IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA DIVISION

STATE OF KANSAS, *ET AL.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Civil Action No. 5:24-cv-04041-JWB-ADM
UNITED STATES DEPARTMENT OF EDUCATION, *ET AL.*	§	
	§	
	§	
Defendants.	§	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
INTRODUCTION 1
UNCONTRADICTED FACTS 1
I. The Final Rule 1
II. The Parties 3
ARGUMENT 9
I. The Final Rule is contrary to three federal statutes 9
a. The Final Rule is contrary to Title IX 9
b. The Final Rule is contrary to 20 U.S.C. § 1688 12
c. The Final Rule is contrary to RFRA 13
II. The Final Rule violates the major questions doctrine 15
III. The Final Rule is contrary to the Constitution 17
a. The Final Rule violates the Spending Clause. 17
b. The Final Rule Violates the First Amendment 20
1. The Final Rule compels speech 21
2. The Final Rule is unconstitutionally vague and overbroad 25
3. The Final Rule involves content-based restriction and viewpoint discrimination 27
IV. The Final Rule is arbitrary and capricious 30
a. The Final Rule offers an implausible explanation for agency action 31
b. The Final Rule is a sharp departure from past practice 32
c. The Final Rule fails to consider reliance interests 32
CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Am. Petroleum Inst. v. United States Dep't of Interior, 81 F.4th 1048 (10th Cir. 2023) 31

Arkansas v. Dep't of Educ., No. 4:24 CV 636 RWS, 2024 WL 3518588 (E.D. Mo. July 24, 2024) 26

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 18

Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) 21, 22

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 24

Boos v. Barry, 485 U.S. 312 (1988) 27

Bostock v. Clayton County, 590 U.S. 644 (2020) 10

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 23

Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023) 15

Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682 (2014) 13

Carroll Indep. Sch. Dist v. Dep't of Educ.., No. 4:24-cv-00461-O, 2024 WL 3381901 (N.D. Tex. Jul. 11, 2024) 32

Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992) 21

Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs, 802 F. Supp. 1223 (D.N.J. 1992) 21

Connally v. Gen. Constr. Co., 269 U.S. 385 (1925) 25

Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163 (D. Colo. 2023) 24

Dep't of Educ. v. Louisiana, No. 24A78, 2024 WL 3841071 (U.S. Aug. 16, 2024) 35

Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) 32, 34

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016) 31

F.C.C. v. Fox Television, 556 U.S. 502 (2009) 32

Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 20

Forth v. Laramie Cnty. Sch. Dist. No. 1, 85 F.4th 1044 (10th Cir. 2023) 19

Grayned v. City of Rockford, 408 U.S. 104 (1972) 25

Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001) 21

Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985) 22

Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 585 U.S. 878 (2018) 20, 22

Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000) 17, 20

Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) 22

L.M. v. Town of Middleborough, No. 23-cv-11111, 2023 WL 4053023 (D. Mass. June 26, 2023) 23

Louisiana v. Dep't of Educ., No. 3:24-cv-00563, 2024 WL 2978786 (W.D. La. June 13, 2024) 16, 32

Matal v. Tam, 582 U.S. 218 (2017) 30

Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) .... passim

Michigan v. EPA, 576 U.S. 743 (2015) 31

Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000) 23

N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) 9

New Mexico Health Connections v. U.S. Dep't of Health & Hum. Servs., 946 F.3d 1138 (10th Cir. 2019) 31

New Prime Inc. v. Oliveira, 586 U.S. 105 (2019) 9, 10

Oklahoma v. Cardona, No. CIV-24-00461-JD, 2024 WL 3609109 (W.D. Okla. July 31, 2024) 35

Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658 (8th Cir. 2023) 23, 27

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 17, 18

Reed v. Town of Gilbert, 576 U.S. 155 (2015) 27

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) 22

Rocky Mountain Wild, Inc. v. Forest Serv., 56 F.4th 913 (10th Cir. 2022) 9

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) 27

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001) 27

Schrier v. Univ. of Colo., 427 F.3d 1253 (10th Cir. 2005) 21

Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities, 359 U.S. 344 (1959) 25

See Menders v. Loudoun Cnty. Sch. Bd., 65 F.4th 65 F.4th 157 (4th Cir. 2023) 24

South Dakota v. Dole, 483 U.S. 203 (1987) 17

Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022) 24, 26, 27

Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019) 15, 30

Tennessee v. Cardona, No. 2:24-cv-0072-DCR-CJS, 2024 WL 3019146 (E.D. Ky. June 17, 2024) 23, 26

Texas v. Cardona, No. 4:23-cv-00604-0, 2024 WL 3658767 (N.D. Tex. Aug. 5, 2024) 11, 14

United States v. Broadway, 1 F.4th 1206 (10th Cir. 2021) 9

United States v. Williams, 553 U.S. 285 (2008) 25

Util. Air Reg. Grp. v. EPA, 573 U.S. 302 (2014) 16

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 25

Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705 (Va. 2023) 15

West Virginia v. EPA, 597 U.S. 697 (2022) 16

Wis. Cent. Ltd. v. United States, 585 U.S. 274 (2018) 9

Statutes

20 U.S.C. § 1688 13

42 U.S.C. § 2000bb-1 14

Alaska Stat. § 14.18.040 .... 5, 32

Kan. Stat. Ann. § 60-5603 .... 5, 32

Okla. Stat. 70, § 1-125 3

Utah Code Ann. § 53G-6-902 .... 5, 32

Utah Code Ann. § 63G-31-301(1) 32

Wyo. Stat. Ann. § 21-25-102 .... 5, 32

Other Authorities

BENEFIT, Ballentine's Law Dictionary (3d ed. 1969) 13

H Sub for SB233, Kan. 2023–2024 Legislative Sessions 28

SEX, 9 Oxford English Dictionary 577–78 (1933) 10

SEX, American Heritage Dictionary 1187 (1969) 10

SEX, Random House Dictionary of the English Language 1307 (1966) 10

Rules

Fed. R. Civ. P. 56(a) 9

Regulations

34 C.F.R. § 106 2

34 C.F.R. § 106.10 12

34 C.F.R. § 106.11 12

34 C.F.R. § 106.31 .... 11, 12

34 C.F.R. § 106.32 32

34 C.F.R. § 106.41 12

34 C.F.R. § 106.42 32

Briefs

Br. for the U.S. as Amicus Curiae, *B.P.J. v. W. Va. State Bd. of Educ.*, Nos. 23-1078(L) & 23- 1130, 2023 WL 2859726 (4th Cir. Apr. 3, 2023) 12

Br. for the U.S. as Amicus Curiae, *Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 21-2475, 2021 WL 5405970 (7th Cir. Nov. 8, 2021) 14

Br. of Jane Doe and Sexuality and Gender Acceptance, Intervenors-Appellees, *Meriwether v. Hartop*, 2020 WL 5044756 (6th Cir. 2020) 14

Statement of Interest of the U.S., *Wood v. Fla. Dep't of Educ.*, No. 4:23-cv-00526, 2024 WL 3380723 (N.D. Fla. June 27, 2024) 15

INTRODUCTION

Defendants through this Final Rule seek to turn Title IX into something unrecognizable. Their approach obliterates First Amendment rights, due process, and the settled understanding of biological reality. Defendants seek to utilize the rulemaking process to remake our schools and universities to conform to a faddish gender ideology that, as a historical matter, was invented the day before yesterday. The Final Rule would institutionalize this ideology in every aspect of K-12 education, tie federal education funding to it, and mandate that colleges and universities punish students who do not adhere to these extreme views. And, while they were at it, Defendants decided to force schools to provide benefits to students and employees seeking voluntary abortions (even in states where it is outlawed), in direct contravention to Title IX's abortion-neutrality requirement. This Final Rule is contrary to statutory law, violates the Constitution, and is arbitrary and capricious.

Plaintiffs represent a diverse group that includes: (1) four sovereign states (Kansas, Alaska, Utah, and Wyoming) that do not want their laws preempted by executive fiat and their federal funding tied to a rule that requires them to violate their citizens' constitutional rights, (2) an organization of parents advocating for their children (Moms for Liberty), (3) college students who want to speak freely in college (Young America's Foundation), (4) female athletes who believe female sports and private spaces should remain preserved for women (Female Athletes United), and (5) a thirteen-year-old girl who does not want to sacrifice her privacy rights and religious liberty at school (K.R.). Plaintiffs sue to vindicate their rights, and this Court should ensure that this unlawful Final Rule never makes its way into any of their schools by granting summary judgment in favor of Plaintiffs.

UNCONTRADICTED FACTS

I. The Final Rule

1. On April 29, 2024, Defendant Department of Education (DoE) issued a final administrative 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).

2. The Final Rule amends 34 C.F.R. § 106, redefining "sex" to include "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,476. The Final Rule considers "gender identity" to mean "an individual's sense of their gender, which may or may not be different from their sex assigned at birth." *Id.* at 33,809.

3. The Final Rule assumes that there are more than two "gender identities." *See id.* at 33,804–05 (removing references to "both sexes").

4. The Final Rule says that schools must allow students (and any other person authorized to be on campus) to use the restrooms and locker rooms (or any educational program or activity) that correspond with that person's "gender identity" and prohibits requiring people to use the restrooms and locker rooms (or any educational program or activity) that correspond with their biological sex. *Id.* at 33,809, 33,818, 33,846.

