OFFICE OF THE SECRETARY,
U.S. DEPARTMENT OF EDUCATION

RE: COMMENT TO PROPOSED RULE REGARDING NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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COMMENT OF THE GREAT LAKES JUSTICE CENTER

The Great Lakes Justice Center promotes principles of good governance and the Rule of Law. Our work includes representing national religious organizations before the U.S. Supreme Court, as well as in the highest levels of government in other nations. We work with legislative, executive, and judicial bodies, as well as with citizen groups, to further good governance practices and the Rule of Law.

I. Introduction

Title IX of the Education Amendments of 1972, designed to protect discrimination based on sex in higher education, provided incredible opportunities for women over the past fifty years and is worth celebrating. In many ways, Title IX is responsible for the creation and success of women's sports in universities.[1] The statute states that, "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."

[1] Ashley McGuire, *Title IX and the Rise and Fall of Women's Sports*, WSJ (June 24, 2022) https://www.wsj.com/articles/title-ix-womnen-s-sports-biden-administration-50th-anniversary-lia-thomas-sex-and-gender-discrimination-equal-access-bernice-sandler-11656100244. McGuire notes that "In the four decades after Title IX became law, ESPN notes that female participation in sports grew more than tenfold, while male participation grew only 22%. Title IX led to a flourishing of women's sports".

20 U.S.C. § 1681(a). This language presumes and protects the fundamental difference between men and women. *United States v. Virginia,* 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring").

The Department of Education's (ED) proposed change to its Title IX regulations[2] threatens the historical recognition of sexual difference, the very basis for Title IX's existence. Two proposed changes are particularly problematic. First, the new rules expand Title IX protections from discrimination based on "sex", rooted in the objectivist distinction between male and female, to also include the subjectivist classifications *sexual orientation* and *gender identity.*[3] Second, the proposed rule redefines sexual harassment to include subjectivist *sex-based harassment*.

Redefining the meaning of "sex" under Title IX collides with the constitutionally and statutorily protected conscience held by many religious schools that acknowledge the inviolable differences between men and women. People of the Abrahamic faiths, for example, recognize that differences in sex reflect God's nature and that this difference is inherent to our status as being made in the image of God: "So God created mankind in his own image, in the image of God he created them; male and female he created them." *Genesis 1:27*. Under the proposal, "any K–12 school or institution of higher education that receives federal funding would have to open its bathrooms, locker rooms, housing accommodations, sports teams, and any other sex-separated educational program or offering to the opposite [biological] sex, if those individuals

[2] U.S. Dept. of Ed., *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment* (June 23, 2022) https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

[3] *Id.*

simply *claim* to be female."[4] For people of faith, the "Imago Dei" is the source of the inherent worth and dignity of all persons. It is *not* invidious discrimination, therefore, to protect one's privacy in a bathroom or shower. Nor is it an oppressive social construct in need of deconstruction. Likewise, for these same reasons, people of faith do not engage in sexual harassment when, grounded in their sincere religious conscience, they express biologically accurate personal pronouns.[5]

At the very least, the Department should make clear that application of these newly proposed rules to religious schools must comply with Title IX's statutory religious accommodation requirements. This statutory accommodation protects the free exercise of conscience by religious schools. As the Department has already stated previously,

> "Title IX '*shall not apply'* to educational institutions that are 'controlled by a religious organization,' to the extent that application of Title IX 'would not be consistent with the religious tenets of such organization.'"[6]

The ED reaffirmed the import of this statutory religious accommodation in 2020 when it correctly concluded that religious schools need not apply for an "assurance letter" from the ED to claim a religious accommodation under Title IX. The ED's proposed rule correctly does not

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[4] Sarah Perry, *The Department of Education's Intended Revision Fails Regulatory and Civil Rights Analyses*, THE HERITAGE FOUNDATION (June 22, 2022), https://www.heritage.org/civil-rights/report/the-department-educations-intended-revision-title-ix-fails-regulatory-and-civil.

