NO. 24-12444

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES SECRETARY OF EDUCATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama
The Honorable Annemarie Carney Axon
Case No. 7:24-cv-533-ACA

BRIEF OF CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL AND FEMALE ATHLETES UNITED AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Civil Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the undersigned certifies her belief that the Certificate of Interested Persons filed with Plaintiffs-Appellants' opening brief is complete, subject to these amendments:

1. Blake, Julie Marie – Counsel for *amici curiae* Christian Educators Association International and Female Athletes United
2. Bowman, Matthew S. – Counsel for *amici curiae* Christian Educators Association International and Female Athletes United

The undersigned will enter this information in the Court's web-based CIP at the same time as filing this brief.

Amici curiae Female Athletes United (FAU) and Christian Educators are nonprofit organizations, do not have a parent corporation, and do not issue stock. Neither is aware of any publicly owned corporation, not a party to the appeal, with a financial interest in the outcome of this case.

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**Practicing under the supervision of D.C. bar members while application is pending.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[*]

Christian Educators Association International is an organization for Christian teachers and educators. It seeks to protect its members' constitutional and statutory rights to speak, work, and live by their faith while pursuing excellence in teaching. Through strategic initiatives, training, support, and legal coverage, Christian Educators works to encourage, equip, connect, and protect its members.

Christian Educators has members throughout the country who teach at public schools and who believe that sex is binary and that people should cherish their sex, not seek to reject it. Many members share the religious belief that sex is an immutable characteristic and want to express that belief. Under the Rule, educators face potential punishment for expressing their beliefs, even outside of school, chilling protected speech in all aspects of their lives. Members also do not want to share restrooms and other private spaces with colleagues and students of the opposite sex because they believe this is inappropriate.

Female Athletes United was formed to defend equal opportunity, fairness, and safety in women's and girls' sports. FAU has members in the plaintiff states who participate on women's sports teams at schools

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[*] No counsel for a party authored this brief in whole or in part; no one, other than *amici* and their counsel, made a monetary contribution for its preparation or submission; and all parties have consented to its filing.

governed by Title IX. FAU members oppose allowing males to compete in women's sports because males have inherent physical advantages that make competing against them unfair and unsafe for female athletes. They also oppose being forced to share private spaces with males. FAU members want to advocate for women's sports, to explain the enduring physical differences between males and females, and to state that sex is real, binary, and unchangeable.

This appeal matters to *amici* for two reasons.

First, *amici* are among the plaintiffs that have successfully challenged the Rule in other jurisdictions. Courts have granted interim relief to Christian Educators' members, *Tennessee v. Cardon*a, No 2:24-072-DCR, 2024 WL 3019146 (E.D. Ky. June 17, 2024), *stay denied*, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024), and *stay denied sub nom*. *Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507, 2510 (2024) (per curiam), as well as to FAU's members, *Kansas v. U.S. Dep't of Educ.*, No. 5:24-CV-4041, 2024 WL 3273285 (D. Kan. July 2, 2024), *stay denied*, No. 24-4041-JWB, 2024 WL 3471331 (D. Kan. July 19, 2024).

Second, injunctive relief here would protect members who live and work in the plaintiff states or travel there for interscholastic events. Christian Educators' members in the states of Alabama, Florida, Georgia, and South Carolina are not protected from the Rule's harms by the *Tennessee* injunction, *see* 2024 WL 3019146, at *44. And while the *Kansas* injunction protects FAU members at their own schools, it does

not extend that protection to away games or meets. *See Kansas*, 2024 WL 3273285, at *20. Injunctive relief here provides needed protection for members throughout the plaintiff states.

STATEMENT OF ISSUES

As text and history show, Title IX allows and sometimes requires sex distinctions to ensure equal educational opportunities. The Department of Education's new Rule reinterprets Title IX to (i) regulate new bases and create new forms of discrimination, (ii) prohibit sex distinctions in private spaces like restrooms and showers, but only when applied to individuals who identify as transgender, and (iii) expand the definition of sex-based harassment to censor and compel speech.