5. The Final Rule also requires educational institutions to take a person at their word as to their "gender identity" without documentation or questioning. *Id.* at 33,819. But the Final Rule provides no guidance for ascertaining a person's "gender identity" if the information is not volunteered. It states, "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements to participate in a recipient's education program or activity consistent with their gender identity imposes more than *de minimis* harm." *Id.* at 33,819. In some cases, the Final Rule considers requesting a birth certificate to be a "burdensome documentation requirement." *Id.*

6. The Final Rule acknowledges that students have a legitimate interest in the "safety and privacy" of sex-separate facilities (such as restrooms, locker rooms, and overnight accommodations) but stays these concerns are "unsubstantiated and generalized." *Id.*

7. The Final Rule states the standard for 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." *Id.* at 33,884.

8. The Final Rule requires schools to provide "Reasonable Modifications" of policies,

practices and procedures including "intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations" so that students can get abortions. *Id.* at 33,575, 33,777, 33,796, 33,798.

II. The Parties

9. The States of Kansas, Alaska, Utah, and Wyoming operate educational facilities that receive federal funding. Those schools (and by extension the States) are subject to the requirements of Title IX and its associated regulations—including, if it takes effect, the Final Rule. Cmpl. ¶¶ 10–12, 15–17, 20–22, 26–29, ECF No. 1; Cawvey Decl. ¶ 6, ECF No. 25-2; Earl Decl. ¶ 6, ECF No. 25-3.

10. The States and their schools have laws and policies that conflict with the Final Rule. Cmpl. ¶¶ 10–12, 16–17, 21–22, 26–29; Cawvey Decl. ¶¶ 8, 10, 15; Earl Decl. ¶¶ 10, 12, 16. Changing these policies will cost time and money. Cawvey Decl. ¶¶ 8, 10, 15; Earl Decl. ¶¶ 10, 12, 16

11. K.R. is a thirteen-year-old girl who lives in Milburn, Oklahoma, and goes to Epic Charter Schools, an online public school that receives federal funding and is subject to Title IX. Suppl. K.R. Decl. ¶¶ 1–4 (Attached as Ex. 1).

12. Last year, K.R. encountered males who identify as females in a girls' restroom at Stillwater Middle. K.R. Decl. ¶ 4, ECF No. 25-4. This made her feel uncomfortable, embarrassed, and unsafe. *Id.* ¶¶ 4–11. She is not comfortable sharing private spaces with males, regardless of their claimed "gender identity." *Id.*

13. Following this and similar incidents, K.R. stopped using the restroom at school, which often required her to avoid using the restroom for nine hours at time. *Id.* ¶¶ 16–18.

14. After Oklahoma passed a state law requiring that multiple-occupancy school restrooms be designated by sex, *see* Okla. Stat. tit. 70, § 1-125, K.R. was able to return to using the girls' restrooms at school, K.R. Decl. ¶¶ 19–20.

15. K.R. wants to continue using the girls' restroom without members of the opposite

sex present. Suppl. K.R. Decl. ¶¶ 21–22.

16. K.R. is also a Christian who believes that God created humans male or female and that humans cannot change their God-given sex. K.R. Decl. ¶¶ 26–28. Her faith also teaches that she should not lie. *Id.* at ¶ 28. She believes that referring to a male as "she," "her," or any other biologically inaccurate pronoun—or vice-versa for a female—would be a lie and would violate her faith. *Id.* She is aware of students at her school who identify as the opposite sex and who want others to refer to them with inaccurate pronouns. *Id.* K.R. cannot do this consistent with her faith. *Id.*

17. K.R. sometimes discusses her religious beliefs with her friends at school. *Id.* ¶ 29. These discussions include her belief that there are only two sexes and that people cannot change their sex. *Id.* They also include her discomfort about using restrooms with members of the opposite sex and her belief that admitting males to the girls' restroom is inappropriate. *Id.* She wants to continue discussing issues concerning "gender identity" in the context of her religious faith. *Id.* ¶¶ 30–31.

18. Female Athletes United (FAU) is a membership organization formed to defend equal opportunity, fairness, and safety in women's and girls' sports. Brown Decl. ¶¶ 3, ECF No. 25-5. FAU has members in the Plaintiff States who participate on girls' and women's sports teams at schools governed by Title IX. *Id.* ¶¶ 23–26. Michele Naudin is the President, Treasurer, and on the Board of FAU and verifies the information of FAU members. Naudin Decl. ¶¶ 2, 6–7 (Attached as Ex. 5).

19. FAU members oppose allowing males to compete in women's sports because males have inherent physical advantages that make competing against them unfair and, often, unsafe. Brown Decl. ¶ 6. FAU members also oppose being forced to share intimate spaces like restrooms, locker rooms, showers, and overnight accommodations with males. *Id.* ¶¶ 27–35. Consistent with FAU's purpose, its members want to advocate for women's sports, to explain the enduring physical differences between males and females, and to express the view that sex is real, binary, and unchangeable. *Id.* ¶¶ 37–46. Many members will not use pronouns that do not accurately

reflect a person's sex. *Id.* ¶ 40.

20. FAU member Aubrey Simpson plays women's volleyball at MidAmerican Nazarene University (a school subject to Title IX) but does not currently have to compete against males because of a National Association of Intercollegiate Athletics (NAIA) policy protecting her. Suppl. Simpson Decl. ¶ 1–2 (attached as Ex. 2).

21. Elizabeth Zwahlen is a collegiate runner, who attends Utah Valley University, a public school in Utah. Zwahlen Decl. ¶¶ 1–20, ECF No. 25-9.

22. FAU member Sara Casebolt is a collegiate runner who attends the University of Idaho. Casebolt Decl. ¶ 2 (attached as Ex. 8). As a high school runner, Sara had to compete against a male athlete. *Id.* ¶¶ 20–23. She finished one place behind him in a race, pushing her down in the rankings. *Id.* ¶ 25. Sara later learned this male athlete regularly beat female athletes and that he had won the girls' 400-meter state championship. *Id.* ¶ 27. This causes her frustration and she views it as an issue of fairness. *Id.* ¶ 33.

23. FAU members A.R.S., T.Z., and T.P. attend public middle and high schools in Kansas, Wyoming, and Utah respectively, play women's sports at those schools, and currently don't have to play against males because of state laws. A.R.S. Decl. ¶ 28, ECF No. 25-7; Suppl. A.R.S. Decl. ¶ 3 (attached as Ex. 3); T.Z. Decl. ¶¶ 20–22, ECF No. 25-17; T.P. Decl. ¶ 13, ECF No. 25-8. *Accord* Kan. Stat. Ann. 60-5603 (Supp. 2023); Alaska Stat. 14.18.040; Utah Code Ann. § 53G-6-902; Wyo. Stat. Ann. § 21-25-102(b).

24. T.P. is a Christian and cannot express things that contradict her beliefs, and she worries the Final Rule will force her to say things with which she disagrees. T.P. Decl. ¶¶ 14–16. She fears that if the rules go into effect, she will not feel comfortable expressing her beliefs on gender identity at school and might be punished for declining to use pronouns she considers incorrect. *Id* at ¶ 38.

25. FAU members A.K. and H.K. attend and play sports at a public secondary chool in Washington. A.K. Decl. ¶¶ 1-3 (attached as Ex. 6); H.K. Decl. ¶¶ 1–3 (Attached as Ex. 7). A.K. has competed against and lost to male students in school athletic competitions. A.K. Decl. ¶¶ 7–

14. She anticipates competing against males again this year. *Id.* ¶ 47. H.K. has not yet had to compete against biological males. Both A.K. and H.K. travel out of state for sports competitions. *Id.* ¶ 20; H.K. Decl. ¶ 37. Even now, H.K. fears talking about her views on gender identity her teammates or other athletes at competitions because many of the other schools are not protected by this Court's injunction. H.K. Decl. ¶ 38. She has had these conversations in the past, and told her class that she believed "God created only two genders and that people are not supposed to change gender." *Id.* at ¶¶ 33.

26. Aubrey Simpson, A.R.S., A.K., Elizabeth Zwahlen, H.K., T.P., and T.Z. want to speak freely about their views on women's sports, forcing women to share intimate spaces with males, and similar issues related to "gender identity." Simpson Decl. ¶¶ 22–24; A.R.S. Decl. ¶ 34; A.K. Decl. ¶ 30–32; Zwahlen Decl. ¶¶ 26–27; H.K. Decl. ¶ 38; T.P. Decl. ¶¶ 14–25, 38; T.Z. Decl. ¶¶ 23–24, 29–30.

27. Moms for Liberty (MFL) is an organization with members nationwide. Justice Decl. ¶ 5, ECF No. 43-6. Its mission is to unify, educate, and empower parents to defend their parental rights, including their right to raise their children in accordance with their values. *Id.* ¶ 9. To accomplish this mission, MFL, through its membership, seeks to protect children from what it views as political and social indoctrination in schools. *Id.* ¶¶ 9–11.

28. MFL's membership is composed of parents with children in elementary through high school, primarily schools that receive federal funding and are thus subject to Title IX. *See, e.g.*, Jensen Decl. ¶¶ 9–10, ECF No. 25-12; Koznek Decl. ¶¶ 9–10, 13, 15, ECF No. 25-13.; Plank Decl. ¶¶ 9–10, ECF No. 25-15.

