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

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

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"But…*Bostock*!"[1] Defendants wield the case as if it's a magic wand that makes anything they do fine, no matter how unconstitutional, unlawful, or absurd it is. But this attempted justification doesn't change the truth: the Department of Education issued an unlawful Rule, which will fundamentally transform every public school in the country. Fortunately, courts across the country (including this one) have seen through their perverse arguments and enjoined the Rule everywhere that it's been challenged. All that is left is to end it for good, and this court should to just that. The Court should grant final judgment in Plaintiffs' favor and vacate the Rule.

ARGUMENT

I. All Plaintiffs have Standing

This Court has already found the States have standing because "Plaintiff States have laws pertaining to students' privacy and separation of students by their biological sex" and because the "Rule interferes with their sovereign right to create and enforce their own laws, imposes administrative costs and burdens, and requires Plaintiff States to redesign or reconfigure their physical facilities." Prelim. Inj. Order at 13. Nothing has changed since then, and Defendants do not challenge the States' standing. As only one party must have standing, the Court can end its analysis there and move on to the merits. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023).

Regardless, all Plaintiffs have standing. Defendants argue K.R. and the Organizational Plaintiffs lack a sufficient injury to challenge § 106.10 or the hostile-environment definition in § 106.2 because the Rule does not injure their members or place their members under a credible threat of punishment. That is wrong. First, multiple courts—including this one—have concluded that the Rule inflicts not just an injury, but an irreparable one, to the First Amendment and privacy rights of students and teachers. Second, Defendants ignore this Circuit's standard for a First Amendment pre-enforcement challenge under the *Walker* factors,

[1] *Bostock v. Clayton Cnty.*,590 U.S. 644 (2020).

which Plaintiffs easily satisfy. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc). Third, Defendants' attempt to divide the challenged provisions of the Rule is disingenuous given how the provisions interact with each other and in light of the overwhelming body of case law concluding preliminarily that the challenged provisions permeate the entire Rule.

A. Prior court rulings recognize that Private Plaintiffs have standing

Article III requires is (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent," as well as (2) "a causal connection between the injury and the conduct complained of," and (3) that it is "likely … that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). This Court has already determined Plaintiffs meet this test. Prelim. Inj. Order at 12–16.

B. The Rule harms Private Plaintiffs' privacy interests

Defendants insist § 106.10 is just a "recognition that Title IX prohibits a school from discriminating against someone 'simply for being transgender," Gov't Br. at 12–13, and claim K.R. and the Organization Plaintiffs will not suffer any concrete injury from that "recognition," so they lack Article III standing to challenge § 106.10. That is a recasting of the same argument rejected by the Supreme Court, this Court, and many others.

Plaintiffs will suffer injury to their privacy interests if the Rule is implemented. K.R. has already encountered males in the girls' restroom. *See* Pls.' Br. at 11. Because of the lack of privacy, she would not use the restroom at all during the school day. This unbearable (and unjust) situation went on for months until Oklahoma law remedied the school's harmful policy—but the Rule would preempt state law. *See* 89 Fed. Reg. at 33,541. School locker rooms, restrooms, and showers offer little privacy. *See, e.g.*, A.R.S. Decl. ¶ 32; T.P. Decl. ¶ 9; Zwahlen Decl. ¶ 19.[2] If

[2] Plaintiffs have submitted declarations, which are outside the administrative record, for the purposes of establishing standing and to aid the Court in determining scope of relief. *See Lujan*, 504 U.S. at 561.

the Rule is implemented and males are admitted to female spaces, K.R. and other students will again suffer such indignity and threats to their safety. That deprives students of educational opportunities. *Cf. Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 295 (W.D. Pa. 2017) ("[T]he use by students of school restrooms is part and parcel of the provision of educational services covered by Title IX …"). Such a deprivation meets the "constitutional minimum" necessary for standing. *Lujan*, 504 U.S. at 560.

As to traceability, Defendants claim that § 106.10 is not the cause of Plaintiffs' injuries when it comes to "the bounds of permissible sex separation under Title IX." Gov't Br. at 12. This argument asks the Court to "put the merits cart before the standing horse." *Walker*, 450 F.3d at 1093. "For standing purposes, [courts] accept as valid the merits of [the plaintiffs'] legal claims." *F.E.C. v. Cruz*, 596 U.S. 289, 298 (2022). Plaintiffs contend that § 106.10—not just § 106.31(a)(2)—will cause schools to open girls' private facilities and opportunities to males who identify as girls. Section 106.10 is an overarching redefinition of *sex-based discrimination*. As Plaintiffs explained, the new definition will fundamentally change how the nation's schools operate, from locker rooms to athletic opportunities. Pls.' Br. at 10–12. And the Supreme Court rejected Defendants' argument that § 106.10 is "merely a straightforward application of the Supreme Court's decision in *Bostock*," *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *5, *1 n.1 (11th Cir. Aug. 22, 2024), that causes no harm in schools' sex-specific spaces and programs. *See Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507, 2509–10 (2024) (per curiam); *accord Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024). And in any event, the Court has to "assume that on the merits the plaintiffs would be successful in their claims." *West Virginia ex rel Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1137 (11th Cir. 2023) (cleaned up).

C. Defendants misunderstand First Amendment standing

Plaintiffs have also shown injury to their First Amendment rights based on chilled speech. In advancing this standing argument, Defendants cite the general standard for demonstrating an Article III injury. *See* Gov't Br. at 22, 25, 34–37. But this ignores the First Amendment context and fails to address the controlling test for associational standing.

While all plaintiffs must satisfy the requirements of Article III, in the First Amendment context, particularly a chilled speech claim, "the issue of standing becomes 'particularly delicate.'" *Rio Grande Found. City of Santa Fe*, 7 F.4th 956, 959 (10th Cir. 2021) (quoting *Walker*, 450 F.3d at 1088). This is because the "injury is inchoate." *Id.* (quoting *Walker*, 450 F.3d at 1088). Under the Tenth Circuit's "relatively relaxed" test for First Amendment pre-enforcement challenges, id., standing "is not supposed to be a difficult bar for plaintiffs to clear," *Peck v. McCann*, 43 F.4th 1116, 1133 (10th Cir. 2022). Because of "[t]he nature of First Amendment rights" and "the importance of these rights," a plaintiff can satisfy its burden through a "rather attenuated injury." *Rio Grande Found. v. Oliver* ("*Oliver*"), 57 F.4th 1147, 1160 (10th Cir. 2023) (quoting Wright & Miller, 13A Fed. Prac. & Proc. § 3531.4 (3d ed.)). These principles appear nowhere in Defendants' brief, meaning Defendants get it wrong on step one.

Assessing standing in chilled-speech claims, the Tenth Circuit considers three factors: (1) "evidence that in the past [members of the plaintiff organizations] have engaged in the type of speech affected by the challenged government action"; (2) evidence "stating a present desire, though no specific plans, to engage in such speech"; and (3) "a plausible claim that they presently have no intention to do so because of a credible threat that the [regulation] will be enforced." *Walker*, 450 F.3d at 1089 (emphasis omitted); *see also City of Santa Fe*, 7 F.4th at 959. Because of the "relatively relaxed standard for an injury-in-fact on a chilled speech claim," a party may be able to satisfy the Article III standing requirement "without meeting all the *Walker* factors." *Oliver*, 57 F.4th at 1161.

By expanding the reach of "sex-based discrimination," § 106.10 harms Plaintiffs by chilling protected speech, burdening religious exercise, and otherwise infringing on First Amendment rights. These harms are compounded by the Rule's new definition of sex-based harassment, which turns even purely verbal conduct into potential hostile-environment harassment. *See infra* II.B–II.D. Such deprivations of First Amendment rights are independently an injury-in-fact traceable to both § 106.10 and § 106.2. *Walker*, 450 F.3d at 1088; *accord Alabama*, 2024 WL 3981994, at *6; *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1114–15 (11th Cir. 2022).

Defendants do not dispute that Plaintiffs have chilled their speech—the first two *Walker* factors—at least as to speech on the topic of gender ideology. Nor could they, given the numerous declarations showing just that. *See* K.R. Decl., Dkt. 25-4 at ¶¶ 25–29; T.P. Decl., Dkt. 25-8 at ¶¶ 14–16, 18–25, 37–38; Zwahlen Decl., Dkt. 25-9 at ¶¶ 25–27, 31; Flynn Decl., Dkt. 25-10 at ¶¶ 7, 9–13; Flynn Supp. Decl. ¶¶ 7, 8, 9, 12 (attached as Ex. 1); Adcock Decl., Dkt. 25-11 at ¶¶ 8, 10–13; Adcock Supp. Decl. at ¶¶ 8, 9, 10, 13 (attached as Ex. 2);Jensen Decl., Dkt. 25-12 at ¶¶ 8, 11, 13, 15; Koznek Decl., Dkt. 25-13 at ¶¶ 8, 12, 14–16, 18; Verdeyen Decl., Dkt. 25-14 at ¶¶ 9, 12–14; Plank Decl., Dkt. 25-15 at ¶¶ 8, 11, 15, 17; Lochner Decl., Dkt. 25-16 at ¶¶ 7, 10–11, 15; Casebolt Suppl. Decl. at ¶ 9 (attached as Ex. 3); H.K. Suppl. Decl. at ¶¶ 4–11, 27 (attached as Ex. 4). So, the only dispute is whether the Plaintiff Organizations and K.R. satisfy the third *Walker* factor: a credible threat of enforcement.

