Public Submission of the

Defense of Freedom Institute for Policy Studies on the

U.S. Department of Education's Notice of Proposed Rulemaking

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams

Agency/Docket Number: ED–2022–OCR–0143
RIN: 1870–AA19
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SUBMITTED VIA FEDERAL eRULEMAKING PORTAL
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The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
PCP–6125
Washington, DC 20202
Attention: Alejandro Reyes

Re: Comment on the Department's Notice of Proposed Rulemaking
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams
Docket ID: ED–2022–OCR–0143
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Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education ("Department") appointees who are experts in education law and policy, in particular the areas covered by the Department's proposed regulations.

On April 13, 2023, the Department published a notice of proposed rulemaking ("Athletics NPRM") "to amend its regulations implementing Title IX of the Education Amendments of 1972 (Title IX) to set out a standard that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity."[1] This proposed rule would work in tandem

[1] U.S. Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and

with the Department's previous proposal to amend its Title IX regulations, published July 12, 2022 ("Title IX NPRM"),[2] to limit athletic opportunities for women and girls at K–12 schools and institutions of higher education by forcing recipients of federal funding to allow boys and men who identify as female to compete in girls' and women's sports.

Despite the Department's characterization of the proposed rule as necessary to clarify "how recipients can ensure that students have equal opportunity to participate on male and female athletic teams as required by Title IX,"[3] the Athletics NPRM does exactly the opposite, sabotaging the Department's otherwise clear and longstanding Title IX regulations relating to sports with a vague, unprecedented, arbitrary, and capricious standard whose terms remain undefined and will leave educational institutions groping in the dark to determine how they can fulfill its terms. The lack of clarity in the standard ultimately arrogates to the Department's Office for Civil Rights ("OCR") the roles of nation-wide judge, jury, and executioner when it comes to cutting off federal funding of educational institutions for deciding not to permit boys and men to compete in women's sports.

Even if the Department believes this arbitrary arrogation of authority in the Department is good policy, which it is not, the proposal fails on a more fundamental basis: Title IX does not allow it. When Congress adopted this groundbreaking law in 1972 to promote educational opportunities for girls and women, it prohibited discrimination on the basis of "sex," the original, readily discernible meaning of which term is the binary, biological distinction between girls and boys and men and women. The purpose of Title IX, along with its interpretation by the Department for nearly all of the 50 years of its existence, bear out this fundamental meaning of the statute that the Department now proposes to completely upend, leaving instability and unfairness in its wake. The Department ignores that Congress has the sole authority to make law setting out standards educational institutions must follow with regard to participation in sports on the basis of one's gender identity. That it has considered and not adopted standards in this area is yet additional evidence that the Department has no authority to decide this question of massive significance to schools, colleges, universities, and female athletes throughout America.

In sum, the Department has staked out a position in territory where it is not authorized to be. It must withdraw the Athletics NPRM and return to its mandated role under Title IX to guarantee that women and men have access to an equal playing field in educational programs and activities funded by the federal government.

Female Athletics Teams, 88 FED. REG. 22,860, 22,860 (Apr. 13, 2023) (hereinafter "Athletics NPRM").

[2] U.S. Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 FED. REG. 41,390 (Jul. 12, 2022) (hereinafter "Title IX NPRM").

[3] Athletics NPRM, *supra*, at 22,860.

I. Title IX and the Department's Unprecedented NPRMs

Congress has not altered Title IX's core prohibition of sex discrimination since it passed the law in 1972:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .[4]

To this categorical, groundbreaking decree, the statute then provides for a limited number of exceptions, which are pertinent to the Department's Athletics NPRM only to the extent that they evince Congress's intent that Title IX prohibit "sex" discrimination as a binary, biological classification, as discussed below.

In 1974, with the aim of clarifying how Title IX applies to educational institutions' practice of providing for separate women's and men's sports teams, Congress adopted the Javits Amendment, directing the Secretary of Education ("Secretary") to propose regulations implementing Title IX "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."[5]

In response to the Javits Amendment, the Department's predecessor, the Department of Health, Education, and Welfare ("HEW"), adopted regulations clarifying institutions' obligations with respect to sex-separated sports that remain in effect. In line with Title IX's categorical language with respect to sex discrimination, the regulations reiterate that educational institutions are not permitted to discriminate on the basis of sex "in any interscholastic, intercollegiate, club or intramural athletics" they offer, and declare that "no recipient shall provide any such athletics separately on such basis."[6] However, in recognition of the biological differences between men and women, the regulations do permit recipients of federal funding to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[7] The regulations require any educational institution receiving federal funding that "operates or sponsors interscholastic, intercollegiate, club or intramural athletics [to] provide equal athletic opportunity for members of *both sexes*," setting out

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[4] 20 U.S.C. § 1681(a).
[5] Provisions relating to sex discrimination. Act Aug. 21, 1974, P. L. 93-380, Title VIII, Part D, § 844, 88 Stat. 612.
[6] 34 C.F.R. § 106.41(a).
[7] 34 C.F.R. § 106.41(b).

a series of factors the Department uses to determine whether such equal athletic opportunities exist.[8]

Congress subjected these regulations to a statutory "laying before" provision, under which Congress could disapprove them by resolution within 45 days if it found them inconsistent with Title IX.[9] Having survived congressional scrutiny, the regulations remain in force as implemented by the Department of Education.

On July 12, 2022, 50 years after Congress wrote Title IX into law, the Department's 2022 Title IX NPRM proposed to transform its protections to prohibit discrimination on the basis of "sex stereotypes," "sex characteristics," "sexual orientation," and "gender identity."[10] Under the proposal, the Department's Title IX regulations would provide that "[i]n the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part."[11] The Title IX NPRM categorically states, "Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex."[12]

Specifically regarding its athletics regulations, the Department's Title IX NPRM stated that it was "not propos[ing] any particular changes," but instead would "issue a separate notice of proposed rulemaking to address whether and how the Department should amend § 106.41 in the context of sex-separate athletics, pursuant to the special authority Congress has conferred upon the Secretary to promulgate reasonable regulations with respect to the unique circumstances of particular sports."[13] Importantly, however, the regulations proposed in the Department's Title IX NPRM contain no provision limiting their applicability in the athletics context. Even without any separate proposed rulemaking, by purporting to prohibit discrimination on the basis of "gender identity," these proposed regulations prohibit discrimination on the basis of "gender identity" in the athletics

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[8] 34 C.F.R. § 106.41(c) (emphasis added).
[9] Athletics NPRM, *supra*, at 22,862.
[10] Title IX NPRM, *supra*, at 41,571 (proposing revisions to § 106.10). On September 11, 2022, DFI submitted a public comment on the proposed rule, a substantial portion of which explained in detail why the Department's unprecedented interpretation of Title IX's prohibition of discrimination on the basis of sex contravened the text, meaning, and purpose of the statute. https://dfipolicy.org/wp-content/uploads/2022/09/DFI-Public-Submission-on-Title-IX-NPRM-website-9-12-22.pdf.
[11] Title IX NPRM, *supra*, at 41,571 (proposing revisions to § 106.31).
[12] *Id.* (proposing revisions to § 106.31).
[13] *Id.* at 41,537.

context, as well as in a multitude of other contexts covered by Title IX's sex discrimination prohibition.

In April 2023, after the 2022 midterm congressional elections, the Department published the Athletics NPRM to which it alluded in its Title IX NPRM, proposing to provide discretion to OCR to limit its application of the Title IX NPRM's categorical prohibition of discrimination on the basis of gender identity in the area of athletics.

The Department proposes to add to its longstanding Title IX athletics regulations the following provision:

> If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) Be substantially related to the achievement of an important educational objective; and (ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.[14]

The Athletics NPRM proposes no inclusion in the regulatory text of a definition of any of the terms included in its proposed rule, including "gender identity," "important educational objective," "substantially related," "limit or deny," or "minimize harms."

II. The Department Violates the Constitution by Proposing to Control How Educational Institutions Offer Sex-Separated Sports Teams on the Basis of Gender Identity Without Authorization from Congress.

DFI's public comment on the Title IX NPRM, submitted on September 11, 2022, explains why that proposed rulemaking implicates the major questions doctrine and ultimately violates the constitutional principle of the separation of powers at the core of this doctrine.[15] Under that doctrine, as explained by the Supreme Court in *West Virginia v. EPA*, when an agency seeks to regulate a matter of economic and political significance, that agency must point to clear congressional authorization for the power it is attempting to assert.[16]

Just as the Department failed even to mention the Supreme Court's major questions doctrine in its Title IX NPRM, the Department does so again in its Athletics NPRM, despite the grave questions

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[14] Athletics NPRM, *supra*, at 22,891.
[15] https://dfipolicy.org/wp-content/uploads/2022/09/DFI-Public-Submission-on-Title-IX-NPRM-website-9-12-22.pdf at 4–57.
[16] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022).

the doctrine raises regarding whether the Department has any authority to redefine Title IX's use of the term "sex," enacted into the statutory language over 50 years ago, to include the concept of "gender identity." The Department's failure to even discuss the Supreme Court's decision in *West Virginia v. EPA* and the application of the major questions doctrine to its Athletics NPRM is a severe oversight that deprives the public of the meaningful opportunity to comment on the Department's view of the application of the doctrine to its authority.

Therefore, the Department should withdraw the current Athletics NPRM and publish a new NPRM that discusses the viability of its proposals under the major questions doctrine. At the very least, the Department must discuss the application of the major questions doctrine to its proposal to regulate discrimination on the basis of "gender identity" in its final rule.

A. The Department's Athletics NPRM Regulates a Matter of Vast Economic and Political Significance.

i. The Athletics NPRM's Economic Significance

A review of 2017 federal and state fiscal support for postsecondary education (including public, nonprofit, and for-profit higher education institutions but excluding student loans and tax expenditures) shows that federal spending totaled $74.8 billion, state spending amounted to $87.1 billion, and local funding contributed $10.5 billion, with the relative level of funding by the federal government growing by nearly 24 percent in real terms between 2000 and 2015.[17] Federally issued student loans ($94 billion in 2018) rose by 26 percent in real terms between 2007 and 2017.[18] In 2017, federal revenue accounted for 13 percent of the budgets of public colleges and universities.[19] These figures make clear the substantial role federal funding plays in postsecondary education and the catastrophic impacts that would unfold for the educational opportunities of students and financial viability of institutions if the Department decided that an educational institution had failed to comply with federal mandates and withheld all or a large part of federal contributions.

As of June 2021, approximately 8 percent of funding for elementary and secondary public schools in the U.S. originates from the federal government, including the Departments of Education, Health and Human Services (Head Start program), and Agriculture (School Lunch program),[20] with significant further increases in K–12 funding identified in the Department's Fiscal Year 2023 Budget Summary.[21]

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[17] *See* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding.
[18] *Id.*
[19] *Id.*
[20] *See* https://www2.ed.gov/about/overview/fed/role.html.
[21] *See* https://www2.ed.gov/about/overview/budget/budget23/summary/23summary.pdf.

The Department's Athletics NPRM puts this substantial funding in jeopardy for educational institutions that do not permit men or boys who identify as female to compete against women and girls in athletic competitions. In particular, the Athletics NPRM identifies 20 states that have passed legislation restricting the ability of men and boys who identify as female to compete in women's and girls' sports, thus running afoul of the Department's command, found nowhere in Title IX's text or previous interpretations of the law, that such policies are prohibited. The Department thus threatens a massive amount of education funding for institutions in these states if they obey their state policies instead of the Department's unprecedented interpretation of Title IX.

ii. The Athletics NPRM's Political Significance

On June 23, 2022, the Department issued a press release on the 50th anniversary of Title IX, which it described as "the landmark civil rights law that has opened doors for generations of women and girls . . ."[22] The Department's unprecedented attempt to transform the meaning of Title IX, especially in the law's most visible and famous area of progress, athletics, is thus clearly a matter of vast political significance.

The *Washington Post* reports that over 390 bills concerning issues related to gender identity have been introduced in the past four years, with 155 bills introduced in 2022 alone[23] and more on the way in 2023.[24] As the Department points out in its Athletics NPRM, laws in 20 states aim to preserve girls' and women's sports in the educational context by restricting the participation in these sports of men or boys who identify as female.[25] Other state laws and policies concern instruction on sexual orientation and gender identify in public education and the rights of parents to know information about their children if they seek to change their gender identity.[26] The political significance of the Department's Title IX NPRM and Athletics NPRM to state lawmakers and authorities is encapsulated in a June 23, 2022 letter from 18 state attorneys general to the

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[22] *See* https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

[23] Anne Branigin and N. Kirkpatrick, *Anti-trans Laws Are on the Rise. Here's a Look at Where – and What Kind*, WASH. POST (Oct. 14, 2022), https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/.

