PACIFIC LEGAL FOUNDATION

September 12, 2022

Ms. Catherine E. Lhamon
Assistant Secretary for Civil Rights
United States Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Opposition to Proposed Title IX Regulation (Docket ID ED-2021-OCR-0166)

Dear Assistant Secretary Lhamon:

Pacific Legal Foundation files this comment opposing the issuance of this Proposed Rule, or, in the alternative, calling for significant revisions to address our concerns. First, the Proposed Rule would chill First Amendment protected speech. Second, the Proposed Rule would lead to unconstitutional and unfair denials of due process for accused students and faculty. Third, it improperly expands coverage of Title IX to questions of sexual orientation and gender identity. This significant expansion involves major questions to which Congress is required to speak clearly for the agency to act in this area. Congress did not do so in enacting Title IX, and so the Office for Civil Rights (OCR) may not issue rules in this area. This comment addresses each objection in turn.

STATEMENT OF INTEREST

Pacific Legal Foundation is the nation's leading public interest organization advocating in courts and with policymakers throughout the country to defend individual liberty and limited government. PLF is concerned about the Constitution's separation of powers and the protection these structural limits on power provide for individual liberty. PLF also fights to ensure that individuals are treated as individuals and not based on their demographic identity including their race or sex. PLF attorneys have extensive experience championing limited government and defending the constitutional separation of powers against the growing administrative state. PLF's attorneys have represented clients in major administrative law cases before the United

States Supreme Court.[1] They have also produced substantial scholarship on administrative law.[2] PLF attorneys often provide their expertise on administrative law matters to policymakers through congressional testimony,[3] rulemaking petitions,[4] and policy papers.

PLF is also concerned about the chilling effect imposed by overbroad and unduly vague laws that restrain First Amendment freedoms. PLF attorneys have published significant First Amendment scholarship[5] and represented clients in free speech cases before the United States Supreme Court and the United States Courts of Appeals.[6]

I. The proposed rule would chill First Amendment protected speech.

Enacted in 1972, Title IX's core provision provides that "[n]o 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." 20 U.S.C. § 1681(a). The Supreme Court in *Davis v. Monroe County* interpreted this provision to prohibit federal funding recipients from acting with deliberate indifference to known acts of sexual harassment that are

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[1] *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016); *Sackett v. U.S. Envtl. Prot. Agency*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876 (2018).

[2] *See, e.g.*, John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 Yale J. on Reg. 617 (2018); Jonathan Wood, *Standing Up to the Regulatory State: Is Standing's Redressability Requirement an Obstacle to Challenging Regulations in an Over-Regulated World?*, 86 UMKC L. Rev. 147 (2017); Damien M. Schiff & Luke A. Wake, *Leveling the Playing Field in David v. Goliath; Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97 (2013).

[3] *See, e.g.*, *Federally Incurred Cost of Regulatory Change and How Such Changes Are Made; Hearing before the Subcomm. On Federal Spending Oversight and Emergency Management of the S. Comm. On Homeland Sec. and Government Affairs*, 116 Cong. 116–62 (Testimony of Mr. Thomas Berry, Attorney, Pacific Legal Foundation).

[4] *See, e.g.*, Damien Schiff & Anthony L. Francois, Petition for Rulemaking to Establish Notice and Hearing Procedures for Compliance Orders Issued Under Section 309(a) of the Clean Water Act, Pacificlegal.org, (Jan. 10, 2020), *available at* https://pacificlegal.org/wp-content/uploads/2020/05/PLF-Petition-for-Rule-Making-for-Procedures-to-Govern-CWA-Compliance-Orders.pdf.

[5] *See* Daniel M. Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 Cath. U. L. Rev. 515 (2021).

[6] *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); *American Society of Journalists and Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021).

sufficiently severe, pervasive, and objectively offensive so as to effectively bar the victim's access to education.[7]

The First Amendment to the United States Constitution provides that "Congress shall make no law … abridging the freedom of speech."[8] Because sexual harassment law as it pertains to schools and workplaces has been interpreted to reach at least some pure speech (as well as expressive conduct), there is a long-recognized tension between the First Amendment and Title VII and Title IX's prohibitions on harassment at school and work.[9] In the recent past (2010), for example, OCR promulgated guidance interpreting Title IX to cover "telling sexual or dirty jokes," "spreading sexual rumors" (without any limitation to false rumors), "circulating or sharing emails or websites of a sexual nature," or "displaying or distributing sexually explicit drawings, pictures, materials, or written materials."[10] When such pure expression is involved, antidiscrimination law "steers into the territory of the First Amendment."[11]

Although the Supreme Court has never definitively spoken on this issue, the requirement that harassment be "severe, persuasive, and objectively offens[ive]"[12] is, as OCR correctly found when promulgating the 2020 amendments, a critical safeguard that ensures that the prohibition on harassment "comports with First Amendment protections."[13] The Proposed Rule abandons that definition and reinstates a broader one that harassment is unlawful if it is "severe *or* pervasive." (Ital. added.). This change imperils freedom of speech on campus by making it likely that professors and students

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[7] 526 U.S. 629, 633 (1999).