This factor requires only that K.R. and Plaintiff Organizations demonstrate "a plausible claim that they presently have no intention to [express their views] because of a credible threat that the [regulation] will be enforced." *Walker*, 450 F.3d at 1089 (emphasis omitted). It has a subjective and objective component. *City of Santa Fe*, 7 F.4th at 960. Defendants do not dispute the subjective component. *See* K.R. Decl., Dkt. 25-4 at ¶ 31; T.P. Decl., Dkt. 25-8 at ¶ 38; Zwahlen Decl., Dkt. 25-9 at ¶ 31, 31; Flynn Decl., Dkt. 25-10 at ¶ 18; Flynn Supp. Decl. ¶¶ 7, 8, 9, 12; Adcock Decl., Dkt. 25-11 at ¶ 17; Adcock Supp. Decl. ¶¶ 8, 9, 10, 13; Jensen Decl., Dkt. 25-12 at ¶ 17; Koznek Decl., Dkt. 25-13 at ¶ 19; Verdeyen Decl., Dkt. 25-14 at ¶ 18; Plank Decl., Dkt. 25-15 at ¶ 18; Lochner Decl., Dkt. 25-16 at ¶ 16. Because of the relaxed standard governing First Amendment standing inquiries and keeping in mind that the standing inquiry assumes Plaintiffs are right on the merits, the objective component is reviewed with a "gloss" and K.R. and the Plaintiff Organizations need only demonstrate that as to her and the members "deterrence is *plausible*." *City of Santa Fe*, 7 F.4th at 960 (emphasis added). In any event, for four reasons, K.R. and Plaintiff Organizations satisfy the objective component.

First, the Rule is clearly intended to compel schools to change or enforce their policies so as to both prohibit speech the Rule deems harmful to transgender individuals and to compel

speech, specifically pronoun and name usage, preferred by transgender individuals. Given the subjective nature of "gender identity," 89 Fed. Reg. at 33,809 (defined to mean a "sense of their gender"), each school will be required to let individuals define harassment for themselves. The funding strings and threat of federal investigation show Defendants are serious.

Second, Defendants have taken an active role in cases involving speech on gender identity, sex stereotypes, and transgender issues, making it more than plausible that they will continue to force their preferred views onto K.R. and members of Plaintiff Organizations. *See Tennessee*, 2024 WL 3453880, at *1 (discussing attempt by DOE to compel pronoun use under Title IX through guidance documents); 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) (contending teacher can trigger Title IX liability for avoiding 'preferred' pronouns); 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) (arguing school policy requiring teachers to use gender-neutral titles rather than preferred honorifics and pronouns creates hostile environment); *cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) ("[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974))). Moreover, fellow students offended by member speech on issues of gender identity, sex stereotypes, and transgender issues can bring enforcement actions through their school or Defendants. *See Driehaus*, 573 U.S. at 164 (credibility of threat of enforcement is "bolstered" when "any person with knowledge of the purported violation [can] file a complaint"); *see also* 34 C.F.R. § 100.7(a)-(c).

Third, schools already have Title IX coordinators and investigation and disciplinary policies in place to address other rules promulgated under Title IX. Accordingly, schools already have daggers pointed at those whose speech is now considered to be "discrimination" on par with questioning whether the races are truly equal; they need not adopt an elaborate scheme to pursue action against members who do not conform.

Finally, and most importantly, this Court has already recognized that Defendants' assurances that they will respect First Amendment rights is hollow. *See* Prelim. Inj. Order at 31–33. For instance, the preamble to the Rule identifies 'misgendering' a transgender individual as causing more than *de minimis* harm, triggering the threshold for hostile environment harassment. *See* 89 Fed. Reg. at 33,516. Plus, the Rule is vague, and, as this Court noted, the Department canoe explain "what a parent should tell their child about the limits of legal speech at their schools on the topic of gender identity or sexual orientation under the Final Rule." Prelim. Inj. Order at 33. It is "to the policy's considerable discredit" that if the attorneys "can't tell whether a particular statement would violate the policy, it seems eminently fair to conclude the school's students can't either." *Speech First, Inc.*, 32 F.4th at 1121–22.

Defendants' inability to explain what speech is allowed belies their claim that Plaintiffs' chilled speech is merely unjustified "self-censorship." Gov't Br. at 23–25. This conclusory attack on Plaintiffs' standing "put[s] the merits cart before the standing horse," *Walker*, 450 F.3d at 1093, which this court cannot do, *see supra* I.B. And in any event, the argument fails for the same reasons as Defendants' merits arguments—reasonable people will think twice before speaking as Plaintiffs wish to speak. *See infra* II.B.

Defendants say Plaintiffs cannot reasonably fear sanction because they themselves were not previously "accused … of harassment based on the gender-identity-related speech described in their declarations." Gov't Br. at 24. If the Rule took effect, the declarants would reasonably fear sanction for the kind of speech they plan. The Rule says "misgendering" can be harassment, 89 Fed. Reg. at 33,516, and celebrates punishing students for saying, "there are only two genders," *id.* at 33,504 (capitalization omitted). Students and teachers' speech must conform, or risk investigation and discipline for sex-based harassment. And the Rule is murky (perhaps intentionally) about what avoids the expansive new definition of harassment, what kind of

speech is discrimination based on "gender identity," "sex stereotypes," etc., and how schools can impose discipline while respecting the First Amendment. *See infra* III.B. The vague nature of the Rule demonstrates that Plaintiff Organizations and K.R. have ample reason to fear enforcement. *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) ("chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing"). Plaintiffs' fears are objectively plausible. That is enough for standing under *Walker*.

Defendants also say that the new definition does not objectively chill speech because some schools previously had similar anti-harassment policies in place. Gov't Br. at 24–25. To be sure, it is likely that some of the nearly 100,000 public schools in the United States have overly broad harassment policies. But Defendants mischaracterize many of those it cites.[3] And FAU, YAF, and MFL have thousands of members, so broad policies from a handful of schools wouldn't change the analysis—associational standing requires only one member who would have standing to sue.

D. Defendants' other arguments are unavailing

To dispute causation, Defendants argue the Rule doesn't "impose penalties or sanctions *on students*," it merely "imposes obligations *on regulated entities*," *i.e.*, schools. Gov't Br. at 23 (emphases added); *see id.* at 12, 25. That is nonsense—a claimant does not have to be a regulated party to challenge agency action under the APA. *See Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv.*

[3] For example, Defendants cite a University of Utah policy that tracks the language of the new Rule and went into effect on August 1, 2024—the effective date of the Rule. So rather than being evidence of a pre-existing broad harassment policy, it's instead evidence of a school implementing an overly broad policy *based on the new Rule*. Univ. of Utah, Rule R1-012A: Non-Discrimination Rule (Effective Date: Aug. 1, 2024), https://perma.cc/Z9TJ-N4QE. Likewise, the Department cites a Colville, Washington school district policy that requires "*substantial[]* interfer[ence] with a student's education" or a level of intimidation and threat absent from the Rule. *See* Colville Sch. Dist., Policy No. 3207, Prohibition of Harassment, Intimidation, or Bullying (Revised Nov. 15, 2023), bit.ly/3zApH5j.

Sys., 144 S. Ct. 2440, 2459 (2024) (applying "… the APA's 'basic presumption' that anyone injured by agency action should have access to judicial review').

The Court should reject the sophistic idea that the Rule isn't what prohibits Plaintiffs from speaking. For purposes of this case, Plaintiffs' concern is not that schools will adopt policies that exceed what federal regulations require, but that schools will adopt exactly what the regulations require—speech codes that violate the First Amendment. If what a student wants to say is deemed "harassment" under the Rule, the school must prohibit her from saying it on pain of all its federal funding. Defendants cannot avoid responsibility for violating First Amendment rights because schools do the dirty work. Again, the court must "accept as valid" that the Rule "unconstitutionally burdens speech." *Cruz*, 596 U.S. at 298.

E. All Plaintiffs have standing to challenge the Rule in full.

As a last-ditch attempt to narrow Plaintiff Organizations and K.R.'s standing to challenge the Rule, Defendants attempt to divide Plaintiffs' First Amendment claims into separate claims. *See* Gov't Br. at 24–25, 34–37 (attempting to separate §§ 106.10 and 106.2 from § 106.31(a)(2) when arguing standing). This is really a repackaging of their merits and severability arguments, addressed *infra* III.C, and the court must assume for purposes of standing that Plaintiffs succeed on the merits. Nor is this how Plaintiffs opted to plead their claims. Also, for two reasons, Defendants' preferred approach is not practical. First, as recognized by this Court and several other district courts, the gender identity, sex stereotypes, and hostile environment harassment provisions permeate the entire Rule. Prelim. Inj. Order at 53 at 40; *see Alabama*, 2024 WL 3981994, at *8–9 (describing §§ 106.10, 106.2, and 106.31(a)(2) as "central provisions that appear to touch every substantive provision of the Rule" (internal quotation marks omitted)); *Tennessee*, 2024 WL 3453880, at *4–5. Second, the three provisions work together to force the result that members of the Plaintiff Organizations and K.R. are not free to voice their views on matters of gender identity, sex stereotypes, sexual orientation, and transgenderism and are not free to use biologically accurate pronouns.