[24] *See generally* Orion Rummler, *Health Care for Transgender Adults Becomes New Target for 2023 Legislative Session*, THE 19TH NEWS (Jan. 5, 2023), https://19thnews.org/2023/01/trans-health-care-bills-2023-legislative-session-lgbtq/.

[25] Athletics NPRM, *supra*, at 22,881.

[26] *See, e.g.*, Florida House Bill 1557, Parental Rights in Education (effective Jul. 1, 2022), https://www.flsenate.gov/Session/Bill/2022/1557/BillText/er/PDF.

Department declaring that they would "fight [the Department's] proposed changes to Title IX with every available tool in our arsenal," specifically citing the rights of girls and women in athletics.[27]

Given his priorities at the outset of his administration, President Biden agrees that reinterpreting federal law to prohibit discrimination on the basis of "gender identity" is a matter of political significance. His Executive Order ("EO") 13988, issued the first day of his administration on January 20, 2021, misinterpreted *Bostock v. Clayton County* and ordered federal agencies to include gender identity and sexual orientation in their enforcement of sex-based statutory prohibitions of discrimination and to review all existing orders, regulations, guidance documents, policies, programs, or other agency actions for consistency with his directive.[28] On March 8, 2021, six days after Secretary Miguel Cardona became Secretary of Education, EO 14021 directed him to review Title IX regulations within 100 days for inconsistency with the President's gender identity and sexual orientation policies announced in EO 13988. The EO instructed the Secretary to implement the administration's positions regarding gender identity and sexual orientation through rulemaking and enforcement actions and to immediately consider "suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding" any previous actions found to be inconsistent with EO 13988. The Department's two proposed NPRMs discussed in this comment—the broader NPRM addressing Title IX and this NPRM specifically focused on athletics—are products of EO 14021.[29]

The U.S. House of Representatives has also demonstrated the political significance of the issue, albeit in a contrary way, by passing the Protection of Women and Girls in Sports Act of 2023, which would foreclose the Department's present athletics rulemaking by restating that Title IX prohibits educational recipients of federal funding from permitting boys and men, no matter their "gender identity," to participate in girls' and women's sports.[30]

President Biden and the Department are thus attempting to take an issue of vast political significance out of the hands of elected lawmakers in Congress and in states. In our constitutional scheme separating central power into legislative, executive, and judicial components, such a legislative power grab by the executive simply is unconstitutional.

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[27] https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/Montana%20Indiana%20Title%20IX%20response%20letter%5B45%5D.pdf.

[28] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.

[29] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/.

[30] *See* https://www.congress.gov/bill/118th-congress/house-bill/734.

B. The Department Does Not and Cannot Point to Any Clear Authorization from Congress in Title IX to Force Girls and Women to Compete Against Boys and Men Who Identify as Female in Sports.

i. The Statutory Text

The Constitution clearly designates the role of Congress vis-à-vis the other branches of the federal government: "All legislative Powers herein granted shall be vested in a Congress of the United States."[31] Administrative agencies thus have no authority under the Constitution to make law.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[32] "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."[33]

The Court has explained that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[34] Since "the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context."[35]

The late Justice Scalia wrote "Congress . . . does not, one might say, hide elephants in mouseholes."[36] Congress does not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme," and "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[37]

Even if an interpretation is "textually plausibl[e]" or "ha[s] a colorable textual basis," the Court will reject it if "given the various circumstances, 'common sense as to the manner in which

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[31] U.S. CONST. art. I, § 1.
[32] *West Virginia*, 142 S. Ct. at 2607 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).
[33] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).
[34] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).
[35] *Id.* at 1750.
[36] *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001).
[37] *West Virginia*, 142 S. Ct. at 2609 (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994); *Whitman*, 531 U.S. at 468).

Congress [would have been] likely to delegate' such power to the agency at issue . . . made it very unlikely that Congress had actually done so."[38]

Passed in 1972, Title IX prohibits the exclusion of, denial of benefits to, and discrimination against anyone in the United States in any education program or activity receiving federal financial assistance "on the basis of sex."[39] The Javits Amendment, passed only two years later, again refers to "sex discrimination in federally assisted education programs" and instructs the Department to issue regulations under Title IX "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."[40] To find within either authorization to expand the meaning of the term "sex" far beyond common understanding (then or now) is certainly akin to discovering a very large elephant in a very tiny mousehole.

Less than a year after Congress adopted Title IX, the Supreme Court stated that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."[41] Similarly, the Court has repeatedly referenced "inherent differences" between men and women as a factor in its discussion of "sex" in the context of education.[42]

"Reputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex."[43] In his dissent in *Bostock*, Justice Alito identified at least six dictionary entries published prior to Title IX that defined sex.[44] "In all of those dictionaries, the primary definition of 'sex' was essentially the same as that in the then-most recent edition of Webster's New International Dictionary . . . '[o]ne of the two divisions of organisms formed on the distinction of male and female.'"[45]

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[38] *West Virginia*, 142 S. Ct. at 2608, 2609 (quoting *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).
[39] 20 U.S.C. § 1681(a).
[40] Provisions relating to sex discrimination. Act Aug. 21, 1974, P. L. 93-380, Title VIII, Part D, § 844, 88 Stat. 612.
[41] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).
[42] *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of members of either sex or for artificial constraints on an individual's opportunities.").
[43] *Adams by and through Kasper v. School Board of St. Johns County*, Case No. 18-13592, 2022 WL 18003897 at *14 (11th Cir. 2022) (en banc).
[44] *See Bostock*, 140 S. Ct. at 1784–1789 (Alito, J., dissenting) (Appendix A).
[45] *Id.* at 1756 (Alito, J., dissenting) (quoting Sex, Webster's New International Dictionary 2296 (2d ed. 1953)).

On the other hand, "[t]he term 'transgender' is said to have been coined 'in the early 1970s,' and the term 'gender identity' . . . apparently first appeared in an academic article in 1964."[46] Any use of the term "sex" to refer to one's "gender identity" was clearly not a common occurrence a mere eight years later.

The Department contends that "the Javits Amendment reflects that the Department has discretion to tailor its regulations in the athletics context that it might not have in other contexts and to adopt 'reasonable provisions considering the nature of particular sports.'"[47] But such discretion must be limited to the clear meaning of Title IX's terms, echoed by the contemporaneous Javits Amendment. The plain language of Title IX restrains the Department's authority to regulate to the realm of "sex" discrimination—clearly intended to convey a binary, biological classification.

This limitation of Title IX's reach to discrimination on the basis of one's biological status as a man or woman is confirmed by the textual context of the statute in which the term "sex" appears, as Title IX repeatedly refers to binary distinctions between "boys" and "girls" and "women" and "men." For example:

- Section 1681(a)(2) expressly provided a temporary exemption "in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*";[48]

- Section 1681(a)(5) refers to public universities with "a policy of admitting only students of *one sex*";[49]

- Section 1681(a)(6)(A) exempted social fraternities and sororities at colleges and universities;[50]

- Section 1681(a)(6)(B) refers to youth service organizations that have "traditionally been limited to persons of *one sex* . . .";[51]

- Section 1681(a)(7) applies to "*boy or girl* conferences";[52]

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[46] *Id.* at 1772 (Alito, J., dissenting) (cleaned up).
[47] Athletics NPRM, *supra*, at 22,866.
[48] 20 U.S.C. § 1681(a)(2) (emphases added).
[49] 20 U.S.C. § 1681(a)(5) (emphasis added).
[50] 20 U.S.C. § 1681(a)(6)(A).
[51] 20 U.S.C. § 1681(a)(6)(B) (emphasis added).
[52] 20 U.S.C. § 1681(a)(7) (emphasis added).

- Section 1681(a)(8) concerns "*father-son* or *mother-daughter* activities at educational institutions" and provides "if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*";[53]

- Section 1681(a)(9) addresses "'beauty' pageants" in which "participation is limited to individuals of *one sex* only";[54] and

- Section 1681(b) refers to "disparate treatment to the members of *one sex* . . . ."[55]

According to the statutory context in which "sex" appears in Title IX, when Congress prohibited discrimination on that basis, it was referring to biological classifications, not to a fluid concept of "gender identity" that the Department is now, over 50 years later, attempting to impose on educational institutions.

ii. The Purpose of Title IX

The purpose of Title IX was to address widespread discrimination against women in educational programs and activities. "[T]he concept of discrimination 'because of,' 'on the basis of,' 'on account of,' or 'on the basis of' sex was well understood" because it "was part of the campaign for equality that had been waged by women's rights advocates for more than a century" and "meant . . . equal treatment for men and women."[56]

Government reports, statements by members of Congress, and records of congressional hearings in the lead-up to the enactment of Title IX clearly demonstrate that the purpose of the law, and its "on the basis of sex" language, was to address pervasive discrimination against women in education.

In 1970, Representative Martha Griffith delivered the first-ever speech in Congress on sex discrimination in education, declaring that "[i]t is shocking and outrageous that universities and colleges, using Federal moneys, are allowed to continue treating women as second-class citizens, while the Government hypocritically closes its eyes."[57] The same year, a report issued by the

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[53] 20 U.S.C. § 1681(a)(8) (emphases added).
[54] 20 U.S.C. § 1681(a)(9) (emphasis added).
[55] 20 U.S.C. § 1681(b) (emphasis added).
[56] *Bostock*, 140 S. Ct. at 1769 (Alito, J., dissenting).
[57] PEG PENNEPACKER, THE BEGINNING OF TITLE IX—THE BERNICE SANDLER STORY, NATIONAL FEDERATION OF HIGH SCHOOL ASSOCIATIONS (May 12, 2022), https://www.nfhs.org/articles/the-beginning-of-title-ix-the-bernice-sandler-story/; *see also* 116 Cong. Rec. 6398-6400 (Mar. 9,

President's Task Force on Women's Rights and Responsibilities stated, "So widespread and pervasive are discriminatory practices against women that they have come to be regarded, more often than not, as normal."[58] That Task Force recommended that Congress amend the Civil Rights Act to "authorize the Attorney General to aid women and parents of minor girls in suits seeking equal access to public education, and to require the Office of Education to make a survey concerning the lack of equal educational opportunities for individuals by reason of sex."[59]

In 1970, Congress considered the Equal Rights Amendment to the Constitution, debated legislation to prevent discrimination against women at American universities,[60] held hearings on discrimination against women in education and other contexts,[61] and considered the Women's Equality Act of 1970, which would have prohibited discrimination against women in federally assisted programs, government employment, and employment in educational institutions.[62]

In September 1971, the "father of Title IX," Senator Birch Bayh, introduced the Women's Educational Equality Act, much of which was later included in Title IX.[63] Speaking on the bill, Senator Bayh stated, "The bill I am submitting today will guarantee that women, too, enjoy the educational opportunity every American woman deserves."[64]

Members of Congress advocated for Title IX as a vehicle for promoting women's equality. For instance, Representative Edith Green stated that "[a]ll that this title does is to ask that a woman be considered as a human being, that her qualifications, her high-school work and other qualifications be considered in the same fashion of those of a male applicant."[65]

The statements of and legislation introduced by proponents of women's equality in Congress in the years immediately preceding the passage of Title IX show that the law's purpose was to end

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1970); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997).

[58] THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE at III (Apr. 1970), https://www.archives.gov/files/research/women/images/task-forcereport-1970.pdf.

[59] *Id.* at IV.

[60] *See* 86 Stat. 1523, 92nd Cong., 2nd Sess. (1972).

[61] *See* Discrimination Against Women, Hearings Before the Special Subcommittee on Education of the Committee on Education and Labor of the House of Representatives 91st Cong., 2d Sess. (Jun. & Jul. 1970), https://babel.hathitrust.org/cgi/pt?id=uiug.30112011649503&view=1up&seq=7.

[62] 116 Cong. Rec. 22,681–22,682.

[63] 92 S. 2185, 117 Cong. Rec. 22,740–22,743.

[64] 117 Cong. Rec. 32,476 (Sept. 20, 1971) (emphasis added).

[65] 117 Cong. Rec. 39,259 (Nov. 4, 1971) (emphasis added).

discrimination against and advance equal opportunities for girls and women at educational institutions receiving federal financial assistance.

iii. Consistent Regulatory Interpretation of Title IX

In *West Virginia v. Environmental Protection Agency*, Justice Gorsuch counseled that "[a] 'contemporaneous' and long held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency."[66] The long-held view of the Department has been that Title IX prohibits discrimination on the basis of biological sex.

Since HEW first issued regulations implementing Title IX in 1975, the agency implementing those regulations—whether HEW or the Department of Education—has never amended them to incorporate gender ideology in the interpretation of the statute. Clarity regarding interpretations of Title IX's sex-based prohibitions was evidenced early in Title IX's implementing regulations, which provided for schools to have "separate toilet, locker rooms, and shower facilities on the basis of sex."[67] There was no regulatory provision for access to intimate facilities based on what is now known as a student's "gender identity," nor was any historical equivalent to "gender identity" included in the implementing regulations.