The issue presented is whether the district court erred in refusing to issue preliminary relief barring enforcement of the Rule.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal agencies have reimagined Title IX—a law meant to protect women's equal opportunities—to threaten the very academic and athletic advancements that Title IX was enacted to facilitate. By twisting Title IX to fit under *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Department of Education would require schools nationwide to open sex-specific spaces and programs based on gender identity; to allow biological males to play against girls in sports and P.E. class; to

assign females to the health class covering the male reproductive system; to use preferred rather than sex-reflective pronouns; and to permit males in girls' bathrooms, showers, and overnight accommodations. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) ("the Rule"). The Rule does this by redefining sex-based discrimination and making gender identity equivalent to sex. Indeed, under the Rule gender identity often supersedes sex—the Rule creates a new "form of discrimination" available based on gender identity alone. That threatens the advancements women have fought so hard to achieve.

This Court correctly rejected the government's interpretation of Title IX two years ago. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811–17 (11th Cir. 2022) (en banc). The Rule itself recognizes as much. 89 Fed. Reg. at 33,820. Yet the district court brushed aside precedent and refused to grant preliminary relief against the Rule. So it fell to this Court to halt the Rule's enforcement during this appeal. *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *2 (11th Cir. Aug. 22, 2024) (per curiam).

This Court joined the eight district courts that have preliminarily enjoined the Rule's enforcement in 26 states and thousands of additional schools. In refusing to stay these injunctions pending appeal, every Supreme Court justice "accept[ed]." *Louisiana*, 144 S. Ct. at

2509–10 (refusing to stay injunctions pending appeal); *see Alabama*, 2024 WL 3981994, at *1 n.2 (collecting cases). In refusing to stay these injunctions pending appeal, every Supreme Court justice "accept[ed] that the plaintiffs were entitled to preliminary injunctive relief" at least in part. *Louisiana*, 144 S. Ct. at 2509–10. The court below is the sole outlier.

Amici write to underscore the unlawfulness of the Rule's three central provisions based on Title IX's text, context, and constitutional constraints. The Rule's core provisions expand the bases for sex-based discrimination (§ 106.10), create a new form of discrimination based on gender identity (§ 106.31(a)(2)), and broaden schools' liability for hostile-environment harassment (§ 106.2). Independently and combined with the rest of the Rule, these provisions are unlawful and will irreparably harm plaintiffs, *amici*, and students across the nation.

ARGUMENT

I. The Rule ignores Title IX's equal-opportunity mandate and its many sex-based distinctions.

Title IX allows and sometimes requires sex distinctions to ensure equal opportunity. But this new Rule by the Department of Education reconfigures Title IX to regulate new bases and forms of discrimination and to prohibit sex distinctions in private spaces when applied to individuals who identify as transgender. This novel approach is not justified by text, context, or history.

A. Title IX respects the immutable differences between male and female

Congress passed Title IX to ensure equal educational opportunities for "women." *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996) (*Cohen II*). Title IX states: "No person … shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving" federal assistance. 20 U.S.C. § 1681(a). In 1972, the word "sex" referred to biological differences, not "gender identity." *Adams*, 57 F.4th at 811. Title IX thus forbids differential treatment that disfavors, denies, or treats one sex worse than the other. *Id.* at 813.

1. While Title IX prohibits sex *discrimination*, it does not forbid all sex *distinctions*. "Discrimination" in education programs refers not to "differential" treatment, but to "less favorable" treatment based on sex, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005), where nothing justifies "the difference in treatment," *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 287 (2011). It means treating a person "worse than others who are similarly situated." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 288 (2023) (Gorsuch J., concurring).

Immutable differences between males and females mean the two often are not similarly situated. Indeed, the statute recognizes that sex-based distinctions can be necessary to equalize educational opportunity.

It states: "[N]othing … [in Title IX] shall be construed to prohibit any educational institution … from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This "[i]nterpretation" principle, as Congress titled it, *id.*, isn't listed among the statutory exceptions, 20 U.S.C. § 1681(a)(1)–(9). It's an interpretive command that forbids *any* part of Title IX from being "construed" to prohibit traditional sex distinctions that respect privacy.

Historical context confirms Title IX's plain meaning. "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *accord Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 & n.36 (1979). That means "Title IX's remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender"—women. *Cohen II*, 101 F.3d at 175; *see Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002). And Title IX has long been interpreted to recognize that sex distinctions are often necessary to ensure equal opportunities. After all, "[p]hysical differences" between men and women are "enduring." *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996).

