To: Department of Education, Office of Civil Rights
Document Number: 2023-07601
Agency/ Docket ID Number: ED-2022-OCR-0143

From: Prof. William Wagner

Date: May 15, 2023

Re: *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams*, **88 Fed. Reg. 22860 (April 13, 2023)**

*Filed via Regulations.gov*

*Introduction*

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at two secular universities where I taught Constitutional Law and Ethics. I currently hold the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. I also serve as the Founder and President Emeritus of the Great Lakes Justice Center.

I respectfully submit the following personal Comment on the 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*, 88 Fed. Reg. 22860, published by April 13, 2023, by the Department of Education, Office of Civil Rights.

*Fundamental Scientific Differences & Title IX:*
*Prevention of Discrimination Against Cisgender Athletes*
*Necessitates Sex-Related Eligibility Criteria*

Scientists and medical practitioners agree that the human species is inherently sexually dimorphic; that is to say, humans exist in two distinct forms, commonly referred to as male and female. Biological males and females are so distinct in physiologic composition that athletes have long been categorized as such in order to

ensure a fair and competitive playing field. Males are physically pre-disposed to outperform females in most athletic activities because most athletic activities depend on physical strength, power, and speed, and their bodies are markedly greater in these areas of measure. Their anatomy is distinctly advantageous many areas, including:

- Adult males tend to be taller and have longer, larger limbs than those born female. The larger breadth of their shoulders allows for more muscle to form on the shoulder girdle, giving biological males a significant advantage in upper body strength. The physical frame of the average female athlete simply does not support the development of a comparable amount of muscle.[1]
- Post-pubescent males have more overall muscle mass and less body fat than females of the same age and development demographic. Male athletes average 4%-12% body fat, compared to females who average 12%-23% body fat. This means the average male athlete is 2x-3x as lean as his female counterpart.in other words, the leanest biological female only compares to the flabbiest, least toned male athlete.[2]
- From conception and throughout life, biological males develop larger skeletal muscles, larger hearts, larger lungs, and a higher quantity of red blood cells (which absorb oxygen creating an aerobic advantage).[3] The National Institute for Health, in a white paper discussing these differences, notes that "Males' lungs are bigger not only in terms of absolute volume, but also in terms of their volume variations. Men, in fact, also have significantly larger mean values for all pulmonary variables, both volumes and flows…For this reason, all the prediction equations for normal values *include sex as discriminating factor*."[4]
- As early as 26 weeks of gestation, the lung, nasal, respiratory capacity is dramatically larger in males of the same body size as females—so much so that it is easily observed in the womb as an indicator of biological gender.[5]
- Likewise, male skulls enhance upper airways and processing of oxygen,

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[1] Human Kinetics. *Reasons for Gender Differences in Youth Sports.* 2023 https://us.humankinetics.com/blogs/excerpt/reasons-for-gender-differences-in-youth-sport

[2] *Id.*

[3] LoMauro, Antonella, and Aliverti, Andrea. *Sex Differences in Respiratory Function*. 2018. Published by the National Institute of Health's National Library of Medicine; National Center for Biotechnology Information. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5980468/

[4] *Id.* (emphasis added)

[5] *Id.*

> with larger skeletal cranial airways, taller piriform apertures, and taller internal nasal cavities and choanae than females.[6] The development of these skeletal features starts in the womb well before birth.

The anatomical advantages of human sexual dimorphism and gender identity are not causally linked. For athletes who identify as a gender different than their truthful biological one (or as transgender), even modern drugs, hormone therapy, gender transition surgeries, and other medical treatments cannot reverse or substantially alter the anatomical and physiologic differences of a sexually dimorphic species, when so many of those dimorphic traits are measurably developed in the womb before birth. The only way to create a fair environment for sportsmanship is to divide athletes along the same lines as nature's design, i.e., biological sex. Anything else gives one sex a scientifically predictable substantial advantage over the other sex and is fundamentally unfair, even discriminatory. Additionally, in contact sports, differences in anatomical stature and muscle mass will lead to an increased likelihood of inadvertent sports-related injury.

