IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FAITH ACTION MINISTRY ALLIANCE, INC., doing business as **GRANT PARK CHRISTIAN ACADEMY**, Plaintiff, v. **NIKKI FRIED**, in her official capacity as Florida Commissioner of Agriculture and Consumer Services, et al., Defendants.	**Case No. 8:22-cv-01696-MSS-JSS** **Challenge to the Constitutionality of a Federal Statute**

PLAINTIFF'S TIME-SENSITIVE MOTION FOR A TEMPORARY RESTRAINING ORDER, A PRELIMINARY INJUNCTION, AND DELAY OF EFFECTIVE DATE

Plaintiff Grant Park Christian Academy moves for a temporary restraining order, a preliminary injunction, and a delay of effective date under Fed. R. Civ. P. 65 and 5 U.S.C. § 705. At the behest of federal officials, Commissioner Fried is poised to block Grant Park Christian Academy's school lunch funding and not accept the school into the school lunch program for the school year starting on August 10, 2022. When the school asked her office to confirm that it could participate in the program without violating its religious beliefs, her office told the school that it is "not required to participate in the National School Lunch Program." Grant Park Christian Academy requests that this Court schedule oral argument and issue an order, without security, no later than August 9, 2022, so it may continue feeding its students.

LEGAL MEMORANDUM

Relief is urgently needed because government officials are threatening to take away lunch money from low-income children simply because they attend a Christian school. Complaint (Compl.) ¶¶ 1–17, ECF No.1.[1]

For many children, the food they get at Grant Park Christian Academy is the best meal they eat all day—and sometimes, it's the only meal. *Id.* ¶ 3. Grant Park Christian Academy treats every student with dignity and respect. *Id.* ¶ 4. The school would never turn away a hungry child. *Id.*

Grant Park Christian Academy receives funding for school lunches from the U.S. Department of Agriculture (USDA) through the National School Lunch Program administered by Florida Agriculture Commissioner Nikki Fried. *Id.* ¶¶ 6, 69–81. Under Title IX of the Education Amendments of 1972, participating schools agree not to discriminate on sex. *Id.* ¶¶ 7, 82–87. Grant Park Christian Academy has participated in the National School Lunch Program for the last five years. At all times, it has fully complied—and continues to comply— with this provision. *Id.* ¶¶ 7, 155–56.

But federal officials now have redefined the word "sex" in Title IX to include sexual orientation and gender identity. *Id.* ¶¶ 119–49. And, because

[1] The declarations and the verified complaint serve as evidence supporting this motion. *PNC Bank v. Land Servs. of FLA., LLC*, No. 3:16-cv-208, 2017 WL 4865457, at *3 (N.D. Fla. Aug. 9, 2017); Exh. 1, Decl. of Alfred Johnson ¶ 1. They set forth and verify this factual and regulatory background in greater detail. Best efforts have been made to give notice of this motion. *Infra* p. 25 (certificate of service).

Title IX applies to *all* school operations, this new school lunch mandate applies to *all* school activities. *Id.* ¶¶ 7, 82–87. That includes restrooms, dress codes, hiring, and daily conversations—it even requires using pronouns contrary to a student's sex. *Id.* ¶¶ 8, 124. Grant Park Christian Academy would never deny any student lunches for any reason, but the new school lunch mandate extends far beyond the lunch line into other areas. Were Grant Park Christian Academy to comply and change its policies for restrooms, dress codes, hiring, or daily conversations, it would violate its religious beliefs. *Id.* ¶¶ 10, 49–62.

Commissioner Fried is now poised to block Grant Park Christian Academy's funding for school lunches—even though Title IX provides a religious exemption. *Id.* ¶¶ 7, 17, 150–76. When asked by Grant Park Christian Academy to confirm its religious exemption and that it could stay in the lunch program, her office told Grant Park Christian Academy that the school is "not required to participate in the National School Lunch Program." *Id.* ¶ 164.[2]

Grant Park Christian Academy seeks interim injunctive relief and a delay of the school lunch mandate's effective date to ensure that its students can keep receiving meals this school year.