As Title IX's principal sponsor understood, the Act recognizes relevant differences between men and women. 117 Cong. Rec. 30,407 (1971) (statement of Sen. Bayh) (Title IX would not require co-ed sports

teams or locker rooms); 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (Title IX would respect personal privacy in athletic facilities). When it comes to privacy, for example, "biological sex is the sole characteristic" that determines whether individuals are similarly situated for purposes of restrooms. *Adams*, 57 F.4th at 803 n.6. The same for athletics. *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

What's more, the Supreme Court has interpreted Title IX's "postenactment developments" as "authoritative expressions concerning [its] scope and purpose." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (citation omitted). When Congress agrees to a statute's settled interpretation, courts assume this interpretation is correct. *Cannon*, 441 U.S. at 686 n.7, 702–03.

And Title IX has a well-documented history in Congress. Start with the implementing regulations born out of the Javits Amendment. Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Those regulations are codified throughout 34 C.F.R. § 106. *Compare* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,139–43 (June 4, 1975) ("1975 rulemaking") *with* 34 C.F.R. § 106.14–41. They permit sex-specific spaces like P.E. classes, restrooms, showers, locker rooms, and sports teams. Further, Congress required the Department's predecessor to submit the rules to Congress for

review. 1975 rulemaking, 40 Fed. Reg. 24,128. After six days of hearings on whether the rulemaking was "consistent with the law" and congressional intent, Congress allowed the regulations to take effect. *N. Haven*, 456 U.S. at 531–32 (citation omitted). Courts and presidential administrations have long concluded these regulations "accurately reflect congressional intent." *Grove City Coll. v. Bell*, 465 U.S. 555, 568 (1984); 89 Fed. Reg. at 33,817. So they have received a "high" degree of deference. *E.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (*Cohen I*); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994).

Congress further ratified this understanding when it amended Title IX through the 1987 Civil Rights Restoration Act, 20 U.S.C. § 1687(2)(A). This was no "isolated amendment[]" with no relation to sex distinctions. *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 81 (2021). Rather, that Act reversed *Grove City College* to ensure that Title IX applied to all education programs at federally funded schools, including programs like sports. Congress shared the legal consensus that Title IX allows schools to consider sex in order to provide "equal opportunities for female athletes." *McCormick*, 370 F.3d at 287; *Cohen I*, 991 F.2d at 894. Congress even made an express finding supporting the "prior consistent and long-standing executive branch interpretation and broad, institution-wide application of" Title IX. Pub. L. No. 100-259, § 2, 102 Stat. 28 (1988).

In short, Title IX's text, "context," and "history" all agree. *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 616 (1978). Sex distinctions are allowed.

2. It makes sense that Title IX sometimes requires sex-based distinctions. Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of' any 'education program or activity.'" *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)). That exclusion may be harassment that keeps "female students from using … an athletic field." *Id.* at 650–51. It may be action "that unintentionally results in exclusion," *Knox Cnty. v. M.Q.*, 62 F.4th 978, 1002 (6th Cir. 2023), or precludes "meaningful access," *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Students are denied opportunities and benefits when they cannot access the spaces necessary to participate.

Take showers and locker rooms. "[T]he use by students of school restrooms is part and parcel of the provision of educational services covered by Title IX …" *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 295 (W.D. Pa. 2017). And students cannot meaningfully access those spaces when their privacy is violated. *Horton v. Goose Creek ISD*, 690 F.2d 470, 478 (5th Cir. 1982) (per curiam).

Title IX was enacted with this understanding. 118 Cong. Rec. 5807 (1972) (Title IX "permit[s] differential treatment by sex … in

sports facilities or other instances where personal privacy must be preserved."). As Justice Ginsburg explained, integrating Virginia Military Institute "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *VMI*, 518 U.S. at 550 n.19. Students do not have equal educational access if forced to shower with the opposite sex.

For example, one plaintiff challenging the Rule is a fifteen-year-old girl, A.C., who described how she was harmed when her middle school used gender identity instead of sex in the girls' locker room. "[A] student who was born male but identifies as female … was allowed to compete on [the girls'] cross-country and track teams" and "was permitted to use the girls' locker room to change clothes." *Tennessee*, 2024 WL 3019146, at *6. This "prompted A.C. to change clothes elsewhere," as she felt uncomfortable "undressing in the presence of biological males and does not want to see biological males undressing." *Id*. If girls must flee their own locker rooms, they are deprived of equal opportunity.