If, as the NIH notes, sex must be a discriminatory factor to calculate respiratory activity, surely the strenuous physical exertion of athletic competition must apply the same discriminating factor. To ignore the significant differences of dimorphic form in gendered athletic competitions would be equivalent of removing another discriminating factor, like age, from competition. If junior high athletes had to compete against high school athletes, or if high school athletes had to compete against college athletes, one age group would always have a clear advantage, just because of their physiological development. No one calls it age discrimination when college-age athletes are precluded from competing against highschoolers, nor is it invidious discrimination when biological males are precluded from competing in female sports leagues.
By proscribing these non-biologically based sex-based eligibility criteria to comply with the DOE's Athletics NPRM , the government legalizes systemic bias against female athletes favoring male athletes, and a creating a conflict with Title IX. Title IX regulations provide that:

> No person shall on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide such athletics separately on such basis.[7]

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[6] Bastir M, Godoy P, Rosas A. Common features of sexual dimorphism in the cranial airways of different human populations. Am J Phys Anthropol 2011; 146: 414–422.

[7] 65 Fed. Reg. 52872 at ï½§ ___.450(a). https://www.justice.gov/crt/title-

Title IX discriminatory violations can take place when an athlete is denied equal opportunity to enjoy "the benefits of" their athletic activity. Under the proposed rule, the physical athletic advantages of trans athletes denies cisgender/biological female athletes meaningful experiences and opportunities like competitive wins or scholarships in athletic events, (or even a place on the team). Such unlawful discrimination victimizes cisgender females as a direct result from the DOE's NPRM 2023-07601.

If the proposed rulemaking voids legal protection for female athletes, they face a greater risk for sports-related injury. They face diminished competitive opportunities for athletic scholarships. They lose a fair opportunity to earn desirable, performance based starting positions on teams. They lose a fair opportunity for equal playing time during competitive games. Effectually, they will be shut out of many athletic opportunities. By upholding the current provisions of Title IX without this proposed rule, you can preserve fairness. Moreover, you can uphold the clear language of the legislators who drafted Title IX. Title IX provides this protection for cisgender athletes in contact sports: "a recipient may 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."[8] This plain language, intended to protect safe, equal opportunity under Title IX, presents more than a solution; it raises a question of good governance.

*Good Governance Concerns*

A politically accountable Congress, pursuant to its Article I power, enacted Title IX. It provides measures for sports sex-based eligibility for athletic activities under certain circumstances and has more than fifty years history as an effectively enforced law. The statute further provides that, "a recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal opportunity for members of both sexes." Note the clear reference to "both sexes," which clearly refers not to gender identity or sexual orientation (being constrained to only two classifications), but the biological description of the human species.[9] The language of the law is clear and its intended reference cannot be misunderstood, even in light of more recent definitions of "sex." Yet NPRM 2023-07601 seeks to virtually abrogate the provisions of the law itself, allowing biological males to physically compete against biological females in athletics. A close reading of Title IX reveals that, while executive agencies may have a role to play in the implementation and execution

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[8] 65 Fed. Reg. 52872 at ï½§ ___.450(b).

[9] See 20 U.S.C. 1681(a)(2)

of the law, nowhere is the politically unaccountable DOE or its Civil Rights Office tasked with or authorized to substantially alter the plain meaning of the law itself. Adopting a rule which clearly amends and abrogates the meaning of the law and institutes a policy directing the very opposite of what the law requires, goes far beyond the authority of the DOE. This unconstitutional executive overreach must not stand.

One further good governance concern remains: The supplementary information included in the notice for 2023-07601 states that the DOE seeks to use the Athletics NPRM as a response to duly enacted laws of certain states. The notice states, "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."[10] Simply put, supplanting properly enacted state law (by politically accountable state legislatures) is not the Constitutional prerogative of bureaucrats in U.S. Department of Education's Office of Civil Rights, (none of whom will ever face a politically accountable electorate).

Finally, Title IX's requirement of religious accommodation expressly provides that Title IX obligations "shall not apply to an educational institution which is controlled by a religious organization if the application [of Title IX] would not be consistent with the religious tenets of such organization."[11] I turn now, therefore, to this important area of concern.