29. Declarants Merianne Jensen, Rebekah Koznek, Tricia Plank, and Deborah Lochner are members of MFL. Jensen Decl. ¶ 5; Koznek Decl. ¶ 5; Plank Decl. ¶ 5; Lochner Decl. ¶ 4. Each of these declarants has children who (1) attend schools at which there are transgender individuals; (2) hold values and have expressed viewpoints on issues of "gender identity" and transgender issues that they worry would trigger the harassment standard in the Final Rule; and (3) attend schools that receive federal funding and, therefore, must effectuate rules, policies, and

procedures in accord with the Final Rule. Jensen Decl. ¶¶ 8, 11–13; Koznek Decl. ¶¶ 8, 12–16; Plank Decl. ¶¶ 8, 11–12, 15; Lochner Decl. ¶¶ 7, 10–11, 13–14.

30. The children of MFL members hold their values and beliefs on issues of 'gender identity' and transgender issues in part due to personal experiences. For instance, at the school attended by one of Ms. Koznek's children, a male student identifying as transgender used the girl's locker room and, while doing so, "twerked" in the faces of several girls, and engaged in other attention-seeking behaviors. Koznek Decl. ¶ 13. And Ms. Plank's children adopted their values and beliefs in part due to an incident where a biological male, who identifies as transgender but who reportedly has not undergone transition surgery, used a women's locker room and changed in front of young girls. Plank Decl. ¶ 13.

31. In accord with their values, the children of these MFL members use traditional, sex-specific pronouns, rather than so-called "preferred pronouns," when identifying transgender individuals in their schools. Jensen Decl. ¶ 13; Koznek Decl. ¶ 14–15; 25-15 ¶ 15; Lochner Decl. ¶ 11. Some of these children do so because, in their view, using "preferred pronouns" signals acceptance of the proposition that sex and gender are fluid. Koznek Decl. ¶¶ 8, 12; Plank Decl. ¶¶ 8, 11; Lochner Decl. ¶¶ 7, 10.

32. Absent the Final Rule, the children of these members of MFL could and would continue to use traditional. sex-specific pronouns, rather than "preferred" pronouns, and/or would continue to express viewpoints on issues of "gender identity" and transgenderism.

33. As a result of the Final Rule, the children of these members of MFL fear facing discipline for using biologically accurate pronouns and/or expressing their viewpoints on issues of 'gender identity' and transgenderism. Jensen Decl. ¶ 17; Koznek Decl. ¶ 19; Plank Decl. ¶ 18; Lochner Decl. ¶ 16.

34. Young America's Foundation (YAF) is an organization with thousands of members who attend colleges that receive federal funding and are, thus, subject to Title IX. Hahn Decl. ¶ 5, ECF No. 43-7.

35. YAF promotes free speech and the exchange of ideas on campuses and provides its

members access to educational resources, campus flyering and tabling materials, and speakers. *Id.* ¶¶ 10–11. YAF's mission is to ensure that young Americans are inspired by ideas including the advancement of traditional values. *Id.* ¶ 9. Some of YAF's materials and speakers focus on issues of "gender identity" and transgenderism, advancing the belief that biological sex controls, and a person cannot select his or her sex or gender. *Id.* ¶¶ 10–11.

36. Declarants Rachel Flynn, Thomas Adcock, and Kailee Verdeyen are members of YAF. Flynn Decl. ¶ 6, ECF No. 25-10; Adcock Decl. ¶ 7, ECF No. 25-11; Verdeyen Decl. ¶ 8, ECF No. 25-14. Ms. Flynn is a student at the University of Utah. Flynn Decl. ¶ 4. Mr. Adcock is a student at Kansas State University. Adcock Decl. ¶ 4. Ms. Verdeyen is a student at the University of Wyoming. Verdeyen Decl. ¶ 4.

37. These individuals all believe and express viewpoints that (a) sex is determined at birth; (b) there are only two genders; (c) an individual cannot change his or her gender; (d) one should use pronouns consistent with an individual's biological sex; (e) using 'preferred pronouns' is an endorsement of the view that sex and gender are fluid; (f) women deserve sex-segregated private spaces on campuses; (g) a biological male should not use a women's restroom or locker room, join a women's-only organization, or play on a women's sports team; (h) Title IX was meant to protect biological women; and (i) state law should prohibit doctors from performing transition surgeries on minors. Flynn Decl. ¶¶ 7–10; Adcock Decl. ¶¶ 8–11; Verdeyen Decl. ¶¶ 9–12.

38. These individuals have frequent interactions with individuals identifying as transgender on their campuses and anticipate having future interactions with individuals identifying as transgender when on their respective campuses. Flynn Decl. ¶ 8; Adcock Decl. ¶ 9; Verdeyen Decl. ¶ 10. Ms. Verdeyen, in particular, has had uncomfortable interactions with female-identifying men in the women's restroom on her campus. Verdeyen Decl. ¶ 11.

39. Additionally, Ms. Verdeyen is concerned that a biological male could join her sorority; one such individual has already joined a sorority at her school. *Id.* at ¶ 11.

40. These declarants have plans to bring speakers to campus to discuss topics in accord

with their viewpoints and to engage in other activism and discussion on their views. Flynn Decl. ¶¶ 12–14; Adcock Decl. ¶¶ 12–13; Verdeyen Decl. ¶¶ 13–14.

41. To date, these individuals have not been the target of any investigatory or disciplinary proceeding for expressing views consistent with their beliefs. Flynn Decl. ¶ 15; Adcock Decl. ¶ 14; Verdeyen Decl. ¶ 15. But under the Final Rule, they fear they will be compelled to use 'preferred pronouns' or face investigatory or disciplinary proceedings. Flynn Decl. ¶¶ 16–19; Adcock Decl. ¶ 15–17. They also would be deterred from expressing their views on transgender and gender identity issues and from organizing and promoting events on campus that discuss transgender and gender identity issues. Flynn Decl. ¶¶ 12–13, 16–18; Adcock Decl. ¶¶ 8, 12–13, 16–17; Verdeyen Decl. ¶¶ 12–14, 16–18.

ARGUMENT

"A court should grant summary judgment when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Rocky Mountain Wild, Inc. v. Forest Serv.*, 56 F.4th 913, 921 (10th Cir. 2022) (quoting Fed. R. Civ. P. 56(a)). Summary judgment is appropriate here because there is no dispute of fact and because the Final Rule (1) is contrary to federal law, (2) violates the major questions doctrine, (3) is unconstitutional, and (4) is arbitrary and capricious. The Court should therefore grant judgment to the Plaintiffs and vacate the rule under the Administrative Procedure Act.

I. The Final Rule is contrary to three federal statutes

a. The Final Rule is contrary to Title IX

The Final Rule is contrary to Title IX. The Court should begin with Title IX's plain language. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). "The plain meaning of a statute is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021) (internal quotes omitted). Furthermore, the statute's plain meaning when it was passed controls. *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018). Later changes in a word's usage are irrelevant. *See New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) ("[I]f judges could

freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." (internal quotes omitted)). When agencies or courts retroactively change a word's meaning, they "risk [] upsetting reliance interests in the settled meaning of a statute." *Id.*

Title IX prohibits discrimination on the basis of "sex." As this Court has already found (and Defendants do not dispute), "the unambiguous plain language of the statutory provisions and the legislative history make clear that the term 'sex' means the traditional concept of biological sex in which there are only two sexes, male and female." Prelim. Inj. Order 17, ECF No. 53 (citation omitted). Every dictionary definition from the era agrees. *See Sex*, American Heritage Dictionary (1969) ("The property or quality by which organisms are classified according to their reproductive functions [and] Either of two divisions, designated male and female, of this classification."); *Sex*, 9 Oxford English Dictionary (1933) ("Either of the two divisions of organic beings distinguished as male and female respectively"); *Sex*, Random House Dictionary of the English Language (1966) ("The fact or character of being either male or female: persons of different sex.... the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences").

So does the Supreme Court. In *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Court discussed the meaning of "sex" in Title VII, a statute passed just a few years before Title IX. The Court was clear that, in 1964, "sex" "referred to 'status as either male or female as determined by reproductive biology'" and "only to biological distinctions between male and female." 590 U.S. at 655. "Sex" does <u>not</u> mean "gender identity" or "sexual orientation." Prelim. Inj. Order 17–18. Title IX does not use the phrase "gender identity" at all—nor would it logically do so. Title IX's goal was to equal the playing field for girls and women.

So, the Final Rule radically changes Title IX by elevating "gender identity" and "sexual orientation" over "sex." 89 Fed. Reg. at 33,887.It also attempts to elevate those who are transgender above those who are biological females (who Title IX was originally designed to protect) by inventing a *de minimis* harm standard. *Id.* . For example, according to DoE, sex

distinctions always cause more than *de minimis* harm, but only when applied to persons with certain gender identities. *See e.g.*, *id.*; *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 to men who identify as men but more than *de minimis* harm when applied to men who identify as women. *Id.* at 33,820.