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

[9] David Bernstein, *You Can't Say That! The Growing Threat to Civil Liberties from Anti-Discrimination Laws* (2004); Eugene Volokh, Testimony to the United States Commission on Civil Rights, July 25, 2014, *available at* http://www.newamericancivilrightsproject.org/wp-content/uploads/2015/02/SupplementalDocsforOCRBudgetMailing.pdf (p. 52 of PDF), finding that a previous Department of Education policy on sexual harassment had "serious" First Amendment implications.

[10] U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic*, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf; Dear Colleague letter, October 26, 2010, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html (guidance marked "not for reliance" because it departs from current Department practices in some ways).

[11] *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995).

[12] 526 U.S. 629 (1999).

[13] 85 Fed. Reg. 30,026, 30,036 (May 19, 2020).

are investigated for even a single remark or one-time action that is perceived as offensive.

Although the Proposed Rule contains some safeguards to prevent recipients from running afoul of the First Amendment, the safeguards are insufficient to cure the constitutional difficulties or eliminate the chilling effect that this new rule will have on campus. To its credit, the preamble to the Proposed Rule states that "the offensiveness of a particular expression as perceived by some persons, standing alone, would not be a legally sufficient basis to establish a hostile environment under Title IX." At the same time, the Proposed Rule is vague about where the line between First Amendment protected speech and prohibited speech lies. Instead, it instructs recipients to "make an individualized determination whether the unwelcome sex-based conduct created a hostile environment based on the totality of the circumstances, including the age and roles of the parties." It also states that "Whether a hostile environment has been created is a fact-specific inquiry" and "A hostile environment may manifest itself in different ways for different complainants."

Because of how vague and open-ended this standard is, recipients have an incentive to treat any incidents of speech that come anywhere close to the line as Title IX violations. Law professor and United States Commission on Civil Rights member Gail Heriot has described how similar indefiniteness regarding what qualified as sufficiently severe or pervasive in the employment discrimination context led employers to react strongly to minor incidents of potential sexual harassment:

> Perhaps the most fundamental problem that employers had to contend with was the Supreme Court's emphasis on the cumulative effect of separate, vaguely defined inputs on the working environment. Liability could stem from verbal or non-verbal conduct that is either severe or pervasive. A thousand pricks, no one of which is serious in itself, could therefore add up to a hostile environment. Those pricks didn't need to come from the same person. They could come from a thousand different colleagues, and those colleagues need not be aware of the existence of each other. That makes it tough on an employer. Even if it had some method for keeping track of how many "pricks" an employee has suffered, it probably would not be able to conclude whether a "hostile environment" had been created ....
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> ... No one should be surprised to learn that many employers aimed (and continue to aim) at stamping out all the slings and arrows, whether large or small, that might plausibly be viewed as helping form a hostile

> environment. This is a perfectly rational response to the legal landscape in which the 1991 Act had landed them.[14]

Abundant anecdotes, going back decades, indicate that many funding recipients have accordingly erred on the side of cracking down on even protected speech to avoid hostile environment liability. Take, for example, the plight of Laura Kipnis, a film and gender studies professor at Northwestern University. She published an essay in *The Chronicle of Higher Education* called "Sexual Paranoia Strikes Academe," claiming that "In the post-Title IX landscape, sexual panic rules" and that if "you wanted to produce a pacified, cowering citizenry, this would be the method."[15] Kipnis's speech about the impact of Title IX on civic participation is at the core of the freedom of speech protected by the First Amendment: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[16] Nonetheless, Kipnis's statements were alleged to have created a "hostile environment" that created a "chilling effect" on complaints of sexual harassment. Northwestern launched a formal Title IX investigation of Kipnis. While her story has complex twists and turns and spanned months of wrangling with her university's Title IX bureaucrats, including a second investigation into Kipnis's writing about her first Title IX investigation, she was eventually cleared of all wrongdoing. Ultimate exoneration, however, did not erase the months of stress, fear, and wasted time and legal costs that were the bitter fruits of an investigation that should have never occurred. It is all too easy for similarly situated persons to look at Kipnis's experience and feel chilled from speaking forthrightly on matters regarding sex discrimination.[17] Examining Kipnis's story, Harvard Law professor Jeannie Suk Gersen concluded that beyond merely prohibiting sex discrimination,

