Texas Public Policy Foundation

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Hon. Miguel A. Cardona
Attn: Docket Operations
U.S. Deptartment of Education
400 Maryland Ave., S.W.
Washington, D.C. 20202

RE: ***Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, RIN 1870-AA16, Docket ID ED-2021-OCR-0166**

Dear Secretary Cardona:

The Texas Public Policy Foundation ("TPPF" or the "Foundation") is a non-profit, non-partisan research institute with a mission to promote and defend liberty, personal responsibility, and free enterprise in Texas and across the nation by educating policymakers with academically rigorous research, analysis, and outreach. We write to draw your attention to several legal deficiencies in the above-captioned proposal that would render the proposal unlawful and indeed unconstitutional if finalized, to explain why the proposal is bad policy, and to urge the abandonment of this fundamentally flawed rulemaking.

INTRODUCTION

Title IX pursues a critical goal in American education: ensuring that America's schools and campuses are open and safe for women just as much as for men. Success in pursuing this goal is essential for the millions of girls and women who attend our schools and for American society as a whole, which depends on the talents that these women contribute to our national life. For these reasons the Foundation strongly supports the goals of Title IX.

Much remains to be done to realize this critical goal. In particular, America's campuses all too often are unsafe for our women and girls. TPPF applauds the colleges and universities that have taken action to make their campuses secure, and we urge schools and governments across the country to emulate their example.

In crafting policies to make their campuses safe, schools face difficult choices: how do they encourage complainants to come forward to share experiences that often have been deeply

traumatic, ensure that justice is done and sexual harassment is vigorously prosecuted, and at the same time recognize the rights of accused students and school staff that are also in play? Schools have evolved a variety of approaches to answer these pressing questions. In 2020 the Department of Education (the "Department") offered its own answers to these questions. While the 2020 regulations are imperfect, the process they set forth is in many ways a sensible framework for the resolution of claims of sexual harassment, respecting as it does the interests of both complainants and respondents in disciplinary proceedings.

Now the Department proposes to replace the 2020 regulations. Unfortunately for the Department, and even more for millions of American students and school workers, the proposal moves in exactly the wrong direction: it would make our schools and campuses *less* open and safe for women while offering *less* protection to complainants and respondents alike. On top of that, it would imperil the statutory and constitutional rights of students, teachers, and staff.

The proposal would vastly expand the scope of conduct covered by the Title IX regulations; indeed, it would expand coverage beyond conduct to pure speech. The current regulations' scope draws on longstanding Supreme Court case law and carefully balances the need for robust protections against sexual harassment with the need especially among students for freedom in campus life and in the intellectual inquiry that is at the heart of education. The proposal would depart from governing case law and upend that balance, prohibiting vast yet undefined swaths of conduct and speech, including conduct and speech off campus. Yet despite the immense significance of this change, the proposal fails to offer adequate reasons for it.

At the same time, the proposal would redefine sex discrimination to include discrimination on the basis of sexual orientation and gender identity ("SOGI"). TPPF strongly urges all schools to treat all their students and employees with the respect their human dignity demands, regardless of their sexual orientation or views about their own gender. But the proposal simply errs by interpreting Title IX to extend to SOGI discrimination. Such an interpretation would raise countless concerns for schools and their students, faculty, and staff, and would make Title IX less effective at promoting educational access for women.

The proposal likewise makes sweeping amendments to the Title IX disciplinary proceedings schools must offer. The proposal would undermine the fairness and accuracy of Title IX proceedings in many ways, such as by limiting complainants' and respondents' access to evidence, by deploying burdensome and intrusive measures on respondents who have not been shown responsible for any misconduct, by allowing the same person to play the roles of both prosecutor and judge, and by arbitrarily limiting the right of appeal.

The proposal contemplates and indeed requires that schools will train their faculty, staff, and students in the Department's new vision of relationships between and among the sexes. Such trainings play a vital role in the proposal's new regulatory scheme. But the Department's own organic statute could not be clearer: it may not mandate instructional content, and its attempt to

disguise such a mandate as compliance with Title IX does not allow it to evade the statutory prohibition.

Finally, the proposal would ban protected speech in violation of the First Amendment, redefining a hostile environment and creating procedures that can only have the effect of strongly discouraging faculty, staff, and students from giving voice to dissentient views about relationships between and among the sexes. Likewise, by forcing students and school employees to conduct themselves in ways that violate their most deeply-held religious beliefs, and even to avow positions that contravene their religious beliefs, the proposal would trench upon religious liberty.

THE PROPOSAL

The proposal offers a series of more than one hundred provisions which it discusses *seriatim*; consequently the reader may find it difficult to understand how the entire proposal hangs together. But only when viewed as a whole do the proposal's vast changes to American education, and the grave harms it would inflict on millions of American female and male students appear.

We begin with the conduct the proposal would prohibit: most importantly, the creation of a "hostile environment," defined as "[u]nwelcome sex-based conduct that is sufficiently severe or pervasive that … [it] denies or limits a person's ability to participate in or benefit from the recipient's education program or activity."[1] Whether conduct causes a hostile environment is a "fact-specific inquiry" "based on the totality of the circumstances."[2]

This standard departs in three notable ways from the current regulatory text. First, under the current regulations conduct that causes a hostile environment must be "severe, pervasive, and objectively offensive"[3]—a formulation taken from Supreme Court case law—but the proposal would cover conduct that is either severe *or* pervasive, and offensiveness drops out of the question altogether. Second, currently a hostile environment is one that "effectively *denies* a person"[4] equal access, but under the proposal an environment is hostile if it "denies *or limits*" someone's participation. Third, currently a hostile environment is one in which someone loses "equal access" to the program, but under the proposal it is one in which a person loses the "ability to participate in *or benefit from*" the program. The bottom line is that the new standard for the creation of a hostile environment would sweep in much more conduct than the current standard.

Under the proposal, a hostile environment would be created by inoffensive conduct that is widespread or severe enough to limit in *any* degree a person's enjoyment of *any* aspect of a recipient's program. The proposal makes clear that the limitations it has in mind need not rise to

[1] 87 Fed. Reg. at 41569. The proposal would also prohibit quid pro quo harassment, sexual assault, dating and domestic violence, stalking, and other forms of discrimination. *Id.* at 41568-69.
[2] *Id.* at 41569.
[3] 34 C.F.R. 106.30.
[4] *Id.* (emphasis added).

the level of impeding access to the program or preventing a student from achieving a successful outcome in the program; it is enough that a student experience "more difficulty" in the program, such as by feeling anxiety or inattention in class.[5] It is difficult to see what conduct to which a complainant objects would *not* be widespread or severe enough to pass this test.

The proposal's redefinition of hostile environment would affect everyone on campus: faculty and staff but also students. Under the proposal a student who—without animus and even without knowledge that her inoffensive sex-based conduct is unwelcome—detracts in any way from another student's enjoyment of an educational program creates a hostile environment. That is so even for a student whose inoffensive conduct creates such an environment only through its aggregation with the conduct of others of which the student was ignorant.

That standard is bad enough. But because the proposal insists that whether a hostile environment is created depends on a holistic, facts-and-circumstances analysis with no bright lines in sight, no student or school can ever know that *any* sex-based conduct will not one day be deemed to have created a hostile environment. Any sex-based conduct at all—including conduct consisting of pure speech[6]—is dangerous. The proposal confirms this concern in its attempt to alleviate it, explaining that "a single request for a date … *generally* would not create a hostile environment."[7] Similarly, a "one-off comment by a student's friend that she was acting 'girly' or 'like a boy'" is "not *likely* [to] create a hostile environment"—but the Department cannot tell us for sure.[8] If the Department cannot say conclusively that a single instance of friendly banter or an invitation to a school dance does not violate Title IX, then there is no sex-based conduct that students or schools can know to be safe.

Yet even this dire picture fails to paint the proposal's expansion in its full colors. For the proposal would also permit, and even in some cases require, the imposition of burdensome and invasive measures against faculty, staff, or students upon the mere allegation that they have engaged in sex discrimination. The proposal requires a school to offer "supportive measures" to a complainant "[u]pon being notified of conduct that *may* constitute sex discrimination" before any determination of whether discrimination actually or even probably occurred.[9] Such measures, the proposal would leave no doubt, must impose any "burden" on the accused—notwithstanding the absence of any finding of misconduct—that is "necessary to restore or preserve the complainant's access to the recipient's education program or activity."[10] Such "burdens" may include forced absence from classes or campus and withdrawal from professional responsibilities, with all the harms thus entailed. Thus, the mere accusation of creating a hostile environment carries potentially

[5] 87 Fed. Reg. at 41417.
[6] *Id.*
[7] *Id.* (emphasis added).
[8] *Id.* (emphasis added).
[9] *Id.* at 41573 (emphasis added).
[10] *Id.* Because the proposal would obligate a school to offer those supportive measures that are "necessary to restore or preserve … access to the recipient's education program or activity," *id.*, schools would in some cases be *required* to burden faculty, staff, and students who have been accused of sex discrimination before any finding of misconduct.

devastating consequences for the accused. Faculty, staff, and students would therefore have powerful reasons to avoid anything that could, however improbably, form the basis for an accusation of sex discrimination under the proposal's all-things-considered test.