*First Liberty Concerns: Religious Conscience and Expression*

Many concerns exist about how the proposed rule affects people of faith. Taken at face value, the proposed rule allows no accommodation for religious recipients or individuals participating in an athletic program organized by a recipient. Indeed, the supplementary information inapplicably references *Bostock* v. *Clayton County,*[12] holding that discrimination based on sexual orientation or gender identity is sex discrimination

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[10] NPRM 2023-07601 includes the following reference to state statutes relating to quoted section: *See, e.g.,* Ind. Code section 20–33–13–4 (2022) ("A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology, may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport."); W. Va. Code section 18–2–25d(c)(1) (2021) (designating participation on interscholastic, intercollegiate, intramural, or club athletic teams sponsored by any public secondary school or state institution of higher education as based on "biological sex"); Idaho Code section 33–6203 (2020) (same). In so doing, these State laws have created additional uncertainty for stakeholders regarding what Title IX permits and requires with respect to male and female teams."

[11] 20 U.S.C. 1681(a)(3)

[12] 140 S. Ct. 1731 (2020),

under Title VII of the Civil Rights Act of 1964"[13] The *Bostock* majority expressly held that its decision did not apply to Title IX. Moreover, in *Bostock*, the high Court demonstrated great care in reaffirming the importance of upholding First Amendment protections, stating, "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[14]

Many Christian colleges and universities ground their policies on sincerely held religious conscience, based in Christian doctrine. To wit, these institutions base their athletic policies and access to locker rooms and other intimate spaces, on biological sex. These policies are grounded in Biblical precepts that God created men and women in His image, as incarnate beings of either the male or female sex. As such, these precepts provide the basis for why Christian institutions hold their students to have inherent value and why they, through their policies, seek to protect the dignity of their students (e.g., by not empowering a biological male student to unfairly physically compete in a woman's sporting event or to share a locker room or other intimate space with a biological female student).

The underlying Biblical precepts, and college policies produced therefrom, are part of an institution's very identity as a Christian college. The proposal here compels a Christian institution to violate a sincerely held religious conscience. In doing so, it directly threatens, indeed destroys, its ability to preserve its identity as a Christian college.

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech ...."[15]

Reflecting an accurate historical understanding of the plain meaning of the Free Exercise Clause, the Supreme Court in *Sherbert v. Verner* and *Wisconsin v. Yoder*, struck down government actions that substantially interfered with a person's sincerely held religious beliefs.[16] Under these decisions, a person's unalienable right to the free exercise of religious conscience appropriately required government to provide a compelling interest to justify its interfering with such a fundamental liberty interest. The Supreme Court, in applying strict scrutiny to the government actions, further required the government to show it used the least restrictive means available to

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[13] https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal

[14] *Bostock* v. *Clayton County*, Opinion of the Court, pg. 32. 140 S. Ct. 1731 (2020)

[15] U.S. Const. amend I.

[16] *Sherbert*, 374 U.S. 398 (1963) (denying unemployment benefits to a person who lost her job when she did not work on her Sabbath); *Yoder*, 406 U.S. 205 (1972) (overturning convictions for violations of state compulsory school attendance laws incompatible with sincerely held religious beliefs).

accomplish its interest. Recently, in *Fulton v. City of Philadelphia*, the Supreme Court confirmed that government action infringing on First Amendment religious liberty warrants the strictest of scrutiny.[17] Moreover, in *Kennedy v. Bremerton School District,* the Court confirmed that religious expression is doubly protected under the First Amendment requiring the application of strict scrutiny.[18]

The current proposal (and other ubiquitous special SOGI preferences, imposed by government authorities), exacerbate the threat to the free exercise of religious conscience. These government actions necessarily require Christian people to: 1) relinquish their religious identity; and 2) surrender their right to freely exercise and express their religious conscience. Government enforcement of such preferences often weaponize government action to eliminate the Free Exercise and Speech Clauses as important constitutional constraints on the exercise of government authority. Indeed, religious people in our nation face a far more horrific predicament than the drafters and ratifiers of the Constitution and Bill of Rights could ever have imagined.

