id.* at 33821; *see* 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex[.]").

Sixth, the rules disregard the biological differences between men and women that justify sex-specific spaces and athletics, including a person's privacy interest in avoiding exposure to persons of the opposite sex.

Seventh, the rules apply the gender-identity mandate to cover discrimination based on sex stereotypes, even though "[r]ecognizing and respecting biological sex differences does not amount to stereotyping." *Skrmetti,* 83 F.4th at 486.

Eighth, the rules fail to meaningfully respond to comments. States' Br. 20.

II. Intervenors will suffer irreparable harm.

Violating constitutional freedoms always constitutes irreparable injury. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (First Amendment); *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). The new rules threaten Christian Educators' free-speech rights. *Supra* § I.B.1. The rules do so by claiming to deprive Intervenors of state laws that protect their free speech and of school-district harassment policies that protect their free-speech rights more broadly. Intervenors' Compl. ¶¶ 260–66. As a result, some Christian Educators' members will begin to self-censor their speech

when the new rules go into effect. *E.g.*, Taylor ¶¶ 48–49. In addition, A.C. and Christian Educators also face the imminent violation of their constitutional right to privacy. *Supra* § I.B.2; Intervenors' Compl. ¶¶ 236–240.

Moreover, courts have recognized that the "lost opportunity to participate in … athletics" is a form of irreparable harm. *Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983, 997 (E.D. Mich. 2018) (collecting cases). A.C. seeks to participate in marching band this summer and fall and to participate in track next season. A.C. ¶¶ 63, 64. But A.C. is "reluctant" to continue with band or track because she fears her school will assign boys to overnight hotel rooms with girls, admit boys into the girls' restrooms and locker room, and allow boys to compete on the track team. *Id.* ¶¶ 64–68; *see* 89 Fed. Reg. at 33821 (stating carveout for "living facilities" applies only to housing). Intervenors need relief now.

III. The public interest and balance of equities favor a stay.

The balance of equities and public interest inquiries "merge when the government is the defendant." *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023). As the States explain, these factors weigh decisively in Intervenors' favor. States' Br. 25.

CONCLUSION

Intervenors respectfully ask this Court to grant their motion for a stay and preliminary injunction.

Respectfully submitted this 16th day of May, 2024.

By: */s/ Rachel A. Rouleau*

Rachel A. Rouleau*
Virginia Bar No. 97783
Alliance Defending Freedom
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707-2119
(571) 707-4790 Fax
rrouleau@ADFlegal.org

Edward L. Metzger III
Kentucky Bar No. 94138
OMEGA LAW PLLC
P.O. Box 559
Union, KY 41091
(859) 898-2140
Lee@nkylaw.net

Jonathan A. Scruggs*
Arizona Bar No. 030505
Henry W. Frampton, IV*
South Carolina Bar No. 75314
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
jscruggs@ADFlegal.org
hframpton@ADFlegal.org

Natalie D. Thompson*
TX Bar No. 24088529
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
(202) 393-8690
(202) 347-3622 Fax
nthompson@ADFlegal.org

Counsel for Intervenor-Plaintiffs

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2024, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send a notification to all counsel of record.

By: */s/ Rachel A. Rouleau*

Rachel A. Rouleau*
Virginia Bar No. 97783
Alliance Defending Freedom
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707-2119
(571) 707-4790 Fax
rrouleau@ADFlegal.org

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

State of Tennessee; **Commonwealth of Kentucky**; **State of Ohio**; **State of Indiana**; **Commonwealth of Virginia**; and **State of West Virginia**,

Plaintiffs,

and

Christian Educators Association International; and **A.C.**, by her next friend and mother, Abigail Cross,

Intervenor-Plaintiffs,

v.

Miguel Cardona, in his official capacity as Secretary of Education; and **United States Department of Education**,

Defendants.

Case No. 2:24-cv-00072-DLB-CJS

District Court Judge Danny C. Reeves

DECLARATION OF RACHEL A. ROULEAU

I, Rachel A. Rouleau, under penalty of perjury, declare as follows:

1. I am over the age of 18, of sound mind, and otherwise competent to sign this declaration. I have personal knowledge of the information below.

2. I am an attorney on the legal team for Plaintiff-Intervenor A.C. and Christian Educators Association International in this litigation. I testify to the following based on own personal knowledge.

3. In their complaint, Intervenors allege that a male named B.P.J. competed against and beat A.C. during athletic competitions in middle school. (Proposed) Intervenor-Pls.' Compl. § III (Doc. 21-3).

4. Exhibit B of the Intervenors' complaint are true and correct copies of B.P.J.'s and A.C.'s athletic records taken from athletic.net. *See* Doc. 21-6. We redacted those records to protect the confidentiality of A.C. and B.P.J.

5. Since Intervenors filed their complaint, B.P.J. has competed in two additional track and field meets in which B.P.J. displaced more girls. These records are publicly available at athletic.net. Attached to this declaration is Exhibit A, which is a true and correct copy of records my legal team downloaded off athletic.net on May 14, 2024. We redacted B.P.J.'s name from these public records to maintain confidentiality.

6. Below is a chart we compiled of the number of girls B.P.J. has displaced (meaning beat or placed above) in competition from 2021 through 2024. During those three years, B.P.J. competed on the Bridgeport Middle School cross country team and the track and field team competing in discus and shot put. These totals represent the number of girls B.P.J. displaced in both sports, not counting competitors who were disqualified or did not compete in an event.

7. We also compiled the number of times B.P.J. displaced girls in both sports, not counting competitors who were disqualified or did not compete in an event.

8. These numbers were compiled from Exhibit B to Intervenor's Complaint (Doc. 21-6) and Exhibit A to this declaration.

School Year	Number of Girls BPJ Displaced
2021–2022	65
2022–2023	128
2023–2024	126
Total (no overlap)	**283**

School Year	Number of Times BPJ Displaced Girls
2021–2022	73
2022–2023	291
2023–2024	340
Total	**704**

DECLARATION UNDER PENALTY OF PERJURY

I, Rachel A. Rouleau, a citizen of the United States and a resident of the State of Virginia, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 16th day of May, 2024, at Lansdowne, Virginia.