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[2] Since then, Commissioner Fried has posted more deadlines for schools to update their websites, brochures, and posters with new nondiscrimination policies. Exh. 3, USDA, *Revised Nondiscrimination Statement and "And Justice for All" Posters; Timelines and Guidance for Implementation*, https://www.fdacs.gov/News-Events/Press-Releases/2022-Press-Releases/VIDEO-Commissioner-Nikki-Fried-Responds-to-Florida-Department-of-Education-Encouraging-Schools-to-Disobey-Federal-Nondiscrimination-Guidance.

It is imperative that Grant Park Christian Academy have its lunch application approved on time as usual. Any day in which the school does not have an approved application in place is a day that federal and state officials will not reimburse the school for the cost of meals. Exh. 2, Decl. of Melanie Young ¶¶ 18–19. The school applied as usual for funding in time for the state to approve the application by the start of the school year. *Id.* ¶¶ 4, 18–20. Right now, the school must order food by August 8, pick up food by August 9, and begin serving food on August 10—the first day of school. *Id.* ¶¶ 5–7. In the normal course, the school would submit its reimbursement request for August meals by September 1, the government would give reimbursement approval by September 30, and funds would be received in 7 to 14 days. *Id.* ¶¶ 11–17.

Any delay on reimbursements (or any days for which meals will not be reimbursed because no approved application was in place) threatens the school's constitutional rights and its ability to keep its doors open. Compl. ¶¶ 195–202. The school will not have sufficient funds to provide meals for every child. *Id.* ¶¶ 189–212. If that happens, the school will lose half or more of its students, and its future will be in doubt—a tragedy that can be avoided if officials would respect its constitutional rights. *Id.*

STANDARD FOR GRANTING THE MOTION

A preliminary injunction or temporary restraining order issues when a plaintiff shows: "(1) a substantial likelihood of success on the merits; (2) a

substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest." *Friedenberg v. Sch. Bd. of Palm Beach Cty.*, 911 F.3d 1084, 1090 (11th Cir. 2018); *see Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir.1995). Under the Administrative Procedure Act (APA), the same standards apply "to prevent irreparable injury" and to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705; *see Scroos LLC v. Att'y Gen. of U.S.*, No. 6:20-cv-689-Orl-78LRH, 2020 WL 5534281, at *2 (M.D. Fla. Aug. 27, 2020).

ARGUMENT

This Court should grant prompt relief to stop the government officials from denying school lunch funding to Grant Park Christian Academy, delay the effective date of the school lunch mandate, and maintain the status quo.

I. This Court has jurisdiction.

A. Grant Park Christian Academy has standing and ripeness.

Grant Park Christian Academy has standing. Its injuries are "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; its injuries are fairly traceable to the mandate; and they are likely to be redressed by relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

If Grant Park Christian Academy complies with the new school lunch mandate, its educational mission, free speech, and religious exercise will be harmed in many ways. Compl. ¶¶ 10, 183–229. Every violation of a right causes damage. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1286 (11th Cir. 2021). The school will no longer be able to maintain sex-specific restrooms for girls based on their biological differences; to maintain sex-specific uniform policies, in which, for example, only girls may wear skirts; to draw its workforce from among those who share and live out its religious convictions; and to refrain from using pronouns that do not correspond to biological sex. *Id.* But if Grant Park Christian Academy does not comply, it cannot provide meals for every child. *Id.* ¶¶ 189–212. The school will lose half or more of its students, and its future will be in doubt. *Id.*

The school has also been injured by officials' failure to respect Title IX's religious exemption, which applies by statute 20 U.S.C. § 1681(a)(3), but which USDA requires schools to publicly "claim" in writing from USDA, 7 C.F.R. § 15a.205. The school has had to expend resources and forgo its privacy to "claim" an exemption, even though USDA may never recognize it. Compl. ¶¶ 208–12.

There "is ordinarily little question" that standing exists where an entity like the school is the "object of the [challenged] action." *Lujan*, 504 U.S. at 561–62. Entities are the object of a regulation when (1) "the regulation is directed at them"; (2) "it requires them to make significant changes in their everyday

business practices"; and (3), "if they fail to observe" the regulation, they are exposed to sanctions. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 153–54 (1967).