The upshot of all this is that faculty, staff, and especially students must navigate sex-based conduct and speech in the shadow of unknowable rules to which they must nevertheless adhere on pain of immense penalties. Such a state of affairs would prove especially deleterious for students, who for better or worse come of age and learn how to relate to members of their own and the opposite sex largely at school. This process of trial and error, so painful and awkward in the best of environments, would be impossible in the schools that the proposal would give us.

The danger of the proposal's new standards is tremendously increased by its redefinition of sex discrimination, which would now include discrimination on the basis of SOGI. Under the proposal, conduct and even speech that fails to comply with the new radical gender ideology would create a hostile environment.

While the proposal itself gives few specifics about what sort of conduct or speech might be barred under its new approach, we need not look far for additional clarity. In 2016 the Department explained, in a letter from the current head of the office tasked with enforcing the Title IX regulation,[11] that Title IX requires the use of a transgender student's preferred pronouns; that it does not allow schools to require biological men to use men's restrooms and locker rooms and vice versa; that schools offering single-sex classes must admit transgender students to classes corresponding to their gender identity; that schools operating single-sex dorms must lodge transgender students who are biologically male in the women's dorms and vice versa; and that schools, when setting up single-sex sports teams, may not "adopt or adhere to requirements that rely on … stereotypes about the differences between transgender students and other students of the … same gender identity."[12]

Faculty, staff, and students will thus be compelled, at risk of the proposal's massive penalties, to act and speak in accord with a radical ideology that many of them contest on the basis of religious belief, philosophical conviction, or plain common sense. And while the proposal leaves intact the regulatory proviso that schools need not "[r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution,"[13] it also explains that its proposed regulatory text "would sufficiently protect the constitutional rights and interests of students and employees" merely by merit of barring only conduct that is "sufficiently severe or pervasive that … it creates a hostile environment" and that is "based on sex."[14] In other words, in the Department's view there is no sex-based conduct or speech that might fall under the proposal's

[11] *Id.* at 41529.
[12] Dear Colleague Letter from Catherine Lhamon and Vanita Gupta 3-4 (May 13, 2016), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[13] 34 C.F.R. 106.6(d); *see also* 87 Fed. Reg. at 41415.
[14] 87 Fed. Reg. at 41415.

broad ban but that is immune from punishment under the First Amendment; therefore schools need not, indeed may not, make exceptions to the proposal for protected conduct or speech. The First Amendment has fallen out of the picture altogether.

How is the Department to ensure compliance with its proposed rule? Its strategy is simple: it will co-opt faculty, staff, and students to monitor each other. Under the proposal, all faculty and many staff would be required to notify the Title IX Coordinator of any fellow employee and any student whose "conduct … *may* constitute sex discrimination."[15] These faculty and staff must report their students and each other for conduct and speech that could potentially create a hostile environment. And the proposal's broad ban and facts-and-circumstances approach mean that just about all sex-based conduct and speech, including speech that even inadvertently fails to use a student's preferred pronouns, *may* create such an environment. College student employees too must play their role in the proposed panopticon: when apprised of conduct that may qualify as sex discrimination, they too must inform the Title IX Coordinator or at the very least nudge another to do so.[16] To ensure that everyone dutifully serves as the eyes and ears of the Title IX Coordinator, failure to report another person is itself deemed an infraction.[17]

To see the proposal's full ambition, it is important to understand the breadth of its scope. The text of Title IX limits the statute's reach to discrimination occurring within educational programs or activities.[18] Not so the proposal, which would reach "all sex discrimination … that is subject to the recipient's disciplinary authority."[19] Off-campus sex discrimination shall be deemed subject to a school's authority, the proposal explains, if a school disciplines for *any* conduct that occurs off-campus as between students.[20] As all schools presumably discipline for at least *some* off-campus activity (e.g., expulsion for the commission of violent crime), the proposal would mean that the whole of student life, no matter where it occurs, would fall within the ambit of the proposed rule.

The student or teacher unlucky enough to be reported to the Title IX Coordinator is not to be envied, for the process that awaits her or him is anything but fair or designed to achieve accuracy. For instance, as we discuss at greater length below, the proposed rule would foreclose access to any evidence it pleases based on its sole and unreviewable determination that the evidence is irrelevant to the final determination of whether misconduct occurred. And it would permit, and sometimes require, schools to issue gag orders that prevent parties from exposing even gross incompetence or abuse of authority by the school officials who run the disciplinary proceedings.

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[15] *Id.* at 41572 (emphasis added).
[16] *Id.* at 41572-73 (explaining that non-faculty staff who do not have leadership roles must either notify the Title IX Coordinator of conduct that may constitute sex discrimination or "[p]rovide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination").
[17] *Id.*
[18] 20 U.S.C. 1681(a).
[19] 87 Fed. Reg. at 41571.
[20] *Id.* at 41402.

The Department cannot achieve its goal of rewriting the relationships between the sexes simply through imposing new rules of conduct. To do that it must go deeper; it must not merely regulate conduct but educate faculty, staff, and especially students to believe that the norms it enjoins upon them are right. So that is what the proposal would do.

The proposal would command schools to "take prompt and effective action to end any sex discrimination," as newly defined in the proposal, and to "prevent its recurrence."[21] Because student conduct and speech can under the proposal easily create a hostile environment, schools would have no choice but to educate their student bodies about the Department's views of the proper relations between the sexes. Further, the proposal would specifically require that all employees, including student employees, receive training on what the Department now views as impermissible sex discrimination, as well as on their obligation to report non-compliant behavior to the Title IX Coordinator.[22] The proposal would also make "training and education programs" available as a "supportive measure" to be mandated for employees and students in consequence of allegations of sex discrimination even before a finding that discrimination has occurred.[23] The proposal also contemplates that the disciplinary process itself would be used to educate. As the Department explains, a prompt response to a claim of sexual discrimination "can be a valuable teaching moment, particularly with younger students,"[24] who might be made to "writ[e] or draw[] an apology" for, e.g., misgendering one of their kindergarten classmates.[25]

The Department will doubtless respond that our portrait of the proposal and its dangers is overwrought; that while the proposal does rely on open-ended standards, schools and the Department that supervises them can be trusted to use their discretion to interpret these standards to prevent harm rather than to oppress. But such a response misses the mark. For the proposal does not simply set forth open-ended standards; it also creates an existential threat—the loss of federal funding—for schools that fail to remedy sex discrimination, while it exacts no penalty from schools that trample on innocent students or others in their zeal to demonstrate compliance with Title IX. It is easy to see what schools faced with this juxtaposition will do. They will err on the side of over-enforcement at every opportunity. Faculty, staff, and students will bear the uncertainty and injustice that result.

[21] *Id.* at 41572.
[22] *Id.* at 41570.
[23] *Id.* at 41573. Further, the Title IX Coordinator would be required to "[t]ake other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity"—and the proposal expressly authorizes the extension of such measures, which presumably would consist largely of training, beyond the parties involved in a proceeding. *Id.*
[24] *Id.* at 41473.
[25] *Id.* at 41454.

DISCUSSION

I. The Proposal Arbitrarily and Unlawfully Expands Title IX's Reach.

A. The Proposal's New Definition of Hostile Environment Discrimination Is Arbitrary and Capricious.

One of the proposal's keystones is its expanded definition of "hostile environment," as discussed above. The current standard is in relevant part nearly a verbatim quotation from governing Supreme Court case law.[26] The Court crafted the formulation used as the current standard in an effort to accommodate both Title IX's objective of ensuring equal access to education and the common-sense acknowledgment that "schools are unlike the adult workplace and … children may regularly interact in a manner that would be unacceptable among adults."[27] A key part of the student experience is learning to navigate relationships with peers, including in sex-based interactions. While it is vital to keep robust guardrails in place to prevent students from injuring each other, it is also true that students need considerable freedom as they work to understand their roles as men and women and the nature of their relationships to members of their own and the opposite sex. Both the Supreme Court and Congress have recognized this basic fact, which underlies the Court's formulation on which the current regulatory definition of sexual harassment is based.[28]

The Department now seeks to abandon this formulation, but its reasons for doing so are arbitrary and capricious.

First, the Department finds liberty to depart from the Supreme Court's standard in the statutory authorization,[29] recognized by the Supreme Court in *Gebser v. Lago Vista Independent School District*, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate."[30] But the Department remarkably omits the phrase directly following its quotation from *Gebser*: the departmental authority to which the Court referred is one to issue requirements to "effectuate [Title IX's] nondiscrimination mandate … even if those requirements *do not purport to represent a definition of discrimination under the statute*."[31] Of course, "defin[ing] … discrimination under the statute" is precisely what the Department does in the proposal. *Gebser* recognized merely that 20 U.S.C. 1682 gave the Department authority to create prophylactic rules,

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[26] *Compare* 34 C.F.R. 106.30(a) (defining sexual harassment as conduct that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity") *with Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 652 (1999) (referring to "behavior [that] is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect").
[27] *Davis*, 526 U.S. at 651.
[28] *See id.* at 651-53.
[29] *See* 20 U.S.C. 1682.
[30] 87 Fed. Reg. at 41413 (*quoting Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998)) (alteration in original).
[31] *Gebser*, 524 U.S. at 292 (emphasis added).

such as mandates to file reports and assurances,[32] to ensure that schools kept their campuses free of discrimination *as defined in the statute*; it did not recognize an authority to define sex discrimination however the Department would like.