* * *

For these reasons, the Court should find all Plaintiffs have standing and may challenge the entire Rule.

II. The Rule is Unlawful and Should be Set Aside

The standing arguments from Defendants are ultimately unserious and are designed to distract the court from a clearly unlawful Rule that they cannot defend on the merits. The Rule is unlawful for multiple reasons. If the court finds for Plaintiffs on even one of those reasons, the entire Rule should be vacated.

A. The Rule violates the major questions doctrine

1. The major questions doctrine applies

The Rule is invalid because DoE attempted to usurp the role of Congress and settle an issue of significant political and economic importance without clear Congressional authorization. That is, the Rule flunks under the major questions doctrine. This Court found as much, devoting several pages to a detailed analysis explaining why. Prelim. Inj. Order at 24–26. Several other courts have come to the same conclusion. *See, e.g.*, *Louisiana v. U S Dept of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786, at *13–15 (W.D. La. June 13, 2024); *Tennessee v. Cardona*, No. CV 2: 24-072-DCR, 2024 WL 3019146, at *14 (E.D. Ky. June 17, 2024); *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109, at *6–7 (W.D. Okla. July 31, 2024). One would expect Defendants to address those concerns in their brief but instead they attempt to downplay the legal infirmity by tucking their analysis into a few pages near the end of their brief and misrepresenting the doctrine. Gov't Br. at 37–38.

First, Defendants argue, that the major questions doctrine only applies when an agency bases a regulation on an "ancillary" provision of law. Gov't Br. at 37. This is not a serious argument. The major questions doctrine applies when agencies attempt to promulgate a Rule that is unprecedented or is of massive economic or political significance. *West Virginia v. EPA*, 579 U.S. 697, 721–23 (2022); *see also Oklahoma*, 2024 WL 3609109, at *6 ("[T]he major questions doctrine applies where an agency claims to discover in a long-extant statute an unheralded power to … make decisions of vast economic and political significance." (cleaned up)).

This Court held that whether every teacher, student, and school in America should be forced to "accept an individual's subjective gender identity regardless of biological sex," whether males should be allowed in female locker rooms and restrooms, and what criteria should schools use to determine gender identity were major questions of "vast economic and political significance." Prelim. Inj. Order at 25–26. Defendants do not even try to dispute this. Nor could they. No one can deny that the balance of gender identity with biological sex—particularly in schools and sports—is an important issue of earnest and profound nationwide debate. In addition, many states have passed or proposed laws ensuring privacy in men's and women's restrooms, locker rooms, or overnight travel or to protect girls' sports. *See, e.g.*, Kan. Stat. Ann. 60-5603 (Supp. 2023); Utah Code Ann. § 53G-6-902; Wyo. Stat. Ann. § 21-25-102(a); Wyo. Stat. Ann. § 21-25-102(b).[4]

The is important because the doctrine also applies when, as here, the agency attempts to interfere with an area "that is the particular domain of state law." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021); *Fed. Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 353–54 (1941). While Defendants argue that the Rule does not intrude on the States legal "domain," Gov't Br. at 37, education is generally regulated by the States and this Rule is unprecedented in how much power it usurps from states in the realm of education. The Rule would dictate who gets to play on the JV girls' basketball team, how kindergarten teachers teach pronouns (regardless of their sincerely held religious beliefs), which restrooms elementary school children can use, and who gets to undress in front of high school girls. For the federal government to try and control every minute element of education is unprecedented. *Alabama Ass'n of Realtors*, 594 U.S. at 765.

Defendants' alternate argument that the doctrine does not apply is that "if the States are unhappy with any of the Title IX's requirements" prescribed by the Rule, "they may 'defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments.'" Gov't

[4] *See also* Katie Barnes, *Transgender Athlete Laws by State: Legislation, Science, More*, ESPN (Aug. 24, 2023), https://tinyurl.com/uapsv4p2.

Br. at 37 (some internal quotation marks omitted) (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 579 (2012)). By suggesting the States should give up billions of dollars in federal funding for doing nothing more than keeping their laws and policies in place, Defendants effectively concede that those laws and policies are incompatible with the Rule. This is exactly what the major questions doctrine is designed to prevent.

The major questions doctrine dooms the *entire* Rule. Courts do not parse regulations and determine if there was Congressional approval for one part if another part is invalidated, nor is it practical to do so here. *See infra* III.B. It is the agency's job to show it had Congressional approval for the action it took. Here, the Rule attempts to fundamentally reorder the nation's education system by (1) conditioning education funding on incorporating gender ideology into the entire K-12 education system, (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 are significant political issues. Defendants' changes also raise serious concerns over the First, Fifth, and Fourteenth Amendment rights of individuals within schools. These are the type of "important subjects" that "must be entirely regulated by the legislature itself." *West Virginia*, 597 U.S. at 737 (Gorsuch, J., concurring).

To be sure, *Bostock* did not apply the major questions doctrine, but *Bostock* did not involve agency action. So, the doctrine did not apply in that case. This case obviously involves agency action. And there is no doubt that the unprecedented nature of the action makes it a major questions doctrine case.

2. The Rule conflicts with Title IX

The major questions doctrine clearly applies here, so Defendants must show clear Congressional authorization—not just plausible Congressional authorization—for the Rule. *West Virginia*, 597 U.S. at 722–23. In Plaintiffs' First Brief, they detailed the numerous ways that clear authorization does not exist, but Defendants ignore much of it. For example, Defendants

do not address the history of Title IX, Prelim. Inj. Order at 1–2; the plain text of the statute, Pls.' Br. at 10; Prelim. Inj. Order 17–18; the dictionary definitions of "sex," Pls.' Br. at 10; Prelim. Inj. Order 17–18; or DoE's own prior position, Pls.' Br. at 12, Prelim. Inj. Order at 4. They do not explain how *any* of this clearly authorizes the Rule.

The Rule's new gender-identity mandate is ultimately inconsistent with a fair reading of the statutory text. Neither the Rule's definition of sex-based discrimination, 34 C.F.R. § 106.10, nor its new type of discrimination for "more than *de minimis* harm" based on gender identity, *id.* § 106.31(a)(2), is lawful. To defend the redefinition of sex-based discrimination, § 106.10, Defendants argue that "sex-based discrimination" occurs any time schools consider sex, so "gender-identity discrimination is sex discrimination even under" the ordinary "binary understanding of sex." *See* 89 Fed. Reg. at 33,802. Gov't Br. at 12, 13–14. That cannot be. While § 106.10's definition hinges on assuming any distinction that notices sex is consequently sex-based discrimination, § 1686, the rest of the statutory context, and longstanding regulations foreclose that assumption. Defendants' reading cannot account for distinctions long-accepted under Title IX—from dormitories and showers to sports and P.E. classes.

Title IX's text differs from Title VII. As *Bostock* observed, the phrase "sex discrimination" implies "a focus on differential treatment between the two sexes as groups." 590 U.S. at 659. Title IX was entitled "Prohibition of Sex Discrimination," Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 373, and "Sex Discrimination Prohibited" was the original heading for its core provision (now § 1681(a)). A group-based understanding explains the many provisions providing for comparable treatment of men and women as groups. *E.g.* 20 U.S.C. § 1681(a)(8); 34 C.F.R. §§ 106.32(b), 106.33, 106.34(b)(2), 106.37(c).

And even assuming Title IX uses a but-for causation standard, *see* Gov't Br. at 13–14, context forecloses applying *Bostock*'s any-consideration-of-sex formula. After all, if every consideration of sex were sex-based discrimination (as *Bostock* says of Title VII), Title IX would have to prohibit sex-specific "living facilities," sports, and restrooms. But that's not viable. Title IX's nondiscrimination provision, 20 U.S.C. § 1681(a), "must be read in … context" and construed

to fit "the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365, 371 (1988) (courts must accept an interpretation that is "compatible with the rest of the law"). Here, a nearby provision states: "[N]othing [in Title IX] shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This rule of construction shows that § 1681(a) itself allows sex distinctions.

Defendants treat § 1686's rule of construction as just another exception to 1681(a). *E.g.*, Gov't Br. at 4; 89 Fed. Reg. at 33,818. But § 1686 specifies that Title IX cannot "be construed" to prohibit "separate living facilities for the different sexes." And Congress titled § 1686 an "[i]nterpretation" principle. *Id.* That "reinforces what the text's nouns and verbs independently suggest," *Dubin v. United States*, 599 U.S. 110, 121 (2023)—that § 1681(a) allows some sex distinctions, including to preserve sex-specific spaces. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221–24 (2012) (explaining title-and-headings canon). Section 1686 is not an exception, but an interpretive command.

Defendants concede as much later, saying § 1681(a) allows the regulations to provide for sex-specific "toilet, locker room, and shower facilities." Gov't Br. at 16. If § 1686 were an exception from § 1681(a)'s non-discrimination rule, then the 1975 regulations could not have provided for sex-specific "toilet, locker room, and shower facilities" unless these private facilities count as "living facilities." *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,139–43 (June 4, 1975) ("1975 rulemaking"). To specify one exception is to exclude others. Scalia & Garner, *supra*, at 107–11. But the Rule says these do not count as living facilities subject to § 1686. E.g., 89 Fed. Reg. at 33,816, 33,821. The Department cannot have it both ways. To read § 1686 as the interpretive rule it is, one must read Title IX to allow some biological distinctions between males and females, as the regulations have done since 1975.