Similarly, for "equal opportunity" in sports, "relevant differences cannot be ignored." *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657 (6th Cir. 1981). Girls face a heightened risk of injury as well as lost opportunities in P.E. classes and interscholastic sports if they must compete with males. Because of "average physiological differences" between men and

women, "males would displace females to a substantial extent if they were allowed to compete" for the same teams. *Clark*, 695 F.2d at 1131; *accord Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam). When "the law is blind" to sex differences, "there may be as much a denial of equality as when a difference is created which does not exist." *Yellow Springs*, 647 F.2d at 657. Yet the Rule says schools "generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity." 89 Fed. Reg. at 33,809.

B. The Rule's new definition of "sex-based discrimination" conflicts with Title IX.

The Rule turns this consensus understanding of Title IX upside down. It swaps a well-established, biological, and binary concept of sex for a recent, subjective, and fluid concept of identity. The Rule says that "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,886 (codified at 34 C.F.R. § 106.10). That is because, the Department concludes, "sex discrimination" under Title IX "includes any discrimination that depends in part on consideration of a person's sex." *Id.* at 33,803.

As this Court has explained, section "106.10 broadens sex to include gender identity in violation of *Adams*.'" *Alabama*, 2024 WL

3981994, at *4. The Rule's new definition is unlawful because it rests on a failed theory. Plenty of litigants have tried, unsuccessfully, to show that Title IX prohibits schools from "consideration of" an individual's sex. *See id.* When some schools cut men's sports teams to bring themselves into compliance with Title IX, male athletes sued for sex discrimination—and lost. *See, e.g.*, *Miami Univ. Wrestling Club*, 302 F.3d at 615; *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002); *see also Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636, 639 (7th Cir. 1999), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259 (2009).

The Rule also does not account for Section 1686's rule of construction, which requires sex-based privacy. Even the Department recognizes this provision covers sex-specific school "housing."

The Rule also does not account for Title IX's rule of construction in 20 U.S.C. § 1686, requiring respect for sex-based privacy. Even the Department recognizes this provision covers sex-specific school "housing." 89 Fed. Reg. at 33,821; *see* 34 C.F.R. § 106.31(a)(2) (exempting "20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1)"). But Section 1686 does much more. Far from a mere exception—it is a rule of construction that informs the meaning of "discrimination" under Title IX. That meaning mandates sex differentiation when necessary to achieve equal opportunity between men and women.

Title IX is not designed to carry the weight of gender ideology, the Department's contrary interpretation makes the regulatory scheme incoherent. As this Court explained in *Adams*, the government's position would prohibit "otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity." *Adams*, 57 F.4th at 814. For example, the Rule says it *allows* sex-specific locker rooms—unless applied to individuals who identify contrary to their sex. 89 Fed. Reg. at 33,818. That would "establish dual protection under Title IX based on *both* sex and gender identity." *Adams*, 57 F.4th at 814. Even assigned by gender identity, separate locker rooms still notice a person's sex (according to the Rule's logic), which the government treats as unlawful under *Bostock*. 89 Fed. Reg. at 33,816. So the Rule draws distinctions forbidden by its own reading of Title IX's nondiscrimination provision. That can't be right.

No surprise, then, that the Supreme Court unanimously "accept[ed] that the plaintiffs were entitled to preliminary injunctive relief as to … the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity." *Louisiana*, 144 S. Ct. at 2509–10.

C. The Rule's new *de-minimis*-harm provision is untethered from Title IX.

The Rule also manufactures a new type of discrimination through its de-minimis-harm provision, 34 C.F.R. § 106.31(a)(2). This stretches

beyond *Bostock* to turn Title IX into a disparate-impact regime—but only for claims based on gender identity.

Section 106.31(a)(2) creates what the Rule calls a new "form of discrimination," 89 Fed. Reg. at 33,848: "treating a person inconsistent with their gender identity," *id.* at 33,803. It goes like this. *First*, the Rule accepts that the sex-based distinctions long found in regulations are still allowed, but not if they cause more-than-de-minimis harm. 34 C.F.R. § 106.31(a)(2)); *see* 89 Fed. Reg. at 33,814. *Next*, it declares that any policy or "practice that prevents a person from participating … consistent with [their] gender identity" causes more than de minimis harm. *See* 89 Fed. Reg. at 33,820. That's a new way of saying the government will "treat a student's gender identity as the student's sex." 2016 Dear Colleague Letter on Title IX and Transgender Students 2, U.S. Dep'ts of Educ. & Justice (May 13, 2016), perma.cc/2VTQ-RUYP. From there, the Department declares that "the prevention of participation consistent with gender identity" is a "form of sex discrimination" like "sex-based harassment" and "sexual violence." 89 Fed. Reg. at 33,848.