First, the government confirmed that the school lunch mandate is directed at the school. Commissioner Fried's office informed the school of the new school lunch mandate and told it that participating schools must comply to get funding. Compl. ¶¶ 150–76. The school cannot receive funding if it is not in compliance at the application or award stage. *Id.* ¶¶ 188.

Second, the school lunch mandate requires significant changes. It forces Grant Park Christian Academy to choose now between two injuries: (1) cease providing lunch and lose many students, or (2) comply with the school lunch mandate and violate its religious beliefs. *Id.* ¶187.

Third, the government's threatened sanctions are strong. The school will lose eligibility for future funding, and, even for past periods of funding, it is exposed to investigations, complaints, and lawsuits under the government's retroactive theory of liability. *Id.* ¶¶ 109, 111–12, 167, 183, 242, 247.

All these injuries are directly traced to the school lunch mandate, the illegality of which this Court must assume for standing purposes. *FEC v. Cruz*, 142 S. Ct. 1638, 1647 (2022). The relief requested—delaying the school lunch mandate's effective date and enjoining its implementation—would remedy these injuries by maintaining the past Title IX requirements as the status quo.

Grant Park Christian Academy thus has standing to sue as the object of agency action, just like when federally funded education providers had standing to sue when the Department of Education imposed a similar standard on them. *Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at *5–12 (E.D. Tenn. July 15, 2022); *Texas v. United States*, 201 F. Supp. 3d 810, 819–23 (N.D. Tex. 2016). Plus, if Title IX were read to encompass sexual orientation and gender identity—which *Bostock* did not hold—the same claims would support relief against enforcement of the statute and its regulations.

For the same reasons, this case is ripe. Further factual development would not "significantly advance [the Court's] ability to deal with the legal issues." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (citation omitted). The school asked officials to confirm that they would not apply Title IX to require the school to violate its religious beliefs, but they told the school it is "not required to participate in the National School Lunch Program." Compl. ¶ 164. When an organization can "realistically expect" that its policies "will be perceived by the Department as a violation," it has shown a "sufficiently distinct and palpable injury." *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1118 (D.C. Cir. 2005). It need not await an enforcement action. *U.S. Army Corps of Engr's v. Hawkes Co.*, 578 U.S. 590, 600 (2016).

The school has suffered a procedural injury, too: being deprived of the right to participate in a meaningful notice-and-comment process. Compl. ¶¶

230–33; *see Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). And a suit to make an agency comply with a mandatory procedure, such as the APA's notice-and-comment requirement, is ripe when the procedural failure occurs. *See Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1174 (11th Cir. 2006).

In addition, this challenge is independently justiciable because the school intends to engage in an activity "arguably affected with a constitutional interest" but "arguably" proscribed, and "a substantial" or a "credible" threat of enforcement exists. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 – 60, 166 (2014). The school seeks to keep policies that the Constitution protects. *Infra* Pt.II.E–F. And the officials' actions meet the "quite forgiving" standard for a "credible threat of enforcement," *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017), because officials said that schools must comply and because any exemption depends on officials' yet-to-be-given approval. Standing is also "bolstered" because the "authority to file a complaint" is not limited to an agency," *SBA List*, 573 U.S. at 164, such as if a private cause of action exists, *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't*, 479 F. Supp. 3d 543, 551 (W.D. Ky. 2020), which is the case with Title IX, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979).

Finally, a plaintiff must fall arguably within the "zone of interests" of the statute at issue. *Hollywood Mobile Ests. Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1268–69 (11th Cir. 2011). That "inquiry is not so demanding." *Id.* at 1269.

Under this test, Grant Park Christian Academy is within the zone of interests to be protected. Title IX requires equal opportunities and practical accommodations for boys and girls, and Title IX gives a robust religious exemption—purposes that the school fully implements and seeks to vindicate. Compl. ¶¶ 88–107. Likewise, the APA's procedural requirements for public participation in rulemaking protect Grant Park Christian Academy's rights against improper government mandates like this one. *Id.* ¶¶ 230–33.