Defendants contrary reading is unpersuasive. To be sure, the Rule says it takes the word "sex" to mean biological sex. 89 Fed. Reg. at 33,802; *see* Gov't Br. at 14–15. But when § 106.10

defines "sex-based discrimination," it elevates gender identity, sex stereotypes, and other characteristics to the same level as sex. Not even *Bostock* justifies that. *Bostock* did not give gender identity equal billing with sex or create new protected classes. But the Rule does. If gender identity and sex must receive the same treatment, as § 106.10 requires, schools cannot separate locker rooms *or* P.E. classes based on gender identity or based on sex. Either way, there would be discrimination.

To support transplanting *Bostock* onto Title IX, Defendants argue that "Title VII, too, contains statutory exceptions" and can protect privacy. Gov't Br. at 15. But Title IX's provisions are more than "exceptions" to the nondiscrimination rule; they govern its interpretation (§ 1686) and reflect the shared understanding (including in 1972) that recognizing sex differences for privacy and sports is not discrimination (*e.g.*, 34 C.F.R. §§ 106.33, 106.34, 106.41(a)–(b)). Moreover, the only Title VII provision Defendants cite—Title VII's "bona fide occupational qualification" provision—is unlike Title IX's § 1686. Gov't Br. at 15. The BFOQ provision says certain distinctions "shall not be an unlawful employment practice." 42 U.S.C. § 2000e-2(e). Unlike § 1686, that is an exception to the general rule.

The Rule's new form of discrimination in 34 C.F.R. § 106.31(a)(2) is also unlawful. First, the new provision turns Title IX into a disparate-impact statute—but only for gender identity. Title IX requires "intentional discrimination," not disparate impact. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *Horner v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 692 (6th Cir. 2000). The "*de minimis* harm" provision recognizes that long-recognized distinctions, like restrooms and showers, are generally permissible. But as applied to someone who is transgender, these same distinctions turn out to be unlawful discrimination. The agency lacks authority to expand Title IX liability to cover disparate impact. And even if it did, the agency has never admitted the change—that, too, is arbitrary and capricious.

Defendants say this new type of discrimination properly "effectuat[es] Title IX's plain text." Gov't Br. at 16. It doesn't. Section 106.31(a)(2)'s final sentence reveals what is really at

stake: the only sex distinctions that cause cognizable harm are those that "prevent[] a person from participating … consistent with the person's gender identity."

Defendants deny giving "preferential treatment to transgender students," saying this is just "an example of separation or differentiation that 'subject a person to more than *de minimis* harm on the basis of sex." Gov't Br. at 18. As a further example, Defendants argue a sex-specific dress code could fit the new form of discrimination "if girls are harmed." *Id.* (cleaned up). But even if dress codes are also amenable to as-applied "more than *de minimis* harm" claims, only gender identity gets guaranteed access to the new form of discrimination. That elevates gender identity *above* sex, and it is unlawful. And a related case, the agency treated the provision as exclusive to gender-identity-based harms, saying § 106.31(a)(2) does not "kick in" unless the alleged harm is "based on gender identity." Transcript, *Carroll ISD v. Dep't of Educ.*, No. 4:24-CV-00461-O (July 8, 2024), at 89:21–24 (attached as Ex. 5). Now Defendants say otherwise. When the agency's own counsel cannot agree on what the provision means, it is arbitrary and capricious for lack of reasoned explanation.

On top of that, § 106.31(a)(2) illogically carves out exceptions where (according to the agency), sex-based harm is *allowed*. *See* Gov't Br. at 17. It is unreasonable to conclude that Congress meant to subject students to legally cognizable injury in dorms across the nation, while mandating that girls share locker rooms with boys and wrestle against them in P.E. class just to avoid those same legally cognizable injuries to those boys. Defendants have no explanation for § 106.31(a)(2)'s bizarre patchwork, opting instead to blame Congress, as if Congress enacted an incoherent statute. Gov't Br. at 17. But absurdity shows the agency's interpretation is wrong, not that Congress enacted incoherent text. *See* John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2458–59 (2003); *e.g.*, *United States v. Fitzgerald*, 906 F.3d 437, 442–43 (6th Cir. 2018). For five decades Title IX has recognized sex-specific spaces, but in Defendants' view, these have been discrimination all along.

To justify the many other provisions allowing sex-specific facilities and programs, Defendants state women's restrooms, for example, are discriminatory when applied to males

who identify as female but not males who identify as males because "a cisgender male suffers no sex-based harm from being excluded from a comparable women's restroom." Gov't Br. at 17 (citing 89 Fed. Reg. at 33,818). That disparate-impact logic is impossible to square with the *Bostock* theory that any sex distinction causes harm. And this conclusion is also completely unsupported. While the Rule cites medical groups as justification, *e.g.*, Gov't Br. at 17–18 & n.4; 89 Fed. Reg. at 33,819, these groups did not hold these novel views about gender in 1972. Their recent policy views cannot change the public understanding of sex discrimination in Title IX's text in 1972. Indeed, these groups can and often do change their minds. Under the Department's logic, Title IX's meaning would change too. But Title IX's text did not peg Title IX's protections in 1972 to the evolving views of medical advocacy organizations in 2024.

Even more fundamentally, Defendants' logic ignores the key injury here: students—particularly girls and women—losing access to *their own* sex-designated spaces. After all, a middle school girl does not care whether the male who enters her shower has an "internal sense" that he is a boy, girl, or something else. That female middle schooler suffers the same privacy loss either way; she loses the same educational benefit (safe access to sex-specific spaces) either way. *See supra* I.C. There is no textual basis in Title IX to make the harm women suffer when losing their privacy turn on how someone else identifies. Defendants knew this, but declared these sex-based privacy concerns are not "legitimate." 89 F.R. at 33,820.[5]

At its heart, the major questions doctrine means courts should pause before concluding an agency can settle important issues of profound and sincere nationwide debate by executive fiat. An agency cannot "arrogat[e] to itself power belonging to [Congress]." *Biden v. Nebraska*, 143 S. Ct. at 2373.[6] The Department has attempted to do so with this Rule. As it attempts to settle a

[5] *See, e.g.*, EPPC Scholars Comment, AR268439 ("[Title IX's sex based distinctions] recognize that women's safety is often threatened by the intrusion of males into private spaces where women are sexually vulnerable."); Tenn. Att'y Gen. et al. Comment, AR259365–79 (the agency has not adequately accounted for the risks these new regs could pose to student and faculty safety).
[6] In *Bradford v. United States Department of Labor*, 101 F.4th 707, 725–28 (10th Cir. 2024), the Tenth Circuit articulated the major questions doctrine test somewhat differently. This articulation

debate that is raging like a wildfire across the country, the Rule threatens to change Title IX "from one sort of scheme of regulation into" a "different" one. *West Virginia*, 597 U.S. at 728 (cleaned up). This sort of fundamental change is contrary to what Congress authorized.

B. The Rule is contrary to the Constitution

1. The Rule is improper under the Spending Clause

The Rule violates the *Dole* factors and is improper under the Spending Clause. As Plaintiffs explained, Pls.' Br. at 17–20, the plain text and history of Title IX put schools on notice that they could not discriminate between biological men and biological women. For over fifty years, everyone accepted that Title IX allows sex distinctions to ensure equal educational opportunities. This Court carefully analyzed the issue and agreed. Prelim. Inj. Order at 27–29.

Defendants do not respond to this. They recite the *Dole* factors but do not explain *why* the Rule does not violate them. Gov't Br. at 35. They do not explain how the plain text of Title IX "unambiguously" means schools must treat students according to their gender identities, sexual orientations, abortion statuses, sex stereotypes, etc. instead of their biological sexes. Pls.' Br. at 17–18. Nor do they explain how schools could have knowingly accepted that gender identities change, gender identities are completely subjective, and the school may not be able to ask about gender identities. Pls.' Br. at 17–18. How would a state official "clearly understand" this condition when she accepted federal funding? Pls.' Br. at 18 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). Defendants do not say. Nor do they explain how the Rule is consistent with achieving equal opportunities for women and girls when it destroys equal opportunities for women and girls. Pls.' Br. at 19.

Defendants also fail to explain how Title IX put States and schools on notice of the implications of the Rule. To accept Defendants' argument, one would have to accept that the text and history of Title IX put schools on notice that (1) schools cannot prevent biologically male teachers and students from using the same restrooms and showers as their female students

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does not change the result here. *Cf. Alaska v. United States Dep't of Educ.*, No. 24-1057-DDC-ADM, 2024 WL 3104578, at *10 n.5 (D. Kan. June 24, 2024).

and classmates; (2) schools must police their students' and teachers' pronoun usage, lest another student's education be "impacted" by being referred to with a biologically correct pronoun; (3) schools must allow boys to wrestle girls in gym class; or a myriad of other things the Rule requires. The bottom line is the Rule sets conditions on federal funding that Congress did not include and the States did not accept. That violates the Spending Clause.