This illogic creates real-world effects on women and girls. Under this regime, Title IX would no longer protect middle-school girls like K.R. who want to use restrooms outside the presence of biological males, or high-school athletes like T.Z. who want to change and shower without biological males looking at her. K.R. Decl. ¶¶ 3–22; T.Z. Decl. ¶¶ 12–15, 20, 27. Instead, it would force these women and girls to either endure the embarrassment of sharing intimate spaces with males or avoid using the restrooms and locker rooms at school altogether. *Accord* Prelim. Inj. Order. 36–37 (recognizing that Final Rule would require schools to give "unfettered access" to any "industrious older teenage boy" who wishes to gain access to the girls' restrooms and locker room). That is obviously not what Congress intended, meant, or enacted in 1972 when it prohibited sex discrimination in education.[1]

The same harms re-appear in athletics too, as men who identify as women have repeatedly displaced women from the winner's podium, taking away women's right to fair competition. While Defendants contend that the Final Rule does not apply to athletics, it does. This happens through four overlapping moves. First, the new § 106.10 broadly redefines sex discrimination throughout the Rule to include gender identity. Second, § 106.11 makes clear that "this part"—including § 106.10— "applies … to all sex discrimination occurring under a recipient's education program or activity." That includes athletics. *See* 89 Fed. Reg. at 33,474 (interpreting "'program or activity' broadly and without geographical limitation…"). Third, § 106.31(a)(1) reiterates that

[1] For its part, Congress has recognized that adding "gender identity" protections to the statue would require legislation. There have been several unsuccessful attempts over the years to amend the statute to include "gender identity" as its own separate protected class. *See Texas v. Cardona*, No. 4:23-cv-00604-0, 2024 WL 3658767, at *35 (N.D. Tex. Aug. 5, 2024). These attempts underscore the fact that Title IX has nothing to do with "gender identity."

the ban on sex discrimination (as redefined to include gender identity) covers "other education program[s] or activit[ies]…" That, too, includes athletics. Fourth and finally, § 106.31(a)(2) only exempts § 106.41(b); it does not exempt § 106.41(a), which bans sex discrimination "in any interscholastic, intercollegiate, club or intramural athletics…." And § 106.31(a)(2) does not cut back § 106.10 or § 106.11's broad scope covering athletics. The net result is that § 106.10's general default rule redefining sex still applies to educational programs generally (including sports) via § 106.11, and § 106.10's default rule (which explicitly covers sports) still specifically applies to § 106.41(a). Through either route, the Final Rule and its sex redefinition cover athletic programs.

Finally, DoE has spent the past three years arguing that *Bostock* requires schools to open sports based on gender identity. In its now-vacated 2021 guidance documents, DoE identified athletic teams based on biological sex as examples of unlawful discrimination, citing *Bostock*. And just last year, the Department of Justice argued that *Bostock* requires gender identity to control sex in Title IX athletics. Br. for the U.S. as Amicus Curiae, *B.P.J. v. W. Va. State Bd. of Educ.*, Nos. 23-1078(L) & 23- 1130, 2023 WL 2859726, at *27–28 (4th Cir. Apr. 3, 2023). DoE cannot whitewash its prior positions to claim that redefining "sex" in the Final Rule does not affect sports. Nor can DoE explain why its pre-rule, informal interpretation of Title IX (incorporating *Bostock*) affected sports, yet its formal redefinition of sex to include gender identity in the rule does not.

As areas like sports, locker rooms, restrooms, and showers underscore, Title IX's meaning is unambiguous. If "sex" does not mean biological sex, these exemptions in Title IX and prior implementing regulations would be "render[ed] meaningless." Prelim. Inj. Order 21. By replacing "sex" with "gender identity," DoE would redefine that clear text, eliminate protections for women and girls, and require schools to do away with sex-separation. That should end the question.

b. The Final Rule is contrary to 20 U.S.C. § 1688

Section 1688 of Title 20 of the United States Code states that "[n]othing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay

for any benefit or service, including the use of facilities, related to an abortion." The Final Rule attempts to get around this by misconstruing the statutory text and limiting § 1688 to the actual provision of abortions. *See* 89 Fed. Reg. 33,757–58. This is wrong. Defendants ignore § 1688's plain language, which prohibits DoE from requiring schools to "provide or pay for any benefit or service… related to abortion" (emphasis added). Supplying a right such as leave—which schools must do under the Final Rule, *see, e.g.*, *id.* at 33,768—is undoubtedly providing a benefit "related to" abortion. Defendants try to work around this by narrowly defining "benefit" to exclude leave and reasonable accommodations. But this is simply rewriting the statute to receive their preferred result. A "benefit" includes "the acquisition of a legal or equitable right to which one otherwise would not be entitled" or "anything which adds to the advantage or security of another." BENEFIT, Ballentine's Law Dictionary (3d ed. 1969). With § 1688, Congress made an explicit decision to amend Title IX to make it neutral toward abortion because they were concerned that, post *Roe*, regulations would be interpreted to force educational institutions to fund abortions and related services. Defendants' attempt to erase that neutrality is unlawful.

c. The Final Rule is contrary to RFRA

The Final Rule is also contrary to the Religious Freedom and Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, because it forces religious students like K.R. and some FAU members to speak against their religious beliefs, and it chills them from sharing their religious views on gender-identity issues.

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Id*. It exists "to ensure broad protection for religious liberty." *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682, 694 (2014). If the government substantially burdens a person's free exercise of religion, the government must "demonstrate that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at 694–95. The Final Rule fails this test.

The Final Rule substantially burdens religious exercise by compelling religious students

to use inaccurate pronouns against their beliefs and prohibiting them from sharing their religious views on issues related to gender identity. For example, K.R. is a Christian who believes that God created humans male and female, and that sex is immutable. K.R. Decl. ¶¶ 25–27. She cannot use pronouns she believes to be inaccurate without violating her religious beliefs. *Id.* ¶ 28. And she wants to exercise her faith by sharing her religious beliefs with her fellow students in appropriate circumstances. *Id.* ¶¶ 29–31. Some FAU members share these convictions. Supp. Brown Decl. ¶¶ 23-24 (attached as Ex. 4).

But this violates the Final Rule, which specifies that any "practice" that does not treat a student "consistent with the person's gender identity" automatically causes "more than *de minimis* harm." 89 Fed. Reg. at 33,887. And anything a student considers "unwelcome" that "limits" the student's ability to benefit from an educational program is unlawful harassment. *Id.* at 33,884. Likewise, the "unwelcome" conduct must only be "offensive" and either "pervasive" or "severe"—not both—to count. *Id.* The complainant doesn't have to "demonstrate any particular harm, such as reduced grades or missed classes." *Id.* Any "impact on their ability to participate or benefit from the education program" will do. *Id.* Schools are required to address or even discipline student behavior or speech that allegedly causes this harm. *See, e.g.*, *id.* at 33,515.

Meanwhile, pronouns are pervasive. Students use them countless times every day. A student declining to use another student's inaccurate pronouns will violate the Final Rule: the conduct will be "unwelcome" to students asserting a gender identity disconsonant with their sex; some will undoubtedly consider it "offensive";[2] it will be pervasive because pronouns are pervasive; and the student will claim it limits their access to the benefits of the educational program. The same is true for any expression of the religious view that sex is immutable.

This interpretation tracks the Biden Administration's position on pronoun use. It has tried to compel pronoun use under Title IX through guidance documents (which courts enjoined). *See, e.g.*, *Cardona*, 2024 WL 3658767, at *1. And it has contended that teachers can

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[2] *See, e.g.*, Br. of Jane Doe and Sexuality and Gender Acceptance, Intervenors-Appellees, *Meriwether v. Hartop*, 2020 WL 5044756, at *5 (6th Cir. 2020) (describing "misgendering" as "harmful").

trigger Title IX liability for avoiding certain pronouns. Br. for the U.S. as Amicus Curiae, *Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 21-2475, 2021 WL 5405970, at *27–30 (7th Cir. Nov. 8, 2021). The administration recently argued that a school policy requiring teachers to use gender-neutral titles like "teacher" or "coach," but not honorifics and pronouns based on gender identity, creates a hostile environment. Statement of Interest of the U.S., *Wood v. Fla. Dep't of Educ.*, No. 4:23-cv-00526, 2024 WL 3380723 (N.D. Fla. June 27, 2024).

And the Final Rule provides no exceptions for sincerely held religious beliefs. It only states, "whether verbal conduct constitutes sex-based harassment is necessarily fact-specific." 89 Fed. Reg. 33,516. Basically, a person cannot know whether their religious beliefs violate the Final Rule until they are investigated. So, if she wants to continue attending public school and avoid a harassment claim, K.R.'s only option is to "comply wholeheartedly" with regulations she "sees as sinful," by using inaccurate pronouns and keeping silent about her religious beliefs. *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 938 (5th Cir. 2023); *accord Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 735 (Va. 2023) (compelling pronoun use violates Virginia RFRA).