B. The school lunch mandate is subject to APA review.

Under the APA's pragmatic approach, *Hawkes Co., Inc.*, 136 S. Ct. at 1815, agency action is final and subject to federal court jurisdiction, *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003), if the action is (1) the "consummation' of the agency's decisionmaking process"; and (2) "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up). Agency action is final if it "has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability." *Texas*, 933 F.3d at 446.

The school lunch mandate is final agency action subject to APA review. USDA's publication of the school lunch mandate—through a departmental regulation, the state letter, the policy update, and the Q&A—issued an obligation in final form. Compl. ¶¶ 234–54. USDA delineated obligations and

rights for federal officials, state agencies, program participants, and the public because USDA required everyone to act as if Title IX covered new bases. *Id.* And the enforcing state agency has expressly demanded compliance.

What is more, distinct from the APA, courts of equity have the power to set aside ultra vires and unconstitutional federal actions. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689–90, 693 (1949). This avenue for relief does not depend on meeting the APA's technical requirements. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 189–90 (D.C. Cir. 2006).

C. USDA's school lunch mandate is a legislative rule subject to rulemaking procedures.

For the same reasons, the school lunch mandate is a legislative rule subject to rulemaking procedures. Under the APA's two categories for agency action, an agency either issues an order by adjudication or a rule by rulemaking. *Jean v. Nelson*, 711 F.2d 1455, 1475 (11th Cir. 1983). A "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551. If an agency "established or changed a 'substantive legal standard,'" the agency sought to make a legislative rule—and it cannot evade notice and comment procedures. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810, 1817 (2019).

An action is a legislative rule when it sets a "binding norm," that is, when an administrator *chooses* to "promulgat[e] rules of general applicability." *Jean*,

711 F.2d at 1476, 1478, 1481–82 (citing 5 U.S.C. § 553). Only when an agency "will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself," is it not a rule. *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974).

The school lunch mandate is a legislative rule imposing substantive duties. USDA removed discretion by announcing a new view of Title IX binding every agency official, State, and program participant. Compl. ¶¶ 234–54. Now, officials need only determine *if* each school's nondiscrimination policies include sexual orientation or gender identity; officials need no longer decide *whether* Title IX addresses sexual orientation or gender identity. *Id.* ¶¶ 234–54. USDA even called its mandate a "departmental regulation." *Id.* ¶¶ 129–30.

The APA's rulemaking procedures are required even if, in the government's view, "the statute explicitly mandates" the new standard, and, even if "the government contends it is doing nothing more than implementing the express language of the statute." *Jean*, 711 F.2d at 1476. Of course, here, the government is incorrect about Title IX, *Tennessee*, 2022 WL 2791450, at *16, 20–21, and so the school lunch mandate seeks to "create[ ] new law," *Tenn. Hospital Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018). Compl. ¶¶244, 254.

II. Grant Park Christian Academy is likely to prevail on the merits.

Under the APA, final agency action must be "set aside" when it is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C.§ 706(2). In addition to violating the APA, Defendants' actions threaten Grant Park's constitutional religious freedom and free speech rights.

A. The school lunch mandate was subject to—but ignored—the APA's notice and comment procedures.

The APA imposes three-fold rulemaking procedures on legislative rules. *First,* an agency must publish a general notice of proposed rulemaking in the Federal Register, including "a statement of the time, place, and nature of public rule making proceedings" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved," or else find good cause on the record to omit these procedures. 5 U.S.C. § 553(b). *Second*, an "agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). And *third*, the "agency must consider and respond to significant comments." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

But USDA just published its school lunch mandate on its website, without warning or comment. Compl. ¶¶ 230–33, 255–63, 279–90.

The federal government's unilateral attempt to rewrite Title IX was thus enjoined for lack of notice and comment when the Department of Education

attempted a unilateral rewrite in 2016, *Texas*, 201 F. Supp. 3d at 828–31, and attempted it last year in 2021, *Tennessee*, 2022 WL 2791450, at *20–21. USDA's identical attempt this year should be enjoined, too.