[5] Under the proposed rule, use of the "wrong" personal pronouns for a person identifying as the opposite sex could be considered sexual harassment. *See* Jarrett Stepman. *By Inserting Gender Identity, Team Biden Muddies Title IX's Protections for Girls, Women at School*, THE HERITAGE FOUNDATION (June 27, 2022), https://www.heritage.org/gender/commentary/inserting-gender-identity-team-biden-muddies-title-ixs-protections-girls-women.

[6] U.S. Dep't. of Educ., *Religious Liberty and Free Inquiry Final Rule*, https://www2.ed.gov/about/offices/list/ope/factsheetreligiouslibertyandfreeiInquiry09032020.pdf (last visited Sep. 2, 2022) *quoting* 20 U.S. Code § 1681 (3).

alter the current regulatory framework as it relates to claiming a religious accommodation. We call on the Department to resist any effort to unconstitutionally drift away from this position.

II. The ED's proposed rules redefining sex to add "gender identity" and "sexual orientation" far exceeds the scope of the statutory language of Title IX, and negatively effects women participation in higher education and substantially interferes with First Amendment rights.

The ED improperly employed inapplicable legal precedent to redefine "sex" under Title IX to also include "gender identity" and "sexual orientation. In its notice to the public related to its new rule, the Department of Education announced that

> The proposed regulations will advance Title IX's goal of ensuring that no person experiences sex discrimination, sex-based harassment, or sexual violence in education. As the Supreme Court wrote in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), it is "impossible to discriminate against a person" based on sexual orientation or gender identity without "discriminating against that individual based on sex.[7]

In *Bostock*, the Supreme Court reviewed whether Title VII's statutory language prohibiting employment discrimination based on sex could be applied to firing someone simply for being homosexual or transgender. *Id.* at 1737, 1753. The *Bostock* Court explicitly refused to redefine "sex" in that case to radically rework other policies (e.g., Title IX), sweeping away fundamental distinctions between men and women.

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination [….] But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. *The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."*

Bostock v. Clayton Cty., 140 S. Ct. 1731, 1753 (2020) (Emphasis added).

The ED's reliance on *Bostock* for the promulgation of its rules under Title IX, therefore, is precluded by limited nature of the Court's ruling in that case. The Court explicitly stated that its

[7] U.S. Dep't of Educ., *supra* note 2.

purpose in *Bostock* was only to determine whether someone could be fired under Title VII and ought not be read to interpret to other federal or state laws that prohibit sex discrimination.

Unfortunately, that is exactly what the ED does in its extension of the reasoning of the *Bostock* decision to Title IX. The downstream consequence of the ED's error here will detrimentally `impact women and free speech rights.

a. Protections for women in higher education will decline via the ED's redefining of "sex" in the proposed rule.

Discrimination based on sexual orientation or gender identity in an employment context is not the same as treating men and women differently in higher education. David French accurately describes the problem of trying to map discrimination based on sex under Title VII to Title IX:

> "Let's imagine a trans employee named "Gina." At work Gina is remarkably effective, better than many peers. Gina's employee evaluations are sterling. Customers love interacting with Gina. Then, one day a new manager discovers that Gina was once called George. Driven by animosity or disagreement, he first sidelines and then fires one of his best employees. This action should offend our moral commitment to equality. In every way that mattered—job performance, customer interactions, kindness to colleagues—Gina was similar to peer employees….
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> But let's put Gina in a different context, a competitive women's swim meet. Is Gina or another trans woman similarly situated to female competitors? No, the female swimmers did not go through male puberty. They do not have male bone structure. In fact, under traditional equal protection categories, treating a competitive women's swim meet as both a male and female space could violate the principle of treating similarly situated people alike and result in exploiting or harming the vulnerable class…." [8]

Although attempts to redefine "sex" to also include gender identity may be pursued from the perspective of trying to protect that class, the proposed rule effectively removes protections for

[8] David French, *What Do We Do When People Are Equal, But Not Alike?*, THE DISPATCH (Mar. 20, 2022), https://frenchpress.thedispatch.com/p/what-do-we-do-when-people-are-equal.

another class, in this case, the vulnerable group that Title IX was designed to protect in the first place – women.