The Government has no compelling interest in forcing religious people like K.R. and FAU members to use false pronouns against their religious beliefs or in chilling speech about their religious views. "[R]egulating speech because it is [believed to be] discriminatory or offensive is not a compelling state interest." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019). Indeed, the Sixth Circuit has already held that this interest is weak in the context of education and sex-specific pronouns. *Meriwether v. Hartop*, 992 F.3d 492, 509–10 (6th Cir. 2021). Were it otherwise, the government could compel or restrict student speech "any time their speech might cause offense." *Id.* at 510. But that is not the law. The government cannot use "[p]urportedly neutral non-discrimination policies" to enforce its preferred view of hot-button public issues, like "gender identity." *Id.*

II. The Final Rule violates the major questions doctrine

The Final Rule triggers (and violates) the major questions doctrine. This doctrine describes the common-sense idea that Congress does not give agencies free rein to make major

policy decisions on issues of vast economic or political importance. *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014). Separation-of-powers principles prohibit agencies from deciding issues of great economic or political significance, or issues traditionally governed by state or local law, absent clear Congressional authorization. *West Virginia v.* EPA, 597 U.S. 697, 723 (2022); *id.* at 743 (Gorsuch, J., concurring). "[T]his means that important subjects … must be entirely regulated by the legislature itself, even if Congress may leave the Executive to act under such general provisions to fill up the details." *Id.* at 737 (internal quotes omitted). If an agency claims the power to make these decisions, the Court should consider whether Congress clearly authorized the agency to do so. *Id.* at 723.

The major questions doctrine "clearly" applies here. Prelim. Inj. Order 25; *accord Louisiana v. Dep't of Educ.*, No. 3:24-cv-00563, 2024 WL 2978786, at *14 (W.D. La. June 13, 2024). The Final Rule attempts to fundamentally reorder the education system across the country through (1) enshrining gender ideology into the entire K-12 education system and tying education funding to it, (2) mandating a campus grievance procedure that limits the due process rights of college students accused of sex-based harassment, and (3) requiring schools to provide benefits to students and employees for voluntary abortions. All of these issues are subject to profound political discussions across the country. Prelim. Inj. Order 26. Furthermore, these provisions raise serious issues regarding First, Fifth, and Fourteenth Amendment rights of individuals in schools. These are important subjects that must be regulated by the legislature itself. *See id.* The Final Rule attempts to swing a sledgehammer through the debates around the country on these important subjects and unilaterally end the discussion. That violates the major questions doctrine.

The Final Rule implicates the major questions doctrine in another equally important way: Defendants seek to intrude into every small aspect education, even issues that have traditionally been the domain of the state. *See West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) ("When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States." (citation

omitted)). The ins and outs of education, such as curricula and who can play on the freshman girls' volleyball team, have traditionally been in states' legal domain. The Final Rule tramples upon that power by imposing a radical ideological framework on sex-based harassment and other matters. At a minimum, DoE had to demonstrate in the Final Rule that Congress gave such clear authorization. The Final Rule certainly invokes the major questions doctrine. At that point, Defendants have the burden to show clear authorization to do it. A colorable or plausible statutory reading is not enough. This burden is high, and Defendants cannot come close to meeting it. Indeed, because the Final Rule is contrary to several federal statutes as demonstrated *supra* Part I, clear Congressional authorization cannot exist.

III. The Final Rule is contrary to the Constitution

a. The Final Rule violates the Spending Clause.

The Final Rule also exceeds federal power under the Spending Clause of Article I, section 8, clause 1. First, the Final Rule violates the *Dole* factors. *See South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987). The Supreme Court has "long recognized that Congress may fix the terms on which it shall disburse federal money to the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). However, the power to fix terms is not unlimited. Courts have recognized "four general restrictions on Congress' exercise of power under the Spending Clause." *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000). These are (1) "Congress's object must be in pursuit of the general welfare"; (2) "if Congress desires to place conditions on the state's receipt of federal funds, it must do so unambiguously so that states know the consequences of their decision to participate"; (3) "the conditions must be related to the federal interest in the particular program"; and (4) "Congress may not induce the states to engage in activities that would themselves be unconstitutional." *Id.* (internal quotes omitted). If DoE's Title IX interpretation were correct, it would violate the second, third, and fourth restrictions.

To begin, the Final Rule imposes conditions on the States to which they did not agree and with which they are unable to comply. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with

federally imposed conditions." *Pennhurst*, 451 U.S. at 17. The States must therefore be fully aware of the strings to which federal funding is attached before they accept federal funds. "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Courts "insist[] that Congress speak with a clear voice," imposing any conditions "unambiguously," so that "States [may] exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* Courts evaluate whether the conditions were "clear" and "unambiguous" by stepping in the shoes of the "state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). They ask whether the state official would "clearly understand" the obligations, such that the state had "clear notice" regarding potential liability." *Id*. The answer in this case is a resounding "no."

As discussed above, it was understood in 1972 and 1975 that "sex" referred to biological sex and that Title IX was intended to provide and protect equal opportunities for students, especially women and girls. State officials would have understood that schools would be required to provide equal facilities for men and women—including restrooms, locker rooms, and overnight accommodations—or else incur liability. It was likewise understood that men and women should have equal sports teams—sex-segregated in most cases—which is why Congress specifically directed DoE to promulgate regulations affecting such teams. A state official viewing the statute, then, would have understood that, by accepting the funding the school was open to liability if it did not create equal opportunities for biological women and girls. It would not have understood that accepting Title IX funds opened the school to liability if a student was treated according to their biological sex rather than their internal concept of "gender identity." *See* Prelim. Inj. Order 28–29. So, "Title IX falls short of providing notice to the Plaintiff States that 'sex discrimination includes gender identity' … [And] the Final Rule violates the Spending Clause because it introduces conditions for spending that were not unambiguously clear in Title IX." *Id.* (citation omitted).

Indeed, the requirements in the Final Rule are so mercurial that it may be difficult for state officials to comply with the conditions. The Final Rule requires schools to treat students according to their own internal sense of their "gender identities" or else face liability for discrimination and potential loss of federal funding. Currently, liability for "discrimination," is understood to require schools to have actual knowledge of harassment that is "so severe, pervasive and objectively offensive that it … deprived the victim of access to the educational benefits or opportunities provided by the school." *Forth v. Laramie Cnty. Sch. Dist. No. 1*, 85 F.4th 1044, 1053 (10th Cir. 2023). Under this standard, schools would not be liable for discrimination if, for example, a teacher directed a female student with a short haircut to the boys' restroom or directed a male student who "identified" as a girl to the boys' restroom. But if the Final Rule is allowed to take effect, liability could be incurred for as little as directing a biologically male student to the boys' restroom when the boy "identifies" as a girl. *See* 89 Fed. Reg. at 33,816.

Complicating things further, the Final Rule acknowledges that "gender identity" may not be readily discernable and is up to the individual student. *Id.* at 33,819–20. And the Final Rule suggests that schools should not require documentation or other examinations to determine students' "gender identity." *Id.* And there's the fact that the Final Rule understands there to be many "gender identities" and the fact that a persons' "gender identity" may change. 89 Fed. Reg. 33,819 & n.90 (citation omitted). The upshot is that schools may not know, and may have no way of knowing, whether any student's "gender identity" is different from his or her sex. So, the only way schools can ensure compliance is to eliminate sex-separation altogether. An ordinary state official would have thought this violated the statute, not ensured compliance.

The Final Rule also violates the third Spending Clause restriction. The federal interest advanced by the creation of the Title IX spending program was the promotion and protection of educational and athletic opportunities for biological women and girls. The Final Rule is not related to, and does not serve, that interest. Indeed, the Final Rule undermines it. If the Final Rule takes effect, women and girls' sports will be effectively destroyed over time. Biological females will be denied the schooling opportunities that Title IX was intended to protect. And

biological females will be placed in unsafe and invasive situations at schools and universities.

The Final Rule also violates the fourth restriction. Under the Final Rule, a teacher would "discriminate" against a student if the teacher refuses to use the student's "preferred pronouns," even if the basis for the teacher's refusal is a religious objection. The Final Rule also violates First Amendment free-speech protections by compelling teachers, administrators, coaches, and staff to use "preferred pronouns," referring to boys as girls and vice-versa. *See infra* 3(b); *see also 303 Creative LLC v. Elenis*, 600 U.S. 570, 584–85 (2023). "Congress may not induce the states to engage in activities that would themselves be unconstitutional." *Kansas*, 214 F.3d at 1199.

Second, the Final Rule violates the principle that the Spending Clause and the Supremacy Clause require Congress to speak. The Final Rule attempts to preempt multiple state laws. Kansas's S.B. 180, which requires all public schools to record a student's sex as his or her sex at birth, is a case in point. Only Congress can take action that displaces state law unless it delegates authority for the agency to do so. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 160 (1982). And Congress has not done so here. The presumed preemption presented by the Final Rule is especially troubling; unlike the situation in *Dole*, neither Congress nor the State legislature is involved. The executive agency sets the new terms of the deal, and the school districts change their behavior to get the money. The state's legislature and statutes are ignored.

b. The Final Rule Violates the First Amendment

Plaintiff Organizations and K.R. move for summary judgment on all three of their First Amendment claims: (1) Compelled speech (Count V), (2) Vagueness and overbreadth resulting in chilled speech (Count VI), and (3) Content and viewpoint discrimination resulting in chilled speech (Count VII). Before turning to each claim individually, two overarching principles deserve highlighting. First, the topics of gender identity and whether biological sex is an immutable reality are "controversial subjects" that are "political topics" and "undoubtedly matters of profound 'value and concern to the public.'" *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 585 U.S. 878, 913-14 (2018) (quotation omitted); *see also Meriwether*, 992 F.3d at 506 (describing debate on gender identity as "a hotly contested matter of public concern" that is

bound to arise in class discussions). This seems obvious; if it were not so, then Defendants would see no need to try to settle the issue nationwide through the Final Rule. In the current environment, even something as simple as "[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Meriwether*, 992 F.3d at 508; *see also, e.g.*, Jensen Decl. ¶ 13; Koznek Decl. ¶¶ 8, 12, 14–15; Lochner Decl. ¶¶ 7, 10. Flynn Decl. ¶¶ 7–1; Adcock Decl. ¶¶ 8–11;Verdeyen Decl. ¶¶ 9–12. Meanwhile, "speech on important social and political topics [is] accorded the highest level of protection." *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992)).