All Defendants do is repeat the Rule's conclusion that it is "consistent with Title IX's text and structure and do[es] not expand or modify the funding conditions set by Congress" because *Bostock* prohibits discrimination because of a person's gender identity under Title VII and extrapolate that to Title IX. Gov't Br. at 35-36. But as other courts have noted, "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." *Tennessee*, 2024 WL 3019146, at *15. In the 1970s and now, "sex" meant biological sex, not "sexual orientation," "sex stereotypes," "pregnancy" or any of the other terms Defendants try to force into the definition. And Defendants stretch this conclusory statement far beyond *Bostock*. The Rule incudes abortion, gender stereotypes, and a myriad of other issues in the definition of "sex," far more than what the *Bostock* court considered. 590 U.S. at 651. It also reaches places *Bostock* expressly left untouched, such as rest rooms and locker rooms. *Id.* at 681 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind."). *Bostock* does not change the terms of funding offered by Congress and accepted by the States, and it certainly does not do so in the way the Rule suggests.

In explaining why the Rule does not implicate the major questions doctrine, Defendants suggest the States may 'defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments.'" Gov't Br. at 37 (some internal quotation marks omitted) (quoting *NFIB*, 567 U.S. at 579). This perfectly explains why the Rule violates the Spending Clause. In *NFIB*, the Court held Congress had exceeded its authority under the Spending Clause by attaching conditions to Medicaid funding that "crossed the line distinguishing encouragement from coercion." 567 U.S. at 579 (quoting *New York v. United States*, 505 U.S. 144, 175 (1992)). Importantly, the Court considered whether Congress "threatened to withhold those

States' *existing* Medicaid funds" if the states did not accept the new conditions. *Id.* at 579–80 (emphasis added). The Court held "the conditions are properly viewed as a means of pressuring the States to accept policy changes," which is unconstitutional. *Id.* The conditions "serve[d] no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act." *Id.* The same is true here. "Sex" in Title IX has never meant "gender identity," "sexual orientation," "sex stereotypes," or any of the other terms Defendants cram into the definition. By changing the meaning of Title IX, the Rule threatens millions of dollars in state educational funding unless the schools accept the new, sweeping policy changes. This is "much more than relatively mild encouragement—it is a gun to the head." *Id.* at 581 (internal quotation marks omitted). The Rule therefore is improper under the Spending Clause.

Finally, Defendants argue the focus of a Spending Clause claim should be on the statute, not on the agency's regulations. Gov't Br. at 35. That doesn't help the Rule when it is contrary to statute. Defendants do not attempt to argue that Congress in the early 1970s meant "sex" to mean "gender identity," "sexual orientation," or "sexual characteristics" or anything other than biological sex. "Sex" in Title IX was biological sex. Prelim. Inj. Order at 27. If Congress cannot change the conditions of federal funding beyond what the States accepted or pressure States into accepting new policy changes, *NFIB*, 567 U.S. at 579, then an executive agency certainly may not change the meaning of the statute to impose conditions Congress did not intend and the States did not accept. Agencies cannot add conditions to a Spending Clause statute—"Congress itself must have spoken with a 'clear voice.'" *Kentucky v. Yellen*, 54 F.4th 325, 354 (6th Cir. 2022) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *Colorado v. U.S. Dep't of Just.*, 455 F. Supp. 3d 1034, 1056–57 (D. Colo. 2020) (discussing and applying this principle).

And if a challenge to a regulation is fundamentally a challenge to "the statute that authorized it," *Cruz*, 596 U.S. at 301, the Rule is nonetheless invalid. Reading Title IX to condition all education funding on a never-before-expressed gender-identity mandate would raise "grave constitutional concerns." *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 966

(5th Cir. 2023). To avoid that, the Court should reject the Rule. *Cf. Kentucky v. Yellen*, 54 F.4th at 347 (explaining that clear-statement rule applies as a matter of statutory interpretation).

The bottom line is the Rule flagrantly violates the Spending Clause and is unconstitutional.

2. The Rule violates the First Amendment by compelling speech

The Rule compels speech, as Plaintiffs have shown. Pls.' Br. at 21–25. The Rule all but acknowledges that it requires students and employees to use requested pronouns and to affirm a non-binary and non-biological understanding of gender. *See, e.g.*, 89 Fed. Reg. at 33,504, 33,508–09, 33,516. The Rule unlawfully compels K.R. and organizational members to affirm gender ideology and prevents them from speaking their own beliefs.

To illustrate using Defendants' words, see Gov't Br. at 28, "repeated or acute refusal to use pronouns consistent with a student's gender identity" will have to be investigated as harassment. *See also* 34 C.F.R. § 106.44 (requiring Title IX coordinator to respond to any conduct that "reasonably may constitute sex discrimination"). That's exactly the kind of speech at issue—members will "repeatedly" "refus[e] to use pronouns consistent with a student's gender identity." To do otherwise would be to speak the government's preferred message—that's compelled speech—and, for many, to violate their religious beliefs—that's a problem under the Free Exercise Clause and RFRA. *See* Pls.' Br. 4–6. For this, they will be investigated and likely even punished, silenced, or sanctioned. The Rule cannot surmount the First Amendment's near per-se bar on such compulsion. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023).

3. The Rule violates the First Amendment because it requires viewpoint discrimination

The Rule also discriminates based on viewpoint. *See* Pls.' Br. 27–30. The new definition of hostile-environment harassment lowers the standard to any time an experience "limits" an individual's participation or benefit from an educational program. It is triggered by subjective offense that can be based on § 106.10's undefined litany of new characteristics. And Defendants make clear that for gender identity, they are only concerned with offense to people who espouse

Defendants' views; they require and even celebrate silencing those who disagree, such as anyone who wants to say "there are only two genders." This viewpoint-based restriction is unconstitutional and incompatible with equal educational opportunity.

In line with their prior positions, Defendants admit that "misgendering" could violate the Rule if it is "persistent" and "limits another student's … performance." 89 Fed. Reg. at 33,508–09; *see Texas v. Cardona*, 4:23-cv-00604-0, 2024 WL 3658767, at *4–5 (N.D. Tex. Aug. 5, 2024) (discussing 2021 agency guidance documents). Whether one chooses sex-based or gender-identity-based pronouns, the choice "conveys a powerful message." *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); *cf. United States v. Varner*, 948 F.3d 250, 256 (5th Cir. 2020) (pronouns can "convey … tacit approval of [a] litigant's underlying legal position"). Defendants have made clear which message is acceptable and which is not. That is viewpoint discrimination.

In defense, Defendants insist there's no problem because the Rule says, "whether verbal conduct constitutes sex-based harassment is necessarily fact-specific." Gov't Br. at 27. Everything is fact-specific in antidiscrimination law. That's one reason the Supreme Court crafted the *Davis* standard to steer clear of the First Amendment. The Rule replaces that standard with an admittedly "broader" one.

Defendants also argue schools can "take remedial measures" that are consistent with the First Amendment. Gov't Br. at 28 (quoting 89 Fed. Reg. at 33,516). They offer no suggestion on what those remedial measures might be. Nor could they credibly do so—the Rule blessed barring a speaker from campus unless he refrained from speaking against gender ideology, *see* 89 Fed. Reg. at 33,686, and the government has said elsewhere that an accommodation like refraining from using pronouns or using surnames only is inadequate, *see, e.g.*, Br for the U.S. as Amicus Curiae, *Kluge v. Brownsburg Cmty. Sch. Corp. Corp.*, No. 21 2475 , 2021 WL 5405970, at *27–30 (7th Cir. Nov. 8, 2021). The very possibility of having one's speech labeled as offensive, "let alone hate or bias," is impermissibly coercive in a school setting. *Speech First, Inc.*, 32 F.4th at 1124. And

even assuming schools endeavor to respect the First Amendment, uncertainty is chilling on its own. *See* Pls.' Br. at 23–24.

4. The Rule violates the First Amendment because it is also vague and overbroad

The Rule is also vague and overbroad. *See* Pls.' Br. at 25–27. Its expansive harassment definition and incorporation of a list of undefined new characteristics that count as sex discrimination threaten First Amendment rights by prompting schools to overregulate for fear of liability. This vagueness and overbreadth chill substantial amounts of protected speech.

Defendants claim that the Rule provides sufficient clarity because it lists "specific and required elements" for actionable hostile-environment harassment. Gov't Br. at 29–30 (citing 89 Fed. Reg. at 33,506). But as discussed above, what the elements condone and restrict is unclear. For example, the Rule requires "*some impact* on [an individual's] ability to participate or benefit from the education program or activity." 89 Fed. Reg. at 33,511 (emphasis added). "Some impact" has no limiting principle. Schools will have to investigate complaints for minor incidents or comments that would be best handled within the classroom. Equally disconcerting, the Rule fails to limit its reach to on-campus or closely tied activities. The harassment standard can sweep in online activities and even conduct occurring outside the country. *See* 89 Fed. Reg. at 33,532. This gives students and employees no reprieve from censorship.

Defendants brush off the Rule's failure to clarify undefined concepts, claiming "gender identity" needs no definition because it "is now well understood." Gov't Br. at 30 (quoting 89 Fed. Reg. at 33,809). What the Rule does say about gender identity "offers no guidance whatsoever. Arguably worse, it suggests that this term of vital importance can be subjectively defined by each and every individual[.]" *Tennessee*, 2024 WL 3019146, at *24.