And this exploitation will not just occur in the arena of college sports; women only spaces will also be subject to unwanted invasions of their privacy:

> "Moreover, athletics are not the only location where trans women and women are not "similarly situated." Consider locker rooms, for example. If a man walked in and revealed his genitalia, that would be indecent exposure. If a trans woman exposes a penis, is that somehow different? Is a woman bigoted if she doesn't want to see biologically male genitalia, even if that genitalia belongs to a trans woman? . . . .
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> Thankfully, our laws aren't that absurd, and there's no meaningful constituency arguing that they should be that absurd. Instead, the argument is that a small population—trans women—are women in every way that should matter in culture, morality, and law."[9]

Unfortunately, the ED's proposed rule aims to reinterpret the law to become precisely *"that absurd."* In its proposed rule, the ED attempts to dismiss the worst possible scenarios by saying that it will still protect the separation of certain spaces based on "sex", but the failure to adequately define "sex" in the first-place renders this effectively impossible. Despite acknowledging that "there are circumscribed situations in which Title IX or the regulations permit a recipient to separate students on the basis of sex, even where doing so may cause some students more than de minimis harm…"[10], the proposed ED rule fails to define "sex":

> "Contrary to assertions made in 2020 and January 2021, the Department does not have a "long-standing construction" of the term "sex" in Title IX to mean "biological sex." The text of the statute and current regulations do not resolve this issue; neither the statute nor the regulations define "sex," purport to restrict the scope of sex discrimination to biological considerations, or even use the term "biological." The Department does not construe the term "sex" to necessarily be limited to a single component of an individual's anatomy or physiology. Further, the Department need not define "sex," …."[11]

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[9] *Id.*

[10] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41536. (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106).

[11] *Id.* at 41537.

The ED's position here contradicts reality and the history of the word sex. Controlled necessarily by an individual's chromosomal constitution, "sex" is an objective reality. Chromosomes are not a social construct. "Sex" is immutable, innate, and a biological truth.[12] Moreover, while the ED deems "gender identity" a protected class, its failure to define the term makes it impossible for universities to determine how to adequately ensure they do not discriminate against that class. In doing so, the ED ignores the interests of women in many different sex-specific spaces -- and how the proposed change adversely affects those interests.[13]

b. Government authorities can use the vague and ambiguous language of the new rule to enforce draconian restrictions on free speech and religious expression.

Generally, the proposed new specially protected classifications prohibit persons with traditional religious views of family and sexuality from exercising their constitutionally protected free speech and free exercise rights. The First Amendment and State Constitutions bar the state from "prohibiting the free exercise [of religion]; or abridging the freedom of speech…" *U.S. Const. amend. 1*

The proposed new categories violate these rights. It prohibits the free exercise of religion by restricting, regulating, and discriminating against persons with traditional views on sexuality and family. It abridges the freedom of speech in a content-based way for all the reasons stated below.

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[12] *See* Lawrence S. Mayer & Paul R. McHugh, Sexuality and Gender; Findings from the Biological, Psychological, and Social Sciences, New Atlantis at 89 (Fall 2016); Francisco I. Reyes et al., Studies on Human Sexual Development, 37 J. of Clin. Endocrinology & Metabolism (1973) at 74-78; Michael Lombardo, Fetal Testosterone Influences Sexually Dimorphic Gray Matter in the Human Brain, 32 J. of Neuroscience 674080 (2012); P.C. Sizonenko, Human Sexual Differentiation, Geneva Foundation for Medical Education and Research (2017).

[13]*See* Glenn Altschuler & David Wippman, G*etting off the Title IX roller coaster*, THE HILL (Jul. 10, 2022), https://thehill.com/opinion/education/3551262-getting-off-the-title-ix-roller-coaster/ ("And once again, colleges and universities must redesign their training and education programs. Apart from the time, energy, legal fees and other costs, the Title IX roller coaster disrupts schools' ability to provide safe learning environments and undermines confidence in the reliability and fairness of campus processes").

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the U.S. Supreme Court struck down a city law that levied special restrictions on individuals who expressed views about race, color, creed, or gender. The Supreme Court held that such a law facially violates the First Amendment right to freedom of speech because "the First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects. Id. at 391. The St. Paul law struck down by the Supreme Court and the proposed new categories share the same unconstitutional features.