Second, the Department appears at times to believe it can abandon the Supreme Court's definition because the formula was given in a case involving money damages.[33] But the Supreme Court was entirely clear that it crafted its formula to take into account "the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored."[34] That congressional intent would hold good in the context of the instant proposed regulation just as much in the context of damages. The Department's contrary position violates Title IX as construed by the Supreme Court.

Third, the proposal explains that its new definition "will enable the Department to enforce Title IX's nondiscrimination mandate and provide more effective protection against sex discrimination in a recipient's education program or activity because" its new formula "covers a broader range of sexual misconduct than that covered under" the current definition.[35] But of course, covering a "broader range" of conduct is a virtue only if it is conduct Congress covered in the statute—and that is precisely the point in issue. To decide rationally to expand its regulatory definition of sexual harassment to match the scope of the statutory prohibition, the Department must first have an idea of what Congress meant to prohibit, and the Department offers no such idea. The failure to meet this basic requirement of rationality is arbitrary and capricious.[36]

Fourth, the proposal justifies changing "effectively denies a person equal access" to "denies or limits a person's ability to participate in or benefit from" on the basis that "a limitation on equal access constitutes a denial of benefits" within the meaning of Title IX's text.[37] But the Supreme Court, confronted with precisely the same statutory text, reasoned that Congress was concerned with ensuring equal access and that not every limitation amounts to a prevention of access, even if it makes access unpleasant or challenging.[38] The Department gives no reason to reject this conclusion.

Fifth, the proposal cites the desirability of bringing the Title IX standard into alignment with the standard for hostile work environment claims under Title VII.[39] But the Department acknowledges that schools will continue to operate under divergent standards, for the Supreme Court's standard

[32] *Id.*
[33] *See, e.g.*, 87 Fed. Reg. at 41413.
[34] *Davis*, 526 U.S. at 653.
[35] 87 Fed. Reg. at 41413.
[36] Likewise, the Department asserts that "Title IX must function as a strong and comprehensive enforcement measure to effectively address sex discrimination." *Id.* at 41414. Very true—but to apply this principle, the Department must first tell us what Congress meant by sex discrimination, and that it does not do.
[37] *Id.* at 41414.
[38] *Davis*, 526 U.S. at 651-52.
[39] 87 Fed. Reg. at 41415.

will continue to apply to claims for money damages and the hostile environment analysis must necessarily differ as between employees and students.[40] It is unclear what is to be gained by syncing up the standard for *some* conduct and claims but not for all. Further, regardless of the merits of the Department's argument where employees are concerned, it does not support the Department's decision to apply its new standard to claims of student-on-student harassment, which even the Department admits raise different considerations than claims with respect to employees and therefore will continue to be analyzed differently than hostile work environment claims. Finally, it bears noting that the Department's standard is not in fact identical to the Title VII standard, which (unlike the Department's new standard) "forbids only behavior … objectively offensive."[41]

Sixth, the proposal's omission of the requirement that unwanted conduct must be "offensive" to constitute harassment occurs without any explanation for or even acknowledgment of the omission. That is textbook arbitrariness. It is all the more inexcusable in light of the significant change the omission makes to the standard, for under the proposal students and others will be on the hook for *inoffensive* conduct and statements that nevertheless limits the enjoyment of a program's full benefits.

Seventh, and most importantly, while the proposal acknowledges the costs of its new standard to schools who will now have to take on additional work,[42] it entirely neglects to consider the adverse effects on students, teachers, and staff subjected to the proposal's new and indeterminate standard. The failure to take into account the principal cost of the proposed standard and to determine whether any benefits are worth that cost is irrational in violation of the APA.

B. The Proposal's Mandate That Schools Exercise Comprehensive Jurisdiction over Student Life Is Unlawful.

Title IX bans sex discrimination "under any education program or activity receiving Federal financial assistance."[43] The limitation of coverage to discrimination within federally-funded programs and activities is no accident; after all, Congress's primary purpose in enacting Title IX was "to avoid the use of federal resources to support discriminatory practices."[44] Further, the need for the limitation is reinforced by the fact that, as the Supreme Court has repeatedly made clear, Congress enacted Title IX pursuant to the Spending Clause,[45] which requires that conditions attached to federal funds bear some relationship to the federal project on which the funds are to be spent.[46] The limitation makes good sense as a practical matter. Schools are well-situated to fight discrimination that happens on campus and in sponsored programs such as off-campus events, but

[40] *Id.* at 41414-15.
[41] *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 81 (1998).
[42] 87 Fed. Reg. at 41414.
[43] 20 U.S.C. 1681(a).
[44] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).
[45] *See, e.g.*, *Davis*, 526 U.S. at 640.
[46] *See S. Dakota v. Dole*, 483 U.S. 203, 208-09 (1987).

they are poorly-positioned to police interactions between students not subject to the inspection and control of school officials and who may, at the time of interacting, be subject to the supervision of their parents, church staff, or other authority figures who are as well, or better, situated to help their charges understand the wrongfulness of discrimination and to regulate their conduct.

The proposal would vitiate the statutory limitation by requiring many schools to police interactions between students when they are away from campus and not participating in any school activities, even when those students are subject to the supervision of their parents or other authority figures. The proposal would define conduct occurring "under any education program or activity"[47] to include "conduct that is subject to the recipient's disciplinary authority," no matter where that conduct occurs.[48] In its preamble, the proposal fills in this concept, explaining that if a school has a "code[] of conduct that address[es] interactions, separate from discrimination, between students that occur off campus," then the school will be deemed to exercise disciplinary authority over any student-on-student discrimination occurring off campus in spaces in which its code would apply (even if its code does not cover discrimination).[49] Such a school would have an obligation under Title IX to prevent and redress such off-campus discrimination.

The proposal's aggressive interpretation of Title IX would likely make most schools responsible for sex discrimination between students wherever it occurred, including in their own homes. We believe there are very few schools which would not discipline students for at least *some* actions against fellow students (such as stealing from them or assaulting them, per the proposal's examples).[50] And a school that would discipline students for *any* off-campus action against fellow students must prevent and address off-campus sex discrimination.

The proposal's interpretation reads Title IX's limitation to federally-funded programs out of the statute. The Supreme Court has made clear that the degree of scholastic control over conduct necessary to deem that conduct "under [a particular] education program or activity" far exceeds the mere authority to impose *ex post* sanctions. For instance, in determining that an assailant's misconduct took place "under" a funded program, the Court in *Davis* relied on the funded school's "comprehensive," "custodial and tutelary" control of the assailant, which "permit[ted] a degree of supervision and control that could not be exercised over free adults."[51] By contrast, the mere ability to impose *ex post* sanctions, which is the only authority necessary to trigger coverage under the proposal's interpretation of Title IX, could and indeed often is "exercised over free adults"—for instance, by universities over their students when off campus; by employers over their employees; and even by governments over their citizens.

[47] 20 U.S.C. 1681(a).
[48] 87 Fed. Reg. at 41571.
[49] *Id.* at 41402.
[50] *Id.*
[51] *Davis*, 526 U.S. at 646.

Further, the proposal's interpretation would trench upon the intimacy of family life and upon parental rights by imposing an obligation on schools to police student-on-student interactions that occur under the supervision of students' own parents or others to whom their parents have entrusted them. Just last year, the Supreme Court recognized that "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."[52] The same could be said of off-campus conduct. But the proposal does not even recognize the vital interests that its interpretation would invade, let alone conclude that their sacrifice is warranted for whatever dubious benefits its expansion of jurisdiction may accrue. The failure to consider these important interests is arbitrary and capricious.

II. The Proposal Errs by Redefining Sex Discrimination.

The Department appears to believe its task in interpreting the phrase "on the basis of sex"[53] is a straightforward application of *Bostock v. Clayton County*.[54] But even setting aside the important textual differences between Titles VII and IX that may affect the meaning of the contested phrase,[55] the Department errs in three critical ways, as we detail below.

A. The Proposal Misinterprets Title IX to Cover SOGI.

Title VII was enacted eight years before Title IX became law and formed an important backdrop against which Congress acted in drafting and enacting the latter statute. Title VII bans employers from firing or refusing to hire a person "because of such individual's … sex."[56] Similarly, Title IX provides that no "person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[57] While the important differences between Titles VII and IX—for instance, Title IX's notable express authorization of certain distinctions between male and female students[58]—may mean Congress intended to cover *less* discriminatory conduct in Title IX than in Title VII, the similarity of the quoted language suggests that at minimum Congress intended Title IX to cover *no more than* the sort of sex discrimination that it believed Title VII banned. If it intended to enact a broader ban, surely it would have said so.