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Defendants' broader justifications are equally unavailing. *See* Gov't Br. at 26.

First, Defendants insist there cannot be a First Amendment problem because the Rule's new harassment standard "mirrors" one applied in Title VII cases. *Id.* That does not help. Title VII harassment liability, too, can "impose[ ] content-based, viewpoint-discriminatory

restrictions on speech." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596–97 (5th Cir. 1995). Indeed, the harassment definition promulgated in 2020 was spurred in part because the prior standards failed to adequately protect First Amendment rights on campus. 85 Fed. Reg. at 30,036, n.88 (the guidance "led to infringement of rights of free speech and academic freedom of students and faculty"). First Amendment issues are worse here, where a broader standard combines with the Rule's radical new expansion of "sex discrimination" in § 106.10. Indeed, the Title VII context illustrates Plaintiffs' objectively reasonable fear of repercussions for speaking their beliefs. The administration is already on record saying employers violate Title VII when they allow employees to use honorifics based on gender identity instead of sex, *see* Pls.' Br. at 14–15, or "misgender" co-workers, EEOC, Proposed Enforcement Guidance on Harassment in the Workplace, 88 Fed. Reg. 67,750 (Oct. 2, 2023), https://perma.cc/VY3Y-RCE8.[7] That's the kind of free-speech restriction at issue here, and the Rule incorporates this guidance and applies it to Title IX. 89 Fed. Reg. at 33,516.

Moreover, Title VII's standard reflects the reality that "schools are unlike the adult workplace and … children may regularly interact in a manner that would be unacceptable among adults." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651–52 (1999). Defendants rely on *Davis*, Gov't Br. at 26, but the Rule abandons *Davis*'s interpretation of Title IX's text in favor of a "broader" definition of unlawful harassment, 89 Fed. Reg. 33,498. *Davis* repeatedly discusses the "severe and pervasive" requirement and takes seriously First Amendment concerns. Indeed, the Department adopted *Davis* in 2020 because the First Amendment demands a "narrowly tailored" harassment definition to avoid censoring protected speech. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial*

[7] Just this month, the EEOC filed an enforcement lawsuit alleging a hostile work environment based in part on "misgendering." *See E.E.O.C. v. Starboard Group, Inc.*, No. 3:24-cv-02260-NJR (S.D. Ill. Oct. 1, 2024). In its press release announcing the lawsuit, the agency stated that "employers must … prohibit misgendering and 'deadnaming' their transgender employees," just as they "should not tolerate the use of racial slurs." Press Release, EEOC Sues Two Employers for Sex Discrimination (Oct. 1, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-two-employers-sex-discrimination-0.

Assistance, 85 Fed. Reg. 30,026, 30,142 (May 19, 2020); *accord id.* at 30,033 (saying *Davis* "helps ensure that Title IX is enforced consistent with the First Amendment."). And the Supreme Court in *Davis* warned against "impos[ing] more sweeping liability than" it "read Title IX to require." 526 U.S. at 652. Citing *Davis* undermines Defendants.

Defendants suggest similar definitions of hostile environment harassment have been "upheld" in the Title VII context. Neither, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), nor *Throupe v. University of Denver*, 988 F.3d 1243, 1251 (10th Cir. 2021), "upheld" anything against a First Amendment challenge. These cases did not address a First Amendment claim, so they are not precedential on that issue. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (a case is not precedent for a question that "merely lurk[ed] in the record, neither brought to the attention of the court nor ruled upon"). In any event, even the Title VII standard addressed in *Harris* required a greater showing than is required under the Rule. Combined with the Rule's redefinition of sex-based discrimination and refusal to define key terms, that standard would also infringe on First Amendment freedoms.

Defendants also point to the Rule's disclaimers against violating the First Amendment and RFRA. *See* Gov't Br. 26, 27–28, 32. Such platitudes are meaningless in practice. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 334 (5th Cir. 2020) (vacating and remanding denial of preliminary injunction in challenge to speech policy with savings clause); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183 (6th Cir. 1995) (disregarding savings clause in harassment policy). The lowered harassment threshold and expansive definition of sex-based discrimination infringe on First Amendment rights, so school policies that satisfy the Rule will do the same.

Under RFRA, K.R. and FAU members have shown that the Rule burdens their exercise of religion. *See* Pls.' Br. 13–15. The Department insists it will enforce the Rule to respect religious exercise, but Plaintiffs are not required to wait until they are disciplined to challenge the unlawful provisions of the Rule. *Cf. Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 944 (N.D. Tex. 2019). On the existing record, the Rule's expansive definitions and gender-ideology-affirming requirements burden their religious exercise. Defendants cannot satisfy RFRA's narrow-

tailoring obligation. So, the Court should issue injunctive relief to protect K.R. and affected members of FAU from the Rule's unlawful burden on their exercise of religion.

C. The Rule is arbitrary and capricious

Plaintiffs argued that the Rule is arbitrary and capricious because it gave an implausible explanation for agency action, did not explain departure from past practice, and did not consider their reliance interests. Pls.' Br. at 30–32. This Court agreed. Prelim. Inj. Order at 33–38. Defendants offer no substantive response.

Implausible explanation. First, Defendants do not respond to Plaintiffs' argument that the Rule's "explanation is implausible because the Final Rule inflicts harm on those Title IX was intended to protect (students and particularly women)." Pls.' Br. at 31. Plaintiffs specifically cited the privacy interests of biological women and girls, which the Rule deems less important than the privacy interests of transgender students. *Id.*; *see also* Prelim. Inj. Order at 34.[8] Defendants insist they held hearings and considered comments, Gov't Br. at 4–5, but fail to explain how they arrived at the conclusion that the "harm [including infringement on privacy] to the transgender student is more than the harm to the biological female," Pls.' Br. at 31 (quoting Prelim. Inj. Order at 34).[9] This constitutes waiver. *Femedeer v. Haun*, 227 F.3d 1244, 1255 (10th Cir.

[8] And they submitted comments on the same. *See supra* note 4.

[9] A growing body of evidence contradicts the claim that unquestioning social affirmation is necessary to avoid harming students who identify as transgender. The Cass Report—the largest and most comprehensive review of medical evidence related to gender dysphoria in children and adolescents—publicized that there is no reliable evidence that "social transition," such as using pronouns, restrooms, or dressing as the opposite sex, improves mental health for children.

Worse still, evidence suggests social transition *harms* children by increasing the odds of persisting in a transgender identity, taking hormones to interfere with normal development, and even surgery. Hilary Cass, The Cass Review: Independent Review of Gender Identity Services for Children and Young People: Final Report (April 2024), available at https://cass.independent-review.uk/wp-content/uploads/2024/04/CassReview_Final.pdf ; Ruth Hall, et al., Impact of social transition in relation to gender for children and adolescents: a systematic review, 109 Archive Disease Childhood (April 9, 2024), https://bit.ly/4dM2LyM; Morandini, et al., Is Social Gender Transition Associated with Mental Health Status in Children and Adolescents with Gender Dysphoria?, 52 Archive Sexual Behavior 1045 (April 4, 2023). Although the Cass Report and associated systematic reviews were published after the comment period closed, the

2000) ("Failure to press a point (even if it is mentioned) and to support it with proper argument and authority forfeits it...." (quoting *Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1212 (7th Cir.1993))); *Walker v. Progressive Direct Ins. Co.*, 472 F. App'x 858, 862 (10th Cir. 2012) (unpublished) (same). The Court may also treat this as a concession that Defendants cannot provide a reasonable explanation for why the privacy interests of biological males who identify as females should be placed above those of biological females, who Title IX was explicitly designed to protect.

Past Practice. Next, Defendants offer no response to the argument that the Rule is arbitrary and capricious because it is a sharp departure from past practice without reasonable explanation. Pls.' Br. at 32. It abandons fifty years of interpretation of Title IX. By insisting it is "clarifying" the statute, the Rule is pretending that it is not a sharp departure from past practice, and "[i]t 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." *Id.* (citing *F.C.C. v. Fox Television*, 556 U.S. 502, 515 (2009)). This also constitutes waiver. *Femedeer*, 227 F.3d at 1255; *Walker*, 472 F. App'x at 862.

Reliance interests. Finally, when an agency does engage in a sharp departure from past practice, at a minimum it must consider the reliance interests of those affected. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020). Defendants argue the States failed to identify their reliance interests in the former (correct) interpretation of Title IX. Gov't Br at 32–33. But the States *did* identify their interests, extensively. They have built physical facilities, including rest rooms and locker rooms, with the understanding that "sex" means biological sex. Pls.' Br. at 32–33. The Rule requires them to reconfigure these facilities. *Id.* at 9 (citing Earl and Cawvey declarations); Prelim. Inj. Order at 14. They have also passed laws and policies based on this understanding. "Changing these policies will cost time and money." Pls.' Br. at 9. Further, Private Plaintiffs identified their own reliance interests, *id.* at 32–33, which Defendants ignore in

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Department cannot claim to have been ignorant of these highly publicized developments when it published the Rule that same month.

their brief in the same way DoE ignored them in the Rule. That is, they ignored them completely. This also constitutes waiver. *Femedeer*, 227 F.3d at 1255; *Walker*, 472 F. App'x at 862. Interestingly, by pretending that States and Private Plaintiffs never identified their reliance interests, Defendants implicitly concede they never considered them. That admission demonstrates the Rule is arbitrary and capricious for failure to consider reliance interests.