Second, although the Final Rule applies within the school setting, "public school students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 (10th Cir. 2004) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). In fact, at least as to colleges and universities, extra caution is necessary where government action infringes on speech because "academic freedom is a special concern of the First Amendment" and "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005) (internal quotes omitted); *see also Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001) (recognizing "the robust tradition of academic freedom in our nation's post-secondary schools").

While schools have some ability to regulate speech that could disrupt their core academic mission, those circumstances are narrow, defined, and must be content-neutral. And a school should never compel speech on a matter of public concern. To justify suppressing speech, "school officials must [point to] 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'" *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (quoting *Tinker*, 393 U.S. at 514).

1. The Final Rule compels speech

The Supreme Court has long recognized that "freedom of thought and expression includes

both the right to speak freely and the right to refrain from speaking at all." *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 559 (1985) (internal quotes omitted). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus*, 585 U.S. at 892 (cleaned up).

As such "the government may not compel a person to speak its own preferred message" that defies a speaker's conscience. *303 Creative, LLC*, 600 U.S. at 586. "To hold differently would be to treat [some] expression as second-class speech…." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 531 (2022). Nor is it acceptable to say that objectors can just keep their opinions to themselves. While "[t]here is certainly some difference between compelled speech and compelled silence, … 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 Final Rule compels[3] the use of 'preferred pronouns' in the academic setting, contrary to the views held by K.R., members of YAF and FAU, and the children of members of MFL, *see* Flynn Decl. ¶¶ 7–10, 16–19; Adcock Decl. ¶¶ 8–11, 15–17; Jensen Decl. ¶¶ 8, 11–12; Koznek Decl. ¶¶ 8, 12–15, 18–19; Plank Decl. ¶¶ 8, 11–12, 17–18; Lochner Decl. ¶¶ 7, 10–11; Casebolt Decl. ¶ 48. The Final Rule's preamble identifies "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" to be part of sex-based harassment. 89 Fed. Reg. at 33,516. It also strongly suggests that repeatedly "misgendering" an individual—*i.e.*, using pronouns that correspond with an individual's biological sex rather than his or her so-called 'gender identity'—qualifies as harassment. *Id.* Further, DoE's intentions are clear by way of their actions as the Department has been an active opponent of school policies that do not compel the use of

[3] The government compels speech when it threatens to punish an individual through "governmental action that is regulatory, proscriptive, or compulsory in nature." *Axson-Flynn*, 356 F.3d at 1290 (internal quotes omitted). "Compulsion need not take the form of a direct threat or a gun to the head. The consequence may be an indirect discouragement, rather than a direct punishment." *Id.* (internal quotes omitted).

preferred names and pronouns. *See Tennessee v. Cardona*, No. 2:24-cv-0072-DCR-CJS, 2024 WL 3019146, at *21 (E.D. Ky. June 17, 2024); *see also supra*, 1(c) (detailing Department's positions).

Compelling "preferred pronouns" in academic settings violates First Amendment principles and qualifies as viewpoint discrimination because baked into the use of "preferred pronouns" is an acknowledgement that individuals can change their sex. *See, e.g.*, *Meriwether*, 992 F.3d at 510 (holding that forced pronoun usage violated First Amendment and stating, "the premise that gender identity is an idea 'embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view'" (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000))); *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023) (school district requiring students to acknowledge gender identity contrary to their beliefs "cannot avoid the strictures of the First Amendment simply by defining certain speech as 'bullying' or 'harassment'").

Unsurprisingly, when concluding that another compelled-speech challenge to the Final Rule was likely to succeed on the merits, the Eastern District of Kentucky observed the significance of both the Final Rule's language on so-called "misgendering" and the DoE's positions in other cases. *See Tennessee*, 2024 WL 3019146, at *21. Further, the Final Rule cites a federal district court case finding that a plaintiff could advance a Title IX claim based on harassment where classmates called a transgender individual a "girl" and used a feminine version of the individual's preferred name. 89 Fed. Reg. at 33,516 (citing *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000)); *see also* 89 Fed. Reg. at 33,504 (citing *L.M. v. Town of Middleborough*, No. 23-cv-11111, 2023 WL 4053023, at *6 (D. Mass. June 26, 2023), for proposition that a school can prohibit student from wearing shirt that read "There are two genders"). Lastly, language accompanying the Final Rule concludes that a failure to treat an individual in accordance with his or her claimed gender identity creates more than a de minimis harm, thus supporting a Title IX claim. *See* 89 Fed. Reg. 33,818-19.

The Final Rule is also coercive because it subjects an individual alleged to have engaged in harassment to investigatory proceedings. *See id.* at 33,893-95. A credible threat of an

investigation is impermissibly compulsory in violation of the First Amendment. *See*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, 68, (1963) (because "[p]eople do not lightly disregard" threats of enforcement, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" are impermissibly coercive); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1124 (11th Cir. 2022) (possibility of having speech labeled as offensive "let alone hate or bias" is impermissibly coercive). And the youth of the speakers involved in this case means that a threat is more likely to be perceived as coercive, *see Speech First*, 32 F.4th at 1123.

The Final Rule also permits disciplinary proceedings, which give broad discretion to the hearing officer to impose punishments if an individual is found guilty of hostile environment harassment. *See* 89 Fed. Reg. at 33,895. Thus, under the Final Rule, students might face suspension or expulsion if they hold true to their beliefs and (1) use pronouns in accord with a classmate's biological sex regardless of how the classmate identifies; or (2) use a classmate's birth name rather than assumed name that corresponds with the classmate's assumed gender. Punishments of this nature are undoubtedly sufficient to compel speech; even the threat of an investigation has consequences for a student's reputation and future prospects that inflict a constitutional injury. *See Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 65 F.4th 157, 165 (4th Cir. 2023).

Defendants' assurances that the Final Rule provides protection against compelled speech are unconvincing. The Final Rule's preamble provides only a single example of speech that would not qualify as hostile environment harassment, stating that "a stray remark, such as a misuse of language, would not constitute harassment under this standard." 89 Fed. Reg. at 33,516. But Moms for Liberty members and their children, as well as Young America's Foundation members and others want, intend, and indeed feel compelled to engage in more than stray remarks. *See* Jensen Decl. ¶¶ 15, 17; Koznek Decl. ¶¶ 18–19; Lochner Decl. ¶¶ 15–16; Plank Decl. ¶¶ 15–16; Verdeyen Decl. ¶¶ 12–14, 16–18; Adcock Decl. ¶¶ 8, 12–13, 15–18; Flynn Decl. ¶¶ 12–13, 16–19. And they must be allowed to do so under the Constitution. *See Meriwether*, 992 F.3d at 510; *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1187 (D. Colo. 2023). This

Court should grant summary judgment in favor of Young America's Foundation and Moms for Liberty on their Count V, First Amendment compelled speech claim.

2. **The Final Rule is unconstitutionally vague and overbroad**

The Court should also convert its preliminary injunction into a permanent one by granting summary judgment in favor of Plaintiff Organizations and K.R. on their Count VI, First Amendment vagueness and overbreadth chilled speech claim. This Court has already looked at the merits of this claim at the preliminary injunction stage, concluding that these Plaintiffs are likely to prevail, Prelim. Inj. Order 29-33, and nothing has materially changed since then.

The First, Fifth, and Fourteenth Amendments prohibit unconstitutionally vague restrictions. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). This requirement gives citizens fair notice of what is outlawed and enforcement standards for officials. *Id.* at 108-09. A restriction is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925). Thus, vague regulations on speech chill not only protected speech targeted by the regulation but also speech in grey zones outside the regulation's intended edges. If a restriction "interferes with the right of free speech," then a stringent test applies. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *see also Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959) ("Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law."). Finally, a law is overbroad under the First Amendment "if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008).