Likewise, the Title IX implementing regulations related to athletics have remained the same since 1975, with § 106.41(c) of the regulations referring to the provision of athletic opportunities "for members of *both sexes*."[68] The undisputed public understanding of the term "sex" at the time, as clearly evidenced by this particular use of the term in the very regulatory provision that the Department now attempts to transform, is insurmountable evidence that when Congress prohibited discrimination on the basis of "sex," it meant biological sex, not "gender identity."

Nearly 45 years after Title IX's enactment, in a 2016 guidance document issued without notice and comment, the Department first asserted that Title IX's prohibition on sex discrimination "encompasses discrimination based on a student's gender identity."[69] The Department withdrew this "guidance" less than a year later.[70]

In August 2020, OCR issued a revised Letter of Impending Enforcement Action related to its investigation of the Connecticut Interscholastic Athletic Conference, along with six school

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[66] *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).
[67] 34 C.F.R. § 106.33.
[68] 34 C.F.R. Sec. 106.41(c) (emphasis added).
[69] Dep't of Justice and Dep't of Educ., Dear Colleague Letter (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[70] Dep't of Justice and Dep't of Educ., Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

districts, informing the recipients that OCR took the position that "when a recipient provides 'separate teams for members of each sex' under 34 C.F.R. § 106.41(b), 'the recipient must separate those teams on the basis of biological sex' and not on the basis of gender identity."[71] Similarly, on January 8, 2021, the Department's Office of the General Counsel issued a memorandum on the application of the Supreme Court's decision in *Bostock v. Clayton County* to the Title IX context, finding that "if a recipient chooses to provide 'separate teams for members of each sex' under 34 C.F.R. § 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status or sexual orientation, to comply with Title IX."[72]

Thus, other than for approximately eight months in 2016–17 and during the current administration, the Department has consistently interpreted Title IX and its regulations first issued in 1975 to prohibit discrimination on the basis of a binary, biological classification, not on the basis of gender identity. This is conclusive evidence that Title IX's reference to "sex" means the binary distinction between girls and boys and men and women.

Defying logic and common sense, the Department claims that its proposed rule would "preserve and build on the current regulatory framework the Department has long used to evaluate whether a recipient offers its students an equal opportunity to participate in athletics consistent with Title IX."[73] It similarly states that the change proposed in its Athletics NPRM "is consistent with OCR's longstanding policy of encouraging compliance with the Department's Title IX athletics regulation 'in a flexible manner that expands, rather than limits, student athletic opportunities.'"[74]

There is nothing about the Department's attempt to transform Title IX to prevent "gender identity" discrimination that could be said to remotely "preserve" the current regulatory framework or be "consistent" with the Department's past approach to enforcing the law in the sports context. As discussed above, the statute has always prohibited discrimination "on the basis of sex," and for nearly 50 years of the law's existence, the Department has not interpreted the term "sex" as anything other than a binary, biological distinction dividing human beings into males and females.

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[71] Athletics NPRM, *supra*, at 22,864, quoting OCR Case No. 01–19–4025, Conn. Interscholastic Athletic Conf. et al. (Aug. 31, 2020) (revised letter of impending enforcement action).

[72] Athletics NPRM, *supra*, at 22,864, quoting U.S. Dep't of Educ., Memorandum from Principal Deputy General Counsel delegated the authority and duties of the General Counsel Reed D. Rubinstein to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights re *Bostock v. Clayton Cnty*. (Jan. 8, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf.

[73] Athletics NPRM, *supra*, at 22,867.

[74] *Id.*, quoting Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (Sept. 17, 2008) (2008 Dear Colleague Letter on Title IX and Athletic Activities), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.pdf.

Until very recently, the Department has never interpreted that term in a "flexible" way. And the principle of separation of powers, as articulated in the major questions doctrine, forecloses the Department from doing so now.

iv. Congress Has Repeatedly Considered Legislation Prohibiting Discrimination on the Basis of Gender Identity.

Adding to the avalanche of evidence indicating that the statutory text Congress enacted in 1972 in Title IX gives the Department no clear authorization to prohibit discrimination on the basis of "gender identity," Congress has repeatedly attempted to pass, and in some cases has passed, legislation prohibiting discrimination on that very ground. This fact demonstrates two things. First, it shows that this is a matter of congressional, not executive, jurisdiction. Second, it shows that, institutionally, Congress does not accept the Department's current interpretation of Title IX to prohibit discrimination on the basis of "gender identity."

After considering and not passing the Employment Non-Discrimination Act ("ENDA") in every Congress since the legislation was first introduced in 1994, the House passed ENDA in 2007, but only after "gender identity" was removed from a previous version of the bill.[75] More recent attempts to prohibit "gender identity" discrimination in employment occurred in 2009 with H.R. 3017[76] and S. 1584,[77] in 2011 with H.R. 1397[78] and S. 811,[79] and in 2013 with H.R. 1755[80] and S. 815.[81]

In 2009, Congress enacted the Hate Crimes Prevention Act, which criminalized willfully causing bodily injury because of a person's gender, sexual orientation, or gender identity.[82]

In its 2013 reauthorization of the Violence Against Women Act ("VAWA"), Congress expressly prohibited discrimination on the basis of gender identity.[83]

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[75] https://www.congress.gov/bill/110th-congress/house-bill/2015?s=1&r=8.
[76] https://www.congress.gov/bill/111th-congress/house-bill/3017.
[77] https://www.congress.gov/bill/111th-congress/senate-bill/1584.
[78] https://www.congress.gov/bill/112th-congress/house-bill/1397.
[79] https://www.congress.gov/bill/112th-congress/senate-bill/811.
[80] https://www.congress.gov/bill/113th-congress/house-bill/1755.
[81] https://www.congress.gov/bill/113th-congress/senate-bill/815. This legislation passed the Senate but did not become law.
[82] 18 U.S.C. § 249(a)(2).
[83] 42 U.S.C. § 13925(b)(13)(A).

The House and Senate first considered the "Equality Act" in 2015 (H.R. 3185[84] and S. 1858[85]). This legislation proposed to amend Titles II, III, IV, VI, VII, and IX of the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex, sexual orientation, and gender identity.

The "Fairness for All Act," first introduced in December 2019 (H.R. 5331[86]) and again in February 2021 (H.R. 1440[87]), likewise proposed to prohibit discrimination on the basis of sex, sexual orientation, and gender identity.

These legislative histories point strongly against the Department's contention that it has authorization from Congress to reformulate Title IX's prohibition against sex discrimination at educational institutions receiving federal funding. Instead, they tell the story of an issue that, for years, has been considered and debated in Congress and that is squarely within the purview of the members of that institution—not the Department.

C. The Department's Misplaced Reliance on *Bostock* and Other Federal Court Cases

In support of its justification for its proposed rulemaking to "govern a recipient's adoption of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity,"[88] the Department errs in its reliance on a misapplication of the U.S. Supreme Court's ruling in *Bostock v. Clayton County*.[89]

Atop this flawed foundation, the Department asserts as a defense to its rulemaking its obedience to two significant EOs issued by President Biden purporting to direct the Department's *Bostock*-related rulemaking and to re-make the Department's policies regarding gender identity (among other characteristics).

EO 13988[90] ordered federal agencies to include gender identity and sexual orientation in their enforcement of sex-based statutory prohibitions of discrimination and to review all existing orders,

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[84] https://www.congress.gov/bill/114th-congress/house-bill/3185.
[85] https://www.congress.gov/bill/114th-congress/senate-bill/1858.
[86] https://www.congress.gov/bill/116th-congress/house-bill/5331/text.
[87] https://www.congress.gov/bill/117th-congress/house-bill/1440/text.
[88] Athletics NPRM, *supra*, at 22,860.
[89] *Bostock*, 140 S. Ct. at 1753 (2020). The *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included the employee's status as homosexual or transgender but expressly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."
[90] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/ (Jan. 20, 2021).

regulations, guidance documents, policies, programs, or other agency actions for consistency with the directive.

EO 14021[91] directed the Secretary of Education to review Title IX regulations within 100 days for inconsistency with the President's gender identity and sexual orientation policies announced in EO 13988 and to implement rulemaking and take enforcement actions forcing educational institutions to implement the administration's positions regarding gender identity and sexual orientation. The Athletics NPRM is responsive to that presidential directive.

The Athletics NPRM does, indeed, conform to the President's EOs, which openly defy the *Bostock* Court's clear limitations on that ruling's applicability.

The *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included the employee's status as a homosexual or transgender person, but explicitly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." In *Bostock*, the Court declined to create or adopt "gender identity" as a protected category, indicating that its decision did not rely on whether the definition of sex "captur[ed] more than anatomy" or "reach[ed] at least some norms concerning gender identity and sexual orientation"[92] and indicated that "future cases" would likely determine additional questions involving other federal or state laws prohibiting sex discrimination in various forms.[93]

The *Bostock* Court could hardly have been clearer that its decision was limited to the context of Title VII and did not extend to the remainder of the Civil Rights Act of 1964, including Title IX. The Court in *Bostock* took pains to emphasize that it was only resolving the issue directly before it.[94] It explicitly disclaimed the implications of extending its interpretation of Title VII of the Civil Rights Act to Title IX, noting concerns about access to bathrooms, locker rooms, and dress codes before acknowledging that "none of those other laws are before us."[95] The *Bostock* Court also noted that a separate analysis of a different statutory scheme (other than section VII) could lead to a different result, stating that "we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."[96]

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[91] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/ (Mar. 8, 2021).
[92] *Bostock*, 140 S. Ct. at 1739.
[93] *Id*. at 1753.
[94] *Pecha v. MW Bancorp, Inc*., 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").
[95] *Bostock*, 140 S. Ct. at 1753.
[96] *Id.*

Nonetheless, the Department's NPRM is written as if the *Bostock* Court had not included those explicit limitations regarding the ruling's effect on other civil rights laws. Instead, the Department has only selectively applied *Bostock*, while discarding the Court's clear warning regarding its limited applicability.

Despite *Bostock's* explicit limitations, in January 2021 the Department quickly commenced its campaign to redefine Title IX by withdrawing its own previous guidance regarding gender identity in light of the *Bostock* decision. In February 2021, it withdrew its previously issued revised Letter of Impending Enforcement Action related to its investigation of the Connecticut Interscholastic Athletic Conference ("revised CIAC") and six school districts.[97] The revised CIAC letter stated that OCR was providing an update in light of *Bostock*, including that when recipients provide "separate teams for members of each sex," the recipient must separate those teams "on the basis of biological sex" and not on the basis of gender identity.[98]

Misapplying *Bostock* again, in March 2021, the Department archived and marked "not for reliance" its previously issued Memorandum from its Office of the General Counsel ("OGC"). Issued in January 2021, OGC's Memorandum had clarified that "if a recipient chooses to provide 'separate teams for members of each sex' under 34 C.F.R. § 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status or sexual orientation, to comply with Title IX."[99]

By these reversals, the Department revealed that a continuation of guidance that preserved equal educational opportunities for girls and women, pursuant to Title IX's sex-based protections, was obviously at odds with the Department's radical new gender identity agenda.

Aligned with its misinterpretation of *Bostock*, the Department now relies on a handful of arguably favorable federal district court findings. Citing *A.M. v. Indianapolis Pub. Schs*.,[100] the NPRM describes[101] the issuance of a preliminary injunction by a federal district court in the Southern

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[97] OCR Case No. 01-19-4025, *Conn. Interscholastic Athletic Conf. et al*. (Aug. 31, 2020) (revised letter of impending enforcement action) (archived and marked not for reliance in Feb. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf.

[98] *Id*. at 36.

[99] U.S. Dep't of Educ., Memorandum from Principal Deputy General Counsel delegated the authority and duties of the General Counsel Reed D. Rubinstein to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights re *Bostock v. Clayton Cnty*. (Jan. 8, 2021) (archived and marked not for reliance in March 2021) ("OGC Memorandum"), https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf.

[100] *A.M. v. Indianapolis Pub. Schs*., No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *14 (S.D. Ind. Jul. 26, 2022), *vacated as moot* (S.D. Ind. Jan. 19, 2023).

[101] Athletics NPRM, *supra*, at 22,869.