In *Fulton,* the Supreme Court confirmed that when First Amendment religious liberty is at stake:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.[19]

Subsequently, in *Kennedy*, the Supreme Court confirmed that "…a [n]atural reading" of the First Amendment leads to the conclusion that "the Clauses have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience.[20] In such situations, *Kennedy* reaffirmed the application of strict scrutiny.[21] The First Amendment "is essential to our democratic form of government, and it furthers the search for truth. Whenever ... a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends."[22] Such actions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to]

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[17] 141 S. Ct. 1868, 1881 (2020)

[18] 142 S. Ct. 2407, 2421, 2426 (2022) citing, *Fulton,* 141 S. Ct. at 1876-1877; *Reed v. Town of Gilbert,* 576 U.S. 155, 171 (2015); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993); *Sherbert*, 374 U.S. at 403 (1963).

[19] *Fulton,* 141 S. Ct. at 1881.

[20] *Kennedy,* 142 S. Ct. 2407, 2421, 2426 (2022).

[21] *Id.*

[22] *Janus v. Amer Fed of State, County, and municipal Employees, Council 31, et a*l., 138 S. Ct. 2448, 2464 (2018).

manipulate the public debate through coercion rather than persuasion."[23]

Here the proposed rule coerces professionals to betray their convictions. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, ... a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence."[24]

The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all. The right to eschew association for expressive purposes is likewise protected."[25] Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[26]

Bearing witness to the intolerant laws of seventeenth century England that persecuted individuals because of their religious views, the First Amendment balances the need for freedom of speech and religion with the need of a well-ordered central government.[27] The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and expressing their freedoms but embrace the security and liberty only a pluralistic society affords. That is why the First Amendment protects expression of a religious person's viewpoints and ideas, subjecting government to the strictest of scrutiny if it substantially interferes.[28] The disturbing diminishment of First Amendment religious conscience and expression, as a practical matter, denudes any meaningful constitutional protection for liberty as a limit on the exercise of State power.

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[23] *Turner Broad Sys., Inc. v FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L.Ed. 2d 497 (1994)

[24] *Janus,* 138 S. Ct. at 2464 (2018) quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633 (1943).

[25] *Janus*, 138 S. Ct. at 2463 (cleaned up).

[26] *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943).

[27] *See, e.g.*, Mark A. Knoll, *A History of Christianity in the United States and Canada* 25-65 (1992); F. Makower, *The Constitutional History and Constitution of the Church of England* 68-95 (photo. reprt. 1972) (1895).

[28] See, e.g., *Masterpiece Cakeshop, LTD., v. Colorado Civil Rights Commission,* 138 S. Ct. 1719, 1745-46 (2018) (Thomas, J., concurring) (noting, the necessity of applying "the most exacting scrutiny" in a case where Colorado's law penalized expression of cake designer) citing *Texas v. Johnson*, 491 U.S. 397, 412 (1989); accord, *Holder v. Humanitarian Law Project*, 561 U.S.1, 28 (2010); see also, *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 164 (2015).

*Significance of Obergefell*

In *Obergefell v. Hodges*, the Supreme Court found in the Constitution a right of personal identity for all citizens.[29] The Justices in the majority held that: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[30] *Obergefell* affirmed, therefore, not just freedom to define one's belief system, but freedom to exercise one's conscience associated with it.

Because *Obergefell* defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must broadly comprehend factual contexts well beyond the same-sex marriage facts of that case.[31] If the Court meant what it said in *Obergefell*, the right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define and express their identity via their religious beliefs.

Christian academic institutions find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian person, whose identity inheres in his or her religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. The proposed rule cancels a Christian person's humanity, dignity, and autonomy, demanding that he or she abandon their identity when expressing principles that are so central to their life and faith.

There can be no doubt that the Supreme Court's recently identified substantive due process right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people. Indeed, government must not use its power, irrespective of whether neutrally applied, in ways hostile to religion or religious viewpoints under this new "autonomy" paradigm.[32] Certainly, government ought to protect, not impede, the free exercise of religious conscience.[33] Government actions must uphold constitutionally-protected freedoms,

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[29] 135 S. Ct. 2584 (2015).