Rachel A. Rouleau

EXHIBIT A

Harry Green Statewide Middle School Invitational MS

OFFICIAL Sat, May 11, 2024 Bridgeport HS Wayne Jamison Field, WV US

Womens Middle School Shot Put 6lb

Finals

1	KR	Kaylee Robinson	Charles Town	35	10.00	10.92n PR	• Yr: 8
2		B.P.J.	Bridgeport	35	03.00	10.74n PR	• Yr: 8
3	AV	Arianna Viglianco	Bridgeport	30	00.00	9.14m	Yr: 8
4	JH	Josie Higginbottom	Bruceton	29	02.00	8.89m	Yr: 7
5	RW	Raegan Wortman	Milton	28	11.00	8.81n PR	• Yr: 7
6	SG	Sierra Greathouse	West Preston	28	08.00	8.74n PR	• Yr: 6
7	OK	Olivea Kimmons	West Preston	28	02.00	8.59m	Yr: 8
8	GT	Grace Taylor	Hamilton	27	05.50	8.37m	Yr: 8
9	LW	Lila Weglinski	Mountaineer (Morga...	27	02.00	8.28m	Yr: 8
10	IW	Isabelle Wolfe	Mountaineer (Morga...	27	01.00	8.26n PR	• Yr: 6
11	SP	Shyanne Polan	Hamilton	26	06.00	8.08m	Yr: 8
12	MS	McKenna Smith	St. Francis Central Ca...	26	05.50	8.06n PR	• Yr: 8
13	EL	Emma Lewis	Aurora	26	04.00	8.03n PR	• Yr: 7
14	BS	Brooklin Swanson	Elkview	24	02.50	7.38m	Yr: 8
15	RR	Riley Rupert	Pleasants County	23	10.50	7.28m	Yr: 8
16	PW	Palia Watson	Charles Town	23	06.00	7.16m	Yr: 8
17		Katilynn Downey	St. Francis Central Ca...	23	02.00	7.06m	Yr: 7
18	EC	Emma Cadle	Winfield	22	01.00	6.73m	Yr: 7
19	KJ	Kenzie Jackson	Hayes	21	06.00	6.55n PR	• Yr: 8
20	PS	Paisley Schnopp	Bruceton	21	00.00	6.40m	Yr: 7
21	AK	Aryanna Keith	Pleasants County	19	03.00	5.87m	Yr: 6
22	MJ	Malia Jones	Westwood	16	09.00	5.11n PR	• Yr: 6
23	AD	Amelia Doerner	Westwood	16	07.00	5.05m	Yr: 7

--	AF	Aaliyah Friend	East Preston	DNS	Yr: 8
--	AR	Angel Redman	Keyser	DNS	Yr: 7

Harry Green Statewide Middle School Invitational MS

OFFICIAL Sat, May 11, 2024 Bridgeport HS Wayne Jamison Field, WV US

Womens Middle School Discus 1kg

Finals

1	KR	Kaylee Robinson	Charles Town	89	11	27.41m	Yr: 8
2		B.P.J.	Bridgeport	79	00	24.08m	Yr: 8
3	RW	Raegan Wortman	Milton	77	02	23.52m	Yr: 7
4	SC	Sophia Christensen	Mountaineer (Morga...	66	05	20.24m	Yr: 7
5	EL	Emma Lewis	Aurora	66	04	20.22n PR	Yr: 7
6		Haven Dickerson	Bridgeport	65	06	19.96m	Yr: 8
7	JH	Josie Higginbottom	Bruceton	62	01	18.92m	Yr: 7
8	EC	Emma Cadle	Winfield	59	00	17.98m	Yr: 7
9		Katilynn Downey	St. Francis Central Ca...	57	04	17.48n PR	Yr: 7
10	SG	Sierra Greathouse	West Preston	56	08	17.27m	Yr: 6
11	GT	Grace Taylor	Hamilton	55	09	16.99m	Yr: 8
12	RR	Riley Rupert	Pleasants County	53	03	16.23m	Yr: 8
13	EG	Elizabeth Gray	Pleasants County	52	00	15.85m	Yr: 7
14	OK	Olivea Kimmons	West Preston	49	02	14.99m	Yr: 8
15	KM	Kaitlyn McMillen	Mountaineer (Morga...	48	02	14.68m	Yr: 7
16	PS	Paisley Schnopp	Bruceton	45	06	13.87m	Yr: 7
17	AF	Ava Fisher	Charles Town	44	09	13.64m	Yr: 6
18	BS	Brooklin Swanson	Elkview	42	02	12.85m	Yr: 8
19	KJ	Kenzie Jackson	Hayes	41	04	12.60m	Yr: 8
20	CB	Caroline Bozek	St. Francis Central Ca...	36	07	11.15n PR	Yr: 6
	AF	Aaliyah Friend	East Preston	DNS			Yr: 8
	AR	Angel Redman	Keyser	DNS			Yr: 7

8th Grade Spectacular MS

OFFICIAL Tue, May 7, 2024 Liberty High School Mazzei Reaser Athletic Complex, WV US

Womens Middle School Shot Put 6lb

Finals

1		B.P.J.	Bridgeport	34 00.50	10.38m	Yr: 8
2	AV	Arianna Viglianco	Bridgeport	32 10.00	10.01m PR	Yr: 8
3	KM	Kyonna Marbury	West Fairmont	28 07.00	8.71m PR	Yr: 8
3	IB	Isabella Bowers	Buckhannon Upshur	28 07.00	8.71m PR	Yr: 8
5		Haven Dickerson	Bridgeport	27 11.00	8.51m PR	Yr: 8
6	IT	Isabella Toothman	West Fairmont	26 07.00	8.10m PR	Yr: 8
7	AP	Annaleigh Pierce	Lincoln	25 07.50	7.81m	Yr: 8
8	BF	Bailey Fernatt	Taylor County	25 05.50	7.76m	Yr: 8
9	EC	Ella Carlson	Bridgeport	25 05.00	7.75m	Yr: 8
10	OR	Olivia Reed	Bridgeport	25 00.00	7.62m PR	Yr: 8
11	BS	Brayliegh Scheuvron	Mountaineer (Clarks...	24 10.00	7.57m PR	Yr: 8
12	KS	Katie Samples	Buckhannon Upshur	24 09.50	7.56m	Yr: 8
13	EB	Elizabeth Brittain	Bridgeport	24 04.00	7.42m PR	Yr: 8
14	NT	Natalee Turner	Washington Irving	23 08.00	7.21m PR	Yr: 8
15	ZS	Zarah Small	Washington Irving	23 03.50	7.10m	Yr: 8
16	JS	Jayda Stone	West Fairmont	20 04.00	6.20m PR	Yr: 8
17	MC	Micah Cain	Mountaineer (Clarks...	19 05.00	5.92m PR	Yr: 8
18	KR	Kenleigh Rittenhous	Robert L. Bland	17 10.00	5.44m PR	Yr: 8
	AP	Alawna Powell	Lincoln	FOUL		Yr: 8
	ES	Emmy Salerno	Lincoln	FOUL		Yr: 8
	RC	Ruveah Carrillo	West Fairmont	DNS		Yr: 8
	SS	Sabrina Shriver	Lincoln	FOUL		Yr: 8
	KG	Katrina Guthrie	Lincoln	FOUL		Yr: 8

DP Dahlia Plemons  West Fairmont DNS Yr: 8

8th Grade Spectacular MS

OFFICIAL Tue, May 7, 2024 Liberty High School Mazzei Reaser Athletic Complex, WV US