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[14] Gail L. Heriot, *The Roots of Wokeness: Title VII Damage Remedies as Potential Drivers of Attitudes Toward Identity Politics and Free Expression* 42-43 (Feb. 14, 2022), Tex. Rev. L. & Pol. (forthcoming), *available at* https://deliverypdf.ssrn.com/delivery.php?ID=533082078095110093118085102004010122024088054014066064078070087101081069118114094078049030032063122035021070078010122007120106024018060008053092093012126005120029003008085105078007071094071010118001022002080017091080028075030106087068096122115103083&EXT=pdf&INDEX=TRUE.

[15] Published February 27, 2015; *available at* http://laurakipnis.com/wp-content/uploads/2010/08/Sexual-Paranoia-Strikes-Academe.pdf.

[16] *Mills v. Alabama*, 384 U.S. 214 (1966).

[17] *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("For the threat of sanctions may deter almost as potently as the actual application of sanctions.") (cleaned up).

> Title IX can also be used to discourage disagreement, deter dissent, deflect scrutiny, or register disapproval of people whom colleagues find loathsome...That risk is now built into the professional life of those of us in universities who engage on subjects related to gender and sexuality. Like Kipnis, I routinely hear from teachers who say they are refraining from teaching and writing on such topics for fear of attracting Title IX complaints, which bring possibilities of termination, demotion, pay cuts, and tens of thousands of dollars in legal fees.[18]

Rules with this kind of chilling effect violate the First Amendment.[19]

Though particularly prominent in national media discussions about Title IX, Kipnis's story is neither unique nor an isolated incident of overreach. Close to home, one author of this letter served as a mentor to an intern who had faced discipline under Title IX for a philosophy paper that he wrote as a Yale University undergraduate criticizing Plato's tripartite theory of the soul:

> I believe spirit can be allied with appetite against reason. Take any drunken-fest. People drink spiritedly even when they know it is against their greater good. Even if an argument will be presented in that case that people's reason is impaired at the time they drink, and thus not in conflict with their spirit, consider the case of a rapist. A rapist may rape with much vigor, or in anger. Here, presumably, reason should dictate not to rape. Is spirit not allied with appetite against reason in this case?

The teaching assistant for the course complained about the above passage to Yale's Title IX office, and the student was ordered to cease contact with the teaching assistant and attend sensitivity training.[20]

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[18] *Laura Kipnis's Endless Trial By Title IX*, The New Yorker, Sept. 20, 2017, *available at* https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix.

[19] *See generally Baggett v. Bullitt*, 377 U.S. 360 (1964) (striking down a loyalty oath requirement and Washington state law that forbade the government to employ "subversive persons"); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (striking down a postal regulation requiring individuals who wished to receive communist literature to sign up at the post office. Although the program included no express sanctions against recipients, the Court held said it would chill individuals who wanted the material but were afraid to make their wishes known to the government); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (a court may enjoin enforcement of a statute that is so overbroad in its prohibition of unprotected speech that it substantially prohibits protected speech—especially if the statute is being enforced in bad faith).

[20] He later sued Yale. The case was settled out of court.

In 2005, a Muslim student at William Paterson University in New Jersey was disciplined for responding to a professor's email featuring a "lesbian relationship story" with a comment that gay relationships are perverted. It took an appeal through a union grievance process before a hearing officer to get the sanction reversed.[21] A year earlier, in 2004, an Occidental College student was disciplined for making sexual jokes on a campus radio show about his rivals in student government.[22]

Because the Proposed Rule expressly applies Title IX for the first time to discrimination on the basis of sexual orientation or gender identity, the potential for First Amendment violations will increase. Both are hot button issues that are the subject of much political debate. Some recipients have already attempted to crack down on protected speech about public affairs because it might offend LGBTQ persons. For example, Michael Stannard, a professor in California's State Center Community College District, faced an investigation from his employer because of comments that "studies showed children do better if they are raised by both biological parents."[23] Another California Community College professor at Madera Community College and co-plaintiff with Professor Stannard, David Richardson, faced a Title IX investigation after a transgender colleague was offended when he used the personal pronouns Do-Re-Mi on his Zoom profile.[24] It is easy to anticipate more of these encroachments into protected speech under the proposed rule, whether it be coaches speaking in opposition to biological males in women's sports, students expressing sincere religious beliefs about the fixed nature of gender, or a range of other viewpoints on matters of great public concern.