[30] *Id.* at 2593; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. at 1727.

[31] 135 S. Ct. at 2589.

[32] *Masterpiece Cakeshop,* 138 S. Ct. at 1731.

[33] *See, e.g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell v. Hobby Lobby Stores, Inc.,*134 S. Ct. 2751, 2775 (2014)

not grant special protections for some, while coercing others to engage in conduct or expression contrary to their religious identity and conscience.

The Supreme Court has already ruled that "religious and philosophical objections" to SOGI issues are constitutionally protected, holding that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths....")[34]

For Christian people in the current cultural environment, though, that right continues to manifest as a mirage. In practice, government authorities elevate SOGI rights above all others, especially the free exercise of religious conscience. Theophobia has replaced homophobia, and the government has become the installer and enforcer of this new tyranny. Special preferences embodied in government SOGI classifications, and the proposed rule here, exalt a particular belief system of what is offensive over another and, by its very nature, signals official disapproval of a Christian person's religious identity, expression, and religious beliefs. "Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."[35]

As the Supreme Court has so clearly stated:

> [T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. . . . The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.[36]

Government imposition of SOGI preferences is unavoidably *always* hostile and can never be "neutral" toward the religious identity and beliefs of orthodox Christian people. Indeed, special SOGI preferences, like the proposed rule here, *necessarily* require Christian people to relinquish their religious identity and the freedom to express and exercise their religious conscience. For the First Amendment to have

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(holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring an employment discrimination suit brought against a religious school).

[34] *Masterpiece Cakeshop,* 138 S. Ct. at 1727, (citing *Obergefell* 135 S. Ct. at 2607)

[35] *Masterpiece Cakeshop* 138 S. Ct. at 1731 (internal quotations and citations omitted).

[36] *Masterpiece Cakeshop,* 138 S. Ct. at 1731 (citing *Lukumi,* 508 U.S. at 534, 547) (internal quotes omitted).

meaning, it must include the right to hold and manifest beliefs without fear of government punishment or coercion.

Finally, the expression of one's religious identity, and exercise of religious conscience is not invidious discrimination. Christian people know God created all human life in His image. Thus, for Christian people, every person holds inherent value and deserves respect. No sincere follower of Jesus would, therefore, ever willfully discriminate against another person based on who they are. Christian people are called, though, to adhere to a standard of behavior and beliefs and can never, then, concede their constitutionally protected religious identity and free exercise of religious conscience. I condemn invidious discrimination and hold no animus toward anyone. I seek respectful consideration of all viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry.

*Kennedy* explains that the First Amendment Clauses "have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience.[37] *Obergefell* teaches that beyond the First Amendment's double protection for religious conscience, a substantive due process right to personal identity also compels the government to always provide religious people with the highest standard of constitutional protection.[38] Government action not only must avoid interfering with a citizen's free exercise of religious conscience, protected by the First Amendment, it must also refrain from violating their personal religious identity rights

*Conclusion*

In summary, for the above reasons I opposes the proposed rules change. Should NPRM 2023-07601 be implemented, many athletes will face sex-based discrimination, be denied opportunities, and face increased risk of physical harm during athletic activities. The spirit of fair play lies at the heart of the fundamental values of every competitive sport and would be substantially diminished if this rule were implemented. Most of all, the sacred religious conscience and expression of athletes and other involved parties could be diminished. The ED ought not pursue rulemaking like the Athletics NPRM that encourages athletic eligibility based on gender identity rather than dimorphic biology. It should instead reaffirm the

[37] 142 S. Ct. 2407, 2421, 2426

[38] While I question the cogency of the substantive due process jurisprudence that birthed the court-created liberty articulated in *Obergefell*, I expect government to follow the now-established constitutional Rule of Law, including when it protects the personal identity and viewpoints of religious people.

Constitutional and Title IX requirement of religious accommodation, as required under the First Amendment and Title 20 U.S.C. 1681(a)(3).

*Respectfully submitted,*

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