Womens Middle School Discus 1kg

Finals

1		B.P.J.	Bridgeport	82 01.50	25.03m	Yr: 8
2	AM	Ava McGill	Lincoln	79 07.50	24.27m	Yr: 8
3		Haven Dickerson	Bridgeport	72 04	22.05m PR	Yr: 8
4	KS	Katie Samples	Buckhannon Upshur	62 11.50	19.19m	Yr: 8
5	BF	Bailey Fernatt	Taylor County	62 06.50	19.06m	Yr: 8
6	KY	Kaylee Yost	Mountaineer (Clarks...	59 00.50	18.00m PR	Yr: 8
7	ZS	Zarah Small	Washington Irving	54 05	16.59m PR	Yr: 8
8	NT	Natalee Turner	Washington Irving	54 04.50	16.57m	Yr: 8
9	EC	Ella Carlson	Bridgeport	52 07	16.03m	Yr: 8
10	EB	Elizabeth Brittain	Bridgeport	35 10	10.92m PR	Yr: 8
11	KR	Kenleigh Rittenhous	Robert L. Bland	31 07.50	9.64m	Yr: 8
	IT	Isabella Toothman	West Fairmont	FOUL		Yr: 8
	ZB	Zayna Buckso	West Fairmont	FOUL		Yr: 8
	KM	Kyonna Marbury	West Fairmont	FOUL		Yr: 8
	SS	Sabrina Shriver	Lincoln	FOUL		Yr: 8

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

STATE OF TENNESSEE, et al.,

Plaintiffs,

v.

MIGUEL CARDONA, *in his official capacity as Secretary of Education*, et al.,

Defendants.

No. 2:24-cv-00072

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR A § 705 STAY AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Title IX prohibits recipients of federal funds from discriminating on the basis of sex in their education programs or activities. 20 U.S.C. § 1681(a). The Department of Education (the "Department") is charged with issuing rules to effectuate this prohibition. 20 U.S.C. § 1682. On April 29, 2024, the Department issued a rule titled Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Final Rule" or "Rule"). Among other things, the Final Rule clarifies that "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," and that the definition of hostile environment sex-based harassment includes "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. at 33,884.

The Department's interpretation of discrimination "on the basis of sex" straightforwardly applies the Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* concluded that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of gender identity "because it is impossible" to discriminate against a person for being transgender "without discriminating against that individual based on sex." *Id.* at 660. That same reasoning applies to the materially similar prohibition on sex discrimination in Title IX.

Further, Plaintiffs fail to demonstrate that the Final Rule is arbitrary or capricious based on the distinctions it recognizes between contexts in which Congress has specified exceptions to Title IX's prohibition on sex discrimination, and other contexts—such as restrooms—in which it has not. The Department's implementation of Title IX's narrow exceptions to the general prohibition

on separate or different treatment based on sex, through the provision to be codified at 34 C.F.R. § 106.31(a)(2), does not somehow render the rest of the Rule unreasonable. On the contrary, the Rule's adherence to the lines drawn by Congress—which specified only a handful of contexts where separation or different treatment based on sex is permitted even when it may subject a person to harm—was proper and lawful.

Plaintiffs also mischaracterize the Final Rule as creating an unworkable harassment standard. In fact, courts and the Equal Employment Opportunity Commission ("EEOC") have used a similar standard to identify harassment under Title VII's similar provisions for decades. And the Department used a similar standard in its enforcement of Title IX for decades prior to regulatory changes made in 2020. Plaintiffs nowhere grapple with or even address this reality. Nor do Plaintiffs demonstrate that the challenged harassment standard threatens freedom of speech or free exercise of religion.

In addition, Plaintiffs fail to show that the Final Rule is an unconstitutional exercise of the Spending Power or that it violates parental rights.

Because Plaintiffs fail to show that the Department's promulgation of these regulations was arbitrary and capricious, beyond the Department's statutory authority, or otherwise unlawful, they have not demonstrated a likelihood of success on the merits and their motion for preliminary relief should be denied.

Plaintiffs also have not met their high burden to satisfy the other requirements for a stay or preliminary injunction. Plaintiffs' alleged harms are speculative at best, or otherwise not legally cognizable, and thus cannot establish irreparable injury justifying preliminary relief. Moreover, the public interest and balance of equities weigh against granting Plaintiffs' motion, as enjoining the Rule would substantially harm the Government's interests in preventing discrimination in

federally funded educational programs and activities.

Accordingly, the Court should deny the motion for a § 705 stay or preliminary injunction.

BACKGROUND

I. Title IX, Implementing Regulations, and Guidance

Title IX's anti-discrimination provision states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). There are only a small number of "specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *see* 20 U.S.C. § 1681(a)(1)–(9) (listing educational institutions, organizations, or programs that are exempt or partly exempt from Title IX's prohibition on sex discrimination); *id.* § 1686 (permitting maintenance of sex-separate living facilities).

Title IX authorizes and directs the Department to "issu[e] rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." *Id.* § 1682. Title IX also sets forth an administrative enforcement scheme, which allows the Department to obtain voluntary compliance from or, failing that, terminate the federal funds of a recipient that fails to comply with the statute or the Department's implementing regulations. *Id.*

Over the years, the Department has promulgated regulations effectuating Title IX, including in 2020, when it specified how recipients of federal funds must respond to allegations of sexual harassment in their education programs or activities. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) [hereinafter 2020 Amendments].

One month after publication of the 2020 Amendments, the Supreme Court held that the

prohibition on discrimination "because of … sex" in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a)(1), necessarily encompasses discrimination because of sexual orientation and gender identity. *See Bostock*, 590 U.S. at 660. Following *Bostock*, President Biden directed the Department of Education to review the 2020 Amendments and existing agency guidance "for consistency with governing law." Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, Exec. Order No. 14,021, § 2, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

In June 2021 the Department's Office for Civil Rights ("OCR") held a nationwide virtual public hearing on Title IX. 89 Fed. Reg. at 33,480. OCR also received more than 30,000 written comments in connection with the hearing, in addition to over 280 live comments. *Id.* at 33,835, 33,860. In addition, OCR held listening sessions with a wide variety of stakeholders. *Id.* at 33,480. In July 2022, the Department issued a Notice of Proposed Rulemaking (NPRM). *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (proposed July 12, 2022). Following extensive review of the more than 240,000 public comments, the Department published the Final Rule, which goes into effect on August 1, 2024. *See* 89 Fed. Reg. at 33,476.

As relevant to this case, the Final Rule: (1) clarifies the scope of sex discrimination under Title IX, *id.* at 33,476; (2) clarifies the limits of permissible different or separate treatment on the basis of sex under Title IX, *id.* at 33,477; and (3) clarifies the definition of sex-based harassment under Title IX, *id.* at 33,476.

II. Procedural History

On April 30, 2024, Plaintiffs filed their Complaint. ECF No. 1. On May 3, 2024, Plaintiffs filed their Motion for a § 705 Stay and Preliminary Injunction. Pls.' Mot., ECF No. 19. This Court also granted a Motion to Intervene, ECF No. 21, and the Intervenor-Plaintiffs have filed a separate

Motion for a § 705 Stay and Preliminary Injunction, ECF No. 63.

LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy" that should "never be awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (citation omitted); *see Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). A plaintiff may obtain this "extraordinary remedy" only "upon a clear showing" that it is "entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In determining whether a preliminary injunction is warranted, the Court considers four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 590–91 (6th Cir. 2012) (citation omitted).

ARGUMENT

I. Plaintiffs Are Unlikely To Succeed on the Merits.

A. The Final Rule's Clarification that Title IX Prohibits Discrimination on the Basis of Gender Identity Is Compelled by the Statutory Text.

Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Final Rule clarifies, "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." 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.10). As the Department explained, "discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological

or 'biological distinctions between male and female." *Id.* at 33,802 (quoting *Bostock*, 590 U.S. at 655).

Plaintiffs argue that the Department's interpretation of Title IX is inconsistent with the statutory text, Pls.' Mem. 12–16, ECF No. 19-1, and that it is arbitrary and capricious, *id.* 19–21. To the contrary, the Department faithfully interpreted the statutory text in light of *Bostock*, which interpreted Title VII's provision making it unlawful, in relevant part, "for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex," 590 U.S. at 655 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Supreme Court explained that Title VII's "because of" language "incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* at 656–57 (citation omitted). "[S]ex is necessarily a but-for cause" of discrimination on the basis of transgender status "because it is impossible" to discriminate against a person for being transgender "without discriminating against that individual based on sex." *Id.* at 660, 661 (emphasis omitted). If, for example, an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," but "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." *Id.* at 660. "[T]he individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.* That is so even assuming "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id.* at 655.

Bostock's reasoning applies with equal force to Title IX's prohibition on discrimination "on the basis of sex," 20 U.S.C. 1681(a), which employs a causation standard indistinguishable from Title VII's "because of . . . sex" language, 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has long used the phrase "on the basis of" interchangeably with Title VII's "because of" language

when discussing Title VII's causation standard, including in *Bostock* itself. *See* 590 U.S. at 650 ("[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of . . . sex."); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (explaining statutory phrase, "based on" has the same meaning as the phrase "because of" (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007))). Courts consistently rely on interpretations of Title VII's prohibition against discrimination "because of . . . sex" to interpret Title IX's textually similar provision. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)); *Nelson v. Christian Bros. Univ.*, 226 F. App'x 448, 454 (6th Cir. 2007) (unpublished) (collecting cases). And as to the specific question at hand, several courts have already held that there is no difference between the two statutes that would require a different result. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023). Title IX no more permits a school to bar a transgender student from band practice on the basis of the student being transgender than Title VII permits an employer to fire a transgender employee because the employee is transgender.

The cited Sixth Circuit decisions do not "foreclose" application of *Bostock*'s reasoning to Title IX, Pls.' Mem. 15. First, *Meriwether v. Hartop* was a fact-specific free speech case, which held that a university lacked a sufficient interest in disciplining a professor for certain classroom statements regarding transgender students. 992 F.3d 492 (6th Cir. 2021). The court explained that the university's Title IX interests were "not implicated" because there was "no indication at this stage of the litigation" that the professor's speech inhibited students' "education or ability to succeed in the classroom." *Id.* at 511. The court also footnoted that "Title VII differs from Title

IX in important respects," pointing to Title IX's provisions allowing for consideration of sex in athletic scholarships and maintenance of separate living facilities for different sexes. *See id.* at 510 & n.4. *Meriwether*, however, nowhere suggests that discrimination "because of . . . sex" in Title VII imposes a different causal standard or means something different than discrimination "on the basis of sex" in Title IX.

The two other cases—*Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318 (6th Cir. 2021), an Age Discrimination in Employment Act ("ADEA") case, and *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023), an equal protection case—are also inapposite. Neither was confronted with nor addressed whether *Bostock*'s interpretation of Title VII's anti-discrimination provision informs interpretation of Title IX's materially indistinguishable anti-discrimination provision. In *Pelcha*, the court merely declined to rely on *Bostock* in light of binding Supreme Court precedent interpreting the ADEA's causality requirement. *See* 988 F.3d at 323–24 (citing *Gross*, 557 U.S. 167). In any event, the court recognized that the ADEA's prohibition on terminating employees "because of such individual's age," 29 U.S.C. § 623(a)(1), imposed no more than "but for" causation, *Pelcha*, 988 F.3d at 324, which is the same causal standard the Court applied in *Bostock* to hold that discrimination "because of sex" necessarily includes discrimination because of transgender status, *Bostock*, 590 U.S. at 656–57.

L.W. similarly did not interpret Title IX, nor did it address what it means to discriminate on the "basis of sex." In staying the preliminary injunction of a state "law that prohibits healthcare providers from performing gender-affirming surgeries and administering hormones or puberty blockers to transgender minors," the court expressed its "initial views"—which "may be wrong"—that transgender status was not a quasi-suspect class subject to heightened scrutiny under the Equal Protection Clause. *See* 73 F.4th at 412, 419–20, 422. After observing that *Bostock* "does not change

the [quasi-suspect class] analysis," *id.* at 420, the court noted in dicta that *Bostock*'s reasoning that "Title VII's prohibition on employment discrimination 'because of . . . sex' encompasses discrimination against persons who are gay or transgender . . . applies only to Title VII, as *Bostock* itself and our subsequent cases make clear," *id.* (citing *Bostock*, 590 U.S. at 681; *Pelcha*, 988 F.3d at 324; *Meriwether*, 992 F.3d at 510 n.4). But contrary to Plaintiffs' suggestion, Pls.' Mem. 15, this acontextual dicta cannot overcome the reasoning in *Bostock* itself. *See Bostock*, 590 U.S. at 654–55, 664–65.

Plaintiffs lean heavily on their view that sex is binary and "biological," Pls.' Mem. 12–16, but fail to acknowledge that *Bostock* "proceed[ed] on the assumption that 'sex' . . . referr[ed] only to biological distinctions between male and female." 590 U.S. at 655. Regardless of how one defines the word, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* at 660. The Final Rule proceeds under the same assumption. *See* 89 Fed. Reg. at 33,802, 33,804–05, 33,807. As *Bostock* underscores, discriminating against someone based on their gender identity necessarily constitutes discrimination "on the basis of" the sex that they were assigned at birth. *See Bostock*, 590 U.S. at 660–61 (explaining "transgender status [is] inextricably bound up with sex").