The ED here seeks to sacrifice free speech on the altar of a political agenda. The First Amendment implications could not be clearer. Is it harassment to merely make a statement that someone else perceives as offensive because of their own internal definition of their sexuality? What does "harassment" mean? Does the policy include nonverbal, verbal, or written actions, such as correctly referring to someone using a biologically accurate pronoun? Is a school really prepared to handle complaints against professors, parents, students, and businesses that speak on these issues in a manner that offends someone?

Imagine a conversation in a school hallway where a student says that he believes that Jesus is the only way to God, or that he does not believe that civil partnerships are pleasing to God, or that homosexual conduct is not condoned in the Bible. Another student hears this and files a complaint with the school board for discrimination under the new categories and policies. Imagine a parent expressing similar statements at a school sporting event. Enforcement action is then filed under this policy. Is government prepared to become the arbiter of these issues?

Moreover, the U.S. Supreme Court has struck down laws infringing upon Freedom of Association based upon the expressive message of a group. Freedom of Association protects the right to exclude others where the exclusion is based upon the expressive message of the group.

See e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000). Freedom of association includes the right not to associate.

The failure to protect citizen's free speech and free exercise rights inevitably leads to more cultural divisiveness and litigation. It further improperly elevates the new categories (and the political agenda of their proponents) over the rights of all the other parents, students and teachers with different religious beliefs or values. Granting special rights at the expense of other's rights is not fair and equal treatment.

The ED defines their new standard for "sexual harassment" creating a "hostile environment, as follows:

> "Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following: (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity; (ii) The type, frequency, and duration of the conduct; (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct; (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and (v) Other sex-based harassment in the recipient's education program or activity."[14]

In contrast to the current rule, based on the Supreme Court's definition for what qualifies for sexual harassment, this definition introduces ambiguity which could be used to stifle free speech.[15] For example, Title IX administrators could use this definition to proscribe speech

[14] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41569 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106).

[15] The current rule simply defines sexual harassment as "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 CFR § 106.30(a)(2). This language directly reflects the Supreme Court's own definition of sexual harassment: "harassment that is so severe, pervasive, and objectively offensive that it effectively

related to a person's chosen pronoun. By deeming that "gender identity" is within the protected class of "sex" under Title IX, it is conceivable that the intentional truthful use of a biologically correct pronoun by person A, at variance with the preferred pronoun of person B, could be interpreted to create a "hostile environment" for person B and therefore qualify as sexual harassment under Title IX.[16] By redefining "sex" to include *gender identity*, while broadening what qualifies for sexual harassment, ED effectively establishes a speech code in university settings.

Professor Jordan Peterson received wide notoriety for his opposition to legislation in Canada which enforced the use of the preferred pronouns of students by university professors.[17] His opposition to Canada's legislation was rooted in deeply held philosophical premises related to human nature, not in adherence to any specific religion. As explained by Carl Trueman:

> "Human nature in general is limited but limitation does not mean less freedom. I cannot fly simply by flapping my arms, but that inability does not mean that I am in bondage. I need to understand my limits as a human being and learn to act accordingly—the limits of human nature in general and of myself in particular: I can, for example, swim but I will never be as good as Michael Phelps.
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> Failure to understand this—or perhaps better, a refusal to acknowledge this—lies at the root of much of the political insanity that surrounds us. Rejecting this is the premise undergirding transgender ideology, turns speech with which we disagree into acts of oppressive hate, and outlaws reality en masse. That is one reason why Peterson opposes the legislation of gender speech codes: not only do such violate the principle of free

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bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632 (1999).

[16] In an interview with the publication Healthline, an individual who identified as transgender expressed that, "'Where I'm at school now there are way less trans and nonbinary folks, no visible trans community, and while our equity training included a video on pronouns, none of my professors or colleagues have ever asked what my pronouns are,' N., 27, said. 'When someone misgenders me at school I just get this shock of painful tension throughout my body.'" Is it really that far of a logical leap to presume that the new language's proposed rules wouldn't be used by individuals who identify as transgender to bring claims of sexual harassment?
K.C. Clements, *What Does it Mean to Misgender Someone?*, HEALTHLINE, https://www.healthline.com/health/transgender/misgendering#why-pronouns-matter (last visited on July 15th, 2022).