B. The school lunch mandate failed to fulfill the APA's requirements of reasoned decision making.

The school lunch mandate should be enjoined under the APA for a second reason: the decision was "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Compl. ¶¶ 264–69. An agency must address important aspects of the issue. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This includes a duty to explain the impact on reliance interests and to consider alternatives. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–13 (2020).

Because USDA skipped rulemaking procedures, USDA never addressed all the issues necessary for reasoned decision making. Compl. ¶¶255–69, 297–309. USDA failed to consider the impact on private religious schools and the students that attend them. USDA failed to address the disruption that the new mandate creates for children and schools who have reliance interests in continuing school meal programs. Nor did USDA consider their interests in freedom of speech, religion, and association, such as in hiring or using correct pronouns. Even less did USDA consider reliance interests in sex-specific restrooms, dress codes, or athletics.

USDA failed to consider alternative policies that respect the interests of religious schools, including their female students, such as (1) taking no action; (2) creating rules to protect female sports and privacy under the correct understanding of Title IX; (3) grandfathering existing categories of programs and practices; (4) confirming that a religious exemption applies under Title IX, the Religious Freedom Restoration Act, and the First Amendment in this context by operation of statute; and (5) creating or expanding exemptions.

The government's failure to "overtly consider" these privacy and religious freedom reliance interests renders it fatally flawed. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). Considering these policy concerns "was the agency's job, but the agency failed to do it." *Regents*, 140 S. Ct. at 1914. Instead, it rested on its view that prior policy was unlawful, which is insufficient. *Id*. at 1909–13.

C. The school lunch mandate conflicts with Title IX's scope and purpose of protecting girls.

The school lunch mandate exceeds Title IX's statutory authority. Compl. ¶¶ 315–27. Title IX's text, structure, legislative history, regulations, and historical interpretation confirm that "sex" means biological sex—that is, a person's status as male or female as determined by biology. *Id*. ¶¶ 88–107.

Title IX does not address sexual orientation or gender identity. It prohibits discrimination only "on the basis of sex." 20 U.S.C. § 1681(a). When

Title IX was passed, Congress understood "sex" as a biological binary. *E.g.*, 20 U.S.C. §§ 1681(a)(2); 1681(a)(8); 1686; 34 C.F.R. § 106.33. Title IX required equal opportunities and practical accommodations according to biological sex, and it did not adopt a sex-blindness theory. Compl. ¶¶ 88–107. That is why Title IX regulations require athletic opportunities to "effectively accommodate the interests and abilities" of girls. 34 C.F.R. § 106.41(c). And this is why the Supreme Court recognized the need to keep separating sex-specific privacy facilities when integrating women into the Virginia Military Institute. *United States v. Virginia*, 518 U.S. 515, 550, 556–58 (1996) (Ginsburg, J.). Permitting males to access female private spaces fails to accommodate girls. It instead discriminates against them by limiting their equal opportunities.

When the government sought to expand Title IX in this way through the Department of Education, it was thus enjoined on this basis as contrary to the statute's text. *Texas*, 201 F. Supp. 3d at 829–34.

In *Bostock v. Clayton County*, the Supreme Court held that terminating an employee "for being homosexual or transgender" constitutes discrimination "because of . . . sex" under Title VII, 42 U.S.C. § 2000e-2, which governs employment. 140 S. Ct. 1731, 1737–38 (2020). But just because a federal law addresses sex discrimination does not mean it is "materially identical" to Title VII. *See Tennessee*, 2022 WL 2791450, at *16, 20–21. After all, the texts of Title VII and Title IX are materially different. *Compare* 42 U.S.C. § 2000e-2(a) with

20 U.S.C. § 1681(a); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). That is why the Supreme Court rejected that its "decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. But, even under Title VII, the court assumed that "sex" "refer[s] only to biological distinctions between male and female." *Id.* at 1739. And it did "not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.* at 1737–38, 1753.

Nor did *Bostock* consider the clear-notice canon, which limits statutes that, like Title IX, preempt core state police-power regulations, *Bond v. United States (Bond II),* 572 U.S. 844, 858 (2014), abrogate sovereign immunity, or impose grant conditions, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 24 (1981). Compl. ¶¶390–98. Under this canon, Congress must use "exceedingly clear language . . . to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). The statute must be "unmistakably clear," *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991), and not use "expansive language," *Bond II*, 572 U.S. at 857–58, 860, to impose "a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 190 n.11 (1982). But Congress did not unmistakably address sexual orientation or

gender identity in Title IX in 1972. The clear-notice canon thus compels a narrow reading.