District of Indiana that banned a school district from excluding a fifth-grade biological boy from the girls' softball team, pursuant to an Indiana law banning biological boys claiming to be girls from participation on female athletic teams.[102] Despite *Bostock*'s explicit limitations, which the Department also evades, the lower court found that "punish[ing] that individual for his or her gender non-conformance" violated Title IX—despite the lack of gender identity protections included in Title IX's clear language.[103]

Much as the Athletics NPRM now utterly fails to consider the likely harms of the proposed regulation to female athletes, the *A.M.* district court refused to grant the State of Indiana leave to file a Brief of Amici Curiae on behalf of five female athletes, who merely wanted to offer their unique perspectives on the impact of permitting biological male athletes to compete against biological females in female athletic programs.[104] The district court did concede that "[t]he United States Supreme Court has not yet considered whether 'sex' for purposes of Title IX means just an individual's biological sex at birth, or also includes their gender identity," while noting that the *Bostock* Court only "considered the meaning of 'sex' in the Title VII context . . . ."[105]

Remarkably, despite the *Bostock* Court's explicit limitations, the district court asserted that "the Supreme Court also did not foreclose the application of its holding to the Title IX context, and the Court finds it appropriate to look to *Bostock* for guidance here."[106] The Department has similarly cherrypicked the portions of *Bostock* (and other federal cases) it sees as useful to justify its rulemaking while failing to address *Bostock's* explicit limitations.

Similarly, citing *Hecox v. Little*,[107] the Department relies extensively on an Idaho federal district court's preliminary injunction temporarily preventing the state from enforcing a law that prevents biological men from participating on women's sports teams. The Department cites the *Hecox* court's finding that there is a "dearth of evidence in the record to show excluding transgender women from women's sports supports sex equality, provides opportunities for women, or increases access to college scholarships."[108] Idaho's Fairness in Women's Sports Act was enacted in

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[102] *A.M.,* WL 2951430, at *14.
[103] *Id*. at *11.
[104] *A.M*., 1:22-cv-01075-JMS-DLP, at 3 (S.D. Ind. Jul. 26, 2022).
[105] *Id*. at 18.
[106] *Id*. at 19.
[107] *Hecox v. Little*, 479 F. Supp. 3d 930, 943, 988 (D. Idaho 2020), *appeal argued*, No. 20-35815 (9th Cir. Nov. 22, 2022).
[108] Athletics NPRM, *supra*, at 22,868 ("The court's equal protection analysis in *Hecox* is instructive and relevant to the Department's proposed Title IX regulation in several respects: the court examined interests commonly proffered to defend policies denying transgender students the opportunity to participate on male or female athletic teams consistent with their gender identity, considered whether such policies actually advance any important objectives, and further

anticipation of problems that have occurred in other states, where biological boys dominated girls track and field events, often displacing and sometimes causing other harm to the biological girls against whom they competed.

Although the Department fails to acknowledge it, a fundamental task of any legislature is to try to anticipate future problems, including those that effectively undermine Title IX's sex-based protections and to enact policies to address them before harm occurs. Courts are then to "accord substantial deference to the predictive judgments of the legislature . . . ."[109] Simply stated, even though participation by biological males who identify as female in women's scholastic athletic competitions is a recent phenomenon for which little data regarding damages to biological females is yet available, both the lower court and Department concern themselves only with the alleged Title IX rights of males claiming to be females in order to participate in women's athletic competitions.

The *Hecox* court and, now, the Department fail to acknowledge that the Ninth Circuit has upheld state regulations of women's sports based on biological sex against equal-protection challenges, finding that differential treatment based on sex is permissible to make up for past discrimination, including lack of athletic opportunities.[110] The Department, unsurprisingly, also fails to address the Ninth Circuit's ruling that "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."[111]

Indeed, the Supreme Court has previously found permissible "[s]ex classifications . . . to advance full development of the talent and capacities" of women,[112] just as Idaho's Fairness in Women's Sports Act[113] constitutes the legislature's effort to protect the equal opportunities of female student athletes. The Department, similarly, neglects to recognize controlling law upholding a state's recognition of the physical differences between men and women (where, in Arizona, the Ninth Circuit upheld the state's policy that kept biological males from competing on a high-school girls' volleyball team[114]).

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considered the effects of those policies on students' equal opportunity to participate in and benefit from their schools' education programs and activities.").

[109] *Heller v. District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011); *see also Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981) (state's legislative finding is entitled to great deference).

[110] *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1129–1132 (9th Cir. 1982).

[111] *Nguyen v. INS*, 533 U.S. 53, 73; *see also Miller v. Albright*, 523 U.S. 420, 444-445 (1998); *Virginia*, 518 U.S. at 533; *Michael M. v. Superior Court*, 450 U.S. at 471–473 (1981).

[112] *Virginia*, 518 U.S. at 533.

[113] Idaho Code Ann. § 33-6201 ("Fairness In Women's Sports Act"); *see* https://legislature.idaho.gov/wp-content/uploads/statutesrules/idstat/Title33/T33CH62.pdf.

[114] *Clark,* 695 F.2d at 1131–1132.

In June 2021, in *B.P.J. v. W. Va. State Board of Educ*.,[115] the Departments of Justice and Education filed a Statement of Interest ("SOI") in a Title IX and equal protection challenge to a West Virginia law[116] limiting the eligibility of a student to participate only on those athletic teams that are consistent with the student's biological identity. In the SOI, the Department refused even to concede the accuracy of the state's biologically based definitions of male and female ("The United States does not concede the accuracy of these [male, female, or biological sex] definitions")[117] while claiming that "effectively prohibiting, solely on the basis of sex, a certain subset of students—girls [biological boys and men] who are transgender—from participating in athletics programs" is facially discriminatory, in violation of Title IX and the Equal Protection Clause of the U.S. Constitution.[118]

In a truly contortionist twist of its Title IX enforcement obligations for America's girls and women, the Department viewed West Virginia's prohibition of participation in scholastic women's sports by biological males claiming to be women to violate Title IX's sex-based protections for biological females. In its consideration of *B.P.J.*, the Department also fails to recognize the Fourth Circuit's long-held biologically based view of sex.[119]

Given the Department's gender identity agenda, its refusal to agree to the simplest of biological definitions of male and female is actually consistent with the *B.P.J.* plaintiff's demand to be allowed to play on sex-segregated sports teams, but that the state's definition of what constitutes a male or female for scholastic athletic competition purposes should be broadened so that as a biological male, the plaintiff will be allowed to participate as a female on a sex-separated (*i.e.*, female) scholastic athletic team. In the apparent view of the Department and the *B.P.J.* plaintiff, the Save Women's Sports Act's definition of females is simply too narrow and underinclusive and

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[115] Statement of Interest of the United States, *B.P.J. v. W.Va. State Bd. Of Educ*., 550 F. Supp. 3d 347 (S.D. W. Va. 2021) (No. 2:2-cv-00316), *see* https://www.justice.gov/crt/case-document/file/1405541/download ("SOI") In April 2023, the Department of Justice filed a brief as amicus curiae in support of the plaintiff's appeal to the Fourth Circuit. *See* Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant and Urging Reversal, *B.P.J. v. W. Va. State Bd. Of Educ*., No. 23-1078 (4th Cir. Apr. 3, 2023), https://www.justice.gov/crt/case-document/file/1577891/download.

[116] W. Va. Code §§ 18-2-25d(c)(1)–(2) ("H.B. 3293") prohibits biological males from participating in female "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education."

[117] *SOI* at n.4, refusing to concede that "male" properly references "an individual whose biological sex determined at birth is male" and that "female" properly references "an individual whose biological sex determined at birth is female." W. Va. Code §§ 18-2-25d(b)(2)–(3).

[118] *Id*. at 5.

[119] *See*., *e.g*., *Virginia,* 518 U.S. at 533 ("Physical differences between men and women, however, are enduring"); *Frontiero*, 411 U.S. at 686 (plurality op.) ("[S]ex . . . is an immutable characteristic determined solely by the accident of birth.").

should be corrected to include biological males claiming to be females. According to this view, sex-separated athletic teams are, apparently, permissible—but only if they employ an elusive, ultimately meaningless, definition of sex under Title IX.

It is folly to presume that the West Virginia or any other state legislature, no matter how allied with the Department's gender identity agenda it might be, could satisfactorily create a statute to ensure equal educational opportunities for women in women's sports—as mandated by Title IX—that could actually protect those rights while permitting the intrusion of biological men to compete in the same athletic competitions. Protecting sex-separated athletic events for girls and women, while also undermining them by admitting boys and men into those sex-separated athletic events, is neither desirable or, by such means, achievable.

On January 5, 2023, the *B.P.J.* district court issued its opinion and order[120] in which it upheld the Save Women's Sports Act, finding no evidence of unconstitutional animus toward transgender (biologically male identifying as female) students and, after applying an intermediate scrutiny standard to the Act, found no violation of the Equal Protection Clause. The district court rejected the *B.P.J.* plaintiff's reliance on a Fourth Circuit (single-sex bathroom policy) case holding that assigning bathrooms based on biological sex violated the Equal Protection Clause, determining that the Fourth Circuit case—which addressed sex-separated bathroom usage, not sex-separated sports teams—was not dispositive.[121]

Although ignored by the Department in the Athletics NPRM, the district court properly recognized that the dispositive issue before it was "whether the legislature's chosen definition of 'girl' and 'woman' . . . is constitutionally permissible . . . ." The court determined that "[w]hile sex and gender are related, they are not the same," that "[i]t is beyond dispute that, barring rare genetic mutations not at issue here, a person either has male sex chromosomes or female sex chromosomes," and that "gender" references a "set of socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate. . . ."[122] The Athletics NPRM irresponsibly ignores this critical analysis and the accompanying district court order as the Fourth Circuit considers the matter.[123]

Rather, the Department cites the adverse *B.P.J.* decision as reason for its proposed rulemaking to "clarify[] the Department's interpretation of its Title IX regulations" and notes that the court

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[120] *B.P.J. v. West Virginia State Bd. Of Educ*., 2023 U.S. Dist. LEXIS 1820 (S.D. W.Va. Jan 5, 2023) ("*B.P.J.* Final Order").
[121] *See* Motion for Stay, Doc. 34-1, at 15–20, No. 23-1078 (4th Cir.) (discussing *Grimm v. Gloucester Cnty. Sch. Bd*., 972 F.3d 586 (4th Cir. 2020)).
[122] *Id*. at *3 and *16.
[123] *West Virginia, et al. v. B.P.J.*, 598 U.S. ___ (2023).

"agreed with the plaintiff that the law classified students based on sex."[124] The *B.P.J.* court held that West Virginia's categorical ban on participation by transgender students consistent with their gender, but not biological, identity was substantially related to the state's interest in providing equal athletic opportunities for girls and women.[125] Inexplicably, the Department uses the court's finding that current § 106.41(b) endorses biologically based sex separation in sports to argue that the Athletics NPRM would properly define "sex" to include the Department's newfound gender identity provisions, thereby addressing the court's view that Title IX and § 106.41(b) "permit[s] categorical exclusion of transgender students from participating consistent with their gender identity."[126]

The Department's meager and sometimes misleading legal offerings in support of the Athletics NPRM fail to address other highly relevant rulings on the matter of sex classifications such as that created by the Save Women's Sports Act, including the Supreme Court's recognition of "'inherent differences' between the biological sexes that might provide appropriate justification for distinctions."[127]

D. The Department Must Point to Clear Congressional Authorization to Issue the Proposed Rule Contained in the Athletics NPRM.

Contradicting its long-held interpretation of Title IX's clear text, purpose, and meaning throughout nearly the whole of the law's existence, the Department chooses to upend its approach to Title IX, with potentially massive economic and political consequences—especially with regard to the 20 states that now restrict participation of boys and men who identify as female in women's sports. To pursue its novel interpretation of this 50-year-old statute, the Department must point to clear congressional authorization to redefine "sex" to prohibit discrimination on the basis of "gender identity" and explain how it can do so in light of the text, purpose, and longstanding interpretation of Title IX as a statute whose aim and effect have been to further opportunities for women and girls in educational programs and activities, including sports.

If the Department fails to explain how its proposed rule can survive judicial scrutiny under the major questions doctrine, then it is acting in an arbitrary and capricious manner.

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[124] Athletics NPRM, *supra*, at 22,868.
[125] *B.P.J.*, 2023 LEXIS 1820, at *8.
[126] Athletics NPRM, *supra*, at 22,868.
[127] *Grimm*, 972 F.3d at 607–608 (4th Cir. 2020) (citing *Virginia,* 518 U.S. at 534).

III. The Department Exceeds Its Statutory Authority in Issuing the Proposed Rule in Violation of the APA.

A. The Department's Unprecedented Misinterpretation of the Word "Sex" in Title IX Contradicts the Statutory Text and Runs Counter to the Purpose of the Law.

The Administrative Procedure Act ("APA")[128] provides that when an agency's action exceeds its statutory jurisdiction, authority, or limitations, the action is invalid.[129] Section 706(2)(A) provides that agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be held unlawful and set aside. Section 706(2)(C) requires that when the agency action is found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," the action shall be held unlawful and set aside.