The First Amendment also has been interpreted to prohibit government from compelling speech: "If there is any fixed star in our constitutional constellation, it is

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[21] Press Release, Foundation for Individual Rights and Expression, *Victory for Free Speech and Religious Liberty at William Paterson University* (Dec. 7, 2005), https://www.thefire.org/victory-for-free-speech-and-religious-liberty-at-william-paterson-university/.

[22] Cited in Eugene Volokh's testimony at page 52.

[23] *Stannard v. State Center Community College District*, First Amended Complaint, July 15, 2022 (copy on file with the authors of this letter). In the Complaint, Professor Stannard claims that the administration misunderstood his comments, which in his view were about the general "problem of origins" faced by children who grew up apart from their biological parents and were not targeted at gay parents .

[24] *Id*. *See also* Josh Bleisch, Punished for Not Using a Student's Preferred Pronouns, Theater Professor Sues, FIRE (Sept. 8, 2022), https://www.thefire.org/punished-for-not-using-a-students-preferred-pronouns-theater-professor-sues/#:~:text=A%20lawsuit%20filed%20last%20week,use%20a%20student's%20preferred%20pronouns.

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."[25] Such compelled speech issues loom large with regard to whether professors or students must be required to use a transgender person's preferred pronouns.[26] Professor Nicholas Meriwether, for example, a philosophy professor at Shawnee State University, faced discipline when a student complained that the professor declined to use a preferred pronoun based on Meriwether's religious convictions. Meriwether had sought a compromise by offering to just refer to the student by first name only, but this did not satisfy his college's administrators. His case ultimately settled out of court after Prof. Meriweather prevailed in the Sixth Circuit Court of Appeals.[27] Professors will not be the only ones compelled to speak: A Wisconsin school recently accused three middle schoolers of sexual harassment for using the wrong pronouns for a classmate.[28] The Proposed Rule should be amended to emphasize that refusing to speak does not constitute harassment under Title IX. At a

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

[26] *West Virginia v. Barnette* notes that requiring gestures or words that seem inconsequential in and of themselves may nonetheless offend the Constitution if the mandated gesture symbolizes acquiescence to a broader ideology: "the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Id.* at 633. Preferred pronouns may be understood as a "short cut from mind to mind" symbolizing acceptance of progressive gender ideology. But more than that, some people may simply not want to make their gender identity the thing that defines them or the trait that they lead with in public conversations on Zoom. Such an expression of viewpoint and speech should not subject a person to punishment.

[27] Matt Lavietes, *Professor who wouldn't use trans student's pronouns wins $400K settlement*, NBC News, Apr. 19, 2022, *available at* https://www.nbcnews.com/nbc-out/out-news/professor-wouldnt-use-trans-students-pronouns-wins-400k-settlement-rcna24989.

[28] Rick Esenberg & Luke Berg, *The Progressive Pronoun Police Come for Middle Schoolers*, Wall St. J., May 3, 2022, *available at* ttps://www.wsj.com/articles/the-pronoun-police-middle-schoolers-sexual-harassment-title-ix-nine-mispronouning-transgender-lgbtqia-free-speech-pronoun-11653337766.

minimum, the Proposed Rule should be clarified to state that Title IX does not compel any individual to use a transgender individual's preferred pronouns.

The Proposed Rule, as already exhibited by the above examples, is likely viewpoint-discriminatory. Viewpoint discrimination is a particularly "egregious" First Amendment violation,[29] and laws discriminating based on viewpoint almost never can survive constitutional scrutiny.[30] Viewpoint discrimination can arise where a law allows viewpoints praising or supporting an idea while punishing viewpoints that criticize that idea. For instance, in *Iancu v. Brunetti*, the Supreme Court struck down a Lanham Act provision that denied trademark registration to "immoral or scandalous" trademarks. The Court held that the provision discriminated based on viewpoint because it "permits registration of marks that champions society's sense of rectitude and morality, but not marks that denigrates those concepts."[31]

The Rule here would likewise discriminate based on viewpoint. By targeting speech that "discriminates" against or "harasses" based on gender identity or sexual orientation, it targets speech that criticizes or "denigrates" these groups while permitting speech that "champions" them. The viewpoint discriminatory nature of this restriction should be apparent. For instance, a professor could be investigated and disciplined for calling for a ban on teenage sex conversion treatments, but not for calling for a ban on teenage conversion therapy. A student could be investigated and disciplined for opposing the inclusion of a transgender athlete on her swim team, but not for celebrating the student's inclusion.