In 1972, Congress would have had no doubt that Title VII's ban on sex discrimination did not cover discrimination on the basis of SOGI. Every court of appeals to reach the issue in the 1970s interpreted Title VII in this way.[59] Indeed, it would be more than forty years until the first court

[52] *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).
[53] 20 U.S.C. 1681(a).
[54] 140 S. Ct. 1731 (2020); *see, e.g.*, 87 Fed. Reg. at 41532 (relying heavily on *Bostock*).
[55] *Bostock* carefully limited its holding to the interpretation of Title VII. 140 S. Ct. at 1753.
[56] 42 U.S.C. 2000e-2.
[57] 20 U.S.C. 1681(a).
[58] *E.g.*, *id.* 1686.
[59] *See Bostock*, 140 S. Ct. at 1777 & nn. 38-40 (Alito, J., dissenting).

of appeals reached the contrary result.[60] The uniform view that Title VII did not cover sexual orientation or gender identity is presumably why, almost contemporaneously with Title IX's enactment, members of Congress introduced bills to amend Title VII to ban discrimination on the basis of one or both of these bases.[61]

Those bills did not succeed, but others did: Congress made significant amendments to Title IX in 1988 when it passed the Civil Rights Restoration Act in response to Supreme Court decisions that Congress believed had unduly narrowed the scope of Title IX and other civil rights statutes.[62] By this time several courts of appeals had rejected the notion that Title VII banned discrimination on the basis of SOGI, and the application of those holdings to Title IX would have been clear. Yet despite the 1988 legislation's express focus on overturning judicial decisions that Congress felt had improperly restricted the reach of Title IX and other civil rights statutes,[63] Congress declined to amend Title IX to reflect the interpretation that the Department now seeks.

Of course, *Bostock* later held that Title VII had covered SOGI all along. But this surprise twist says nothing about what Congress intended to do when it copied Title VII's prohibition into Title IX or when it acquiesced in 1988 in the uniform judicial view that discrimination on the basis of sex did not mean discrimination on the basis of SOGI. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law" on which it drew in enacting new legislation, "but rather what its perception of the state of the law was."[64]

Cannon v. University of Chicago is highly instructive. In that case, the Supreme Court held that Congress had made available private remedies under Title IX. The Court explained that Title IX drew on Title VI of the Civil Rights Act of 1964,[65] which in 1972 was understood to confer private remedies.[66] The respondents in *Cannon* disputed the premise, arguing that Title VI does not in fact create private remedies. But the Court explained that "[e]ven if these arguments were persuasive with respect to Congress's understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable."[67] Substitute Title VII for Title VI and coverage of SOGI for private remedies and the application to the proposal is unmistakable: Even though *Bostock* held that in 1964 Congress did indeed cover SOGI in Title VII, the question is Congress's understanding of Title VII in 1972. And about that understanding no reasonable dispute is possible.

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[60] *Id.*
[61] *Id.*
[62] Pub. L. 100-259, 102 Stat. 28.
[63] *Id.* § 2.
[64] *Cannon*, 441 U.S. at 711.
[65] That Title IX drew on Title VI does not mean it did not *also* draw on Title VII's prohibition on sex discrimination; the inference that it did so is difficult to escape.
[66] *Cannon*, 441 U.S. at 710-11.
[67] *Id.*

For these reasons, Title IX forecloses the Department's attempted application of *Bostock*. That is reason enough to abandon the proposal's redefinition of sex discrimination. But there are also other reasons.

B. The Department Misconceives the Question before It.

Congress enacted Title IX pursuant to the Constitution's Spending Clause.[68] That fact, although not mentioned in the proposal, is of immense significance, for "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions."[69] Whether a recipient may be bound to comply with a condition attached to federal funds turns on whether the recipient has freely accepted that condition, and there "can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions or is unable to ascertain what is expected of it."[70] "That contractual framework distinguishes Title IX from Title VII."[71]

Notwithstanding the holding in *Bostock*, one thing should be clear: recipients were not on notice that Title IX's prohibition on sex discrimination might also cover SOGI—let alone that they might be required to adopt the speech codes and policies the proposal would demand, as we discuss below—when they accepted the federal funding to which Title IX's conditions are attached. As schools made the decision to accept federal funds in the years after Title IX's enactment, they did so in reliance on the case law discussed above, which led ineluctably to the conclusion that Title IX does not cover SOGI. That case law, *Bostock* later determined, was in error, but *Bostock* does not change the fact that the only reasonable view in the years immediately after Title IX's enactment, when schools faced the decision whether to accept federal funds, was that Title IX did not cover SOGI. Even schools that may have doubted that reading would have been reassured by the reflection that, as we outlined above, even if Title VII should one day be interpreted to cover SOGI, Title IX was enacted based on a reading of Title VII that did not cover SOGI and so therefore itself does not cover SOGI. In any event, even if recipients could reasonably have read Title IX as ambiguous on this point when they accepted funds, it is perfectly clear that the statute did not provide recipients the requisite "clear notice"[72] of the obligations the Department now asserts they accepted. If any additional proof were needed on this point, it could be found in the fact that for decades thousands of schools have sought and received federal funds subject to Title IX while openly maintaining facilities (such as bathrooms) and programs that the entire time have been "discriminatory" under the Department's new view.

The Department will doubtless respond that *Bostock* held that Title VII unambiguously covers SOGI and that Title IX is therefore similarly unambiguous. But as *Bostock* itself explained, a

[68] *Davis*, 526 U.S. at 640.
[69] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
[70] *Id.*
[71] *Gebser*, 524 U.S. at 286.
[72] *Pennhurst*, 451 U.S. at 25.

statute's unambiguous meaning can be anything but obvious.[73] And obviousness, not unambiguity, is the relevant quality for assessing whether recipients had fair notice of their obligations when accepting federal funds.

The Department may also respond that, regardless of whether recipients had adequate notice when they first accepted federal funds subject to Title IX, they are on notice going forward, due either to *Bostock* or to the proposed new regulation itself. But such a response would misunderstand the role of notice under the Title IX contract. In the years since 1972, many schools have built infrastructure and undertaken operations heavily dependent on federal funding. The schools' investment decisions were predicated on the belief that they understood their obligations under Title IX and could continue to comply with those obligations in the future. The moment at which adequate notice was required was when the schools made their investments, and neither *Bostock* nor the proposed rule can make up for lack of notice at that time.

For these reasons, it is clear that Title IX does not extend to SOGI. Nor may the Department expand the statute's scope. Agencies have only the authorities given to them by Congress. As the Supreme Court recently reiterated, an agency may not readily presume that Congress has given it authority to change the fundamentals of a statutory scheme on matters of great economic or political significance, especially where the statute is a long-extant one and Congress has had ample opportunity to amend the statute itself to accomplish what the agency seeks to do.[74] The basis for this canon of construction is common sense: it is simply implausible to imagine that Congress intended to leave certain "major questions" to agency discretion rather than decide them itself. To show a delegation of authority on such questions, agencies must point to a clear statement in the statutory text. In *West Virginia v. EPA*, the failure of the agency to identify such a clear statement in the Clean Air Act provision it sought to invoke meant that the agency's Clean Power Plan lay outside its authority.

Title IX falls within the scope of the "major questions" doctrine just as surely as the Clean Power Plan did. In the first place Title IX, like the Clean Air Act provision at issue in *West Virginia v. EPA*, is a statute of long standing; in fact, the two are contemporaries, enacted within two years of each other. Like the Clean Air Act, Congress has had many opportunities to amend the statute to do what the Department seeks to do here. Many of the bills introduced in each Congress from 1975 onward to include SOGI within the scope of Title VII[75] would also have accomplished the banning of SOGI discrimination, in whole or in part, at federally-funded schools,[76] yet Congress rejected each of those bills. Moreover, as noted above, Congress amended Title IX in 1988 without altering the meaning of the statutory text, which under contemporary case law clearly did not cover SOGI.

[73] 140 S. Ct. at 1753 (explaining that Title VII "has repeatedly produced unexpected applications").
[74] *See West Virginia v. EPA*, slip op. in No. 20-1530, at 16-20 (June 30, 2022).
[75] *See Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).
[76] *See, e.g.*, H.R. 655, 101st Cong., 1st Sess. (1989).

Further, we cannot imagine a regulation that would more fundamentally change the statutory scheme on a matter of greater political significance than would the proposal. In the first place, the proposal would redirect Title IX from its primary purpose of ensuring equal educational access to women and girls, transforming it into an impediment to such equal access. The proposal would force schools to admit biological men into women's restrooms and locker rooms, imperiling the privacy and safety of the women who use them and thus impeding and in some cases preventing women from accessing the school programs that depend on these facilities. Further, the proposal, which comes with no additional funding, would force schools to shift funds from investigating and redressing claims of sexual assault—actions that can play an important role in making our campuses safe for women—toward investigations of alleged speech code violations.

We also expect that the proposal would be read by some schools to require them to permit biological men to participate in women's sports. True, the proposal plans to leave unchanged 34 C.F.R. 106.41(b), which expressly authorizes single-sex sports teams, pending a subsequent rulemaking. But we expect that some schools would read this subsection, which permits schools to "operate or sponsor separate teams for members of each sex," as irrelevant to questions of discrimination on the basis of sexual orientation and gender identity which the proposal would prohibit. At these schools, women would lose the opportunity to compete in sports on equal terms. We urge the Department to foreclose this possibility by explaining in the regulatory text that schools may operate sports teams restricted to biological men and to biological women.

The proposal would attempt to resolve some of the day's most controversial issues—indeed, with the arguable exception of abortion, *the* most controversial issues of our time. Bathroom policy, the competition of biological men in women's sports, pronoun usage, what to teach our children about sex and sexuality, limitations on speech and inquiry in school: the proposal takes on these questions and more. It is simply unimaginable that Congress would have wished to delegate to an agency the authority to resolve these fundamental questions, just as it is inconceivable that the American Founders would have given Congress the authority to make the delegation. If these questions are not major, then none are.