[17] Jessica Murphy, *Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns*, BBC (Nov. 4, 2016), https://www.bbc.com/news/world-us-canada-37875695.

> speech, in the hands of the transgender lobby they demand that people say that which they know is untrue and inconsistent with reality."[18]

The overbroad and ambiguous definition of the ED's proposed rule for "sexual harassment" improperly elevates the feelings of individuals identifying as transgender over the constitutional rights of others to express religious and political views inconsistent with transgender ideology.

The First Amendment to the United States Constitution protects individuals against government actions substantially interfering with the free exercise of religion or abridging freedom of speech or assembly. U.S. Const. amend. I. Under the Constitution, no Federal agency can dictate what is acceptable and not acceptable on matters of religion and politics. The government cannot silence and punish all objecting discourse to promote one political viewpoint. Yet, the ED's proposed rule does just that by providing a vehicle to punish those who do not align with the present-day transgender "orthodoxy". Coercing authorities to limit the viewpoint of allowable speech, the proposed rule unconstitutionally compels university administrators to politically normalize transgender ideology. "If 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." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). The ED should revise its proposed rule to protect constitutionally protected speech.

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[18] Carl R. Trueman, *Jordan B. Peterson: A Sign of the End Times?*, MODERN REFORMATION (Aug. 20, 2018), https://modernreformation.org/resource-library/web-exclusive-articles/the-mod-jordan-b-peterson-a-sign-of-the-end-times/.

i. ***Due Process Concerns -- Unconstitutional Vagueness***

The Due Process Clauses of the United States Constitution guarantees individuals the right to prior notice of what constitutes prohibited conduct. If a policy is vague, ambiguous, or indefinite so that it is impossible to determine what it requires, the courts will hold the policy unconstitutionally void for vagueness, and therefore unenforceable. The meaning of a policy must be clear enough so that ordinary persons who are subject to its provisions can determine what acts will violate it and so they do not need to guess at its meaning. An unambiguously drafted policy affords prior notice to the citizenry of conduct proscribed. In this way the rule of law provides predictability for individuals in their personal and professional behavior. A fundamental principle of due process, embodied in the right to prior notice, is that a policy is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that policies give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly.

The proposed rule puts academic institutions in an impossibly precarious position to try to discern what constitutes discrimination under the new categories. Because accusers with an agenda can use the ambiguity of the proposed categories to decide, after the fact, what is prohibited or what offends them, the possibility of people of faith facing oppressive action is limitless. The accusers are only limited by their own imagination and ability to come up with new ways to enforce the new categories.

The proposed new protected categories are incapable of clear definition. A person can be accused and charged under the vague terms of such categories for merely expressing a religious belief that another individual internally defines as being offensive to him or her. The determination of whether a person is a member of one of the new protected classes is subjective

and in the eye of the beholder. A person cannot know if their conduct is prohibited until after the fact. Thus, even if a person or academic institution possesses no intent to offend or discriminate, the alleged victim can commence enforcement of this policy and subject the accused to legal costs and sanctions pursuant to the policy.

For example, categories like "gender identity" and "sexual orientation" have meaning way beyond just homosexuality. An accuser, therefore, gets to define what this language means without limit by simply filing charges alleging some statement or action violates the policy.

For example, some definitions of "sexual orientation" routinely list different lifestyles and then qualify the list by stating, "by orientation or practice, whether past or present." Because the sexual orientation of the relevant group is vaguely defined, no reasonable person can understand what it means. Sexual orientation comes in many forms. Does the policy cover groups of people with various sexual orientations? Does it cover, for example, the conduct of a group of people whose sexual orientation is for extramarital sex (swingers/adulterers)? Does it cover the conduct of a group of people whose sexual orientation is for multiple partners within a marital relationship (polygamists)? Does it cover numerous other groups whose activities are currently illegal? For example, what about a group of people whose sexual orientation is for young children (pedophiles)? Does it cover a group of people whose orientation is toward violence (e.g., serial killer rapists)? What about people whose sexual orientation is for dead humans (necrophiles)? What about people whose sexual orientation is for barnyard animals (bestiality)? Or those whose sexual orientation is toward one's own close relatives (incest)?