In *Bowen v. Georgetown Univ. Hosp.*,[130] the Supreme Court observed that "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." In *FDA v. Brown & Williamson Tobacco Corp.*, it declared that an "administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[131] As the U.S. Court of Appeals for the District of Columbia Circuit has stated, "The authority to issue regulations is not the power to make law, and a regulation contrary to a statute is void."[132]

In *Chevron, U.S.A., Inc. v. NRDC, Inc.*, the Supreme Court noted that "[i]f a court, employing traditional rules of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[133] The Court has also held that "[w]hen terms used in a statute are undefined, we give them their ordinary meaning."[134] More recently, the Court explained that "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[135]

In the previous section, we explained why the Department's attempted redefinition of Title IX's unambiguous prohibition of discrimination on the basis of sex frustrates the meaning of the text and the driving purpose behind the statute, in contravention of the principle of the separation of powers. For the same reasons, the proposed regulation in the Athletics NPRM violates the APA's

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[128] 5 U.S.C. §§ 551–559.
[129] 5 U.S.C. §§ 706(2)(A), (C).
[130] 488 U.S. 204, 208 (1988).
[131] 529 U.S. 120, 151 (2000).
[132] *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009).
[133] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 843 n.9 (1984).
[134] *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).
[135] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325 (2014).

prohibition against rulemaking that is “not in accordance with law” and “in excess of statutory jurisdiction, authority, or limitations . . . .”

The Department’s proposed regulations go far beyond any valid grant of authority by Congress. When it prohibited discrimination “on the basis of sex,” Congress certainly “had an intention on the precise question at issue”—that is, how far that prohibition on discrimination could extend. All evidence points to Congress’s intent to prohibit discrimination on the basis of biological sex—not on the basis of one’s fluid “gender identity,” which was certainly not a concept included within the “ordinary meaning” of the term “sex” when the statute passed in 1972. The Department thus has no power to make law by rewriting an unambiguous term of a statute to include a concept Congress had no intention of including within its regulatory jurisdiction.

The original purpose of Title IX—to place women on an equal footing with men in educational programs and activities—and the progress the law has made in furthering this laudable goal, particularly in athletics, highlights the Department’s betrayal of the law through the Athletics NPRM and failure to operate within its limits. “There can be no doubt that Title IX has changed the face of women’s sports as well as our society’s interest in an attitude toward women athletes and women’s sports.”[136] For some, Title IX “had an almost mythical air” that helped explain “why every girl [she] knew played some kind of sport.”[137] The success of Title IX’s guarantee of an equal playing field in educational programs and opportunities helps explain why, per the Secretary, “in 1972, there were only 300,000 girls competing in high school athletics; today that number is 3.4 million. In college it was similar” with numbers increasing from an estimated 30,000 to an estimated 150,000.[138] Similarly, the growth of participation in women’s sports is viewed as one of Title IX’s “major achievements.”[139] Since its enactment, female participation at the high school level has grown 1,057 percent and at the college level by 614 percent.[140]

The Department now proposes to force female athletes, who have for so long benefited from the equal playing field mandated by Title IX, to compete against boys and men as a matter of federal

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[136] *Cohen v. Brown University*, 101 F.3d 155, 188 (1st Cir. 1996).
[137] Maggie Mertens, *50 Years of Title IX: How One Law Changed Women’s Sports Forever*, SPORTS ILLUSTRATED (May 18, 2022), https://www.si.com/college/2022/05/19/title-ix-50th-anniversary-womens-sports-impact-daily-cover.
[138] Paula Lavigne, *Education Secretary Miguel Cardona on Title IX Compliance: “It Shouldn’t Be that the Federal Government has to Watch – It’s Everyone’s Job,”* ESPN (Jun. 15, 2022), https://www.espn.com/college-sports/story/_/id/34084273/education-secretary-miguel-cardona-title-ix-compliance-the-federal-government-watch-everyone-job.
[139] *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting).
[140] Tara D. Sonenshine, *Women and Sports: 50 Years after Title IX, Is the Playing Field Level?*, THE HILL (Jun. 20, 2022), https://thehill.com/opinion/civil-rights/3529746-women-and-sports-50-years-after-title-ix-is-the-playing-field-level/.

law. This is a perversion of the purpose of Title IX, a landmark civil rights law. Importing gender identity into Title IX "may . . . force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male."[141] Beyond eliminating spaces for women on teams and redirecting athletic scholarships from women to biological men, this move will likely deter some girls and women from pursuing competitive sports at their schools, colleges, and universities.

Likewise, the Department's proposal that educational institutions bear the burden of proving that their policies protecting female athletes are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to the men and boys who are excluded from competing in women's and girls' sports "for each sport, level of competition, and grade or education level" turns Title IX on its head. It is simply not plausible that, when Congress enacted Title IX in 1972, it intended to *weaken* the ability of educational institutions to guarantee women and girls the opportunity to participate in sex-separated sports in furtherance of their equal opportunity to compete and achieve on the same terms as men. Placing the burden on institutions to show that allowing girls and women to compete on separate teams from boys and men will not harm those boys and men contradicts the purpose of Title IX as a guarantor of opportunities for women and goes well beyond any authorization Congress granted to the Department in prohibiting discrimination based on sex.

The Department must explain how limiting opportunities for biological girls and women in sports by forcing them to compete against biological boys and men who identify as female, and placing the burden on institutions to show that policies advancing women's opportunities in athletics align with the Department's current ideological objectives, could possibly be consistent with the text, original meaning, and purpose of Title IX and not run afoul of the APA's requirement that courts set aside rulemakings that are "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations."

B. The Department's Proposed Rule Is in Excess of Its Jurisdiction and Authority Under Its Authorizing Statute.

In its Athletics NPRM, the Department arbitrarily and capriciously fails to consider that forcing state institutions to abide by its proposed rule places the Department out of compliance with its authorizing statute, the Department of Education Organization Act ("DEOA").

Enacted in 1979, the DEOA prohibits the Secretary and other officers of the Department from exercising any direction over administration of school districts and state universities and colleges. Framed as a rule of construction, the prohibition states:

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[141] *Bostock*, 140 S. Ct. at 1779–1780 (Alito, J., dissenting).

> No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, **administration**, or personnel of **any educational institution, school, or school system**, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.[142]

In addition to this direct language, Congress included clear statements in the law that the creation of the Department does not displace the primary role of state and local governments in education:

> It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is systems and other instrumentalities of the States.[143]

By forcing schools and institutions of higher education receiving federal funding, including public schools, colleges, and universities, to carry out its ideological agenda to require female athletes to compete against boys and men who identify as female, the Department oversteps its authority as set out in the DEOA and violates the APA.

C. The Department's Proposed Rule Would Undermine Students' Reasonable Expectations of Privacy.

In *United States v. Virginia*, where the U.S. Supreme Court held that the exclusively male admissions policy of the Virginia Military Institute violated the U.S. Constitution's Equal Protection Clause,[144] the Court recognized that students have certain sex-based privacy rights that the institution would have to accommodate under the ruling.[145] Lower courts have acknowledged

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[142] 20 U.S.C. § 3403(b) (emphases added).
[143] 20 U.S.C. § 3403(a).
[144] 518 U.S. at 558.
[145] *Id.* at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.").

this right to a reasonable expectation of privacy in not having to appear undressed or partially clothed in the presence of the opposite sex.[146]

The Athletics NPRM applies to policies of educational institutions that "limit or deny a student's eligibility to participate on a male or female team" because of that student's biological sex.[147] This vague standard could serve as a basis for the agency to recognize that the opportunity to "participate" on a team includes, for example, sharing a locker room or overnight accommodations with people of the opposite sex. Institutions that limited team "participation" in such a way would be forced to show that this limitation is "substantially related to the achievement of an important educational objective" and "[m]inimize[s] harms to students" who are seeking to participate on the team.[148]

Despite the burdens the Athletics NPRM places on educational institutions that choose to "limit" biologically male students' participation in female teams by declining to admit them to the same restrooms, locker rooms, showers, and overnight accommodations as the female members of those teams, the Department utterly fails to address the well-established right to an expectation of privacy of student athletes who do not wish to appear partially or fully unclothed in the presence of an individual of the opposite sex.

The Department must explain whether an institutional policy of not admitting biological boys or men to the same intimate facilities as biological girls and women would be a limitation of a biological male's right to participate on a team of his choice, thus triggering the proposed rule's requirement that an institution demonstrate that the policy is substantially related to an important objective and that it is minimizing harms to the student whose opportunity to participate is limited. If it is a limitation on the student's eligibility to participate, then the Department must explain how its rule is consistent with federal case law recognizing a right to a reasonable expectation of privacy. If the Department fails to do so, then it is acting in an arbitrary and capricious manner.

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[146] *See Doe v. Luzerne Cnty.*, 660 F.3d 169, 176-77 (3d Cir. 2011) (recognizing an individual's reasonable expectation of privacy in their partially clothed body exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (finding a parolee has a right not to be observed producing a urine sample by an officer of the opposite sex).
[147] Athletics NPRM, *supra*, at 22,891.
[148] *Id.*

D. The Department Must Perform a Family Policymaking Assessment.

Federal law requires that, prior to implementing any policy or regulation that "may affect family well-being," the Department must evaluate its proposed rule in light of whether "(1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; (3) the action helps the family perform its functions, or substitutes governmental activity for the function; (4) the action increases or decreases disposable income or poverty of families and children; (5) the proposed benefits of the action justify the financial impact on the family; (6) the action may be carried out by State or local government or by the family; and (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society."[149] There is no question that the rule proposed in the Athletics NPRM, in encouraging the social transitioning of children from one sex to another in the context of school athletics programs, "may affect family well-being." Therefore, the Department must assess its proposed rule in light of the seven factors listed in the law in order to avoid acting in an arbitrary and capricious manner. Any failure to do so would be arbitrary and capricious and a violation of the APA.

IV. The Department's Proposed Rule Unlawfully Coerces State Educational Institutions to Carry out Its Novel Policy Priorities in Violation of the Constitutional Principles of Federalism and the Separation of Powers.

In 2012, the U.S. Supreme Court invalidated a portion of the Affordable Care Act ("ACA") that threatened to withdraw all federal Medicaid funding from the states unless they accepted an expansion of the program and the conditions that accompanied this expansion.[150] In his opinion, Chief Justice John Roberts pointed to the Court's previous case law indicating that the validity of congressional legislation passed under the Spending Clause authority in the U.S. Constitution,[151] including the Medicaid expansion at issue in the ACA, "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'" offered by the legislation.[152] As the Chief Justice

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[149] Public Law 105–277, 112 Stat. 2681-529 (§ 654(c)).
[150] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012).
[151] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").
[152] *NFIB*, 567 U.S. at 577 (quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)); *see id.* at 25 ("Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or 'retroactive' conditions."); *New York v. U.S. Dept. of Health & Human Services*, 414 F. Supp. 3d 475, 567 (S.D.N.Y. 2019) ("In assessing whether States have been given notice consistent with this standard, the Court must view the challenged conditions 'from the perspective of a state official

wrote, "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."[153]

Of course, under its Spending Clause authority, Congress can use relatively minor financial conditions to steer state and local governments in its preferred direction.[154] In the case of the Medicaid expansion, however, the Chief Justice characterized "the financial 'inducement' Congress has chosen," the termination of all existing Medicaid funding, as "much more than 'relatively mild encouragement'—it is a gun to the head."[155]

The Chief Justice also described the Medicaid expansion as "a shift in kind, not merely degree," as it transformed Medicaid from a program "designed to cover medical services for four particular categories of the needy" into "an element of a comprehensive national plan to provide universal health insurance coverage."[156]

This comment has already discussed the substantial amount of funding at stake for K–12 schools, colleges, and universities—easily constituting 13 percent of the revenue of public colleges and universities and 8 percent of funding for elementary and secondary schools. In the past half-century of Title IX enforcement, there is no evidence that state and local governments "knowingly and voluntarily" accepted this funding with the expectation that they might someday be required to admit boys and men who identify as women into their women's and girls' school sports programs. Certainly the 20 states that have restricted the participation of boys and men in girls' and women's athletic programs did not do so. In abruptly flipping Title IX, the Department's radical, unauthorized proposed revision of the statutory terms is a difference in kind, not merely in degree.

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who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds' and 'must ask whether such a state official would clearly understand that' the challenged condition was 'one of the obligations [attached to the accepted funding].'") (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).

[153] *NFIB*, 567 U.S. at 577.

[154] *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) ("When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.").

[155] *NFIB*, 567 U.S. at 581; *see also New York v. HHS*, 414 F. Supp. 3d at 570 ("The threat to funding presented by § 88.7(i)(3)(iv) makes *NFIB* a more apt analogy here than *Dole*. That provision threatens not a small percentage of the States' federal health care funding, but literally all of it. Indeed, the Rule allows HHS to initiate a compliance review if it 'suspect[s]' noncompliance and to withhold, deny, suspend, or terminate all federal funding from HHS even during the pendency of voluntary good-faith efforts to come into compliance with the Rule.") (internal citations omitted)).