But Title IX says nothing of the sort. Its plain text contains many provisions and regulations allowing sex-based distinctions. *See Adams*, 57 F.4th at 811. Thus, to reach its preferred conclusion, the Department claims (for the very first time) that Congress told it to countenance "more than de minimis," or, "legally cognizable," harm in many

educational settings, including sororities, Boy Scouts, and student housing across the country. 89 Fed. Reg. at 33,814. Relying on that rationale, the Rule exempts these "statutory" exceptions from its new form of discrimination. Put another way, "failure to treat a person consistent with their gender identity," *id.* at 33,807, *isn't* actionable discrimination in the settings that are exempted by statute, *id.* at 33,814.

But even that novel solution doesn't lead exactly where the Department needs to go. After all, the government cannot countenance the outcome of its position—destroying women's sports as we know them. So the "statutory" exceptions from the de-minimis-harm form of discrimination also include 34 C.F.R. § 106.41(b), the provision covering sex-specific sports teams, even though the statute does not exempt sports (or say anything about them). *See* 89 Fed. Reg. at 33,819. That is internally inconsistent. *See* Appellants' Br. at 8. Either the agency may newly recognize "exceptions" not found in the text, or it may not. But the Rule does both.

The de-minimis-harm provision elevates gender identity, which is absent from the text, above sex, which is what Title IX is all about. The Rule says sex distinctions always cause more than de minimis harm—but only when applied to persons with certain gender identities. E.g., 89 Fed. Reg. at 33,887; *accord id.* at 33,815 (saying "stigmatic injuries" are per se harmful). So sex-specific locker room policies cause merely de

minimis harm when applied to men who identify as men, but more than de minimis harm when applied to men who identify as women. 89 Fed. Reg. at 33,820. This is even though women—whose privacy interest the Department says is not "legitimate," *id.* at 33,820—have their unclothed bodies exposed to a male in both cases.

The provision also rests on an unlawful conception of harm. Far from employing an "objective standard," the Rule says harm is cognizable only if it implicates a person's "subjective, deep-core sense of self." *Compare* 89 Fed. Reg. at 33,815, *with id.* at 33,809; *see also Muldrow v. City of St. Louis*, 601 U.S. 346, 355–56 (2024) (explaining that an elevated harm requirement leads to subjective evaluations of what counts as "significant"). For obvious reasons, the Rule does not define the term "deep-core sense of self," and it does not tell educators how to assess whether a student's harm meets this indeterminate standard.

All of this undermines Title IX's textually identified purpose: to ensure no person is "denied the benefits of … any education program" on the basis of sex. 20 U.S.C. § 1681(a). At a minimum, that purpose includes stopping "discrimination against women in education." *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999). By allowing gender identity to supersede sex-based privacy protections based on a student's assertion of more than de minimis harm, this new standard prevents others (particularly female students) from

"participat[ing] in" or receiving "the benefits of" educational programs. 20 U.S.C. § 1681(a). For five decades, Title IX has recognized sex-specific spaces, but in the government's view, these have been discrimination all along.

The provision also unlawfully creates a disparate-impact regime. Under the Rule's logic, traditional sex-specific spaces and programs are rendered unlawful only where they have a disparate impact because of a person's gender identity. But Title IX requires "intentional discrimination," not just disparate impact. *Gebser v. Lago Vista ISD*, 524 U.S. 274, 281 (1998); *Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993). Simply put, § 106.31(a)(2) "add[s] words" and "impose[s] a new requirement" that Title IX does not include. *Muldrow*, 601 U.S. at 355. The Department lacks statutory authority for this change.