For these and the reasons discussed in Plaintiffs' brief, the Rule is arbitrary and capricious and must be set aside.

D. The Rule violates Section 1688

Nothing in Defendants' response changes the fact that Congress prohibited the Department from requiring schools to provide any benefit related to abortion, 20 U.S.C. § 1688, and the Rule does just that, *see* 89 Fed. Reg. at 33,779 (requiring schools to provide benefits such as modifications, leaves of absence, "extra time to complete an exam or coursework," "access to online or homebound instruction," and more so that students may obtain abortions). Although this Court did not decide on that issue in the preliminary injunction phase, another court has found that the Rule's abortion protections are likely unlawful. *See Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342, at *9-10 (N.D. Tex. July 11, 2024).

III. Plaintiffs are entitled to vacatur, a permanent injunction, and declaratory relief

The Rule is unlawful in a variety of ways. The only thing left for this Court to do is vacate it—all of it. Defendants try to incoherently slice and dice the Rule in a desperate attempt to salvage any part of it. The Court should not entertain that request.

A. Vacatur is not limited to the parties.

As both this Court and Defendants correctly recognized, the APA authorizes court to vacate unlawful agency action under 5 U.S.C. § 706, and regulations "cannot be vacated as to only one party." Prelim. Inj. Order at 44 (quoting *Texas v. Cardona*, No. 4:23-CV-00604-O, 2024 WL 2947022, at *47 (N.D. Tex. June 11, 2024)); Gov't Br. at 45. *See also Regents of the Univ. of Cal.*, 591 U.S. at 9 (unlawful agency action must "be vacated"); *Corner Post*, 144 S. Ct. at 2460 (Kavanaugh, J., concurring) ("[T]he APA authorizes vacatur of agency rules."); *Dine Citizens*

Against Ruining Our Env't v. Haaland, 59 F.4th 1016, 1048 (10th Cir. 2023) (recognizing vacatur under the APA is "common, and often appropriate").

Defendants' "newly minted position" that vacatur is not universal would "revolutionize long-settled" administrative law and is both "novel and wrong." *Corner Post*, 144 S. Ct. at 2461 (Kavanaugh, J., concurring). They present no binding precedent to support this proposition. In fact, they remarkably rely on *New Mexico Health Connections v. Department of Health & Human Services*, Gov't at 57, even though the court specifically rejected this very argument:

> Finally, the Court cannot, *in an intellectually honest manner*, limit vacatur of the rules to the state of New Mexico. The Court does not know how a court vacates a rule only as to one state, one district, or one party. The main Department of Justice lawyer advised that he was not sure if the department had ever asked for relief to be limited to one state before doing so in this case and did not know of anyone else in the United States asking for such relief.

340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) (emphasis added).

Vacatur operates on the Rule itself—not the parties—by denying it legally operative effect and treating it as void as to all affected parties. *See Career Colls. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024) (vacatur under § 706 "should not be party restricted"); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 52 (D.D.C. 2020) (Jackson, J.) (vacatur of a rule "for everyone" is normal APA remedy (quotation marks omitted). Once vacated, a rule is "treated as though it had never happened." *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 2 n.1 (2023) (Kavanaugh, J., statement respecting denial of application for stay). Because vacatur removes the legal source of the agency's action, the agency cannot legitimately act unlawfully as to anyone. *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1131 (2020). DoE, like any agency, "'literally has no power to act'—including under its regulations— unless and until Congress authorizes it to do so by statute." *Cruz*, 596 U.S. at 301 (2022) (cleaned up).

The courts of this Circuit have long operated under the understanding that vacatur is not party-limited. *See, e.g., Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1155 (10th Cir. 2016) (universally vacating invalid regulation); *Jordan v. Pugh*, No. 02–cv–01239–MSK–KLM, 2007 WL 2908931, *4 (D. Colo. Oct. 4, 2007) ("[I]t is proper to enjoin all application and enforcement

of the regulation."); *see also Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("the ordinary result" of a successful APA claim is that "the rules are vacated," not "their application to the individual petitioners is proscribed" (quotation marks omitted)).

Defendants argue that 5 U.S.C. § 706 doesn't authorize remedies at all, but that "weak" argument overlooks the plain text of § 706, "which authorizes courts to 'compel agency action unlawfully withheld or unreasonably delayed'—unmistakably a remedy." *Corner Post*, 144 S. Ct. at 2467 (Kavanaugh, J., concurring) (quoting 5 U.S.C. § 706(1)). Defendants also argue that universal vacatur transgresses the scope of traditionally-circumscribed equitable remedies, but this too ignores that "Congress did in fact depart from that baseline and authorize vacatur" through § 706. *Id.*

B. This Court should also grant declaratory and injunctive relief

Along with vacating the Rule, the Court should issue declaratory relief and permanent injunctive relief prohibiting DoE from imposing its erroneous reading of Title IX through future agency action. *See, e.g.*, *Texas v. Cardona*, No. 4:23-cv-00604-0, 2024 WL 3658767, at * 50 (N.D. Tex. 2024) (vacating agency action and granting declaratory and injunctive relief because "the Department has enacted similar guidance in the past and may attempt to do so again"). This is not DoE's first attempt to impose a gender-identity mandate on Title IX; it is likely to try again. *See supra* I.C; *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 585–87 (6th Cir. 2024) (discussing history of the Department's actions on gender identity and Title IX); *Texas v. United States*, 201 F. Supp. 3d 810, 816–17 (N.D. Tex. 2016) (finding unlawful DoE's 2016 "Dear Colleague" letter on gender identity). Though future attempts are not presently final agency action that would independently trigger the APA's waiver of sovereign immunity, a reviewing court can declare DoE's legal position unlawful and issue whatever relief is necessary. *See* 5 U.S.C. § 703.

Declaratory relief is appropriate. Both the Declaratory Judgment Act and the APA contemplate declaratory relief that establishes the legal rights of interested parties. 28 U.S.C. § 2201(a); 5 U.S.C. § 703. "The existence of another adequate remedy," moreover, "does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ. P. 57. This Court

should declare that the Rule and its interpretation of Title IX is unlawful, unconstitutional, and in contravention of the law.

A permanent injunction is also appropriate. Plaintiffs seeking a permanent injunction must demonstrate (1) "that it has suffered an irreparable injury"; (2) "that remedies at law, such as monetary damages, are inadequate to compensate for that injury"; (3) "that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted"; and (4) "that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). This Court already made the requisite findings, Prelim. Inj. Order at 38–39, and Defendants have not presented any new arguments for reconsideration.

C. The Court should vacate the entire Rule

This Court has already found the Rule cannot be severed because its "impermissible definition" of sex discrimination "permeates the entire rule." Prelim. Inj. Order at 40. Since this ruling, the Supreme Court has rejected the exact severance argument Defendants make here. *See Dep't of Educ. v. Louisiana*, 144 S. Ct. at 2510. In fact, no court has agreed with Defendants' severability arguments. There is no reason for this Court to be the first.

Defendants' declaration that the Rule can operate without the challenged provision is too little, too late. They ask this Court to revisit its ruling that the Rule "would operate" without § 106.10. Gov't Br. at 55. Both the Sixth and Eleventh Circuits concluded these provisions are "central," "touch every substantive portion of the Rule," and the agency "never contemplate[d] enforcement" without them. *Id.* at *20 (quoting *Tennessee*, 2024 WL 3453880, at *3–4). And the Rule's redefinition of "harassment" in § 106.20 "contravenes the Supreme Court's" ruling in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999) and "runs headlong into the First Amendment." *Alabama*, 2024 WL 3981994, at *6. Defendants do not contest that.

"[T]he ultimate determination of severability will rarely turn on the presence or absence of a severability clause." *Nasdaq Stock Mkt. LLC v. Sec. & Exch. Comm'n*, 38 F.4th 1126, 1145 (D.C. Cir. 2022). Instead, the Court "must find that the agency would have adopted the same disposition

regarding the unchallenged portion of the regulation if the challenged portion were subtracted." *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019) (brackets and internal quotation marks omitted). And the Court must find the regulation can "function sensibly without the stricken provision. *Id.* (internal quotation marks omitted). The Court may consider whether the challenged provisions have "no connection" to the remainder of the Rule and the agency analyzed them "independently," or whether the challenged provisions are "interconnected" and "intertwined" with the rest of the rule. *Id.* at 351–52.

Defendants cannot show that the Rule can function in a manner consistent with the agency's intent without the challenged provisions. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Indeed, the Rule itself links its "purpose" to the challenged provisions and traces the "[n]eed for [r]egulatory [a]ction" to eliminating gender-identity discrimination. 89 Fed. Reg. 33,476, 33,859-60. It substantially justifies its significant costs by referencing the benefits flowing from the provisions it now says can be severed. *See id.* at 33,859-63. But the Rule does not meaningfully "address[]" how it could satisfy that cost-benefit calculus without those provisions. *Ohio v. EPA*, 144 S. Ct. 2040, 2055 (2024). The Rule was "intended … to stand and fall as a whole" and sought a "single, coherent policy, the predominant purpose of which" was to expand the definition of sex in Title IX. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *see Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000) (challenged provisions are "integral"); *Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 188 (D.C. Cir. 2022) (question is whether agency would have promulgated the rule if the challenged provisions were omitted "from the outset"). Defendants cannot disclaim that purpose now. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept [] counsel's post hoc rationalizations for agency action."). Finally, "[a] decision to leave standing isolated shards of the Rule that are not specifically infirm would ignore the big picture: that it [is] shot through with glaring legal defects." *New York v. Scalia*, 490 F. Supp. 3d 748, 795 (S.D.N.Y. 2020) (cleaned up).