[156] *Id.* at 583.

The Court based its *NFIB* holding on *Congress's* decision to condition a vast amount of federal funding on states' acceptance of certain policies. When a federal agency purports to establish such a condition, it raises even more serious constitutional issues related to the constitutional principle of separation of powers. That is because federal agencies have no authority to withhold funding from state or local governments without Congress's permission to do so.[157] "Aside from the power of veto, the President is without authority to thwart congressional will by canceling appropriations passed by Congress. Simply put, 'the President does not have unilateral authority to refuse to spend the funds.'"[158]

Here, the Department unilaterally applies a new condition, not found anywhere in Title IX or directed by Congress and contrary to its own interpretation of that law for nearly its entire history, for public schools, colleges, and universities to continue to receive federal funds—namely, that they must withdraw all sex-related categorical protections for women's and girls' sports and show why these restrictions meet certain burdens invented by the Department. By doing so, the Department arrogates to itself Congress's power under the Constitution's Spending Clause and violates the constitutional principle of the separation of powers.

The Department must explain how it possesses the constitutional and legal authority to coerce schools, institutions, and programs that receive federal financial assistance in this manner. If it fails to do so, then the Department is acting arbitrarily and capriciously.

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[157] *See, e.g.*, *New York v. HHS*, 414 F. Supp. 3d at 562 ("An agency may not withhold funds in a manner, or to an extent, unauthorized by Congress.") (citing *Train v. City of New York*, 420 U.S. 35, 44–46 (1975)); *id.* ("§ 88.7(i)(3)(iv) claims a power that no Conscience Provision nor other statute has delegated to HHS: to terminate the entirety of a recipient's HHS funding as a penalty for violating a Conscience Provision. Congress nowhere 'provid[ed] the Executive with the seemingly limitless power to withhold funds' on this scale. Section 88.7(i)(3)(iv) thus aggrandizes the Executive Branch at Congress's expense. Such an encroachment is inconsistent with the separation of powers.") (internal citations omitted) (quoting *Train*, 420 U.S. at 45–46)); *City of Chicago v. Barr*, 961 F.3d 882, 892 (7th Cir. 2020) ("The executive branch has significant powers of its own—particularly in matters such as immigration—but the power to wield the purse to alter behavior rests squarely with the legislative branch. Congress has thus far refused to pass legislation that would do precisely what the Attorney General seeks to do here."); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234–1235 (9th Cir. 2018) ("Because the Executive Order directs Executive Branch administrative agencies to withhold funding that Congress has not tied to compliance with § 1373, there is no reasonable argument that the President has not exceeded his authority. Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals. Because Congress did not authorize withholding of funds, the Executive Order violates the constitutional principle of the Separation of Powers.") (footnote omitted)).

[158] *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (quoting *In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013)).

V. The Department's Proposed Rule Is Arbitrary and Capricious in Violation of the APA.

A. The Department's Athletics NPRM Fails to Properly Consider the Harms the Proposed Rule Will Cause Female Athletes.

Throughout its Athletics NPRM, the Department shows special solicitude for individuals whose biological sex does not match their "gender identity" and wish to compete on a team on the basis of the latter. The Department indicates that individuals unable to compete on the athletic team that matches their "gender identity" lose out on benefits such as "learning to work as a team,"[159] "develop[ing] a connection with teammates and the school community,"[160] "increased cognitive performance and creativity,"[161] "improved educational and occupational skills,"[162] "higher academic performance and likelihood of graduation from a 4-year college,"[163] "improved mental health,"[164] and "improved cardiovascular and muscle fitness,"[165] among others.

The Department fails to consider the benefits lost to biological girls and women. There are numerous legitimate reasons why a biologically female athlete would choose not to compete with or against a biologically male athlete, including but not limited to concerns about one's physical safety on the playing field, a desire not to share an intimate facility such as a locker room or bathroom with a person of the opposite sex, objections to the unfairness inherent in being forced to compete against an athlete with innate biological advantages, a desire to engage in activities with members of the same sex, or religious objections to sharing intimate spaces with someone of the opposite sex.[166] The Department must weigh against any claimed benefits of its proposed rule the potential harms its proposed rule will cause girls and women at every level who will lose a spot on the team or who do not wish to compete for the aforementioned reasons or others. If it does not do so, then it is acting in an arbitrary and capricious manner.

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[159] Athletics NPRM, *supra*, at 22,870.
[160] *Id.* (quoting LUKE MODROVSKY, TRANSGENDER ATHLETES—PARTICIPATION, EQUITY AND COMPETITION (May 12, 2022), https://www.nfhs.org/articles/transgender-athletes-participationequity-and-competition).
[161] *Id.* at 22,879.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] Many males required to compete against biological women who identify as male under the Department's proposed rule will share some of these concerns. The Department also fails to consider their concerns and the likelihood that they may choose not to compete in its proposed rule and must do so in its final rule; otherwise, it is engaged in arbitrary and capricious rulemaking.

B. The Vagueness of the Department's Proposed Rule Turns the Athletics Field into a Legal Minefield.

One key purpose cited by the Department in its Athletics NPRM is "to provide greater clarity to recipients and other stakeholders about the standard that a recipient must meet under Title IX if it adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity . . . ."[167] But the vague standard it proposes would accomplish just the opposite, frustrating any attempt by institutions or stakeholders to define their rights and obligations. This is arbitrary and capricious rulemaking that violates the APA.

i. The Department's Failure to Define "Sex" and "Gender Identity" Is Arbitrary and Capricious.

The Department's proposed rule applies to any recipient of federal funds that "adopts or applies *sex-related* criteria that would limit or deny a student's eligibility to participate on a male or female team *consistent with their gender identity* . . . ."[168] Yet it is impossible to know the scope of the application of the rule because the Department refuses to define "sex" and "gender identity" anywhere in the text of the proposed regulation or even in the preamble of the Athletics NPRM.

How can institutions predict the scope of the term "sex-related criteria" if the Department is not even capable of defining the word "sex"? The Department's July 2022 Title IX NPRM redefined "discrimination on the basis of sex" to "*include* discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[169] It did not define any of these terms other than "pregnancy or related conditions," and it explicitly left open the possibility of other concepts being included in the definition. The Athletics NPRM identifies "sex characteristics" as sex-related and gives as an example of "sex-related eligibility criteria" a requirement "based on a sex marker on an identification document, such as a birth certificate, passport, or driver's license," or "[c]riteria requiring physical examinations or medical testing or treatment related to a student's sex characteristics . . . ."[170] But without defining "sex" in the proposed regulation, given the brave new world the Department is seeking to usher in where the term "sex" means "sex stereotypes," "sex characteristics," "sexual orientation," and "gender identity," the Department sets educational institutions adrift regarding the limits of its term "sex-

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[167] Athletics NPRM, *supra*, at 22,879; *see also id.* at 22,866 ("This clarification regarding Title IX's application to sex-related eligibility criteria is particularly important as some States have adopted criteria that categorically limit transgender students' eligibility to participate on male or female athletic teams consistent with their gender identity.") (citations omitted).
[168] *Id.* at 22,891 (emphasis added).
[169] Title IX NPRM, *supra*, at 41,571.
[170] Athletics NPRM, *supra*, at 22,871.

related criteria." The Department must provide a definition of "sex" in the text of its proposed regulation, or it is acting in an arbitrary and capricious manner.

The Department's refusal to define "gender identity" in its proposed rule likewise will throw Title IX enforcement throughout the country into a state of confusion and disarray. The proposed rule only tells schools, colleges, and universities that they will be subject to new requirements if they restrict participation by students in athletics on the basis of their "gender identity"; it tells them nothing about the definitional scope of that term. Given that private companies like Facebook have offered users the choice of at least 58 different gender identities,[171] it will be no easy feat to sort out whether all of these gender identities must be accommodated or only some and which gender identities are associated with "male" teams and which are associated with "female" teams.

This last point is especially important for the enforcement of Title IX because it will cause extreme difficulty for schools in sorting out how eligibility for certain teams is determined. With regard to "nonbinary" students, or students whose "gender identity" does not align with either male or female sex categories, the Department simply compounds the problem in the preamble of its Athletics NPRM by stating, "When applying sex-related criteria to nonbinary students, a recipient may need to determine whether the criteria do, in fact, limit or deny a nonbinary student's eligibility to participate on a male or female team consistent with their gender identity to determine whether the proposed regulation would apply."[172] But how will educational institutions actually do so? The Department does not say.

The Department must answer the following questions related to the definitional scope of "gender identity" or it will fail to provide enough detail for educational institutions to enforce its proposed rule effectively.[173]

- If a recipient prohibits a student who identifies as "agender" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

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[171] Russell Goldman, *Here's a List of 58 Gender Options for Facebook Users*, ABC NEWS (Feb. 13, 2014), https://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users.
[172] Athletics NPRM, *supra*, at 22,869.
[173] These categories are drawn from Facebook's list of 58 "gender identities" users may use to classify themselves on the platform. *See* Goldman, *supra*. If the Department believes that this list is overinclusive or that any of these entries are not legitimate "gender identity" categories, then it must identify which "gender identities" are not within the scope of the term it uses in its proposed rule, or it is acting in an arbitrary and capricious manner.

- If a recipient prohibits a student who identifies as "androgynous" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "bigender" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "gender fluid" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "gender nonconforming" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "gender questioning" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "gender variant" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "genderqueer" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to

the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "neutrois" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "pangender" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

- If a recipient prohibits a student who identifies as "two-spirit" from participating on a female sports team due to that student's sex-related criteria, must the recipient show that the sex-related criteria are "substantially related to the achievement of an important educational objective" and "[m]inimize harms" to that student?

In particular, the Department must identify the criteria educational institutions must use to determine the "consistency" of each of these "gender identity" categories with either a male or female sex-separated team. If it does not do so, then it is acting in an arbitrary and capricious manner. And if the Department fails to provide any definition of "gender identity" in its final regulatory text, then that regulation is arbitrary and capricious.

ii. The Department's Vague Reference to Criteria that "Limit" or "Deny" a Student's Participation on a Sports Team Is Arbitrary and Capricious.

The Department's proposed rule imposes requirements on educational institutions receiving federal funding that adopt or apply sex-related criteria "that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity . . . ."[174] The Department arbitrarily and capriciously refuses to define what constitutes a limit on or denial of eligibility to participate on such a team. The Athletics NPRM's preamble gives brief, vague examples, stating that a "limitation" would include "not allow[ing] transgender students to participate fully on a male or female team consistent with their gender identity (e.g., by permitting a student to participate in some but not all competitions)."[175] It says that a denial would include

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[174] Athletics NPRM, *supra*, at 22,891.
[175] *Id.* at 22,871.

"foreclos[ing] students' opportunity to participate on male or female teams consistent with their gender identity (e.g., by requiring transgender students to participate consistent with their sex assigned at birth or by prohibiting transgender girls who have undergone endogenous puberty from participating on girls' teams)."[176]

The Department fails to provide clarity on what it means to "fully" participate on a sports team. Does it mean simply in competitions or does it mean in any facet of the team's activities? For instance, would a school be subject to the rule's burden of proof requirements if it denied a student the opportunity to share a locker room or bathroom with teammates? Would a school be subject to these requirements if it did not offer lodging to the student on the same basis as teammates—for instance, by sharing a room with that teammate? If a co-ed school sports team requires that girls and boys or men and women compete equally (for instance, by allotting a certain number of penalty kicks to females or requiring a certain number of females to be on the field at all times), and the school or coach interpreted this requirement on the basis of participants' biological sex, then would the school be forced to make the onerous showings required by the proposed rule?

The Department is also unclear about how an educational institution, program, or activity might apply its criteria to competitions between teams of different schools. For example, would a secondary school be required to make the showings required in the proposed rule if it did not allow a female volleyball team from another school to field biologically male athletes when competing against the school's female volleyball team?

The Department must answer these questions or it is acting in an arbitrary and capricious manner. More generally, these examples expose the vagueness of the Athletics NPRM when it comes to limitations on or denial of opportunities to participate that will turn Title IX into a costly legal minefield for schools, colleges, and universities and incentivize such institutions to avoid potential enforcement risks by requiring all teams to admit all individuals on the basis of their "gender identity." Such was never the purpose of Title IX and violates its core purpose of providing opportunities for girls and women, including in sports. The rule is thus arbitrary and capricious and contrary to law.

iii. The Department's Vague "Important Educational Objective" Standard Is Arbitrary and Capricious.

When an educational institution receiving federal funding chooses to apply "sex-related criteria" to participation requirements for a male or female athletics team that limit or deny a student the opportunity to participate on that team in line with that student's "gender identity," one of the showings the institution must make under the Department's proposed rule is that the criteria "[b]e

[176] *Id.* at 22,871–22,872.

substantially related to the achievement of an important educational objective . . . ."[177] The Department is open in its Athletics NPRM about the fact that its proposed rule "does not specify the objectives that a recipient may assert."[178] By failing to do so, the Department is issuing an arbitrary and capricious regulation.