The Rule also does not list any explicit First Amendment protections for research or scholarly inquiry. Universities have sometimes taken adverse actions against researchers because their work takes controversial positions on matters relating to race, sex, or other matters protected by the civil rights laws. Two of the authors of this letter represent Elizabeth Weiss, an anthropology professor at San Jose State University in California. Her case shows how universities might invoke antidiscrimination laws to punish dissidents' research on controversial topics. Weiss specializes in osteology—the study of human skeletal remains. She recently published a book criticizing the Native American Graves Protection and Repatriation Act (NAGPRA) as stunting scientific research and arguing that such laws may even be

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[29] *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

[30] *Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part) ("It is telling that the Court's precedents have recognized only one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf.").

[31] 139 S. Ct. 2294, 2299 (2019).

unconstitutional. The book was both peer-reviewed and published through a reputable academic press. Nevertheless, critics ignored the merits of the book's arguments and instead launched a campaign to label Prof. Weiss as anti-Indigenous and racist.

Rather than stand by Weiss, her university joined in on the criticism, sponsoring a speaker series that called for shutting down views such as hers. At a Zoom event entitled "What to Do When a Tenured Professor Is Branded a Racist," university officials repeatedly called Prof. Weiss a racist and a white supremacist. She has also been told that if she dares to teach her views to her students, she could face disciplinary action or other forms of retaliation. After Prof. Weiss posted a photo on Twitter of herself with skeletal remains, a common practice used to promote the anthropology department and anthropological research more generally, the university removed her access to the skeletal collection that forms the basis for her academic research, going so far as to change the locks to bar her from the curational facility. While Weiss's university has not expressly invoked laws prohibiting race discrimination as justification for their actions, it is plausible to imagine a university in a similar situation doing so.

It is similarly plausible to imagine a university citing Title IX as a justification for taking adverse action against a professor whose research is viewed (fairly or otherwise) as disparaging to persons based on their sex, gender identity, or sexual orientation. Returning to Dr. Weiss's field, osteology, some have claimed that classifying a skeleton as male or female is wrong and unfair to transgender people because long-dead persons' gender identities cannot be ascertained.[32] Professor Weiss has written an article opposing this trend and plans to continue classifying remains as male or female.[33] It seems all too likely that under the Proposed Rule, she could be accused of violating Title IX. One might also imagine similar scenarios regarding research that casts doubt on the desirability of gender transition or on research suggesting that children raised by same-sex couples have worse outcomes on some measure than children raised by opposite-sex couples such as the findings that Prof. Stannard highlighted.

Finally, the Proposed Rule exacerbates these First Amendment concerns by expanding the scope of Title IX's reach far beyond the educational environment. Section 106.11 states that schools have "an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment *occurred outside the recipient's education program*

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[32] Alexandra Krawlick, *How Human Bones Reveal the Fallacy of a Biological Sex Binary*, Pac. Standard, Dec. 25, 2018, *available at* https://psmag.com/social-justice/our-bones-reveal-sex-is-not-binary.

[33] Elizabeth Weiss, *There's no such thing as a binary skeleton*, Spiked (Aug. 10, 2022).

activity or outside the United States." (Ital. added). This vague and overbroad language threatens to chill a wide variety of expression by students and faculty who have no means of knowing when their speech may have some incidental or indirect effect on the learning environment. Even in the K-12 environment, where free speech is more circumscribed than in the post-secondary context, the Supreme Court has warned that "[w]hen it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention."[34] If a government purports to "regulate off-campus[35] speech," it must carefully limit the reach of off-campus regulation because an overbroad regulation "may mean the student [or faculty] cannot engage in that kind of speech at all."[36] If that is the case with K-12 education where the Supreme Court has found greater leeway for speech regulations to prevent disruption and prevent decorum, than that is even more certainly the case in higher education where the full weight of the First Amendment applies.

The scope of the new rule is particularly problematic because it may cover speech with little to no nexus to the learning environment. Ostensibly, almost any speech on social media or in other public settings can reach the ears or eyes of students or faculty and thus have an incidental effect on the learning environment. Would a student's retweet of an article criticizing a biological male for competing against biologically female athletes fall within Title IX's reach if a transgender classmate saw the tweet, thus causing the tweet to "contribute" to a hostile environment? Would a student giving a sermon in his church congregation defending his faith's traditional view of marriage be subject to a Title IX investigation if someone in the congregation is a classmate or the video is recorded and uploaded to YouTube? By failing to clearly define the reach of Title IX to those circumstances that directly affect the educational environment, the Rule chills a substantial range of protected speech.

To address these problems, we first recommend that the final rule return to using the *Davis* definition of sexual harassment to reach only harassment that is severe, pervasive, and objectively offensive. While restoring that definition may not resolve all First Amendment concerns, it would make it less likely that a recipient will find protected speech or expression to be prohibited harassment. Second, we recommend that any final rule clarify that speech about matters of governmental policy or other matters of public concern touching on matters of sex, gender, gender identity, and sexual orientation is protected under the First Amendment and does not violate Title

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[34] *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

[35] *Id*. at 2046.