D. The school lunch mandate conflicts with Title IX's religious exemption.

The school lunch mandate also conflicts with Title IX by artificially imposing procedural hurdles on obtaining a religious exemption. Compl. ¶¶177–82, 328–32. Title IX does not apply to schools "controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). This robust religious exemption applies *automatically* by operation of statute. *Maxon v. Fuller Theological Seminary*, 549 F. Supp. 3d 1116, 1125 (C.D. Cal. 2020). But regulations require schools to write to USDA to "claim" an exemption. 7 C.F.R. § 15a.205. This exemption process does not address interim compliance or retroactive liability, nor does it give USDA any duty or timeline to respond.

E. The school lunch mandate violates the freedom of speech.

The school lunch mandate violates the First Amendment's Free Speech Clause by censoring and compelling speech by content and viewpoint and by attaching unconstitutional conditions. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Grant Park Christian Academy shares its views on marriage, sexuality, and the human person in appropriate ways. Compl. ¶¶ 56, 215–16, 341–42, 349–50. Its speech on these topics receives strong protection. *Loudoun*

County Sch. Bd. v. Cross, No. 210584, slip op. at *9–10 (Va. Aug. 30, 2021). But under the school lunch mandate, officials would consider this speech to constitute harassment, hostile environment, or discrimination. Compl. ¶ 349. The school lunch mandate requires the school to speak in ways contrary to biological sex, including pronouns, and it prohibits speech taking a different view. It forces the school to adopt government policies that violate its religious beliefs, and post these policies publicly, and it requires the school to file assurances of compliance, pledging to avoid speech that the government disfavors. *Id.* ¶¶ 335–59.

But "regulating speech because it is discriminatory or offensive is not a compelling state interest." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019). The government lacks any legitimate objective "to produce speakers free" from purported bias, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578–79 (1995), and so any non-discrimination "interest is not sufficiently overriding as to justify compelling" speech. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 914–15 (Ariz. 2019). Far from being "always" a "compelling interest," this interest is "comparatively weak" in the context of education and pronouns. *Meriwether*, 992 F.3d at 509–10. And any interest could be achieved in more narrow ways.

F. The school lunch mandate burdens the free exercise of religion.

The school lunch mandate also conflicts with the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(a), and the First Amendment's Free Exercise Clause. Compl. ¶¶362–85. Under the school lunch mandate, Grant Park Christian Academy either must violate its religious beliefs or be excluded from meal programs. The government exempts many schools, 20 U.S.C. § 1681(a)(3), but seeks to enforce Title IX against Grant Park Christian Academy, and so the school lunch mandate must satisfy strict scrutiny under either law. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878, 1881 (2021).

The government may not rely on a "'broadly formulated'" interest in "equal treatment" or in "enforcing its non-discrimination policies generally," but must establish a compelling interest of the highest order "in denying an exception" to this school, and the interest must be narrowly tailored. *Id.* at 1879, 1881 (citation omitted). But here, "[t]he creation of a system of exceptions . . . undermines the [government's] contention that its nondiscrimination policies can brook no departures." *Id.* at 1882. Under the First Amendment and RFRA, that should be the end of the school lunch mandate.

III. Grant Park Christian Academy will suffer irreparable harm without an injunction.

Grant Park Christian Academy is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555

U.S. 7, 20 (2008). An injury is also "irreparable" when it cannot be undone through monetary remedies. *Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). Compl. ¶¶270–72.

"'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (citation omitted). Any "'substantial pressure'" to comply with a government mandate and violate a religious belief thus "constitutes an irreparable injury." *Navy Seal 1 v. Austin*, No. 8:21-CV-2429-SDM-TGW, 2022 WL 534459, at *19 (M.D. Fla. Feb. 18, 2022). This is especially true when the injury is "'direct penalization, as opposed to incidental inhibition' of First Amendment rights.'" *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (quotation omitted).