Once again, the exemptions from the new type of discrimination make no sense. "[T]reating a person inconsistent with their gender identity," 89 Fed. Reg. at 33,803, is discriminatory when it comes to "separate toilet, locker room, and shower facilities," 34 C.F.R. § 106.33, "[c]ontact sports in physical education classes," lessons on "[h]uman sexuality," *id.* § 106.34(a)(1), (3), and "interscholastic, intercollegiate, club or intramural athletics," *id.* § 106.41(a). So schools must assign males to the health class covering the female reproductive system and allow males to play against girls in sports and P.E. class. In contrast, sex-specific "living facilities" are lawful—but only for student "housing,"

id. § 106.32(a), not in other bathrooms and showers or for overnight school trips, *id*. § 106.33; *see* 34 C.F.R. § 106.31(a)(2). This standard creates bizarre results, like males in women's locker rooms and showers but not women's dormitories.

Under the Rule's logic, Congress was content to allow what the Department calls "more than de minimis harm," 34 C.F.R. § 106.31(a)(2), in dormitories across the country, and it cared more about distinguishing "Boy Scouts" from "Girl Scouts" than preserving privacy in showers and locker rooms. That renders the statute impermissibly incoherent. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) (courts should prefer a reading that harmonizes the statutory scheme); John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2458–59 (2003).

D. *Bostock* does not apply.

The Rule's many statutory errors derive from its inappropriate reliance on *Bostock*. The Rule cites, for example, decisions from the Ninth and Fourth Circuits that reflexively applied *Bostock* without considering Title IX's rule of construction or recognizing that Title IX allows consideration of sex in many like contexts. *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023); *Grimm v. Gloucester*

Cnty. Sch. Bd., 972 F.3d 586, 616–17 (4th Cir. 2020). Those decisions are unpersuasive.

At the outset, *Bostock* expressly disavowed the implication that its rationale translates to Title IX. 590 U.S. at 681. And for good reason. *Bostock* dealt with hiring and firing employees under Title VII; Title IX concerns educational opportunities. Title VII treats an individual's sex in employment like race and religion, where none of these factors are "relevant." *Bostock*, 590 U.S. at 660. No one thinks Title VII allows business owners to hire only male accountants or assign men and women to different office floors. But sex distinctions are common in schools—like boys' and girls' gym class. *See Adams*, 57 F.4th at 808; *cf. L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023) (refusing to extend *Bostock*'s reasoning beyond Title VII).

Transplanting *Bostock* to Title IX rejects this Court's holding that "Title IX and its implementing regulations prohibit discrimination on the basis of sex, but they also explicitly permit differentiating between the sexes in certain instances." *Adams*, 57 F.4th at 814. And the Rule fails to explain how *Bostock*'s "but-for test" can apply to students who identify as neither male nor female. *Bostock*, 590 U.S. at 656. This failure is understandable—it can't.

On top of that, Title IX repeatedly allows schools to "treat[] males and females comparably as groups," while Title VII does not. *Bostock*, 590 U.S. at 665 (rejecting this reading of Title VII). Title IX exempts

"father-son or mother-daughter activities" so long as "opportunities for reasonably comparable activities [are] provided for students of [both sexes]." 20 U.S.C. § 1681(a)(8). Housing for each sex must be "[c]omparable in quality and cost to the student." 34 C.F.R. § 106.32(b)(ii); *see also id.* § 106.32(c)(2) (similar). "[T]oilet, locker room, and shower facilities" must likewise be comparable. 34 C.F.R. § 106.33. And schools must "provide equal athletic opportunity for members of both sexes." *Id.* § 106.41(c). The list goes on. *See, e.g.*, *id.* § 106.31(c); *id.* § 106.34(b)(2); *id.* § 106.37(c). Under *Bostock*'s logic—and thus the Rule's—all these long-standing regulations would violate Title IX because all of them rely on noticing an individual's sex. Instead, these regulations show that Title IX is not blind to sex—the government's reading is wrong.

Even assuming *Bostock*'s but-for causation test applies beyond Title VII, the Rule goes far beyond *Bostock* in defining "sex-based discrimination" to include considerations like "sex stereotypes," "gender identity" and "sex characteristics." In contrast, *Bostock* did not create any new protected classes. *See, e.g.*, *Texas v. EEOC*, 633 F. Supp. 3d 824, 831 (N.D. Tex. 2022); *Stollings v. Texas Tech Univ.*, No. 5:20-CV-250-H, 2021 WL 3748964, at *10 (N.D. Tex. Aug. 25, 2021). But the Rule's new definition does just that, elevating "gender identity" and other characteristics to protected-class status under Title IX—and indeed, superseding statutorily protected characteristics like sex.