[36] *Id*.

IX.[37] Third, we recommend that the rule be clarified to state that Title IX does not compel speech of any kind. Fourth, we recommend that the Rule clarify that research or scholarly inquiry that addresses matters of sex, gender identity, or sexual orientation is not prohibited harassment under Title IX. Finally, we recommend that the Rule clearly and specifically tie the prohibited discrimination or harassment to the educational environment.

II. The Proposed Rule would lead to unconstitutional and unfair denials of due process.

As the Proposed Rule states, OCR's interpretation of the requirement to provide prompt and equitable grievance procedures must observe the due process rights of the persons involved in a public recipient's grievance procedures.[38] Although OCR does not enforce the Due Process Clause directly, it is an agency of the federal government subject to the Constitution, including the Fifth Amendment, and cannot interpret Title IX to compel a recipient, public or private, to deprive a person of due process rights. Similarly, the Due Process Clause does not directly apply to private institutions. But the government may not use funding cut-offs to incentivize recipients to take adverse actions against persons that, if taken directly by OCR, would violate the Due Process Clause.

The 2020 amendments to the Title IX regulations required all recipients to adopt grievance procedures that provide for the fair resolution of sex discrimination complaints, establishing "procedures that ensure that Title IX is enforced consistent with both constitutional due process and fundamental fairness, so that whether a student attends a public or private institution, the student has the benefit of a consistent, transparent grievance process with strong procedural protections regardless of whether the student is a complainant or respondent."[39] To its credit, the Proposed Rule retains some of the due process protections set forth in the 2020 Amendments and is thus an improvement over some pre-2020 OCR guidance documents.

On the other hand, the Proposed Rule removes important safeguards that in our view are crucial to maintaining constitutional due process and fundamental fairness.[40]

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[37] 85 Fed. Reg. at 30,051 n.226 (citing 2001 Revised Sexual Harassment Guidance at 22).

[38] For a general introduction to the constitutional principles of due process and how they apply to the regulatory state, please see "Why Due Process of Law Is a Necessary Constraint on the Regulatory State," *available at* https://pacificlegal.org/the-separation-of-powers-explained/#3.

[39] 85 Fed. Reg. at 30,047.

[40] The Preamble in several places describes conversations that OCR had with administrators at recipients that are K-12 school districts who recounted why grievance procedures appropriate

Among those are the rule that Title IX investigations and adjudications may not be performed by the same person and the requirement that postsecondary institutions must provide for a live hearing with cross-examination for complaints of sex-based harassment.

1. The "single investigator" model routinely led to violations of due process and deprivations of fundamental fairness and should not be permitted.

One of the core guarantees of due process is the right to be heard before an impartial tribunal. Unfortunately, the proposed rule would undermine that core due process protection. Proposed section 106.45(b)(2) would eliminate the prohibition found in the 2020 Amendments on the decisionmaker in Title IX cases also being the Title IX coordinator or investigator. Before the 2020 Amendments, some recipients used a single investigator model in which one person or one team both investigated a complaint and made findings of fact regarding whether a respondent violated Title IX. The 2020 Amendments specifically prohibited this method because OCR found that combining the investigative and adjudicative functions in a single entity created an unnecessary risk of bias that unfairly impacted one or both parties. Specifically, OCR stated that placing these varied responsibilities in one individual or group risks those involved improperly relying on information gleaned during one role to affect decisions while performing a different role, and that separating investigative and adjudicative functions protected the parties by making it more likely that fact-based determinations regarding responsibility are based on objective evaluations of relevant evidence.

As a federal court found in a case concerning alleged sexual misconduct at Brandeis University, "The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions. The dangers of such a process can be considerably mitigated if there is effective review by a neutral party, but here that right of review was substantially circumscribed." That decision recognized why the American legal system has long forbidden such proceedings in the criminal

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for colleges or universities were inappropriately onerous for them. A kindergarten student who refuses to stop hugging his classmate, for example, might arguably be engaged in sexual misconduct as defined by Title IX. Yet a full-fledged disciplinary tribunal would make little sense given that he lacks the maturity to understand such a proceeding. We agree that for elementary and preschool students, more modest due process protections in this area are appropriate. Our comments are directed mostly toward accusations of sexual misconduct in postsecondary settings.

justice system: In a criminal proceeding, vesting a single person with such a great quantity of aggregated power would violate due process.[41]