In *Bostock*, the Court held that the major questions doctrine did not apply to the question whether Title VII prohibited discrimination on the basis of SOGI. But that holding does not foreclose application of the doctrine to the distinct question raised here: what are the terms Congress has attached to the funding that thousands of state and private schools have received for decades? Regardless of one's views of *Bostock*, it should be clear that whether the receipt of federal funds requires these thousands of schools to take certain positions on these hotly-contested issues is a major question.

C. The Department Arbitrarily Disregards Its Responsibility to Consider All Relevant Factors in This Rulemaking.

In any event, the meaning of the text of Title IX is only part of the question, for the Department is not a court but an agency. It has an obligation not simply to gloss the text but also to issue a

regulation "effectuat[ing] the provisions of section 1681."[77] That command, the source of the Department's regulatory authority here, cannot be satisfied simply by interpreting the statutory phrase "on the basis of sex"; after this interpretive task the Department's work continues, for it must determine how best to "effectuate" section 1681. That determination requires the Department to consider all relevant factors, not just the broadest possible interpretation of the phrase "on the basis of sex."

The Supreme Court has often explained that "no legislation pursues its purposes at all costs."[78] To the contrary, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."[79] If that is true for judges interpreting statutes, it is doubly true for agencies "effectuating" them, for one of the principal rationales for delegations such as section 1682's is that agencies, due to their expertise, are able to trade off the multitude of goals imbedded in a statute in light of various changing circumstances. One reason Congress gave the Department authority under section 1682, rather than simply specify what schools must do to eliminate sex discrimination, was its belief (right or wrong) that the Department would wisely take into account a host of considerations in tailoring a regulatory approach. That is clear from the very text of section 1682, which instructs the Department to account for other objectives than just the prevention of discrimination.[80] The Department disserves its mission when it reflexively forces schools to police against all conduct falling within the broadest conceivable reading of the phrase "on the basis of sex" without considering other relevant factors.

One such important objective is protecting the reasonable reliance interests of schools that have built their infrastructure and operations on the basis of their understanding of Title IX.[81] Another is the privacy and safety interests of women in America's schools. Yet another is the need to protect space for free speech and religious belief, as we discuss further below. The proposal, if finalized on the basis the Department currently advances for it, would be arbitrary and capricious both for failing to recognize its discretion to consider additional factors than the scope of section 1681's coverage and for failing to take into account these additional factors and others.

III. The Proposal's Disciplinary Procedures Are Arbitrary, Capricious, and Unlawful.

The proposal makes several important changes to the requirements for the Title IX disciplinary processes that schools must administer. These changes are guaranteed to result in proceedings that

[77] 20 U.S.C. 1682.
[78] *Rodriguez v. United States*, 480 U.S. 522, 524 (per curiam).
[79] *Id.* at 525.
[80] 20 U.S.C. 1682 (departments are "authorized and directed to effectuate the provisions of section 1681 of this title … by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken").
[81] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

are less fair and accurate than the current regulations require. As we explain below, many of the proposal's key provisions are irrational in violation of the APA and otherwise unlawful.

A. The Proposal's Imposition of Harmful Burdens upon Respondents in the Absence of Any Process Violates the APA and Departs from Due Process.

The proposal proclaims as the fundamental principal of the process it demands that schools must "[t]reat the complainant and respondent equitably,"[82] meaning that schools may not advantage one party over another.[83] Further, the proposal mandates "a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient's grievance procedures."[84] Laudable principles, these. But unfortunately the proposal does not live up to them.

That is nowhere more evident than in the provision allowing imposition of "[s]upportive measures that burden a respondent … during the pendency" of disciplinary proceedings.[85] Such measures include the same sorts of measures that could eventually be imposed if the respondent were found guilty, including "restrictions on contact between the parties; leaves of absence; voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative" for a respondent to continue her educational or professional pursuits.[86] These gravely burdensome measures may be imposed to the extent "necessary to restore or preserve the complainant's access to the recipient's education program or activity."[87]

Because the Title IX Coordinator must offer whatever supportive measures are necessary to preserve the complainant's access, the proposal does not merely authorize imposition of burdens on respondents, but requires it whenever the Title IX Coordinator deems it necessary to preserve access.[88] Indeed, the proposal would seem to require that the heaviest of burdens be imposed on a respondent if necessary to preserve even the slightest modicum of a complainant's access. Critically, while the proposal demands that burdens be placed on respondents to preserve complainants' access, it does *not* make a similar allowance or demand for burdens to be placed on complainants to preserve respondents' access.

Granting such an important advantage to complainants flagrantly contradicts the proposal's core principle of equitability. Enacting a rational regulation would mean squarely engaging that contradiction and resolving it, but instead the proposal fails to mention it. Unacknowledged internal contradictions are classic arbitrariness.

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[82] 87 Fed. Reg. at 41573.
[83] *See, e.g.*, *id.* at 41483, 41500.
[84] *Id.* at 41575.
[85] *Id.* at 41573.
[86] *Id.*; *see also id.* at 41447, 41449.
[87] *Id.* at 41573.
[88] *Id.*

The provision likewise irrationally contradicts the presumption of non-responsibility. Because a respondent is presumed not responsible until proven otherwise, a respondent and her accuser are on precisely the same footing; there is no reason at all to believe or be more concerned with one over the other. Yet the proposal determines that, "in cases in which one party or the other will necessarily be denied some access to a program or activity during the pendency of grievance procedures," it will always be the respondent who, although presumed non-responsible, nevertheless loses access.[89]

Even putting aside the internal contradictions to which we have drawn attention, the preference for complainants would be irrational. The APA requires that agencies have reasons for what they do; here, there simply is no reason for categorically preferring complainants over respondents. Nor does the proposal try to find a reason for its irrational preference. It does not, for instance, assert that complainants categorically stand in greater need of supportive measures that burden respondents than do respondents of supportive measures that burden complainants—presumably because whether a complainant's or respondent's need is greater turns on the particularities of each case.

Shockingly, the proposal does not even demand any sort of preliminary assessment of the merits of a complainant's claim, such as a court would undertake in a motion for preliminary relief, before imposing intensely invasive and disruptive conditions on a respondent of just the sort that could be imposed after a finding of misconduct. Indeed, the proposal does not even *permit* such an assessment; it sets forth several factors that a school "may consider in offering … supportive measures," but likelihood of success on the merits is not one of them.[90] Once a complaint has been filed, even if the complaint is defective on its face, the school must impose any conditions necessary to preserve the complainant's access, no matter how burdensome to the respondent. And while the proposal does provide for review of burdensome measures by a new decision-maker, such review will be only minimal help, for it does not create an opportunity for balancing the equities as between the complainant and the respondent or for a preliminary merits assessment. This arrangement is both arbitrary and profoundly foreign to traditional American notions of procedural justice; it is, in fact, a gross violation of due process.

B. The Proposal Arbitrarily Forecloses Access to Potentially Vital Evidence.

The current regulations require a recipient school to offer the complainant and respondent equal opportunities "to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations … including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility."[91] The preamble to the 2020 rule explained that this "approach balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence … with the parties' equal right to participate in furthering

[89] *Id.* at 41449.
[90] *Id.* at 41448.
[91] 34 C.F.R. 106.45(b)(5)(vi).

each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant."[92] In other words, the current regulations demand that a school turn over evidence that is related to the allegations but that the school has deemed irrelevant to resolution of the claims to give the parties a chance to disagree with the school's assessment of relevance and explain to the decision-maker why evidence initially deemed irrelevant is actually probative.

The proposal would replace the provision quoted in the preceding paragraph with one that merely requires schools to give "equitable access to the evidence that is relevant to the allegations."[93] The proposal does not find fault with the 2020 rule's objective of permitting the parties the opportunity to dispute relevance. Instead, it explains that its new formulation would also achieve that objective by defining "relevant" so as to include "evidence related to the allegations."[94] In light of this definition, the proposal explains, its new framework would "require a similar universe of evidence to be made available to the parties" as under the current regulations.[95]

But the proposal mischaracterizes its new definition of "relevant," for it fails to discuss the second sentence of the definition, which explains when "evidence is relevant": "when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred."[96] Operating under this definition of "relevant evidence," a school would turn over to the parties only evidence that the decision-maker deems potentially helpful to him in evaluating the allegations. The parties will not have a chance to explain to the decision-maker why other evidence which he deemed unhelpful is in fact highly probative, because they will never see that evidence. In short, the proposal would create precisely the danger that the 2020 rule sought to avoid.

The proposal's treatment of this issue is arbitrary and capricious, for two reasons. First, the proposal admits the importance of the 2020 rule's objective but then does nothing to address that objective; it thus "fail[s] to consider" what the Department itself admits is "an important aspect of the problem."[97] Second, the Department appears not to understand that the proposal fails to address the problem. This failure to understand its own proposal is separately arbitrary and capricious.

C. The Proposal's Gag Order Provision Arbitrarily and Capriciously Shields Schools from Accountability.

The proposal makes a similar error with respect to its new gag-order provision. The current regulations forbid gag orders, providing that schools must "[n]ot restrict the ability of either party

[92] 85 Fed. Reg. at 30303.
[93] 87 Fed. Reg. at 41577.
[94] *Id.* at 41499.
[95] *Id.*
[96] *Id.* at 41568.
[97] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

to discuss the allegations under investigation."[98] The preamble to the 2020 rule explains that one important reason for this provision is to ensure that parties to disciplinary proceedings may "criticize the recipient's handling of the investigation,"[99] bringing to bear "that right of freely examining … measures , and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right."[100]

The proposal takes a radically different approach. It eliminates the ban on gag orders, replacing it with a new requirement, §106.45(b)(5), that schools "[t]ake reasonable steps to protect the privacy of the parties and witnesses."[101] This command is not unlimited: schools need not enact measures that, for instance, "restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses … [or] consult with a family member, confidential resource, or advisor."[102] But the proposal does not include an exception for communications needed to hold schools to account for their handling of a disciplinary proceeding.