This Court reached its conclusion on the preliminary injunction because not even counsel for Defendants could explain the Final Rule's scope and what speech by students would qualify as hostile environment harassment under the Rule. Prelim. Inj. Order at 33. When government

lawyers cannot say what speech a policy prohibits, it is a sure sign that it will chill speech of ordinary students. *Accord Speech First*, 32 F.4th at 1123. The age of the students means they are only more susceptible to self-censorship from being called "'offensive,' 'hostile,' or 'harmful.'" *Id.* at 1123–24.[4]

As this Court correctly found, the Final Rule interferes with free speech because it presents a standard for sex-based harassment that is at a minimum vague and standardless, fails to define "gender identity," and judges harassment from the subjective position of an individual who believes gender is fluid. Prelim. Inj. Order 29–33; *accord Arkansas v. Dep't of Educ.*, No. 4:24 CV 636 RWS, 2024 WL 3518588, at *18 (E.D. Mo. July 24, 2024); *Tennessee*, 2024 WL 3019146, at *25. Although the preamble presents some examples, the Court is correct that the Final Rule obviously views so-called "misgendering" as potentially sex-based harassment. Prelim. Inj. Order 31. Further, the "severe or pervasive" standard adopted by the Final Rule adds to the regulation's ambiguity and breadth, for it requires mere frequency and not severity. And the Final Rule does little to define "severe" or "pervasive," leaving the strong impression that "anyone refusing to use preferred pronouns, be it for moral or religious reasons, would necessarily be engaging in pervasive conduct." *Tennessee*, 2024 WL 3019146, at *25. Defendants do not solve this problem by merely "parroting the definition in support of its position." Prelim. Inj. Order 31. As a result, the Final Rule fails to provide fair notice as to what is outlawed and opens the door to arbitrary enforcement. Multiple members of Plaintiff Organizations are being forced to forgo their rights to speech because (1) it is not clear what speech falls within the ambit of the Final Rule and (2) they credibly fear arbitrary enforcement of the Final Rule. *See* Flynn Decl. ¶¶ 12–13, 16–18; Adcock Decl. ¶¶ 8, 12–13, 16–17; Jensen Decl. ¶¶ 15, 17; Koznek Decl. ¶¶ 18–19; Verdeyen Decl. ¶¶ 12–14, 16–18; Plank Decl. ¶¶ 17–18; Lochner Decl. ¶¶ 15–16.

Defendants' standards are "'inherently not objective at all'" because the DoE "*intentionally opted to leave the vague terms undefined*." *Tennessee*, 2024 WL 3019146, at *26. This is exactly the type

[4] *Speech First* considered a university policy that affected "teenagers and young adults," 32 F.4th at 1123; the Final Rule reaches even kindergarteners.

of vague restriction that courts have routinely held unconstitutional because it opens the door to arbitrary or biased enforcement. *See Speech First*, 32 F.4th at 1114-15, 1125 (holding harassment policy similar to Final Rule "fatally overbroad"); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) (invalidating policy covering "any unwelcome verbal" conduct). Accordingly, this Court should grant summary judgment in favor of Plaintiffs on their Count VI vagueness and overbreadth claim.

3. The Final Rule involves content-based restriction and viewpoint discrimination

Finally, Plaintiff Organizations and K.R. move for summary judgment on their Count VII content and viewpoint discrimination claims brought under the First Amendment.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A law discriminates based on viewpoint when it allows the expression of some viewpoints but not others. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). A content-based restriction can only survive where the government can show that the restriction is narrowly tailored to serve a compelling interest. *Boos v. Barry*, 485 U.S. 312, 324 (1988). Defendants are unable to satisfy any of this standard.

As already touched upon, the issues and speech regulated by the Final Rule involve important social and political topics. *See Meriwether*, 992 F.3d at 508; *Parents Defending Educ.*, 83 F.4th at 667. This is evidenced by the growing number of recent court decisions addressing matters such as compelled pronoun usage, the ability of transgender and gender-nonconforming individuals to access the bathroom and locker room of their choice, and the ability of gender-nonconforming individuals to play on sports team of their choice. But the importance of this issue goes beyond court rulings. For instance, in recent months, numerous sports associations, including the NAIA, have enacted policies limiting biological men identifying as women from playing on women's sports teams. States have also enacted laws prohibiting biological men from playing on women's sports teams and using sex-segregated restrooms and locker rooms

designated for women. *See, e.g.*, Alaska Stat. § 14.18.040; Kan. Stat. Ann. § 60-5603; Utah Code Ann. §§ 53G-6-902, 63G-31-301(1); Wyo. Stat. Ann. § 21-25-102(a)-(b). Finally, and specific to the speech of one of the YAF declarants, Thomas Adcock, the Kansas legislature recently passed a bill prohibiting doctors from performing transition surgeries on minors, only to have the governor veto the bill. *See* H Sub for SB233, Kan. 2023–2024 Legislative Sessions, https://www.kslegislature.org/li/b2023_24/measures/sb233/ (last visited Aug. 24, 2024). Thus, debate on issues surrounding gender identity and transgenderism touch close to home for those members of Plaintiff Organizations in states such as Kansas, as well as other states where similar legislative efforts are ongoing.

Through the Final Rule, Defendants engage in classic viewpoint discrimination. As noted above, both verbal and nonverbal actions geared toward someone's gender identity can qualify as sex-based harassment. 89 Fed. Reg. at 33,516. A person who refuses to address another individual by their 'preferred pronouns' and instead by their biological sex or who is critical of the Defendants' views on gender ideology would run afoul of the Final Rule and face a credible threat of enforcement. For instance, a transgender individual who underwent transition surgery at a young age could file a harassment charge against a person who vocally opposed doctors performing transition surgeries on minors. Permitting the Final Rule to take effect would, therefore, cut at the core of speech on important political and social topics. And it would do so while placing no restrictions on converse messages advocating for (1) a doctor's ability to perform a transition surgery on minors; (2) the proposition that a man can become a woman; or (3) the propositions that individuals should be permitted to use a bathroom or locker room of their choice and play on the sports team of their choice. Thus, the Final Rule not only chills core political and social speech entitled to the highest First Amendment protection, but it also does so while placing a hefty thumb on the scale in favor of a particular viewpoint.

K.R. and members of Plaintiff Organizations have deeply held beliefs on an array of issues involving gender identity, sex stereotypes, sex characteristics, transgenderism, faith, and biology. *See* Flynn Decl. 25-10 ¶¶ 7-10, Adcock Decl. ¶¶ 8–11; Jensen Decl. ¶¶ 8, 11–13; Koznek

Decl. ¶¶ 8, 12–16; Verdeyen Decl. ¶¶ 9-12; Plank Decl. ¶¶ 8, 11–12, 15–18; Lochner Decl. ¶¶ 7, 10–11, 13–14. K.R. is a Christian and does not want to be forced to convey a message she believes violates her religious convictions. K.R. Decl. ¶¶ 25, 28. FAU Members like H.K. also do not want to be forced to express messages they disagree with and want to be free to share their beliefs in appropriate circumstances. *See* A.R.S. Decl. ¶ 34; T.P. Decl. ¶¶ 14–25, 38; T.Z. Decl. ¶¶ 23–24, 29–30. These members and their children have expressed views on these matters within the school setting, including at times while in the presence of individuals identifying as transgender. Flynn Decl. ¶¶ 7–10; Adcock Decl. ¶¶ 8–11; Jensen Decl. ¶¶ 8, 11–13; Koznek Decl. ¶¶ 8, 12–16; Verdeyen Decl. ¶¶ 9–12; Plank Decl. ¶¶ 8, 11–12, 15; Lochner Decl. ¶¶ 7, 10–11, 13–14. In many cases, the views these individuals have formed and expressed are the result of personal experiences they encountered or are likely to encounter. Flynn Decl. ¶¶ 12–14, 16–18; Adcock Decl. ¶¶ 8, 12–13; Verdeyen Decl. ¶¶ 12–14, 16–18; *see also, e.g.*, Plank Decl. ¶ 13 (discussing incident where tennis coach for another school who is a transgender, biological male used a women's locker room and changed in front of young girls); Koznek Decl. ¶ 13 (discussing incident in school district where transgender, biological male, while using girls' locker room, "'twerked' in the faces of several girls and engaged in other attention seeking behavior"); Verdeyen Decl. ¶ 11 (expressing concern about transgender, biological male joining her sorority where a transgender, biological male joined another sorority at her university). The YAF members have also organized or participated in public events promoting these views and fear consequences if they do so. *See, e.g.*, Adcock Decl. ¶¶ 12–13; Flynn Decl. ¶¶ 12–14; Verdeyen Decl. ¶¶ 13–14.

To date, the members of FAU, YAF, and MFL and their children have engaged in these speech activities without becoming the subject of any investigatory or disciplinary proceedings. Flynn Decl. ¶ 15; Jensen Decl. ¶ 14; Koznek Decl. ¶ 17; Verdeyen Decl. ¶ 15; Plank Decl. ¶ 16; Lochner Decl. ¶ 12; *see also* K.R. Decl. ¶ 30; Simpson Decl. ¶¶ 22–23; A.R.S. Decl. ¶ 34; A.K. Decl. ¶ 30–32; Zwahlen Decl. ¶¶ 26–27; H.K. Decl. ¶ 38; T.P. Decl. ¶¶ 14–25, 38; T.Z. Decl. ¶¶ 23–24, 29–30; Casebolt Decl. ¶¶ 49–50. Absent the Final Rule, these individuals would continue to express views on gender identity issues and organize and promote events advancing biologically

accurate views on these matters; however, now they are deterred from doing so out of a reasonable fear of being the subject of investigatory and disciplinary proceedings upon the Final Rule taking effect. Flynn Decl. ¶¶ 12–13, 16–18; Adcock Decl. ¶¶ 8, 12–13, 16–17; Jensen Decl. ¶¶ 15, 17; Koznek Decl. ¶¶ 18–19; Verdeyen Decl. ¶¶ 12–14, 16–18; Plank Decl. ¶¶ 17–18; Lochner Decl. ¶ 15–16. Thus, allowing the Final Rule to take effect will violate the free-speech rights of members of Young America's Foundation and the children of members of Moms for Liberty.