Plaintiffs argue that it is "arbitrary" to rely on *Bostock*, based on the Court's statement that it did "not purport to address bathrooms, locker rooms, or anything else of the kind." Pls.' Mem. 19 (citing 590 U.S. at 681); *see id.* 15. But neither does the Final Rule's clarification of the scope of sex discrimination (to be codified at § 106.10) purport to address "bathrooms, locker rooms, or anything else of the kind." Rather, the provision merely explains the general scope of prohibited "[d]iscrimination on the basis of sex" under Title IX. 89 Fed. Reg. at 33,886. Whether any different or separate treatment on the basis of sex may be permissible in certain circumstances is addressed

by other portions of the Final Rule and Title IX regulations. *See infra* Part I.B. Plaintiffs' challenge appears to stem in large part from § 106.31(a)(2), the provision governing the manner in which recipients may permissibly implement measures separating or differentiating students based on sex. *See* 89 Fed. Reg. at 33,887. Plaintiffs conflate § 106.10 with § 106.31(a)(2). But these are separate provisions with separate justifications; *Bostock*'s reasoning is fully consistent with § 106.10's general description of the scope of Title IX's prohibition on sex discrimination with or without § 106.31(a)(2)'s more specific instructions. *Compare id.* at 33,801–13, *with id.* at 33,814–25.

For these reasons, the Department properly applied *Bostock*'s straightforward textual analysis in interpreting Title IX's anti-discrimination provision. Plaintiffs thus are unlikely to succeed on the merits of their claims that the interpretation of sex discrimination in the Final Rule is inconsistent with Title IX or otherwise arbitrary and capricious.

B. The Final Rule's Limitations on Sex Separation and Differentiation Properly Account for Congressional Direction on Title IX's Coverage and Application to Different Contexts.

Contrary to Plaintiffs' suggestion, Pls.' Mem. 20–21, the Final Rule's adherence to the limited scope of Title IX's exceptions to the statute's general prohibition on sex discrimination also follows naturally from Title IX's operative text, and is not arbitrary or capricious. Plaintiffs take issue with the Final Rule's provision that, with limited exceptions, a recipient may not carry out otherwise permissible different or separate treatment on the basis of sex in a manner that prevents a person from participating in an education program or activity consistent with the person's gender identity. *See id.* Plaintiffs also claim that this provision of the Rule ignores safety, privacy, and compliance concerns. *Id.* at 21. These arguments fail.

As explained in the Final Rule, the Department's regulations have long specified that separate or different treatment on the basis of sex is generally prohibited under Title IX because

such treatment is presumptively discriminatory. 89 Fed. Reg. at 33,814 (citing NPRM, 87 Fed. Reg. at 41,534; 34 C.F.R. § 106.31(b)(4), (7)). The regulations, however, also have long recognized limited contexts in which sex separation or differentiation is allowed. *Id.* The provision to be codified at 34 C.F.R. § 106.31(a)(2) explains how recipients may carry out such separate or different treatment without running afoul of the statute's nondiscrimination mandate. In short, the Rule provides, consistent with Supreme Court precedent, that save for limited instances allowed by statute, Title IX prohibits "distinctions or differences in treatment [on the basis of sex] that injure protected individuals." 89 Fed. Reg. at 33,814 (brackets in original) (quoting *Bostock*, 590 U.S. at 681).

As compelled by that natural reading of the statutory text, the Department explained that, except in certain contexts explained below, a recipient must not provide sex-separate facilities or activities in a manner that subjects any person to legally cognizable injury, *i.e.*, more than de minimis harm. *Id.* As Plaintiffs note, the Department has regulations that "allow sex-separated 'toilet, locker room, and shower facilities,' among other things." Pls.' Mem. 14 (citing 89 Fed. Reg. at 33,816, 33,818–20; 34 C.F.R. §§ 106.33–.34). The Department has long recognized that sex "separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination" because such sex-separate facilities generally impose no more than de minimis harm on students. 89 Fed. Reg. at 33,818; *see generally* 34 C.F.R. § 106.33. But consistent with federal court decisions and guidelines published by respected medical organizations, the Department explained that sex separation that prevents a person from participating in a program or activity consistent with their gender identity *does* cause more than de minimis harm—a conclusion that Plaintiffs do not dispute. 89 Fed. Reg. at 33,816 (citing *Grimm*, 972 F.3d at 617–18; *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*,

858 F.3d 1034, 1045–46 (7th Cir. 2017)); *id.* at 33,819 n.90 (citing guidelines published by medical organizations). Because preventing a student from using sex-separate restrooms or participating in single-sex classes consistent with their gender identity causes more than de minimis harm on the basis of sex, *id.* at 33,814, it is prohibited by Title IX.

At the same time, the Department recognized that Congress specified a few limited contexts in which more than de minimis harm is permitted by the statute. *Id.* at 33,819; *see, e.g.*, 20 U.S.C. § 1681(a)(6) (membership practices of certain social fraternities or sororities); *id.* § 1681(a)(4) (institutions focused on military training); *id.* § 1686 (educational institution's maintenance of "separate living facilities for the different sexes"). Plaintiffs are incorrect that the Final Rule's attention to the distinction between regulations informed by express congressional direction, listed in § 106.31(a)(2), and regulations permitting sex separation in other contexts reflects "self-contradictory . . . logic," Pls.' Mem. 20. To the contrary, as explained by the Department, this distinction follows directly from the statute itself. 89 Fed. Reg. at 33,814, 33,819. The Final Rule "clearly effectuates this basic congressional decision." *Califano v. Aznavorian*, 439 U.S. 170, 178 (1978). As Congress did not except bathrooms and sexual education classes from the general prohibition on sex discrimination, Pls.' Mem. 20, the Department reasonably determined that sex separation in such contexts can be consistent with Title IX only to the extent that any sex-based harm imposed is de minimis—*i.e.*, not discriminatory. 89 Fed. Reg. at 33,816; *see id.* at 33,821 (explaining that the statutory living facilities "carve-out" in 20 U.S.C. § 1686 is inapplicable to "other aspects of a recipient's education program or activity for which Title IX permits different treatment or separation on the basis of sex, such as bathrooms, locker rooms, or shower facilities," and noting that the latter are "regulations that the Department adopted under different statutory authority, and which have long been addressed separately from 'living

facilities'").

Nor does the Department's decision to address athletics through a separate rulemaking,[1] and to specify that the de minimis harm rule in § 106.31(a)(2) does not apply to male and female athletic teams that a recipient offers under § 106.41(b), *see* 89 Fed. Reg. at 33,816, bear on this issue. Congress recognized by statute that athletics is a special context, *id.*; *see* Education Amendments of 1974, section 844, and the Department's athletics regulations have always tracked this determination that the unique circumstances of athletics merit a different approach, "governed by an overarching nondiscrimination mandate and obligation to provide equal athletic opportunities for students regardless of sex." 89 Fed. Reg. at 33,816 (citing 34 C.F.R. § 106.41(a), (c)). This approach allows that individual students may be excluded from a particular male or female team based on their sex, even when doing so may impose more than de minimis harm. *Id.* at 33,817. Contrary to Plaintiffs' contention, Pls.' Mem. 20, the Rule thoroughly explains why the de minimis harm standard in § 106.31(a)(2) does not apply to the athletics regulations, and why this is consistent with the Department's longstanding approach to athletics. 89 Fed. Reg. at 33,816–19.