The first problem with this provision is that, perhaps inadvertently, it does not do what the Department says it does. The Department claims that proposed §106.45(b)(5) would "prohibit [a recipient] from taking any steps to protect privacy that restrict the parties' ability to consult with an advisor," etc.[103] But the plain text of §106.45(b)(5) does not do this; indeed, it contains no prohibitions at all. Instead, it simply relieves schools of the *obligation* to promulgate a privacy-protective measure if that measure would impede parties' ability to consult with an advisor, speak to witnesses, etc.; while schools need not enact measures that have those effects, they may. If the Department really does intend to preserve the rights of the parties to communicate with advisors and speak to witnesses, we urge it to correct this error in its proposed regulatory text.

New §106.45(b)(5) is problematic in a second way that is less likely to be accidental: it allows schools to issue gag orders that prevent both complainants and respondents from criticizing the schools' handling of their cases. This failure would remain even if the Department makes the correction urged in the preceding paragraph, for the list of exceptions in §106.45(b)(5) does not contain one for publicizing a school's failures in running its disciplinary proceedings. This omission is all the more puzzling because the proposal acknowledges that the 2020 rule sought to preserve this important right and even claims that it "respect[s] the Department's objectives as discussed in the preamble to the 2020" rule.[104] The Department goes so far as to claim that new §106.45(b)(5) "would not permit a recipient to prohibit parties from criticizing the recipient's handling of the grievance procedures,"[105] but that is simply false: nothing in the new provision would limit a school's ability to issue gag orders, and a school would even be required to issue one

[98] 34 C.F.R. 106.45(b)(5)(iii).
[99] 85 Fed. Reg. at 30295.
[100] *Report on the Alien and Sedition Acts*, in *Madison: Writings* 631-32 (Library of America 1999).
[101] 87 Fed. Reg. at 41575.
[102] *Id.*
[103] *Id.* at 41470.
[104] *Id.* at 41469.
[105] *Id.* at 41470.

if it concluded that doing so is necessary "to protect the privacy of the parties and witnesses during the pendency" of disciplinary proceedings.[106]

The bottom line is that the proposal acknowledges the importance of the freedom of parties to criticize schools' handling of their cases—and then does nothing to protect that freedom, all the while declining to explain why it has decided not to do so. That is arbitrary and capricious, as is the proposal's apparent failure to understand that it has done nothing to protect this vital freedom.

D. The Proposal Arbitrarily and Unconscionably Excludes Parents from College Disciplinary Proceedings.

The proposal plans to permit colleges and universities to exclude parents from their children's disciplinary proceedings. But the proposal does not give a single plausible reason for this inhumane proviso. It would therefore be arbitrary and capricious if finalized.

A student's participation in a Title IX disciplinary proceeding, as either a complainant or a respondent, can be an immensely difficult experience. It is easy to see why: such proceedings often involve recalling deeply personal and sometimes traumatic experiences, for many students they are the first experience of adversarial proceedings, and the stakes are enormous. Even many middle-aged or older people would find the presence of family in such circumstances an absolute necessity; that is why we see so many families attend court with their loved ones. For college students the need is often even stronger, for many of them have just ceased to be legally dependent on their parents, some of them mere weeks ago. For these reasons we expect that many complainants and respondents would feel a strong need for parental presence in disciplinary proceedings.

Yet the Department plans to allow colleges and universities to exclude them. To force students to do without the support to which even adults of much greater maturity would be entitled in judicial proceedings requires a strong justification. Yet the Department has almost nothing to say in favor of this proviso.

The Department points out that college students are more likely to live alone than elementary and secondary school children and are more likely to be independent than younger students. Their parents are also less likely to have legal authority to exercise rights on their behalf.[107] Of course, these assertions are not true for some large number of college students. But more importantly they are, at best, reasons that college students need parental presence less than younger students; they are not an *affirmative reason* to exclude parents from collegiate proceedings. And an affirmative reason to exclude parents is what the Department needs. It needs to point to something desirable that excluding parents would achieve; absent such a reason for action, their exclusion would be arbitrary and capricious.

[106] *Id.* at 41575.
[107] *Id.* at 41459.

The Department refers in passing to a single desideratum that the parent ban might achieve: it tells us that colleges and universities "generally expect students to self-advocate as part of their educational experience, including by participating independently of parents, guardians, or other authorized representatives in disciplinary proceedings."[108] Respectfully, the Department's concern for the educational value of Title IX disciplinary proceedings borders on the grotesque. The point of these proceedings is to determine whether discrimination occurred and to remedy it, not to educate. And in any event, in many educational contexts (e.g., learning to drive, to fly an airplane, or to litigate), the presence of a more experienced person is not an impediment to eventual self-direction but rather an important cause of it, through coaching and modeling the activity at issue. The Department has given no reason to believe that having a parent accompany his or her child through a Title IX proceeding will be less effective at promoting the child's eventual independence than banning the parent from the room.

E. The Proposal's Plan to Allow the Same Person to Investigate Students and to Decide Their Fate Violates the APA.

The current regulations provide that the person who determines whether sexual harassment occurred cannot be the same person who investigated the allegations of harassment. If that requirement sounds familiar, that is because it is one of the most fundamental procedural safeguards for the securing of justice that the Western legal tradition has devised. Yet the proposal plans to "eliminate the prohibition on the decisionmaker being the same person as the … investigator."[109] Only the most compelling reasons, if any, could justify abandoning this core protection.

The Department offers only two reasons for this proviso. The first is that a school "is not in the role of prosecutor seeking to prove a violation of its policy. Rather, the recipient's role is to ensure that its education program or activity is free of unlawful sex discrimination, a role that does not create an inherent bias in favor of one party or another."[110] Yet despite the Department's insistence (the proposal repeats it twice *in haec verba* on the same page), this rationale does not hold up.

For one thing, despite the proposal's aspersions, prosecutors do not simply "seek[] to prove a violation" without regard to the merits of the case. Rather, as the Department of Justice explains, a prosecutor "should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense" and if other conditions are also met.[111] The prosecutor's role is to ensure that her jurisdiction is free of unlawful activity, not just to secure convictions. According to the Department, such a role should "not create an inherent bias or conflict of interest in favor of one party or another."[112] Yet independent judges preside over

[108] *Id.* at 41461.
[109] *Id.* at 41466.
[110] *Id.* at 41467.
[111] Justice Manual 9-27.220.
[112] 87 Fed. Reg. at 41467.

criminal proceedings because the American legal tradition understands the potential of even the most well-intentioned prosecutor to become biased through the course of the investigation. Likewise, the tradition understands the desirability of new perspectives that a fresh mind may bring to the case, even putting issues of bias aside. There is simply no reason to believe that schools are immune from these dynamics.

Indeed, if anything, schools are *more* likely to succumb to bias than are prosecutors. A prosecutor who declines to prosecute a guilty suspect may experience reputational costs, but a school stands to lose much more for failure to root out sexual harassment in its programs: access to the millions of federal dollars upon which the school's existence depends. By contrast, a school that overzealously punishes innocent students and teachers does not risk access to these funds.

In any event, asking (as the Department does) whether *schools* may have biases is the wrong question; the right one is whether investigator-judges may. It simply blinks reality to assert that investigators will not form views during the course of their investigations that then will play out in their adjudication of the disciplinary proceedings, or that proceedings would not benefit from a second, fresh perspective on the case.

The Department's second reason for its decision is that the proposal's other procedural protections would adequately protect against bias.[113] But crucially, the Department does not explain *why* these protections are up to the task. The criminal judicial process is subject to procedural protections much more robust than those the proposal offers, yet they do not obviate the need for an independent judge. To justify its position, the Department would need to explain precisely how the procedures it cites are sure to prevent the same sorts of risks that the presence of an independent adjudicator is designed to foreclose.

So much for the proposal's two reasons for dispensing with the guarantee of an independent adjudicator. Without those reasons, the Department cannot eliminate the guarantee. True, the Department also points to certain advantages that it argues the single-investigator model makes available, but it never asserts that these advantages would outweigh the disadvantages of introducing the possibility of bias. Rather, its decision to eliminate the guarantee is based on the conclusion that the guarantee would not do any good. Thus, if the Department has no reason to believe that the proposal would guarantee against bias—and for the reasons we have given, it does not—then the Department must retain the guarantee of an independent adjudicator.

But in any event, many of the advantages that the Department asserts may be captured by the single-investigator model turn out to be available in systems that have independent decision-makers, too. For instance, the proposal explains that the single-investigator model allows schools to employ an outside investigator "who could conduct an equitable investigative process without perceived institutional bias."[114] But a school could obtain the same advantage by simply hiring

[113] *Id.*
[114] *Id.*

two outside persons rather than just one. The proposal also explains that small institutions sometimes have trouble finding competent investigators and adjudicators, but this problem, too, could easily be solved simply by contracting with two outside persons.