The Rule purports to recognize that nondiscrimination under Title IX includes group-based equality, but only for athletics. *See* Non-discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,538 (July 12, 2022); *accord* 89 Fed. Reg. at 33,818. The Rule observes that prior regulations "have always permitted" sex distinctions in athletics. 89 Fed. Reg. at 33,819. But that is true of many other regulatory contexts too, like "toilet, locker room, and shower facilities." 34 C.F.R. § 106.33. And "biological sex is the sole characteristic on which [such regulations] and the privacy interests guiding [them] are based." *Adams*, 57 F.4th at 803 n.6. Title IX calls for schools to recognize that when it comes to matters of privacy and physical differences, boys and girls are not similarly situated.

And make no mistake: the Rule threatens women's sports—a key purpose of Title IX—even though the Department denies it. This follows because § 106.10 broadly redefines sex discrimination to include gender identity. Then § 106.11 makes clear that "this part," including § 106.10, "applies … to all sex discrimination occurring under a recipient's education program or activity…." Combined, the Rule prohibits schools from doing anything to "prevent a person from participating … consistent with the person's gender identity." 89 Fed. Reg. at 33,809. And the new form of gender-identity discrimination applies to § 106.41(a), which bans sex discrimination in athletics. By its own

terms, § 106.10's general rule redefining sex-based discrimination applies to athletics.

Indeed, the government's disclaimer on women's sports appears disingenuous. The government argued just last year that *Bostock* requires gender identity to control in Title IX athletics based on provisions the Rule does not alter. Br. for the U.S. as *Amicus Curiae* in Supp. of Pl.-Appellant and Urging Reversal 27–28, *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 541 (4th Cir. 2024), 2023 WL 2859726.

For all these reasons, *Bostock* does not "undermine" the conclusion this Court reached in *Adams* and previously in this case, *Alabama*, 2024 WL 3981994, at *5: Title IX covers sex-based discrimination, not gender-identity-based discrimination.

II. The Rule flouts constitutionally mandated canons of construction.

By snubbing Congress, enlarging agency power, and rendering Title IX incoherent, the government's reimagining of Title IX puts the Rule on a collision course with constitutional requirements and canons of construction. Title IX targets discrimination based on "sex"—it does not give clear notice of banning gender-identity discrimination, as would be required of valid Spending Clause legislation. It upsets the traditional federal-state balance. And whether gender identity supersedes sex across our nation's schools is a major question for our

elected representatives, not a minor gap fillable by unelected bureaucrats five decades later.

First, in a Spending Clause context, Congress must "speak with a clear voice" and impose conditions "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17–18 (1981). For over 50 years, everyone, including the government, accepted that Title IX allowed sex distinctions in locker rooms, showers, and athletics. It is unreasonable to now say that Title IX "unambiguously" elevated gender identity over sex when no federal court or official so construed the Act.

Second, Supreme Court "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 621–22 (2020). Education is a context "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Yet here, the federal government wants to override state authority over a vast array of topics like locker rooms, restrooms, physical education, and speech on a controversial issue. There is no clear Congressional approval for this incursion.

Finally, "clear congressional authorization" is needed when agencies purport to resolve questions of vast "economic and political significance." *West Virginia v. E.P.A.*, 597 U.S. 697, 721–23 (2022). The Rule threatens to change Title IX "from one sort of scheme of regulation into an entirely different kind." *Id.* at 728 (cleaned up). Indeed, over

half of the states have passed or proposed laws protecting women's sports and ensuring privacy in men's and women's restrooms. The Rule tries to settle these important political issues, and it does so by threatening to cut hundreds of billions of dollars in federal funding. That's a major question if there ever was one.

Bostock did not confront the clear-statement rule or the major-questions doctrine, since it did not involve Spending Clause legislation or review agency action. Indeed, *Bostock* admitted that its interpretation of Title VII was "unexpected," "momentous," and "unanticipated at the time of the law's adoption." 590 U.S. at 649, 660, 679 (cleaned up). That admission dooms the Rule under clear notice canons applicable to this Spending Clause, state sovereignty, and major question context.

III. The Rule infringes on First Amendment rights.

Besides blue-penciling an established statute, the Rule also violates First Amendment freedoms. *Alabama*, 2024 WL 3981994, at *6.