Further, Plaintiffs have not shown that, in promulgating § 106.31(a)(2), the Department "entirely fail[ed] to consider certain important aspects of the problem or address relevant evidence" counter to its conclusions. Pls.' Mem. 21 (cleaned up). The Department thoroughly considered and addressed commenters' concerns, including reported concerns regarding safety, privacy, and

[1] In April 2023, the Department issued a separate notice of proposed rulemaking regarding the athletics regulations, which will be finalized in a separate rulemaking. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22,860 (proposed Apr. 13, 2023). As the Department has explained, "[u]ntil that rule is finalized and issued, the current regulations on athletics continue to apply." 89 Fed. Reg. at 33,817.

compliance. The Department "strongly agrees that recipients have a legitimate interest in protecting all students' safety and privacy." 89 Fed. Reg. at 33,820 (explaining that, under § 106.31(a)(2), "a recipient can make and enforce rules that protect all students' safety and privacy without also excluding transgender students from accessing sex-separate facilities and activities consistent with their gender identity"); *id.* ("nothing in Title IX or the final regulations prevents a recipient from offering single occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason"). The Department reasonably concluded, however, that there is no "evidence that transgender students pose a safety risk to cisgender students, or that the mere presence of a transgender person in a single-sex space compromises anyone's legitimate privacy interest." *Id.* The Final Rule notes, for example, that federal courts have rejected "unsubstantiated and generalized concerns that transgender persons' access to sex-separate spaces infringes on other students' privacy or safety." *Id.* (citing cases). The Department also addressed concerns regarding compliance, including "questions about how a recipient should determine a person's gender identity for purposes of § 106.31(a)(2)." *Id.* at 33,819 (noting that "many recipients rely on a student's consistent assertion to determine their gender identity, or on written confirmation of the student's gender identity by the student or student's parent, counselor, coach, or teacher").

In sum, the Final Rule's application of the de minimis harm standard in § 106.31(a)(2) is supported and logical, and, in promulgating this provision, the Department neither entirely failed to consider an important aspect of the problem nor ignored relevant evidence. *See FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (noting that judicial review under arbitrary-and-capricious standard is "deferential" and "simply ensures that the agency has acted within a zone of reasonableness").

C. The Final Rule's Definition of Hostile Environment Sex-Based Harassment Is a Lawful Exercise of the Department's Statutory Authority and Consistent with the Requirements of the First Amendment.

The Final Rule defines hostile environment sex-based harassment, in relevant part, as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. at 33,884. This definition "closely tracks longstanding case law defining sexual harassment," *id.* at 33,494 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)), and aligns with the definition used by the EEOC. *Id.* at 33,516. In addition, the definition in the Final Rule is consistent with "relevant judicial precedent, and . . . with congressional intent and the Department's longstanding interpretation of Title IX and resulting enforcement practice prior to the 2020 amendments." *Id.* at 33,490.

Plaintiffs nevertheless argue that the Final Rule's harassment definition is unlawful for three reasons: (1) the definition is inconsistent with the definition in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), Pls.' Mem. 16–17; (2) the "definition's breadth . . . runs afoul of the First Amendment," *id.* 17; *see also id.* 18–19; and (3) in promulgating the definition, the Department failed to consider and respond to significant comments, *id.* 20. These arguments are incorrect.

First, Plaintiffs' reliance on *Davis* is misplaced because *Davis* addressed a standard that a plaintiff must meet to bring a private action for damages, 526 U.S. at 650; it did not limit the Department's investigative and enforcement authority. The Supreme Court's articulation of the scope of the private cause of action in Title IX focused on the fact that this cause of action is implied, rather than an express creation of Congress. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). Explaining that "[t]he requirement that recipients receive adequate

notice of Title IX's proscriptions . . . bears on the proper definition of 'discrimination' in the context of a private damages action," *Davis* thus held that "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. at 651.

Plaintiffs identify no basis to conclude that the *Davis* standard must apply in the distinct administrative enforcement context. Title IX permits the Department to enforce its nondiscrimination mandate through "'any . . . means authorized by law,' including ultimately the termination of federal funding." *Gebser*, 524 U.S. at 280–81, 287 (quoting 20 U.S.C. § 1682). But Title IX and its implementing regulations do not allow the Department to sue for damages, and *Davis*'s analysis of when to allow recovery of damages on theories of *respondeat superior* and constructive notice is thus inapposite. Indeed, after observing that Congress ''entrusted'' Federal agencies to ''promulgate rules, regulations, and orders to enforce the objectives'' of Title IX, 526 U.S. at 638, the *Davis* Court repeatedly and approvingly cited the Department's then-recently published guidance regarding sexual harassment, *see id.* at 647–48, 651 (citing Sexual Harassment Guidance, 62 Fed. Reg. 12,034 (Mar. 13, 1997)). That guidance specifically stated that schools could be found to violate Title IX if the relevant harassment "was sufficiently severe, persistent, or pervasive to create a hostile environment." 62 Fed. Reg. at 12,040.

Second, Plaintiffs fail to show that the Final Rule's definition of sex-based harassment runs afoul of the First Amendment. *See* Pls.' Mem. 16–17, 18–19. "Where a plaintiff makes a facial challenge under the First Amendment to a statute's constitutionality, the 'facial challenge' is an 'overbreadth challenge.'" *Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir. 2013) (citation omitted).

In such a facial challenge, "a plaintiff must show substantial overbreadth: that the statute prohibits a substantial amount of protected speech both in an absolute sense and relative to the statute's plainly legitimate sweep." *Id.* (cleaned up). Plaintiffs cannot meet this standard.

By its own terms, the Final Rule "maintain[s] the language from . . . the 2020 amendments that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment." 89 Fed. Reg. at 33,503. In response to concerns about the Rule's interaction with the First Amendment, the Department "revised the definition to retain the 2020 amendments' reference to offensiveness," and so the definition "covers only sex-based conduct that is unwelcome, both subjectively and objectively offensive, and so severe or pervasive that it limits" a person's ability to participate in the recipient's education program or activity. *Id*. The Supreme Court has upheld Title VII's anti-harassment provisions that apply a similar standard "without acknowledging any First Amendment concern." *Id.* at 33,505 (citing *Harris*, 510 U.S. at 23). Further, the Final Rule "only prohibit[s] conduct that meets *all* the elements" set forth in the definition. *Id.* at 33,506 (emphasis added). The Rule's "reference to the totality of the circumstances derives from these very specific and required elements and is meant to ensure that no element or relevant factual consideration is ignored." *Id*. Plaintiffs do not show that the challenged definition "prohibits a substantial amount of protected speech . . . in an absolute sense" or "relative to the statute's plainly legitimate sweep." *Speet*, 726 F.3d at 872.