The Department does identify in its Athletics NPRM two limited purposes educational institutions may pursue in establishing "sex-related criteria" that exclude certain students from sports teams that qualify as "important educational objectives": "ensuring fairness in competition" and "prevention of sports-related injury."[179] The Department does not propose to include these objectives in the regulatory text, however, exacerbating the lack of clarity in the proposed rule and placing them in danger of being swept away at the whim of this or a future administration without the benefit of notice and comment.

The Department's failure to define "important educational objective" in its proposed regulation or in the Athletics NPRM places in doubt the use of other objectives that are undoubtedly important to educational institutions and to students seeking to participate in school sports. These objectives include protection of the privacy of students who do not wish to share a locker room, restroom, shower, or overnight accommodation with an individual who is not the same sex as that student; allowing students to choose to associate with members of their own biological sex to build camaraderie and long-lasting friendships; and recognizing the religious concerns of some students and their parents in commingling with students of the opposite sex outside the classroom and in intimate spaces. The Department must explain whether each of these purposes an institution has could constitute an "important educational objective" and is therefore more or less legitimate than any other purpose an institution might have, especially in the context of a statute that simply prohibits discrimination "on the basis of sex" in educational programs and activities and whose purpose was to provide more opportunities to women and girls. If it does not do so, then the Department is acting in an arbitrary and capricious manner.

While it arbitrarily and capriciously neglects to define the full range of "important educational objectives" it chooses to recognize as legitimate under Title IX, the Department identifies several objectives that fail to meet its test, including policies "excluding transgender students from sports, or to require adherence to sex stereotypes, or solely for the purpose of administrative convenience."[180] By singling out objectives that it disagrees with and precluding educational institutions, LEAs, and states from pursuing such purposes, the Department exposes the unreasoned nature of its proposed rulemaking. Simply put, the Department has absolutely no statutory basis to prohibit an educational institution from pursuing any or all of these objectives as

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[177] *Id.* at 22,891.
[178] *Id.* at 22,872.
[179] *Id.*
[180] *Id.*

long as they do not discriminate "on the basis of sex." By overreaching its statutory jurisdiction and infusing gender ideology into a statute that only speaks of binary, biological sexual categories, the Department chooses an illegal and unreasonable "I know it when I see it," "gotcha" standard regarding "important educational objectives." As the DEOA makes clear, states, not the agency, decide such objectives. This is the domain of Congress and state legislatures, not of the Department.

iv. The Department's Vague "Substantially Related" Standard Is Arbitrary and Capricious.

When a recipient chooses to apply "sex-related criteria" to participation requirements for a male or female athletics team that would deny a student the opportunity to participate on that team in line with that student's "gender identity," it must also show that the criteria are "substantially related" to the objective it is pursuing.[181] The Department states that "sex-related criteria would be substantially related to achievement of an important educational objective if there is a direct, substantial relationship between a recipient's objective and the means used to achieve that objective, and if the criteria do not rely on overly broad generalizations about the talents, capacities, or preferences of male and female students."[182]

The Department is adept at describing what it does not like but capriciously fails to propose regulatory text that meets even minimal federal rulemaking requirements to state what it requires of recipients. Criteria would not be "substantially related" to such an objective, for example, if they "assume all transgender girls and women possess an unfair physical advantage over cisgender girls and women in every sport, level of competition, and grade or education level."[183] "If a school can achieve its objective using means that would not limit or deny a student's participation consistent with their gender identity, its use of sex-related criteria may be pretextual rather than substantially related to achievement of that important educational objective."[184] In establishing such sex-related criteria, "a recipient would not be permitted to rely on false assumptions about transgender students," and, importantly, "nothing in Title IX precludes a school from taking nondiscriminatory steps to prevent misconduct and protect privacy for all students."[185]

This "substantially related" standard (which is arbitrarily and capriciously not defined in the proposed regulatory text) is a vague device that will serve as *carte blanche* for the Department to second-guess and overturn the decisions of educational institutions and state and local authorities

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[181] *Id.* at 22,891.
[182] *Id.* at 22,873 (quotation marks omitted) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Virginia*, 518 U.S. at 533; *Hecox*, 479 F. Supp. 3d at 982).
[183] *Id.*
[184] *Id.* at 22,874.
[185] *Id.*

to establish *any* sex-related criteria for their athletics programs. Through this standard, the Department gives itself the power to declare any criteria to be a violation of Title IX because it is based on a "false assumption" about the nature of students who do not identify with their sex at birth. The Department claims the authority to look behind the text of any "sex-related criteria" and simply declare that it is "pretextual" because it is based on some improper motive. Leaving aside the obvious fact that Title IX gives the Department no authority to do this, establishing the Department as the arbiter of whether any motive (real or imagined) is sufficiently related to the objective pursued would result in a massive power shift from states and school districts and higher education institutions to Washington—all on the basis of the Department's decision to read "gender identity" into a law that protects no such class.

The "false assumptions" language in the Athletics NPRM is particularly insidious because it places the Department in charge of determining what is true and what is false when it comes to the advisability of requiring institutions to allow students to participate in sex-separated sports on the basis of their "gender identity." What the Department may believe to be true today with regard to scientific evidence regarding "gender identity" theory and athletics could be demonstrated to be false tomorrow. This fact is clearly demonstrated by the eagerness with which the current administration has adopted the precepts of gender ideology, about which Congress had no knowledge when it enacted Title IX.

The Department's "substantially related" requirement is vague and would unlawfully, arbitrarily, and capriciously give it the authority to turn down any recipient's explanation for its sex-related criteria as "pretext." Its proposed regulation is unlawful under the APA.

v. The Department's Vague "Minimization" Requirement Is Arbitrary and Capricious.

When a recipient chooses to apply "sex-related criteria" to participation requirements for a male or female athletics team that would deny a student the opportunity to participate on that team in line with that student's "gender identity," the agency requires that the recipient must "[m]inimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."[186] The Department explains that, under this standard, such sex-related criteria would be invalid "if the recipient can reasonably adopt or apply alternative criteria that would be a less harmful means of achieving the recipient's important educational objective."[187] This is simply an extension of the "substantially related" standard requiring educational institutions to tailor their sex-related criteria to whatever objectives the Department views as sufficiently "important" to be pursued. As we have seen above, this standard is arbitrarily and capriciously vague and not based in law.

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[186] *Id.* at 22,891.
[187] *Id.* at 22,877.

To the extent that the Department's proposed harm minimization requirement goes beyond the need to tailor one's criteria to objectives, it is nonsensical because the "harm" to which the student in question will claim to be subjected is the very exclusion from or limitation of participation on the sex-separated sports team at issue. If a school establishes sex-related criteria for a certain sports team that excludes or limits a student from participating on that team, *that* is the alleged harm to which the student is subjected. It is difficult to fathom what an institution could do to "minimize" that harm without allowing the student to participate on whatever team or in whatever way that student wishes. For instance, if a secondary school implements sex-related criteria that "limit" a student's participation on a team by excluding that student from using the locker room with teammates, how will a school "minimize" the harm to that student beyond allowing the student to share the locker room with teammates? The "harm" in this case has already occurred through the exclusion or "limitation"—"minimizing" that harm is impossible.

For these reasons, the Department's minimization requirement is vague, with no definition in the in the proposed regulatory text, and arbitrary and capricious in violation of the APA.

C. The Department Arbitrarily and Capriciously Fails to Explain How Any Sex-Related Criteria for Athletics Teams Would Survive Scrutiny Under Its Proposed Rule.

The Department proposes regulatory text that, on its face, would permit recipients to establish sex-related criteria that would limit or deny students the opportunity to participate on a male or female sports team consistent with their "gender identity," as long as they make certain showings—namely, that they have an "important" enough educational interest in doing so, that their criteria are "substantially related" to that interest, and they have minimized any harms to the individual whose opportunity to participate is limited or denied.

But the Department's preamble raises serious questions regarding whether *any* sex-related criteria would surmount these onerous hurdles. For instance, the Department notes with approval submissions by some stakeholders in the rulemaking process that "ensuring fair competition and prevention of sports-related injury does not necessarily require schools to adopt or apply sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity. As discussed above, many schools do not impose such restrictions, and some sport governing bodies impose such restrictions only for older students in highly competitive settings."[188] And in its description of the harm minimization requirement, the Department states that "whether the objective could be accomplished through alternative criteria

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[188] *Id.* at 22,872 (citation omitted).

that would not limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity would be relevant to the analysis."[189]

All recipients are interested in the two important educational objectives the Department cites, fairness in competition and physical safety. If, as the Department points out, some recipients choose to pursue these aims without excluding anyone from teams and without limiting their participation, then how could a different school justify pursuing its objectives by more restrictive means, such as by imposing biological criteria that other schools have rejected, to accomplish the same ends? Under the Department's standard, these institutions will not be able to show that their means are sufficiently tailored to their ends or that they have minimized harms because other schools pursue these ends in a less restrictive manner—namely, by allowing everyone to compete on the basis of their "gender identity."

The Department must explain whether its proposed rule will work as a one-way ratchet that will, in the long term, require all recipients to permit participation on all teams by all students consistent with their "gender identity." If it does not do so, then it is engaging in arbitrary and capricious rulemaking in violation of the APA.

D. The Department's Requirement that Recipients' Sex-Related Criteria Be Tailored to Each Sport, Level of Competition, and Grade or Education Level Is Costly and Unworkable.

When a recipient adopts or applies sex-related criteria that limit or deny the participation by a student on a male or female team consistent with that student's "gender identity," the Department's proposal requires that the criteria be related to an important educational objective "for each sport, level of competition, and grade or education level."[190] This requirement would force nearly 24,000 school districts, colleges, and universities that receive federal education funding to examine biology-based requirements for participation on sports teams in every context in which the recipient offers a sport. Beyond the cost of reviewing these criteria and adjusting them for each sport, level of competition, and grade or education level for every recipient in the country, this requirement that every recipient parse out whether their criteria meet the vague, undefined standards set out by the Department is simply unworkable.

The requirement to apply different standards to different sports, levels of competitions, and grades or education levels will also confuse the students and parents who are supposed to be helped by this standard. Particularly troubling is the Department's expectation that eligibility criteria will be "more likely to satisfy the proposed regulation at higher grade levels."[191] This variation in

[189] *Id.* at 22,874.
[190] *Id.* at 22,891.
[191] *Id.* at 22,876.

standards could cause greater harm to some students who are permitted to participate in a sport in line with their "gender identity" in earlier grades and then are denied that opportunity at higher levels than would a consistent policy throughout grade levels. The Department must consider this potential harm and balance it against any claimed benefits of its proposed rule; otherwise, it is acting in an arbitrary and capricious manner.

In the end, rather than deal with the time, cost, and potential enforcement actions involved in offering varying sex-related criteria in different sports, levels of competition, and grades, recipients will be inclined under the Department's proposed rule to offer the same criteria—and likely no criteria—at all levels. Even though this approach does not serve the interest of providing an equal playing field to women and girls that is at the core of Title IX, the Department does not prohibit this approach and in fact welcomes it. As long as institutions do not establish any sex-related criteria for male and female teams, they do not have to consider whether their policies risk unfairness in competition or threaten the physical safety of athletes. The Department thus offers a convenient, less costly path of least resistance to institutions that many will likely pursue—no doubt one of the agency's unwritten intentions with this rulemaking.

E. The Department Arbitrarily and Capriciously Fails to Consider Evidence in Favor of Single-Sex Athletics and in Opposition to Gender Transitioning.

In its Athletics NPRM, the Department considers scant evidence that it arbitrarily and capriciously mischaracterizes as supporting its proposed regulatory approach to athletics under Title IX, and it fails to consider weighty evidence that counsels against its proposed rule.

In support of its contention that "allowing transgender children to socially transition (i.e., present themselves in everyday life consistent with their gender identity) is associated with positive mental health outcomes for those children," the Department cites one study,[192] entitled *Mental Health of Transgender Children Who Are Supported in Their Identities*.[193] That study examined the mental health of pre-pubescent children who identified as the opposite gender from their sex at birth and "present in all contexts (e.g., at school, in public) as that gender identity" and found that these children did not have elevated levels of depression but *did have* elevated rates of anxiety compared to the population average.[194] The study pointed out the uniqueness of these children in terms of how early they transitioned and warned that it strictly focused on children prior to the onset of puberty, when such children would be subjected to factors that could exacerbate depression and anxiety symptoms.[195] The Department's reliance on this study, which actually found heightened

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[192] *Id.* at 22,879.
[193] Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, PEDIATRICS, Mar. 1, 2016, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4771131/.
[194] *Id.*
[195] *Id.*

anxiety in children who socially transitioned and did not even study children who had gone through puberty, to support social transitioning of all students based on their "gender identity" is arbitrary and capricious.