Another example of how combining the investigative, prosecutorial, and judicial power in one works in practice appears in Alexandra Brodsky's *Sexual Justice*. Brodsky is a prominent progressive advocate for sexual harassment victims. "Brandon," a young African American man at a community college in California, was found responsible for sexual assault based on the findings of a single investigator without a hearing. When Brodsky received a copy of the investigator's report, she recounted being "genuinely shocked by its lack of detail and level of analysis. It provided no explanation for the investigator's decision, jumping from a bare recitation of the facts to the conclusion. It included testimony provided by the [accuser's] witnesses, but not Brandon's, without an explanation as to why.... Brandon told me that when he sought out the investigator, the older man told him that he found [the accuser] more credible, but did not elaborate." Eventually Brandon cleared his name, but only after hiring a lawyer at his own personal expense and after much related aggravation and stress.[42]

While some postsecondary institutions have argued that the single investigator model is more efficient, efficiency is not the only nor most important value at stake in these proceedings. The criminal justice system would also function more efficiently if we dispensed with independent judges and juries and simply let prosecutors also serve as factfinders. We would never permit such a practice, largely because determining the truth of an accusation matters more than efficiency when it comes to criminal allegations. While jail time is not on the table in postsecondary sexual misconduct proceedings, the consequences are far from trivial. A student found responsible for sexual misconduct may face expulsion and struggle to enroll elsewhere or to find a good job because of the stigma associated with a sexual misconduct expulsion. Because the consequences of a biased inquisitorial model are particularly severe for the accused, the Department should restore the old rule prohibiting the single investigator model.

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[41] *In re Olive*r, 333 U.S. 257, 278–79 (1948) (Rutledge, J., concurring) ("Michigan's one-man grand jury ... combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment.).

[42] Brodsky, *Sexual Justice* 82 (2021).

2. The Department should retain the rule that requires postsecondary institutions to use live hearing with cross-examination.

Current § 106.45(b)(6)(i) provides that for formal complaints of sexual harassment, postsecondary institutions must provide for a live hearing during which the decisionmaker must permit each party's advisor to ask the other party and any witnesses all relevant and any other follow-up questions, including those challenging credibility. The Proposed Rules get rid of these question and answer requirements and replace them with a weaker 106.45(g), which would merely require a recipient to provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations. This Proposed Rule would in effect permit, but not require, live hearings.

In the rulemaking that led to the 2020 Amendments, OCR described cross-examination as "the greatest legal engine ever invented for the discovery of truth" and a necessary part of a fair, truth-seeking process in postsecondary institutions.[43] The Preamble to those rules also noted that at least one federal circuit court has held that cross-examination is a constitutional requirement of due process in the Title IX context at public institutions.[44] Even absent a general right to cross-examination, some courts have held that in both public and private postsecondary settings, due process and fundamental fairness require some method of cross-examination when a disciplinary charge rests on a witness or complaint's credibility.

While OCR now claims that postsecondary education institutions objected to these procedures as too prescriptive and burdensome, values other than procedural efficiency are at stake in these proceedings. OCR states in the Preamble to the Proposed Rule that some postsecondary institutions "questioned the utility of live hearings, noting that much of the information elicited during a hearing relates to questions that were asked and answered during an investigation." But that redundancy is a feature, not a bug, when it comes to the pursuit of justice. The criminal justice system has live trials even though the questions asked there are often the same as those asked by police officers at the interrogation stage. So, too, in civil trials, the questions asked there commonly overlap with those asked in depositions or interrogatories. Among the reasons for the repetitiveness: sometimes witnesses change their stories, and a witness who tells the same story consistently is more likely to be telling the truth than one who does not. Also, having different people conduct investigation and adjudication

[43] 83 Fed. Reg. 61,462, 61,476 (Nov. 29, 2018) (quoting *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 John Wigmore, Evidence § 1367 at 29 (3d ed. 1940))).

[44] *Doe v. Baum*, 903 F.3d 575, 581 (5th Cir. 1981).

helps ensure that biases or prejudices on the part of one party do not unfairly affect the outcome.

Some postsecondary institutions have also complained that the new rules make it difficult for recipients to address sexual harassment in situations where a complainant or witness declines to submit to cross-examination. But an accuser's or witness's willingness to submit to cross-examination indicates her willingness to stand by her claims. Sometimes persons may decline to submit to cross-examination because they have been intimidated, and that is a serious problem. On other occasions witnesses decline to submit to cross-examination because they fear probing questions will show that they are lying. The 2020 Amendment contained safeguards that minimized some potential negative effects on complainants, while at the same time ensuring that claims are tested appropriately for truthfulness through cross-examination.[45] Because live hearings with cross-examination help to ensure that sexual misconduct proceedings in post-secondary institutions uncover the actual truth of what happened and are fair to all parties, this requirement should be kept in the Final Rule.