Given the absence of any clear definition, the ambiguous language of the proposed policy arguably could include all such groups. Will an otherwise law-abiding teacher, student, or academic institution therefore, face enforcement action for calling pedophilia or polygamy bad

or for refusing to accommodate such a person? An individual's inalienable right to due process and notice forbids such government-imposed guessing games, especially when, as here, the public has no way of predicting what morally-relative choice the proponents will choose when making a decision to take enforcement action against an alleged perpetrator. Thus, the conduct prohibited by such proposed categories wholly depends on the whim of the accuser, based upon their perceived feelings—rather than a clearly expressed standard articulated in the policy. Again, who determines this? Such language is nebulous at best and citizens are left to guess at the meaning.

Under "gender identity" the usual understanding includes "A person's actual or perceived gender," their "self-image," and "expression." This is internal to the person. How is the accused supposed to know how someone else perceives their own gender? Such categories literally require mind reading on the part of the accused. It is unconstitutionally vague and overbroad. Reasonable people will not be able to agree on what such a category in the policy means. The potential means by which the school can apply the law to selectively challenge a professor or student's actions vividly illustrates why the United States Constitution prohibits such ambiguity. Here the inherent vagueness enables one to make a personal choice to elevate the right of one protected group (with a particular sexual orientation, gender identity, etc.), over the right of another protected group (with a sincerely held religious conscience). In using the inherent vagueness of the policy to make a morally-relative determination, academic officials at any time can arbitrarily transform a citizen's protected expression of sincerely held faith-based beliefs, into an actionable case. Discerning prohibited conduct in such a manner, after the fact, violates the citizen's Constitutional right to prior notice of prohibited conduct.

ii. Enforcement of the Proposed Policies Undermines Precepts of Good Governance

Arbitrarily enforcing such vague policies undermines good governance under the rule of law. A principal precept of the rule of law is that it provides predictability for individuals in the conduct of their affairs. As discussed above, vague provisions provide no such predictability and opens the door for government authorities to decide what the policy means after the conduct occurs. That which is prohibited becomes clear only after government selectively enforces the vague policy against someone—based upon the government's own morally relative construal of the ambiguous language. To be sure, the exercise of such discretion provides the means for proponents of the new categories to efficiently advance a political agenda. The insidious consequences of doing so, however, include the deterioration of fundamental democratic principles and good governance under the rule of law

In the case of a vaguely worded policy, enforcement can, without prior notice of the conduct prohibited, lead to a citizen's loss of property and a free public education. Moreover, if the policy vaguely regulates free expression, an ominous chill on the exercise of fundamental freedoms accompanies its promulgation. The great potential for abuse through arbitrary enforcement of these new provisions is reason enough to oppose their enactment. Compelled by the piercing chill of an unpredictable potential enforcement action, citizens cease exercising their basic liberties. They fear to speak or exercise their religious freedom.

In a pluralistic society, numerous conflicting points of view exist. Historically, therefore, the perpetuation of a functional republic requires free and open debate. The current prosecution and persecution of Christian people around the world illustrates, however, just how efficiently

government can use a vague policy or law to suppress free expression and the free exercise of religion.

The potential for unpredictable legal action chills future religious expression of teachers, students, and religious academic institutions. Fearing enforcement action, citizens and religious leaders will inevitably self-censor sincerely held faith-based beliefs—and may even cease expressing anything at all.

The proposed categories also communicate an ominous admonition to academics and anyone expressing a point of view different from that held by the proponents. To maintain comity between those of differing viewpoints and ensure public order, all academic institutions (and the ED) must first recognize these universal constitutional freedoms.

III. The ED's proposed rule, as it relates to the statutory religious accommodation in Title IX, properly maintains the 2020 rule's commitment to religious accommodations.