The cases Plaintiffs rely upon to argue that "such policies present First Amendment problems" are inapposite. Pls.' Mem. 17. In *Speech First*, at issue was a policy that, among other things, prohibited "a wide range of 'verbal, physical, electronic, and other' expression concerning any of (depending on how you count) some 25 or so characteristics," and "reache[d] not only a

student's own speech, but also her conduct 'encouraging,' 'condoning,' or 'failing to intervene' to stop another student's speech." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125 (11th Cir. 2022). In contrast to the Final Rule, "[t]he policy, in short, [was] staggeringly broad," *id.*, and it was not "tailored to harms that have long been covered by hostile environment laws." 89 Fed. Reg. at 33,505 (discussing *Speech First*, 32 F.4th 1110). In *Meriwether*, similarly, the challenged policy did not prohibit harassment with a standard that delineated elements necessary to show a hostile environment, but rather flatly ordered faculty—on threat of discipline—to "refer to students by their "preferred pronoun[s]." 992 F.3d at 498. Plaintiffs cite no case in which a court has held unconstitutional a definition of harassment analogous to the hostile environment sex-based harassment definition to be codified at 34 C.F.R. § 106.2.

Third, Plaintiffs' argument that the Final Rule fails to adequately consider First Amendment concerns raised by commentors is belied by the record. *See* 89 Fed. Reg. at 33,492-97, 33,500-11, 33,514-16, 33,542, 33,559, 33,570-71, 33,616, 33,810, 33,828, 33,838. And with respect to Plaintiffs' specific concern that the Department "relies on Title VII EEOC harassment guidance that implicates free speech rights on its face," Pls.' Mem. 20, the Department specifically addressed comments related to that guidance and explained that "unwelcome conduct based on gender identity can create a hostile environment when it otherwise satisfies the definition of sex-based harassment." 89 Fed. Reg. at 33,516 (citing EEOC guidance document). But "a stray remark, such as a misuse of language, would not constitute harassment under [the applicable] standard," and "nothing in the regulations requires or authorizes a recipient to violate anyone's First Amendment rights." 89 Fed. Reg. at 33,516.

Accordingly, Plaintiffs cannot show that the Rule's definition of sex-based harassment is arbitrary, capricious, in excess of statutory authority, or in violation of the First Amendment.

D. The Final Rule's Clarification of the Scope of Title IX's Unambiguous Prohibition on Sex Discrimination Poses No Spending Power Issue.

Plaintiffs contend that if the Final Rule correctly describes the scope of Title IX's prohibition on discrimination on the basis of sex, Title IX violates the Spending Clause. Pls.' Mem. 17–18. Plaintiffs are incorrect.

There is no Spending Clause problem because the relevant provision in the Final Rule merely clarifies the scope of Title IX's unambiguous prohibition on sex discrimination, based on the statutory language's plain meaning. *See* 89 Fed. Reg. at 33,802. "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds," *NFIB v. Sebelius*, 567 U.S. 519, 579 (2012), so long as it does so "unambiguously," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The requirement of unambiguity requires that Congress "make the existence of the condition itself" "explicitly obvious," not that Congress list all ways in which a recipient could fail to comply. *Benning v. Georgia*, 391 F.3d 1299, 1307 (11th Cir. 2004) (citation omitted). Indeed, "so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Id.* at 1306.

Here, this condition is met because Title IX unambiguously prohibits any form of sex-based discrimination. *See, e.g.*, 20 U.S.C. § 1681(a) ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."). Plaintiffs in essence argue—again—that Title IX should not be understood to prohibit discrimination based on gender identity because the statute does not expressly state that discrimination based on gender identity is sex discrimination. Pls.' Mem. 18. But "the fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates

the breadth of a legislative command." *Bostock*, 590 U.S. at 674 (cleaned up); *see also id.* at 688 (Alito, J., dissenting) ("According to the Court, the text is unambiguous.").

This conclusion is in harmony with the Supreme Court's prior decisions addressing Title IX: in 2005 the Court rejected the argument that retaliation was not covered as a form of sex-based discrimination, concluding that specific forms of discrimination not mentioned in the statute—such as retaliation—were nonetheless discrimination. *Jackson*, 544 U.S. at 175; *see also id.* ("Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered."). Title IX places recipients of federal funds clearly on notice that they must comply with the prohibition on sex-based discrimination in all of its forms.

E. The Final Rule Does Not Violate Parental Rights.

Plaintiffs are also incorrect that the Final Rule will "trespass" on the right of parents to "bring up" their children. Pls.' Mem. 19 (cleaned up). As an initial matter, Plaintiffs—who are exclusively state governments—lack standing to bring any claim based on the rights of parents. *See Haaland v. Brackeen*, 599 U.S. 255, 295 (2023) (noting that "'[a] State does not have standing as *parens patriae* to bring an action against the Federal Government'" (citation omitted)).

Plaintiffs also fail to support their argument on the merits. The only cases cited by Plaintiffs involve a completely different context—the procedural protections available before the permanent termination of a parental relationship. *See* Pls.' Mem. 19 (citing *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 842 (1977); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996)). Nothing in the Final Rule would terminate any parental relationships. On the contrary, the Department thoroughly considered parental rights and drafted the Final Rule with the utmost respect for the fundamental role of parents in bringing up their children, and without disturbing any existing parental rights. *See, e.g.*, 89 Fed. Reg. at 33,821 (explaining that "nothing in Title IX or the final

regulations may be read in derogation of any legal right of a parent . . . to act on behalf of a minor child"); *see also id.* at 33,835–36, 33,531.

II. Plaintiffs Have Not Established Irreparable Harm.

Plaintiffs also fail to establish the imminent irreparable harm needed to justify a preliminary injunction. "Irreparable harm is an 'indispensable' requirement for a preliminary injunction, and 'even the strongest showing' on the other factors cannot justify a preliminary injunction if there is no 'imminent and irreparable injury.'" *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (citation omitted).

First, Plaintiffs claim that they will suffer irreparable harm in the form of unrecoverable compliance costs in the lead up to the Final Rule's effective date of August 1, 2024. When weighing the relevance of unrecoverable compliance costs, courts must look to "the peculiarity and size of a harm." *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023). Plaintiffs have failed to show that their alleged compliance costs are either peculiar or of such a great magnitude to justify a preliminary injunction. Rather, most of Plaintiffs' declarants identify the "general[] . . . costs to comply with a federal rule implementing Title IX." Mason Decl., Ex. C ¶ 7; *see also* Thompson Decl., Ex. B ¶ 11; Coons Decl., Ex. J ¶ 9; Garrison Decl., Ex. H ¶ 11; Trice Decl., Ex. K ¶ 7. At most, some declarants assert unspecified costs associated with standard practices taken to ensure compliance with Title IX and its implementing regulations. *See, e.g.*, Thompson Decl. ¶ 11 ("The amount of time dedicated to Title IX training . . . and thus the cost for providing that training[,] increases in a year in which the [Department] adopts significant changes to Title IX regulations."); Coons Decl. ¶ 9 (costs "may include updating policies and training materials that reflect policies inconsistent with such a rule and incurring additional training costs for Title IX Coordinators"). But far from peculiar, costs associated with updating policies and conducting training to ensure compliance with new Title IX regulations are routine. *See Kentucky v. EPA*, Civ. No. 3:23-CV-

00007, 2023 WL 2733383, at *7 (E.D. Ky. Mar. 31, 2023) (finding that "jurisdictional assessments and consultations" are not "peculiar" because they "are a common element of doing business"), *appeal filed*, Nos. 23-5343, 23-5345 (6th Cir. Apr. 19, 2023).