First, the Rule changes Title IX's harassment standard: it creates an amorphous, "broader standard" for hostile-environment claims based on the existing—and new—protected classes. 89 Fed. Reg. at 33,498. Harassment now can be "severe *or* pervasive"—it need not be both. *Id.* at 33,884 (emphasis added). Complainants need not show "any particular harm" or denial to an educational program. *Id.* at 33,511.

Harassment can be anything students consider "unwelcome" or that "limits" their ability to benefit. *Id.* at 33,884. And the Rule's harassment definition applies to speech online or outside the country. *Id.* at 33,535, 33,886. Even the Department recognizes this standard is "broader" than the Supreme Court's interpretation in *Davis*, 526 U.S. 629. 89 Fed. Reg. at 33,498. This Court's precedent invalidates harassment definitions like this one. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1114–15, 1125 (11th Cir. 2022).

Second, when paired with the Rule's extra-textual expansion of Title IX's scope, this "broader" standard will cause schools to increasingly censor and compel speech by viewpoint. Under the Rule, students and staff must speak inaccurate pronouns and avoid saying sex is binary or immutable. Under the Rule, failing to use someone's chosen pronouns causes more than *de minimis* harm, 89 Fed. Reg. at 33,887, so it's no wonder the government says "misgendering" can be harassment, *id.* at 33,516. Plus, pronoun usage is ubiquitous in conversation, making it pervasive, and harassment need not be severe for a school to have a duty to prevent it. *Id.* at 33,498. And the Rule says that if speech "treat[s] a person inconsistent with their gender identity," 89 Fed. Reg. at 33,803, it is discriminatory. That unlawfully allows teachers and students to champion "one side of a debate," but not the other. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

The government's previous statements underscore the implications of the Rule's new definition. Just recently, the government argued that a school policy requiring teachers to use gender-neutral titles like "teacher" or "coach," but not gender-identity-based honorifics and pronouns, creates a hostile environment under Title VII. Statement of Interest of the U.S. of Am., *Wood v. Fla. Dep't. of Educ.*, No. 4:23-cv-00526, 2024 WL 3380723 (N.D. Fla. June 27, 2024). It has made similar arguments elsewhere. *See* Br. for U.S. as Amicus Curiae, *Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 21-2475, 2021 WL 5405970 (7th Cir. Nov. 8, 2021). Indeed, the Rule applauded *punishing* a student for wearing a t-shirt saying, "THERE ARE ONLY TWO GENDERS," because that speech "invades the rights of others." 89 Fed. Reg. at 33,504. This is why *amici*'s members reasonably fear that nearly anything they say about sex or gender could be construed as "harassment" under the Rule.

The Rule is unlawful because it inevitably chills speech. Speech about gender identity is a matter "of profound value and concern to the public" that "merits special protection." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (cleaned up). Even "[p]ronouns … convey a powerful message implicating a sensitive topic of public concern." *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021); *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 740 (Va. 2023); *cf. United States v. Varner*, 948 F.3d 250, 256 (5th Cir.

2020). Also protected are statements about what defines men and women and whether sex can be chosen or changed.

Because the Rule chills too much speech, it is unconstitutionally overbroad. *Alabama*, 2024 WL 3981994, at *6. It is nearly identical to a policy this Court struck down on that basis. *Id.* (citing *Speech First*, 32 F.4th at 1114–15).

The Rule is unconstitutionally vague, too. It fails to explain what teachers and students can or can't say. For example, can athletes say it's unfair for males to compete in women's sports? Can girls object to having males in their locker rooms or P.E. classes? Can teachers talking with colleagues praise the plaintiff states' laws protecting privacy? The government won't say, but it suggests such statements could be discrimination or harassment. That "imprecision exacerbates [the Rule's] chilling effect." *Speech First*, 32 F.4th at 1121, 1125.

Nor can the government save the Rule through unenforceable preamble disclaimers, or by repeating that schools must respect First Amendment rights. 89 Fed. Reg. at 33,503. Such platitudes are meaningless in practice. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 324 (5th Cir. 2020) (vacating and remanding denial of preliminary injunction in challenge to speech policy with savings clause).

CONCLUSION

The Court should reverse and enter a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Fed. R. App. P. 29(a)(5) because, according to the word-count feature of the program used to prepare it and excluding the items listed in Fed. R. App. P. 32(f), it contains 6,452 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I electronically filed this brief with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that counsel for all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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