The Department's reliance on this study is especially flawed because the proposed rule does not, and cannot, force students' peers or families to support their social transition process. In fact, the Department's proposed rule would likely do the opposite in many cases, forcing teammates who do not wish to do so to "accept" that they will from henceforth be required to compete with someone who does not share their biological sex. This will likely lead in some cases to ostracization of the individual who joins the team due to a federal mandate and could lead to worse mental health outcomes for the students the Department claims to help through its proposal. The Department must weigh this harm against any claimed benefits of its proposed rule or it is acting in an arbitrary and capricious manner.

The Department must also consider evidence that single-sex education and athletics programs are broadly beneficial to students. In 2006, the Department issued a final rule clarifying the requirements for elementary and secondary schools to offer single-sex education, classes, and extracurricular programs in compliance with Title IX.[196] The rulemaking pointed to "educational research suggest[ing] that single-sex education may provide benefits to some students under certain circumstances," citing a 2005 systematic review from the Department's Office of Planning, Evaluation and Policy Development.[197] The review found "some support for the premise that single-sex schooling can be helpful, especially for certain outcomes related to academic achievement and more positive academic aspirations."[198] Such research suggests that single-sex activities, such as in athletics competitions, hold similar opportunities for participants and that permitting individuals of the other biological sex to join such activities could reduce their value in terms of academic achievement and aspirations. The Department must consider this evidence as it issues its final rule.

As it did in its July 2022 Title IX NPRM, the Department ignores the dangers of social transitioning as a precursor to medical transitioning measures such as puberty blockers and gender reassignment surgery.[199] The same potential harms apply with force to the Department's Athletics NPRM, and the Department must consider these harms in the context of both rulemakings and weigh them

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[196] U.S. Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 FED. REG. 62,530, 62,530 (Oct. 25, 2006).
[197] U.S. DEPARTMENT OF EDUCATION, OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT, SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING: A SYSTEMATIC REVIEW (2005), *available at* https://www2.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf.
[198] *Id.* at x.
[199] *See* https://dfipolicy.org/wp-content/uploads/2022/09/DFI-Public-Submission-on-Title-IX-NPRM-website-9-12-22.pdf at 96–101.

against any claimed benefits of its proposals. If it does not do so, then it is acting in an arbitrary and capricious manner.

F. The Department's Reasoning Against Asking Students to Reveal Their "Gender Identity" Is Undercut by Its Recent CRDC Proposals.

In its Athletics NPRM, the Department warns, "Criteria that limit or deny students' eligibility to participate in sports consistent with their gender identity can force individual students to disclose that they are transgender, which can be 'extremely traumatic' and 'undermine [a student's] social transition.'"[200] But if this is a harm, then it is a harm that the Department itself is exacerbating.

On November 19, 2021, and in its revised proposal on December 13, 2021, the Department proposed to add to its 2021–2022 Civil Rights Data Collection ("CRDC") survey of LEAs and schools across the country a nonbinary sex category "to capture data regarding nonbinary students."[201] The CRDC does not *require* schools to collect this information from students but certainly encourages schools to do so in order to gather the data the Department requests.

The Department must explain why for this NPRM it decries the harms of asking students about their "gender identity" yet for the CRDC encourages schools to collect this precise data from students. If it does not do so, it is acting in an arbitrary and capricious manner.

G. The Department Arbitrarily and Capriciously Fails to Account for the Costs of Its Proposed Rule.

The Department projects that the costs of its rule will only amount to between $23.4 million to $24.4 million over 10 years.[202] This projection is not based on any reasoned analysis (or, in fact, reality) and is thus arbitrary and capricious.

As the Department points out, Title IX applies to around 18,000 LEAs and over 6,000 institutions of higher education (IHEs). If the Department's cost estimate is correct, then each LEA, college, and university will only spend $1,000 each on average over ten years to implement and comply with the proposed rule—a paltry sum that does not come close to what will be the true cost of implementing this unprecedented rule.

If each LEA, college, and university only spent an average of $10,000 over 10 years to review and implement the proposed rule (still a very low estimate), the cost would be $240 million. At $50,000

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[200] Athletics NPRM, *supra*, at 22,877.
[201] U.S. Department of Education, Mandatory Civil Rights Data Collection, December 2021, Supporting Statement, Part A: Justification, 9 (Dec. 13, 2021).
[202] Athletics NPRM, *supra*, at 22,879.

over 10 years, the cost would be $1.2 billion. At a more realistic $100,000 over 10 years, the cost would be $2.4 billion.

The Department's NPRM also does not appear to account for any costs related to complaints of institutional or individual violations of the Department's proposed rule, supportive measures to be provided to complainants, investigations, hearings, or appeals, even though the Department's broader Title IX rule proposed to require recipients to supply these procedural measures in all cases of alleged sex discrimination in educational program and activities.[203] The Department must estimate the costs of such procedures to provide a full accounting of the rule's impacts on educational institutions and individuals.

The Department's unrealistic cost estimate has deprived the public of a meaningful opportunity to comment on the proposed rule in violation of the APA. The Department should withdraw its Athletics NPRM and issue a new one that provides a complete picture of costs the proposed rule will impose on LEAs, colleges, universities, and individuals.

H. The Department Must Comment on the Proposed Rule's Federalism Impacts.

Despite the fact that the Department identifies 20 states that have enacted laws or policies that would conflict with the proposed rule in its Athletics NPRM,[204] the Department merely acknowledges that "[t]he proposed regulation . . . may have federalism implications" and invites comment from state and local elected officials on the proposal.[205] Although it is well aware that its proposed rule would sweep aside conflicting state laws and policies across the country, the Department offers no further observations on this aspect of the rule and thus deprives the public of a meaningful opportunity to comment on its views. The Department should withdraw its Athletics NPRM and issue a new NPRM that examines the federalism impacts and implications of the proposed rule.

I. The Department Must Comment on the Interaction of the Proposed Rule with FERPA.

Under the Federal Educational Rights and Privacy Act ("FERPA"), K–12 schools, colleges, and universities receiving federal funding are generally prohibited from releasing educational records of students, or personally identifiable information contained in those records, without the written consent of their parents.[206] Under that law, it would appear that schools, colleges, and universities

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[203] *See* Title IX NPRM, *supra*, at 41,575 (amendment to § 106.45, Grievance Procedures for the prompt and equitable resolution of complaints of sex discrimination).
[204] *See* Athletics NPRM, *supra*, at 22,881.
[205] *Id.* at 22,890.
[206] 20 U.S.C. § 1232g(b)(1).

would not be permitted to inform parents or students about the biological sex of another participant on a sports team who shares intimate facilities or overnight accommodations with other members of the team. As parents may have grave concerns—some based in the constitutional right to free exercise of one's religion—regarding an individual of the opposite sex being permitted to share a locker room or overnight accommodations with their child, the Department must comment on the interaction of its proposed rule with the privacy provisions of FERPA. If it does not do so, it is acting in an arbitrary and capricious manner.

J. The Department's Decision Not to Allow Simultaneous Comment on Its July 2022 Title IX NPRM and Its Athletics NPRM Is Arbitrary and Capricious.

By issuing its broad Title IX NPRM in July 2022 and waiting nine months to release its NPRM applying specifically to the athletics context, the Department has deprived the public of a meaningful opportunity to comment on both proposed rules in defiance of APA requirements.

The July 2022 Title IX NPRM proposes to redefine "sex" to include the concept of "gender identity," among other things, and prohibits any "practice that prevents a person from participating in an education program or activity consistent with the person's gender identity."[207] Because the 2022 NPRM stated that the Department was reserving for a future rulemaking process "the question of what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team,"[208] the public had no forewarning of how this rule would interact with the to-be-announced athletics rule. In fact, the impacts of each proposed rule are dependent on the impacts of the other rule: to the extent that the Athletics NPRM carves out some discretion for educational institutions in the area of athletics, it necessarily limits the reach of the categorical 2022 NPRM, and vice versa. To comment on the reach of one is necessarily to offer a comment on the reach of the other.

For instance, does the Athletics NPRM provide discretion for educational institutions to determine sex-related criteria with regard to access to locker rooms, bathrooms, or overnight accommodations specifically related to athletic activities or are these covered by the broader Title IX NPRM, which offers no such discretion? It would have been helpful to the public and to the Department to be able to consider the interplay between these two proposed rules at the same time. It would have been especially helpful for the public to know that, under the Title IX NPRM's preemption provisions,[209] the Athletics NPRM would propose to preempt 20 state laws that restrict participation in sports on the basis of "gender identity." Instead, the Department allowed comment on one only before it revealed the other. This is not the basis of reasoned rulemaking as required under the APA.

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[207] Title IX NPRM, *supra*, at 41,571.
[208] *Id.* at 41,537.
[209] *Id.* at 41,569.

To make matters worse, the Department has issued its Athletics NPRM before issuing its final rule in the broader Title IX rulemaking process, so it is impossible for the public to know how the rule the Department proposes in its Athletics NPRM fits into the Department's broader Title IX plans. The Department's proposed rulemaking thus rests on shifting sands, making it impossible for interested members of the public to provide meaningful comments on its unprecedented proposals. This is not the basis of reasoned rulemaking.

It bears mentioning that the two rulemakings straddled the 2022 midterm elections, with the Athletics NPRM being published only after the election occurred. This is evidence alone of the political significance of the proposed rule contained in the Athletics NPRM. Shielding a set of proposals to transform how Title IX applies to women's and girls' athletics due to its political unpopularity in the context of contested election campaigns is not sufficient reason for the Department not to provide the public a meaningful opportunity to comment on its proposals.

The Department must explain why it failed to give the public adequate notice of its athletics proposals at the same time as its release of the broader scheme of Title IX enforcement in 2022. No matter its explanation, the Department must reopen the public comment periods for both its Title IX NPRM and its Athletics NPRM so the public has a chance to comment on each within the context of the other. If it does not do so, then it violates the notice-and-comment provisions of the APA.

K. The Department's Unreasonably Brief Comment Period Arbitrarily and Capriciously Deprives the Public of an Opportunity to Comment on the Proposed Rule.

With its Athletics NPRM, the Department proposes to upend Title IX's protections in the athletics context, striking at the heart of the rights of America's girls and women to compete with and against other girls and women in schools, colleges, and universities. Yet, shockingly, the Department provided only 30 days for public comment.

Allowing at least 60 days for public comment is standard practice under the governing authorities cited by the IDR NPRM. The "Invitation to Comment" section of the proposed rule seeks the public's assistance "in complying with the specific requirements of Executive Orders 12866 and 13563 . . . ."[210] Executive Order 13563, "Improving Regulation and Regulatory Review," states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, *with a comment period that should generally be at least 60 days*."[211] Executive Order 12866, "Regulatory Planning and Review," includes similar language: "[E]ach

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[210] Athletics NPRM, *supra*, at 22,861.
[211] Executive Order 13563, § 2(b) (emphasis added).

agency should afford the public a meaningful opportunity to comment on any proposed regulation, *which in most cases should include a comment period of not less than 60 days*."[212] The Department ought to observe the key orders that it cites.

The Department offered a 60-day comment period for its Title IX NPRM published in July 2022. Given the inextricable nature of these two rules—and the fact, discussed above, that the Department should have issued the two rules and allowed comments at the same time—the Department must extend its comment period on the Athletics NPRM to provide a meaningful opportunity for the public to comment. If it does not do so, it has engaged in an arbitrary and capricious rulemaking without due consideration of the valuable input the public has to offer on this rule.

Conclusion

In direct defiance of the five decades of progress made by girls and women against the backdrop of Title IX's anti-discrimination protections, the Department's athletics proposal signals its plans to put a thumb on the scale in favor of men and boys who identity as female and who demand to compete against women and girls in sports. The Department's proposal will result in profound unfairness to female athletes and ignores legitimate concerns for their physical safety that will certainly dissuade them from taking the field against larger, stronger men. Throughout its proposed rule, the Department shows special solicitude for the biological boys and men who identify as female and who it claims will benefit from its rule. It shows no such solicitude for the women and girls forced to bear its consequences as the agency directs educational institutions to ignore their interests when formulating sex-related criteria for participation in athletics.

Congress did not authorize the Department to issue this rule, and the Department acts beyond the scope of its statutory jurisdiction in doing so. The Department also blatantly violates Title IX by working to undermine its strong protections for women and girls that have yielded so much progress in the last half-century. Finally, the Department violates the United States Constitution by issuing a rule that it has no authority to create and by thwarting America's system of federalism in its attempt to supplant state laws and policies without any statutory authorization.

For the reasons discussed above, the Department should immediately withdraw the NPRM in its entirety.

[212] Executive Order 12866, § 6(a) (emphasis added).

Sincerely,

/s/ *Robert S. Eitel*
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