Moreover, despite Plaintiffs' assertion that the Final Rule will lead to "significant and costly compliance activities," Pls.' Mem. 22, their declarants do not quantify the alleged compliance cost with any measure of specificity—let alone show it will be "significant." *See, e.g.*, Thompson Decl. ¶ 11 ("[W]hen new Title IX regulations are promulgated, the Department's Office of Civil Rights must review the regulations to determine whether the Department will recommend that the Tennessee State Board of Education's Civil Rights Compliance Rules be revised."). Such generic statements do not establish irreparable harm. *See, e.g.*, *Kentucky*, 2023 WL 2733383, at *8 (finding general description of cost of "'develop[ing] a plan to address the implications of the Final Rule on a number of [state-administered] programs' . . . and . . . 'need[ing] to hire additional manpower or divert' resources" did not adequately "establish the amount (or 'size') of compliance costs" (citation omitted)).

Second, Plaintiffs allege that the Final Rule threatens to strip them of federal funding. Pls.' Mem. 22. But Plaintiffs fail to identify how any such injury is realistic, let alone "imminent." *See D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019). Indeed, even if an administrative enforcement action were to occur once the Rule goes into effect, Plaintiffs could at that time raise challenges to any administrative enforcement proceedings, which would necessarily precede any termination of funds. 20 U.S.C. § 1682. Moreover, any adverse administrative determination would be subject to judicial review. *Id.* § 1683.

Third, Plaintiffs claim the Rule will prevent some Plaintiff States from enforcing their laws. But regardless of whether Plaintiff States' laws conflict with the Final Rule, a "corollary [of the

Supremacy Clause] is that the activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943). Accordingly, it is the federal government, not the States, that faces significant irreparable harm, if it is prevented from administrating the Rule.

Finally, Plaintiffs claim that the Final Rule will cause irreparable harm to their citizens in the form of violations of bodily privacy, "heightened" "inappropriate sexual behavior," and "unfair and unsafe competition" for female athletes.[2] Pls.' Mem. 24–25. As explained above, Plaintiffs lack standing to sue the federal government in *parens patriae* capacity, so they cannot rely on such alleged harms to satisfy the irreparable-harm element. *See supra* Part I.E. But regardless, Plaintiffs fail to show that such alleged future harms are concrete and imminent, rather than speculative and hypothetical. Plaintiffs' fears are at most a "possibility," which is insufficient to establish irreparable harm. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

III. The Equities and Public Interest Weigh Against Preliminary Relief.

The balance of equities and the public interest "merge when the Government is the opposing party." *Id*. Here, these combined factors strongly counsel against issuing the requested preliminary relief. The Final Rule implements the Department's authority to enforce the statutory objectives of Title IX. *See* 20 U.S.C. § 1682. "There is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). The public interest favors allowing the Department to fulfill these responsibilities.

Moreover, granting preliminary relief would significantly harm the Government's interests in preventing discrimination in educational programs and activities. The Final Rule effectuates

[2] As noted above, *supra* note 1, the Rule does not affect the Department's athletics regulations.

Title IX's important goals of "avoid[ing] the use of federal resources to support discriminatory practices [and] provid[ing] individual citizens effective protection against those practices." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). Needless to say, preventing sex discrimination is in the public interest. *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 458 (6th Cir. 1999).

Conversely, Plaintiffs have failed to show they face significant imminent and irreparable harm. *See supra* Part II. At best, Plaintiffs have pointed to an unspecified amount of compliance costs. *See id.* But compelling non-monetary government interests measure up against even serious economic harm. *See, e.g.*, *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129 (6th Cir. 2020) (unpublished) (weighing Plaintiffs' "very real risk of losing their businesses" against "the Governor's interest in combatting COVID-19").

IV. Any Relief Afforded by the Court Should Be Limited in Accordance with the Administrative Procedure Act ("APA") and Equitable Principles.

While Defendants dispute that any relief is necessary for the reasons explained above, any relief afforded must be appropriately limited.

The Court should not issue preliminary relief that extends beyond Plaintiffs or beyond portions of the Rule as to which the Court has found that Plaintiffs have established a likelihood of success. Under traditional equitable principles, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). That means that a court should not issue injunctions that provide relief to non-parties, or that enjoin more than is "necessary to remedy the harm at issue." *United States v. Miami Univ.*, 294 F.3d 797, 816 (6th Cir. 2002). "At a minimum, a district court should think twice—and perhaps twice again—before granting universal anti-enforcement injunctions against the federal government." *Arizona v. Biden*, 40 F.4th 375, 395–96 (6th Cir. 2022) (Sutton, C.J.,

concurring).

Alternatively, Plaintiffs assume that pursuant to 5 U.S.C. § 705, this Court can "[s]tay[] the effective date of the Department's Final Rule . . . thus denying it legally operative effect" for the country at large. Pls.' Mot. 3. But such a sweeping remedy would raise all the problems of nationwide injunctions. *See DHS v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring in the grant of stay). Moreover, Section 705 (like other APA provisions) "was primarily intended to reflect existing law," not "to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974). Plaintiffs do not identify, and the Government has not found, any pre-APA practice of district courts granting universal stays of agency regulations. Consistent with that backdrop, Congress contemplated that any relief under Section 705 "would normally, if not always, be limited to the parties," Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 277 (1946).

Finally, the Final Rule is severable. *See* 89 Fed. Reg. at 33,848 ("[R]emov[ing] any 'doubt that it would have adopted the remaining provisions of the Final Rule' without any of the other provisions, should any of them be deemed unlawful."). Plaintiffs have challenged only certain provisions of the Rule as discussed above; the remainder should be permitted to go into effect, as intended, on August 1, 2024. As the Supreme Court explained, courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force, . . . or . . . sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a § 705 stay and preliminary injunction.

Dated: May 24, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

EMILY B. NESTLER
Assistant Branch Director

/s/ Pardis Gheibi

ELIZABETH TULIS
REBECCA KOPPLIN
BENJAMIN TAKEMOTO
HANNAH SOLOMON-STRAUSS
PARDIS GHEIBI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box No. 883, Ben Franklin Station
Washington, DC 20044
Phone: 202-305-3246
Fax: (202) 616-8470
E-mail: Pardis.Gheibi@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2024, I electronically filed this document with the Court by using the CM/ECF system, and that this document was distributed via the Court's CM/ECF system.

/s/ Pardis Gheibi