Defendants' insistence that *Bostock* requires the Rule makes it impossible to be "confident" that the Department would have adopted the Rule, *NFIB*, 567 U.S. at 587, "without the prohibitions" on gender-identity and sexual orientation discrimination, *Mayor of Baltimore v. Azar*, 973 F.3d 258, 292 (4th Cir. 2020) (citation omitted). *See* Gov't Br. at 25. And Defendants don't say they would have, focusing instead on whether the Rule can "operate," Gov't Br. at 55, without the challenged portion.

Further, Defendants wrongly contend that only "gender identity" in § 106.10—not any of the other topics like "sexual orientation" or "pregnancy condition"—has been challenged. *Id.* But Defendants fail to explain how any of these terms fall under the publicly understood meaning of "sex" when Title IX was enacted any more than gender identity does. *Bostock*—which addressed *only* transgenderism and homosexuality—utterly fails them here, and the Supreme Court has elsewhere rejected this argument while interpreting Title VII. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *overturned by statute* (finding exclusion of pregnancy from healthcare coverage was not sex-based discrimination under Title VII). So, Defendants have nothing on which to base their assertion that these terms fall under the definition of "sex."

Plaintiffs have consistently argued that sex means one thing—biological sex. That means any definition that reaches any further is unlawful, as this Court so found. *See* Prelim. Inj. Order at 18 (finding that "'sex' meant biological sex and not gender identity or sexual orientation"). Plaintiffs have provided examples of how including sex stereotyping, sex characteristics, and sexual orientation also threaten their First Amendment rights. *See* Flynn Supp. Decl. ¶¶ 7, 8, 9, 12; Adcock Supp. Decl. ¶¶ 8, 9, 10, 13.

That "sex discrimination" has existed in regulations for decades without being defined, Gov't Br. at 43, does not explain how schools are to implement the new definition and practically operate under the Rule. For example, if a "transgender man" (a biological female who identifies as a male) seeks leave to get an abortion, and the school administrator processing the request denies it because "men can't get pregnant," is that sex-based discrimination if the challenged provisions are struck? Does that constitute harassment? What documentation (if

any) would the school be allowed to request? *See* Fed. Reg. at 33,779 (asking questions about an abortion may in itself violate Title IX). And if a "transgender woman" (a biological male who identifies as female) requests to use the lactation room, can the school deny access, or would doing so implicate the "sex stereotype" that only biological women can breastfeed? It is not clear what the result would be in these and a myriad of other circumstances that would arise if parts of the Rule take effect. The whole thing violates the APA, the Constitution, and the statutes it claims to interpret. Universal vacatur of the unlawful Rule—as authorized by Congress—is far more consistent with our constitutional system than what Defendants request, which is that the Court play the role of executive and rewrite the Rule to make it lawful.

D. Relief to the associations' members must extend outside the Plaintiff States.

Plaintiff Organizations are just that—organizations—not states themselves, and state lines have no inherent relationship to the scope of relief that is needed to prevent their injuries from continuing to occur. Prelim. Inj. Order at 43 ("Here, Plaintiffs include organizations with members all over the country."). Defendants *chose* to make their requirements national rather than allow individual states to decide the questions on their own. They cannot complain that their decision requires relief in all fifty states, especially when Plaintiffs in this case include national organizations.

Defendants' argument fundamentally misunderstands associational standing. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 399 (2024) (Thomas, J., concurring) ("If a single member of an association has suffered an injury, our doctrine permits that association to seek relief for its entire membership."); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 334 (1977) ("[N]either … the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context."). Defendants cite no case establishing that an association with bona fide standing must also submit evidence that numerous other members are injured. And analytically, such a rule would lead to absurd results. Associations represent their members. Yet the government might contend that Plaintiffs need to submit fifty declarations to obtain nationwide relief. Even if they had fifty declarations, Defendants could

next contend that they need a declaration for every recipient of Title IX funds covered by the injunction, or even a declaration for every school.

Under longstanding case law, associations can proceed without the participation of individual members so long as the "relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause[.]" *Warth v. Seldin*, 422 U.S. 490, 511 (1975). And when it comes to prospective relief, courts consistently recognize that there is no need for individual members to participate. *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 958 F.2d 1018, 1021 (10th Cir. 1992) (recognizing under *Warth* that associations that seek damages "would require an individualized showing by each member of the fact" but not in "cases in which an association seeks declaratory or injunctive relief").

Defendants' primary argument is that some YAF and FAU members attend schools in the Plaintiff States. Dkt. 91 at 48. This mystifying argument ignores that (1) YAF and FAU have members in other states, Hahn Decl., Dkt. 43-7 at ¶ 5 ("all fifty states"); (2) as does Moms for Liberty (M4L), Justice Decl., Dkt. 43-6 at ¶ 5 ("across the country" Casebolt Suppl. Decl. at ¶ 7; H.K. Suppl. Decl. at ¶¶ 17–19); and (3) YAF also provides speakers who can travel anywhere, Hahn Decl., Dkt. 43-7 at ¶ 11, and they too need protection from the injury they face as speakers. *Cf., Leadership Inst. v. Stokes*, No. 1:24-cv-187-DHU-JMR, 2024 WL 4298898, at *4 (D.N.M Sept. 26, 2024) (recognizing injury to association when policy "places unbridled discretion in an official to decide whether to apply the policy").

While accepting that M4L has members outside Plaintiff States, Defendants still contend that its members will not be injured by the Rule because some M4L declarants are in New York, California, and one school in Pennsylvania where transgender students already use locker and bathrooms of their choice. Gov't Br. at 61. Unmentioned by Defendants, (1) it is not just about *access* to locker and bathrooms, but the right to *discuss* these and many other topics, including pronouns, and (2) M4L has members in other states. *See* Jensen Decl., Dkt. 25-12 at ¶ 2 (Virginia); *see generally* Dkt. 72 (listing schools); Dkt. 74 (supplementing list of schools); Dkt. 80 (same).

Even if states or schools are inflicting an additional injury independent of the Rule, this Court is still capable of delivering effectual relief. As a legal matter, the challenged action need not be "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see Sierra Club v. EPA*, 964 F.3d 882, 889 (10th Cir. 2020) (recognizing that "the existence of other contributors wouldn't affect the Sierra Club's standing"); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (recognizing that Article III "demands something less than the concept of proximate cause" found in tort law (internal quotation marks omitted)). Courts can provide relief when the government's action "has a powerful coercive effect" on the "*independent* action of some third party." *Bennett*, 520 U.S. at 169 (emphasis preserved). Undoubtedly, the Rule does exactly that—even in states that are taking steps to implement portions of what the Rule strives to require everywhere. By vacating the Rule and declaring its interpretation unlawful, this Court would be giving some "effectual relief," "however small" the practical significance may be. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. SEIU Local 100*, 567 U.S. 298, 307 (2012)).

In response, Defendants rely on an unpublished Western District of Oklahoma case to assert that standing and relief are not necessarily coterminous. Gov't Br. at 61. In *Ziggy1 Corp. v. Lynch*, the DEA was enjoined from confiscating various items from smoke shops that it alleged were illegal under the Controlled Substance Act. 123 F. Supp. 3d 1310 (W.D. Okla. 2015). In finding standing at the preliminary motion to dismiss stage, the court observed that the plaintiff's showing that it met Article III was separate from the question of the scope of a damages remedies. *Ziggy1 Corp. v. Lynch*, No. Civ.-15-0715-HE, 2016 WL 4083656, at *1 (W.D. Okla. 2015) ("It may well be that plaintiff cannot ultimately identify every specific item in its inventory on a particular date, and that may impact or limit the scope of relief it might otherwise be entitled to."). The point in that case was merely that a plaintiff need not prove the complete universe of its financial injuries to establish standing.

The case has no bearing here. Plaintiff Organizations have standing and the injury that gives them standing is irreparable, so they are entitled to relief. This is not a damages case. The injury to each organization is to its members, as a complete whole. There is no "catalogue" of

financial interests that the plaintiffs must show, as there was in *Ziggyl Corp.*, with respect to its smoke shop inventory. *Cf. Vogt v. State Farm Life Insurance Company*, No. 2:16-cv-04170-NKL, 2018 WL 4937069, at *2 (W.D. Mo. Oct. 11, 2018) (citing *Ziggyl Corp.* for the unremarkable proposition that "even if damages cannot ultimately be proved, that does not mean that there was no standing to sue."). Defendants' sole case is inapposite.

CONCLUSION

The Rule is unlawful in a myriad of ways. The Court has already concluded that. Nothing has changed since that time. All that is left is to end this Rule permanently. It should not apply to anyone in any place or in any form. This Court should do what the law requires, which vacating the Rule in its entirety and providing declaratory and injunctive relief as well.

Respectfully submitted this 10th of October, 2024,

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