III. <u>The prohibition of discrimination based on sexual orientation or gender identity is a major question that is not addressed by Title IX, and this Rule should not interpret Title IX to broadly address such discrimination</u>.

As noted in the Preamble to the Proposed Rule, the Department's Title IX regulations have never previously addressed the application of Title IX to discrimination based on sexual orientation or gender identity. This Proposed Rule, however, proposes adding a new section, § 106.10, titled "Scope," that would interpret Title IX's prohibition on sex discrimination to cover sexual orientation and gender identity.[46] The Proposed Rule also amends the current § 106.31 to make clear that preventing any person from participating in any education program or activity consistent with their gender identity would subject them to more than *de minimis* harm

[45] The 2020 Amendments require that cross-examination must be conducted by the party advisors rather than by the parties themselves.

[46] We agree that in some instances, sex discrimination that is prohibited under Title IX would overlap with sexual orientation or gender identity discrimination. For example, if a gay student faced severe and pervasive harassment at school because of his mannerisms that are perceived as effeminate, that harassment would violate Title IX.

and thus be prohibited.[47] The questions of how to handle sexual orientation and gender identity discrimination in athletics has been reserved for a subsequent rulemaking.

Sexual orientation and gender identity discrimination are major questions about which Congress is required to speak clearly when giving an agency power to address them. Agencies, including the Department of Education, have only those powers given to them by Congress. Generally, Congress intends to make major policy decisions itself, not leave those decisions to agencies.[48] Thus, in cases involving such major policy decisions, both separation of powers principles and a practical understanding of legislative intent require that Congress clearly authorize the agency's use of such power.[49]

The major questions doctrine has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably have been understood to have granted. In *West Virginia v. EPA*, for example, the Supreme Court discerned a major question where the agency "claim[ed] to discover in a long-extant statute an unheralded power" that constituted "a transformative expansion [in] its regulatory authority"[50] and where the agency's "discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[51]

In concurrence in *West Virginia v. EPA*, Justice Neil Gorsuch offered some additional observations on when an agency action involves a major question for which clear congressional authority is required.

Most importantly for present purposes, the doctrine applies when an agency claims the power to resolve a matter of great "political significance"[52] or to "end an

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[47] The Department's current rules allow recipients to separate students by sex in limited circumstances where separation would not cause more than *de minimis* harm. *See*, *e.g.*, 34 C.F.R. § 106.33 (allowing separate toilet, locker room, bathroom, and shower facilities); *id.* § 106.34(a)(3).

[48] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[49] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

[50] *West Virginia v. EPA*, 142 S. Ct. at 2610, 2595.

[51] *West Virginia v. EPA*, 142 S. Ct. at 2610 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000), *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006); *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2486–87, 2490 (2021)).

[52] *West Virginia v. EPA*, 142 S. Ct. at 2616, 2620 (Gorsuch, J., concurring) (citing *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring)).

earnest and profound debate across the country."[53] Also, the Court has found it telling when Congress has "considered and rejected" bills authorizing something akin to the agency's proposed cause of action, as that may be a sign that the agency is attempting to work around the legislative process to resolve for itself a question of great political significance.[54]

Sexual orientation and gender identity discrimination are matters of great "political significance," and the Proposed Rule would "end an earnest and profound debate across the country" about how funding recipients should address these matters. The decision therefore belongs to Congress.

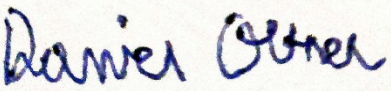
CONCLUSION

The Proposed Rule should not be adopted, or should be at least significantly revised, to address three major concerns. First, the redefinition of harassment as severe or pervasive conduct is likely to chill some First Amendment protected speech. The current, narrower definition should be retained, and OCR should add more explicit rules to make sure that recipients do not chill protected speech. Second, the Proposed Rule removes some due process safeguards that are necessary to secure fair treatment for accused students. OCR should continue to maintain these due process rules. Third, prohibitions on sexual orientation and gender identity discrimination are major questions, which an agency cannot regulate without a clear statement from Congress that it intended to regulate conduct in this area. Because Congress has not spoken clearly to those particular major questions, OCR should not adopt rules regarding discrimination on sexual orientation and gender identity.

Sincerely,

Alison Somin

Ethan Blevins



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[53] *Id*. (citing *Gonzales*, 546 U.S. at 267–68).

[54] *Id*. at 10 (citing *Brown & Williamson*, 529 U.S. at 144).