F. The Proposal Arbitrarily Plans to Permit Schools to Offer Appeals to Some Parties but Not Others and in Some Circumstances but Not Others.

The proposal recognizes the importance of offering the "right to appeal equally to the parties."[115] Rightly so, for any system that allows one party but not the other to appeal does not treat the parties equitably. Yet for reasons that it fails to explain, the proposal then proceeds to violate the very norm it lays down: it offers an unequal right of appeal.

Putting aside for the moment sexual harassment claims in the collegiate context, the proposal requires that schools offer only a single right of appeal, from the dismissal of a complaint. Notwithstanding its much-reiterated endorsement of the principle of equitable treatment, the proposal allows schools to forego offering a right of appeal to respondents. The proposal does not recognize, let alone respond to, the tension between this policy and its principle of equitable treatment.

As its reason for this strange policy, the Department gives several advantages that schools may seek in foreclosing appeals from respondents. But it never inquires what are the *costs* of foreclosing appeals and so therefore never compares the costs to the benefits of its approach.[116] But such a comparison is necessary if the Department is to make a reasonable decision. This one-sided evaluation is an exemplar of arbitrary and capricious decision-making.

The proposal does at least guarantee a right for both complainants and respondents to appeal in cases involving collegiate sexual harassment. But even this aspect of the proposal is also ill-considered and arbitrary, for the bases it gives for appeal do not include simple error. The proposal allows appeal for procedural error, new evidence, or bias[117]—but what if the front-line decision-maker simply got it wrong? For instance, what if the complainant clearly alleges sexual harassment and all the evidence supports her story, yet the decision-maker just disbelieves her? Or what if video footage conclusively places the respondent in another state on the night of the alleged misconduct, yet the decision-maker nevertheless finds against her? It is obviously desirable to allow an appeal on such bases. Yet the Department has given no reasons why such appeals should not be allowed, and that is arbitrary.

G. The Proposal Irrationally Allows Reliance on the Testimony of Witnesses Who Refuse to Demonstrate Their Credibility.

[115] *Id.* at 41511.
[116] *Id.* at 41489.
[117] *Id.* at 41511.

The current regulations provide that "[i]f a party or witness does not submit to cross-examination …, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility."[118] The purpose of this provision is to ensure that decision-makers rely only on evidence the credibility of which is subject to evaluation.

The proposal "recognizes the importance of a postsecondary institution having procedures in place to assess credibility when necessary" and asserts that it provides a process "to adequately assess the credibility of the parties and witnesses."[119] But while the proposal does retain a modified version of the requirement that adjudicators may not rely on the statements of a *party* who refuses to submit to a credibility evaluation, the proposal inexplicably drops any such requirement for a *witness*.[120]

This change is arbitrary and capricious for at least two reasons. In the first place, the proposal gives not a single reason for dropping the credibility requirement for witnesses or for treating witnesses differently from parties. That is definitionally unreasoned decision-making. Second, even had the Department explained its reasons, those reasons could not have been adequate, for there simply is no reason to depart from the Department's own announced intention to provide an effective process for evaluating the credibility of parties and witnesses, nor is there a good reason to distinguish between parties and witnesses.

IV. The Proposal Would Depart from the Department of Education's Own Foundational Statute by Telling Schools What To Teach.

Congress placed a vital limit on the Department's powers at the moment of its creation: the Department may not "exercise any direction, supervision, or control over … [any] program of instruction … except to the extent authorized by law."[121] That proviso was essential to safeguard the continuing primacy of State and local governments and most of all parents in the education of American children.

The proposal flies in the face of this foundational principle given to the Department at its creation. For the proposal would require schools to teach students the Department's current position about sex discrimination, and in particular radical gender ideology. As we explained above, the proposal makes widespread use of trainings for employees (including student-workers) and students alike. Indeed, it contemplates that in certain situations "training for the larger school community" may be "necessary."[122] After all, "the Department recognizes the significant role training plays in shaping a school and campus climate and environment."[123] The proposal likewise intends that the disciplinary proceedings it requires will conform students' habits to the Department's vision of

[118] 34 C.F.R. 106.45(b)(6)(i).
[119] 87 Fed. Reg. at 41503.
[120] *Id.* at 41578.
[121] Pub. L. 96-88 § 103, 93 Stat. 670-71.
[122] 87 Fed. Reg. at 41450.
[123] *Id.*

relations between and among the sexes; indeed, the Department explains in the proposal that it made certain disciplinary design choices to ensure that "[y]ounger students are" able "to appreciate the causal connection between prior behavior and any subsequent discipline," so as to "deter[] similar conduct in the future."[124]

The Department will doubtless respond that all this is simply what Title IX requires. But that is not so. The Supreme Court has explained that, contrary to the proposal's view, Title IX does not require schools "to ensure that … students conform their conduct to certain rules."[125] Rather, a school complies with Title IX if it simply "respond[s] to known peer harassment."[126] While the Department may and should issue prophylactic rules to prevent harassment before it starts, the limit in its organic statute circumscribes the prophylactic measures it may use and forbids it to prescribe what schools shall teach. Title IX may not be said to "authorize" instructional mandates that it does not require, and there can be no argument that Title IX requires the educational measures that the proposal contemplates.

V. The Proposal Would Violate the Constitution and the Religious Freedom Restoration Act.

A. The Proposal, If Finalized, Would Unconstitutionally Restrict Protected Speech.

As the preamble to the 2020 rule conclusively showed, Title IX regulations, and in particular regulations with respect to the creation of a hostile environment, raise important questions under the Free Speech Clause of the First Amendment. We write to make three points about the proposal's attempt to address these questions.

1. In the first place, the proposal's changes to the hostile environment standard would certainly cause the prohibition of protected speech. As the 2020 rule explained, the current regulation is designed to avoid precisely that outcome. It tried to achieve this result by defining hostile environment harassment as conduct "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." By prohibiting only the effective barring of a student from access to a funded program, the current regulation aimed to ban conduct, rather than speech—even if that conduct is undertaken at least in part by means of speech.[127] By adopting this approach, the 2020 rule attempted to fall within Supreme Court case law permitting laws "directed at conduct rather than speech" to prohibit speech incidentally, as a law against treason incidentally prohibits telling defense secrets to a hostile power.[128]

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[124] *Id.* at 41459.
[125] *Davis*, 526 U.S. at 648 (alterations and quotation marks omitted).
[126] *Id.* at 649.
[127] *See* 85 Fed. Reg. at 30161-65.
[128] *See, e.g.*, *RAV v. St. Paul*, 505 U.S. 377, 389 (1992).

The proposal, as explained above, dramatically broadens the definition of hostile environment harassment. Even inoffensive speech that is "sufficiently severe or pervasive" to diminish someone's enjoyment of any benefit of a funded program would create a hostile environment. Because the touchstone for both "severity" and "pervasiveness" is simply whether the speech limits enjoyment of a benefit in any way—speech that limits a benefit is severe or pervasive, no matter how mild and infrequent it is—just about any speech is enough under the proposal to create a hostile environment. A single objectively inoffensive remark or set of remarks that prompts a student to feel anxious or to have difficulty concentrating one day in class would be deemed to create a hostile environment.[129]

This speech ban is only made worse by the fact that, under the proposal, mere allegations of sex discrimination would trigger measures of the most burdensome and intrusive nature against respondents. Thus, it is not even enough for students and workers to avoid all speech that actually violates the proposed regulation; they also must steer clear of any speech that could conceivably be perceived as doing so.

The Department may respond that the proposal would not ban speech but rather the causing of anxiety or inattention that is its result, but as the Supreme Court has explained, this argument "is wordplay."[130] For the proposal does not prohibit the causing of anxiety or inattention by stray remarks generally, but only by "sex-based" remarks; what triggers coverage by the proposal is that anxiety, inattention, or other difficulty "is caused by a distinctive idea, conveyed by a distinctive message."[131]

It is thus evident that the proposal would cover an indeterminate but undoubtedly considerable amount of protected speech. That fact alone is enough to undercut the Department's rationale for the proposal. The Department's sole justification for its assertion that its rule passes muster under the First Amendment is that it does not in fact regulate protected speech; it does not offer additional reasons, for instance that the rule regulates protected speech but passes muster under the requisite level of scrutiny.[132] Because that sole rationale plainly fails, the Department lacks a sound reason for its conclusion that the proposed rule satisfies the First Amendment, and finalizing the proposal would therefore be arbitrary and capricious in addition to a violation of the First Amendment.

2. Even if the proposal's hostile environment standard should be construed and implemented more narrowly than its text warrants, such that it does not regulate protected speech, the proposal would still violate the First Amendment. That is because its standard is so indeterminate that it cannot give guidance to students and employees of recipient schools, whose protected speech will be chilled regardless of whether the standard does in fact cover protected

[129] *See* 87 Fed. Reg. at 41417.
[130] *RAV*, 505 U.S. at 392.
[131] *Id.* at 392-93.
[132] 87 Fed. Reg. at 41415.

speech. This chill is only made worse by the fact that burdensome measures would be triggered upon the mere allegation of a violation of the new speech code.