As noted above, Defendants have the burden to show their content-based speech restriction is narrowly tailored to serve a compelling interest. *See Kennedy*, 597 U.S. at 530. Defendants have no compelling interest in limiting the speech of those who disagree with their stated views on transgender ideology, even if Defendants claim offense at such speech. *See generally Matal v. Tam*, 582 U.S. 218, 243 (2017) ("Giving offense is a viewpoint."); *303 Creative*, 600 U.S. at 595 ("Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive."). Defendants also cannot claim an interest in civil-rights enforcement, even if Title IX really did authorize the Final Rule. *303 Creative*, 600 U.S. at 592; *Telescope Media*, 936 F.3d at 755. The usage of biologically correct pronouns is not discrimination under Title IX. *See Meriwether*, 992 F.3d at 511.

Furthermore, to the extent Defendants have any legitimate interest at all, the Final Rule is not narrowly tailored. Instead, the Final Rule goes in the opposite direction. It takes every possible step to ensure that speech disfavored by Defendants' is chilled as it only cites a "stray remark" as an example of something that does not violate the Final Rule. *See* 89 Fed. Reg. at 33,516. In other words, everything except the most fleeting comments is covered. This is far from a narrowly tailored approach. Therefore, the Final Rule is unconstitutional.

IV. The Final Rule is arbitrary and capricious

Arbitrary and capricious regulations are unlawful. An agency acts arbitrarily and capriciously when it: "(1) entirely fails to consider an important aspect of the problem, (2) offers 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 of the product of agency expertise, (3) fails to base its decision on consideration of the relevant factors, or (4) makes a clear error of judgment." *N.M. Health Connections v. Dep't of Health & Hum. Servs.*, 946 F.3d 1138, 1162 (10th Cir. 2019). Furthermore, "one of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). And when an agency departs from a prior policy, it must provide a "more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Furthermore, while the APA requires agencies to "take into account any serious reliance interests created by the prior policy," "present and continuing reliance" requires an especially detailed analysis. *Am. Petroleum Inst. v. Dep't of Interior*, 81 F.4th 1048, 1060 (10th Cir. 2023) (cleaned up). Such analysis must consider costs, which are a "centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015).

a. The Final Rule offers an implausible explanation for agency action

Defendants offer an explanation for their decision that is so implausible that it could not be ascribed to a difference in view of the product of agency expertise. Defendants state, "the Department has determined that amendments are required to fully effectuate Title IX's sex discrimination prohibition." 89 Fed. Reg. at 33,477. This explanation is implausible because the Final Rule inflicts harm on those Title IX was intended to protect (students and particularly women). For example, the Final Rule concludes that transgender students face "substantial harm" if "they are excluded from a sex-separate facility consistent with their gender identity." *Id.* at 33,819. When it comes to biological girls, however, DoE was not concerned about the harm they face when their privacy rights are violated by sharing a bathroom with a biological male. Rather, the DoE rejected the idea "that the mere presence of a transgender person in a single-sex space compromises anyone's legitimate privacy interest." *Id.* at 33,820.; *see also* Prelim. Inj. Order 34 ("The DoE has determined that the harm to the transgender student is more than the harm to the biological female."); *Carroll Indep. Sch. Dist v. Dep't of Educ..*, No. 4:24-cv-00461-O, 2024 WL

3381901, at *4 (N.D. Tex. Jul. 11, 2024) ("It seems that Defendants summarily dismissed the concerns of non-transgender students."); *Louisiana*, 2024 WL 2978786, at *18–19 (concluding Final Rule arbitrary and capricious because DoE failed to consider impact on ordinary students). The idea that the agency is "fully effectuating" Title IX by elevating only transgender individuals over the women and girls Title IX was meant to protect is implausible.

b. The Final Rule is a sharp departure from past practice

As the Court has also noted, "[t]he Final Rule is … a sharp departure from past practice without reasonable explanation" and is therefore arbitrary and capricious. Prelim. Inj. Order 37; *accord Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30–31 (2020). Throughout Title IX's history, it has never applied to gender identity or sexual orientation. As recently as 2020, DoE "stated that Title IX did not cover gender identity discrimination." Prelim. Inj. Order 37. Instead of acknowledging this departure, DoE pretends it is simply clarifying Title IX. 89 Fed. Reg. at 33,474. It is impossible to have a reasonable explanation as to why an agency is departing from past practice if the agency does not acknowledge that departure in the first place. *F.C.C. v. Fox Television*, 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* ….").

c. The Final Rule fails to consider reliance interests

When Title IX was enacted in 1972, it prohibited discrimination "on the basis of sex." At that time, Congress, DoE, the States, schools, teachers, parents, and students understood the term "sex" to mean biological sex, not gender identity. The Department maintained this understanding as it interpreted Title IX so as to permit states to distinguish between males and females with respect to "toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33, housing, *id.* § 106.32, and sports teams, *id.* § 106.42. Over more than fifty years, states have established reliance interests rooted in that understanding, which continue to this day. Under DoE established prior policy, the states constructed toilets, locker rooms, shower facilities, and housing separated by biological sex and designed with the different biological

needs of males and females in mind.

The Final Rule departs from this prior policy. It "clarifies" that "adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity causes more than de minimis harm" and is therefore prohibited under Title IX. 89 Fed. Reg. at 33,876. And DoE itself (and the sources on which it relies for its justification) assume there are more than two "gender identities." 89 Fed. Reg. at 33,820 & n.90. The Final Rule requires the States to alter their present arrangements to accommodate males with female gender identities in what had previously been female spaces, to accommodate females with male gender identities in what had previously been male spaces, and to accommodate individuals with gender identities that are neither male nor female, or which are some indeterminate combination of male and female, presumably in spaces which do not currently exist and which would need to be constructed to accommodate them. These accommodations cannot be accomplished with schools' existing sex-separated facilities.

Additional changes to state programs would be required because sports teams separated by gender identity would still be required to provide equal opportunities for males and females. 34 C.F.R. § 106.41(c). Under DoE's equal-opportunity policies, the new policy requiring sports teams to provide access on the basis of gender identity would require significant and unpredictable adjustments to programs in order to maintain the equal opportunity for males and females that is required by Title IX. Schools have already relied on DoE's prior understanding of equal opportunity to structure their sports programs, budgets, scholarships, publicity, and recruitment operations, such that males and females have equal opportunities for participation. The Final Rule completely fails to consider how the states' reliance on the prior policy affects the states' present and continuing structuring of their sports programs in these ways.

These changes would require spending state resources on new and modified facilities, additional equipment, and perhaps entirely new organizational models. The Final Rule does not acknowledge any of this, let alone adequately explain it. Rather, the Final Rule states merely that "[c]ompliance with proposed § 106.31(a)(2) may require updating of policies or training

materials, but would not require significant expenditures, such as construction of new facilities or creation of new programs." 89 Fed. Reg. at 33,876. This is implausible. Far from the "more detailed justification" that is required under the APA, the department offers a flat denial of any significant costs as a result of the rule. DoE's denial without explanation does not meet APA requirements.

In contrast to what DoE has done here, the Supreme Court requires agencies to undertake a serious analysis of reliance interests. *Regents*, 591 U.S. at 33. Agencies that change a longstanding policy—that are not "writing on a blank slate"—must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* And the agency must do so even if it does not believe those reliance interests are legally protectable. In *Regents*, the Department of Homeland Security (DHS) asserted that the reliance interests at issue were not "legally cognizable" and did not confer "substantive rights" because they depended on the continuance of an illegal program. *Id.* at 1913. But the Court stated it did not believe that "such features automatically preclude reliance interests." *Id.* Such factors "are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review." *Id.*

The Final Rule suffers from the same flaws as the DHS rule in *Regents*. It does not acknowledge any reliance interests of the states in continuing to separate their facilities and sports teams by biological sex, even to deny their importance. And its terse denial of costs to regulated entities rejects many comments submitted by the public, *see, e.g.*, Ohio Comment Letter at 16, ECF No. 1-3, without explaining in any way why educational institutions will not incur significant costs when they are forced to make alterations to their facilities and sports teams in order to comply with the rule. DoE's failure to explain the effects the rule would have on the States' reliance interests based on fifty years of policy is arbitrary and capricious.

It also ignores the reliance interests of K.R. and members of Plaintiff Organizations who have long attended public schools governed by a Title IX standard formulated to protect

women. Having committed their academic and athletic careers to these schools, the government is now changing the bargain by forcing them to share intimate spaces with males, compete against males in women's sports, speak against their faith and consciences, and stay silent on important social issues involving gender identity. Changing schools is no simple task, particularly since the Final Rule takes all public schools and many private schools off the table. These students and their families will have no choice but to expend substantial time, energy, and resources to find educational and athletic opportunities that respect the inherent differences between males and females and their constitutional rights.

CONCLUSION

The Court has already found Plaintiffs are likely to succeed on the merits on a number of their claims. *See generally* Prelim. Inj. Order. The only thing to have changed since the Court entered that order is that more courts have rejected Defendants' arguments in support of the Final Rule. *See, e.g.*, *Dep't of Educ. v. Louisiana*, No. 24A78, 2024 WL 3841071 (U.S. Aug. 16, 2024) ("[A]ll Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity."); *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109, *2 n.2 (W.D. Okla. July 31, 2024) (collecting cases). Plaintiffs request that the Court now turn its preliminary injunction into a permanent one, enter judgment for Plaintiffs, and vacate the Final Rule.

Respectfully submitted this 26th of August, 2024.

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