The proposed new rules do not apply to "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(3).

Under the ED's 2020 rule, the ED acknowledged that religious schools do not need to apply for an "assurance letter" from the Department of Education to claim a religious exemption to Title IX. 34 C.F.R. § 106.12(b) (2021). The ED promulgated the 2020 rule in response to confusion regarding the scope of this accommodation. In its discussion on the importance of this provision, the ED recognized that,

> "No part of the statute requires that recipients receive an assurance letter from OCR, and no part of the statute suggests that a recipient must be publicly on the record as a religious institution claiming a religious exemption before it may invoke a religious exemption in the context of Title IX. Nevertheless, the current regulations are not clear on whether recipients

> may claim the exemption under § 106.12(a) only by affirmatively submitting a letter to the Assistant Secretary for Civil Rights."[19]

The ED further recognized that, "these final regulations have the effect of promoting religious freedom. The final regulations codify longstanding OCR practices and are consistent with the Title IX statute."[20]

The statutory religious accommodation is properly left untouched by the present proposed rule. It is troubling, however, that some groups advocate for an unconstitutional reversal of this policy.[21] In responding to objections surrounding the ED's 2020 rule, the department said that,

> "the Title IX statute does not require a recipient to request and receive permission from the Assistant Secretary to invoke the religious exemption, requiring a recipient to do so may constitute a substantial burden that is not in furtherance of a compelling government interest or the least restrictive means of furthering that compelling government interest under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–1."[22]

The ED's application of the law then, was correct (specifically, as it relates to the statutory religious accommodation, and the now codified practice of not requiring letters of assurance from religious institutions). The ED's proposed rule correctly does not alter this currently existing regulatory framework as it relates to claiming a religious accommodation. We call on the ED to resist any effort by political activists encouraging the ED to unconstitutionally change the policy.

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[19] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30475 (May 19, 2020) (codified at 34 C.F.R. § 106.12).

[20] *Id.* at 30476.

[21] Nadra Nittle, *Biden Administration Announces Plan That Would Undo DeVos's Gutting of Title IX*, TRUTHOUT (June 25, 2022), https://truthout.org/articles/biden-administration-announces-plan-that-would-undo-devoss-gutting-of-title-ix/.

[22] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 19, at 30477.

IV. Conclusion

In a constitutional republic like ours, freedom of religion, freedom of speech and expression, and freedom of association are not needed to protect the ideas and rights of people with whom the government agrees – it is needed to protect those with whom the government does not agree. Make no mistake about it. Those groups advocating for new categories in the Title IX regulations will wield these policies as a weapon capable of destroying expression of viewpoints grounded in the sacred. One merely needs to look at the scores of cases brought against schools, churches, businesses, and individuals around our country based upon these types of laws. Proponents use these laws to silence and financially cripple those who dare to adhere to a different viewpoint and oppose their agenda. The irony is that, while trumpeted as non-discrimination policies, these policies invidiously discriminate against, and violate the conscience of, many professors, parents, students, and religious academic institutions.

Moreover, the impetus for adding these new categories has nothing to do with advancing or protecting civil rights. Rather it is about coerced acceptance of LGBTQ ideology, by force of law and punishment. Even if the ED agrees with such policies, such agreement gives the Department no right to trample on the constitutional rights of others. The test of a properly functioning republic is not whether the government protects the speech and religious rights with which it agrees – it is whether it will protect the speech, religious rights, and liberty of those citizens with whom it does not agree. Instead of censuring or punishing speech and religious rights, the answer is always to have more speech and the free exchange of ideas – at least in a republic that values true freedom, pluralism, and diversity. Selective enforcement and

punishment of citizens under these proposed policies sends a bitter chill throughout our country. Promulgating vague policies that allow for arbitrary and selective enforcement is never an appropriate public policy for any institution that values good governance under the rule of law.

For all the above-stated reasons, we urge the Department:

- to not create special classifications that unfairly and unconstitutionally deny constitutional rights of teachers, parents, students, and academic religious institutions.
- to preserve the current regulatory framework providing for religious accommodations.

Respectfully submitted,

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GREAT LAKES JUSTICE CENTER