The Supreme Court has explained that—especially where universities are concerned—"First Amendment freedoms need breathing space to survive," so "government may regulate in the area [of free speech] only with narrow specificity."[133] After all, "[w]hen one must guess what conduct or utterance may" run afoul of legal sanctions, "one necessarily will steer far wider of the unlawful zone."[134] That is undoubtedly the case here. Even if the Department and the courts are able to divine some limiting principle in the proposal's hostile environment standard that restricts the proposal to regulating conduct rather than speech, school faculty, staff, and especially students will not be able to do so. They will know only that remarks that to them seem harmless may be judged "severe" or "pervasive" enough to subject them to sanctions under Title IX.

That is true also of the scope of any First Amendment exceptions to the proposal. As we have explained above, we read the proposal to take the position that there is no sex-based speech that might fall under the proposal's broad ban but that is immune from punishment under the First Amendment; therefore schools need not, indeed may not, make exceptions to the proposal for protected speech. But if we are wrong, and the proposal does allow or require schools to make exceptions in favor of protected speech, that policy cannot save the rule, for it provides no guidance at all to help faculty, staff, and students understand when these exceptions come into play; they will therefore moderate even speech entitled to an exception.

Further, even if in the final rule the Department shifts gears by admitting that the proposed rule regulates protected speech but claims that such regulation is justified under the relevant level of scrutiny, the chill upon protected student and employee speech would demand the conclusion that the proposed rule violates the First Amendment. That is because even if the proposal's approach is broadly justified, that is still no reason for regulating more protected speech than is necessary—and the inevitable effect of the new standard's vague terms would be to do just that.

3. Finally, the proposal likewise fails because it does not engage in any meaningful way with the 2020 rule's extensive First Amendment analysis.

As noted, the 2020 rule concluded that its hostile environment standard was needed to respond to serious First Amendment concerns that a broader standard would raise. It is clear that the proposal rejects this analysis—but that is all that is clear; we are left to wonder what the 2020 rule got wrong. The proposal's explanation as to why its formulation would not cover protected speech consists of a single sentence, which explains that the proposal passes First Amendment muster because it "requir[es] not only that the prohibited conduct be sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it creates a hostile environment, but also that the conduct be based on sex and occur under the recipient's

[133] *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967) (internal quotation marks omitted).
[134] *Id.* (internal quotation marks omitted).

education program or activity."[135] But that is just a description of the proposal's standard; it says exactly nothing about *why* that standard adequately protects First Amendment freedoms and thus nothing about how the 2020 rule's First Amendment analysis erred.

The APA requires more. The Supreme Court has explained that, to avoid arbitrariness in a policy change, "a reasoned explanation is needed for disregarding facts and circumstances that underlay … [an agency's] prior policy."[136] Here, among the most critical of the "facts and circumstances" that prompted the 2020 rule was the conclusion that a more relaxed standard raised serious First Amendment concerns. If the Department now takes the opposite view, it must explain why.

B. The Proposal Violates the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act.

Remarkably absent from the proposal is any mention of its implications for religious liberty. But those implications are both real and troubling. For instance, the proposal would compel faculty, staff, and students to speak in particular ways about SOGI that may well conflict with their religious beliefs.[137] The proposal does not consider its implications for people holding such beliefs. Indeed, its only discussion of religious exercise at all is a passing reference to the exemption to Title IX for certain religious schools,[138] but this exemption does not apply to persons of faith attending non-religious schools or religious schools that are unable or unwilling to invoke the exemption.

The Department has an obligation to take into account the need of such persons for the freedom to exercise their faith. Declining to do so would be to "fail[] to consider an important aspect of the problem"[139] that the proposal aims to address. That is the teaching of the Supreme Court's decision in *Little Sisters of the Poor Sts. Peter and Paul Home v. Pennsylvania*.[140] There, the Court explained that an agency that failed to take into account religious freedom concerns potentially raised by one of its rules "certainly would be susceptible to claims that the rules were arbitrary and capricious."[141]

That is even more true in the instant rulemaking than it was in the rulemaking before the Court in *Little Sisters*. There, the Court relied on the fact that the Religious Freedom Restoration Act ("RFRA") made religious liberty a relevant concern for the Department of Health and Human Services in its rulemaking under the Affordable Care Act. RFRA applies to the instant rulemaking

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[135] 87 Fed. Reg. at 41415.
[136] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).
[137] *See, e.g.*, *Vlaming v. West Point Sch. Bd.*, 10 F.4th 300, 304 (2021) ("using male pronouns to refer to someone who was born a female violated [appellant's] religious beliefs").
[138] 87 Fed. Reg. at 41528; *see also* 20 U.S.C. 1681(a)(3).
[139] *State Farm*, 463 U.S. at 43.
[140] 140 S. Ct. 2367 (2020).
[141] *Id.* at 2384.

as well, but there is more, for the statutory exemption from Title IX's reach for religious schools[142] indicates congressional solicitude to protect free exercise in the Title IX context in particular. The Department must take seriously the need to protect the religious freedom about which Congress has shown itself so concerned.

Upon conducting the required analysis, the Department will have no choice but to conclude that, at minimum, it must create an exemption for speech and conduct motivated by religious conviction that would otherwise subject the speaker or actor to discipline for creating a hostile environment. Title IX, RFRA, and the Constitution all require that result.

The Department will not be the first to consider how religious faith and Title IX's commands interact; Congress has also taken up that question and answered it decisively when it enacted Title IX's statutory religious exemption. The remedy the exemption offers is far-reaching: if the tenets of a religious school would be burdened by application of Title IX, then the statute in its entirety does not apply to the school in its entirety. By offering this sweeping, even drastic, relief to prevent Title IX from burdening religious belief, Congress indicated its firm determination that Title IX shall not apply if such application would burden religious beliefs. The relief this comment requests—that individual teachers, staff, and students be relieved of one particular application of the Title IX regulation—is extremely modest in comparison to the relief Congress has already determined to grant to religious institutions in statute; accordingly, there can be no doubt about how Congress would weigh the pressing need for a religious exemption here, and the Department is bound by that implicit congressional determination.

Because the conclusion to be drawn from Title IX's text is so clear, the Department need not apply RFRA to determine whether to grant the exemption we seek. But should the Department reach the application of RFRA, that too is perfectly clear. There can be no question that the choice to which the proposal would put some religious students, teachers, and staff would substantially burden religious exercise, for it would put them to a terrible choice: violate their consciences or risk dismissal or expulsion. Nor can it be said that the Department has a compelling interest in forcing that choice. The Department has not shown, and there is no reason to believe, that permitting teachers, staff, and students of faith to speak and act in accordance with their faiths on matters of sexuality would create hostile environments at schools across the nation. (For this reason refusing the exemption would likewise be arbitrary and capricious.) In any event, it is evident from Congress's decision that the goals Title IX pursues, as important as they are, may not override the need for religious liberty. And finally, even assuming the Department's interest is compelling, the proposal is not even close to the least restrictive means to achieve that interest. Indeed, the Department itself admits that schools have other options to promote non-hostile environments, such as "affirm[ing their] own commitment to nondiscrimination based on sex and tak[ing] steps to ensure that competing views are heard."[143]

[142] 20 U.S.C. 1681(a)(3).
[143] 87 Fed. Reg. at 41415.

The Department's failure to grant the requested accommodation would violate not just statutory law, but also the First Amendment's Free Exercise Clause. The Department will doubtless respond by claiming that the proposal does not raise First Amendment concerns under *Employment Division v. Smith* because it is neutral and generally applicable.[144] But this response would be far off the mark, for the *Smith* standard is used to determine when a law may ban or punish religiously-motivated *conduct*, but the proposal also demands that students, teachers, and staff make *professions* that are at odds with their religious beliefs.

Take as an example the use of personal pronouns specific to one sex to refer to a person of another sex, which we believe the proposal would require in at least some instances. To use a masculine pronoun is to convey that there is something male about the person to whom the pronoun refers. Some religious believers maintain on the basis of faith that what gives a person maleness or femaleness is the sex with which they are born. A person who subscribes to such religious beliefs cannot in good conscience use a male pronoun to refer to someone born as a female—not just because she believes that doing so is *wrong*, but also because she believes it to be *false*. To force such a person to use pronouns against her conscience is to force her to profess that she disbelieves something that she in fact believes on the basis of faith.

The *Smith* test is not the right one to evaluate whether a compelled disavowal of religious beliefs is permitted. If the Free Exercise Clause means anything, it is that "[w]ith man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted."[145] Or as *Smith* itself put it, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[146] *Smith* distinguished the domain of profession from the domain of conduct; it is only in the latter domain that its rule of neutrality and general applicability applies.[147] Where religious profession is involved, there is one simple rule: the government may not require it.

It is worth contemplating the consequences if the Department fails to grant the requested exemption. Teachers, staff, and students whose faiths forbid them from, for instance, using the pronouns that certain person's demand, would have two choices: they could violate their consciences or absent themselves from federally-funded schools. Both alternatives are utterly unacceptable in the United States of America. For these reasons we demand an exemption for conduct or speech motivated by religious conviction that would otherwise subject the speaker or actor to discipline for creating a hostile environment.

[144] 494 U.S. 872 (1990).
[145] *United States v. Ballard*, 322 U.S. 78, 87 (1944).
[146] 494 U.S. at 877.
[147] *Id.* at 877-78.

CONCLUSION

For these reasons, the Foundation urges the Department to abandon this ill-advised rulemaking or, if it mistakenly chooses to proceed, to make the clarifications and create the exemptions requested above.

Sincerely,

Robert Henneke
Executive Director
Texas Public Policy Foundation