Commissioner Fried is poised to block the school from this year's lunch program. Federal enforcement actions and penalties for past or "continued noncompliance could be crippling"—they would "effectively force" the school "to close its door or violate its sincerely held religious beliefs." *Beckwith Elec. Co. v. Sebellius.*, 960 F. Supp. 2d 1328, 1350 (M.D. Fla. 2013).

Plus, there is no cause of action to recover damages from the federal government for violating the APA, Title IX, or the Constitution. "[T]he inability to recover monetary damages because of sovereign immunity renders the harm

suffered irreparable." *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). And, of course, even "'[t]o hypothesize that the earthly reward of monetary damages could compensate for these profound challenges of faith is to misunderstand the entire nature of religious conviction at its most foundational level.'" *Navy Seal 1,* 2022 WL 534459, at *19 (citation omitted).

IV. The balance of the equities and the public interest favor Grant Park Christian Academy.

The threatened harm to Grant Park Christian Academy, its schoolchildren, and others like them outweighs any harm to the government, and the balance of the equities and the public interest strongly favor relief.

First, relief would not harm the government. An injunction blocking the school lunch mandate would simply preserve the status quo that has been in effect for fifty years under Title IX. Injunctive relief and a delay of effective date would "'simply suspend administrative alteration of the status quo.'" *Wages & White Lion Invs., LLC v FDA*, 16 F.4th 1130, 1144 (5th Cir. 2021) (citation omitted). The federal government in fact regularly consents to using 5 U.S.C. § 705 to delay rules' effective dates. *E.g.*, HHS Services Grants Regulation, 87 Fed. Reg. 31,432 (May 24, 2022) (delays over 15 months); Delay of SUNSET Rule, 87 Fed. Reg. 12,399 (Mar. 4, 2022) (delay over 18 months).

Second, in contrast, the harm to Grant Park Christian Academy is imminent. The irreparable harm to the school—and to its students' "constitutional rights and health"—thus outweighs any other interests. *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 3041326, at *21 (S.D. Fla. June 6, 2020).

Third, vindicating constitutional and statutory rights serves the public interest "almost by definition." *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012). There is no public interest in unlawful conduct. *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010).

Fourth, an interim order pertaining to any enforcement of the school lunch mandate is fully appropriate. When an agency rule of broad applicability is unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

V. No Bond Should Be Required

Finally, Grant Park Christian Academy asks the Court to exercise its "well-established" discretion to "'elect to require no security'" or bond. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005). In "[p]ublic interest litigation," such as this case, *Booher v. Marion Cty.*, No. 5:07-CV-00282, 2007 WL 9684182, at *4 (M.D. Fla. Sept. 21, 2007), no bond is needed.

CONCLUSION

This Court should (1) delay the effective date of the agency actions under 5 U.S.C. § 705 until at least one year after the conclusion of this Court's review and (2) issue a temporary restraining order and preliminary injunction without security against Defendants' implementation, enforcement, or application of a gender identity or sexual orientation mandate, under Title IX or under any other statute, on school operations such as restrooms, dress codes, hiring, admissions, curricula, activities, and daily conversations, including against any actions to deny federal financial assistance or qualification for participation in federally funded programs such as meal programs, or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions. A declaration, exhibits, an argument request, and a proposed order are attached.

Respectfully submitted this August 3, 2022,

By: /s/ Erica Steinmiller-Perdomo

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CERTIFICATE OF SERVICE

I certify that this document will be served on all defendants via USPS Priority Mail Express to the addresses listed in the complaint. In addition, I will send courtesy copies via USPS Priority Mail Express and via email to Jeremy Newman, U.S. Department of Justice, 1100 L Street, NW Washington, DC 20005 jeremy.s.newman@usdoj.gov; Janie Simms Hipp, USDA General Counsel, Room 107W, 1400 Independence Ave, SW. Washington, D.C. 20250-1400 janie.hipp@usda.gov; Steven Hall, FDACS, Office of General Counsel, 407 S. Calhoun St., Tallahassee, FL 32399-0800 GeneralCounsel@FDACS.gov.

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